UNITED STATES SENTENCING COMMISSION

Proposed Priorities for Amendment Cycle

AGENCY: United States Sentencing Commission.

ACTION: Notice; Request for public comment.

SUMMARY: As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, and in accordance with Rule 5.2 of its Rules of Practice and Procedure, the United States Sentencing Commission is seeking comment on possible priority policy issues for the amendment cycle ending May 1, 2017.

DATES: Public comment should be received by the Commission on or before **July 25, 2016**.

ADDRESSES: Comments should be sent to the Commission by electronic mail or regular mail. The email address is pubaffairs@ussc.gov. The regular mail address is United States Sentencing Commission, One Columbus Circle, NE, Suite 2-500, South Lobby, Washington, DC 20002-8002, Attention: Public Affairs – Priorities Comment.

FOR FURTHER INFORMATION CONTACT: Christine Leonard, Director, Office of Legislative and Public Affairs, (202) 502-4500, pubaffairs@ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

Pursuant to 28 U.S.C. § 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.

The Commission provides this notice to identify tentative priorities for the amendment cycle ending May 1, 2017. The Commission recognizes, however, that other factors, such as the enactment of any legislation requiring Commission action, may affect the Commission's ability to complete work on any or all of its identified priorities by the statutory deadline of May 1, 2017. Accordingly, it may be necessary to continue work on any or all of these issues beyond the amendment cycle ending on May 1, 2017.

As so prefaced, the Commission has identified the following tentative priorities:

(1) Continuation of its work with Congress and other interested parties on statutory mandatory minimum penalties to implement the recommendations set forth in the Commission's 2011 report to Congress, titled Mandatory Minimum Penalties in the Federal Criminal Justice System, including its recommendations regarding the severity and scope of mandatory minimum penalties, consideration of expanding the "safety valve" at 18 U.S.C. § 3553(f), and elimination of the mandatory "stacking" of penalties under 18 U.S.C. § 924(c), and to develop appropriate guideline amendments in response to any related legislation.

(2) Continuation of its multi-year examination of the overall structure of the guidelines post-Booker, possibly including recommendations to Congress on any statutory changes and development of any guideline amendments that may be appropriate. As part of this examination, the Commission intends to study possible approaches to (A) simplify the operation of the guidelines, promote proportionality, and reduce sentencing disparities; and (B) appropriately account for the defendant's role, culpability, and relevant conduct.

(3) Continuation of its study of approaches to encourage use of alternatives to incarceration, including possible consideration of amending the Sentencing Table in Chapter 5, Part A to consolidate and/or expand Zones A, B, and C, and any other relevant provisions in the Guidelines Manual.

(4) Continuation of its multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior conviction (e.g., "crime of violence," "aggravated felony," "violent felony," "drug trafficking offense," and "felony drug offense") and the impact of such

definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal), possibly including recommendations to Congress on any statutory changes that may be appropriate and development of guideline amendments that may be appropriate.

(5) Continuation of its comprehensive, multi-year study of recidivism, including (A) examination of circumstances that correlate with increased or reduced recidivism; (B) possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons, and promote effectiveness of reentry programs; and (C) consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.

(6) Study of the findings and recommendations contained in the May 2016 Report issued by the Commission's Tribal Issues Advisory Group, and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.

(7) Study of the treatment of youthful offenders under the Guidelines Manual, including possible amendments to Chapter Five, Part H.

(8) Study of the operation of Chapter Four, Part A of the Guidelines Manual, including (A) the feasibility and appropriateness of using the amount of time served by an offender, as opposed to the sentence imposed, for purposes of calculating criminal history under Chapter Four; and (B) the treatment of revocation sentences under §4A1.2(k).

(9) Study of offenses involving 3,4-Methylenedioxy-N-methylcathinone (Methylone) and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.

(10) Implementation of the Bipartisan Budget Act of 2015, Pub. L. 114–74, and any other crime legislation enacted during the 114th or 115th Congress warranting a Commission response.

(11) Resolution of circuit conflicts, pursuant to the Commission's continuing authority and responsibility, under 28 U.S.C. § 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991), to resolve conflicting interpretations of the guidelines by the federal courts.

(12) Consideration of any miscellaneous guideline application issues coming to the Commission's attention from case law and other sources, including possible consideration of whether a defendant's denial of relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of §3E1.1.

The Commission hereby gives notice that it is seeking comment on these tentative priorities and on any other issues that interested persons believe the Commission should address during the amendment cycle ending May 1, 2017. To the extent practicable, public comment should include the following: (1) a statement of the issue, including, where appropriate, the scope and

manner of study, particular problem areas and possible solutions, and any other matters relevant to a proposed priority; (2) citations to applicable sentencing guidelines, statutes, case law, and constitutional provisions; and (3) a direct and concise statement of why the Commission should make the issue a priority.

AUTHORITY: 28 U.S.C. § 994(a), (o); USSC Rules of Practice and Procedure 5.2.

Patti B. Saris

Chair

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
United States District Court
500 West Pike Street, 2nd Floor
Clarksburg, WV 26301

July 20, 2016

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20008

Dear Judge Saris:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, I appreciate the opportunity to provide comment on possible priorities for the guideline amendment cycle ending May 1, 2017. The Criminal Law Committee's jurisdiction within the Judicial Conference includes overseeing the federal probation and pretrial services system and reviewing issues relating to the administration of the criminal law.[1] Under this broad jurisdictional statement, the Committee: (1) provides oversight of the implementation of sentencing guidelines and makes recommendations to the Judicial Conference with regard to proposed amendments to the guidelines, including proposals that would increase their flexibility; (2) proposes to the Judicial Conference or Director of the Administrative Office of the U.S. Courts, as appropriate, policies and standards on issues affecting presentence investigation

[1] Jurisdiction of Committees of the Judicial Conference of the United States (as approved by the Executive Committee, effective February 7, 2013).

procedures, sentencing, and sentencing guidelines; and (3) monitors the workload and operations of probation offices.

After careful analysis, we have decided to focus on one issue, which we believe merits serious consideration. In particular, the Sentencing Commission has tentatively proposed studying the feasibility and appropriateness of using the amount of time served by an offender (hereafter, "the time served approach"), as opposed to the sentence imposed, for purposes of calculating criminal history under Chapter Four of the *Guidelines Manual*. As discussed below, the Committee has serious concerns about the ability to effectively implement the time served approach.

In a separate letter to the Commission, the Probation and Pretrial Services Chiefs Advisory Group (CAG), expressed concern about using the time served approach on three grounds.[2] First, incarceration records regarding the length of time served by an inmate are difficult to access and often are unreliable. In contrast to records regarding the sentence imposed, which are maintained by the courts, incarceration records are difficult to acquire due to wide variations in the record-keeping practices and resources of state and local correctional institutions.[3] Moreover, these records often contain incomplete or unreliable information.[4]

Second, decisions regarding inmate release generally are made by correctional officials and may be informed factors that are not necessarily relevant when assessing a defendant's prior criminal history. These include an inmate's institutional adjustment, institutional overcrowding, inadequate funding, and lack of programmatic options. Finally, if a time served approach were adopted, it would be unclear how to measure certain types of prior sentences including sentences containing multiple counts of varying terms of incarceration; sentences served concurrently or consecutively; sentences subject to multiple jurisdictions; sentences served in more than one

[2] Letter from Anthony M. San Giacomo, Chair, Chiefs Advisory Group, to Hon. Patti B. Saris, Chair, U.S. Sentencing Commission. The mission statement of the CAG is to provide advice to the Administrative Office of the U.S. Courts on policies, procedures, and programs affecting the probation and pretrial services system and to provide chiefs an opportunity for input into the development of national policies. Membership on the CAG includes six chief probation officers and two chief pretrial services officers.

[3] The Committee was recently briefed by Patrick A. Woods, the 2015-2016 Supreme Court Fellow for the Sentencing Commission, on some the challenges that may arise from moving to the time served approach for measuring prior criminal history. The Committee was also provided a draft of Woods' forthcoming paper on the subject. *See* Patrick A. Woods, Assessing Time Served (July 6, 2016) (unpublished draft Supreme Court Fellows Program research paper). The paper discusses a number of factual and legal complexities to the time served approach including difficulties acquiring reliable prison records from state and local authorities within a reasonable period of time.

[4] *See also* Patrick A. Woods, *supra* note 3, at 22 (describing a survey of public state incarceration databases, which identified a pattern of inconsistency in both the amount and quality of available data related to the amount of time served).

institution due to detainers; sentences served following revocation of terms of community supervision; and sentences that included a lengthy term of pretrial detention.[5]

The Committee shares the concerns discussed by the CAG, and it believes that the confusion and excessive use of resources that would result from the time served approach are not worth the benefits that may occasionally result from its application. We are concerned that the time served approach would be too complicated, esoteric, and time-consuming for probation officers, and would often require courts to rely on unreliable information regarding an offender's criminal history. Indeed, as you know, the Commission itself has considered adopting a time served approach to measure criminal history on several occasions, but it has rejected such the approach based in part on practical concerns raised by law enforcement and probation officers.[6]

In cases where the sentence imposed may not adequately reflect the severity of the offender's criminal history, the sentencing court may of course depart or vary from the criminal history category of the guidelines to account for the circumstances in the individual case. As the Committee has stressed in the past, departures provide the flexibility needed to assure adequate consideration of circumstances that the guidelines cannot adequately capture and provide judges the ability to exercise individualized judgment.[7] Over the years, the Judicial Conference and the Committee have advocated for the use of criminal history departures to account for dangerousness of specific defendants.[8] In testimony before the Commission in November 2015,

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[5] *See also* Woods, *supra* note 3, at 25 ("Significant complexity with the use of the 'time served' measure arises in the process of determining how to calculate the 'time served' amount. This complexity requires a number of definitional decisions, each of which reflect a policy judgement on the part of those either designing or interpreting the system. Questions arise as to exactly what sorts of penal and rehabilitative controls [including halfway house, home confinement, and other non-prison custody] should be included in adding up the time measured, how time spent incarcerated should be attributed when multiple convictions result in one term of incarceration, and whether additional time spent incarcerated as a result of the revocation of a violation of release conditions should be aggregated with the original amount of time the offender served.").

[6] *See* Woods, *supra* note 3, at 17 ("The United State Sentencing Commission considered incorporating 'time served' as a predicate model several times [in 1986, 1991, and 2016], and in each case was advised by law enforcement and probation officers that such a shift would be impractical.").

