FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

801 I Street, 3rd Floor
Sacramento, California 95814

Chair: Heather Williams Phone: 916.498.5700

February 22, 2024

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

Re: Public Comment on 2024 Proposed Amendments #2 (Youthful Individuals), #3 (Acquitted Conduct), and #7 (Simplification)

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide our views on the Sentencing Commission's proposed 2024 amendments. Enclosed are Defenders' comments on three of the proposed amendments. We will present our comments on additional proposed amendments next week, in the form of witness statements.

Following are our enclosed comments on:

Proposal 2: Youthful Individuals

Proposal 3: Acquitted Conduct

Proposal 7: Simplification

We appreciate the Commission considering our views and look forward to continuing to work together to improve federal sentencing policy.

Very truly yours,

Heather Williams
Federal Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Enclosures

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

Federal Public and Community Defenders Comment on Youthful Individuals (Proposal 2)

February 22, 2024

TABLE OF CONTENTS

I. Part A: Computing Criminal History for Offenses Committed Prior to Age 18.

Defenders commend the Commission for proposing to amend its long-outdated treatment of prior offenses committed before age 18.[1] Section 4A1.2(d), the primary rule which governs the treatment of youth priors,[2] has remained unamended since the rule first appeared in the original 1987 Guidelines Manual.[3] Yet much has changed since 1987.

Today, the Commission is equipped with decades of data, scientific research, and caselaw confirming not only that children are different, but that our juvenile legal system is deeply fractured and flawed. Treatment of youth offenses varies drastically among states and communities. Myriad different rules (and exceptions to those rules) lead to adjudications that lack critical procedural safeguards and yield convictions and sentences that fail to reflect the nature of the prior offense. And racial and ethnic disparities remain pervasive: at all processing points in the juvenile legal system children of color, particularly Black, Native, and Latino children, fare worse.[4]

---

[1] *See* USSC, Proposed Amendments to the Sentencing Guidelines 13–37 (2023), http://tinyurl.com/43bpht56 ("Proposed Amendment").

[2] When Defenders use the term "youth priors," we are referring to any offense committed prior to age 18, regardless of whether that offense was classified by the presiding jurisdiction as a juvenile adjudication, adult conviction, or something else, like a "youthful offender" conviction. *See, e.g.*, Ian Marcus Amelkin & Nicholas Pugliese, *The Delinquent Guidelines: Calling on the U.S. Sentencing Commission to Stop Counting Federal Defendants' Prior Offenses Committed Before 18*, 19 Harv. L. & Pol'y Rev. __, *19 (forthcoming Spring 2024) ("*Delinquent Guidelines"*) (describing three categories of "pre-18 priors"), http://tinyurl.com/35c9vxxn.

[3] *See* Proposed Amendment at 13. *Compare* USSG §4A1.2(d) (1987), *with* §4A1.2(d) (2023).

[4] *See infra* Section I.A.2. Because of a lack of comprehensive and uniform ethnicity data collection, researchers have had difficulties calculating an accurate population estimate of Latino youth in the juvenile and criminal legal systems and determining how Latino youths are impacted by these systems. *See* Sonia Diaz et al., *The Latinx Data Gap in the Youth Justice System*, UCLA Latino Policy & Politics Initiative 15, 18–19 (2020), http://tinyurl.com/bdhaft5w. Despite the underreporting of Latino data, available data confirms that, like other children of color, Latino youth are overrepresented in the legal system. *See id.* at 15. *See also* Joshua Rovner, The Sentencing Project, *Latinx Disparities in Youth Incarceration* (2023),

In addition to advancements in knowledge about the juvenile legal system, the Commission now has information on the impact of its own rules. According to recently released data, a shocking 88.8 percent of those who received at least one criminal history point for a youth prior in Fiscal Year 2022 were non-white.[5] Almost 60 percent were Black.[6] The adverse impact §4A1.2(d) has on individuals of color exceeds even the career offender guideline[7]—a rule the Commission has long recognized as a source of significant and unwarranted racial disparities.[8]

To be sure, the Commission cannot fix how other jurisdictions treat their youth. But it can and should refuse to continue to engraft past injustices and disparities into its own guidelines.

Defenders strongly urge the Commission to adopt Option 3 of the proposed amendment without any upward departure or limitation. By excluding from the criminal history calculation all sentences resulting from offenses committed before age 18, Option 3 best ameliorates the jurisdictional, racial, and ethnic disparities resulting from the current rule; reflects the advancement of knowledge about the realities of the juvenile legal system and brain development and behavior; and is the simplest and fairest rule to apply. The Commission has authority to promulgate Option 3 and should swiftly do so.

---

http://tinyurl.com/y2x6y8n4. In this comment we use both "Latino" and "Hispanic." Although these terms are not interchangeable, *see* BBC News, *Latino or Hispanic? What's the difference?*, YouTube (Nov. 5, 2019), http://tinyurl.com/yc6udrsz, the articles, studies, and data cited herein use both terms. In the interest of accuracy, we use whichever term the referenced source used. If we are not citing a source, we use "Latino."

[5] *See* USSC, *Public Data Presentation: Proposed Amendments on Youthful Individuals* 28 (2024) ("USSC Data Briefing"), http://tinyurl.com/422d9y4n.

[6] *See id.* (reporting 59.7 percent).

[7] *See* USSC, *FY 2022 Quick Facts on Career Offenders* 1 (2023), http://tinyurl.com/5n7wrtf5 (reporting in Fiscal Year 2022, 76.4 percent of people designated as career offenders were non-white and 57.7 percent were Black).

[8] *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133–34 (2004), http://tinyurl.com/4hx9rsw6.

A. The Commission's current treatment of youth priors is outdated and problematic.

To determine whether a youth prior counts towards a person's criminal history, §4A1.2(d) first requires the court to ascertain whether the conviction was an adult conviction or not. If a juvenile "was convicted as an adult" and received "a sentence of imprisonment exceeding one year and one month" that was "imposed within fifteen years of the [ ] commencement of the instant offense," the youth prior is valued the same as any other adult sentence of the same length: three points.[9]

If the conviction was not an adult conviction, or if the sentence imposed was 13 months or less, the court must determine the length of "confinement" imposed and whether the prior is recent enough to count for points.[10] Any adult or juvenile sentence to confinement of at least 60 days is assessed two points so long as the person was released within five years of the instant offense.[11] Any other youth prior "not otherwise covered," imposed within five years of the instant offense, counts for one criminal history point.[12]

Last year, almost 70 percent of people who received criminal history points for youth priors were pushed into a higher criminal history category.[13] Higher criminal history categories yield higher guideline ranges. And "when a [g]uidelines range moves up or down, [the] sentence[ ] move[s] with it"[14]—meaning the Commission's treatment of youth priors lengthens the time our clients spend in prison.

Youth priors that receive criminal history points do more than enhance a person's criminal history category. They can be used to enhance Chapter 2

---

[9] USSG §§4A1.2(d)(1), (e).

[10] *See* USSG §4A1.2(d)(2).

[11] *See* USSG §4A1.2(d)(2)(A).

[12] *See* USSG §4A1.2(d)(2)(B).

[13] *See* USSC Data Briefing at 32.

[14] *Peugh v. United States*, 569 U.S. 530, 544 (2013); *see also* USSC, *Final Quarterly Data Report FY2022* 28, fig. 5 (2022) (reflecting that, from Fiscal Years 2017–22, the average guideline minimum acted as an anchor for the average sentence), http://tinyurl.com/cn427v7t.

base offense levels,[15] and certain youth priors can trigger the draconian, racially disparate career offender designation.[16] Youth priors may contribute to a person's ineligibility to obtain safety-valve relief from mandatory minimums.[17] And, of course, if sentenced to imprisonment, a person's criminal history score affects their security designation at the BOP.[18]

Despite repeated criticism of the Manual's treatment of youth priors,[19] it has remained unchanged. It is time the Commission amend this rule.

1. Section 4A1.2(d) creates unwarranted disparities based on differing jurisdictional practices.

Since 1987, the Commission has recognized that counting youth priors in the guidelines "[has] the potential for creating large disparities."[20] Sure enough, by categorizing youth priors based on how state and county jurisdictions process them, the Commission bakes myriad jurisdictional practices into §4A1.2(d), necessarily treating similarly situated individuals differently.

Jurisdictional variation has been a hallmark of the juvenile legal system for decades. Starting in the 1980s and 90s, just as tough-on-crime

---

[15] *See* USSG §2K1.3(a)(1)–(2), comment. (n. 9); §2K2.1(a)(1)–(4), comment. (n. 10); §2L1.2(b)(1)–(b)(3), comment. (n. 3).

[16] *See* USSG §4B1.2(c), (e)(4).

[17] *See* 18 U.S.C. §3553(f)(1).

