The Delinquent Guidelines: Calling on the U.S. Sentencing Commission to Stop Counting Defendants' Prior Offenses Committed Before Age 18

*Ian Marcus Amelkin & Nicholas Pugliese**

Abstract

The United States Sentencing Guidelines' recidivism provisions recommend harsher punishment for defendants with a prior criminal record. The Guidelines authorize an accounting not only of a federal defendant's criminal record as an adult, but also as a child. Prior offenses committed before age 18 enhance sentences for thousands of people each year, but the practice has not been widely explored in the academic literature. A federal defendant's juvenile record can lead to a higher Guidelines range through a variety of mechanisms: it can increase a defendant's criminal history category, increase the crime's total offense level, qualify the individual for "career offender" status, and deny relief from mandatory minimum sentences.

The use of pre-18 priors to enhance later federal sentences is both constitutionally suspect and misguided public policy. First, the practice stands in tension with Supreme Court precedent recognizing "that children are constitutionally different from adults for purposes of sentencing" in a way that makes them "less deserving of the most severe punishments." Second, it is inequitable to people of color, who are more likely to be prosecuted for their pre-18 conduct than their white counterparts who commit similar acts. Third, it generates unequal treatment between similarly situated defendants, a result at odds with the Guidelines' "primary goal" of fostering uniformity in sentencing. Finally, it raises problems of notice given that young people often are not told that their juvenile or youthful offender cases, which are not "convictions" under most states' laws, can later be used against them to enhance a federal sentence.

The United States Sentencing Commission has the power to end this unjust practice. This Article recommends that the Commission amend the Guidelines to stop counting defendants' prior offenses committed before age 18.

* Ian has worked for seven years as an assistant federal defender at the Federal Defenders of New York, Inc., in the Southern District of New York. That organization contracts with the federal judiciary to represent indigent clients charged with federal crimes. Similar offices exist in each judicial district throughout the country. *See generally* David Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 Cornell L. Rev. 335 (2017). Nicholas is now a judicial clerk for a federal judge. A previous version of this Article won the Benjamin Scharps Prize at Yale Law School for the best paper by a third-year student.

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Introduction

The United States Sentencing Guidelines (U.S.S.G. or the Guidelines), which federal judges rely on to impose criminal sentences, are animated by the belief that "[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."[1] To that end, the Guidelines contain "recidivist enhancements," provisions that result in higher recommend sentences and harsher punishment for defendants with a prior criminal record.[2] Of central concern to this Article, the Guidelines authorize an accounting not only of a defendant's criminal record as an adult, but also as a child.[3] Prior offenses committed before age 18—what this Article refers to as "pre-18 priors"—enhance sentences for thousands of people each year, including more than 3,000 in 2022 alone.[4] Under the Guidelines, the more criminal history points, the longer a defendant's recommended sentence.[5]

Criminal history points are just one of several ways that the Guidelines recommend an escalating term of incarceration based upon a defendant's pre-18 priors. Those priors may also influence a defendant's offense level score, the other major variable that judges plug into the Guidelines' Sentencing Table to calculate the recommended sentence.[6] What is more, pre-18 priors can trigger other devastating outcomes: the draconian "career offender" enhancement as well as mandatory minimum sentences.[7] In short, the Guidelines' treatment of pre-18 priors is a powerful but often overlooked engine of incarceration.

This Article calls on the United States Sentencing Commission (the Commission) to end the practice of counting pre-18 priors in the Guidelines. Federal judges routinely incarcerate people for extra years or even decades due to these Guideline enhancements. Courts' continued reliance on these provisions is constitutionally suspect and deeply misguided public policy. The Commission has the power to stop this unjust practice while not disturbing federal judges' ultimate discretion to consider a defendant's pre-18 priors in crafting an appropriate sentence.

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[1] U.S. Sent'g Guidelines Manual ch. 4, pt. A, introductory cmt. (U.S. Sent'g Comm'n 2023) [hereinafter U.S.S.G.]. Unless otherwise noted, all citations to U.S.S.G. refer to the 2023 Guidelines, effective November 1, 2023.

[2] *See id.* § 4.

[3] *Id.* § 4A1.2(d).

[4] U.S. Sent'g Comm'n, Public Data Presentation: Proposed Amendments on Youthful Individuals 26 (2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2024_Youthful-Sentenced-Individuals.pdf [https://perma.cc/2PP7-6QU6]. According to another study examining data from 2010 to 2015, one in four defendants under 25 at the time of their federal sentencing received "criminal history points" for pre-18 priors. U.S. Sent'g Comm'n, Youthful Offenders in the Federal System 35–36, (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf [https://perma.cc/K8GW-S3R2].

[5] U.S.S.G. ch. 5, pt. A. A defendant receives criminal history points for prior offenses as outlined in Chapter Four of the Guidelines. Those points determine a defendant's criminal history category.

[6] U.S.S.G. ch. 5, pt. A. A defendant's offense level score is calculated under Chapters Two and Three of the Guidelines.

[7] *Id.* § 4B1.1(a); 18 U.S.C. § 3553(f) (denying "safety valve" relief from mandatory minimums to defendants with certain criminal history).

In Part I, we explain how the Guidelines use pre-18 priors to enhance federal defendants' sentences. We also explain that each pre-18 prior falls into one of three categories that impact the Guidelines in different ways: juvenile adjudications in a state's juvenile courts, adult convictions in a state's criminal courts, or so-called "youthful offenses" adjudicated in whichever courts are designated by state statute (typically criminal courts). In Part II, we argue that counting pre-18 priors is inappropriate in light of Supreme Court precedent holding "that children are constitutionally different from adults for purposes of sentencing" in a way that makes them "less deserving of the most severe punishments."[8] Central to the Court's reasoning is that because the adolescent brain is still developing, teenagers as a group are more inclined to commit crimes compared to older cohorts. In Part III, we argue that counting pre-18 priors is unfair and constitutionally suspect for three reasons. First, it is inequitable to people of color, who are more likely to be prosecuted for their conduct as children than their white counterparts. Second, it generates unequal treatment between similarly situated defendants, a result at odds with the Guidelines' "primary goal" of fostering uniformity in sentencing.[9] Third, it raises concerns about notice. Young people often are not told by their counsel or by a court that their juvenile or youthful offender cases, which are not "convictions" under most states' laws, can later be used against them to enhance a potential federal sentence.[10]

The Commission can make straightforward changes to the Guidelines to stop counting pre-18 priors. In Part IV, we recommend that *no* pre-18 priors should be counted to enhance a federal defendant's sentence under the Guidelines. This approach is the optimal choice for four reasons. First, it requires action by a single agency, the Commission, whose role is to "review and revise" the Guidelines on an annual basis.[11] Second, our recommendation is simple to implement from a technical standpoint, requiring minimal edits to the Guidelines as opposed to a significant overhaul of federal law. In fact, during its most recent amendment cycle, the Commission considered implanting the changes we suggest, although it did not adopt the proposal.[12] Third, this option best accords with the insights of the Supreme Court, modern developmental research, and policy considerations, all of which support the conclusion that individuals charged with federal crimes should not receive a higher Guidelines range (and thus, most likely, a higher sentence) because of their pre-18 priors. Fourth, this option will not prohibit federal judges from considering pre-18 priors in sentencing. The Guidelines are advisory, and under federal law, federal judges can still weigh a federal defendant's pre-18 priors if they so choose

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[8] Miller v. Alabama, 567 U.S. 460, 471 (2012).

[9] S. Rep. No. 98-225, at 52 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3235 ("A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity.").

[10] *See infra* Part III.C.

[11] 28 U.S.C. § 994(o). After a three-and-a-half-year period under the Trump Administration when it lacked the quorum needed to conduct business, the Commission returned to action in August 2022. Dave S. Sidhu, Cong. Rsch. Serv., LSB10890, Back in Action, the U.S. Sentencing Commission to Resolve Circuit Splits on Controlled Substances and Sentencing Reductions 1 (2022).

[12] *U.S. Sentencing Commission Seeks Comment on Proposals Addressing the Impact of Acquitted Conduct, Youthful Convictions, and Other Issues*, U.S. Sent'g Comm'n (2023), https://www.ussc.gov/about/news/press-releases/december-14-2023 [https://perma.cc/J253-PZRK].

as part of the mandatory 18 U.S.C. § 3553(a) analysis that forms the heart of their sentencing decisions.[13]

A real-world example that inspired this paper comes from one of the authors' representation of an 18-year-old client in the Southern District of New York. This client was charged with robbing a taxi driver and then briefly driving the taxi before abandoning it in the Bronx. The client had a difficult upbringing and severe cognitive challenges. He also had no prior adult felony convictions. Facing his first federal and adult case, the client was shocked to learn that four youthful offenses he previously pleaded guilty to in New York State court, for conduct he committed when he was 16 and for which he served a single concurrent sentence, greatly enhanced his Guidelines range. He was shocked because he had been advised—correctly—that youthful offenses are not convictions and are sealed under New York law.[14] In New York City, where the client spent his entire life, he had no criminal record. Under federal law, however, each of his youthful offenses counted separately as if they were adult convictions. Accordingly, he was treated under the Guidelines as the most aggravated possible repeat offender, skyrocketing his recommended sentencing range from 63 to 78 months, to 120 to 150 months.[15]

The use of pre-18 priors to enhance the sentences of federal defendants is unfair and unjust. It is time for this practice to end.

I. How the Guidelines Utilize Pre-18 Priors to Enhance Federal Sentences

A. The Guidelines Regime from Inception to Modern Practice

The Guidelines have been at the heart of federal sentencing practice since 1987, when they were first promulgated by the Commission pursuant to the Sentencing Reform Act of 1984 (the SRA).[16] The Guidelines were conceived amid a "sentencing revolution" spurred by a crisis of faith among leading legal thinkers in the ability of incarceration to promote rehabilitation and by the belief that excessive judicial discretion had led to unfair disparities in sentencing.[17] Particularly influential in shaping public discourse was

[13] *See* 18 U.S.C. § 3553(a)(1) (requiring courts in each case to consider the history and characteristics of the defendant, the nature and circumstances of his crime, similarly-situated defendants, and the defendant's need for treatment, among other factors); *see also* Gall v. United States, 552 U.S. 38, 49–53 (2007).

[14] N.Y. Crim. Proc. Law § 720.35(1) ("A youthful offender adjudication is not a judgment of conviction for a crime or any other offense."); *id.* § 720.35(2) (sealing records of youthful offender adjudications).

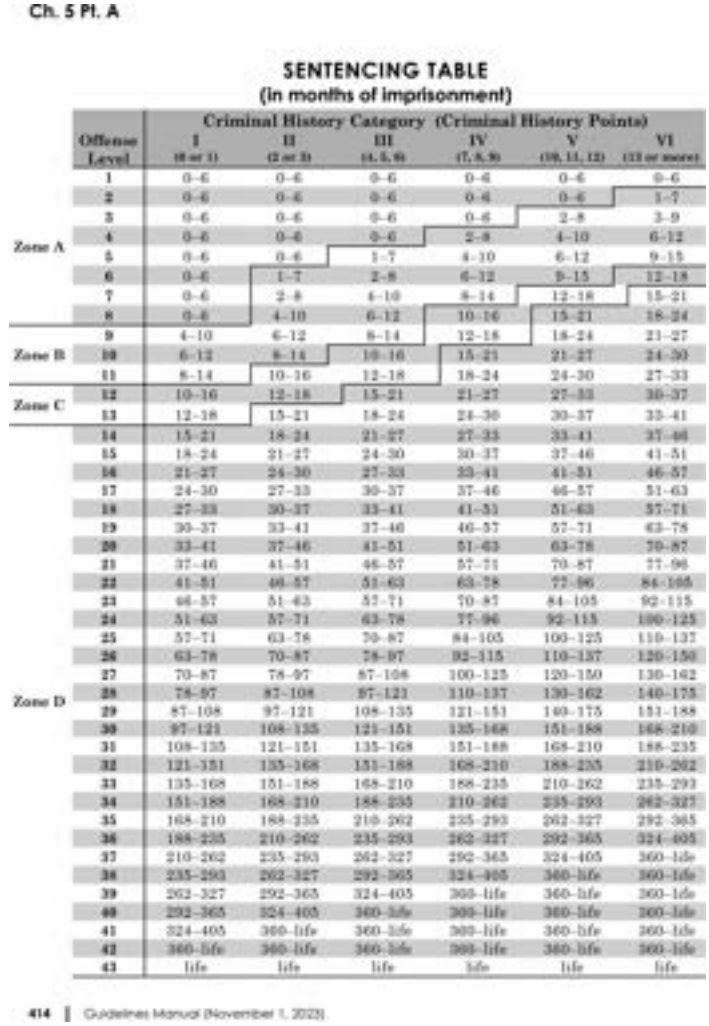
[15] The client ultimately received a sentence significantly below the recommended Guidelines range because his sentencing judge "varied downward" pursuant to 18 U.S.C. § 3553(a). Such downward variances are not common in many districts throughout the country. In 2023, they were granted in only 30% of sentencings nationwide. U.S. Sent'g Comm'n, 2023 Sourcebook of Federal Sentencing Statistics tbl. 29 (2024) [hereinafter U.S. Sent'g Comm'n, 2023 Sourcebook].

[16] Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1837 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[17] James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. Legal Analysis 119, 127–28 (2009).

Judge Marvin Frankel's 1973 book *Criminal Sentences: Law Without Order*, in which he described the sentencing power of federal judges as "almost wholly unchecked and sweeping," which he found "terrifying and intolerable for a society that professes devotion to the rule of law."[18] In response, Congress created the Guidelines to impose a determinate sentencing regime that cabined judges' decision-making.[19]

To create greater uniformity in sentencing, the Guidelines introduced a point system that assigns a numerical value to the charged offense and to the defendant's criminal history. The higher the score in each category, the higher the sentence. The scheme is encapsulated in a two-dimensional grid known as the "Sentencing Table."[20]



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SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
Zone A	4	0–6	0–6	0–6	2–8	4–10	6–12
	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
Zone B	9	4–10	6–12	8–14	12–18	18–24	21–27
	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
Zone D	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

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[18] Marvin E. Frankel, Criminal Sentences: Law Without Order 5 (1973).
[19] Whitman, *supra* note 17, at 127–28.
[20] U.S.S.G. § 5A.

After the judge calculates an individual's base offense level (ranging from 1 to 43 on the y-axis) and criminal history category (ranging from I to VI on the x-axis), she finds the Guidelines range at the intersection of the two. To calculate these scores, a judge applies hundreds of pages of "sentencing factors" set forth in Chapters One through Four of the Guidelines. Every federal crime has a base offense level that must be adjusted up or down based on various aspects of the crime, such as whether a weapon was used,[21] or based on the defendant's prior and subsequent behavior, such as acceptance of responsibility.[22] The defendant's criminal history category, in turn, is determined by adding up points based on the number of prior convictions and the sentences received for those convictions.[23]

The Guidelines as originally conceived were mandatory and binding on judges.[24] After judges calculated the Guidelines range, they were required to sentence defendants to a period of incarceration within the range specified by the Sentencing Table.[25] The main exception was if the judge determined that an upward or downward adjustment, known as a "departure," was warranted.[26] The availability of departures, however, was tightly constrained by "policy statements" within the Guidelines, which specified that considerations such as race or socioeconomic status were "not relevant" in granting departures, while other factors such as family ties, mental health, and addiction were "not ordinarily relevant."[27] Judges could also depart if an aggravating or mitigating circumstance was present "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."[28] The Guidelines were clear that departures should occur only in the "atypical" or "unusual" case.[29] The most common basis for departure was for "substantial assistance in the investigation or prosecution of another person."[30] Judges, therefore, had limited ability to maneuver around the dictates of the Sentencing Table.[31] The results of the mandatory Guidelines scheme were devastating for federal defendants.[32]

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[21] *See, e.g.*, U.S.S.G. § 2A2.2 ("If [during an aggravated assault] (A) a firearm was discharged, increase by 5 levels; (B) a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by 3 levels.").