[7] *See, e.g.*, Public Hearing on Federal Sentencing Options After *Booker* before U.S. Sentencing Commission, February 16, 2012 (statement of Judge Paul J. Barbadoro on behalf of the Committee on Criminal Law of the Judicial Conference of the United States); Public Hearing before U.S. Sentencing Commission, August 19, 2003 (statement of Judge David Hamilton on behalf of the Committee on Criminal Law, Judicial Conference of the United States).

[8] As noted above, the Committee's jurisdictional statement includes making recommendations to the Judicial Conference with regard to proposed amendments to the guidelines, including proposals that would increase their flexibility. In 1990, the Judicial Conference approved submission by the Committee to the Commission of a proposal to promulgate a two-part policy statement in section 4A1.3 to clarify that departures due to the inadequacy of the criminal history score may be based on either degree of risk or type of risk. JCUS-SEP 90, p. 70. The first part of the proposal focused on the degrees of risk (i.e., over - or underrepresentation of the likelihood that the defendant will commit further crimes). The second part focused on the type of risk (i.e., if the defendant does re-offend, what type of crime s/he is likely to commit). The proposal regarding type of risk was that if reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's

I expressed the Committee's opposition to adding an additional complex requirement to the definition of "felony" in section 4B1.2.[9] The Committee supported retaining the current definition of "felony" in part because it was clear and easy to apply. And in cases when the current definition of "felony" does not adequately represent the defendant's criminal history, I reiterated that the court may depart or vary from the criminal history category of the guidelines to account for the circumstances in the individual case.

The Committee on Criminal Law is committed to working collaboratively with the Commission to simplify the guidelines and improve their operation. We are concerned that adopting the time served approach would pose unnecessary practical challenges for probation officers, would result in an unnecessary increase in workload, and would result in inconsistent and unreliable criminal history records. Any concerns about fairness or accuracy when measuring criminal history would be better addressed through departures or variances from the guidelines.

Thank you for the opportunity to provide comment about proposed priorities for this guideline cycle. I and my successor, Chief Judge Ricardo S. Martinez, stand ready to assist with this effort in any way we can. As always, I remain

Sincerely,

Irene M. Keeley

cc: Hon. Ricardo S. Martinez
Matthew G. Rowland
Anthony San Giacomo

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past criminal conduct, the court may consider imposing a sentence departing from the otherwise applicable guideline range. *Id*. at Appendix A. In 1995, the Criminal Law Committee supported the Commission's proposal to add a departure under section 4A1.3 for prior convictions involving death, serious bodily injury (or attempts to inflict either), as well as sexual offenses which are similar to the instant offense, if not otherwise accounted for by the career offender or armed career offender guidelines. Letter from Judge Maryanne Trump Barry, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Richard P. Conaboy, Chair, U.S. Sentencing Commission (Dec. 6, 1995).

[9] Public Hearing on Proposed Changes to Definitions of "Crime of Violence" and Related Issues, November 5, 2015 (statement of Judge Irene M. Keeley on behalf of the Committee on Criminal Law of the Judicial Conference of the United States). To implement the requirement that the offense be a "felony," the current definitions in section 4B1.2 specify that the offense must have been an offense under federal or state law, punishable by imprisonment for a term exceeding one year. The Commission proposed adding an additional requirement that the offense must also have been classified as a felony or comparable classification under the laws of the jurisdiction in which the defendant was convicted.

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

Nancy D. Freudenthal
Chief U.S. District Judge

[redacted]

July 15, 2016

U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: U.S.S.G. § 2D1.1(c) - Methamphetamine (actual)

Dear Commissioners:

The purpose for this letter is to request the U.S. Sentencing Commission reconsider and revise U.S.S.G. § 2D1.1(c) (Drug Quantity Table) as it concerns Methamphetamine (actual). As you know, the Sentencing Guidelines are designed to assure justice is met by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes and to avoid disparity in sentencing. However, this objective is arguably undermined by dated assumptions driving the Drug Quantity Table concerning methamphetamine. Over the past several years the District of Wyoming has seen a significant shift in the purity of methamphetamine being distributed. Many years ago it was common to see purity levels below 50%. Currently, if substances are tested, it is far more common to see the purity levels above 90%, which qualifies the substance as methamphetamine (actual). This is creating a disparity in sentencing somewhat similar to the cocaine –vs- cocaine base disparity that ultimately led to a modification of the guidelines.

Perhaps it is time to consider a modification to the Guidelines in regard to this issue. The arguments in support of this include the following:

- The use of methamphetamine (actual) was originally based on the premise that higher purity methamphetamine recovered was confirmation that it came directly from, or one step below the original source, suggesting a higher level of culpability for that defendant. However, in today's competitive market, it is rare to see purity rates below 90%. This premise seems to be now outdated.
- Only a minority of cases are tested for purity. Testing for purity is expensive and is not used on a regular basis. The use of testing seems inconsistent and somewhat random regarding which cases are tested.
- Given today's market, purity testing offers little value when evaluating culpability, and results in treating similarly situated defendants differently. In fact, many cases where this discrepancy arises involve multi-defendant conspiracies. This ironically then triggers an

issue under 18 U.S.C. § 3553(a)(6), which is the very result the guidelines were intended to avoid.

- This issue is also compounded based upon U.S.S.G. § 2D1.1(c)(n.B) and our Circuit's corresponding requirement that the district court use the quantity of methamphetamine (actual) to find the base offense level because it produces a higher sentence. *See U.S. v. Gigley*, 213 F.3d 509, 519 (2000)(referencing § 2D1.1(c) n.B).

In short, the use of methamphetamine (actual) results in a significantly harsher sentence for defendants caught in possession of a substance, and then somehow selected to have the substance tested for purity as compared to defendants whose drug amounts are based on historical sales or substances that were not tested. It is this District's view that, in all likelihood, the two substances (mixture and actual) were of very similar purity levels. This disparity should be considered and addressed by the Commission.

Thank you. Please feel free to contact me if you should have any questions or concerns.

Yours very truly,

NANCY D. FREUDENTHAL
Chief United States District Judge

cc: Tambra Loyd, Chief, Probation and Pretrial Services
Christopher Crofts, United States Attorney
District Judge Alan Johnson
District Judge Scott Skavdahl

Subject: Chapter 7

Kathleen,
As we discussed today, I hope that the USSC will consider adding to its priorities examination and updating of the supervised release policy statements which have not been closely examined for over 25 years. These are the problems that I see:
1. The blanket recommendation to impose consecutive sentences for supervised release violations may be excessive in cases where a court has already increased the sentence for a recidivating defendant.
2. Delaying resolution of violations of probation and supervised release until after the defendant has served the prison term for the offense underlying the violation has significant adverse collateral consequences that are ultimately harmful to public safety, e.g., ineligibility for residential drug treatment and for reentry programs such as halfway houses.

Chief Judge Beryl A. Howell
United States District Court
for the District of Columbia
E. Barrett Prettyman United States Courthouse

Subject: Child Abuse or Neglect Offense Level Guideline Proposal

Nicole, consistent with our discussion yesterday, I am attaching a draft of a proposed guideline provision on child abuse. This email is to provide background on how I came to draft such a provision.

As you know, I sentence many defendants from Indian country for offenses under the Major Crimes Act and Assimilative Crimes Act. The Major Crimes Act, 18 U.S.C. 1153(a), extends federal criminal jurisdiction in Indian country to any "Indian" who commits any of the listed crimes within the statute. One of the listed crimes in the Major Crimes Act is "felony child abuse or neglect." There is no provision in the Guidelines Manual for "felony child abuse or neglect."

I frequently sentence defendants who are convicted of child abuse. On Monday of this week, I sentenced two more defendants convicted of child abuse. I asked the pre-sentence report writer who has written the most reports for me to determine how frequently I sentence on child abuse cases.
She located 21 such cases over the span of the past few years. The pre-sentence report writers and I reference Section 2X5.1 of the guidelines to seek to apply the most analogous guideline, and at times the conduct underlying a child abuse case looks similar to a simple assault or aggravated assault or involuntary manslaughter. Many cases involving child abuse, however, involve facts where there is no analogous guideline provision.

I am among those federal judges who find the sentencing guidelines very useful and who follows the guidelines more frequently than most judges. My own preference is to have an applicable offense level calculation for crimes on which I frequently sentence, like child abuse. I would think that judges who infrequently see a child abuse case might appreciate some guidance and that having an offense level guideline for child abuse might result in more consistency among judges in sentencing on such convictions.
The attachment reflects my best effort to draft what I believe to be a fair offense level calculation for child abuse or neglect consistent with the factors that I consider important in evaluating the seriousness of such a crime--whether the defendant's conduct was intended to harm the child; whether the child was below the age of six, between six and twelve, or a teenager; how severe an injury resulted to the child; and other aggravating factors such as a pattern of activity, use of a dangerous weapon, or strangling or suffocation.

You and those who work with the Sentencing Commission may be wondering what sort of cases get prosecuted as child abuse in Indian country. I have not considered the case loads of other judges or surveyed my entire history of sentencing in child

abuse cases, but had the opportunity to review brief summaries of the 21 cases that the one pre-sentence writer located. Some cases involve driving offenses, commonly drunk or careless driving by a defendant where a child is badly injured but not killed. Some cases involve physical abuse or extreme corporal punishment, where I have used analogue guidelines for simple or aggravated assaults or second degree murder. Some cases involve extreme neglect, such as awareness of a child being sexually abused but continuing to expose the child to the abuser, allowing a boyfriend to beat a child on repeated occasions, committing crimes with the child in tow or in front of the child, having the child experiment with illegal drugs and other such circumstances.

I leave it to the Sentencing Commission and commission staff to decide what priority to give this idea.

U.S. District Judge Roberto Lange
District of South Dakota

Felony Child Abuse or Neglect

§2A7.1 [or § 2A2.5] Child Abuse

(a) Base Offense Level:
1) 10 if the offense involved an intent to harm the child; or
2) 6,otherwise.

(b) Specific Offense Characteristics:
1) Age of Victim
If the victim (A) had not attained the age of twelve years, increase by 2 levels: (B) had not attained the age of six years, increase by 4 levels;

2) Injury to Victim:
If the victim (A) sustained bodily injury as a result of the child abuse, increase by 2 levels; (B) sustained serious bodily injury or was subjected to a sexual assault or sexual abuse or sexual exploitation, increase by 4 levels; (C) sustained permanent or life threatening bodily injury as a result of the child abuse, increase by 6 levels; (D) died as a result of the child abuse, increase by 8 levels. If the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels. If the degree of injury is between that specified in (B) and (C), increase by 5 levels.