[18] *See* Bureau of Prisons, Form BP-A0377, Inmate Load and Security Designation (last accessed Feb. 16, 2023) (showing in Security Designation Data box 8 that as criminal history points increase, so do the number of security points), http://tinyurl.com/yc5e92fc.

[19] *See, e.g.*, *Delinquent Guidelines*, *supra* note 2; Andrew Tunnard, Note, *Not-So-Sweet Sixteen: When Minor Convictions Have Major Consequences Under the Career Offender Guidelines*, 66 Vand. L. Rev. 1309 (2013); Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement under the Federal Sentencing Guidelines: Is it Sound Policy?*, 10 Va. J. Soc. Pol'y & L. 231 (2002); Letter from Heather Williams on behalf of the Fed. Defenders to the U.S. Sent'g Comm at 12–14 (Aug. 1, 2023), http://tinyurl.com/2fu34fub; Letter from Marjorie Meyers on behalf of the Fed. Defenders to the U.S. Sent'g Comm at 20–37 (Feb. 20, 2017), http://tinyurl.com/yc6cbdz5.

[20] USSG §4A1.2 comment. (n. 7) (recognizing disparities exist both "due to the differential availability of records" of juvenile adjudications and "from jurisdiction to jurisdiction in the age at which a [person] is considered a 'juvenile'").

laws were being enacted for criminal courts, "perceptions of a juvenile crime epidemic" fueled the enactment of punitive juvenile crime laws.[21] While much of this perception was unfounded,[22] "[b]etween 1992 and 1997, all but three states changed their laws" to "crack down on juvenile crime"[23] by "expand[ing] the treatment of juveniles as adults for purposes of sentencing and punishment," albeit in differing ways.[24] Some implemented or amended transfer provision laws—including adopting mandatory transfer provisions—to make it easier to transfer cases from juvenile court into adult criminal court.[25] Some states gave courts increased sentencing authority over youths, weakened confidentiality provisions, or increased the discretion of juvenile prosecutors.[26] And while several states have since moved away from some of these punitive laws, many have not.[27] What remains is a "patchwork quilt of juvenile justice systems resulting in inconsistent outcomes for youth, families, and communities[.]"[28]

It would be impossible to document all the ways youth cases vary from state to state. Indeed "even within states, case processing may vary from community to community, reflecting local practice and tradition."[29] However, we flag a few prominent examples, including variations in: (1) maximum age standards for juvenile court jurisdiction; (2) transfer and "reverse transfer"

---

[21] Charles Puzzanchera et al., Nat'l Ctr. for Juvenile Just., Youth and the Juvenile Justice System: 2022 National Report 77 (2022), ("NCJJ National Report"), http://tinyurl.com/43cneswh; *see also* Barry C. Feld & Perry Moriearty, *Race, Rights, and the Representation of Children*, 69 Am. U. L. Rev. 743, 784–85 (2020) ("*Race, Rights, and Representation*"); Brief of Jeffrey Fagan, et al, as Amici Curiae in Support of Petitioners, Miller v. Alabama, at 9–18, 567 U.S. 460 (2012) (No. 10-9646), 2012 WL 174240 ("*Miller* Amici").

[22] *See, e.g.*, *Miller* Amici, at 18–29 (describing scientific evidence and empirical data that invalidated the "juvenile superpredator" myth).

[23] NCJJ National Report at 80.

[24] *Miller* Amici at 15; *see also Race, Rights, and Representation* at 785.

[25] *See* NCJJ National Report at 80; *Miller* Amici at 16.

[26] *See* NCJJ National Report at 80; *Race, Rights, and Representation* at 785.

[27] *See* NCJJ National Report at 81–82.

[28] Act 4 Juvenile Justice, *Juvenile Justice and Delinquency Prevention Act, What is JJDPA?*, http://tinyurl.com/5n83xhr6 (last visited Feb. 19, 2024) (recognizing more than 56 different juvenile legal systems independently operating).

[29] NCJJ National Report at 88.

mechanisms between juvenile and adult court; (3) sentencing disposition options; and (4) the availability of expungement. These examples show that by attempting to differentiate youth priors as either "adult" or "juvenile sentences" and assessing the severity of youth priors based on the length of imprisonment or confinement imposed, §4A1.2(d) necessarily perpetuates unwarranted disparities resulting from different jurisdictional practices.

Maximum Age Standards. States set a maximum age above which a case does not qualify for juvenile court jurisdiction. That is, states initially decide based on age—not the nature of the alleged offense—whether a case should be adjudicated in juvenile court. Today, most states set the maximum age for juvenile court jurisdiction at 17 years old.[30] But as of 2021, three states still set their upper age at 16.[31] Consequently, for many individuals, whether their youth prior counts for points (and, if so, for how many) depends simply on the location in which that youth prior was committed.

Indeed, defenders in Wisconsin, one of three states that still set the maximum age for juvenile court jurisdiction at 16, advise that they regularly argue §4A1.2(d) creates unwarranted disparities. Because all youth offenses committed by 17-year-olds in Wisconsin are classified as adult convictions, a person sentenced in federal court who received a 14-month sentence for a Wisconsin offense committed at age 17 would be assessed three points, while a 17-year-old who was adjudicated in juvenile court in neighboring Michigan for committing the same prior offense would receive less points—or no points at all.[32]

---

[30] *See id.* at 87.

[31] *See* Anne Teigen, Nat'l Conf. of State Legislatures, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, (Apr. 8, 2021) ("Juvenile Age of Jurisdiction"), http://tinyurl.com/3tss6686. The three states are Wisconsin, Georgia, and Texas. *See id.*

[32] Michigan raised their maximum age for juvenile court jurisdiction to 17 in 2019, effective in 2021. *See id.*; Press Release, *Governor Whitmer Signs Bipartisan Bills to Raise the Age for Juvenile Offenders*, Governor Gretchen Whitmer (Oct. 31, 2019), http://tinyurl.com/492asm5r. A Wisconsin youth prior classified as an adult conviction with a sentence of 14 months would be assessed 3 points so long as that sentence was imposed within 15 years of the commencement of the instant offense. *See* USSG §§ 4A1.1(a); 4A1.2(d); 4A1.2(e)(1). A person cannot receive three points for a juvenile adjudication, meaning a Michigan juvenile adjudication would be

Further, while all states have an upper age limit of at least 16 today, this was not always the case. Recognizing the need for fairer policies, between 2000 and 2020, ten states passed laws to raise their upper age of original juvenile jurisdiction.[33] However, some people adjudicated in these states before their laws changed still have "adult" priors for youth offenses on their records. Thus, by attaching significance to whether a youth prior was characterized as an adult conviction, §4A1.2(d) creates not only inter-jurisdictional disparities, but also intra-jurisdictional disparities.

Take North Carolina as an example. Defenders in that district advise that before 2019 North Carolina classified any offense committed by someone 16 or older as an adult conviction. In 2019, North Carolina raised its upper age cap from 15 to 17.[34] Although the state law changed, pre-2019 adult convictions for 16- and 17-year-olds remain on the books and still count for criminal history under the guidelines today. Therefore, two people from the same district with the same youth prior committed at the same age could be treated differently under §4A1.2(d).

As state policies evolve to reflect advancement in knowledge about youthful behavior, the guidelines need to keep pace. Otherwise, disparities will persist due to the guidelines' outdated treatment of youth priors.

Transfers Mechanisms to Adult Court. Even if a person is within the age range to have their case handled in juvenile court, most states have rules for when a juvenile case can be transferred to adult court. Transfer may happen in one of three ways: (1) "judicial waiver" (permitting or requiring the juvenile judge to waive jurisdiction); (2) "statutory exclusion" (statutorily excluding some youth from juvenile court jurisdiction); and (3) "prosecutorial waiver" (permitting the prosecutor discretion to file a case in either juvenile or adult court).[35] As of 2019, 47 states had judicial waiver authority, 27 states

---

assessed, at most, 2 points. *See* §4A1.2(d)(2). And since the decay period for juvenile adjudications is only five years (measured either from release from confinement or date sentence was imposed, depending on the sentence), if the Michigan offense resulted in a juvenile adjudication outside the five years, it would not count for points. *See id.*

[33] *See* NCJJ National Report at 87.

[34] *See id.*

[35] *Id.* at 95.

had statutory exclusions, and 14 states permitted prosecutorial waiver.[36] However, even in states that offer the same transfer mechanisms, disparities persist. For instance, many states have "once an adult, always an adult" provisions—requiring a juvenile's case to be handled in adult court if he was already convicted of an offense in adult court.[37] Some states provide "reverse waivers," which permit the transfer of a juvenile case being handled in adult court *back* to juvenile court.[38] And like with age limitations, states' transfer laws continue to evolve: between 2004 and 2019, 29 states and District of Columbia changed their transfer laws.[39]

Dispositions. Differing disposition options available in each jurisdiction means that whether a youth prior is countable under the guidelines (and if so, for how many points) may depend, not on the severity of the offense, but on the sentencing options available in a particular jurisdiction. For instance, even if a case is handled in adult court, approximately half the states permit the adult court to impose a sanction typically available only in juvenile court.[40] In some states, this "blended sentencing" works in the reverse, that is, juvenile courts have the authority to impose adult criminal sanctions.[41] So, similarly situated youths may receive dramatically different sentencing treatment based on the sentencing options of the jurisdiction where the offense occurred. In this way, §4A1.2(d) creates unwarranted disparities by focusing on sentence length.