[22] *Id.* § 3E1.1.

[23] *Id.* § 4.

[24] Mistretta v. United States, 488 U.S. 361, 367 (1989).

[25] *Id.*

[26] Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. Cin. L. Rev. 749, 778, 782 (2006).

[27] U.S.S.G. § 5H1 (U.S. Sent'g Comm'n 1987).

[28] 18 U.S.C. § 3553(b)(1).

[29] U.S.S.G. § 1A4(b) (U.S. Sent'g Comm'n 1987).

[30] *Id.* § 5K1.1 (still a ground for departure today).

[31] That is not to say that all discretion was removed from federal sentencing. Prof. Michael O'Hear, for example, has pointed out that the departure mechanism afforded judges discretion in both whether to depart (e.g., what are the boundaries of "not ordinarily relevant") and by how much. O'Hear, *supra* note 26, at 798. And by constraining judges, the Guidelines transferred discretionary power to prosecutors in their charging decisions, plea bargains, and control over cooperation benefits. *Id.* at 807–08.

[32] Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1328–33 (2005) ("[B]y any standard the severity and frequency of punishment imposed by the federal criminal process during the guidelines era is markedly greater than it had been before.").

In 2005, the Supreme Court declared in the seminal case of *United States v. Booker* that the sentencing ranges prescribed by the Guidelines were no longer mandatory, but instead advisory in most cases.[33] In relegating the Guidelines to advisory status, the Court breathed new life into 18 U.S.C. § 3553(a), which directs sentencing judges to consider each defendant's "history and characteristics" and "impose a sentence sufficient, but not greater than necessary" to comply with the statutory purposes of sentencing, which are generally punishment, deterrence, incapacitation, and rehabilitation.[34]

In a series of decisions in the wake of *Booker*, the Supreme Court clarified the extent of judges' discretion to deviate from the Guidelines. District courts no longer need to presume that a sentence within the recommended Guidelines range is reasonable.[35] Judges are free to deviate from the Guidelines based solely on policy considerations, such as disagreement with the Guidelines' shameful former hundred-to-one ratio for crack cocaine versus powder cocaine sentences.[36]

Even post-*Booker*, though, the Guidelines continue to serve as "the starting point and the initial benchmark" of sentencing.[37] Sentencing judges follow a three-step process set forth by *Gall v. United States*.[38] First, judges must properly calculate the advisory Guidelines range.[39] Second, they must determine whether to depart from the Guidelines range.[40] Third, once the final Guidelines range is pronounced (after ruling on any objections), they consider the factors in 18 U.S.C. § 3553(a) to determine whether a sentence outside the Guidelines range, known as a "variance," is warranted.[41]

This scheme has meant that the Guidelines, although advisory, continue to exert considerable sway over the decisions of sentencing judges.[42] In 2023,

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[33] 543 U.S. 220 (2005).

[34] 18 U.S.C. § 3553(a); Peugh v. United States, 569 U.S. 530, 536 (2013) ("[T]he Guidelines are no longer binding, and the district court must consider all of the factors set forth in §3553(a) to guide its discretion at sentencing." (citing *Booker*, 543 U.S. at 259–60, 264)). The statutory purposes of sentencing are listed at 18 U.S.C. § 3553(a)(2).

[35] Rita v. United States, 551 U.S. 338, 351 (2007) ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."). For their part, courts of appeal may—but are not required to—presume that a within-Guidelines sentence is reasonable. *Id.* at 353.

[36] Kimbrough v. United States, 552 U.S. 85, 91 (2007); Spears v. United States, 555 U.S. 261, 265 (2009). Congress subsequently increased the quantities of crack cocaine that trigger five- and ten-year mandatory minimum sentences and eliminated the mandatory minimum sentence for simple possession of crack cocaine. Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§ 2–3, 124 Stat. 2372, 2372 (2010). *See also* Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, ACLU i–ii (2006) (highlighting how the enactment of federal mandatory minimum sentencing for crack cocaine offenses drastically increased sentencing disparities between white and Black individuals).

[37] Gall v. United States, 552 U.S. 38, 49 (2007).

[38] *Id.* at 49–50; *see also* U.S.S.G. § 1B1.1(a)–(c) (application instructions). Judges receive key assistance in applying the Guidelines from the U.S. Probation Office, which must conduct a presentence investigation and submit a presentence report to the court prior to every sentencing, with limited exceptions. Fed. R. Crim. P. 32.

[39] *See Gall*, 552 U.S. at 49; 18 U.S.C. § 3553(a)(4); U.S.S.G. § 1B1.1(a).

[40] *See Gall*, 552 U.S. at 49–50; 18 U.S.C. § 3553(a)(5); U.S.S.G. § 1B1.1(b).

[41] *See Gall*, 552 U.S. at 49–50; U.S.S.G. § 1B1.1(c).

[42] *See, e.g.*, Peugh v. United States, 569 U.S. 530, 543–44 (2013) ("[Defendant] points to considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges.").

even after thirty-five years of criticism,[43] federal judges nationwide imposed sentences dictated by the Guidelines Manual—meaning a sentence within the Guidelines range or adjusted by a departure—in 67% of cases, while granting variances in only 33%.[44] In the absence of a prosecutor's agreement or suggestion, courts adhere to the Guidelines even more closely, granting downward variances in roughly one-fifth of all cases.[45]

Even when judges do grant variances, the Guidelines influence what judges think is a reasonable length of imprisonment—a phenomenon known as the "anchoring effect."[46] The anchoring effect is a cognitive bias that describes the human tendency to adjust judgments higher or lower based on previously disclosed external information.[47] Former District Court Judge Mark W. Bennett convincingly argues that the Guidelines are a "hulking anchor for most judges" that prevents them from meaningfully deviating from the advisory ranges even as they express widespread dissatisfaction with the Guidelines' harshness.[48]

Judge Bennett's assertion is supported by scientific experiments that have confirmed the anchoring effect in a variety of settings, including among physicians, real estate agents, lawyers, and judges.[49] In one study of German judges, for example, participants in a mock sentencing scenario received an unexpected phone call from a reporter who suggested different anchors by asking: "Do you think that the sentence for the defendant in this case will be

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[43] *See, e.g.,* Jed. S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 Fed. Sent. Rep. 6, 7 (2013) ("Perhaps the most fundamental flaw in the Sentencing Guidelines is that they are based on the assumption that you can, in the name of reducing disparities, isolate from the complexity that every sentence presents a few arbitrary factors to which you then assign equally arbitrary weights—and somehow call the result 'rational.'"); Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal F. 149, 164 (2005) ("At or near the root of virtually every serious criticism of the Guidelines is the concern that they are too harsh—that federal law requires the imposition of prison sentences too often and for terms that are too long."). Though the rate at which judges have sentenced below the Guidelines have increased since *Booker*, rates of imprisonment were unaffected because "the guidelines recommend sentences of incarceration for almost all defendants." Paul J. Hofer, *Federal Sentencing After Booker*, 48 Crime & Just. 137, 145 (2019).

[44] U.S. Sent'g Comm'n, 2023 Sourcebook, *supra* note 15, tbl. 29. In 2022, 68% of cases resulted in sentences dictated by the Guidelines Manual, while judges granted variances in 32% of cases. U.S. Sent'g Comm'n, 2022 Annual Report and Sourcebook of Federal Sentencing Statistics 84 tbl. 29 (2023). In 2021, judges imposed sentences under the Guidelines Manual in 69% of cases while granting variances in 31% of cases. U.S. Sent'g Comm'n, 2021 Annual Report and Sourcebook of Federal Sentencing Statistics 84 tbl. 29 (2022).

[45] U.S. Sent'g Comm'n, 2023 Sourcebook, *supra* note 15, tbl. 29. Considerable variation exists between federal judicial districts in the rate at which they grant variances, ranging in 2023 from a low of 9% in the District of the Virgin Islands and 10.2% in the Southern District of California to a high of 75.9% in the Eastern District of Wisconsin. *Id.* at tbl. 30.

[46] Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 495 (2014).

[47] *Id.*

[48] *Id.* at 523, 525–28 ("Given the widespread dissatisfaction among federal district judges with the Guidelines, judicial acceptance cannot possibly explain the extent of judges' tethering to the Guidelines."). To counter the influence of the anchoring effect, Judge Bennett proposes requiring judges to consider the defendant's personal history and other factors under 18 U.S.C. § 3553(a) and determine a preliminary sentencing range *before* the presentence report prepared by the U.S. Probation Office discloses the advisory Guidelines range. *Id.* at 529–30.

[49] *Id.* at 495.

higher or lower than [one or three] year(s)?"[50] When asked if they were going to impose a one-year sentence, the judges imposed an average sentence of twenty-five months, while those asked if they were going to impose a three-year sentence imposed an average sentence of thirty-three months.[51] The anchoring effect is observed "even when the anchors are incomplete, inaccurate, irrelevant, implausible, or random."[52]

The post-*Gall* sentencing procedure, when combined with the anchoring effect, thus preserves the Guidelines' status as the "lodestone of sentencing" even in the post-*Booker* era.[53]

B. The Guidelines' Treatment of Offenses Committed Before Age 18

A federal defendant's pre-18 record can lead to a higher Guidelines range through a variety of mechanisms: it can increase a defendant's criminal history category, increase the crime's base offense level, qualify the individual for "career offender" status, and deny relief from mandatory minimum sentences. Throughout this discussion, it is important to note that the Article's definition of "pre-18 priors" encompasses three categories of offenses: adjudications through states' juvenile courts; adjudications under state "youthful offender" statutes; and adjudications through adult criminal courts, which result in "adult" convictions even though the offender was still a child when he committed the crime. The Guidelines treat pre-18 youthful offenses and adult convictions more harshly than juvenile adjudications. The Guidelines' treatment of youthful offenses is especially problematic, as discussed in the next section.

The most straightforward way that pre-18 priors contribute to a higher recommended sentence is via the criminal history categories. To calculate this metric, judges review all of a defendant's priors—whether committed before or after age 18—and assign each of them a numerical value.[54] The "points" are then added together to calculate the defendant's criminal history category, ranging from I to VI. Category I corresponds to zero or one point, Category II to two or three points, and so on, up to Category VI at thirteen or more points.[55] A higher criminal history category equates to a longer recommended prison sentence.[56]

The Guidelines contain two similar but distinct schemes to assign criminal history points, depending on whether the prior offense was committed before or after age 18. Under the scheme for past offenses committed after age 18, the Guidelines assigns three criminal history points for each prior sentence of imprisonment exceeding one year and one month, two points for

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[50] *Id.* at 504.
[51] *Id.*
[52] *Id.* at 502.
[53] Peugh v. United States, 569 U.S. 530, 544 (2013).
[54] U.S.S.G. § 4A1.1.
[55] *Id.* § 5A.
[56] *Id.* For a crime with a base level offense of 14, for example, the advisory range is 15–21 months in Criminal History Category I but 37–46 months in Criminal History Category VI.

each prior sentence exceeding sixty days, and one point for prior sentences not otherwise counted.[57] A three-point offense is counted so long as the defendant was incarcerated for that offense—including for violations of probation or parole that resulted in short jail sentences—at any time during the fifteen-year period immediately preceding when he committed the charged federal crime.[58] Two- and one-point offenses have a ten-year lookback window from the date of the federal crime.[59]

The counting scheme for past offenses committed prior to age 18 differs slightly, as outlined in Section 4A1.2(d) of the Guidelines.[60] A defendant will receive three points if "convicted as an adult" and sentenced to a term of imprisonment exceeding one year and one month, two points for each adult or juvenile sentence of at least 60 days, and one point for all other adult or juvenile sentences.[61] Three-point offenses are subject to the same fifteen-year lookback period as in the adult scheme.[62] Unlike prior adult offenses, however, two- and one-point offenses committed prior to age 18 are counted only if the defendant's sentencing or any confinement for those offenses occurred within five years of the commission of the charged federal crime.[63]

The second way pre-18 priors enhance Guidelines ranges is by raising the offense level for certain categories of crimes. Each charged federal crime is assigned a base offense level between 1 and 43.[64] The higher the number, the higher the recommended sentence.[65]

The base offense level for each type of crime can then be adjusted upward or downward based on aggravating or mitigating factors. Consider, for example, an individual found guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Pursuant to U.S.S.G. § 2K2.1(a), if that person had previously sustained a felony conviction for a "crime of violence" or a "controlled substance offense," the offense level increases by four points; if he had two such convictions, the offense level increases by eight.[66] "Felony conviction" is defined to include judgments for offenses committed prior to age 18 if the judgment "is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted."[67] This definition encompasses

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[57] *Id.* § 4A1.1.
[58] *Id.* § 4A1.2(e); *see also id.* § 4A1.2(k).
[59] *Id.*
[60] *Id.* § 4A1.2(d).
[61] *Id.*
[62] *Id.* § 4A1.2(e).
[63] *Id.* § 4A1.2(d).
[64] *Id.* § 5A.
[65] *Id.*
[66] *See id.* §§ 2K2.1(a)(2), (a)(4). A "crime of violence" is any felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or is categorically "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." *Id.* § 4B1.2(a). A "controlled substance offense" is any felony that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense" or is "an offense described in 46 U.S.C. § 70503(a) or § 70506(b)." *Id.* § 4B1.2(b).
[67] *Id.* § 2K2.1 cmt. n.1.

pre-18 adult convictions and, in most federal circuits, youthful offenses—but not juvenile adjudications.[68] Similar language appears in two other Guidelines sections concerning the crimes of unlawfully entering or remaining in the United States[69] and unlawful receipt, possession, or transportation of explosive material.[70] These offenses are among the most commonly charged by federal prosecutors, with firearms and immigration cases alone accounting for roughly 44% of all federal sentences in 2023.[71]

Third, pre-18 priors can make a defendant a "career offender," a designation that applies to federal defendants who commit a crime of violence or controlled substance offense after sustaining two prior felony convictions for such crimes.[72] Crucially, pre-18 priors count as qualifying prior convictions if they were classified as adult convictions in the jurisdiction that adjudicated the case.[73] Again, this definition encompasses pre-18 adult convictions and most youthful offenses. Being deemed a career offender is one of the most consequential misfortunes that can befall an individual charged in federal court. It automatically places the defendant in the highest criminal history category and simultaneously increases the base offense level to produce an advisory Guidelines range approximating the statutory maximum for the offense of conviction.[74] Many small-time, non-violent drug dealers are now spending the rest of their lives in prison because of this provision of the Guidelines.[75]

To take a real-world example, a Federal Defenders client pleaded guilty in 2021 to federal charges of brandishing a firearm during a robbery of a New York City bodega.[76] His plea agreement stipulated an advisory Guidelines range of 121 to 130 months, based on a base offense level of 17 and a criminal history category of IV. In preparing the Presentence Investigation Report (PSR), the U.S. Probation Office uncovered a youthful offender adjudication from a New York State case that was sealed and thus unknown to the prosecutor. Taking that adjudication into account, which stemmed from conduct when the client was 17, the Probation Office classified the client as a career offender, more than doubling his advisory Guidelines range to 262 to 327 months.[77]

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[68] *See infra* Part I.C.

[69] *Id.* § 2L1.2; *id.* § 2L1.2 cmt. n.1(B).

[70] *Id.* § 2K1.3; *id.* § 2K1.3 cmt. n.2.

[71] U.S. Sent'g Comm'n, 2023 Sourcebook, *supra* note 15, tbl. 13.

