# VICTIMS ADVISORY GROUP

*A Standing Advisory Group of the United States Sentencing Commission*



February 22, 2024

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

**RE: Request for Comment on Proposed Amendments to the Sentencing Guidelines**

Dear Members of the Commission:

## Introduction

The Victims Advisory Group ("VAG") appreciates the opportunity to provide information to the Sentencing Commission ("Commission") regarding its proposed amendments to the Sentencing Guidelines ("Guidelines"). Our views reflect detailed consideration of the proposals by our members who represent the diverse community of victim survivor professionals from throughout the nation. These members work with a variety of victim survivors of crime in all levels of litigation and include: victim advocates, prosecutors, private attorneys, and legal scholars. During the VAG's consideration of the proposals, two overriding themes emerged. First, the Guidelines must reflect the bedrock principle of our sentencing system of individualized sentencing which accurately captures for both offenders and victim survivors the nature of the offense, the character of the offender, and the scope of the harm caused. Second, the Commission cannot exceed its authority to disrupt settled Supreme Court precedent or Congressional enactments. When either of these maxims is violated, which is the case with many of these proposals, victim survivors' legal rights are compromised and they suffer further harm.

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## 2. Youthful Offenders

The VAG strenuously and unequivocally opposes the proposed amendments regarding youthful offenders and submits that they should be rejected in their entirety.[1] As drafted, the proposed amendments would specifically forbid or severely limit a judge from taking into account at the sentencing of a convicted offender his prior criminal or relevant juvenile record, regardless of the nature or severity of the crimes or the defendant's role in them simply because those crimes were committed when the defendant was under 18 years old. As an initial matter,

[1]For reasons unclear to the VAG, the Commission, has employed the term "youthful individuals" without definition. The individuals at issue are by definition offenders, as they have been convicted of federal crimes. Specifically, in the context of Part A, they have also been convicted or adjudicated of serious offenses as juveniles. Consequently, both the law and the Commission have correctly referred to this cohort as "youthful offenders," a term dating back to 1885, defined by Black's Law Dictionary as "a person in late adolescence or early adulthood who has been convicted of a crime." *Youthful Offender*, Black's Law Dictionary (11th ed. 2019). Notably, in prior instances when the Commission addressed this matter in 2017 and 2023, it used the term, "Youthful Offender." In its September announcement of policy priorities, it used the appropriate term "Youthful Offenders." Since "Youthful Individual" lacks completeness and obscures the reality that the individual before the court for sentencing is not only a defendant, but also an offender, the VAG will utilize the more accurate and appropriate term.

the VAG believes that these proposed amendments are contrary to well-established law regarding the purpose and manner of sentencing in the federal system and thus exceed the authority of the Commission. The consequences of passing such amendments would be completely inapposite to the purposes of sentencing. As drafted, the proposed amendments unnecessarily preclude judges from fulfilling their duty to justly sentence individual defendants, re-victimize victims of crime and/or their family members, and create new risk in the community that others will be victimized, because a likely consequence of these amendments will be increased criminal activity by offenders whose prior juvenile criminal behavior was not properly considered at the time of sentencing. Thus, they do not accomplish the goals stated by the Commission.

As a threshold matter, the VAG recognizes some of the concerns of the Commission and supports many aspects of criminal justice reform – particularly those which address racial disparities in the criminal justice system. Furthermore, many of the people we represent were victimized as children. Consequently, we recognize the effects of trauma on children and can see the need for some changes to aspects of our criminal justice system. This may include addressing how juvenile offenders are treated in the juvenile rehabilitation system as well as expungement of juvenile records of victims of sex trafficking for crimes committed as a direct result of their exploitation.[2] However, these misguided proposals do not address the causes of the aforementioned problems. Instead, these problems should be addressed by the relevant part of the criminal justice system, not by the Sentencing Guidelines at the time of sentencing for a new offense and at the expense of victims.

### A. Purpose of Sentencing – Individualized Sentencing Is Compromised By These Proposals

The purpose of sentencing generally, and the Guidelines specifically, are clear. Sentences should "reflect the **seriousness of the offense**,[] **promote respect for the law**, []**provide just punishment** for the offense; afford adequate **deterrence to criminal conduct**; **protect the public from further crimes of the defendant**; and provide the defendant with needed educational or vocational training, medical care, **or other correctional treatment** in the most

[2] *Workable Solutions for Criminal Record Relief: Recommendations for Prosecutors Serving Victims of Human Trafficking*, American Bar Association (2019), https://www.ojp.gov/ncjrs/virtual-library/abstracts/workable-solutions-criminal-record-relief-recommendations.

effective manner."[3] To that end, the Commission has stated the statutory mission of the Guidelines is to further the "basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."[4]

Central to achieving this mission is the concept of individualized sentencing. Each defendant should be sentenced as an individual with a full opportunity for the sentencing court to consider the full history of the defendant including the characteristics and impact of not only his current criminal activity for which he is being sentenced, but the prior criminal activity – both mitigating and aggravating. The Supreme Court has been quite clear on this point, "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[5] Indeed the Court has "emphasized that '[h]ighly relevant--if not essential--to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." [6]

Given that it is *essential* in determining the appropriate sentence that a court be fully informed about a defendant's life and characteristics, the proposal to artificially eliminate from the sentencing court's consideration a full and complete picture of an offender's prior criminal history can only be described as antithetical and one sided. Such a position flies in the face of nearly a century old understanding of the value of learning about the personal characteristics of an offender. "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[7] That bedrock of criminal sentencing is reflected in 18 U.S.C. 3661 which commands that "No limitation shall be placed on the information concerning the background, character, and conduct

[3] 18 U.S.C. § 3553(a)(2) (emphasis added).
[4] United States Sentencing Commission, *Guidelines Manual*, §1A.1.2 (Nov. 2023).
[5] Pepper v. United States, 562 U.S. 476, 488 (2011) (*quoting* Koon v. United States, 518 U.S. 81, 113 (1996)).
[6] Pepper, 562 U.S. at 488 (internal citation omitted).
[7] Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937).

of a person convicted of an offense which a court of the United States may receive and consider for the purpose of sentencing."[8]

Prior criminal histories when committed before the age of 18 have been utilized by several courts and found to be extremely useful information.[9] Indeed, the Probation Officers Advisory Group ("POAG") noted that there is a general consensus "that juvenile offenders should be held accountable for past convictions. Accounting for past criminal history is important, especially if the defendant has violent or repeat offenses."[10] Therefore, as threshold matter these proposals are far too broad and antithetical to the purposes of sentencing.