Expungement. The availability of juvenile record expungement also produces unwarranted disparities.[42] "Sentences for expunged convictions are not counted" for criminal history points.[43] But whether a person is fortunate

---

[36] *See id.*

[37] *See id.*

[38] *See id.* (of the 42 states in 2019 with mandatory judicial waiver, statutory exclusion, or prosecutorial waiver provisions, 26 also had reverse waiver provisions).

[39] *See id.* at 100.

[40] *See id.* at 95.

[41] *See id.*

[42] This fact has been recognized by the Commission since 1987. *See* USSG §4A1.2 comment. (n.7) (1987).

[43] USSG §4A1.2(j).

enough to have a youth prior expunged "varies widely from state to state."[44] As of 2019, only 19 states permitted expungement of juvenile records.[45] Further, while the goal of expungement "is to make it as though the records never existed[, t]he process is not always comprehensive in practice."[46] For instance, some states use the terms "expunge" and "seal" interchangeably.[47] But sealed records are considered just "removed from public view," and since most states allow records to be unsealed to inform future investigation or prosecution,[48] they could still be used to enhance federal sentences. Even if expungement is offered, it is not always automatic. States may require that the court, prosecutor, or another agency initiate the process, or require the person to file a petition.[49] The expungement process is "often complicated, expensive, and may require an attorney."[50]

At bottom, §4A1.2(d) assumes as fact what, in many cases, is not: that prior sentence type (adult or juvenile) and length (confinement or not) are meaningful proxies for offense seriousness and culpability. To be sure, Defenders recognize that people under age 18 can, and do, commit serious and sometimes violent crimes. But the seriousness of those crimes—and whether they need to be further accounted for in a later federal sentencing—should require a thoughtful 18 U.S.C. § 3553(a) review by the court. The Commission's one-size-fits-all treatment of youth priors cannot account for varying state practices.

---

[44] *See* Andrea R. Coleman, U.S. Dep't of Just., Expunging Juvenile Records: Misconceptions, Collateral Consequences, and Emerging Practices 2 (2020) ("Expunging Juvenile Records"), http://tinyurl.com/2p8ys6ru.

[45] *See* NCJJ National Report at 94.

[46] Expunging Juvenile Records at 2.

[47] *See id.*

[48] *See* NCJJ National Report at 93–94.

[49] *See id.* at 94; Expunging Juvenile Records at 3.

[50] NCJJ National Report at 94.

2. Section 4A1.2(d) compounds the gross racial and ethnic injustices prevalent in the juvenile legal system.

By using youth priors to enhance guideline ranges, §4A1.2(d) compounds and extends the racial and ethnic disparities endemic to the juvenile legal system. This is reason enough to jettison §4A1.2(d).

"Race has animated the juvenile court system since its inception."[51] Starting in the late nineteenth century, juvenile courts were developed ostensibly to provide youth with an alternative to the punitiveness of the criminal legal system.[52] Believing youth to be more amenable to rehabilitation, juvenile justice reformers created courts designed not to punish, but to provide a "benign, nonpunitive, and therapeutic" cure to delinquent youth.[53] But because the "juvenile court movement grew up under the watchful gaze of Jim Crow," Black children were underserved from the start.[54] Throughout the 1900s, Black children were seen as unworthy of juvenile justice's goal of rehabilitation and were excluded from many of the refuge homes and rehabilitative resources and services provided to other youth.[55]

---

[51] Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform* 86 Geo. Wash. L. Rev. 1604, 1614 (2018) ("*Challenge of Race and Crime*").

[52] *See id.* at 1614–15 (explaining the "traditional rendition" of juvenile court history involves progressives' concern over children's welfare and development, but "[r]ecent revisionist accounts" are more skeptical of such benign motives and contend that progressive reformers wanted to "control the influx of poor immigrant youth . . . into American urban centers in the early to mid-1800s" by using the new juvenile courts to "assimilate the new poor immigrants").

[53] Barry C. Feld, *The Transformation of the Juvenile Court*, 75 Minn. L. Rev. 691, 694–95 (1991).

[54] Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 Md. L. Rev. 607, 627 (2013)*; see also Challenge of Race and Crime* at 1615–16; *Race, Rights and Representation* at 764.

[55] *See Challenge of Race and Crime* at 1615–16.

In the late twentieth century, the concept of the juvenile "superpredator" was born.[56] In response to a perceived juvenile crime epidemic, Princeton professor John DiIulio, Jr. coined this term to describe "a fundamental transformation in child development"[57] that would create a new generation of "radically impulsive, brutally remorseless youngsters" to wreak havoc on society for years to come.[58] This nefarious and racialized trope—which ultimately proved baseless[59]—propelled nearly every state and the U.S. Congress to pass more punitive laws for juvenile crime.[60]

We see the results of this tainted history today. "[B]egin[ning] with over-policing youth of color in schools and the community, continuing through arrest, diversion or charging decisions, [and] at all stages of the juvenile justice process,"[61] research consistently shows that children of color are disproportionately represented.[62]

Disparate arrests. While national demographic data on arrests do not account for ethnicity, data reveal stark race-based differences in arrest rates.[63] In 2019, Black children comprised 17 percent of the juvenile population, but an estimated 34 percent of juvenile arrests.[64] That year,

---

[56] *See supra* Section I.A.1; *Miller* Amici at 12; Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy Is the Preadolescent's Best Defense*, 75 N.Y.U. L. Rev. 159, 165 (2000).

[57] *Miller* Amici at 12.

[58] *Challenge of Race and Crime* at 1621 (internal quotation and citation omitted); *see also Miller* Amici at 13.

[59] *See Miller* Amici at 18–37 (collecting studies that confirm the juvenile superpredator generation was a myth that "threw thousands of children into an ill-suited and excessive punishment regime."); *see also Challenge of Race and Crime* at 1621.

[60] *Miller* Amici at 15–17 (collecting laws).

[61] Ellen Marrus & Nadia N. Seeratan, *What's Race Got to Do with It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America,* 8 J. Marshall L. J. 437, 441 (2015) ("*What's Race Got to Do with It?*").

[62] *See id.* at 442–47; U.S. Dep't of Justice, Ofc. Of Juvenile Justice & Delinquency Prevention, *Racial and Ethnic Disparity in Juvenile Justice Processing* (Mar. 2022) ("OJJDP Racial and Ethnic Disparities"), http://tinyurl.com/4pzsu84f; NCJJ National Report at 163–67.

[63] *See* NCJJ National Report at 164.

[64] *See id.* at 108, 164 (using a national population of those age 10–17 years).

Black youths were 2.4 times more likely to be arrested than white youths,[65] and, according to another study, are twice as likely than whites to be arrested for the same conduct.[66] Native youths are 1.5 times more likely to be arrested than white youths.[67]

Disparate Referrals. Just because a child is arrested does not mean that child will be referred to juvenile court. Indeed, "many youth[s] who commit crimes (even serious crimes) never enter the juvenile justice system" at all.[68] In 2019, approximately 25 percent of juvenile arrests resulted in the child being released without referral for prosecution or to another agency.[69] However, in 2019, Black children were nearly three times more likely to be referred to juvenile court for a delinquency offense than white youth.[70]

Disparate Diversion. Once a child is referred to juvenile court, diversion is still an option and nearly half of all juvenile delinquency cases in 2019 were handled without a formal petition.[71] Unsurprisingly, this option is disparately applied. In 2019, Black, Hispanic, and Native youth were less likely to be awarded diversion than their white peers.[72]

Disparate Dispositions. If a child is adjudicated delinquent, there are several sentencing options, including community-based dispositions like probation, or residential placement.[73] Residential placement facilities vary. Some are a "secure, prison-like environment," but other placements include

---

[65] *See* OJJDP Racial and Ethnic Disparity *supra* note 62.

[66] *See Race, Rights, and Representation* at 788 (citing underlying study).

[67] *See* OJJDP Racial and Ethnic Disparity, *supra* note 62.

[68] NCJJ National Report at 53.

[69] *See id.* at 88.

[70] *See id.* at 164.

[71] *See id.* at 88.