[72] U.S.S.G. § 4B1.1(a).

[73] *Id.* § 4B1.2(e)(4) (using same language as in §§ 2K1.3, 2K2.1, and 2L1.2).

[74] *Id.* § 4B1.1.

[75] Ashley Nellis, The Sent'g Project, Still Life: America's Increasing Use of Life and Long-Term Sentences 13 (2017) ("More than two-thirds of federal prisoners serving life or virtual life sentences have been convicted of nonviolent crimes, including 30 percent for a drug crime.") (internal footnote omitted); *see also* U.S. Sent'g Comm'n, Report to the Congress: Career Offender Sentencing Enhancements 31 (Aug. 2016) ("[T]he career offender guideline has the greatest impact on the offenders in the drug trafficking *only* category.") (emphasis added).

[76] These facts, with identifying information removed, were taken from court submissions in the 2022 sentencing of a client represented by the Federal Defenders of New York, Eastern District, and shared with the authors.

[77] In this case, the prosecutor abided by the terms of the plea agreement and asked the judge for a sentence of 130 months. The judge ultimately imposed a sentence of ninety-six months.

Fourth, in addition to enhancing Guidelines ranges, pre-18 priors may make a federal defendant ineligible for relief from statutory mandatory minimum sentences for controlled substance offenses.[78] Congress has dictated that hundreds of offenses require punishment by a mandatory term of imprisonment. These mandatory sentences are especially common for drug trafficking offenses.[79] Congress created a narrow exception in 1994, the so-called "safety valve," to allow certain people convicted of drug crimes to avoid the harshness of the statutory minimums.[80] To qualify for the safety valve, the drug crime for which the individual was convicted must not have resulted in death or serious injury, the crime must not have been violent, the individual cannot have been armed or a leader in a drug trafficking organization, and the individual must provide the government with a full accounting of their role in the offense and related conduct.[81] Finally, the individual must not have more than a certain number of criminal history points. As discussed, a pre-18 prior can be assigned up to three criminal history points. Until 2018, anyone with more than one criminal history point under the Guidelines was ineligible for safety valve relief.[82] The First Step Act, enacted in 2018, broadened that criterion slightly so that defendants are eligible unless they have a prior two-point violent offense, a prior three-point offense, or more than four total criminal history points.[83] Even after the First Step Act, however, the criminal history points assigned to pre-18 priors can deny safety valve relief to the thousands of individuals convicted each year of drug offenses carrying a mandatory minimum sentence.[84]

C. How the Guidelines Transform State "Youthful Offender" Adjudications into Adult Convictions for Sentencing Purposes

As distinct from pre-18 juvenile adjudications and "adult" convictions, the treatment of state-level youthful offenses in federal sentencing raises major policy and constitutional concerns. This troubling subject has been

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[78] The most commonly prosecuted drug offenses carrying mandatory minimum sentences are found at 21 U.S.C. §§ 841, 960. *See* U.S. Sent'g Comm'n, An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System 11–12 (2017).

[79] U.S. Sent'g Comm'n, Quick Facts: Mandatory Minimum Penalties 1 (2023) ("Of all cases carrying a mandatory minimum penalty: 73.2% were drug trafficking.") [hereinafter Quick Facts: Mandatory Minimum Penalties].

[80] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §80001, 108 Stat. 1796, 1985–86. The only other ways to get out from under statutory mandatory minimum sentences require a motion from the prosecutor based on the defendant's substantial assistance to the Government. *See* 18 U.S.C. § 3553(e); Fed. R. Crim. P. 35(b); *see also* Charles Doyle, Cong. Rsch. Serv., Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions 2 (2022).

[81] 18 U.S.C. § 3553(f).

[82] First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221 (amending 18 U.S.C. § 3553(f)(1)).

[83] *Id.*; *see also* Pulsifer v. United States, 144 S. Ct. 718, 723 (2024).

[84] *See* Quick Facts: Mandatory Minimum Penalties, *supra* note 79, at 1 (more than 13,000 individuals were sentenced in 2022 for drug offenses carrying a mandatory minimum penalty). The average sentence for individuals convicted of a drug crime carrying a mandatory minimum penalty was 133 months without the safety valve or another form of relief, compared to 61 months with such relief. *Id.* at 2.

little explored in the academic literature but is potentially life-changing for defendants.

Youthful offender statutes in many states create interstitial adjudicatory systems with procedures that mix those found in juvenile and adult courts. The statutes often authorize special procedures by which offenders who are ineligible for juvenile court but are still under a certain age—often 18 but sometimes several years older—can receive dispositions that are more rehabilitative and less punitive than the penalties to which adults in criminal courts are exposed.[85] In New York, for example, a state court can grant "youthful offender" status to people 18 or younger who commit a crime but for whom the court determines that the burden of a criminal record would be against "the interest of justice."[86] Accordingly, under New York law, a youthful offender adjudication "is not a judgment of conviction for a crime or any other offense," and the records are sealed.[87]

The Guidelines, however, recognize only two categories of prior criminal adjudications—juvenile and adult.[88] This raises the question as to which category youthful offenses belong. The answer is consequential because, as discussed, pre-18 priors classified as adult convictions can receive more criminal history points than a juvenile adjudication and, unlike juvenile adjudications, can increase the crime's base offense level and qualify the individual for career offender status. At first glance, youthful offenses, which are often committed by teenagers, appear to fit more naturally into the category of juvenile than adult priors. Most federal appellate courts to consider the question, however, have interpreted language in the Guidelines to hold the opposite.[89] As a result, judgments that are classified as "youthful offender" adjudications under state law are counted as adult convictions under the Guidelines in several circuits.[90] New York is an exemplar of this dynamic but is by no means unique. This dynamic is problematic because the Guidelines' treatment of youthful offender adjudications is often in direct conflict with language in state statutes labeling them as non-convictions and limiting their use in future proceedings.

In sorting a defendant's priors into either the juvenile or adult bucket, the Guidelines look to more than just the age at which the prior offense was committed. That is, the Guidelines do not classify all offenses committed prior to 18 as juvenile offenses. Instead, the Guidelines ask how defendants were prosecuted for that offense in the relevant jurisdiction—whether as a juvenile or as an adult. In its instructions for assigning criminal history points to pre-18 priors, the Guidelines specify that an offense should receive three points "*[i]f the defendant was convicted as an adult* and received a sentence of imprisonment exceeding one year and one month."[91] Separately, in its instructions

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[85] 43 C.J.S. *Infants* § 380 (2023).
[86] N.Y. Crim. Proc. Law § 720.20(1)(a) (McKinney 2023).
[87] *Id.* §§ 720.35(1)–(2).
[88] *See, e.g.*, U.S.S.G. § 4A1.2(d).
[89] *See infra* Part I.C.i–v.
[90] *Id.*
[91] U.S.S.G. § 4A1.2(d)(1) (emphasis added).

about whether a pre-18 prior can count as a predicate "prior felony conviction" toward designation as a career offender, the Guidelines advise:

> "Prior felony conviction" means a prior *adult* federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year . . . . 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).[92]

This language in the Guidelines recognizes that all states have statutes specifying when crimes committed by an individual under 18 may or must be considered the crime of an adult.[93] Three different practices predominate: (1) statutory exclusion laws, which require charges against juveniles for certain offenses to be filed in adult court; (2) prosecutorial discretion laws, which give prosecutors discretion to file charges directly in adult court; and (3) judicial waiver laws, which require a juvenile court judge to decide whether a minor can be charged as an adult.[94] Some states specify a minimum age at which minors can be transferred to adult court, while others set no minimum age.[95]

Read literally, the Guidelines give substantial deference to prosecuting state jurisdictions in determining whether a pre-18 prior should subsequently be treated by federal courts as a juvenile adjudication or adult conviction. In practice, however, the Guidelines have been interpreted by federal courts to permit most youthful offender adjudications to count as adult priors, regardless of the intention of the prosecuting jurisdiction. This dynamic raises a host of policy concerns over notice and fairness, which we discuss in Part III. In this section, we describe the relevant precedent.[96]

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[92] *Id.* § 4B1.2(e)(4) (emphasis added). Sections 2K1.3 and 2K2.1, which contain instructions for calculating the base offense levels for crimes involving explosive materials and firearms, respectively, use the same language to define a prior "felony conviction." *Id.* §§ 2K1.3 cmt. n.2, 2K2.1 cmt. n.1. Section 2L1.2, regarding the crime of unlawful entry, refers to a broader category of "felony offenses" than do Sections 2K1.3 and 2K2.1 but nonetheless defines such offenses to include those committed prior to age 18 using the same operative language. *Id.* § 2L1.2 cmt. n.1(B) ("Subsections (b)(1), (b)(2), and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.").

[93] *Jurisdictional Boundaries*, Juv. Just. Geography, Pol'y, Prac. & Stat., http://www.jjgps.org/jurisdictional-boundaries [https://perma.cc/EA9C-LG3M] (last visited Jan. 5, 2024).

[94] *See id.*; Ioana Tchoukleva, Note, *Children Are Different: Bridging the Gap Between Rhetoric and Reality Post* Miller v. Alabama, 4 Cal. L. Rev. Cir. 92, 94 (2013).

[95] *See* Miller v. Alabama, 567 U.S. 460, 486 (2012) ("[I]ndeed, some of those States set no minimum age for who may be transferred to adult court in the first instance, thus applying life-without-parole mandates to children of any age—be it 17 or 14 or 10 or 6.").

[96] We start with the Second Circuit's interpretation of New York state law as a primary case study and then briefly mention similar circuit court holdings regarding the laws of other states, including South Carolina, Florida, Alabama, Michigan, and Massachusetts. This is not intended to be an exhaustive list of all affected jurisdictions.

1. Second Circuit Treats New York Youthful Offender Adjudications as Adult Convictions

Under New York law, "[a] youthful offender adjudication is not a judgment of conviction for a crime or any other offense."[97] Despite the unambiguous statute, the Second Circuit disagrees and classifies such adjudications as adult convictions. This metamorphosis is the product of the specific design of New York's youthful offender procedure.

Until recently, New York prosecuted any individual over age 15 as an adult.[98] To avoid the full consequences of an adult conviction, 16-, 17-, and 18-year-olds were potentially eligible for relief under New York's youthful offender statute.[99] Under that statute, an eligible individual's case proceeds in adult court, but when the individual pleads or is found guilty at trial, his conviction is immediately vacated and replaced with a youthful offender adjudication.[100] All records of youthful offender adjudications are then sealed.[101] Youthful offender adjudications do not disqualify individuals from public employment, voting, and other civic privileges, and individuals need not disclose such judgments if, say, future job or housing applications ask about past convictions.[102] New York courts cannot use the adjudications to enhance sentences in subsequent cases.[103]

Under a "Raise the Age" law that took full effect on Oct. 1, 2019, New York raised the age of criminal responsibility to 18.[104] This reform makes most offenders below age 18 eligible to have their cases adjudicated in juvenile court—rather than in adult court, as required under the youthful offender statute—but youthful offender adjudications are still possible.[105] Since the law has been in effect, hundreds of cases involving individuals under 18 have remained in adult court.[106] In addition, the new law does nothing to transform youthful offender adjudications imposed on 16- and 17-year-olds before the Raise the Age legislation was enacted into juvenile adjudications. Therefore,

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[97] N.Y. Crim. Proc. Law § 720.35(1) (McKinney 2023).

[98] *Raise the Age*, N.Y. Courts (Dec. 23, 2019), https://www.nycourts.gov/courthelp/criminal/RTA.shtml [https://perma.cc/NB5N-FVA3].

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

[100] *See* United States v. Driskell, 277 F.3d 150, 155 (2d Cir. 2002). In some situations, courts "must" grant a youthful offender finding. N.Y. Crim. Proc. Law § 720.20(1). In others, judges have discretion to do so if it finds that "the interest of justice would be served by relieving the eligible youth from the onus of a criminal record." *Id.*

[101] N.Y. Crim. Proc. Law § 720.35(2).

[102] *Id.* § 720.35(1); Video interview with Donna Henken, Adolescent Intervention and Diversion Project Att'y, The Legal Aid Soc'y (Mar. 6, 2023).

[103] United States v. Matthews, 205 F.3d 544, 548 (2d Cir. 2000).

[104] N.Y. Crim. Proc. Law § 722 (McKinney 2023) (as added by L.2017, ch. 59, pt. WWW); *see also Raise the Age*, *supra* note 98.

[105] *Raise the Age Flowchart*, N.Y. Courts, https://nycourts.gov/courthelp/pdfs/RTA_flowchart.pdf [https://perma.cc/CER4-6WS9] (last visited Jan. 6, 2024).

[106] *Juvenile Offender (JO) and Adolescent Offender (AO) Arrests, Court Case Outcomes and Youth Part Activity*, N.Y. State Div. of Crim. Just. Serv., https://www.criminaljustice.ny.gov/crimnet/ojsa/juv_off/index.htm [https://perma.cc/288H-UC78] (last visited Jan. 6, 2024). In 2022, 508 out of 3,427 cases involving 16- and 17-year-olds who committed a felony offense remained in adult court; in 2021, 449 out of 2,700 did so; in 2020, 243 out of 2,846; and in 2019, 157 out of 2,062. *Id.*

these youthful offender adjudications remain a live issue for many people later accused of federal crimes.

Nearly two decades before New York's Raise the Age law—and before the Supreme Court recognized that juveniles are entitled to more leniency at sentencing, as discussed in Part II—the Second Circuit held that New York youthful offender adjudications should count as prior adult convictions for federal sentencing purposes. In *United States v. Driskell*, the Second Circuit reasoned that because youthful offenders in New York are tried and convicted in adult court before their convictions are vacated, the "substance" of their adjudications are more in line with an adult conviction "than the statutory term affixed to it by a state court."[107] The *Driskell* court dismissed the argument that assigning criminal history points for youthful offender adjudications contravened the intent of the New York legislature. The youthful offender statute, the *Driskell* court wrote, "emanate[s] from a legislative desire not to stigmatize youths between the ages of 16 and 19 with criminal records triggered by hasty or thoughtless acts."[108] But the statute is not meant, in the Second Circuit's view, to eliminate the offender's "culpability" or shield the offender from consequences if he recidivates.[109]

The Second Circuit built on its reasoning in *Driskell* to hold, in *United States v. Reinoso*, that youthful offender adjudications also count as prior adult convictions when calculating a federal defendant's base offense level[110] and, in *United States v. Jones*, when designating that person as a career offender.[111] In *United States v. Sellers*, however, the Second Circuit rejected the argument that youthful offender adjudications could qualify as predicate convictions under the Armed Career Criminal Act (ACCA), which contains language that differs in a key respect from that in the Guidelines.[112] The Second Circuit has not published a decision on this topic since *Sellers* in 2015.

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[107] 277 F.3d 150, 153–54 (2d Cir. 2002) (relying on *Matthews*, 205 F.3d at 548–49, which held that a youthful offender adjudication does not operate as an expungement of a conviction).

[108] *Id.* at 156 (quoting People v. Drayton, 350 N.E.2d 377, 379 (N.Y. 1976)).

[109] *Id.* at 155–56 ("Setting aside a conviction may allow a youth who has slipped to regain his footing by relieving him of the social and economic disabilities associated with a criminal record. But if a juvenile offender turns into a recidivist, the case for conferring the benefit dissipates. Society's stronger interest is in punishing appropriately an unrepentant criminal.") (quoting United States v. McDonald, 991 F.2d 866, 872 (D.C. Cir. 1993)).

[110] 350 F.3d 51, 55 (2d Cir. 2003) ("There is no principled reason to distinguish between convictions that are considered for the purpose of calculating a defendant's criminal history category, and those used to calculate the base offense level.").