3) Other Aggravating Factors:
If the offense involved one of the following aggravating factors: (A) possession, or threatened use, of a dangerous weapon; (B) strangling, suffocating, or attempting to strangle or suffocate; (C) a pattern of activity involving child abuse of the same victim, increase by 2 levels. If the offense involved more than one of subdivisions (A), (B), or (C), increase by 4 levels.

(c) Cross Reference
If the conduct of the defendant being sentenced constituted aggravated assault, apply § 2A2.2 (Aggravated Assault); if voluntary manslaughter, apply § 2A1.3 (Voluntary Manslaughter); if involuntary manslaughter, apply § 2A1.4 (Involuntary Manslaughter); if a sexual assault, apply either § 2A3.2 (Sexual Abuse of Minor) or § 2A3.3 (Criminal Sexual Abuse) or § 2A3.4 (Criminal Sexual Abuse of Minor); or if kidnapping, apply § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint).

Commentary

Statutory Provisions: 18 U.S.C. § 1153(a)

Application Notes:

1. Definitions – For purposes of this guideline:
"Bodily injury," "serious bodily injury," "permanent or life-threatening bodily injury," and "dangerous weapon" have the meanings given those terms in § 1B1.1.

2. "Sexual assault of sexual abuse or sexual exploitation," is defined as including any crime outlawed by 18 U.S.C. §§ 2241–2244, 2251–2260.

3. The cross-reference to this section recognizes that "felony child abuse or neglect" is a separate crime under 18 U.S.C. § 1153(a) from other crimes listed there such as murder, manslaughter, kidnapping, incest, sexual assault, and aggravated assault. If a defendant's conviction is for felony child abuse or neglect, but the underlying conduct of that defendant satisfies all of the elements of any of the greater crimes listed in the cross-reference, then the offense level should be calculated under guidelines applicable to the greater crime.

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND
ONE EXCHANGE TERRACE
PROVIDENCE, RI 02903

John J. McConnell, Jr.
UNITED STATES DISTRICT JUDGE

November 3, 2015

The Honorable Patti B. Saris
Chair of the U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Saris and the United States Sentencing Commissioners:

As a Federal District Judge, I am tasked with administering justice under the Constitution and laws of the United States. Earlier this year, in applying Section 1B1.10 of the Sentencing Guidelines, I was faced with a conflict between those duties: I was obligated to follow a guideline that prevented me from administering justice.

Amendment 759 to Section 1B1.10 of the Sentencing Guidelines creates a legal fiction that anyone who could have been sentenced as a career offender, was so sentenced, and is therefore ineligible for a retroactive sentence reduction. That legal fiction needlessly undermines the Commission's policy goals, and prevents judges from exercising the discretion necessary to administer justice.

In your next amendment cycle, I ask that you consider repealing Amendment 759 for the reasons laid out in my attached opinion.

Please contact me if I can be of any help in this process.

Sincerely yours,

John J. McConnell, Jr.
U.S. District Judge, District of Rhode Island

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	)	
v.	)	CR. No. 12-001-M-LDA
EDDIE TORIE BARR Defendant	)	

ORDER

This matter is before the Court on the Government's Motion for Reconsideration (ECF No. 31) of this Court's Order (ECF Nos. 29 & 30) reducing the sentence of defendant Eddie Torie Barr pursuant to 18 U.S.C. § 3582(c)(2). The Court is required to GRANT the Government's motion.

I.
Summary

The United States Sentencing Guidelines Section 1B1.10 as amended by Amendment 759 rejects *United States v. Cardosa*, 606 F.3d 16 (1st Cir. 2010) and precludes Mr. Barr's eligibility for the retroactive sentence reduction adopted by Amendment 782. While this Court finds itself bound by Amendment 759 due to the holding of *Dillon v. United States*, 560 U.S. 817 (2010), this Court nonetheless urges the Sentencing Commission to rescind this ill-wrought Amendment. Amendment 759 is needlessly harsh. Its binding and onerous effects flout the spirit of *Booker v. United States*, 543 U.S. 220 (2005), may violate the Constitution, are unsupported by any policies enunciated at its adoption, and are in significant tension with the policies behind Amendment 782.

II.
Argument

On May 7, 2012, Mr. Barr was sentenced based on the crack cocaine guideline range, after this Court found that "in his [case] . . . the career offender application is too harsh and . . . n[o]t appropriate given all [his] characteristics." ECF No. 18 at 35. The First Circuit was clear in its holding and rationale in *United States v. Cardosa* that if a district judge actually based the defendant's sentence on a guideline range that was subsequently reduced, rather than the career offender range, that judge had the discretion, granted by statute, to reduce the sentence accordingly. 606 F.3d at 16. The First Circuit found that the sentencing judge was in the best position to make this determination. *Id.* at 22.

Unfortunately, the United States Sentencing Commission decided to undo the First Circuit's holding by inventing the legal fiction that any person who *could* have been sentenced under the career offender provision, was sentenced under that provision, for purposes of determining eligibility for a sentence reduction.[1] This fiction had the effect of removing the sentencing judge's discretion to reduce certain defendants' sentences. While this Court disagrees with the Sentencing Commission's diktat, the Court's statutory power to reduce a sentence is limited to situations when "a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). The binding policy statement governing § 3582(c)(2) proceedings is USSG §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) as amended by USSG App. C Vol. III, Amendment 759. *Dillon*, 560 U.S. at 819. That policy statement precludes a reduction of Mr. Barr's sentence.

[1] *See* United States Sentencing Commission, *Guidelines Manual*, App. C Vol. III, Amdt. 759 (Nov. 2014) (adopted Nov. 2011) (USSG).

Amendment 759 of the United States Sentencing Guidelines treats Mr. Barr as though he were sentenced based on the career offender provision, even though he was not. USSG App. C Vol. III, Amdt. 759. At Mr. Barr's 2012 sentencing, this Court determined that justice would not be served by applying the career offender provision to Mr. Barr, and instead sentenced Mr. Barr under the crack guidelines. ECF No. 29 at 1-2 ("sentencing goals would not be served by sentencing Mr. Barr as a career offender").

The crack guidelines were subsequently lowered by two points in 2014, and this sentencing reduction was made retroactive. USSG Supp. App. C, Amdt. 782. The Sentencing Commission explained that the reduction "would permit resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public safety." *Id.* The reduction achieved these salutary effects without diluting the incentives for defendants to plead guilty, cooperate with authorities, or avoid recidivism.[2] *Id.* The policies driving Amendment 782 certainly apply to Mr. Barr's situation and support its

[2] The Commission cited four reasons for this conclusion. USSG Supp. App. C, Amdt. 782. First, that adequate incentives to plead guilty already exist for non-violent drug defendants through the operation of the "safety valve" provision, which "allows the court, without a government motion, to impose a sentence below a statutory mandatory minimum penalty" if the court finds the defendant had sufficiently cooperated with the government. *Id.* Second, the Commission pointed to a similar 2007 sentence reduction amendment for crack cocaine, and noted that it did not negatively affect plea and cooperation behavior. *Id.* ("[I]n the fiscal year before the 2007 amendment took effect, the plea rate for crack cocaine defendants was 93.1 percent. In the two fiscal years after the 2007 amendment took effect, the plea rates for such defendants were 95.2 percent and 94.0 percent, respectively.) Third, the Commission allayed concerns about public safety by pointing to a study that detected no statistically significant difference in the rates of recidivism between offenders who were released early pursuant to the retroactive application of the 2007 crack cocaine amendment and those who served their full terms of imprisonment. *Id.* (citing USSG App. C Vol. III, Amendment 713). Fourth, the Commission recognized that the increased flexibility of the current guidelines, which allow for tailoring the defendant's sentence "based on specific conduct, reduce[s] the need to rely on drug quantity . . . as a proxy for culpability, and the amendment permits these adjustments to differentiate among offenders more effectively." *Id.*

retroactive application to his case. However, the Commission's earlier Amendment 759 renders this preferred result legally unreachable.

In 2011, the Sentencing Commission amended its rules for the retroactive application of sentencing reductions by inserting a parenthetical into the Commentary of §1B1.10. As a result, the amended provision now reads as follows:

> Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range *(i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guideline Manual or any variance)*. Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

USSG §1B1.10 (italicized portion added to Guidelines by operation of Amendment 759).

Through application of Amendment 759, the Commission endeavors to reach back in time and mandate the imposition of the career offender provision (for the purposes of a sentencing reduction) on a defendant, despite the district judge's explicit finding that justice would not be served by the imposition of that provision on that particular defendant. The Commission's policy violates the spirit, if not the word, of *United States v. Booker*.[3] 543 U.S. 220, 246 (2005). *See also Dillon*, 560 U.S. at 833 (Stevens, J., dissenting) ("[T]reat[ing] the

[3] It is absurd that *Booker* and its progeny permit district courts to shun the career offender provision at sentencing upon finding that this provision does not "exemplify the Commission's exercise of its characteristic institutional role," and instead produces "disproportionately harsh sanctions . . . [that are] 'greater than necessary' in light of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)," yet the Sentencing Commission binds courts by this same disproportionally harsh provision at § 3582(c)(2) proceedings. *Kimbrough v. United States*, 552 U.S. 85, 109 (2007); *see also United States v. Martin*, 520 F.3d 87, 96 (1st Cir. 2008) (affirming sentencing judge's decision to sentence defendant as though he were not subject to career offender provision).

Commission's policy statement as a mandatory command rather than an advisory recommendation is unfaithful to *Booker*.") This policy may stand on dubious constitutional ground.[4] *Id.* And finally, it is in significant tension with the policy statement enunciated in the Commission's more recent Amendment 782. *Compare* policy reasons for Amendment 782 discussed *supra* at 1-2 (retroactive reduction of crack guidelines alleviates overcrowding without compromising sentencing purposes) with lack of policy reasons for Amendment 759 discussed *infra* at 5-6 (retroactive reduction of crack guidelines not applicable to "career offenders" sentenced under crack guidelines because of semantic structure of §1B1.1).

Having considered these infirmities, this Court nonetheless finds itself bound by the more specific language of Amendment 759 and the Supreme Court's majority holding in *United States vs. Dillon*, which found *Booker*'s holding inapplicable to § 3582(c)(2) proceedings. *Dillon*, 560 U.S. at 824. Therefore, to determine Mr. Barr's sentence reduction eligibility, the Court must succumb to the compulsory task of determining the Sentencing Commission's "applicable

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[4] In his *Dillon* dissent, Justice Stevens raised three separation-of-powers issues implicated by the Commission's interpretation of § 3582(c)(2). 560 U.S., at 843-46. The *Dillon* majority "d[id] not respond to the dissent's separation-of-powers discussion, as that issue [wa]s not fairly encompassed within the questions presented and was not briefed by the parties." 560 U.S., 826 n.5. Therefore, the issues raised by Justice Stevens have not been settled by the Supreme Court.