[72] *See id.* at 164; *see also* Katherine Hunt Federle, *The Right to Redemption: Juvenile Dispositions and Sentences*, 77 La. L. Rev. 47, 48–49 (2016) ("*Right to Redemption*") ("[A]lthough [in 2013] the likelihood of formal case processing increased across all racial groups [for teens 16 and older], cases involving [B]lack youth were more likely to be formally processed than those involving white youth. In 2013, 61% of all petitioned delinquency cases involved [B]lack youth compared to 52% for white youth. Additionally, formal processing for [B]lacks was substantially more likely than for white across all offense categories.").

[73] *See* NCJJ National Report at 90–91.

group homes, treatment centers, training schools, or forestry camps.[74] Unfortunately, when determining whether a residential placement constitutes "confinement" under §4A1.2(d)(2), federal courts do not assess the carceral nature or purpose of the facility. Rather, most courts have found that any "commitment to the custody of the state's juvenile authority" constitutes confinement.[75] And while §4A1.2(d)(2) treats sentences of confinement more severely than those without confinement,[76] data show that juvenile placement is not reserved for the most serious offenses. In fact, in the years 2003 and 2013, approximately three quarters of all youth committed to placement were adjudicated of a nonviolent offense.[77] Available data confirm that placement is still overused today, including as punishment for technical violations, although it's "not recommended practice."[78]

These data are particularly disturbing because juvenile adjudication outcomes "var[y] considerably by race," and children of color, particularly Black, Native, and Latino children, are more likely to be sent to residential placement than their white peers.[79] In 2021, Black youth were almost five

---

[74] *Id.* at 91; *see also id.* at 179.

[75] *United States v. Birch*, 39 F.3d 1089, 1095 (10th Cir. 1994)*; see also, e.g.*, *United States v. McNeal*, 175 F. App'x 546, 549–50 & n.8 (3d Cir. 2006) (finding that commitment to an "outward bound" "therapeutic" program was a sentence of confinement because McNeal was not free to leave during his 4-month commitment); *United States v. Pointer*, 1994 WL 43812, *2–3 (7th Cir. Feb. 14, 1994) (finding state commitment sufficient for confinement even if placed in a nonsecure facility); *United States v. Hanley*, 906 F.2d 1116, 1120 (6th Cir. 1990) (finding state commitment to a juvenile facility sufficient for "confinement"); *United States v. Williams*, 891 F.2d 212, 215–16 (9th Cir. 1989) (holding state commitment to juvenile hall is confinement even though the purpose of placement is rehabilitative, not punitive).

[76] *See* §4A1.2(d)(2) (assessing two points to certain sentences of confinement and one point to certain sentences without confinement).

[77] *See* Joshua Rovner, The Sentencing Project, *Policy Brief: Racial Disparities in Youth Commitments and Arrests* 7 (2016) ("*Youth Commitments and Arrests*"), http://tinyurl.com/vmu9z5j9.

[78] NCJJ National Report at 91. In 2019, 18 percent of the children in detention centers were there as result of technical violations. *See id.* at 91. Further, "[i]n four states, the proportion of youth detained for a technical violation exceeded the proportion detained for a person offense[.]" *Id.* at 188.

[79] *See id.* at 160; *Youth Commitments and Arrests* at 7 (citing data from DOJ's Office of Juvenile Justice and Delinquency Prevention).

times more likely to be held in juvenile facilities than whites.[80] For some states, that rate was vastly higher.[81] In 2021, Native youth were 3.7 times more likely to be detained or placed in juvenile facilities than their white peers.[82] Hispanic children are also more likely to be sent to out-of-home placement.[83] It bears noting that many secure detention facilities are anything but rehabilitative; recent allegations and findings of mistreatment, neglect, and abuse in these settings are numerous.[84]

Disparate Waivers. Children of color are also more likely to be waived into adult court. For most of 2005 to 2019, Black youth were more likely than white or Hispanic youth to be judicially waived into adult court, regardless of offense.[85] In 2020, 3,000 cases were judicially waived to adult court and over half involved Black youth.[86] For nonjudicial waivers like

---

[80] *See* Joshua Rovner, The Sentencing Project, *Fact Sheet: Black Disparities in Youth Incarceration* 1 (2023), http://tinyurl.com/4exndnby (looking at combined rates of detention or commitment to juvenile facilities)

[81] *See id.* In Connecticut, Black children were over 31 times more likely to be held in placement; in New Jersey they were almost 29 times more likely and in Wisconsin, they were almost 15 times more likely to held in placement than white youth. *See id.*

[82] *See* Joshua Rovner, The Sentencing Project, *Tribal Disparities in Youth Incarceration* at 1 (Dec. 2023), http://tinyurl.com/jvhm2z2x.

[83] *See* OJJDP Racial and Ethnic Disparity, *supra* note 62; *Race, Rights, and Representation* at 788–89 ("Latino/Hispanic youth are 1.5 times as likely" to be committed to secure placement.).

[84] *See, e.g.*, Daniel Wu, *Detained Kentucky teens denied toilets, showers and clothes, suit says*, Wash. Post (Jan. 21, 2024), http://tinyurl.com/38bpew7k (alleging isolation in dark cells without running water or toilets, denied bathing opportunities, educational opportunities, and mental healthcare); Mike Catalini, *A New Jersey youth detention center had 'culture of abuse.' New lawsuit says*, AP News (Jan. 17, 2024), http://tinyurl.com/5abrzs9v (noting that in 2018 the state announced plans to close the facility after, in part, DOJ reported allegations of high rates of sexual abuse); Erin Cox & Steve Thompson, *Lawsuit alleges dozens were sexually abused in Md. Juvenile facilities*, Wash. Post (Oct. 2, 2023), http://tinyurl.com/52ne95fp (recounting allegations of "rampant sexual abuse" in six state facilities).

[85] *See* NCJJ National Report at 162.

[86] *See id.*

statutory exclusions or prosecutorial discretion, disproportionality similarly "remains a hallmark."[87]

Data on offending rates do not justify the disparities that occur throughout the juvenile legal system.[88] For instance, in 2019, Black high school seniors reported drug use rates far lower than their white or Hispanic peers for most types of drugs.[89] Research from 2013 indicate that Black and white children are "roughly as likely to get into fights, carry weapons, steal property, use and sell illicit substances, and commit status offenses, like skipping school."[90] Indeed, "studies have repeatedly shown that any statistical differences in offending patterns are simply not great enough to account for the racial disparities observed at any of the processing points in the U.S. juvenile justice system."[91]

3. Section 4A1.2(d) relies on adjudications that lack procedural protections and reliability.

Recently described as a "second-class criminal court," the juvenile legal system "mete[s] out the punishment without the protections of its criminal counterpart."[92] Because the accuracy, reliability, and fairness of juvenile adjudications cannot consistently be assured, they should not be considered under the guidelines.

---

[87] *Right to Redemption* at 55–56 (collecting statistics establishing disproportionate rates of nonjudicial waivers of cases involving Black and Hispanic youth as compared to whites).

[88] *Race, Rights, and Representation* at 787–89 & n. 299 (collecting sources); Perry L. Morierty & William Carson, *Cognitive Warfare and Young Black Males in America,* 15 J. Gender Race & Just. 281, 301–02 (2012) ("*Cognitive Warfare*").

[89] *See* NCJJ National Report at 60.

[90] Youth Commitments and Arrests, at 6 (citing Centers for Disease Control and Prevention's 2013 Youth Risk Behavior Survey).

[91] *Race, Rights, and Representation* at 787 & nn.290–291 (citing studies)*; see also What's Race Got to Do with It?,* at 440 (citing support that minority "youth at virtually every stage of the juvenile justice process, receive harsher treatment than white youth, even when faced with identical charging and offending histories").

[92] *Race, Rights, and Representation*, at 754.

Right to Jury. Juries are "fundamental to the American scheme of justice."[93] "[A]rguably the most important check against prosecutorial overreach," juries provide not only "an inestimable safeguard" against overzealous prosecutors, but also protect the criminally accused against a "compliant [or] biased" judge.[94] Because convicting a person of a crime is so significant, our country has "insist[ed] upon community participation in the determination of guilt or innocence."[95]

Except for juveniles.

In *McKeiver v. Pennsylvania*, a plurality of the Supreme Court ruled that children do not have a right to a jury at juvenile adjudication hearings.[96] The Court came to its holding, in part, to attempt to preserve the juvenile legal system's "rehabilitative goals" to treat, not punish.[97] While rehabilitation may have been the central goal when *McKeiver* was decided, as discussed above, it is not anymore.[98] Without the right to a jury trial, juveniles are at a real disadvantage. Research shows juries are much more likely to acquit than judges even when presented with similar evidence, and that juries may weigh evidence, facts, and the standard of proof with greater care.[99] And juries require group decision-making, which ensures "more accurate outcomes by airing competing points of view."[100]

---

[93] *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

[94] *Race, Rights, and Representation,* at 775; *Duncan*, 391 U.S. at 156.

[95] *Duncan*, 391 U.S. at 156.