[111] 415 F.3d 256, 258 (2d Cir. 2005) ("While it is true that Jones may only have pleaded guilty because the judge had indicated that he would adjudicate him a youthful offender, this does not change the fact that Jones was convicted before receiving youthful offender status."); *see also* United States v. Parnell, 524 F.3d 166, 171 (2d Cir. 2008).

[112] United States v. Sellers, 784 F.3d 876, 879 (2d Cir. 2015) ("We hold that a drug conviction under New York law that was replaced by a YO adjudication is not a qualifying predicate conviction under the ACCA because it has been 'set aside' within the meaning of 18 U.S.C. § 921(a)(20) and New York law.").

2. Eleventh Circuit Rejects Language in South Carolina, Florida, and Alabama Laws to Hold that Youthful Offender Adjudications are Adult Convictions

The Eleventh Circuit likewise considers youthful offender adjudications under the laws of South Carolina, Florida, and Alabama to be adult convictions for federal sentencing purposes, despite those states' contrary classifications. The first case in the Circuit to address this issue was *United States v. Pinion*.[113] In *Pinion*, the defendant challenged the use of a South Carolina youthful offender adjudication to designate him as a career offender under the Guidelines.[114] Inclusion of a youthful offense from when he was 17 years old resulted in a then-mandatory Guidelines range of 360 months to life in prison.[115] Even though South Carolina had not prosecuted him as an adult, the Eleventh Circuit stressed the need "to take the inquiry to a level above that of mere semantics" and "focus on the nature of the proceedings, the sentences received, and the actual time served."[116] The Eleventh Circuit affirmed the use of his youthful offender adjudication to sentence him as a career offender.[117]

In *United States v. Wilks*, the Eleventh Circuit relied on its reasoning in *Pinion* to hold that the defendant's prior youthful offender adjudications in Florida counted as predicates toward not only the career offender enhancement, but also the Armed Career Criminal Act's mandatory 15-year minimum sentence.[118] Because *Wilks* was decided after the Supreme Court banned the use of the death penalty for juveniles in *Roper v. Simmons*,[119] the court addressed the argument we make in Part II:

> It is one thing to prohibit capital punishment for those under the age of eighteen, but an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood. *Roper* does not mandate that we wipe clean the records of every criminal on his or her eighteenth birthday.[120]

Finally, in *United States v. Elliot*, the Eleventh Circuit held that youthful offender adjudications under Alabama law could count as career offender predicates even though, under state law, such adjudications "shall not be

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[113] 4 F.3d 941 (11th Cir. 1993).

[114] *Id.* at 943. The Court read South Carolina law to define "youthful offender" as a criminal defendant between the ages of 17 and 25. *Id.* at 944 n.5 (citing S.C. Code Ann. § 24-19-10(d)). The defendant asked the court "to recognize a quasi-juvenile status for a South Carolina youthful offender who is seventeen years old." *Id.*

[115] *Id.* at 942–43.

[116] *Id.* at 944.

[117] *Id.* at 944–45.

[118] 464 F.3d 1240, 1243 (11th Cir. 2006) (interpreting ACCA, 18 U.S.C. § 924(e)). This result is at odds with the holding in *United States v. Sellers*, which, as discussed, rejected the argument that youthful offenses under New York law could qualify as ACCA predicates. 784 F.3d 876, 887 (2d Cir. 2015).

[119] 543 U.S. 551 (2005).

[120] *Wilks*, 464 F.3d at 1243.

deemed a conviction."[121] This case differed slightly from those discussed above in that Alabama's youthful offender statute applies to anyone who is under 21, and the defendant was 20 when he committed the state offense at issue.[122] Nonetheless, the court was faced with the question of whether the defendant's youthful offender adjudication counted as a conviction at all.[123] The court concluded that it did, reasoning that federal law trumps state law in determining the meaning of "conviction" for purposes of federal sentencing.[124]

3. Sixth Circuit Counts Dismissals under Michigan's Holmes Youthful Trainee Act Toward a Defendant's Criminal History Score

Using logic similar to that of the Second and Eleventh Circuits, the Sixth Circuit has held that even when young people have charges dismissed pursuant to Michigan's Holmes Youthful Trainee Act ("HYTA"), the underlying offenses can still be used to enhance their advisory Guidelines range if they are subsequently convicted of a federal crime.[125] The HYTA addresses a slightly older cohort of offenders than many other youthful offender statutes: defendants between ages 18 and 25 are eligible to be assigned the status of a youthful trainee.[126] Nonetheless, the program has the same purpose as the New York statute described above, which is to shield defendants from the lifelong collateral consequences for crimes they committed at a young age. Michigan law states that:

> [A]ssignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime and . . . the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee.[127]

To be assigned a youthful trainee, a young person must first plead guilty to a criminal offense.[128] The judge, however, does not enter a judgment of conviction.[129] If the individual successfully completes the trainee program, the original charges are dismissed.[130]

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[121] 732 F.3d 1307, 1311–13 (11th Cir. 2013) (quoting Ala. Code § 15-19-7(a) (2023)).
[122] *Id.* at 1311, 1311 n.2 (citing Burke v. State, 991 So. 2d 308, 310–311 (Ala. Crim. App. 2007)).
[123] *Id.* at 1311.
[124] *Id.* at 1312.
[125] United States v. Shor, 549 F.3d 1075 (6th Cir. 2008) (interpreting Mich. Comp. Laws § 762.11–.15 (2023)).
[126] Mich. Comp. Laws § 762.11(2) (2023).
[127] *Id.* § 762.14(2).
[128] *Id.* § 762.11(2).
[129] *Id.*
[130] *Id.* § 762.14(1); *see also* United States v. Hill, 769 F. App'x 352, 354 (6th Cir. 2019) ("Under HYTA, certain defendants in Michigan are eligible to plead guilty and have their convictions dismissed if they complete the youthful trainee program.").

The Sixth Circuit held in *United States v. Shor* that because a guilty plea is a precondition for eligibility in the youthful training program, the underlying offense can be assigned criminal history points under the Guidelines.[131] In doing so, the panel referred to Section 4A1.2(f) of the Guidelines:

> Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. *A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.*[132]

The Sixth Circuit has reaffirmed the *Shor* holding in more recent cases, solidifying that a guilty plea under the HYTA constitutes a "prior sentence" despite the contrary language and apparent intent of Michigan law.[133]

4. First Circuit Charts a Different Path, Upholding Massachusetts' Distinction Between Youthful Offender Adjudications and Adult Convictions

The First Circuit has ruled differently, reading the Guidelines' career offender provisions to require greater deference to how states classify judgments.[134] In *United States v. McGhee*, the defendant challenged the use of a youthful offender adjudication from when he was 15 to designate him as a career offender.[135] Under Massachusetts law, youthful offenders are treated like adults in some ways and juveniles in others. Youthful offenders can be indicted, they can be incarcerated, and their records are open to the public.[136] However, jurisdiction over such cases remains in juvenile court and the proceedings "shall not be deemed criminal proceedings."[137]

Faced with this inconclusive evidence, the First Circuit returned to the language in the Guidelines: for career offender purposes, a judgment for an offense committed before age 18 counts as a predicate only if "it is classified as an adult conviction under the laws of" that jurisdiction.[138] That language, the court reasoned, "undermin[es] any presumption in favor of a federal standard that disregards state labels,"[139] such as those articulated by the Second Circuit in *Jones*[140] and the Eleventh Circuit in *Pinion*.[141] The court instead held that youthful offender adjudications may not be used as a career offender

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[131] 549 F.3d 1075, 1078 (6th Cir. 2008).
[132] *Id.* at 1077–78 (quoting U.S.S.G. § 4A1.2(f) (U.S. Sent'g Comm'n 2006) (emphasis added) (language still in effect as of 2023 Guidelines Manual)).
[133] *See, e.g.*, *Hill*, 769 F. App'x at 354.
[134] United States v. McGhee, 651 F.3d 153, 158 (1st Cir. 2011).
[135] *Id.* at 156.
[136] *Id.* at 157.
[137] *Id.* at 157–58.
[138] *Id.* at 155 (quoting U.S.S.G. § 4B1.2 cmt. n.1 (U.S. Sent'g Comm'n 2006)).
[139] *Id.* at 157.
[140] United States v. Jones, 415 F.3d 256, 260–64 (2d Cir. 2005).
[141] United States v. Pinion, 4 F.3d 941, 944–45 (11th Cir. 1993).

predicate.[142] "This is a judgment call," the court wrote, "but Massachusetts' nomenclature clearly distinguishes between youthful offenders and adults, and to the extent that objective criteria apply, the treatment accorded under state law is significantly different than that given adult offenders."[143]

These case studies demonstrate how many states' youthful offender adjudications count as adult convictions for Guidelines purposes in subsequent federal cases. However, they also show that the circuits have not acted uniformly. Given this split, it is all the more important that the Commission address the issue by amending the Guidelines.

II. The Supreme Court's "Juveniles Are Different" Jurisprudence and the Underlying Science Support Amending the Guidelines

The Guidelines' use of pre-18 priors to enhance the sentences of federal defendants stands in tension with the U.S. Supreme Court's "juveniles are different" jurisprudence. The Court has held "that children are constitutionally different from adults for purposes of sentencing" in a way that makes them "less deserving of the most severe punishments."[144] Put another way, the Court recognizes that juveniles categorically are less culpable than adults.

In reaching this conclusion, the Court has relied on behavioral and neuroscientific research that, over the past twenty-five years, has provided a nuanced understanding of why and when the behavior of adolescents differs from that of adults. This research has revealed that while humans' capacity to reason and deliberate systematically matures by around age 16, our ability to exercise self-regulation, especially in socially and emotionally arousing contexts, does not mature for roughly another five years.[145] Adolescents, therefore, are at a developmental disadvantage compared to adults in resisting impulses and urges to engage in criminal behavior.[146]

The literature on adolescent development can be divided into three broad categories—cognitive, psychosocial, and neurobiological—each of which describes systematic patterns of maturation through the teenage years and, in some cases, beyond.[147] Cognitive research focuses on the basic faculties that support logical reasoning and thoughtful, informed decision making. Along these measures of intellectual abilities, adolescents do not differ meaningfully from adults.[148] Scholars have found that the cognitive capacities that facilitate logical reasoning, planning, and analytical thought plateau in early- to mid-adolescence.[149] Thus, by the time they are 15 to 17 years old, adoles-

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[142] *McGhee*, 651 F.3d at 158.
[143] *Id.*
[144] Miller v. Alabama, 567 U.S. 460, 471 (2012) (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)).
[145] Laurence Steinberg & Grace Icenogle, *Using Developmental Science to Distinguish Adolescents and Adults Under the Law*, 1 Ann. Rev. of Dev. Psych. 21, 34 (2019).
[146] *Id.*
[147] *Id.* at 27.
[148] *Id.* at 28.
[149] *Id.*

cents perform at adult levels on various tasks that test their ability to plan ahead or weigh the costs and benefits of risky behavior, such as riding with a drunk driver.[150] Likewise, that age cohort exhibits adult-like ability to make informed decisions in legal, medical, and research contexts.[151]

Psychosocial research, however, shows that despite their intellectual abilities, adolescents in emotionally arousing situations tend not to evince adult levels of self-control until well beyond their eighteenth birthday.[152] Whereas mental processes employed in emotionally neutral contexts are often called "cold" cognition, this area of research focuses on "hot" cognition—how adolescents in situations that hinder deliberate decision making are able to control their impulses, assess risks, resist coercive influences, and consider the future consequences of their decisions.[153] Compared to adults, adolescents into their twenties have lower impulse control, a greater tendency toward sensation seeking, a greater sensitivity to rewards, and a weaker ability to delay gratification.[154] Furthermore, "[t]here is extensive empirical support for the observation that youth act differently when they are among peers and friends than they do when they are alone,"[155] an important observation given that, unlike adults, most criminal offenses among teenagers occur in groups.[156]

Finally, neurobiological research approaches, which utilize functional magnetic resonance imaging to measure brain activity, reach results consistent with the findings from behavioral studies and provide a biological explanation for the developmental differences between adolescents and adults. Scientists attribute the psychological immaturity observed during adolescence to the differing timetables along which two important brain systems change—a model referred to as "maturational imbalance."[157] The brain system responsible for risk-taking and reward-seeking undergoes dramatic changes in early adolescence, but the system responsible for regulating impulses and thinking ahead is still undergoing maturation into the mid-twenties.[158] Faced with peer pressure, potential rewards, or other stressors, the emotional centers of the

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[150] *Id.*

[151] *Id.*

[152] *Id.* at 29; *see also* 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 Law & Hum. Behav. 69, 69–70 (2019) (documenting a "maturity gap" between the timetables of intellectual and emotional development in both American and international samples).

[153] Icenogle et al., *supra* note 152, at 71.

[154] Steinberg & Icenogle, *supra* note 145, at 29; *see also* Elizabeth Scott & Laurence Steinberg, *In Defense of Developmental Science in Juvenile Sentencing: A Response to Christopher Berk*, 44 Law & Soc. Inquiry 780, 782 (2019).

[155] Steinberg & Icenogle, *supra* note 145, at 29.

[156] Alexandra O. Cohen & B.J. Casey, *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 18 Trends in Cognitive Sci. 63, 64–65 (2014).

[157] *Id.* at 30.

[158] *Id.* at 30–31; *see also* Brief for Am. Psych. Ass'n et al. as Amici Curiae Supporting Petitioners at *25–31, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174239; Brief for Am. Med. Ass'n et al. as Amici Curiae Supporting Neither Party at *35, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 121237 ("[T]he adolescent brain is biologically biased to engage in exploring new environments and experiences which can involve taking risks.").

brain can "hijack" the less mature self-control system.[159] As one research team summarized, "in many respects and under certain circumstances, individuals between ages 18 and 21 are more neurobiologically similar to younger teenagers than had previously been thought."[160]

In light of these findings, psychologists have urged policymakers to set different age boundaries for different legal purposes: a lower age for matters in which cognitive capacities predominate (such as voting) and a higher age for matters in which psychosocial maturity plays a substantial role (like gambling).[161] The decision to commit crime falls into the latter category, as adolescents who engage in criminal behavior often do so surrounded by peers and under considerable stress and time pressure.[162]

Armed with researchers' early findings about adolescent development, the Supreme Court set off a "juvenile sentencing revolution"[163] in 2005 with its landmark decision in *Roper v. Simmons*, banning as "cruel and unusual" the death penalty for pre-18 offenders.[164] *Roper* was significant as much for its holding as for its reasoning, which concluded that juveniles have "diminished culpability" compared to adults based on three broad observations about the nature of youth.[165] First, juveniles exhibit "a lack of maturity and an underdeveloped sense of responsibility."[166] Second, juveniles are more susceptible to negative influences and peer pressure, in part because they often "have less control, or less experience with control, over their own environment."[167] Third, "the character of a juvenile is not as well formed as that of an adult."[168] The Court supported its findings by citing an influential 2003 article by Professors Laurence Steinberg and Elizabeth Scott, who used emerging evidence from behavioral studies and neuroscience to argue that youth should not be held to the adult standard of criminal liability.[169]

The Court subsequently extended the reach of *Roper* to other areas of juvenile sentencing. In *Graham v. Florida*, the Court forbid the imposition of a life-in-prison-without-parole (LWOP) sentence on juvenile offenders who did not commit homicide.[170] In *Miller v. Alabama*, the Court outlawed mandatory LWOP for juveniles who *did* commit homicide.[171] And in *Montgomery v. Louisiana*, the Court held that *Miller* announced a new substantive rule

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[159] Cohen & Casey, *supra* note 156, at 65.
[160] Steinberg & Icenogle, *supra* note 145, at 32.
[161] *See*, *e.g.*, *id*. at 34; Icenogle et al., *supra* note 152, at 82–83.
[162] Steinberg & Icenogle, *supra* note 145, at 34; Icenogle et al., *supra* note 152, at 71.
[163] Note, *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, 130 Harv. L. Rev. 994, 1004 (2017) [hereinafter *Mending the Federal Sentencing Guidelines*].
[164] 543 U.S. 551, 576–78 (2005).
[165] *Id*. at 571.
[166] *Id*. at 569.
[167] *Id*.
[168] *Id*. at 570.
[169] *Id.* at 569 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1009 (2003)).
[170] Graham v. Florida, 560 U.S. 48, 82 (2010).
[171] Miller v. Alabama, 567 U.S. 460, 489 (2012) ("[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles").

of constitutional law that applies retroactively to cases on state collateral review.[172] In both *Graham* and *Miller*, the Court emphasized that the behavioral and neuroscience research underpinning its reasoning in *Roper* had grown only more extensive in the intervening years.[173]

Although the Court's juveniles-are-different quartet addresses only death penalty and LWOP cases, numerous commentators have argued that there is no principled way to wall off the Court's key insight—that "children are constitutionally different from adults in their level of culpability"—from other areas of sentencing.[174] Indeed, this principle underpins our recommendation that the Commission stop counting pre-18 priors when calculating a federal defendant's Guidelines range. The Court's reasoning, bolstered by developmental science, demands that the offense of an adolescent never be equated to that of an adult—as happens frequently under the current Guidelines.[175] What an adult did when they were 17 or younger is too attenuated—from a developmental perspective—to factor into the punishment they deserve for a later federal offense.[176] In other words, an adult should be punished for what they did with a fully developed brain, not for what they did when developmental realities made them less able to resist impulses and think ahead.