**B. Part A – Computing Criminal History for Offense Committed Prior to Age 18**

(1) <u>These Proposals Violate Individualized Sentencing and Create Inaccurate and Biased Sentences</u>

These proposed amendments in Part A are antithetical to this well-established process for individualized and fair sentencing because they seek to *remove or severely limit* from a judge's analysis prior adjudications and convictions of the offender. It is important to be clear what this would actually look like in court to a victim – or anyone else. These amendments implicate adult federl offenders who have a history of criminal activity either within the last 5 years, or a conviction that resulted in incarceration within the last 15 years. Given the graduated punishment system of the juvenile justice system, that would mean that these offenders most likely have a history of attempted rehabilitation, an escalation of crime resulting in increasingly secure confinement, ultimately leading to a federal conviction. As noted by some members of the POAG in August,

> [H]istorically juvenile offenders receive graduated sanctions where they are often offered initial leniency from the juvenile courts and more serious sanctions were only imposed upon new, repeated or more serious behaviors. Given this pattern, the scoring of juvenile adjudications within five years would continue to identify those juveniles who have committed recent and more serious, or escalating behaviors. To not score or account for

[8] 18 U.S.C. § 3661.

[9] E.g., <u>*United States v. Orona*, 724 F.3d 1297 (10th Cir. 2013)</u>(upholding the use of the defendant's juvenile adjudication as a predicate offense for Armed Career Criminal Act (ACCA) and citing to over 20 state statutes allowing consideration of juvenile records in adult sentencing); <u>*United States v. Barber*, 200 F.3d 908 (6th Cir. 2000)</u>; <u>*United States v. Brenes*, 98-1736, 2000 U.S. App. LEXIS 31505 (2d Cir. Dec. 7, 2000)</u>.

[10] Probation Officers Advisory Group, Public Comment to Sentencing Commission Proposed Priorities (August 1, 2023) at 6.

> the adjudications would be to essentially 'turning a blind eye" or treating juvenile offenders equal to those individuals with no juvenile past, thus promoting disparity."[11]

Yet, the proposals would limit significantly or not allow a judge to consider prior rehabilitative efforts or confinement sentences in assessing whether rehabilitation or some other sentence is appropriate. The proposals take general knowledge concerning juveniles – that their brains are not fully developed – to dilute or eliminate specific knowledge about the now adult offender, i.e. his previous experience with law enforcement, criminal activity, and prior efforts to curtail his criminal activity. Such a proposal is an affront to individualized sentencing.

Not only does it thwart individualized sentencing, but it does so in an unbalanced and biased direction. First, it precludes from sentencing consideration of only information that may increase his sentence, not information from a defendant's history that may decrease his sentence. A defendant is still allowed, as he should be, to bring forth evidence from his background such as childhood trauma, negative influences on him that may contribute to his criminal acts, positive past achievements, or any historical circumstances that will mitigate his criminal sentence. Under this proposal, a judge can consider such evidence from a defendant even before turning the age of 18, but never be informed of the numerous crimes previously committed by an offender and the several efforts to rehabilitate or deter further criminal activity. Such a proposed system does not achieve the full sentencing envisioned by the Court or Congress. Rather, it creates an artificial, indeed inaccurate picture of the defendant's history and characteristics, thus thwarting an accurate and individualized sentence.

Secondly, this is not a neutral inaccuracy. It is unfairly imbalanced in its inaccuracy in a way that favors only offenders. Up until now the Commission valued accurate individualized sentencing and recognized the importance of not grouping defendants who actually have distinctly different criminal histories. Just last year, the Commission was greatly concerned with accurate criminal histories. So concerned it created an entirely new category of offenders, Zero - Point Offenders. Driving this radical change in the Guidelines was the Commission's concern that Criminal History Category (CHC) I grouped together offenders with truly no criminal

[11] Id. at 5. See also, e.g., *United States v. Winfrey*, 23 F.4th 1085, 1087 (8th Cir. 2022) (rejecting the claim that an ACCA enhancement based on crimes committed as a juvenile was unconstitutional and noting ACC recidivists have been given an opportunity to demonstrate rehabilitation, but have elected to continue a course of illegal conduct.).

histories and offenders who actually had criminal histories but were not counted.[12] The Commission found that this failure to distinguish between offenders more granularly was unfair, particularly because the recidivism rates of Zero-Point Offenders was lower than that for other offenders. Consequently, for purposes of *accuracy* and fairness the Commission created an entirely new category of offenders.

This proposal does the **exact opposite**. Here, rather than distinguishing among offenders who truly have no relevant criminal history prior to 18 years of age from offenders who have lengthy criminal histories, the Commission proposes to put them together by either giving them all no criminal history points or just one point regardless of the distinctions among defendants. Not only that, it seeks to do this although, by its own research, these offenders have **a higher rate of recidivism** than other offenders**.**[13] By approving this amendment, the Commission suggests that it is concerned about distinguishing among offenders only when it is to the defendant's advantage. Even more perplexing is, according to the Commission's own data under Option 2 62% of these offenders would have a lower Criminal History Category ("CHC"), some more than two levels and one quarter of whom would then have zero points – when they actually have criminal (and often lengthy) records. When it is not to defendant's advantage, the Commission seeks to artificially create a misleading criminal history. In short, last year's amendments are inapposite to these and both cannot be true.