[96] *See McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

[97] *See id.* at 547.

[98] *See supra* at I.A.2; NCJJ National Report at 82; *Cognitive Warfare* at 294–300.

[99] *See generally* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 Wake Forest L. Rev. 1111, 1162–69 (2003) (summarizing advantages and reviewing study findings).

[100] *Id.* at 1165.

Closed Courtrooms. In many states, juvenile delinquency hearings are closed to the public.[101] While good reasons exist to keep these proceedings outside the public view,[102] "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power" that often does not accompany youth adjudications.[103]

Access to Counsel. In 1967, the Supreme Court articulated in *In re Gault* a juvenile's *right* to counsel.[104] But *access* to effective counsel is woefully lacking.[105]

Children consistently appear without counsel in juvenile court. In fact, as of 2017, "only 11 states provide[d] every child accused of an offense with a lawyer, regardless of financial status" and 36 states allowed children to be charged fees to obtain counsel.[106] Many states do not guarantee counsel for children during interrogation.[107] "Hundreds of thousands of children appear in juvenile court each year without counsel, or with lawyers who are undertrained, undersupervised, underpaid, and overworked."[108]

---

[101] *See* NCJJ National Report at 93 (reporting as of 2019, 26 states and D.C. restricted the public from attending delinquency adjudication hearings, with limited exceptions).

[102] *See, e.g.*, Andrew Keats, *Keep Juvenile Court Out of the Public Gaze*, The Imprint (Oct. 5, 2022), http://tinyurl.com/msbczj4j (including protecting the child from public stigma, scrutiny, and collateral consequences).

[103] *In re Oliver*, 333 U.S. 257, 270 (1948).

[104] *In re Gault*, 387 U.S. 1, 41 (1967).

[105] *See* Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles A Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 Rutgers L. Rev. 175, 175 (2007) ("*Ensuring Juvenile's Right to Counsel*") ("[J]uveniles' access to timely, zealous, and effective legal representation remains a patchwork of disparate state and local laws, policies and practices that fail to assure that all youth receive skilled representation throughout their involvement with the juvenile justice system."); Nat'l Juvenile Defender Ctr., Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel (2017), ("NJDC National Snapshot"), http://tinyurl.com/32tajbx3.

[106] *See* NJDC National Snapshot at 9 & 21.

[107] *See* Kate Bryan, *Recent State Laws Strengthen Rights of Juveniles During Interrogations*, Nat'l Conf. of State Legislatures (Jan. 10, 2024), http://tinyurl.com/4dup7wc4.

[108] *Race, Rights, and Representation* at 750.

One major problem preventing meaningful access to counsel is that children are permitted to waive their own counsel, and, in at least one state, 90 percent of them do.[109] "Many states permit waiver by a juvenile after cursory inquiry" that the waiver was knowing, intelligent, and voluntary.[110] Often, children are allowed to waive their right to counsel without first consulting a lawyer.[111] And, since at the adjudicatory stage "waiver of counsel is, almost without exception, connected to an 'admission,' or guilty plea,. . . waiver of counsel is also about waiving a right to trial."[112]

Whether children are even *capable* to waive counsel knowingly, intelligently, and voluntarily is questionable.[113] Studies show youth are less likely to understand their rights and relevant legal language than adults.[114] "[A]dolescents are less likely to consider the long-term consequences of waiving the right to trial. . . [and] are also more willing to falsely plead guilty than adults."[115] One study found that adolescents ages 11–18 failed to understand completely their attorney's role and that parents, when present, often could not compensate for their child's knowledge gap.[116]

Another obstacle to access to counsel is that the *Gault* right does not extend to "proceedings or hearings that precede or follow the adjudicatory hearing itself."[117] Such proceedings may include critical stages of the case,

---

[109] *See id.* at 779 (citing a National Academy of Sciences study referencing Louisiana's waiver rates and indicating that about 50 percent of juveniles waived their right to counsel in "many other states," including Florida, Georgia, and Kentucky).

[110] Jennifer Woolard, *Waiver of Counsel in Juvenile Court*, Final Report to the National Institute of Justice 4 (May 30, 2019) ("*Waiver of Counsel*"), http://tinyurl.com/49yctamy.

[111] *See* NJDC National Snapshot at 25 (reporting 43 states allowed waiver without attorney consultation).

[112] *Waiver of Counsel* at 4 (citing studies that approximately 90 percent of youth waive their trial right in plea bargains).

[113] *See, e.g.*, *Ensuring Juvenile's Right to Counsel* at 177, n.6 & 191–93; *Race, Rights, and Representation* at 792–93; *Waiver of Counsel* at 6–8 (collecting studies).

[114] *See Waiver of Counsel* at 8.

[115] *Id.*

[116] *Id.* at 18–19.

[117] *Ensuring Juvenile's Right to Counsel* at 178.

like intake, detention, transfer to adult court, disposition, post-disposition parole or probation, and appeal.[118] For instance, although "the vast majority of youth transferred to the adult system are there because of [statutory exclusion laws],. . . [m]any states deny [statutorily excluded] youth any hearing procedure to challenge the appropriateness of their prosecution as adults."[119] Similarly, children are not guaranteed the meaningful assistance of counsel at disposition. This sentencing-like hearing "places a juvenile's liberty squarely at issue—and in jeopardy."[120] At the disposition hearing, the court is required "to consider the individual characteristics of the juvenile."[121] "It would be difficult for an adult [ ] to marshal all the facts and evidence necessary. . . to address at disposition;" for a child without competent counsel, "this task would be impossible."[122]

Without meaningful counsel at all critical stages of a case, mistakes necessarily happen. According to the National Registry of Exonerations, as of 2022, 34 percent of exonerated cases in which the person was under 18 at the time of the crime involved false confessions. Only ten percent of exonerated adults falsely confessed.[123]

Lack of Notice. Juveniles charged with youth priors are often unaware that those priors could later be used to enhance another sentence—in fact, they may be explicitly informed the opposite.

Take children in New York for example. Under New York's "youthful offender" statute, once an eligible child is found guilty in adult court and found to be a "youthful offender, . . . the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding."[124] "Youthful offender" records are sealed, and those adjudicated "youthful offenders" need

---

[118] *See id.* at 178–79 (explaining each stage); NJDC National Snapshot at 31.

[119] *Ensuring Juvenile's Right to Counsel* at 179.

[120] *Id.* at 188.

[121] *Id.*

[122] *Id.*

[123] *See* Nat'l Reg. of Exonerations, *Age and Mental States of Exonerated Defendants Who Confessed* (Apr. 10, 2022), http://tinyurl.com/3h33r9a2.

[124] N.Y. Crim. Proc. Law § 720.10 (McKinney 2023).

not disclose their judgments on job or housing applications.[125] New York courts cannot use "youthful offender" adjudications to enhance later sentences.[126] It should come as no surprise, then, that New York juveniles are regularly informed—by both their attorneys and the court—that their "youthful offender" adjudications are "not a judgment of conviction for a crime or any other offense."[127]

But while the express purpose of "youthful offender" adjudications is to "reliev[e] the eligible youth from the onus of a criminal record," these adjudications are counted in federal court—contrary to the state legislature's intention and the representations made by attorneys and courts—and often with significant consequence.[128]

4. Section 4A1.2(d) fails to recognize case law and scientific research confirming that kids are different.

The Commission knows far more about people under 18 today than it did in 1987. Decades of research confirm the simple fact that children are fundamentally different from adults. The Supreme Court has similarly recognized that because children have "diminished culpability," they are "different from adults for purposes of sentencing."[129] But despite

---

[125] *Delinquent Guidelines* at 22–23.

[126] *Id.* at 23; N.Y. Crim. Proc. Law. § 720.35(1) (McKinney 2023).

[127] *Delinquent Guidelines* at 19 & 42–43 (quoting N.Y. Crim. Proc. Law § 720.35(1)–(2) (McKinney 2023) (interviewing state public defenders at three different offices, none of whom were aware these adjudications could enhance later federal sentences).

[128] N.Y. Crim. Proc. Law § 720.10 (McKinney 2023); *United States v. Driskell*, 277 F.3d 150, 155 (2d Cir. 2002). Particularly perverse, the Second Circuit has held that, while "youthful offender" adjudications cannot be used to trigger mandatory penalties under the Armed Career Criminal Act, they are sufficiently "adult" to count under §4A1.2(d) and the career offender guideline. *Compare United States v. Parnell*, 524 F.3d 166, 170–71 (2d Cir. 2008) (New York State "youthful offender" adjudication qualifies as a "prior felony conviction" under §§4B1.1, 4B1.2), *with United States v. Sellers*, 784 F.3d 876, 886–87 (2d Cir. 2015) (New York State "youthful offender" adjudication cannot be a qualifying predicate under the Armed Career Criminal Act because these adjudications are "set aside" under New York law, making them excludable under 18 U.S.C. §§ 922(g)(1) and 921(a)(20)).