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[172] Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).

[173] *Graham*, 560 U.S. at 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."); *Miller*, 567 U.S. at 472 n.5 ("The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").

[174] *Montgomery*, 577 U.S. at 213; Brief for Am. Psych. Ass'n et al. as Amici Curiae Supporting Petitioners at *33, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174239 ("[T]here is no reason why the reduction in culpability associated with adolescence should vary according to the severity of the offense."); *Mending the Federal Sentencing Guidelines*, *supra* note 163, at 1006 ("[T]here may be reason to believe that the Court's observations about the nature of adolescence apply just as vigorously to at least some noncapital and non-LWOP crimes.").

[175] *See supra* Part I.B–C.

[176] Even with age 18 as the generally accepted line of demarcation between childhood and adulthood (as established in *Roper* and subsequent cases), a person's brain is still developing well past age 18. Accordingly, some commentators have urged policymakers to adopt sentencing procedures that provide more leniency to individuals past their eighteenth birthday. Prominent juvenile justice scholar Barry C. Feld, for example, has long advocated that jurisdictions adopt a "youth discount" at sentencing to account for young people's diminished culpability. *See* Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper, Graham, Miller/Jackson*, and the Youth Discount*, 31 Law & Ineq. 263, 322–25 (2013). Another commentator, Kelsey Shust, favors a scheme that would extend to defendants up to age 25 a rebuttable presumption that they should be excused from society's harshest punishments—the death penalty, life imprisonment for nonhomicide offenses, and mandatory life without parole—on account of their youthfulness. Kelsey B. Shust, Comment, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. Crim. L. & Criminology 667, 698–99 (2014). In January 2024, the Massachusetts Supreme Judicial Court took a step in this direction, becoming the first state supreme court to forbid imposing a sentence of life in prison without the possibility of parole on offenders under 21. Commonwealth v. Mattis, 224 N.E.3d 410, 428 (Mass. 2024). The opinion describes other states that have made similar changes, albeit with more limitations. *Id.* at 425–28. Should the Commission adopt this Article's recommendation to stop counting pre-18 priors under the Guidelines, the authors urge the Commission to study further changes that would reduce the criminal history points assigned for crimes committed before age 21 or even 25.

III. The Use of Pre-18 Priors to Enhance Federal Sentences Undermines the Legitimacy of the Guidelines and Is Constitutionally Suspect Due to a Lack of Notice

The use of pre-18 priors to enhance federal sentences has pernicious consequences that undermine the legitimacy of the Guidelines. First, poor people of color are disproportionally punished by the current regime. This is reason alone to abandon it. Second, counting pre-18 priors is directly at odds with the goal of "sentencing uniformity" at the heart of the Guidelines. Third, the current regime raises constitutional problems related to notice. In countless cases where a federal defendant receives a harsher penalty due to a prior youthful offender adjudication, he was told as a teenager by his attorney and the presiding judge that his adjudication was not a conviction and would be sealed.

A. Counting Pre-18 Priors Disproportionately Harms People of Color

Poor people of color, especially Black people, are overly policed, more strictly prosecuted, and fare worse with judges than any other definable group in the United States.[177] This is true even in today's federal system.[178] This systemic bias starts before age 18, meaning that poor people of color are more likely to have juvenile or youthful offender adjudications than their white peers.[179]

The national data documenting this dynamic is robust and damning. In 2019, Black youth were nearly three times as likely as white youth to be referred to juvenile court for common age-appropriate infractions, such as getting in a fight at school.[180] As a result, Black youth comprised 15% of America's youth population that year, but they accounted for 35% of all delinquency cases handled by juvenile courts.[181] Among youth already in the juvenile system, youth of color—and Black youth in particular—are treated more harshly than their

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[177] The Sentencing Project, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System (2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/ [https://perma.cc/862Y-LDFT] ("African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences.").

[178] Chad M. Topaz et al., *Federal Criminal Sentencing: Race-Based Disparate Impact and Differential Treatment in Judicial Districts*, Humans. and Soc. Sciences Commc'ns (June 29, 2023), https://www.nature.com/articles/s41599-023-01879-5 [https://perma.cc/574H-X2Z7] ("At the system-wide level, Black and Hispanic defendants receive average sentences that are approximately 19 months longer and 5 months longer, respectively.").

[179] *Racial and Ethnic Disparity in Juvenile Justice Processing*, Office of Juv. Just. and Delinq. Prevention (Mar. 2022), https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity [https://perma.cc/A33U-3GLS] ("National data show that Black youths and other youths of color are more likely than white youths to be arrested, referred to court, petitioned after referral (*i.e.*, handled formally), and placed in an out-of-home facility after being adjudicated.").

[180] Charles Puzzanchera et al., *Youth and the Juvenile Justice System: 2022 National Report*, Nat'l Ctr. For Juv. Just. 163–64 (Dec. 2022), https://ojjdp.ojp.gov/publications/2022-national-report.pdf [https://perma.cc/UBK4-MAGK] ("Compared with their proportion in the population, Black youth are overrepresented at various juvenile justice decision points.").

[181] *Id.* at 145.

white peers.[182] For example, in 2019, cases involving youth of color were more likely to result in incarceration or a group home placement than were those cases involving white youth.[183] These figures are in line with the results of studies from earlier years.[184]

The same racial disparities persist in the process by which local authorities select certain youth to prosecute as adults. In 2013, "[B]lack and American-Indian youth were . . . more likely to be waived to criminal [adult] court for trial than white youth."[185] Consistent with that finding, a 2014 study in Florida found that Black adolescents comprised only about 27% of arrested youth but accounted for 51% of all transfers to the adult system.[186] Similarly, in California, Black youth in 2014 comprised only 5% of the state's population of 14- to 17-year-olds but were the subject of 27% of the cases that prosecutors filed directly in adult court.[187] White youth in California, meanwhile, accounted for 30% of the population but only 10% of the transfers.[188] Similar trends have been observed in Michigan and Arizona.[189]

The racial disparities described above are devastating for people of color with pre-18 priors who are later charged in federal court. As discussed, juvenile adjudications can lead to a higher criminal history score under the Guidelines and the denial of safety valve relief, while pre-18 youthful offenses or "adult" convictions can additionally increase the base offense level and contribute to career offender status. Because young people of color are being more aggressively policed and prosecuted, it follows that they start from a worse position in the federal criminal justice system.

Federal sentencing data illustrates the effects of this phenomenon. In 2021, Black individuals comprised 12% of the country's population[190] but 23% of all federal defendants,[191] 37% of those in the top three criminal history categories,[192] and 58% of those designated career offenders.[193] Black defendants also qualify for safety valve relief less often than do members of any other

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[182] *Id.* at 163.

[183] *Id.*

[184] *See, e.g.*, Katherine Hunt Federle, *The Right to Redemption: Juvenile Dispositions and Sentences*, 77 La. L. Rev. 47, 51–52 (2016).

[185] *Id.* at 52–53.

[186] Alba Morales, *Branded for Life: Florida's Prosecution of Children as Adults Under its "Direct File" Statute*, Hum. Rts. Watch 29–32 (April 2014), https://www.hrw.org/sites/default/files/reports/us0414_ForUpload%202.pdf [https://perma.cc/MF6S-K3H4].

[187] Federle, *supra* note 184, at 59.

[188] *Id.*

[189] *Id.* at 58–59.

[190] *Black/African American Health*, U.S. Dep't of Health & Hum. Serv., Off. of Minority Health, https://minorityhealth.hhs.gov/blackafrican-american-health [https://perma.cc/8PEB-EMU6] (last visited Jan. 5, 2024).

[191] U.S. Sent'g Comm'n, 2021 Annual Report and Sourcebook of Federal Sentencing Statistics 48 tbl. 5 (2022).

[192] U.S. Sent'g Comm'n, Interactive Data Analyzer, https://www.ussc.gov/research/interactive-data-analyzer [https://perma.cc/GR5Y-2CBZ] (last visited Jan. 5, 2024).

[193] U.S. Sent'g Comm'n, Quick Facts: Career Offenders 1 (June 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY21.pdf [https://perma.cc/8K6T-E9RF].

group because "Black offenders who commit drug offenses often do not qualify for the safety valve because of their criminal history."[194]

No longer counting pre-18 priors will not cure embedded racism and racial disparities in the juvenile and criminal justice systems. It is likely people of color will continue to be overrepresented in juvenile, state, and federal courts. That said, ending the use of pre-18 priors would be a critical and important step toward leveling the playing field for people of color charged with federal crimes.

B. Counting Pre-18 Priors Undermines the Guidelines' Goal of Uniformity in Sentencing

Reduction of "unwarranted sentencing disparities" was a primary goal—perhaps *the* primary goal—of the SRA.[195] The Guidelines, therefore, attempted to achieve uniformity: people with similar records found guilty of similar conduct should receive similar sentences.[196] However, in relying on state practices to classify prosecutions of adolescents as either juvenile or adult, the Guidelines as currently interpreted by several circuit courts expose federal defendants to arbitrarily harsh or lenient treatment depending upon geography alone.

The absurdity of the Guidelines' current approach to pre-18 priors is encapsulated in an anecdote related by a group of federal public defenders to the Commission in 2017:

> [I]n one Defender case, a defendant who committed a note job bank robbery [passing a note to a bank employee demanding money] at the age of 19 was sentenced as a career offender based on two prior convictions for struggles with police that occurred when he was 17. The priors counted as career offender predicates because at that time, all 17-year-olds were treated as adults in Massachusetts. If the offenses had occurred in neighboring Rhode Island, where the juvenile court has original jurisdiction over all young people under the age of 18, the defendant likely would not have qualified as a career offender. Indeed, if it simply had happened a few years later, after Massachusetts increased the jurisdiction of its juvenile courts

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[194] U.S. Sent'g Comm'n, An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System 40 (2017).

[195] Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 104 (1998) (describing legislative history of the SRA). An official at the Department of Justice explained in 1987 that "unwarranted sentencing disparity caused by broad judicial discretion is the ill that the Sentencing Reform Act seeks to cure." Letter from Stephen S. Trott, Associate Attorney General, on behalf of the U.S. Dep't of Just., to Hon. William W. Wilkins, Jr., Chairman, U.S. Sen'g Comm'n (Apr. 7, 1987). Coincidentally, as a judge on the Ninth Circuit Court of Appeals seven years later, Trott called for undoing the Guidelines, observing that "[i]n the pursuit of treating people equally, we have overdone it to the point where the cure is worse then [sic] the disease." Letter from Hon. Stephen S. Trott to Hon. Richard Conaboy, Chairman, U.S. Sen'g Comm'n (Nov. 9, 1994). The letters are reprinted in 8 Fed. Sent'g Rep. 196–99 (1995).

[196] *See* 18 U.S.C. § 3553(a)(6); 28 U.S.C. §§ 991(b)(1)(B), 994(f).

> to all young people under the age of 18, it is likely he would not have been deemed a career offender.[197]

Each state takes its own approach to how it classifies young offenders as juveniles or adults, thereby rendering impossible the Guidelines' goal of crafting a nationally uniform sentencing regime. To begin, four states differ on the age at which they set the upper boundary of juvenile court. The vast majority—46 states—set the maximum age of juvenile court jurisdiction at 17.[198] However, Georgia, Texas, and Wisconsin draw the juvenile/adult line at 16.[199] And in 2020, Vermont became the first state in the nation to expand juvenile court jurisdiction to 18-year-olds.[200]

The upper age-boundary for juvenile court tells only part of the story because "[a]ll states have statutes that make exceptions . . . by specifying when the offense of a juvenile may or must be considered the crime of an adult."[201] Which young people are excepted from juvenile jurisdiction and how that decision is made varies dramatically state to state.[202] Many states give juvenile court judges the authority to transfer a young person to adult court.[203] Other states have "statutory exclusion" laws that require transfer to adult court based on the nature of the offense or if the young person had ever been in adult court previously (known as "once an adult, always an adult" provisions).[204] Still other states allow prosecutors to decide.[205] Each jurisdiction implements one or more of these common practices with its own idiosyncratic variations. For example, some states allow "reverse waiver," in which young people start in adult court but can argue for transfer to juvenile court.[206] Others provide for "criminal blended sentences" in which adult courts retain jurisdiction over young people while imposing a juvenile-only disposition or a combination of juvenile and adult sanctions.[207] This is the category to which many "youthful offender" statutes belong.

Even if a young person is tried as a juvenile and not as an adult, most states' juvenile courts provide fewer constitutional protections—most notably

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[197] Fed. Def. Sent'g Guidelines Comm., Comment Letter on Proposed Amendments for 2017 29–30 (Feb. 20, 2017), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170220/FPD.pdf [https://perma.cc/BFW5-FS3G].

[198] Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, Nat'l Conf. of State Legislatures (Apr. 8, 2021), https://www.ncsl.org/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws [https://perma.cc/T9CQ-E6GP].

[199] *Id.*

[200] Calvin Cutler, *Vermont's 'Raise the Age' Juvenile Offender Law to Remain on Pause*, WCAX (Dec. 6, 2023), https://www.wcax.com/2023/12/06/vermonts-raise-age-juvenile-offender-law-remain-pause/ [https://perma.cc/UQ4H-ULEY]. Vermont policymakers have since delayed plans to raise the age of juvenile court jurisdiction even higher, to 20. *Id.*

[201] *Jurisdictional Boundaries*, *supra* note 93.

[202] *See generally id.* (in subsections "transfer provisions" and "compare transfer provisions"); *see also Transfer Provision Detail*, Juv. Just. Geography, Pol'y, Prac. & Stat., http://www.jjgps.org/about/jurisdictional-boundaries [https://perma.cc/XT92-SNVP] (last visited Jan. 5, 2024).

[203] *Jurisdictional Boundaries*, *supra* note 93; *Transfer Provision Detail*, *supra* note 202.