(2) The Proposals Create A Disproportionate Benefit to Offenders and Grave Harm to Victim Survivors of Their Crimes

The second basis for the VAG's opposition to the proposed amendments affecting juvenile offenders is that these proposals disproportionately benefit truly dangerous offenders and risk further harm to truly vulnerable victims.

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[12] USSC, *Proposed Amendments* at 178-179 (Dec. 2023).

[13] It should be noted that waivers of children into adult courts "have dropped more than 50% in the last fifteen years." Jonathan W. Caudill & Chad R. Trulson, *The hazards of premature release: Recidivism outcomes of blended-sentenced juvenile homicide offenders*, 46 J. Crim. Just. 219 (2016). Consequently, serious and violent offenders are found in the juvenile system with increasing frequency. "As a natural consequence of blended sentencing laws, state juvenile justice systems are now retaining serious and violent offenders who might have otherwise been removed from the juvenile justice system." Id.

*a. Offenders*

The concern of this unfairness is further compounded by the very people impacted by these amendments. The VAG is aware of brain research regarding juvenile offenders. As a group the VAG accepts some of this research as a helpful generalization of people under 18 years of age. However, as the Commission notes, another important reality of this offender group is that it has the highest level of recidivism. The Guidelines themselves note that "a defendant with a record of prior criminal behavior is more culpable that a first offender thus deserving of greater punishment."[14]

"It's not uncommon for rearrest rates for youth returning from confinement to be as high as 75 percent within three years of release, and arrest rates for higher-risk youth placed on probation in the community are often not much better."[15] Not only are the rearrest rates substantially higher than any other age group, but the crimes are not minor. One international meta-analysis noted that the rate of violent recidivism was higher in studies with longer follow-up periods.[16]

The Commission's own data confirms this reality. This data only covered three years after release and research indicates longer periods of study reflect even higher recidivism rates. However, even with this short time frame, 72.1% of offenders with at least 2 points under Option 1 were rearrested. Although the Commission only highlighted certain "crimes of violence" if one includes in this list crimes against victims (crimes of violence and burglary, drug trafficking, weapons, and other sex offenses), 50% of these new crimes directly harm victims. [17]

These statistics comport with the experience of many members of the VAG who represent crime victims across the country and note collectively that some of the most violent

[14] USSG, Chapter 4, Part A, Introductory Comments).

[15]Elizabeth Seigle, et al., *Core Principles of Reducing Recidivism and Improving Other Outcomes for Youth in the Juvenile System* at 1 (2020), https://csgjusticecenter.org/wp-content/uploads/2020/01/Juvenile-Justice-White-Paper-with-Appendices-.pdf; *see also* Office of Juvenile Justice and Delinquency Prevention, *Juvenile Reentry* at 1 (2017), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/aftercare.pdf (A review of "state studies have shown that rearrests rates for youth within 1 year of release average 55 percent, while reincarceration and reconfinement rates during the same timeframe average 24 percent") (internal citation omitted).

[16] Hanneke E. Creemers, et al., *Ramping Up Detention of Young Serious Offenders: A Safer Future?*, 24 Trauma, Violence, & Abuse 2863, 2863 (2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10486148/pdf/10.1177_15248380221119514.pdf

[17] USSC, Supplemental Recidivism Data (February 2024), available at https://www.ussc.gov/education/videos/2024-youthful-individuals-data-briefing

cases on which they have worked on behalf of victims of crime involved juvenile offenders.[18] They also comport with POAG's observation that "our system is seeing more violent and repeat young offenders than in the past."[19] This anecdotal experience is borne out by the statistics. The Department of Justice reported in 2023 that murders committed by juveniles acting alone increased by 30% and when acting with other juveniles by 65%.[20] Similarly, the Office of Justice Programs ("OJP") found youth ages 12-17 responsible for 146,000 serious violent crimes in 2019 and "juveniles involved in homicides increased 27% between 2013 and 2019."[21] Another OJP study found that juveniles make up more than one quarter of sex offenders and commit more than one third of sex offenses against minors.[22] Washington, D.C. demonstrates the sad increase in violent victimization committed by juvenile offenders overall. In 2023 alone, violent crime increased 39% and juvenile arrests increased 17% in the first 6 months.[23]

The Guidelines already accommodate for youthful offenders with less serious criminal histories by excluding from considerations older or minor offenses.[24] They also distinguish between offenders with an older or less serious juvenile offenses from offenders with more recent or very serious offenses.[25] Therefore, this proposed amendment benefits the most violent of youthful offenders who are now currently engaged in the federal system as adults. Consequently, the VAG cannot support these amendments.

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[18] See, infra pages 13-14 describing typical cases handled by members of the VAG.
[19] Probation Officers Advisory Group, Public Comment to Sentencing Commission Proposed Priorities (August 1, 2023) at 5.
[20] Office of Juvenile Justice and Delinquency Prevention, *Statistical Briefing Book: Offending by Juveniles* (last updated 2023).
[21] Id.
[22] David Finkelhor, et al., *Juveniles Who Commit Sex Offenses Against Minors*, OJJDP at 3 (2009), https://www.ojp.gov/pdffiles1/ojjdp/227763.pdf.
[23] DC Metropolitan Police Department, *District Crime Data at a Glance* (2023), https://mpdc.dc.gov/page/district-crime-data-glance; DC Metropolitan Police Department, *Bi-Annual Report on Juvenile Arrests, Jan-June 2023* (2023) https://mpdc.dc.gov/node/1677791; *see also* David Lippman, *Data show surge of juvenile arrests ahead of DC curfew crackdown*, WUSA9 (Sept. 1, 2023, 11:20 PM) https://www.wusa9.com/article/news/verify/verify-data-shows-surge-juvenile-arrests-dc-curfew/65-99d67463-65ac-4eac-b6e1-20818182f8e9 (reporting an approximate 47% increase in juveniles arrested for violent crime between 2021 and 2023).
[24] E.g. § 4A1.2(c), (d).
[25] Id.