First, Justice Stevens recalled that the Sentencing Reform Act, pre-*Booker*, "drew a basic distinction: Guidelines would bind; policy statements would advise," and pointed out that it may exceed the authority Congress did (or could) delegate to the Commission to bind Courts via policy statements. *Id.* at 844. Second, the Commission may not have the power, "by its own fiat, to limit the effect of [the Supreme Court's] decision in *Booker*." *Id.* Justice Stevens argued "[t]hat Congress has declined to disturb *Booker* in the five years [now ten] since its issuance demonstrates . . . that Congress has acquiesced to a discretionary Guidelines regime," whose scope must necessarily include the application of § 3582(c)(2). *Id.* Third, Justice Stevens questioned whether an "intelligible principle" exists to guide the Commission's sentence reduction and retroactivity policies so as to comport with the Court's nondelegation doctrine. *Id.* at 842-45 (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). *See also Mistretta v. United States*, 488 U.S. 361, 421 (1989) (Scalia, J., dissenting) ("The delegation of lawmaking authority to the Commission is, in short, unsupported by any legitimating theory to explain why it is not a delegation of legislative power. . . . [T]he consequence is to facilitate and encourage judicially uncontrollable delegation.")

guideline range" for Mr. Barr, rather than looking to the guideline range the Court actually used to sentence Mr. Barr.

In Mr. Barr's case, the "guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guideline Manual or any variance" is the career offender provision, §4B1.1. The Sentencing Commission deems this Mr. Barr's "applicable guidelines range" despite the contrary finding of the sentencing judge. Because Amendment 782 "does not have the effect of lowering the defendant's applicable guideline range," "a reduction in [Mr. Barr's] term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement." *Id.*

This result is mandated by Amendment 759, which discarded the nuanced approach to sentence reductions followed by the First Circuit, and at least three other circuits, in favor of blanket denials.[5] The First Circuit's approach had recognized that "cases are not all of one size or shape," and therefore "let the district judge – who after all did the original sentencing – decide in the first instance whether [a reduction is appropriate]." *United States v. Cardosa*, 606 F.3d 16, 21 (1st Cir. 2010). This approach was implicitly approved by the Supreme Court in *Freeman v. United States*, 131 S. Ct. 2685 (2011), which held that defendants who entered plea agreements that used or employed a particular Guidelines range were eligible for relief under § 3582(c)(2) if that range was later reduced. The *Freeman* plurality opinion echoed *Cardosa* in rejecting the Government's argument to adopt the position embodied by Amendment 759:

[5] *Cardosa*, 606 F.3d 16 (1st Cir. 2010) (allowing reduction); *United States v. Flemming*, 617 F.3d 252, 254 (3rd Cir. 2010), *as amended* (Sept. 27, 2010) (same); *United States v. Munn*, 595 F.3d 183, 194-95 (4th Cir. 2010) (same); *United States v. McGee*, 553 F.3d 225, 227-28 (2d Cir. 2009) (per curiam) (same); *United States v. Wesson*, 583 F.3d 728, 732 (9th Cir. 2009) (dicta).

> The Government would enact a categorical bar on § 3582(c)(2) relief. But such a bar would prevent district courts from making an inquiry that is within their own special knowledge and expertise. What is at stake in this case is a defendant's eligibility for relief, not the extent of that relief. Indeed, even where a defendant is permitted to seek a reduction, the district judge may conclude that a reduction would be inappropriate. District judges have a continuing professional commitment, based on scholarship and accumulated experience, to a consistent sentencing policy. They can rely on the frameworks they have devised to determine whether and to what extent a sentence reduction is warranted in any particular case. They may, when considering a § 3582(c)(2) motion, take into account a defendant's decision to enter into an 11(c)(1)(C) agreement. If the district court, based on its experience and informed judgment, concludes the agreement led to a more lenient sentence than would otherwise have been imposed, it can deny the motion, for the statute permits but does not require the court to reduce a sentence. This discretion ensures that § 3582(c)(2) does not produce a windfall.

Freeman v. United States, 131 S. Ct. 2685, 2694 (2011). The plurality in *Freeman* would have permitted a reduction in Mr. Barr's case, yet Amendment 759, adopted just months afterward, denies it.[6] 131 S. Ct. at 2692-93 ("§ 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement").

With Amendment 759, the Sentencing Commission closed the door of lenity on anyone who qualified for the career offender provision, regardless of how harsh the result. And any type of imposition of the career offender provision, even if only to render certain defendants ineligible

[6] This Court reads the controlling opinion in *Freeman* to also have permitted a reduction in a case such as Mr. Barr's. *See* 131 S. Ct. at 2704 (Roberts, J., dissenting) ("Is a . . . sentence still subject to reduction if the parties relied on the wrong sentencing range? Justice Sotomayor's . . . answer is 'yes.'"); *but see United States v. Pleasant*, 704 F.3d 808, 812-14 (9th Cir.) *cert. denied*, (2013) (reaching a different conclusion). The disagreement is academic because this Court agrees with the Ninth Circuit that regardless of which interpretation is correct, "Amendment 759 . . . abrogated [this Court's view of] *Freeman*." *Id.* at 812.

for sentence reductions, is notoriously harsh when those defendants are nonviolent drug offenders.[7]

"Section 3582(c)(2) empowers district judges to correct sentences that depend on frameworks that later prove unjustified. There is no reason to deny § 3582(c)(2) relief to defendants who linger in prison pursuant to sentences that would not have been imposed but for a since-rejected, excessive range." *Freeman v. United States*, 131 S. Ct. 2685, 2689 (2011). In Mr. Barr's case, the career offender range was rejected by the sentencing judge, while the crack range was rejected by the Sentencing Commission. There is no principled reason why Mr. Barr

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[7] Sentences recommended by the career offender guideline are among the most severe and least likely to promote sentencing purposes in the United States Sentencing Guidelines Manual. *See* United States Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform, at 133-34 (2004). One problem is that the guideline range is keyed to the statutory maximum, the result of a congressional directive to the United States Sentencing Commission. Another problem--created by the Commission itself--is that the class of career offenders is defined much more broadly than the statute requires. Neither the severity of the guideline nor its breadth is the product of careful study, empirical research, or national experience.

. . . .

[The career offender guideline] was initially based on a congressional directive requiring the Commission to set guideline ranges at or near the statutory maximum for certain specifically described repeat violent and repeat drug offenders. The Commission then significantly deviated from the directive, applying the severe punishments directed by Congress to offenders not described by Congress, without stated reasons or careful study, and contrary to feedback from the courts and its own empirical research.

Sentences recommended by the career offender guideline are many orders of magnitude higher than time served before the guidelines, than recommended by the ordinary guideline, or than sound policy would suggest, and in many instances than the congressional directive requires. The typical defendant subject to the career offender guideline today is a low-level drug offender, or occasionally a bank robber, with two prior state convictions for minor drug offenses or "crimes of violence," broadly defined to include offenses that are not violent, for which they received little or no jail time.

Amy Baron-Evans et. al., Deconstructing the Career Offender Guideline, 2 Charlotte L. Rev. 39, 40-42 (2010).

should linger in prison for the time determined by either of those ranges. *See Rita v. United States*, 551 U.S. 338, 347 (2007) (disapproving of "grant[s of] greater factfinding leeway to [the Sentencing Commission] than to a district judge").[8]

One would think that the Sentencing Commission would at least offer a reasoned explanation when issuing a policy statement that rejected the considered opinions of not only the First Circuit, but also three other Circuit courts and at least four Justices of the Supreme Court.[9] And one would be disappointed, because the Commission offered simply the following:

> [T]he amendment amends the commentary to §1B1.10 to address an application issue. Circuits have conflicting interpretations about when, if at all, the court applies a departure provision before determining the "applicable guideline range" for purposes of §1B1.10. The First, Second, and Fourth Circuits have held that, for §1B1.10 purposes, at least some departures (e.g., departures under §4A1.3 (Departures Based on Inadequacy of Criminal History Category) (Policy Statement)) are considered before determining the applicable guideline range, while the Sixth, Eighth, and Tenth Circuits have held that "the only applicable guideline range is the one established before any departures".[10] See United States v. Guyton, 636 F.3d 316, 320 (7th Cir. 2011) (collecting and discussing cases; holding that departures under §5K1.1 are considered after determining the applicable guideline range but declining to address whether departures under §4A1.3 are considered before or after). Effective November 1, 2010, the Commission amended §1B1.1 (Application Instructions) to provide a three-step approach in determining the sentence to be imposed. See USSG App. C, Amend. 741 (Reason for Amendment). Under §1B1.1 as so amended, the court first determines the guideline range and then considers departures. Id. ("As amended, subsection (a) addresses how to apply the provisions in the Guidelines Manual to properly determine the kinds of sentence and the guideline range. Subsection (b) addresses the need to consider the policy statements and commentary to determine whether a departure is warranted."). Consistent with the three-step approach adopted by Amendment 741 and reflected in §1B1.1, the amendment adopts the approach of the Sixth, Eighth, and Tenth Circuits and amends

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[8] The injustice embodied in the Sentencing Commission's position is evident when on realizes the fact that if this Court sentenced Mr. Barr today, it would have sentenced him to the lowered drug guideline.

[9] *See supra* notes 5-6 and accompanying text.

[10] The Third Circuit had reached the same conclusion. *United States v. Flemming*, 617 F.3d 252, 254 (3rd Cir. 2010), *as amended* (Sept. 27, 2010) ("we join the First, Second, and Fourth Circuit Courts in concluding that such a defendant is eligible for a sentence reduction under § 3582(c)(2)").

> Application Note 1 to clarify that the applicable guideline range referred to in §1B1.10 is the guideline range determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance.

USSG Supp. App. C, Amdt. 759.

The only explanation that can be gleaned from that text is that the Commission felt that Amendment 759 fit better semantically with the structure of §1B1.1.[11] That is not a persuasive reason to deny defendants the opportunity for lenity, when the district judge finds it warranted. The Sentencing Commission provided no principled analysis in its guidelines for why it chose three circuits over four circuits and at least four Justices in determining the retroactive application of sentencing reductions. The approach chosen by the Sentencing Commission establishes a one-size fits all regime that denies defendants the opportunity for individual review. Justice, and the judges who administer it, deserve better.