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

the lack of trial by jury—than adult courts.[208] Such informal proceedings, which vary state to state as to the procedural protections they provide juveniles, should not be relied on to enhance a future federal sentence.[209]

The wide variation among state practices illustrates why the Guidelines' current treatment of pre-18 priors must end. Two people charged with identical federal crimes who committed identical prior offenses as adolescents can have radically different Guidelines ranges based on the quirks of geography, timing, and luck. A 17-year-old treated as a juvenile in one state could be excluded from juvenile court jurisdiction in a neighboring state. Alternatively, a 17-year-old facing adult charges one year could be treated as a juvenile the next were his state to pass Raise the Age legislation, like New York.[210] Finally, a 17-year-old with a favorable judge, a lenient prosecutor, or a good attorney could avoid transfer to adult court, while another 17-year-old lacking those in the courtroom next door could be prosecuted as an adult. These examples do not even account for the racial disparities discussed above.

Randomness is at odds with the Guidelines' goal of uniformity in sentencing. The Commission should not allow a subset of federal defendants to be punished more severely based on the idiosyncratic laws of their home states and their federal circuit's interpretation of those statutes. Instead, the Commission should amend the Guidelines with a clear and uniform rule: pre-18 priors do not count.

C. Counting Pre-18 Priors Is Constitutionally Suspect Due to the Lack of Notice

The authors are deeply concerned that young people in plea negotiations do not receive adequate notice that any charges they agree to can be used against them in a future federal case to enhance their federal sentence. The lack of notice is most disturbing in the context of youthful offender adjudications, but it affects juvenile adjudications as well. When one of the authors worked as a state-level public defender at the Legal Aid Society in New York City, for example, he was trained that youthful offender adjudications were not

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[208] McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) ("[W]e conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."). In reaching its decision in *McKeiver*, the Court conceded that "the fond and idealistic hopes of the juvenile court proponents . . . have not been realized," citing a scarcity of professional help, an inadequacy of dispositional alternatives, and a general lack of concern for young people as contributing to the system's failures. *Id.* at 543–44. In the ensuing decades, states have moved to much more punitive models of juvenile justice, further weakening *McKeiver*'s already-shaky foundation. *See* Robin Walker Sterling, *Fundamental Unfairness: In Re Gault and the Road Not Taken*, 72 Md. L. Rev. 607, 613, 613 n.26, 675 (2013) (discussing the move by several states to amend the purpose clause of their juvenile codes to incorporate the goal of punishment and to expand the consequences of a juvenile adjudication to include new "procrustean punishments" such as lifetime sex offender registration, potential enhancement of future criminal sentences, ineligibility for student loans, disqualification from public benefits, and ineligibility to enlist in the military).

[209] Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in A Post-*McKeiver *World*, 91 Neb. L. Rev. 1, 4 (2012) ("[D]espite widespread criticism from commentators, the overwhelming majority of courts continue to rely on *McKeiver* as the basis for unjustifiably denying jury trials to delinquents facing punitive sanctions, which would trigger jury trial rights in adult criminal court." (footnote omitted)).

[210] *See supra* Part I.C.i.

convictions, would not show up on rap sheets, and would not saddle young clients later in life with burdensome collateral consequences. Not once did he consider the severe ramifications for his clients who accepted youthful offender adjudications should they later be found guilty of a federal offense. Now in federal practice, the disbelief expressed by dozens of clients impacted by their past youthful offender adjudications confirms that he was not alone.

Compounding the notice problem is that federal defendants may not learn of the effect of their pre-18 priors until *after* they have pleaded guilty in federal court. Prosecutors often become aware of sealed adjudications—which can include both juvenile and youthful offender adjudications—only after plea negotiations have concluded and the U.S. Probation Office files its PSR shortly before sentencing.[211] Factoring in the sealed adjudications can drastically change a defendant's advisory Guidelines range.[212] Beyond providing inadequate notice to defendants, a change in the Guidelines so late in a federal case creates challenges for the Government, as the legitimacy of the plea agreement and agreed-upon Guidelines range may be called into question by the sentencing court. The lack of notice—both at the time a young person agrees to a juvenile or youthful offender adjudication and during a subsequent federal case's plea negotiation—is fundamentally unfair, constitutionally suspect, and bad public policy. The practice should end.

The authors set out to discuss this notice problem as it relates specifically to youthful offender adjudications with state public defenders at three different New York City offices. Attorneys at the Legal Aid Society,[213] the Neighborhood Defender Service of Harlem,[214] and the Bronx Defenders[215] reported that they generally did not advise their young clients about the potential federal ramifications of New York youthful offender adjudications. The attorneys provided multiple reasons for this. Some attorneys were not aware of this aspect of the federal Guidelines, given that New York law specifies that youthful offenses are sealed non-convictions. More significantly,

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[211] In New York, for example, an individual's youthful offender adjudications usually do not appear on his rap sheet because they are sealed. Similarly, prosecutors in the U.S. Attorney's Office for the Southern District of New York do not have access to a federal defendant's sealed youthful offense history. Because federal defendants typically believe those cases are not convictions and are sealed, they rarely reveal the prior offenses unless asked directly by their counsel. Thus, defense counsel and the Government frequently sign plea agreements, including an agreed-upon advisory Guidelines range, that do not account for these offenses. The defendant is then shocked when the court, after receiving the PSR, calculates a much higher Guidelines range than what he agreed to. At that point, the defendant cannot go back on his plea: The agreement stipulates that the U.S. Probation Office may find a different Guidelines range and the sentence will be determined solely by the court. However, had the defendant known his Guidelines range would be so much higher, he might not have pleaded guilty or might have sought a different offer than the one to which he ultimately agreed.

[212] *See, e.g.*, *supra* Part I.A for the description of a Federal Defenders client who was classified as a career offender—more than doubling his Guidelines range—due to a prior youthful offense uncovered by the Probation Office shortly before sentencing.

[213] Video interview with Donna Henken, Adolescent Intervention and Diversion Project Att'y, The Legal Aid Soc'y (Mar. 6, 2023).

[214] Video interview with Elizabeth Fischer et al., Managing Att'y, Crim. Def. Prac., Neighborhood Def. Serv. of Harlem (Mar. 15, 2023).

[215] Video interview with Ann Matthews et al., Managing Dir., Crim. Def. Prac., The Bronx Defs. (Mar. 14, 2023).

several attorneys expressed that, especially before New York's Raise the Age legislation, negotiating a plea to a youthful offense was a significant victory when faced with the alternative of an adult conviction. During plea negotiations, therefore, attorneys prioritized what was in the client's immediate best interest—agreeing to a youthful offense and thus avoiding a criminal record—over the possibility of harm should the client later pick up a federal case. Moreover, these attorneys said that state prosecutors would not be swayed during plea negotiations by concerns about a future case in a different jurisdiction. Compared to the federal consequences of youthful offenses, these attorneys said they more routinely advised their young clients about the immigration, housing, and employment consequences of their pleas. As a separate matter, the attorneys also reported that they had never heard a New York State judge advise those they sentenced to youthful offenses about the potential federal repercussions of their pleas.

One attorney who works predominantly on immigration matters pointed out the anomaly of the Guidelines' treatment of New York youthful offender adjudications compared to a federal Board of Immigration Appeals precedent holding that such adjudications do not count as criminal convictions for immigration purposes.[216]

Immigration consequences are an interesting parallel, as the Supreme Court requires notice in that context. In *Padilla v. Kentucky*, the Supreme Court held that "counsel must inform [a] client whether his plea carries a risk of deportation."[217] Concurring in the judgement, Justice Alito wrote, "By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise."[218] Here, the consequences are similarly severe. As discussed, a single unknown youthful offender adjudication can increase a defendant's Guidelines significantly, especially if the adjudication makes him a career offender.[219]

The Court in *Padilla* based its holding on the test for constitutionally ineffective of assistance of counsel that it previously developed in *Strickland v. Washington*.[220] In determining whether counsel is constitutionally ineffective under the Sixth Amendment, *Strickland* requires courts to determine whether counsel's representation "fell below an objective standard of reasonableness."[221] If so, the reviewing could should then determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[222] In holding that defense counsel is constitutionally ineffective when she does not inform a client of the risk of deportation, the *Padilla* Court explained that it has "never

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[216] *In re* Devison-Charles, 22 I&N Dec. 1362, 1373–74 (BIA 2000) ("There is simply no evidence that when Congress enacted a statutory definition of the term 'conviction,' it intended to thwart the federal and state governments from acting as *parens patriae* in providing a separate system of treatment for juveniles.").

[217] 559 U.S. 356, 374 (2010).

[218] *Id.* at 387.

[219] *See supra* note 212.

[220] 466 U.S. 668 (1984).

[221] *Id.* at 688.

[222] *Id.* at 694.

applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."[223] Despite this language, the Court recognized in a subsequent case that *Padilla* "breach[ed] the previously chink-free wall between direct and collateral consequences."[224] Indeed, *Padilla* announced a "new rule of constitutional law" that requires courts to advise defendants "concerning the collateral consequences arising from a guilty plea."[225]

The *Padilla* decision, described as "seismic" by one commentator, begs the question as to which collateral consequences are sufficiently like deportation such that notice is constitutionally required.[226] McGregor Smyth, a former public defender and now long-time Executive Director of New York Lawyers for the Public Interest, proposed a standard to evaluate these questions: "Under *Padilla* and prevailing professional standards, a defense counsel has a specific duty to advise and advocate when a penalty is severe, enmeshed with the criminal charges, and likely to occur."[227]

Applying this standard, we believe notice should be required of the potential consequences of pre-18 priors on a future federal sentence. Pre-18 juvenile and youthful offender adjudications can greatly enhance a federal defendant's sentence, resulting in exceedingly severe penalties. Further, most pre-18 priors *must* be counted by a federal sentencing court as part of its Guidelines calculations. Therefore, if an individual with pre-18 priors picks up a federal case, the penalty for the pre-18 priors (a higher federal sentence) is both "enmeshed" in the prior adjudications and highly likely to occur.[228]

Moreover, were young people informed of the potential consequence of their pre-18 priors, there is a reasonable probability that the outcome of their juvenile or youthful offender cases would differ.[229] During training at the Legal Aid Society, for example, one of the authors was instructed that it was better to advise clients to accept a youthful adjudication, which would

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[223] *Padilla*, 559 U.S. at 365.

[224] Chaidez v. United States, 568 U.S. 342, 352–53. However, courts have often been reluctant to expand *Padilla* to other contexts. *See, e.g.*, United States v. Youngs, 687 F.3d 56, 63 (2d Cir. 2012) (courts need not advise defendants of the possibility of civil commitment prior to accepting a guilty plea); Chavarria v. United States, 739 F.3d 360, 362–63 (7th Cir. 2014) (holding in a case involving a pre-*Padilla* guilty plea with immigration consequences that "[a] lawyer's advice about matters not involving the 'direct' consequences of a criminal conviction—collateral matters—is, in fact, irrelevant under the Sixth Amendment; such advice is categorically excluded from analysis as professionally incompetent, as measured by *Strickland*. *Padilla* departed from this direct-collateral distinction [only] because of the 'unique' nature of deportation.").

[225] *Chaidez*, 568 U.S. at 359 (Thomas, J., concurring).

[226] McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 How. L. J. 795, 798 (2011); *see also Chaidez*, 568 U.S. at 352 (explaining that Sixth Amendment scrutiny was applied in *Padilla* to advice about a plea's deportation risk because deportation is a "particularly severe" penalty, is "intimately related to the criminal process," and immigration statutes make it "nearly an automatic result" of some convictions).

[227] Smyth, *supra* note 226, at 822.

[228] We do not intend to suggest that individuals who commit crimes before age 18 are therefore highly likely to be arrested for a future federal crime. Our point, rather, is that if they do pick up a federal case, it then becomes highly likely that their pre-18 priors will impact their federal sentence.

[229] *See* Strickland v. Washington, 466 U.S. 668, 694 (1984).

not result in a criminal record, over an "adult" misdemeanor, which would. Following this guidance, he recommended that clients agree to youthful offender adjudications that, it turns out, are considered adult felonies under the Guidelines rather than misdemeanors, which would have a less severe impact on a future federal sentence. That problem persists today, as evidenced by the interviews discussed above.[230]

Turning our attention away from youthful offender adjudications, a survey of existing case law suggests that young people similarly are not given adequate notice that their juvenile adjudications can enhance a future federal sentence. In one First Circuit case, the federal defendant contested the consideration of a prior state juvenile adjudication on the grounds that a Maine law specifically made the adjudication off-limits in subsequent proceedings.[231] In a Third Circuit case, the defendant argued that counting his prior juvenile adjudications under the Guidelines violated due process and was an unconstitutional *ex post facto* law because at the time of those adjudications, the defendant believed they could not be used against him at future proceedings.[232] And in a Fourth Circuit case, the defendant argued that the use of his prior juvenile adjudications violated due process "because he was not aware that confidential juvenile proceedings could be used to enhance future sentences."[233]

The grievances raised in these cases are especially concerning given that so many young offenders lack counsel during their juvenile proceedings, making it highly unlikely that they fully understand the potential federal consequences of their legal decisions. Despite the Supreme Court's landmark 1967 ruling recognizing a right to counsel in juvenile proceedings,[234] "[i]t is an open secret in America's justice system that countless children accused of crimes are prosecuted and convicted every year without ever seeing a lawyer."[235]

Federal courts have not been receptive to challenges on due process grounds to the practice of counting prior juvenile adjudications under the Guidelines, in part because they have failed to engage with the reality that young people are either wrongly advised—or not advised at all—about the potential federal consequences of these adjudications. In each of the three

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[230] *See supra* notes 213–15.

[231] United States v. Gray, 177 F.3d 86, 92 (1st Cir. 1999).

[232] United States v. Bucaro, 898 F.2d 368, 369–72 (3d Cir. 1990).

[233] United States v. Daniels, 929 F.2d 128, 129 (4th Cir. 1991).

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

[235] *Defend Children: A Blueprint for Effective Juvenile Defender Services*, Nat'l Juv. Def. Ctr. 10 (Nov. 2016), https://njdc.info/wp-content/uploads/2016/11/Defend-Children-A-Blueprint-for-Effective-Juvenile-Defender-Services.pdf [https://perma.cc/73S9-7N9L]. This occurs because, in many jurisdictions, children are routinely permitted—even encouraged—to waive their right to counsel without first consulting with an attorney. *Id.*; *see also* Karol Mason & Lisa Foster, *Guest Post: Some Juvenile Defendants Still Denied Justice Through Lack of Counsel*, Wash. Post. (Dec. 20, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/12/20/guest-post-some-juvenile-defendants-still-denied-justice-through-lack-of-counsel/ [https://perma.cc/YTG6-G2G8] ("Many young people in detention facilities never had a lawyer appointed to represent them, and too often children are encouraged to waive their right to counsel even when doing so can hurt their chances of a fair hearing and a fair result."); 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, 1170 ("Studies in many states consistently report that juvenile courts adjudicate youths delinquent without the appointment of counsel.").

appellate cases mentioned above, the court dismissed the defendants' arguments on narrow technical grounds. In the above-mentioned First Circuit decision, the court stated that, even assuming the Maine law at issue prohibited the consideration of a juvenile adjudication in future proceedings, "that reading of the law would fall under the force of the Supremacy Clause."[236] The court wrote:

> Whether a particular offense falls within the federal guidelines' criminal history framework is a question of federal law, not state law. States enjoy a broad range of flexibility in choosing how they will treat those who offend their laws. But they may not dictate how the federal government will vindicate its own interests in punishing those who commit federal crimes.[237]

In the Third Circuit, the court construed language in the Pennsylvania law at issue—that a juvenile adjudication can be used "in dispositional proceedings after conviction of a felony for the purposes of a presentence investigation and report"—to provide constitutionally adequate notice.[238] And in the Fourth Circuit, the court argued in dicta that because the Guidelines were enacted before the defendant's juvenile adjudications, he "was charged with notice that those juvenile adjudications could later be used for sentencing under federal law."[239]

These decisions do not honestly engage with the fact that many—if not most—young people do not receive notice of the potential federal consequences of their juvenile or youthful offender adjudications. For example, when one of the authors asks his clients if they have any such priors, they often respond to the effect, "Why does it matter? Those are sealed and not convictions." His clients are invariably shocked and dismayed to learn that such adjudications may have a profound effect on their Guideline calculations.