*b. Vulnerable Victims*

One of the justifications for exploring this radical change to generalized sentencing is the demographics of offenders.[26] However, those same concerns exist for the victims of juvenile offenders, a group not referenced in the Commission's data. While studies of crime victims of juvenile offenders are not plentiful, some studies indicate this same demographic is put at risk by these offenders. A review of homicides by juveniles reported that 86% of these victims were male and 55% of them black.[27] "The overwhelming majority (88%) of homicide victims of juveniles were killed with a firearm," and since 2013 juveniles who committed a homicide with a firearm increased 68% through 2019.[28] Similarly, a measurable portion of the victims of juvenile sexual offenders are also minors.[29] Gun deaths among children increased 30% between 2019 and 2021, with 60% of those due to homicide.[30] The New York Times recently analyzed the data from the Gun Violence Archive and reported that "[a] person younger than 18 shot and killed another child somewhere in the United States once per day on average last year."[31]

Effects of exposure to the violence caused by teens and youth are profound. Youth who must live with violence in their communities perpetrated by other youth are more likely to experience anxiety, depression, substance abuse, difficulty in education, and become involved in violence.[32] In short, the very group the Commission is concerned with are the very people victimized by the cohort who will benefit from this sweeping proposal.

A closer examination of the crimes involving victims committed by offenders affected by this proposal indicates a profound impact on victims. Of the potentially 3,112 who would

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[26] USSG, *Proposed Amendments* at 14 (Feb. 2023).
[27] National Center for Juvenile Justice, *Youth and the Juvenile Justice System: 2022 National Report* at 65-66.
[28] Id at 68.
[29] David Finkelhor, et al., *Juveniles Who Commit Sex Offenses Against Minors*, OJJDP at 3 (2009), https://www.ojp.gov/pdffiles1/ojjdp/227763.pdf. (finding one-third of sex offenses against minors are committed by offenders under 18 years of age).
[30] John Gramlich, *Gun Deaths Among Children and Teens Rose 50% in Two Years*, Pew Research Center (April 6, 2023), available at https://www.pewresearch.org/short-reads/2023/04/06/gun-deaths-among-us-kids-rose-50-percent-in-two-years/
[31] Tim Arango and Robert Gebeloff, *Young Victims, Young Suspects: The Kansas City Shooting and Gun Violence*, The New York Times (February 16, 2014), available at https://www.nytimes.com/2024/02/16/us/kc-super-bowl-shooting-gun-violence.html.
[32] Eileen Ahlin and Maria Antunes, *Addressing Youth, Violence and Victimization From an Environmental Perspective*, Office of Justice Programs (March 2020) at 8-10.

benefit from these proposals, the vast majority, over 2000 of them, seem to have received an adult sentence greater than 13 months, thus they are among the more serious offenders.[33] Looking at each cohort, the bulk of the crimes committed seem to implicate victims. Reviewing just the offenders impacted by Option One, of the youthful offenders with one point 23.6% assaulted another, 7.8% robbed another, 4.7% committed another crime of violence, 16.4% burglarized a home.[34] For those with two points, the level of violence and crimes involving victims increases with robberies increasing threefold to 21.2%, 26.5% assaulting victims, 5.8% engaging in drug trafficking, and 22.9% using a firearm.[35] As is expected, this cohort of One-Point and Two-Point offenders find themselves in federal court with crimes affecting victims as their instant offense with 30.1% of One-Point offenders convicted of drug trafficking and 26% convicted of firearms offenses, and 38.3% of the two point offenders also committing firearm offenses.[36] Therefore, the picture that emerges from this cohort of One and Two Point offenders are individuals who have committed hundreds of crimes affecting victims and then continued and escalated their crimes.[37]

The numbers become even more stark for victims of crimes when one reviews the findings for Option 3 which would encompass nearly 8% of all offenders with criminal history points. Offenses committed by this cohort include the robbery of victims (23.9%), assault of victims (20%), burglary of victims (16.8%), drug trafficking (7.2%), weapons offenses (14.9%) and even murder of victims (3.7%).[38] These defendants become involved in federal court due to very dangerous crimes including firearms violations (38.3%) and drug trafficking (28.1%) as their instant offense.[39] 81.9% of these individuals do not have minor criminal histories but are in CHC III or above with 22.1% offending so severely that they reside in CHC VI.[40] Not only do

[33] USSG, *Public Data Presentation: Proposed Amendments on Youthful Individuals* (Jan. 2024).
[34] Additionally, 13.7% engaged in drug trafficking or another drug crime not including possession. *Id.* at 9.
[35] *Id*.
[36] *Id* at 11. Additionally, these offenders are not before the court with solely these juvenile adjudications and convictions. 86% of two-point offenders and 58% of one-point offenders have criminal history categories of III or higher. *Id*.
[37] Option 2 promises an even more violent outcome with 27% of those defendants assaulting another, 14.9% robbing another, 17% burglarizing another's home, and 18.5% engaging in a firearms offense. Notably, if adopted over one quarter of these offenders will have their CHC change to be considered Zero-Point Offenders, although they have prior significant criminal history. *Id.*
[38] *Id.* at 27.
[39] *Id*.
[40] Of the 3112 people affected, only 562 are in CHC I or II. *Id.*

those with the most significant criminal histories benefit from this proposal, but under Option 3, 68.2% of individuals with points for offenses occurring prior to 18 and over 80% of those with CHC IV and 89.2% of those with CHS V will decrease on level.[41] A distressing change occurs among the 2123 of the 3112 offenders having their CHC decrease when most of them are in the higher CHC categories. Due to their multiple offenses 16% will artificially become zero point offenders.[42] At a time when juvenile crime is increasing both in number and severity of violence, the idea that the courts should not consider the full criminal history of a juvenile offender is misplaced, to say the least.