III.
Conclusion

Booker and its progeny should have compelled the Sentencing Commission to allow District Courts to properly exercise their individual judgments in applying retroactive sentencing reductions.[12] No purpose is served by enforcing a punitive residual effect of the career offender provision on a defendant for whom the sentencing judge had found that provision to be unduly harsh. This Court calls on the Commission to rescind its 2011 Amendment 759, make the recession retroactive, and to follow the lead of the First, Second, Third, and Fourth Circuit

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[11] Lest one thought the policy explanation might be hidden in the Reason for Amendment 741, referenced in the Reason for Amendment 759, it is not. That policy statement is similarly lacking in policy analysis. *See* USSG App. C Vol. III, Amdt. 741.

[12] *See, e.g.*, *Rita v. United States*, 551 U.S. 338 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *United States v. Martin*, 520 F.3d 87 (1st Cir. 2008); *United States v. Boardman*, 528 F.3d 86 (1st Cir. 2008).

Courts, and a significant contingent of the Supreme Court, by allowing district judges discretion to reduce sentences based on guideline ranges that were later reduced.

The Court reluctantly GRANTS Government's Motion for Reconsideration (ECF No. 31) and VACATES its prior orders (ECF Nos. 29 & 30).

IT IS SO ORDERED.

John J. McConnell, Jr.
United States District Judge

September 24, 2015

U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

July 19, 2016

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Chief Judge Saris:

The Sentencing Reform Act of 1984 requires the Criminal Division to submit to the United States Sentencing Commission, at least annually, a report commenting on the operation of the sentencing guidelines, suggesting changes to the guidelines that appear to be warranted, and otherwise assessing the Commission's work.[1] We are pleased to submit this report pursuant to the Act. The report also responds to the Commission's request for public comment on its proposed priorities for the guideline amendment year ending May 1, 2017.[2]

Meaningful reform in criminal justice and sentencing remains a priority for this Administration. We aim to make the criminal justice system fairer, smarter, and more cost effective, while enhancing the ability of law enforcement to keep our communities safe. In 2015, we proposed working in partnership with you on necessary sentencing reform, and our partnership has been very productive, with the Department and the Commission working together to provide relevant data and testimony to Congress on a number of key sentencing and criminal justice reform bills. We are grateful to the Commission for the significant and important work you have done in this regard and look forward to continued collaboration with the Commission on this front. We also look forward to working with the Commission to simplify the guidelines to better reflect the current, post *Booker* legal framework, and to reduce needless litigation and circuit splits concerning overly precise and anachronistic guideline provisions.

We also thank you for providing us with data necessary to evaluate our Smart on Crime initiative, under which we amended our charging policies so that certain people who have committed low-level, nonviolent drug offenses, and who have no ties to large-scale organizations, gangs, or cartels, will no longer be charged with offenses imposing unnecessarily

[1] 28 U.S.C. § 994(o) (2006).
[2] *Notice of Proposed Priorities and Request for Public Comment*, 80 Fed. Reg. 26594 (June 25, 2015).

long mandatory minimum sentences.[3] We are very happy to see that the measures adopted under Smart on Crime, in combination with other measures such as the Commission's actions to reduce drug penalties, are reaching their intended effect.[4]

We also want to bring to your attention that, although we were not in complete agreement with the Commission regarding your most recent revisions to the guidelines on Compassionate Release, we are building on what we have learned during last year's amendment cycle, and we are currently revising portions of the criteria for inmates seeking reduced sentences under the Bureau of Prisons Compassionate Release Program (also known as Reduction in Sentence, or RIS program).

The Commission has also expressed interest in the Department's Clemency Initiative, under which the Department makes recommendations to the President regarding commuted or reduced sentences for specific inmates. Under this Initiative, the Pardon Attorney and the Deputy Attorney General consider a variety of factors, including whether the inmate was low-level, nonviolent, not connected to a large-scale organization, gang, or cartel, has served at least 10 years in prison, would likely receive a shorter sentence today, and does not pose an ongoing risk to public safety. President Obama has thus far granted clemency to 348 inmates during his Administration, almost all pursuant to this initiative.[5]

With respect to the Commission's proposed priority to study approaches and encourage the use of alternatives to incarceration, we note that the Department is developing a federal community supervision demonstration project based on Hawaii's successful HOPE model. In Hawaii and several state and local jurisdictions nationwide, the HOPE model has dramatically driven down rates of probation revocations, violations of release conditions, drug use, reoffending, and the numbers of re-incarceration days for probationers.[6] The program is based

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[3] The most recent data which you have provided to us for fiscal year 2015 shows that federal prosecutors have indeed charged fewer drug indictments carrying mandatory minimum sentences, and at the same time the cases we have charged are more serious cases.

[4] The data show that federal prosecutors are charging mandatory minimums significantly less frequently, and being more selective in their drug prosecutions: even though drug cases are fewer in number, they are more focused on the most serious defendants. At the same time, the percentage of those drug defendants with a weapon rose, and the percentage of defendants with an aggravating role steadily increased as well. *See* DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, NEW SMART ON CRIME DATA REVEALS FEDERAL PROSECUTORS ARE FOCUSED ON MORE SIGNIFICANT DRUG CASES AND FEWER MANDATORY MINIMUMS FOR DRUG DEFENDANTS (March 21, 2016), https://www.justice.gov/opa/pr/new-smart-crime-data-reveals-federal-prosecutors-are-focused-more-significant-drug-cases-and.

[5] October 1, 2015 through June 6, 2016. *See* CURRENT FISCAL YEAR CLEMENCY STATISTICS, https://www.justice.gov/pardon/current-fiscal-year-clemency-statistics.

[6] *See* ANGELA HAWKEN, PH.D. AND MARK KLEIMAN, PH.D., NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE 17-26 (Dec. 2, 2009) (HOPE program), https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf; ANGELA HAWKEN, PH.D., ET AL., NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, HOPE II: A FOLLOW-UP EVALUATION OF HAWAII'S HOPE PROBATION 22-28 (May 17, 2016) (surveying success of HOPE model in other jurisdictions throughout country), https://www.ncjrs.gov/pdffiles1/nij/grants/249912.pdf; NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, *"Swift and Certain" Sanctions in Probation Are Highly Effective: Evaluation of the HOPE Program*, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, http://www.nij.gov/topics/corrections/community/drug-offenders/pages/hawaii-

on the principles of behavior modification, and a significant feature of the HOPE model is to swiftly punish *all* offenders who violate their conditions of supervision, but do so with the use of multiple, micro-sanctions: incarceration measured by days, weekends or weeks, rather than the months or years recommended under the current guidelines. The Department currently makes technical support available to states implementing such programs, under the rubric of Swift Certain Fair (SCF).[7] Although recent research indicates that defendants on probation and supervised release in the federal system have lower recidivism than their counterparts in the state system,[8] there is much room for growth in this space. We look forward to discussing with the Commission the results of this and possibly other pilot programs, with an eye on things that we can do to improve the federal system generally.

We also bring to your attention a number of deficiencies in the current guidelines which currently need to be addressed, even as we work together on longer term projects. These deficiencies concern serious issues, and failing to resolve them now will leave loopholes, encourage law breakers, and erode confidence in the guidelines. Specifically:

- We ask the Commission to update the guidelines treatment of illegal synthetic drugs, a serious public health problem involving overdoses and deaths, for which our current regulatory and statutory framework has evolved, but for which the guidelines have not, creating a problem for law enforcement.

- We ask the Commission to make amendments for certain environmental offenses under three of our Nation's pollution statutes – the Clean Water Act, the Resource Conservation and Recovery Act, and the Clean Air Act: specifically, offenses where defendants knowingly endanger the public. Under the current guidelines, such offenders are generally facing a third of the sentence that Congress intended.

- We ask the Commission to address the guidelines concerning tax offenses involving hidden offshore accounts so that defendants who willfully conceal the existence of offshore bank accounts in order to avoid paying taxes do not escape punishment. We also ask the Commission to amend the guideline for tax evasion to make clear that loss includes penalties and interest. And we also ask the Commission to amend the sophisticated means enhancement in two tax guidelines to conform to the 2015 amendment narrowing this enhancement as applied to the fraud guideline.

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hope.aspx (last modified Feb. 3, 2012); *Why Swift Certain & Fair?*, SWEET CERTAIN & FAIR, http://www.swiftcertainfair.com/why-swift-certain-and-fair/;ZACHARY HAMILTON, PH.D., ET AL., WASHINGTON STATE UNIVERSITY, EVALUATION OF WASHINGTON STATE DEPARTMENT OF CORRECTIONS (WADOC) SWIFT AND CERTAIN (SAC) POLICY, PROCESS, OUTCOME AND COST-BENEFIT EVALUATION 35-48 (Aug. 31, 2015), https://wsicj.wsu.edu/wp-content/uploads/sites/436/2015/11/SAC-Final-Report_2015-08-31.pdf.

[7] *See* Swift, Certain, and Fair Sanctions Program (SCF): Replicating the Concepts Behind Project HOPE FY 2016 Competitive Grant Announcement, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, https://www.bja.gov/funding/swiftandcertain.pdf.

[8] JOSHUA A. MARKMAN, BJS STATISTICIAN, ET. AL. BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, RECIDIVISM OF OFFENDERS PLACED ON FEDERAL COMMUNITY SUPERVISION IN 2005, PATTERNS FROM 2005 TO 2010 (2016), http://www.bjs.gov/content/pub/pdf/ropfcs05p0510.pdf.

- We ask that the Commission address the issue of how to calculate loss when offenders fraudulently obtain government contracts under the Small Business Administration by falsely certifying that their firm is minority-owned. Some courts apply credits against loss and determine that there has been no loss, at odds with provisions of the Small Business Jobs Act of 2010.

- Finally, we ask that the Commission add to its many valuable research products two studies which would be of great value to the Department, namely re-sentencings following *United States v. Johnson* and new jurisprudence regarding the definition of a crime of violence; and how suspended sentences for prior convictions for sexual abuse of a minor, sexual assault, and assault are being used in practice in sentencing illegal reentry offenses.

Please see below for a discussion of each these. Thank you in advance for considering our proposals.