These clients are not to blame for their lack of awareness. They are ignorant of how the Guidelines treat pre-18 priors either because their previous counsel did not tell them or because they did not have counsel to begin with. If they were told anything during their juvenile or youthful offender proceedings, at least in New York, it was that the adjudications would not count as convictions and would be sealed. State law advises them of the same. Given that young people routinely do not receive notice of the ways in which their pre-18 priors can enhance a future federal sentence, it is deeply unfair and constitutionally suspect to allow the current Guidelines policy to continue.

IV. Recommendations

We recommend that the Commission amend the Guidelines to stop counting pre-18 priors to enhance a federal defendant's Guidelines range and

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[236] United States v. Gray, 177 F.3d 86, 93 (1st Cir. 1999).
[237] *Id.* (internal quotation marks and citations omitted).
[238] United States v. Bucaro, 898 F.2d 368, 372–73 (3d Cir. 1990).
[239] United States v. Daniels, 929 F.2d 128, 130 (4th Cir. 1991).

to bar safety valve relief. Because developmental realities render adolescents less culpable for their criminal behavior than adults, pre-18 priors should never count under the Guidelines. Pre-18 priors perpetuate racial disparities and inject arbitrariness into the federal criminal justice system. To continue counting them, especially for young people told by their attorneys that juvenile or youthful offender adjudications are not convictions, is bad public policy and constitutionally suspect.

Our proposal brings the Guidelines into harmony with modern constitutional doctrine on adolescent development, addresses equity concerns, promotes uniformity in sentencing, and responds meaningfully to the reality that young people lack notice about the Guidelines' treatment of such offenses. As detailed below, the Commission has the legal authority to amend the Guidelines to implement our proposal. Even if the Commission declines to act, other legal actors can take steps now to mitigate the Guidelines' shortcomings.

A. The U.S. Sentencing Commission Has the Authority to Amend the Guidelines' Treatment of Pre-18 Priors

The Commission is made up of seven voting members appointed by the President and confirmed by the Senate.[240] The commissioners serve staggered six-year terms.[241] No more than four members of the Commission can be members of the same political party, and at least three must be federal judges.[242] The Attorney General, or the Attorney General's designee, and the Chair of the U.S. Parole Commission serve as ex officio, nonvoting members of the Commission.[243]

The Commission has the statutory authority to revise how the Guidelines count offenses committed before age 18 in sentencing. It is empowered by Congress to promulgate sentencing guidelines and policy statements for federal sentencing courts[244]; to periodically "review and revise" those guidelines[245]; and to submit proposed amendments to Congress no later than May 1 each year.[246] At least four members must approve any change to the Guidelines before the edits are submitted to Congress, which has a 180-day review

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[240] *Organization*, U.S. Sent'g Comm'n, https://www.ussc.gov/about/who-we-are/organization [https://perma.cc/B83D-6KQQ] (last visited May 15, 2024). The current commissioners are Judge Carlton W. Reeves (Chair), Judge Luis Felipe Restrepo (Vice Chair), Laura E. Mate (Vice Chair), Claire Murray (Vice Chair), Judge Claria Horn Boom (Commissioner), Judge John Gleeson (Commissioner); and Candice C. Wong (Commissioner). *About the Commissioners*, U.S. Sent'g Comm'n, https://www.ussc.gov/commissioners [https://perma.cc/G5F3-CVQM] (last visited May 15, 2024).

[241] *Organization*, *supra* note 240.

[242] *Id.*

[243] *Id.* Jonathan J. Wroblewski currently represents the Attorney General's Office, and Patricia K. Cushwa represents the Parole Commission. *About the Commissioners*, *supra* note 240. The Commission should consider adding a representative of the federal defender offices as a third *ex officio* member.

[244] 28 U.S.C. § 994(a).

[245] *Id.* § 994(o).

[246] *Id.* § 994(p).

period to modify or disapprove of the proposed amendment.[247] Absent action of Congress to the contrary, the proposed amendments become effective on the date specified by the Commission—typically November 1 of the same year.[248]

The Commission has considered excluding pre-18 priors from Guidelines calculations twice before. The Commission first considered such a proposal in 2016 and took no action.[249] Shortly thereafter, it was hamstrung in its efforts to make any revisions to the Guidelines at all. Between 2019 and July 2022, the Commission lacked the necessary quorum to promulgate amendments to the Guidelines.[250] In August 2022, however, the U.S. Senate confirmed a full slate of seven new commissioners, enabling the Commission to promulgate a slew of amendments—none of which dealt with pre-18 priors—that went into effect November 1, 2023.[251]

Then, in the past amendment cycle that ended May 1, 2024, the Commission revisited the issue of pre-18 priors. In the Proposed Amendments it published in December 2023, the Commission invited public comment on three potential options to change how the Guidelines count pre-18 priors.[252] Option 1 would have limited juvenile adjudications to receiving one criminal history point, whereas now they can receive up to two, but would have made no further changes..[253] Option 2 would have excluded all juvenile adjudications from the calculation of criminal history points, leaving only pre-18 "adult" convictions and youthful offenses in most circuits.[254] Option 3 would have fully adopted this Article's recommendation: No pre-18 prior of any kind would be considered under any Guidelines provision.[255] For example, Section 4A1.2(d), which currently specifies how to assign criminal history points to pre-18 priors, would have read: "Sentences resulting from offenses committed prior to age eighteen are not counted."[256]

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[247] Sidhu, *supra* note 11, at 3.

[248] *Id.*

[249] Sentencing Guidelines for United States Courts, 81 Fed. Reg. 92003, 92010–11 (proposed Dec. 19, 2016). The Commission considered no longer counting juvenile adjudications or, in the alternative, any pre-18 prior. *Id.*

[250] Sidhu, *supra* note 11, at 1.

[251] *Id.*; *Adopted Amendments (Effective November 1, 2023)*, U.S. Sent'g Comm'n (Apr. 27, 2023), https://www.ussc.gov/guidelines/amendments/adopted-amendments-effective-november-1-2023 [https://perma.cc/JST2-A93J]. The Commission adopted meaningful changes, including a two-point offense level reduction for certain offenders with zero criminal history point and limits on the use of "status points" to increase an offender's criminal history score—that is, points for having committed the instant offense while on probation, on supervised release, or in other circumstances.

[252] *Proposed Amendments to the Sentencing Guidelines*, U.S. Sent'g Comm'n 13–38 (Dec. 26, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf [https://perma.cc/QM2L-R7W8] [hereinafter *2023 Proposed Amendments*].

[253] *Id.* at 15, 17–20. Currently, the Guidelines add two criminal history points under §4A1.2(d) for each juvenile sentence—that is, a juvenile adjudication—to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense.

[254] *Id.* at 15–16, 21–25.

[255] *Id.* at 16, 26–37.

[256] *Id.* at 27.

In the end, the Commission adopted none of these options. Instead, it opted to amend Section 5H1.1 of the Guidelines, which is a policy statement that describes when the age of a defendant may be grounds for a downward departure from the advisory Guidelines range. The amendment, which is due to take effect November 1, 2024, states that a downward departure:

> may be warranted due to the defendant's youthfulness at the time of the offense or prior offenses. Certain risk factors may affect a youthful individual's development into the mid-20's and contribute to involvement in criminal justice systems, including environment, adverse childhood experiences, substance use, lack of educational opportunities, and familial relationships. In addition, youthful individuals generally are more impulsive, risk-seeking, and susceptible to outside influence as their brains continue to develop into young adulthood. Youthful individuals also are more amenable to rehabilitation.[257]

The authors endorse this amendment as a positive first step—but we believe it falls woefully short of what is needed to fix the Guidelines' current treatment of pre-18 priors. First, downward departures are exceedingly rare for anything other than assisting the Government or participating in so-called "fast-track" sentencing programs, which are authorized in some judicial districts primarily to help process cases involving immigration offenses.[258] Excluding departures for cooperating with the government or participating in a fast-track program, and absent a Government motion, judges in 2023 granted downward departures in just 1.7% of cases.[259] Second, this amendment does little to address the anchoring effect of initial Guidelines ranges on judges' appraisals of a reasonable sentence.[260] Even if a judge is inclined to grant a downward departure under the new policy statement, the defendant's pre-18 priors will already have unfairly driven up his advisory Guidelines range at the first step of sentencing. Finally, courts' ability to grant a departure based on pre-18 priors is largely redundant of their ability to grant a variance based on a defendant's "history and characteristics" under 18 U.S.C. § 3553(a). While the new language helps draw attention to the behavioral and neuroscientific research discussed in Part II, the amendment will solve very few of the problems described in Part III. Until the Commission amends the Guidelines to categorically end the practice of counting pre-18 priors, countless individuals will continue to receive more prison time than is necessary because of crimes they committed while they were "more impulsive, risk-seeking, and

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[257] *Adopted Amendments (Effective November 1, 2024)*, U.S. Sent'g Comm'n 13–14 (Apr. 30, 2024) (official text), https://www.ussc.gov/guidelines/amendments/adopted-amendments-effective-november-1-2024 [https://perma.cc/G59S-XQRH] [hereinafter *2024 Adopted Amendments*].

[258] *See* Thomas E. Gorman, Comment, *Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split*, 77 U. Chi. L. Rev. 479, 479 (2010).

[259] U.S. Sent'g Comm'n, 2023 Sourcebook, *supra* note 15, tbl 39.

[260] *See supra* Part I.A.

susceptible to outside influence as their brains continue[d] to develop into young adulthood."[261]

B. How the Commission Should Amend the Guidelines

As part of a future amendment cycle, the Commission should adopt its formerly proposed Option 3 regarding pre-18 priors. Options 1 and 2 fail to meaningfully grapple with the myriad problems described in Parts II and III of this Article. Most significantly, those options deal only with juvenile adjudications—which are damaging in that they can add one or two points to a defendant's criminal history score and block safety valve relief—but leave unaddressed the even more severe consequences of counting youthful offender adjudications and pre-18 "adult" convictions. Youthful offender adjudications, for example, can upend plea deals, add up to three points to a defendant's criminal history score, increase a crime's base offense level, bar safety valve relief, and surprise defendants with career offender status—all despite the fact that such adjudications are classified by state law as sealed non-convictions.[262] Such a practice must not be allowed to continue. Only Option 3 addresses the urgent problems in federal sentencing law that we have identified in this Article.

Should the Commission eventually agree with our recommendation that no pre-18 prior be considered under the Guidelines' enhancement provisions, the Guidelines must be amended in several ways. Our proposed amendments largely track the changes suggested by the Commission to implement former Option 3[263] and are appended to this Article.[264] In effect, these amendments allow the Guidelines to be fully consistent with the principle that sentences resulting from offenses committed prior to age eighteen are not counted for any purpose. These changes can be implemented through the Commission's normal amendment cycle, and they would not require action from Congress other than to abstain from affirmatively blocking the amendments.[265]

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[261] *2024 Adopted Amendments*, *supra* note 257, at 13–14.

[262] *See supra* Part I.C.

[263] *2023 Proposed Amendments*, *supra* note 252, at 26–35.

[264] *See* Appendix.

[265] The Commission asked, when proposing Option 3, whether its implementation would exceed the Commission's authority because some of the Guidelines provisions that would have been affected were "promulgated in response to [congressional] directives, such as 28 U.S.C. § 994(h)." *See 2023 Proposed Amendments*, *supra* note 252, at 36. The answer is "no." Section § 994(h) required the Commission to implement a career offender guideline, promulgated in U.S.S.G. § 4B1.1, that result in a prison term "at or near the maximum term" for a federal defendant who commits a crime of violence or controlled substance offense and has "two or more prior felonies, each of which is a . . . crime of violence" or a controlled substance offense. Critically, "prior felony conviction" is defined at U.S.S.G. § 4B1.2(e)(4) to include a pre-18 prior "if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted." Because it is the Guidelines that define the term "prior felony conviction" and not the statute, the Commission is well within its authority to amend the definition such that it encompasses only those offenses committed after age 18.

C. Other Legal Actors Can Take Steps Now to Mitigate the Guidelines' Shortcomings

Until the Commission heeds our call to amend the Guidelines, other legal actors can take immediate steps to address the constitutional and policy-based problems with the Guidelines' treatment of pre-18 priors.

First, we recommend that both criminal defense attorneys and judges implement training on the Guidelines' treatment of pre-18 priors so they can address these issues through their advocacy and sentencing decisions. Defense attorneys at both the state and federal levels would benefit from such training. Attorneys representing individuals under 18 at the state level, for example, should be aware of dispositions that will be particularly harmful should their clients one day pick up a federal charge, and they should advocate for an alternate disposition if possible. Federal defense attorneys, meanwhile, can use the arguments presented in this Article to educate judges as to why the Guidelines may overstate the severity of their clients' criminal history. They can also ensure they know their client's juvenile and youthful offender history before agreeing to any plea deal with the Government.

Likewise, judges at both the state and federal levels should understand how pre-18 priors are counted against defendants under the Guidelines. This knowledge could encourage state juvenile judges, for example, to limit dispositions of confinement so as not to burden young people with a prior that would earn them two criminal history points in a subsequent federal case.[266] It may also prompt some state judges, whether juvenile or adult, to advise young defendants that while certain adjudications cannot later be used against them under state law, federal law is likely less forgiving. Trainings for federal judges, meanwhile, would encourage them to examine critically the Guidelines' current treatment of pre-18 priors.

Second, we encourage federal judges to grant both departures and variances to give proper weight to pre-18 priors. Section 4A1.3(b) allows judges to depart downward from the Guidelines range "[i]f reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."[267] As discussed, the newly amended Section 5H1.1 also provides a basis for a downward departure based on a defendant's youthfulness at the time of the offense or prior offenses. Judges may use these provisions to discount pre-18 conduct if they agree with the arguments laid out in this Article. Additionally, judges may, pursuant to 18 U.S.C. § 3553(a), grant variances to a lower sentence if the judge agrees, as a matter of policy, that pre-18 priors should not be used to enhance a later federal sentence.[268] Judges need not—and should not—adhere to the Guidelines

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[266] U.S.S.G. § 4A1.2(d) (assigning two criminal history points for each juvenile sentence of at least 60 days' confinement but one point if the sentence carries a shorter period of confinement or no confinement).

[267] U.S.S.G. § 4A1.3(b)(1).

[268] *See* Kimbrough v. United States, 552 U.S. 85, 91, 101 (2007) ("The Government acknowledges that the Guidelines are now advisory and that, as a general matter, courts may vary

if doing so perpetuates constitutionally suspect and racially disparate outcomes that defy the Guidelines' own stated policy objectives. Regardless of action by the Commission, federal judges should make it a practice to sentence individuals without considering offenses they committed as an adolescent.