The practical effects of these amendments are demonstrated by two examples of cases handled by members of the VAG. In the first example, the night before her eighteenth birthday in June 2020, a young woman, having just graduated high school, was shot in the head three times by her sixteen year old boyfriend. The offender invited his girlfriend for a nighttime walk in the woods behind his house. She did not know that he earlier directed a fourteen year old juvenile to wait with a handgun in the woods. The offender retrieved the gun from the fourteen-year-old and shot his girlfriend. The boyfriend and the fourteen-year-old left the girl in the woods to die and she was found by a passerby the next morning. The sixteen-year-old was tried as an adult and convicted of First-Degree Murder. Being under the age of eighteen, he could not be sentenced to life without the possibility of parole, so will be eligible for parole. At his sentencing hearing, he violently attacked the deputies providing courtroom security, with friends from the gallery trying to assist him, causing the courthouse to be locked down. Security was provided to the victim's family to safely return to their parked cars. The fourteen year old was processed as a juvenile, adjudicated for Conspiracy to Commit Murder, and placed on probation.

In a separate case, two juvenile brothers, aged fourteen and sixteen years old, harassed a sixty-year-old man at the County fair because the man refused to give the brothers money when they approached him. The brothers and their friends trailed the man and his niece through the crowd, cursing, heckling and threatening them. When the man stopped and faced the sixteen-year-old, the sixteen-year-old put up his fists while his fourteen-year-old brother blindsided the man with a running punch to the head, knocking the man down, fracturing his skull. The sixteen-

[41] *Id*. at 31.
[42] *Id*.

year-old then spit on the unconscious man. The man never regained consciousness from the brain injury and was days later declared brain dead, requiring his family to decide whether to take him off life support. None of his family, including his then nearly ninety ~~90~~ -year-old parents, recovered from the shock and loss. The fourteen-year-old was adjudicated as a juvenile for Manslaughter, detained for a short while and then placed on probation. The sixteen-year-old was adjudicated as a juvenile for misdemeanor Assault Second Degree and placed on probation.

Under Proposed Option 1, all the adjudicated juveniles at most would receive one point, depending on the five-year time frame between prior disposition and date of current offense. Under Proposed Option 2, all the adjudicated juveniles would receive no points. Under Proposed Option 3, neither the adjudicated juveniles nor the sixteen-year-old convicted as an adult for First Degree Murder would receive a point.

*(3) Specific Impact on Victims is Grossly Out of Balance in its Inaccuracy of Sentencing*

The Commission states that it "seeks to strike the right balance between various considerations related to the sentencing of youthful individuals including difficulties in obtaining supporting documentation…, recent brain development research, demographic disparities, higher arrest rates for younger individuals, and protection of the public."[43] Notably absent from this list are the interests of victims at sentencing.

Such a radical and imbalanced change in the Guidelines negatively affects two groups of victims. First, it revictimizes the victims in the instant case. These are victims who find themselves in federal court having been victimized by an offender with a lengthy criminal record which includes at least juvenile confinement and likely adult sentencing. By definition such a defendant has already been afforded juvenile penalties, but their criminal activity increased to the point where they have been convicted for a federal crime within 5 years of his juvenile confinement or 15 years of an adult conviction. At this point in the proceeding the victim has already been traumatized once by the criminal act and likely a second time going through a trial.

Now at sentencing, the victim has rights under the law because of the Crime Victims' Rights Act. Notably, victims have a right to participate in sentencing procedures, including to

[43] USSG, *Proposed Amendments* at 14 (Feb. 2023).

reasonably be heard and the fundamental right to be "treated with fairness and with respect."[44] Victims, like defendants, also have a right to a just sentence that adequately considers the "history and characteristics" of the defendant, promotes respect for the law, provides a just punishment, and adequately deters criminal conduct.[45] These rights would be denied to victims if the proposed amendments are passed.

As drafted the amendments would not treat victims with fairness and respect because the sentences given to defendants would intentionally ignore some of the most important information a court can consider about a defendant at the time of sentencing. Forcing sentencing judges to sentence defendants while precluding the them from considering the full "history and characteristics" of defendants is not fair or just for victim survivors. How can a judge impose a just punishment without a full picture of the defendant? They cannot. How can a judge consider what deterrence is adequate without reviewing what opportunities the defendant has previously had – whether rehabilitative or punitive? They cannot. How can a judge evaluate what treatment the defendant might need that will be most effective without reviewing what if any rehabilitation and treatment an offender has already had or not had? They cannot. As a result, any sentence will be fictional and misleading, ignoring the full picture of the defendant who harmed the victim and permanently altered the course of her life.

It is essential to see the very practical effects of these proposals at a sentencing hearing. It is not just that they preclude consideration of an aggravated criminal history of the offender, but these proposals do not limit the defendant in any way from presenting mitigating claims that stem from the same time period in their life. Defendants will still be permitted to present any information from their childhood or their emerging adult years which will paint them in a positive light worthy of mitigation. This might include childhood trauma, good works, social achievement, character witnesses, etc. Yet, the government, and by extension the victim, will be unable to present actual findings of responsibility and/or guilt of violent crimes committed by the offender during that same time period. Not only would such a sentencing system be allowing an *incomplete* picture of the defendant, it would be advancing a *false* picture of the offender. And a crime victim who has gone through a trial in which the rules of evidence preclude a presentation

[44] 18 U.S.C. § 3771(a).
[45] 18 USC § 3553(a).

of the full picture of the crime, now at a sentencing which is supposed to be individualized and honest, will receive a false sentence that does not reflect the severity of the crime committed or the defendant's culpability for that crime.