[129] *Roper v. Simmons*, 543 U.S. 551, 571 (2005); *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

acknowledging these research and judicial developments years ago,[130] the Commission's treatment of youth priors fails to sufficiently reflect them.

Over the last several decades, research has repeatedly confirmed what "any parent knows": brain development and behavior "are profoundly in flux" from childhood through late adolescence.[131] While "cold" cognition—decisions without time pressure and with adult assistance, like voting—develop and plateau much quicker among early- and mid- adolescents, "hot" cognition—mental processing in charged situations—"follow a protracted development into adulthood."[132] Issues related to "hot cognition" include driving, criminal behavior, resistance to peer pressure, and risk seeking.[133] Experts agree that the prefrontal cortex, the part of the brain responsible for controlling impulses, "is among the last brain regions to develop."[134] So, even "when teenagers' *cognitive* capacities come close to those of adults, adolescent *judgment* and their actual decisions may differ from adults as a result of psychosocial immaturity."[135] Consequently, studies show "sensation seeking

---

[130] *See* USSC, *Youthful Offenders in the Federal System* 5 (2017) ("Youth Offense Report"), https://tinyurl.com/5n8v62ah.

[131] Brief of Neuroscientists, Psychologists and Criminal Justice Scholars as Amici Curiae Supporting Defendant-Appellant, *Commonwealth v. Mattis*, SJC-11693 (Mass. Dec. 16, 2022) (presenting research confirming that "fundamental changes in brain development occur through late adolescence"); *see also Roper*, 543 U.S. at 569.

[132] Grace Icenogle et al., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample*, 43 L. & Hum. Behav. 69, 71 (2019).

[133] *Id.; see also Waiver of Counsel* at 5–6.

[134] *See, e.g.*, *Commonwealth v. Mattis*, 224 N.E.3d 410, 420, 422 (Mass. 2024) (collecting the "modern scientific consensus" on adolescent brain development to support its holding that the imposition of LWOP sentences on young adults ages 18 to 20 constitutes cruel and unusual punishment).

[135] Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychol. 1009, 1012 (2003), http://tinyurl.com/5fsecvjp (emphases added).

is higher during adolescence" while self-regulation skills develop gradually through the mid-20s.[136]

In a series of opinions, the Supreme Court has confirmed that a child's criminal conduct should be treated differently than that of an adult.[137] Relying on much of the research described above, the Court has identified that children are different from adults in three distinct ways. First, children's "lack of maturity [and] underdeveloped sense of responsibility lead[s] to recklessness, impulsivity, and heedless risk-taking."[138] Next, children have "limited control over their own environment," making them "more vulnerable to negative influences and outside pressures, including from family and peers" and less able to remove themselves from "crime-producing settings."[139] Third, because children's character traits are "less fixed," they have a heightened capacity for change and rehabilitation as they mature.[140]

By treating most youth priors the same as adult priors,[141] §4A1.2(d) fails to account for this advancement in knowledge.

---

[136] Laurence Steinberg et al., *Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation*, 21(2) Dev. Sci. 2, 15–16, 20 (2018), http://tinyurl.com/mr3t2yup.

[137] *See Roper*, 543 U.S. at 571; *Graham v. Florida*, 560 U.S. 48, 75 (2010); *Miller*, 567 U.S. at 471; *Montgomery v. Louisiana*, 577 U.S. 190 (2016); *see also J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) ("[C]hildren cannot be viewed simply as miniature adults."); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) ("[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage.").

[138] *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569) (internal marks omitted).

[139] *Id.* (internal marks omitted).

[140] *Id.*; *Montgomery*, 577 U.S. at 207–08.

[141] *See* USSC Data Briefing at 24 (reporting 2,172 people in Fiscal Year 2022 would have received relief from Option 3 (removing all youth priors, including adult convictions) but not Option 2 (removing only juvenile adjudications), meaning that, of the 3,112 individuals with convictions prior to age 18, nearly 70 percent were adult convictions).

5. Section 4A1.2(d) injects unnecessary complexity into Chapter 4.

Section §4A1.2 adds unnecessary complexity into an already complex Chapter 4 by creating a set of different triggering events and standards to assess certain youth priors that do not apply to post-18 priors.

In the normal course, the recency of a prior sentence is measured by the date the prior sentence was *imposed*.[142] But, according to §4A1.2(d)(2)(A), juvenile and adult prior sentences of at least 60 days are measured from the date of a person's *release*.[143]

Section §4A1.2(d) also requires a decay period of 5 years for many youth priors, while all other priors are subject to a fifteen- or ten-year decay period.[144] The rule further directs courts assess the length of "confinement" for certain youth priors, as opposed to the length of "imprisonment" standard used for all other prior convictions.[145]

Section §4A1.2(d)'s complexity is not just limited to its distinct rules. It can also be difficult to obtain and discern the necessary information to *apply* these rules. For example, what, exactly is a "sentence of confinement"? The answer may boil down to the evidence available in a given case. In *United States v. Stewart*, the Eighth Circuit affirmed a district court's finding that Mr. Stewart's placement at Glen Mills juvenile facility was not a sentence of confinement because the court heard testimony that Mr. Stewart was "not being physically confined. . . and he was free to leave."[146] Three years later, in *Howard v. United States*, the Sixth Circuit affirmed the district court's determination that placement at Glen Mills—the same facility at issue in *Stewart—was* a sentence of confinement because the evidence in that case

---

[142] *See* USSG §4A1.2(d)(2)(B), §4A1.2(e)(1)–(2).

[143] The recency of adult and juvenile youth priors with sentences less than 60 days confinement are measured from the date the sentence was imposed. *See* USSG §4A1.2(d)(2)(B).

[144] *Compare* USSG §4A.2(d)(2), *with* §4A1.2(e).

[145] USSG §4A1.2(d).

[146] *United States v. Stewart*, 643 F.3d 259, 261 (2011) (citation omitted).

showed that while "Glen Mills's campus is 'very similar to a small private college,'" Mr. Howard was not free to leave the facility.[147]

Further, because Chapter 4 interchanges its emphasis on "adult *conviction*" and "adult *sentence*," courts have struggled to determine whether certain youth priors can trigger career offender designation if, while classified as adult convictions, they did not result in an adult sentence. According to §4B1.2(c), a "prior felony conviction" must be countable under §4A1.2(a)–(c) to be a career offender predicate. Section §4A1.2(d)(1) provides that youth priors classified as "adult *convictions*" are countable under §4A1.2(a) if they resulted in a prior sentence of imprisonment exceeding 13 months. But §4A1.2, Application Note 7 states that, "for offenses committed prior to age eighteen, only those that resulted in *adult sentences* of imprisonment exceeding [13 months] . . . are counted."

Section 4B1.2(e)(4), which defines "prior felony conviction" for purposes of the career offender guideline further adds:

> A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

Unsurprisingly, assessing whether a person was "expressly proceeded against as an adult" for some youth priors is not easy. In fact, courts are currently split as to whether only an adult conviction is needed for a youth

---

[147] *Howard v. United States*, 743 F.3d 459, 463–67 (6th Cir. 2014) (acknowledging *Stewart* but noting that "determining whether a juvenile's attendance at a facility qualifies as confinement is a fact-intensive inquiry" and that "[t]he focus of our attention must be on whether a child's confinement is the direct legal consequence, as determined by a judicial body, of wrongdoing").

prior to qualify as a career offender predicate, or if both an adult conviction *and* an adult sentence are required.[148]

B. Option 3 is the best option to ameliorate §4A1.2(d)'s problems.

Option 3 best ameliorates many of §4A1.2(d)'s current problems. By focusing on the *age* of the individual committing the offense—a uniform standard—rather than the way the offense was subjectively characterized and resolved through various state rules, Option 3 best avoids the unwarranted jurisdictional disparities that stem from relying on state vagaries. While Option 2 (eliminating all juvenile adjudications) is a modest improvement, it still relies on the incorrect assumption that youth priors classified as adult convictions are uniformly more serious than those that are not. And Option 1, which leaves most of §4A1.2(d)'s rules in place, would hardly decrease jurisdictional disparities at all.