D. Amending the Guidelines Will Not Foreclose Federal Judges from Considering Pre-18 Priors in Sentencing

Should the Commission eventually amend the Guidelines as outlined above, judges may still consider pre-18 priors in crafting a federal sentence. Just as they can depart downward if a defendant's criminal history category overstates the seriousness of his record, judges can depart upward if a "defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."[269] More significantly, Section § 3553(a)(1) requires the Court to consider "the history and characteristics of the defendant" in every single case.[270] Assuming the U.S. Probation Office continues to include a defendant's pre-18 priors in its PSRs, judges will be able to weigh those offenses in the context of the defendant's life and consider whether they merit additional punishment. As long as the court justifies its sentence by reference to Section 3553(a)'s sentencing factors, that sentence will be entitled to deference by a reviewing court.[271]

Therefore, our recommendation will not prevent judges from considering pre-18 priors in making their sentencing decisions. Our recommendations will instead create a starting point under the Guidelines that is more equitable and uniform across the country.

Conclusion

Thousands of federal defendants each year face enhancements to their advisory Guidelines ranges or are denied relief from draconian mandatory minimums because of the Guidelines' recidivism provisions, which penalize defendants for pre-18 priors. Given that the Guidelines continue to hold considerable sway over the decisions of sentencing judges, this approach adds years in prison because of prior offenses that individuals committed when they were children under the law. It is past time for this injustice to end.

First, the use pre-18 priors to enhance subsequent federal sentences flies in the face of the Supreme Court's juveniles-are-different jurisprudence, which is animated by the insight that adolescents are less culpable for their

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[from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.") (internal quotation marks omitted); *cf.* Spears v. United States, 555 U.S. 261, 265–66 (2009) ("[D]istrict courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines.").

[269] U.S.S.G. § 4A1.3(a)(1).

[270] 18 U.S.C. § 3553(a)(1).

[271] Gall v. United States, 552 U.S. 38, 49–53 (2007).

crimes on account of their immaturity. Second, counting pre-18 priors is not equitable given that young people of color are far more likely than white youth to be involved in the justice system before their eighteenth birthday. Third, the Guidelines' reliance on highly variable state practices to distinguish between juvenile and adult priors injects arbitrariness into the sentencing process. Fourth, adolescent offenders are not on notice that their juvenile or youthful offender adjudications may later be used against them. In fact, they are told the opposite—that these adjudications are sealed non-convictions.

While defenders and judges can take steps to mitigate these failures, it is ultimately the Commission that can make the most meaningful change. We recommend that the Commission adopt what it formerly identified as Option 3 and categorically end the practice of counting pre-18 priors. The Guidelines are the authoritative statement of federal sentencing policy. Modern science, fairness in sentencing, and public policy all demand our proposed amendments.

There may be some judges, prosecutors, and commentators who disagree with this proposal and think that because of recidivism, deterrence, or any number of other factors, pre-18 priors should still be considered. To that, we say: they can be. Even if the Commission implements our recommendation, the Guidelines remain advisory, and judges will retain broad discretion to impose a sentence they believe appropriate in light of the defendant's history, background, and the other sentencing factors listed in 18 U.S.C. § 3553(a). If a judge thinks a longer sentence is warranted because of past misconduct, even if not counted by the Guidelines, she may depart or vary upward.

In the end, Congress assigned to the Commission the duty to establish federal sentencing policies that "provide certainty and fairness," "avoid[] unwarranted sentencing disparities," and "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[272] Our proposal meets each of these aims. Now that the Commission is back in action following a three-and-a-half-year hiatus, it should update the Guidelines to end the policy of counting prior offenses committed before a person turned 18.

[272] 28 U.S.C. § 991(b).

UNITED STATES SENTENCING COMMISSION

GUIDELINES MANUAL

2023

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This document contains the text of the *Guidelines Manual* incorporating amendments effective November 1, 2023, and earlier.

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a)–(e), (h), (i), (l)–(o), (p)(2), 844(d), (g), 1716, 2283; 26 U.S.C. § 5685.

Application Notes:

1. "***Explosive material(s)***" include explosives, blasting agents, and detonators. *See* 18 U.S.C. § 841(c). "Explosives" is defined at 18 U.S.C. § 844(j). A destructive device, defined in the Commentary to §1B1.1 (Application Instructions), may contain explosive materials. Where the conduct charged in the count of which the defendant was convicted establishes that the offense involved a destructive device, apply §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) if the resulting offense level is greater.

2. For purposes of this guideline:

   "***Controlled substance offense***" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

   "***Crime of violence***" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

   "***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. ~~A conviction for an offense committed prior to age eighteen years 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).~~

3. For purposes of subsection (a)(4), "***prohibited person***" means any person described in 18 U.S.C. § 842(i).

4. "***Felony offense***," as used in subsection (b)(3), means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.

5. For purposes of calculating the weight of explosive materials under subsection (b)(1), include only the weight of the actual explosive material and the weight of packaging material that is necessary for the use or detonation of the explosives. Exclude the weight of any other shipping or packaging materials. For example, the paper and fuse on a stick of dynamite would be included; the box that the dynamite was shipped in would not be included.

6. For purposes of calculating the weight of explosive materials under subsection (b)(1), count only those explosive materials that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any explosive material that a defendant attempted to obtain by making a false statement.

"***Destructive device***" has the meaning given that term in 26 U.S.C. § 5845(f).

"***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. ~~A conviction for an offense committed prior to age eighteen years 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).~~

"***Firearm***" has the meaning given that term in 18 U.S.C. § 921(a)(3).

2. **Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.**—For purposes of subsections (a)(1), (a)(3), and (a)(4), a "***semiautomatic firearm that is capable of accepting a large capacity magazine***" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

3. **Definition of "Prohibited Person".**—For purposes of subsections (a)(4)(B), (a)(6), and (b)(5), "***prohibited person***" means any person described in 18 U.S.C. § 922(g) or § 922(n).

4. **Application of Subsection (a)(7).**—Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.

5. **Application of Subsection (b)(1).**—For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.

6. **Application of Subsection (b)(2).**—Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (*e.g.*, prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1)–(a)(5), subsection (b)(2) is not applicable.

7. **Destructive Devices.**—A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (*e.g.*, subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by **6** levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **2** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1253, § 1325(a) (second or subsequent offense only), § 1326. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **In General.—**

(A) **"Ordered Deported or Ordered Removed from the United States for the First Time".—**For purposes of this guideline, a defendant shall be considered "ordered deported or ordered removed from the United States" if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction. "For the first time" refers to the first time the defendant was ever the subject of such an order.

(B) **Offenses Committed Prior to Age Eighteen.—**Subsections (b)(1), (b)(2), and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age. ~~unless such conviction is classified as an adult conviction under the laws of the juris-diction in which the defendant was convicted~~.

2. **Definitions.—**For purposes of this guideline:
"***Crime of violence***" means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance. "Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

(d) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.

(e) Add **1** point if the defendant (1) receives 7 or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

Commentary

The total criminal history points from §4A1.1 determine the criminal history category (I–VI) in the Sentencing Table in Chapter Five, Part A. The definitions and instructions in §4A1.2 govern the computation of the criminal history points. Therefore, §§4A1.1 and 4A1.2 must be read together. The following notes highlight the interaction of §§4A1.1 and 4A1.2.

Application Notes:

1. **§4A1.1(a).** Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this subsection. The term "***prior sentence***" is defined at §4A1.2(a). The term "***sentence of imprisonment***" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

   Certain prior sentences are not counted or are counted only under certain conditions:

   A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted unless the defendant's incarceration extended into this fifteen-year period. *See* §4A1.2(e).

   A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is not counted ~~under this subsection only if it resulted from an adult conviction~~. *See* §4A1.2(d).

   A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. *See* §4A1.2(h) and (j) and the Commentary to §4A1.2.

2. **§4A1.1(b).** Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this subsection. The term "***prior sentence***" is defined at §4A1.2(a). The term "***sentence of imprisonment***" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

   Certain prior sentences are not counted or are counted only under certain conditions:

   A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. *See* §4A1.2(e).

   A~~n adult or juvenile~~ sentence imposed for an offense committed prior to the defendant's eighteenth birthday is not counted ~~only if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense~~. *See* §4A1.2(d).

Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. *See* §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* §4A1.2(g).

3. **§4A1.1(c).** One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this subsection. The term "***prior sentence***" is defined at §4A1.2(a).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. *See* §4A1.2(e).

~~An adult or juvenile~~ sentence imposed for an offense committed prior to the defendant's eighteenth birthday is not counted ~~only if imposed within five years of the defendant's com-mencement of the current offense~~. *See* §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. *See* §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. *See* §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. *See* §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* §4A1.2(g).

4. **§4A1.1(d).** In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (*see* §4A1.2(a)(2)), one point is added under §4A1.1(d) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(d). For purposes of this guideline, "***crime of violence***" has the meaning given that term in §4B1.2(a). *See* §4A1.2(p).

For example, a defendant's criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are treated as a single prior sentence. *See* §4A1.2(a)(2). If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(d) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(d) because the sentence for the second robbery already resulted in an additional point under

Careless or reckless driving
Contempt of court
Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
False information to a police officer
Gambling
Hindering or failure to obey a police officer
Insufficient funds check
Leaving the scene of an accident
Non-support
Prostitution
Resisting arrest
Trespassing.

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Fish and game violations
Hitchhiking
~~Juvenile status offenses and truancy~~
Local ordinance violations (except those violations that are also violations under state criminal law)
Loitering
Minor traffic infractions (*e.g.*, speeding)
Public intoxication
Vagrancy.

(d) OFFENSES COMMITTED PRIOR TO AGE EIGHTEEN

Sentences resulting from offenses committed prior to age eighteen are not counted.

(1) ~~If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add **3** points under §4A1.1(a) for each such sentence.~~

(2) ~~In any other case,~~

(A) ~~add **2** points under §4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;~~

(B) ~~add **1** point under §4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).~~

(e) APPLICABLE TIME PERIOD

(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.

(2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.

(3) Any prior sentence not within the time periods specified above is not counted.

~~(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by §4A1.2(d)(2).~~

(f) DIVERSIONARY DISPOSITIONS

Diversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered~~, except that diversion from juvenile court is not counted~~.

(g) MILITARY SENTENCES

Sentences resulting from military offenses are counted if imposed by a general or special court-martial. Sentences imposed by a summary court-martial or Article 15 proceeding are not counted.

(h) FOREIGN SENTENCES

Sentences resulting from foreign convictions are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(i) TRIBAL COURT SENTENCES

Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(j) EXPUNGED CONVICTIONS

Sentences for expunged convictions are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(k) REVOCATIONS OF PROBATION, PAROLE, MANDATORY RELEASE, OR SUPERVISED RELEASE

(1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable.

(2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2~~(d)(2) and~~ (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (*see* §4A1.2(e)(1)); and (B) ~~in the case of any other confine-ment sentence for an offense committed prior to the defendant's eight-eenth birthday, the date of the defendant's last release from confine-ment on such sentence (*see* §4A1.2(d)(2)(A)); and (C)~~ in any other case, the date of the original sentence (*see* §4A1.2~~(d)(2)(B) and~~ (e)(2)).

(l) SENTENCES ON APPEAL

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), (d), and (e) shall apply as if the execution of such sentence had not been stayed.

(m) EFFECT OF A VIOLATION WARRANT

For the purposes of §4A1.1(e), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) FAILURE TO REPORT FOR SERVICE OF SENTENCE OF IMPRISONMENT

For the purposes of §4A1.1(e), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

However, because predicate offenses may be used only if they are counted "separately" from each other (*see* §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the defendant's commencement of the instant offense. *See* §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.

(B) **Upward Departure Provision.**—Treating multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which the defendant has committed crimes.

4. **Sentences Imposed in the Alternative.**—A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (*e.g.*, $1,000 fine or ninety days' imprisonment) is treated as a non-imprisonment sentence.

5. **Sentences for Driving While Intoxicated or Under the Influence.**—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of §4A1.2(c) do not apply.

6. **Reversed, Vacated, or Invalidated Convictions.**—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (*e.g.*, 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

7. **Offenses Committed Prior to Age Eighteen (Full text replaced for formatting purposes).**—Offenses committed prior to age 18 do not count pursuant to §4A1.2(d). Nonetheless, the criminal conduct underlying any conviction resulting from offenses committed prior to age eighteen may be considered pursuant to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

8. **Applicable Time Period.**—Section 4A1.2~~(d)(2) and~~ (e) establishes the time period within which prior sentences are counted. As used in §4A1.2~~(d)(2) and~~ (e), the term "***commencement of the instant offense***" includes any relevant conduct. *See* §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

9. **Diversionary Dispositions.**—Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.

10. **Convictions Set Aside or Defendant Pardoned.**—A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j).

11. **Revocations to be Considered.**—Section 4A1.2(k) covers revocations of probation and other conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

    Where a revocation applies to multiple sentences, and such sentences are counted separately under §4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points. **Example:** A defendant was serving two probationary sentences, each counted separately under §4A1.2(a)(2); probation was revoked on both sentences as a result of the same violation conduct; and the defendant was sentenced to a total of 45 days of imprisonment. If one sentence had been a "straight" probationary sentence and the other had been a probationary sentence that had required service of 15 days of imprisonment, the revocation term of imprisonment (45 days) would be added to the probationary sentence that had the 15-day term of imprisonment. This would result in a total of 2 criminal history points under §4A1.1(b) (for the combined 60-day term of imprisonment) and 1 criminal history point under §4A1.1(c) (for the other probationary sentence).

12. **Application of Subsection (c).—**

(A) **In General.**—In determining whether an unlisted offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

(B) **Local Ordinance Violations.**—A number of local jurisdictions have enacted ordinances covering certain offenses (*e.g.*, larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (*e.g.*, a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(2) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.

(C) **Insufficient Funds Check.**—"***Insufficient funds check***," as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account.

Background: Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 262–265); November 1, 1990 (amendments 352 and 353); November 1, 1991 (amendments 381 and 382); November 1, 1992 (amendment 472); November 1, 1993 (amendment 493); November 1, 2007 (amendment 709); November 1, 2010 (amendment 742); November 1, 2011 (amendment 758); November 1, 2012 (amendment 766); November 1, 2013 (amendment 777); November 1, 2015 (amendment 795); November 1, 2018 (amendment 813); November 1, 2023 (amendment 821).

§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

(a) UPWARD DEPARTURES.—

(1) STANDARD FOR UPWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.—The information described in subsection (a)(1) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for juvenile, foreign, and tribal convictions).

(ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.

(iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.

(iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

(v) A previous sentence for a serious offense committed before age eighteen.

(B) **Upward Departures from Criminal History Category VI.**—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

(C) **Upward Departures Based on Tribal Court Convictions.**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

(v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this chapter.

(vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

3. **Downward Departures.—**

(A) **Examples.**—A downward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

(d) INCHOATE OFFENSES INCLUDED.—The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(e) ADDITIONAL DEFINITIONS.—

(1) FORCIBLE SEX OFFENSE.—"***Forcible sex offense***" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(2) EXTORTION.—"***Extortion***" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

(3) ROBBERY.—"***Robbery***" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(4) PRIOR FELONY CONVICTION.—"***Prior felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. ~~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).~~

Commentary

Application Notes:

1. **Further Considerations Regarding "Crime of Violence" and "Controlled Substance Offense".**—For purposes of this guideline—

   Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

   Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

   Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

   Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

   A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

2. **Offense of Conviction as Focus of Inquiry.**—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

3. **Applicability of §4A1.2.**—The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.

4. **Upward Departure for Burglary Involving Violence.**—There may be cases in which a burglary involves violence, but does not qualify as a "crime of violence" as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a "crime of violence." In such a case, an upward departure may be appropriate.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 49); November 1, 1989 (amendment 268); November 1, 1991 (amendment 433); November 1, 1992 (amendment 461); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 568); November 1, 2000 (amendment 600); November 1, 2002 (amendments 642 and 646); November 1, 2004 (amendment 674); November 1, 2007 (amendment 709); November 1, 2009 (amendment 736); November 1, 2015 (amendment 795); August 1, 2016 (amendment 798); November 1, 2023 (amendment 822).