A second set of victims will also be disproportionately affected. With recidivism rates as high as 70% for youthful offenders, by falsely sentencing this cohort of offenders to lesser sentences, a court will be creating a new group of victims. The statistics demonstrate that this cohort not only recidivates at a higher rate than older offenders, but the violence they use increases.[46] A judge is required to consider the need "to protect the public from further crimes of the defendant"[47] and a victim has the right to be "protected from the defendant."[48] Not only will such a proposal retraumatize victims in the instant case, but will also lead to the unnecessary victimization of others by tying a judge's hands at sentencing and forcing him to sentence a defendant without a full picture of his history, thus failing to protect the public.

Repeat juvenile crime victimizes not only individual people but *entire communities* as well. These are communities to which a judge is required to consider their protection.[49] For example, the community of Gilbert, Arizona was tormented by a group of young adults and juveniles who engaged in a series of beatings, intimidation, and robberies in an escalating manner which resulted in several individual victims and one youth being beaten to death. The community expressed fear and outrage at these violent events.[50] The tragic shooting in Kansas City, Missouri during the Superbowl parade have brought into the national spotlight the youth violence plaguing that community.[51] Similarly, Washington D.C. residents have openly discussed an increased fear of carjacking and other forms of violent crime being committed by youthful offenders.[52] When a defendant is escalating his criminal activity and the court cannot take that escalation into consideration by reviewing the prior criminal activity of youthful

[46] It should be noted that these figures are considered by many authorities as likely underestimating the recidivism rates because many crimes are not reported.
[47] 18 U.S.C. § 3553(a).
[48] 18 U.S.C. § 3771.
[49] 18 U.S.C. §§3553(a), 3771.
[50] *See, e.g.*, *Here's a timeline of everything involving Preston Lord, Gilbert Goons, East Valley youth violence*, KTAR News (Feb. 8, 2024 10:11 AM).
[51] *E.g.,* Ryan Hennessy, *Shooting at Union Station becomes latest evidence youth violence is not unknown to Kansas City*, KCTV5 (Feb.15, 2024 8:17 PM).
[52] *E.g.*, Adam Longo & Matt Pusatory, *Southeast D.C. residents share carjacking concerns with leaders*, WUSA 9 (Jan. 31, 2024, 9:03 AM).

offenders, it compromises public safety and traumatizes entire communities. These proposals do just that.

*(4) The Goals of the Commission Are Addressed by the Current Guidelines More Precisely Than the Proposals Which Themselves Will Cause Disparate Sentences.*

The VAG also opposes these proposals because they preclude judges from being able to perform their duties. The VAG recognizes some of the concerns raised by the Commission regarding juvenile adjudications possibly having a disparate impact on a sentence.[53] As stated above, these proposals create their own disparate sentences by sentencing a defendant with no significant juvenile history the same as an offender with a lengthy criminal history. Furthermore, the law, the Guidelines, and the Commission's own data demonstrate that courts already must and do take this concern into consideration and these proposals are unnecessary to accomplish the Commission's goals but instead further aggravate disparities.

The law is clear that judges are trusted to weigh factors appropriately and to engage in just sentences.[54] The Guidelines themselves also afford judges the ability to lower a sentence based on the offender's age and if the criminal history substantially over-represents the seriousness of the defendant's criminal history or the defendant's age distinguishes his case from a typical one.[55] Furthermore, the Commission's own data demonstrates that currently the majority of offenders with one or two points are sentenced below the Guideline range.[56]

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[53] The Commission has also identified a possible disparity of sentence issue. The VAG recognizes that some offenses may be treated as adult cases in some states and juvenile offenses in others, triggering a 15 year lookback. This kind of inconsistency is not dissimilar to other variations among states regarding sentencing norms and degrees of crimes. A more appropriate approach to this problem may be to review the 15 year lookback as suggested by POAG in 2017. *See* Probation Officers Advisory Group Public Comment on Proposed Amendments (July 31, 2017) at 6.

[54] *See, e.g.*, United States v. Chavez-Meza, 854 F.3d 655, 659 (10th Cir. 2017), *aff'd*, 138 S.Ct. 1959 (2018) ("absent some indication in the record suggesting otherwise, that trial judges are presumed to know the law and apply it in making their decisions"); United States v. Lymon, 905 F.3d 1149, 1155 (10th Cir. 2018) (*quoting* Chavez-Meza).

[55] USSG §§4A1.3, 5H1.1. Indeed, the Guidelines as written are balanced in that they allow for a judge to increase or decrease a sentence based on the criminal history not accurately reflecting the gravity of the offender's criminal actions or over representing them. §4A1.3. These proposals seek to allow a departure *only in one direction*: down. This provides a benefit to the offenders but precluding a benefit to victim survivors of the offender's previous or instant criminal activity.

[56] USSG, *Public Data Presentation: Proposed Amendments on Youthful Individuals* at 13, 30 (Jan. 2024) (noting that under Option 1, 58.3 % of one-point offenders and 50.5% of two-point offenders are sentenced below the Guideline range and under Option 3, 50.2% of offenders with one point for an offense over 18 are sentenced below the Guideline range.