Option 3 is also the best of the promulgated options to mitigate the significant racial and ethnic disparities that plague the current guideline. While Options 1 and 2 would restrict or prohibit the use of youth priors resulting in juvenile adjudications, they would leave undisturbed the portion of §4A1.2(d) that counts youth priors resulting in adult convictions. Adult

---

[148] *Compare United States v. Gregory*, 591 F.3d 964, 967 (7th Cir. 2010) (holding a youth prior for robbery could be used as a career offender predicate because, even though Mr. Gregory served his sentence in a juvenile facility, he was convicted as an adult, noting that the guidelines do not require courts to distinguish between adult and juvenile *sentences*, only convictions), *and United States v. Moorer*, 383 F.3d 164, 167–68 (3d Cir. 2004) (holding that a "prior felony conviction" is defined "purely in terms of the kind of conviction the defendant had, not the kind of sentence."), *and United States v. Carillo*, 991 F.2d 590, 593–94 (9th Cir. 1993) (noting that while defense's "argument is not without force" "there is no indication in the Guidelines that sentencing courts may consider the characterization or purpose of a particular sentence under state law."), *with United States v. Mason*, 284 F.3d 555, 560 (4th Cir. 2002) (holding that youth prior must have resulted in both an adult conviction and an adult sentence of imprisonment exceeding 13 months to qualify as a career offender predicate), *and with United States v. Pinion*, 4 F.3d 941, 944–45 (11th Cir. 1993) (requiring courts to focus on both the nature of the conviction and the sentence to determine whether a youth prior qualifies as a career offender predicate but refusing to "plumb the nuances" of the state scheme). *See also* Andrew Tunnard, *Not-So-Sweet Sixteen: When Minor Convictions have Major Consequences Under Career Offender Guidelines*, 66 Vand. L. Rev. 1309, 1321–23 (2013) (discussing split).

convictions comprise the vast majority of youth priors that currently count for points and research shows youth of color are more likely to have their cases handled in adult court.[149]

Further, Option 3 better ensures the reliability of convictions and protects the individual because it would prohibit courts from relying on juvenile adjudications imposed without critical procedural safeguards or without notice that the adjudication could be used to enhance a later federal sentence. By excluding juvenile adjudications, Option 2 would also solve this problem, but Option 3 is the simpler rule to apply. With Option 3, courts, counsel, and probation would no longer need to hunt for and interpret juvenile court records. They would not need to worry about whether the sentence imposed for the youth prior was an adult sentence or juvenile sentence or whether a person was sentenced to "confinement" and for how long.[150] They would not have to remember the different triggers for different decay rules, like whether to calculate decay from the date the sentence was imposed or the date the person was released.[151] And by excluding all youth priors from criminal history points, Option 3 has the added benefit of resolving the longstanding split as to whether a person's adult conviction resulting from a youth offense can be used to trigger career offender designation if a juvenile sentence was imposed.[152]

To be sure, Option 3 is by no means a perfect solution. For instance, it does not fully reflect our advancement in knowledge that a person's brain development is not complete until their mid-20s.[153] As has already happened in Vermont, states may consider this scientific knowledge to further increase their maximum age thresholds for juvenile court jurisdiction, which may prompt the Commission to rethink its own age threshold for youth priors in

---

[149] *See* USSC Data Briefing at 24; *see also supra* at I.A.2.

[150] *See* §4A1.2(d)(2) & comment. (n. 7); §4A1.2(e)(4).

[151] *See* USSG §4A1.2(d)(2)(A) & (B).

[152] *See supra*, note 148.

[153] *See supra*, I.A.4; Youth Offense Report at 1 (defining "youth" as age 25 or younger, consistent with research).

the future.[154] But Option 3 is a significant improvement that ameliorates many of the problems confronting the current rule.

Defenders encourage the Commission to adopt Option 3 without an upward departure. Not only would an invited departure be inconsistent with the Commission's Simplification proposal, an invited departure would encourage courts to inject back in the disparities that Option 3 helps avoid. It is also unnecessary. Courts are well aware of their right under both §4A1.3 and 18 U.S.C. § 3553(a) to increase a sentence as a result of a youth prior when appropriate.

C. The Commission's recidivism research should not prevent the Commission from adopting Option 3.

In its synopsis of the proposed amendment, the Commission emphasizes its desire to "strike the right balance" between the numerous and strong policy reasons that justify amending its treatment of youth priors and recidivism.

On February 12, the Commission released a supplemental data briefing that reports rearrest data for the groups impacted by Options 1–3.[155] Included in this data is a comparison of the rearrest rates between people with at least one criminal history point not pursuant to §4A1.2(d) and people who received at least one criminal history point pursuant to §4A1.2(d). The data indicate that the §4A1.2(d) group has a higher rearrest rate than those who otherwise received at least one point.[156] These data should not dissuade the Commission from adopting Option 3.

First, these data do not show that youth priors cause recidivism. They show only that people with countable youth priors are rearrested more frequently than those who do not have youth priors. But that is not surprising. The group of people with youth priors are mostly people of color,

---

[154] *See* Juvenile Age of Jurisdiction, *supra* note 31 (recognizing Vermont became the first state to expand juvenile jurisdiction to 18).

[155] *See* USSC, *2024 Youthful Individuals Data Briefing: Supplemental Recidivism Data* (2024), http://tinyurl.com/5n7j32sz.

[156] *See id.* at 14.

and specifically Black.[157] It is well-known that Black individuals are over-policed and arrested more frequently than whites, even though higher arrest rates "often [do] not reflect a higher rate of criminal offending."[158] Data on exonerations also indicate that Black individuals are seven times more likely than whites to be falsely convicted of certain crimes and 19 times more likely to be falsely convicted of drug crimes.[159]

Second, unlike data provided on other criminal history rules,[160] the recent data briefing does not include any indication of whether §4A1.2(d) improves the criminal history rules' predictive value. So, while the data show a stronger correlation between the §4A1.2(d) group and a higher rearrest rate than the group without §4A1.2(d) points, it does not show that increasing

---

[157] The Commission does not provide demographic information of the 2015 cohort it used to provide the recidivism data. *See id.* However, according to the Commission's data briefing released in January, almost 60 percent (59.7) of those who received at least one point for a youth prior in Fiscal Year 2022 were Black. *See* USSC Data Briefing at 28.

[158] Nazgol Ghandnoosh & Celeste Barry, *One in Five: Disparities in Crime and Policing* 6, 9, The Sentencing Project (Nov. 2023), http://tinyurl.com/2ns8k9fh ("[P]eople of color are more likely to be arrested even for conduct that they do not engage in at higher rates than whites. . . with drug offenses, . . .traffic stops, pedestrian stops, and with policing in schools."); *see also* Brendan Lantz et al., *What if They Were White? The Differential Arrest Consequences of Victim Characteristics for Black and White Co-offenders*, 70 Soc. Problems 297, at 3, 16–17 (2023), http://tinyurl.com/2ws5dbn4 (collecting research on arrest rates, including that "roughly 49 percent of Black men were arrested by age 23" and finding "significant evidence for the presence of racial bias against Black[s]," in part because Blacks were more likely to be arrested than whites after controlling for offending behavior); Jelani Jefferson Exum, *Nearsighted and Colorblind: The Perspective Problems of Police Deadly Force Cases*, 65 Clev. St. 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 legal system results from "racial disparity in law enforcement practices" rather than "a problem of crime within the Black community alone").

[159] *See, e.g.*, Samuel Gross et al., *Race and Wrongful Convictions in the United States* iii–v, Nat'l Registry of Exonerations (Sept. 2022), http://tinyurl.com/2tax7z36.

[160] *See, e.g.*, USSC, *Revisiting Status Points* 3, 5 (2022), http://tinyurl.com/y6jrc3jm (citing USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 26 (2005), http://tinyurl.com/3pmp8msy.

someone's sentence by one to three points for a youth prior strengthens the criminal history score's prediction of rearrest.

Such information would be critical to support retaining §4A1.2(d). Ten years ago, the Robina Institute urged sentencing commissions to:

> eliminat[e] or reduc[e] the weight given to any criminal history score component that has been shown to have a strong disparate impact on non-white [individuals] especially when such a component cannot be shown to substantially increase the ability of the score to predict future recidivism risk.[161]

Considering the gross racial disparities resulting from the application of §4A1.2(d)—disparities worse than even the career offender guideline—the Commission should not maintain this rule without clear evidence of its efficacy. That evidence has not been produced.

D. The Commission has the authority to promulgate Option 3.

Option 3 is the best policy choice. But the Commission asks whether it has authority to adopt Option 3.[162] It does.

Section 994(h) requires the Commission to "specify a sentence . . . at or near the statutory maximum" "for categories of defendants in which":

- The individual is eighteen years old or older;
- has an instant felony offense that is either a "crime of violence" or "an offense described in [enumerated federal drug statutes];" and
- has been twice previously convicted of a felony "crime of violence" or "an offense described in [enumerated federal drug statutes]."

---

[161] Richard S. Frase et al., *Criminal History Enhancements Sourcebook* 27 Robina Institute of Criminal Law and Justice (2015), http://tinyurl.com/y2e4yvnv.

[162] Proposed Amendment at 36.

The Commission has implemented § 994(h) through the career offender guideline. Because Option 3 would prohibit courts from considering youth priors when counting criminal history points, Option 3 would also restrict courts from using youth priors as career offender or other predicates under §§4B1.1, 4B1.2.[163] This amendment would be fully consistent with Congress's directive at § 994(h).