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Proposed Priority **Page No.**

I. Jointly Propose to Congress Legislation to Enact Simplified Guideline System to Address Growing Unevenness in Sentencing Outcomes for Similar Offense Conduct

As we suggested in our letter to you in July of 2015, we believe that a new, simpler guideline system would better guide judicial decision-making, given the current legal framework, and also reduce needless litigation and unwarranted disparities in federal sentencing.[9] In its report on the impact of *Booker v. United States*,[10] the Commission recognized the disconnect between the legal structure left in the wake of the Supreme Court's new Sixth Amendment jurisprudence and the structure of the federal sentencing guidelines, which was crafted in a different legal context and based on different legal assumptions. As the Commission is already well enough aware, federal courts currently sentence in varying ways, with fundamental policy disagreements, leading to dramatically different sentencing results between judges in the same district, between districts, and between circuits. We brought this problem to your attention to this last year, and referenced Table 26 of the Commission's 2013 annual sourcebook. [11] Sadly, the same conclusion can be drawn from this year's figures from Table 26 in the 2014 Sourcebook.[12] It is hard to imagine that Table 26 from the 2015 and 2016 sourcebooks will be any different.

II. Equivalencies for Two Synthetic Cannabinoids, as well as for Methylone, Mephedrone, and MDVP

The Commission has proposed as a priority for this year to study offenses involving Methylone (3,4-Methylenedioxy-N-methylcathinone) and to consider any amendments to the guidelines that may be appropriate. We support this proposal, but we ask that the Commission also address four other substances. Two – JWH-018 and AM-2201 – are synthetic cannabinoids, producing effects intended to be similar to tetrahydrocannabinol (THC), primary psychoactive constituent of marijuana. The two others – MDPV and Mephedrone – are synthetic cathinones, intended to produce effects similar to methamphetamine, amphetamine, cocaine, cathinone, methcathinone and MDMA.

These substances were all charged and prosecuted as analogues until they were recently regulated and placed in Schedule I. The process involved was resource intensive and time

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[9] JONATHAN WROBLEWSKI, DIRECTOR, OFFICE OF POLICY AND LEGISLATION, CRIMINAL DIVISION, DEP'T OF JUSTICE, ANNUAL LETTER TO PATTI B. SARIS, CHAIR, U.S. SENTENCING COMM'N, 8, (2014) (on file with Dep't of Justice at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140729/DOJ.pdf).

[10] U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf.

[11] *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 26 (2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table26.pdf.

[12] *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 26 (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table26.pdf.

consuming, requiring the promulgation of three new regulations,[13] and the enactment of new legislation.[14] However, without specific "marijuana equivalencies" in the guidelines, in each case, courts must determine anew the degree to which the synthetic substance meets the factors identified in Application Note 6 of §2D1.1. In applying these factors, courts must consult and interpret empirical evidence and scientific research, a burdensome task that leads to discrepancy, as courts reach different results.

Furthermore, the amount of work involved signals to all parties that cases involving these synthetics will be more difficult than cases involving the illegal substances they are intended to mimic. The system in effect incentivizes the illegal synthetic drug trade, even as synthetic substances disproportionately result in emergency hospital room visits, injuries, and deaths. In sum, manufacturers and dealers of illegal synthetic drugs took advantage of the American legal and regulatory system by introducing synthetic versions of illegal drugs. Drug traffickers have flooded our country with dangerous synthetic drugs at a pace that has challenged our capacity to legislate and regulate. They now take advantage of our legal system again and place a heavy burden on the Government by disputing factors going into the guideline calculation required for sentencing.

As you know, last year the Department asked the Commission to create equivalencies in the guidelines for all five of these substances.[15] Together these five substances continue to present a serious challenge to law enforcement, and a serious threat to public health. In contrast to the Commission's most recent action for offenses involving hydrocodone, the five synthetic substances in question here have no lawful use, and Commission action in this matter will not have to consider the medical use of the drug.

In setting equivalencies, the Commission should review the scientific research on these five synthetic substances, and apply the three factors of §2D1.1 discussed above. But the Commission should not stop there: the Commission should also consider that these two synthetic cannabinoids are intended as alternatives to other controlled substances, and have been manufactured and distributed with the most sophisticated means to defeat our legal and

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[13] *See, e.g.*, Placement of Methylone into Schedule I, 78 Fed. Reg. 21818 (Apr. 12, 2013); Temporary Placement of Three Synthetic Cathinones into Schedule I, 76 Fed. Reg. 65371 (Oct. 21, 2011); Temporary Placement of Five Synthetic Cannabinoids into Schedule I, 76 Fed. Reg. 11075 (Mar. 1, 2011).

[14] Food and Drug Safety and Innovation Act of 2012, Pub. L. No. 112-144, § 1152). The synthetic cannabinoid AM-2201 was first scheduled by Congress in 2012. *See* Synthetic Drug Control Act, H.R. 1254, 112th Cong. § 2 (2011). For illustration of the effects of these substances, see the following studies related to AM-2201 published in the last few years: David McQuade et. al., *First European Case of Convulsions Related to Analytically Confirmed Use of the Synthetic Cannabinoid Receptor Agonist AM-2201*, 69(3) EUR. J. CLINICAL PHARMACOLOGY 373 (2013); Amy L. Patton et. al., *K2 Toxicity: Fatal Case of Psychiatric Complications Following AM-2201 Exposure*, 58(6) J. FORENSIC SCI. 1676 (2013). The synthetics MDPV, Mephedrone, Methylone, and JWH-018 were temporarily placed in Schedule I by the Drug Enforcement Administration (DEA) in 2011 through rulemaking authority, and all but Methylone were permanently placed into Schedule I by the Food and Drug Safety and Innovation Act of 2012 (FDSIA), signed into law on July 9, 2012. For JWH-018, *see* Temporary Placement of Five Synthetic Cannabinoids into Schedule I, *supra* note 11. For MDPV, Mephedrone, and Methylone, see Temporary Placement of Three Synthetic Cathinones into Schedule I, supra note 11. *See also* Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, § 1152, 1130 Stat. 126 (2012). Pursuant to rulemaking authority, the DEA Administrator permanently placed Methylone into Schedule I effective April 12, 2013. *See* Placement of Methylone into Schedule I, supra note 11.

[15] *See* WROBLEWSKI, *supra* at 14.

regulatory system. In other contexts in the guidelines the use of sophisticated means would result in enhanced sentences.

In addition, the Commission should also consider that these two synthetic cannabinoids are a much greater threat to public health than marijuana, and their production and distribution should be met with a greater consequence. Providing comparatively enhanced penalties for these cannabinoids as compared to marijuana would be consistent with the Commission's treatment of fentanyl and its analogues in the Guidelines' Drug Quantity Table. The table provides that one quarter the amount of fentanyl analogue triggers the same base offense level as Fentanyl.[16]

Setting these equivalencies will demonstrate that the Commission takes these substances seriously, and telegraph a message of deterrence to would be offenders. Finally, publishing such equivalencies will provide notice and consistency in sentencing.

The Public Health Concerns of MDPV, Mephedrone, Methylone, JWH-018, and AM-2201 Justify Commission Action

The Centers for Disease Control and Prevention and the Substance Abuse and Mental Health Services Administration have reported on the incidence of emergency room visits resulting from the consumption of synthetic cannabinoids: between January and May 2015, U.S. poison centers in 48 states reported receiving 3,572 calls related to synthetic cannabinoid use, a 229 percent increase from the 1,085 calls received during the same January through May period in 2014.[17] Further, the American Association of Poison Control Centers has reported receiving thousands of calls every year since 2011 regarding serious adverse effects resulting from the ingestion of synthetic cannabinoids: most recently 5369 from January through August 17th 2015.[18]

The ingestion of synthetic cannabinoids can result in serious adverse health effects including death.[19] Adverse health effects following ingestion of JWH-018 have been reported to include short-term memory defects, hypertension, delusions, chest pain, intractable abdominal pain, nausea, vomiting, tachycardia, anxiety, paranoia, auditory and visual hallucinations,

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[16] U.S. SENTENCING GUIDELINES MANUAL §2D1.1 (c) (Drug Quantity Table) (U.S SENTENCING COMM'N 2015). Fentanyl and its Analogue are first listed at Base Offense Level 12, where less than four grams of fentanyl receives the same offense level as less than one gram of a fentanyl analogue. This ratio continues throughout the table to Level 38, where 36KG of Fentanyl receives the same base offense level as 9KG of a Fentanyl Analogue.

[17] Royal Law et al., *Notes from the Field: Increase in Reported Adverse Health Effects Related to Synthetic Cannabinoid Use — United States, January–May 2015*, MORBIDITY AND MORTALITY WEEKLY REPORT , June 12, 2015, at 64(22);618-619, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6422a5.htm?s_cid=mm6422a5_w; Donna M. Bush & David A. Woodwell, *Update: Drug-Related Emergency Department Visits Involving Synthetic Cannabinoids*, THE CBHSQ REPORT October 16, 2014 , http://www.samhsa.gov/data/sites/default/files/SR-1378/SR-1378.pdf.

[18] AMERICAN ASS'N OF POISON CONTROL CTRS., SYNTHETIC MARIJUANA DATA (2015), https://aapcc.s3.amazonaws.com/files/library/Syn_Marijuana_Web_Data_through_8.12.15_EzSJJxV.pdf (reporting 6968 calls in 2011, 5230 calls in 2012, 2668 in 2013, 3682 in 2014, and 5369 from January 1st through August 17th, 2015). Recent law enforcement data indicates some declines in the use of the leading synthetic drugs.

[19] Bush and Woodwell, *supra* note 16.

seizure, coma and death.[20] Adverse effects following ingestion of AM2201 have been reported to include convulsions, intractable abdominal pain, nausea, vomiting, confusion, disorientation, psychiatric complications including self-induced lethal trauma and death.[21]

Adverse effects associated with the consumption of methylone, mephedrone and MDPV include palpitations, hyperthermia, seizures, hyponatremia, bruxism, sweating, hypertension, tachycardia, headache, thirst, mydriasis, tremor, fever, confusion, psychosis, paranoia, hallucinations, combativeness, agitation, and death.[22] Excited delirium, a condition characterized by agitation, aggression, acute distress and sudden death,[23] is also associated with MDPV.

The Administration is concerned about these psychoactive substances because of their composition of highly dangerous substances that elicit serious and even lethal outcomes. This danger, coupled with easy access, has made them responsible for an unprecedented amount of hospital emergency department admissions and Medical Examiner reports.[24] Acting Administrator of the DEA Chuck Rosenberg used three simple words to describe the propagation for these substances to Senate Judiciary Committee: vile, volatile, and lethal.[25]

The FDA has developed significant research over the harmful nature of these substances and the necessary need for regulation.[26] The Synthetic Drug Abuse Act Prevention Act (SDAPA), which is part of the FDA Safety and Innovation Act of 2012, [27] permanently placed 26 substances into Schedule I of the Controlled Substances (CSA).[28] All, but one of the compounds recommended for marijuana equivalency in this letter are classified into Schedule I through SDAPA.