These laws and statistics reflect that the Guidelines already allow courts to appropriately consider an offender's youth at sentencing to make appropriate allowances for it based on the facts. As some members of the POAG have previously noted, the current scheme "accounts for only those juveniles who have a higher likelihood of recidivism and future criminal behavior based on their criminal past."[57] While the goals of the Commission are valued, the present sentencing structures already address these concerns adequately. To go further is to take a measure that thwarts the goals of sentencing as a whole.

While the VAG vehemently opposes all three options for all the aforementioned reasons, should the Commission ignore the positions of victims on this issue, the VAG would prefer Option 1. Said option runs afoul of the purposes of sentencing and revictimizes victims the least of the three options.

### C. Part B - Sentencing of Youthful Individuals

While there was some discussion among the VAG about various nuances of the Part A proposal, the VAG unanimously finds the proposal in Part B to be nothing less than shocking in its breadth and lack of basis. Part B seeks to provide a pathway for decreasing sentences of all defendants based on "youthfulness" while at the same time removing limiting language in current Guidelines. This sweeping proposal would affect 15.4% of all defendants sentenced 2018-2021.[58] The VAG opposes this proposal because of its breadth, that it lacks any meaningful guardrails which will lead to disparate sentences, fails to meet the stated goals of the Commission, and is unprecedented in its thwarting of truly individualized sentencing.

#### *(1) The Proposal is Far Too Broad Both in the Number of Offenders and the Gravity of Their Crimes*

A word must be said about the breadth of this proposal. First, the Commission candidly notes that it cannot say how many people will be affected by this proposal.[59] That is of concern. Second, the Commission released some data on people it now refers to "youthful individuals," shockingly including offenders under 25 years of age. This breadth of people encompassed by this term is without basis. First, it encompasses 15.4% of all those sentenced. Second, is far too

[57] Probation Officers Advisory Group Public Comment on Proposed Amendments (Fe. 21, 2017) at 5.
[58] USSC Data Presentation Proposed Amendments on Youthful Individuals (January 2024).
[59] USSC Data Presentation Proposed Amendments on Youthful Individuals (January 2024).

broad to be a category of people – as a class – who are assumed to be less culpable as individuals. By way of comparison, 22,390 federal employees are 24 years old or younger.[60] The minimum age to become a police officer is 18 – 21 years of age.[61] The average age of a starting medical student is 24 years old.[62] Yet, the VAG is unaware of policies which would seek lesser punishments for a federal employee who engages in workplace harassment, a police officer who uses excessive force on an arrestee, or a medical student who commits an error while on rotation. So, to suggest such sweeping generalization for the same age group of offenders is misplaced.

Although the Commission cannot say how many people will be affected, it is apparent it will benefit a large number of offenders who have committed crimes involving victims: 15.4% of all sentenced individuals, 25.4% of whom committed drug trafficking offenses, 15.2% who committed firearms offenses, and who as group committed nearly double the amount of violent offenses than those who are older (13% as compared to 8.5%).[63] Therefore, this amendment will benefit offenders who are significantly involved in drug trafficking, firearms, and crimes of violence.

Of paramount concern to the VAG is the lack of limits to this text. As stated supra, the term youthful offender has been defined in the law as an offender under the age of 18.[64] This provision discusses downward departures for a new and undefined category of "youthful individuals." It does not define that term. It offers no limits as to who is "youthful." Thus, allowing a judge to depart based on his own concept of "youthfulness."

The Court has long warned of the dangers of vagueness and noted a principal danger of unbridled terms is exactly what the Commission claims it is trying to end: "arbitrary and discriminatory enforcement."[65] The proposal as written would allow a judge to decide who is

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[60] Office of Personnel Management, Fulltime Permanent Age Distributions, https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/full-time-permanent-age-distributions/

[61] Madalyn K. Wasikzud, *Developing Police*, 70 Buf. L. Rev 271, 301-302 (2022).

[62] Brendan Murphy, *Going Directly from College to Medical School: What it Takes*, American Medical Association (August 15, 2019).

[63] *Id.*

[64] See supra n. 1. The Commission has only once before referenced youthful offenders as offenders – notably not individuals – as offenders whose crime occurred before age 25. See Youthful Offenders in the Federal System (May 2017).

[65] *E.g.*, Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

"youthful" stretching any brain research far beyond its intended use. One judge could conclude a thirty-year-old is "youthful," another a 25-year-old is "youthful," and another may find no one is "youthful." This is exactly the kind of arbitrariness the Sentencing Reform Act was designed to prevent. As such, this proposed amendment allowing such subjectivity and generalizations is axiomatic to the goal of both individualized sentencing and uniformity of sentencing.

The fear that judges will act arbitrarily with such a blank check is not speculative. A district court judge who did not understand the harms of child sexual abuse material did just that.[66] In *United States v. Reingold*, the District Court was sentencing a 20-year-old defendant after pleading guilty for distribution of child sexual abuse material. The defendant admitted to using the online name "Boysuck0416" to download "'a ton' of child pornography" including videos, to distributing child pornography to several others, and to previously sexually assaulting numerous minors including multiple and increasingly penetrative sexual assaults on his own 8 year old half-sister over a three year period.[67] The PSR recommended a period of imprisonment of 168-210 months and the offense carried a mandatory minimum sentence of five years' incarceration. Yet, the District Court decided the offender was "immature" and, relying on generalized brain research, attempted to sentence the defendant to 30 months incarceration and recaption the case as a juvenile matter. Fortunately, the Court of Appeals rejected such an improper use of *Graham v. Florida*[68] and *Miller v. Alabama*[69] and their reference to brain development, condemning the District Court's "effort to blur the distinction between juvenile and adult offenders…."[70] The Court of Appeals found this use of "immaturity" an improper "subjective criterion."[71]

The proposed amendment suffers from the same fatal flaw that has been rejected by circuit courts. While the *Reingold* Circuit Court found that immaturity is relevant to sentencing it "is appropriately considered by a judge in making a *case specific* choice of sentence" not a