While § 994(h) requires the Commission to specify a sentence at or near the statutory maximum for "categories of defendants" who meet specified criteria, it left the Commission significant discretion to control which individuals fall within those categories. Indeed, the Commission has always understood that while it must provide sentences at or near the statutory maximum for certain "categories of defendants" with particular criminal records, it gets to decide how best to focus its guideline "on the class of recidivist [individuals] for whom a lengthy term of imprisonment is appropriate."[164] For instance, since the guidelines' inception, §4B1.2 has required prior convictions to be countable under Chapter 4, Part A to qualify as predicates.[165] Consequently, the Commission excludes from career offender any prior conviction that falls outside its decay rules.[166] It also excludes a prior conviction if it is not counted separately and instead treated as a single sentence with another prior sentence.[167]

The Commission has also specified the "categories of defendants" within the confines of § 994(h) by choosing to define "controlled substance offense" as including state drug priors, instead of only the federal drug crimes the directive enumerates, and by both narrowing and expanding the

---

[163] *See* Proposed Amendment at 35. *See also* §4B1.2(c) (requiring career offender predicates to be countable under §4A1.1(a)–(c)).

[164] USSC §4B1.1 background comment.

[165] *See* USSG §4B1.2(3) (1987). *See also* USSG App. C., Amend. 268, Reason for Amendment (Nov. 1, 1989) (adding current Application Note 3 to clarify that "all pertinent definitions and instructions in §4A1.2 apply" to §4B1.2).

[166] *See* USSG §4A1.2(e)(3).

[167] *See* USSG §4A1.2(a)(2).

definition of "crime of violence" in 2016 based on empirical data and stakeholder feedback.[168]

The Commission's authority to exclude individuals with youth priors from the "categories of defendants" subject to § 994(h) also makes sense when reading the statute as a whole.[169] In § 994(d), Congress instructed the Commission to establish "categories of defendants for the use in the guidelines. . . governing the imposition of sentences."[170] The Commission executed this duty by creating the criminal history categories and deciding whether and to what extent prior convictions count for criminal history points. It has done and should continue to do the same thing here.

Further, in executing its mandate at § 994(h), the Commission is directed to develop a guideline that is certain, fair, avoids unwarranted disparities, and evolves to reflect the advancement of human knowledge.[171] As detailed above, removing youth priors from the career offender guideline's punitive reach advances these critical policy interests.

Of course the Commission's flexibility to implement § 994(h) is not "unbounded."[172] In *United States v. Labonte*, the Supreme Court determined that the Commission exceeded its authority when it interpreted "maximum term authorized" as used in § 994(h) to mean the statutory maximum term available excluding any statutory sentencing enhancements because "the

---

[168] *See* USSG §4B1.2(b) (defining "controlled substance offense" as including "an offense under federal or state law"); USSG App. C, Amend. 268 (Nov. 1, 1989) (adding to §4B1.2's commentary that "crime of violence" and "controlled substance offense" includes inchoate offenses); USSG App. C, Amend. 798 (Aug. 1, 2016) (revising the way the Commission "[i]dentif[ies] a defendant as a career offender" by: removing burglary of a dwelling from §4B1.2(a)'s enumerated offenses; removing §4B1.2(a)(2)'s residual clause; and adding several enumerated offenses to §4B1.2(a)(2)'s text).

[169] *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal citation omitted)); *Graham Cty. Soil & Water Conservation Dist. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (recognizing we "construe statutes, not isolated provisions").

[170] 28 U.S.C. § 994(d).

[171] *See* 28 U.S.C. § 991(b)(1)(B), (C).

[172] *United States v. Labonte*, 520 U.S. 751, 753 (1991).

Commission [cannot] select as the relevant 'maximum term' a sentence that is different from the congressionally authorized maximum term."[173]

But *Labonte* does not hold that the Commission lacks authority to exclude individuals with youth priors from the "categories of defendants" subject to § 944(h), just like *Labonte* does not hold that the Commission lacks authority to exclude individuals with stale priors from the "categories of defendants" subject to § 994(h).[174] *Labonte*'s holding focused on the meaning of "maximum term authorized"; its holding said nothing about the Commission's authority to decide who is subject to a sentence at or near that "maximum term." And unlike the amendment invalidated in *Labonte*—which would have made Congress's enhanced statutory penalties in 21 U.S.C. § 841 "a virtual nullity"— excluding youth priors from criminal history points does not render any other statute or statutory penalty to which § 994(h) refers meaningless.[175]

E. Section 3B1.4 (upward adjustment for the use of a minor) should not be expanded.

If the Commission promulgates any of the proposed options to limit the use of youth priors, it should not expand §3B1.4.[176]

First off, this adjustment is rarely used—it applied in less than one half percent of cases in the last five years.[177] Of that half percent, over 60 percent were from two districts within the same state.[178] The adjustment has a severe disparate impact on Hispanic individuals, who comprise 75 percent

---

[173] *See id.* at 753 & 760–61.

[174] In *Labonte*, the respondent argued that "categories of defendant" should be read "to encompass all repeat offenders charged with violating the same criminal statute"—including those for whom an enhanced statutory maximum applied and those who were subject to an unenhanced penalty, so that "maximum statutory term" could be reasonably read to mean the unenhanced maximum. 520 U.S. at 759. The Court rejected that "strained construction," but was not asked to (and did not) otherwise determine what "categories of defendants" in § 994(h) meant. *Id.*

[175] *Id.* at 760.

[176] *See* Proposed Amendment at 37.

[177] USSC, *Individual Datafiles* (FY 2018–22) (reporting .4 percent of cases in which this adjustment applied).

[178] *See id.* The two districts are the Southern and Western Districts of Texas.

of those who receive it.[179] And it is currently the subject of a circuit split.[180] All this confirms that expanding §3B1.4 would only compound unwarranted disparities between the few cases in which it is applied, and the many cases where it is not.

Further, there is no data that point to this adjustment needing to be expanded—in fact, data show the opposite. In the last five years, over 56 percent of cases where the adjustment applied involved sentences below the guidelines range; less than three percent of cases were imposed above the range.[181]

II. Part B: Sentencing of Youthful Individuals.

Defenders welcome the Commission's recognition that a person's age—whether young or old—may warrant a mitigated sentence and that courts are free to consider a person's youth when determining whether a sentence other than imprisonment is sufficient to meet the purposes of sentencing.[182] If, consistent with the proposed Simplification Amendment and Defender comment, the Commission simplifies the Guidelines Manual and removes Chapter 5H, we acknowledge that §5H1.1 would be deleted, and the amendment proposed in Part B would not be adopted.[183]

If, however, the Commission retains §5H1.1, Defenders recommend the proposed amendment be simplified by deleting scientific studies and rearrest data as enumerated factors that a court should consider. We suggest:

---

[179] *See id.*

[180] *See* Order Granting *En Banc* Review, *United States v. Gutierrez*, No. 22-1157 (1st Cir. Feb. 1, 2024) (granting *en banc* review to address whether §3B1.4 requires the individual to affirmatively act to help involve the minor in the criminal enterprise, as the Third, Tenth, and Ninth circuits have held, or simply to reasonably foresee a co-conspirator's use of a minor, as currently held in the First Circuit).

[181] *See* USSC, *Individual Datafiles* (FY 2018–22).

[182] *See* Proposed Amendment at 38.

[183] *See id.* at 124; Defender Comment on Simplification (Proposal 7).

> Age ~~(including youth)~~ may be relevant in determining whether a departure is warranted~~, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines~~. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. A downward departure also may be warranted due to the defendant's youthfulness at the time of the offense. In an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing.

We appreciate the Commission's recognition that scientific studies on youth brain development are critical considerations for federal courts when sentencing youthful individuals.[184] We agree. However, there are countless reasons why a below-guidelines sentence based on age—whether elder or youth—may be appropriate. Age will impact every case differently because no two convicted individuals are the same. Because the Commission's amendment, as proposed, could be interpreted as elevating some considerations relevant to age above others, we urge the Commission to not identify specific factors courts should consider when determining whether a below guidelines sentence based on age is appropriate.

III. Conclusion.

Defenders hope that the Commission will finally amend the guidelines' treatment of youth this year. For Part A of the proposed amendment, we encourage the Commission to adopt Option 3, without an invited departure or limiting language, and exclude all youth priors from the criminal history calculations. For Part B, we support the Commission's proposal to simplify the three-step sentencing process, including its proposal to delete Chapter 5H and recognize that if the Commission simplifies the Manual, §5H1.1 would be removed. If Chapter 5H is not removed this year, we urge the Commission to confirm in §5H1.1 that youthfulness may be a reason for a sentence of non-

[184] *See supra* I.A.4.

imprisonment, without specifying criteria courts should consider when assessing whether a below-guidelines sentence is warranted.