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[20] Gurney SMR, Scott KS, Kacinko SL, Presley BC, Logan BK (2014), 26(1) *Pharmacology, Toxicology, and Adverse Effects of Synthetic Cannabinoid Drugs*, FORENSIC SCI. REV. 54-78.
[21] *Id*.
[22] J.M. Pearson et al., *Three Fatal Intoxications Due to Methylone*, 36 J. ANALYTICAL TOXICOLOGY 444-451 (2012); B. Warrick et al., *Lethal Serotonin Syndrome After Methylone And Butylone Ingestion*, 8 J. MED. TOXICOLOGY 65-68 (2012); B. Cawrse et. al., *Distribution of Methylone in Four Postmortem Cases*, J. OF ANALYTICAL TOXICOLOGY 36, 434-439 (2012); ; J. Wyman et al., *Postmortem Tissue Distribution of MDPV Following Lethal Intoxication by "Bath Salts*," J. OF ANALYTICAL TOXICOLOGY 37, 182-185 (2013); B. Murray et. al., *Death Following Recreational Use Of Designer Drug "Bath Salts" Containing 3,4-Methylenedioxypyrovalerone (MDPV)*, J. MED. TOXICOLOGY 8, 69-75 (2012); K. Kesha et al., *Methylenedioxypyrovalerone ("Bath Salts"), Related Death: Case Report And Review Of The Literature*, J. OF FORENSIC SCI. 58, 1654-1659 (2013).
[23] Takeuchi A, Ahern T, Henderson S, *Excited Delirium*, WEST J. EMERG. MED. 12(1): 77-83 (2011).
[24] *Deadly Synthetic Drugs: The Need to Stay Ahead of the Poison Peddlers Before the Sen. Comm. On the Judiciary*, 114th Cong. 2 (2016) [hereinafter *Deadly Synthetic Drugs*] (testimony of Dr. Douglass Throckmorton, Deputy Director for Regulatory Programs, Center for Drug Evaluation and Research, Food and Drug Administration NY).
[25] *Deadly Synthetic Drugs*, supra note 22, (testimony of Chuck Rosenberg, Acting Administrator, Drug Enforcement Administration).
[26] Often, these drugs are labelled with captions reading, "not for human consumption", to mask their intended purpose and avoid Food and Drug Administration (FDA) regulatory oversight of the manufacturing process and and prosecution under the analogue provisions of the CSA.
[27] Food and Drug Administration Safety and Innovation Act, P.L. 112-144 Sub D §1151, "Synthetic Drug Abuse and Prevention Act of 2012." (2012).
[28] *Deadly Synthetic Drugs, supra* note 22 at 11 (testimony of Michael Botticelli Director, Office of National Drug Control), https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Botticelli%20Testimony.pdf.

The Congress and the Administration's initiatives to schedule these substances, through SDAPA, and via temporary and permanent scheduling efforts before SDAPA was enacted, and in cases where SDAPA did not schedule them, indicate their support for an increased level of control and clarity regarding these dangerous substances. The FDA conducts a scientific and medical evaluation, involving an 8-factor analysis, considering the pharmacological makeup and physiological effects of these synthetic substances. The FDA's and the DEA's internal processes have determined that there is a critical need to protect the public from the dangers posed by these substances.[29] None of the five drugs recommended for equivalency guidelines have known legitimate medical or industrial uses and are not approved by the FDA for use in medicine.[30]

Why Equivalencies Are Necessary for these Specific Synthetics

It is true that creating guidelines for these five substances will not address the potentially hundreds of variations of synthetic substances that exist today or may exist in the future. However, specific equivalencies will go a long way at remedying problems that arise from these particularly troublesome substances.

According to the DEA in its 2011 report analyzing mephedrone, methylone, and MDPV and recommending temporary scheduling under schedule I, these drugs were "the most commonly encountered synthetic cathinone. . . represent[ing] more than 98% (1,401 of 1,429) of the synthetic cathinones that have been encountered by law enforcement."[31] The report also observed that at the time of its publishing, the abuse of these drugs was growing, with poison control centers receiving 4,137 calls in forty-seven states and the District of Columbia relating to these three specific products.[32] Indeed, these specific substances are the object of intense international drug smuggling. As the Federal Register observed in the final order before the scheduling of JWH-018, that drug was extensively "encountered by U.S. customs and Border Protection in 2010. One enforcement operation encountered five shipments of JWH-018 totaling over 50 kilograms[.]"[33]

As to whether the problem persists, Cathy Lanier, Chief of the Washington D.C. Police Department, in her testimony before the Senate Judiciary Committee on June 7, 2016, observed that drugs like those at issue here have a "higher impact than other drugs frequently used on the street," causing side effects like "extreme anxiety, paranoia, panic attacks, psychotic episodes,

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[29] *Deadly Synthetic Drugs*, *supra* note 22, at 2-4 (testimony of Dr. Douglass Throckmorton, Deputy Director for Regulatory Programs. Center for Drug Evaluation and Research, Food and Drug Administration), https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Throckmorton%20Testimony.pdf

[30] *Deadly Synthetic Drugs*, *supra* note 22, at 1- 2 (testimony of Chuck Rosenberg, Acting Administrator, Drug Enforcement Administration).

[31] *Background, Data and Analysis of Synthetic Cathinones: Mephedrone (4-MMC), Methylone (MDMC) and 3,4-Methylenedioxypyrovalerone (MDPV)*, DEA, 4 (Aug. 2011). www.regulations.gov/document?=DEA-2011-0008-0002. The report also notes that "Of all the reports, (1,429) of synthetic cathinones recorded by NFLIS from January 2009 to June 2011, 55% (791) were MDPV, 23% (331) were mephedrone, and 20% (279) were methylone." *Id.*

[32] *Id.* at 11.

[33] Schedules of Controlled Substances: Temporary Placement of Five synthetic Cannabinoids into Schedule I, 76 Fed.Reg. 11075, 11075-11078 (Mar. 1, 2011).

and hallucinations."[34] Moreover, Lanier stressed that a lack of specific sentences encouraged the distribution of these substances—because "penalties were neither swift nor certain . . . small businesses such as gas stations and convenience stores continued to sell synthetic drugs."[35]

Creating Sentencing Equivalencies Will Unburden Courts and Prosecutors

Creating sentencing guidelines for these specific controlled substances will unburden the Department of duplicative work at the sentencing phase and free valuable court, prosecutor and scientific resources. Courts must determine that the controlled substance not referenced in the guidelines 1) has a chemical structure that is substantially similar to a controlled substance referenced in the guideline; 2) that the substance has a stimulant, depressant, hallucinogenic effect that is substantially similar to a controlled substance referenced in the guideline; and 3) the quantity of the controlled substance not referenced in the guideline is necessary to produce a substantially similar effect substantially similar to a controlled substance referenced in the guideline. [36]

In his testimony before the Senate Judiciary Committee on June 7, 2016, DEA Acting Administrator Chuck Rosenberg explained to Senator Grassley how a lack of specific sentencing equivalencies hamstrings law enforcement, without which "prosecutors are required to produce evidence addressing the factors identified in the relevant guidelines," and that in addition courts must hear from expert witnesses, including DEA scientists who are also responsible for evaluating new substances for scheduling, "at every sentencing hearing … a time consuming,

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[34] *Deadly Synthetic Drugs*, *supra* note 22, at 1 (statement of Cathy L. Lanier, Chief of Police for the District of Columbia).

[35] *Id.* at 2.

[36] As discussed above, guidelines list only a limited number of substances in a drug quantity table. When a substance is not listed in the drug quantity table, the Court must determine the most closely related controlled substance listed in the guidelines to convert the substance to a "marijuana equivalency," which is the used to determine the defendant's base offense level under the guidelines. Application Note 6 to U.S.S.G. § 2D1.1 explains the resource intensive and cumbersome process as follows:

> "In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marihuana equivalency of the most closely related controlled substance referenced in this guideline. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:
>
> > (A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.
> >
> > (B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.
> >
> > (C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline."

esource intensive, and inefficient process."[37] As noted by Acting Administrator Rosenberg, much of this work is duplicative, and the Commission could alleviate the burden at sentencing by setting specific equivalencies.

Setting Equivalencies Provides Defendants with Notice, Serves as a Deterrent to Drug Traffickers, Provides for Consistency in Sentencing, and Further Legitimizes the Sentences Handed Ordered by Judges

Creating specific sentencing equivalencies will also provide greater consistency to sentences for similarly situated defendants. As observed by the DEA in testimony before the Senate Judiciary Committee: "[d]ifferent courts have reached very different results for the same substance which has resulted in disparate sentences for similarly situated offenders."[38] Because new sentencing equivalencies will provide greater consistency in how similarly situated defendants are treated, it follows this consistency will provide greater notice to criminal defendants about the penalty they can expect for trafficking and distributing these five illegal analogues. This greater notice serves as a deterrent, and helps to effectuate the Department's effort to decrease and stymie the efforts of drug traffickers. Finally, greater notice also increases the legitimacy of the sentence handed down by the judge.

Equivalencies: MDPV is Comparable to Methcathinone and Methamphetamine but at least as Potent as Methamphetamine

Regarding MDPV, the Department recommends that the Commission begin with the marijuana equivalency currently used for methcathinone, which has a marijuana equivalency ratio of 1:380, but then impose a ratio consistent with both the available scientific information and the harms to the public. The substance 3,4-Methylenedioxy-pyrovalerone (MDPV) is closely related in structure and pharmacology to phenethylamines such as the schedule I and II stimulants amphetamine, methamphetamine, and methcathinone, each of which has a different marijuana equivalency in the guidelines.

Moreover, retrospective studies observing humans admitted to poison centers in Louisiana and Kentucky confirmed defects in patients who had ingested so-called "bath salts" such as MDPV. "The most common clinical effects reported were agitation, combative violent behavior, tachycardia [abnormally accelerated heart rate], hallucinations, confusion, myoclonus [muscle spasms], hypertension, chest pain and mydriasis [dilatation of the pupil]."[39]

Methylone and Mephedrone as Comparable to MDMA

Regarding the equivalency to be used for methylone and mephedrone, the Department proposes that the Commission use the marijuana equivalency currently used for MDMA, which

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[37] *Deadly Synthetic Drugs*, *supra* 22, at 4-5 (statement of Chuck Rosenberg, Acting Administrator, DEA, https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Rosenberg%20Testimony.pdf). *See* also *Deadly Synthetic Drugs*, supra 22, at 5 (testimony Michael Botticelli Director, Office of National Drug Control).