[66] *United States v. Reingold*, 731 F.3d 204 (2013).
[67] *Id*. at 207-208.
[68] 560 U.S. 48 (2010).
[69] 567 U.S. 460 (2012).
[70] *Rheingold*, 731 F.3d at 215.
[71] *Id*. at 215.

blanket one.[72] Here, the Commission is advocating the very same type of blanket rule that the courts have rejected. [73]

This amendment will open up an avenue allowing every offender to seek to avoid a just sentence based not on their individual characteristic but on a vague concept of "youth." Such is untenable. Criminal defendants over 18 years of age are responsible for their actions. Under the current Guidelines, and consistent with the purposes of sentencing, a defendant can argue that his particular age distinguishes his case. Such is appropriate to advance individual sentencing. To literally allow any defendant to argue "youthfulness" invites great variances in sentencing disproportionately affecting those without means to establish such a vague claim and allowing unguided courts with unbridled arbitrary discretion.

*(2) The Proposal Thwarts Individualized Sentencing*

The second reason the VAG opposes this proposal is it thwarts this section of the Guidelines designed to advance individualized sentencing, not impede it. Section 5H1.1 is located in the section of the Guidelines labeled *Specific* Offender Characteristics (emphasis added). It is in response to the Congressional order that the Commission consider whether age "matters with respect to **a** defendant."[74] It further notes the Supreme Court's emphasis to "individualize sentences where necessary."[75] Yet, the proposed amendment does not apply individually or neutrally. It (a) only directs courts to depart *downward* and (b) directs courts to consider *generalized* studies to depart only downward in an *individual* case. The VAG is unaware of other instances where the Guidelines suggest a *generalized study* should be the basis for an *individual departure* and that such a departure can only go *downward*.

Such a pounding of a square peg into a round hole has no place in the Guidelines. For example, many victims of crime experience trauma as a result of their victimization.[76] Yet, the

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[72] *Id*. at 215 (emphasis added).

[73] *Id.; E.g.*, United States v. Cobler, 748 F.3d 570, 581 (4th Cir. 2014) ("To the extent that this 28–year–old defendant argues that his developmental immaturity categorically requires that he be treated more leniently as a juvenile, we reject that argument at the outset given the complete lack of evidence in the record regarding any national consensus about how immature adults should be sentenced for child pornography crimes.").

[74] USSG, Part H at 458 (citing 28 U.S.C. §994(e)).

[75] USSG, Part H at 466 (citing United States v. Booker, 543 U.S. 220, 264-265 (2005)).

[76] *E.g.*, James Hill, Victims' Response to Trauma and Implications for Interventions: A Selected Review and Synthesis of the Literature, Canadian Department of Justice (Nov. 2003).

Guidelines would never contemplate that blanket general fact to justify an increase in a sentence of an individual defendant. Rather, an extreme trauma experienced by a victim may be appropriate to consider, but that individual experience of that particular victim would need to be established for the court to consider it. Additionally, as the Commission notes, the research is unquestionable that youthful offenders *in general* recidivate at higher rates, in shorter time periods, to more violent crime. Yet, that *generalization* alone should not be sufficient to establish a higher sentence for an *individual* defendant. Rather, it should be established that there is a likelihood of an individual defendant to reoffend. The same should be true in this instance. It is inappropriate to point to a generalized information as a basis to depart in a sentence of an individual offender –in any direction and, certainly, not in only one direction.

Under the current Guidelines a defendant is free to use his age to argue that in his specific case that his age should be particularly noted to make his case unusual. That accomplishes the goals of the Commission. To add language that only allows a departure in one direction – downward – based not on individual characteristics but on general information is unjust and antithetical to sentencing.

*(3) The Proposal Fails to Serve the Commission's Stated Goals*

In putting forth these proposals, the Commission states it is trying to balance difficulties in obtaining documentation for juveniles and assessing confinement, recent brain development research, demographic disparities, higher arrest rates for younger offenders, and protection for the public.[77] These may be valid goals. But these after the fact proposals do not properly address the underlying issues laid out by the Commission and instead achieve blanket downward departures for defendants often at the expense of victims of crime and public safety. The difficulties in obtaining documentation and assessing confinement are administrative problems. That is not to say they are minor or unimportant. We all benefit from accurate sentencing and these problems should be solved. But they should be solved with administrative solutions, not substantive changes to the Guidelines as proposed here. Sentencing courts will always struggle with adequate documentation and disputes about prior events. Judges are equipped to address them within their discretion and pre-sentence reports will not include information that is

[77] USSG, *Proposed Amendments* at 14 (Feb. 2023).

unreliable. Similarly, brain development studies are a factual reality for general observations about the average juvenile, but they are not specific information regarding specific defendants and, as such, their role should be limited and should not automatically be the basis for downward departures any more than high recidivism rates among juvenile offenders should be the basis of an automatic upward departure. Far from helping demographic disparities in sentencing, Part A will disproportionately affect victims of crime who are often the victims of these offenders and Part B is so vague that it will encourage arbitrary enforcement which leads to disproportionate outcomes. Finally, under no measure do these proposals increase protection of the public. Rather, they decrease it by causing inaccurate and false sentences that fail to consider what the Commission has described as "an important specific offender characteristic…the defendant's criminal history."[78]

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[78] USSG, Part H at 458.

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**Conclusion**

The VAG appreciates the opportunity to comment upon these proposals. The VAG takes seriously its commitment to advise the Commission and to share Victim perspectives on the sentencing process. It respectfully requests the Commission to stay within its authority, avoid defraying individualized sentencing, and respect the rights of victim survivors.

Respectfully yours,

The Victims Advisory Group
Mary Graw Leary
Chair

cc: Advisory Group Members