[38] *Id.* at 5.

[39] Declaration of Cassandra Prioleau, Ph.D. at 5i, United States v. McFadden, 753 F.3d 432, 445 (4th Cir. 2014) (No. 312CR00009), 2012 WL 12055116.

has a marijuana equivalency ratio of 1:500. This is based both on determinations grounded in court decisions based upon expert testimony, as well as independent scientific research. For example, the Eastern District of New York determined that methylone was comparable to MDMA for sentencing.[40] The validity of this comparison is supported by independent neuropsychological research, which examined the neurological effect of both methylone and mephedrone on rats. Both "exhibit[ed] potency and selectivity comparable to MDMA[.]"[41] Moreover, the study found methylone to be "about half as potent" as MDMA.[42] The result of this recommendation is an equivalency of 1:500.[43]

JWH-018 and AM-2201 are Comparable to THC

Regarding JWH-018 and AM-2201, the Department recommends that the Commission begin the analysis by looking at THC, which has a marijuana equivalency of 1:167. This equivalency would follow the holdings of both the Fifth and Eighth Circuits, which have held that AM-2201 is comparable to THC.[44] In *United States v. Malone*, the Fifth Circuit upheld the determination by the district court, which relied on expert testimony that rats reacted similarly to both JWH-018 and AM-2201, and that both of these synthetic drugs reacted similarly to THC.[45] Likewise, in *U.S. v. Carlson*, the Eighth Circuit determined after extensive expert testimony that JWH-018 should be sentenced under the marijuana equivalency for THC.[46]

However, in the World Health Organization's (WHO) Critical Review Report of AM-2201, the WHO reported that the effects of AM-2201 are more potent than those of THC: "when smoked, AM-2201 produces cannabimimetic effects in doses lower than the doses of Delta-9-tetrahydcrocannibinol (THC) needed to produce effects of similar strength (higher potency)."[47] The WHO also noted in its report the deleterious effects, and complete lack of medical use of AM-2201.[48]

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[40] *See United States v. Chin Chong*, No. 13 Cr. 570, 2014 WL 4773978 (E.D.N.Y. Sept. 24, 2014).
[41] Michael H. Baumann, et al. *The Designer Methcathinone Analogs, Mephedrone and Methylone, are Substrates for Monoamine Transporters in Brain Tissue*, 37 NEUROPSYCHOPHARMACOLOGY 1192, 1194 (2012), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3306880/.
[42] *Id.*
[43] It is worth noting that the Eastern District adopted the equivalency of MDMA used by the Southern District of New York, which diverged from the guidelines and instead set the equivalency at 1:200. *See* United States v. McCarthy, No. 09 Cr. 1136, 2011 WL 1991146, at *4 (S.D.N.Y. May 19, 2011); United States v. Qayyem, No. 10. Cr. 19(KMW), 2012 WL 92287, at *8 (S.D.N.Y. Jan. 11, 2012). The S.D.N.Y.'s reasoning in for diverging from the Guidelines was that "a 500:1 MDMA-to-marijuana equivalency would give rise to a sentence that is greater than necessary to serve the objectives of sentencing." *McCarthy*, 2011 WL 1991146, at *1. The Department supports the Commission adopting an approach consistent with existing guidelines.
[44] *See* U.S. v. Stanford, No. 15–30127, 2016 WL 2909203 (5th Cir. May 18, 2016); U.S. v. Ramos, 814 F.3d 910 (8th Cir. Feb. 09, 2016); U.S. v. Carlson, 810 F.3d 544 (8th Cir. Jan. 14, 2016); U.S. v. Malone, 809 F.3d 251 (5th Cir. 2015).
[45] *Malone*, 809 F.3d at 255.
[46] *Carlson*, 810 F.3d at 556.
[47] EXPERT COMM. ON DRUG DEPENDENCE, WHO, AM-2201 CRITICAL REVIEW REPORT 7 (Jun. 16-20, 2014).
[48] "AM-2202 is clandestinely manufactured, of especially serious risk to public health and society, and of no recognized therapeutic use by any party. Preliminary data collected from literature and different countries indicated that this substance may cause substantial harm and that it has no medical use." *Id.* at 8.

As discussed above, adverse health incidents following ingestion of JWH-018 have included, among other things, delusions, paranoia, seizures, coma and death,[49] and following the ingestion of AM2201 have included convulsions and psychiatric complications including self-induced lethal trauma and death.[50] In addition, as discussed above, and as discussed recently before Congress, these two substances were manufactured and trafficked specifically to skirt our laws and regulations and to evade the reach of law enforcement and the courts.

The Department therefore recommends that the Commission provide for an increase to the equivalency for JWH-018 and AM-2201 as compared to THC, by a factor of four, consistent with how fentanyl and fentanyl analogue are currently treated in guidelines,[51] and how fentanyl and fentanyl analog are treated in the Controlled Substances Act.[52] The result is a marijuana equivalency of 1:668.

III. Simplify the Guidelines by Eliminating the Misleading Term "Marijuana Equivalency"

As discussed in excruciating detail above, for drugs not listed in the Drug Quantity Table, the guidelines require the computation of "marijuana equivalencies." For example, in the case of opium, the guidelines instruct that rather than convert it to heroin, it must be converted to a marijuana equivalency.[53] This results in great confusion for those not versed in the guidelines, as the first question that comes to mind is "why are we comparing this drug to marijuana, given that they have so little in common?"

We do not dispute that the Drug Quantity Table must have a reference category. But as the Commission notes, "equivalent" is a term of art.[54] As such, the Department recommends that the Commission eliminate the term "marijuana equivalency." As demonstrated in the discussion above on the creation of marijuana equivalencies, the term is misleading, and, as acknowledged by the Commission, is a term of art. The Commission could instead use the term "equivalency unit." This would simplify the guidelines so that individuals not fully versed in their inner workings can better understand and follow the way guidelines ranges are calculated for a given substance.

IV. Knowing Endangerment for Offenses Involving the Clean Water Act, the Resource Conservation and Recovery Act, and the Clean Air Act

From major environmental catastrophes like the BP Deepwater Horizon disaster to significant incidences of polluted water, air, and land over the last several decades, federal environmental regulation has served as the foundation for enforcing basic public health

[49] Gurney *et. al.*.
[50] *Id*.
[51] *See* §2D1.1(c) (Drug Quantity Table).
[52] *See* 21 U.S.C. § 841 (b)(1)(A)(vi) and (B)(vi).
[53] *See* U.S. SENTENCING COMM'N., DRUG PRIMER, 10 (March 2013), http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Drug.pdf.
[54] *Id*.

protections. While varying forms of pollution have long been federal offenses, it wasn't until the 1980s that Congress enacted the knowing endangerment provisions to three of our Nation's pollution statutes – the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act.[55] Most recently, in June of 2016, a knowing and willful endangerment provision was added to the Toxic Substances Control Act.[56]

The Clean Water Act limits the discharge of pollutants into navigable waters; the Clean Air Act regulates the emission of hazardous air pollutants; the Resource Conservation and Recovery Act governs the control, management and disposal of hazardous wastes; and the Toxic Substances Control Act addresses the production, importation, use and disposal of dangerous chemicals.[57] The knowing endangerment provision of these laws apply where the defendant knowingly violates the underlying statute while also knowing that the violation puts another person in imminent danger of death or serious bodily injury.[58] Culpable individuals face a maximum term of incarceration of fifteen years, an enhanced penalty that reflects a rational and necessary effort to protect public safety. However, the sentencing guideline applicable to these offenses does not come close to providing for the maximum term of incarceration in any circumstance, and is therefore at odds with the intent of Congress in passing these provisions. Increasing the base offense level for §2Q1.1 (Knowing Endangerment Resulting from Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants) would address this discrepancy.

The knowing endangerment provisions are assigned to §2Q1.1,[59] A defendant sentenced for a knowing endangerment violation has a base offense level of 24 under §2Q1.1. There are no specific offense characteristics.[60] The sentencing guidelines range for such a defendant with a criminal history category of I would be 51 – 63 months, nowhere near the statutory maximum. Assuming that Congress intended the statutory maximum to be reached only for defendants with extensive criminal history (rather than the circumstances of the offense), the sentencing guidelines range for a defendant within the highest criminal history category of VI would be 100 – 125 months, over four and one-half years short of the fifteen year maximum term of incarceration.

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[55] These provisions are found in the Clean Water Act, 33 U.S.C. § 1319(c)(3); the Clean Air Act, 42 U.S.C. § 7413(c)(5); and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(e), which deals with hazardous waste. Under both the Clean Water Act and the Clean Air Act, a second violation under the knowing endangerment provision carries a maximum term of thirty years.

[56] See H.R. 2567, Frank Lautenberg Chemical Safety for the 21st Century Act, Title I, Section 12. This new endangerment provision in the Toxic Substances Control Act has not yet been assigned to a guideline. Currently, all of the violations of the Toxic Substances Control Act fall under §2Q1.2. The new endangerment provision is the only felony in that statute.

[57] 33 U.S.C. § 1251(a), 42 U.S.C.A. § 7401(b)(1), 42 U.S.C. § 6902(b), 15 U.S.C. § 2601(a).

[58] *Id.*

[59] While §2Q1.2 lists all Clean Air Act criminal violations and §2Q1.1 does not include the Clean Air Act's knowing endangerment provision, Appendix A shows that provision as assigned to §2Q1.1. The Clean Water Act and RCRA knowing endangerment provisions were assigned to §2Q1.1 when the sentencing guidelines were initially created. Other violations of those two statutes fall under either §2Q1.2 or §2Q1.3, depending upon the nature of the pollutant. The knowing endangerment provision in the Clean Air Act was not enacted until 1990. However, all of the criminal provisions of that Act including knowing endangerment remained attached to §2Q1.2 or §2Q1.3, although Appendix A suggests otherwise. This oversight should be corrected.

[60] The Application Note to USSG §2Q1.1 does allow for an upward departure "[i]f death or serious bodily injury resulted . . . ." Application Note 6 to USSG §2Q1.2 has similar language.

In contrast, an offense level calculation under §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) for the same set of facts but not charged as knowing endangerment could result in a higher sentencing guidelines range than that available under §2Q1.1. Depending on the specific offense characteristics present, a defendant with the lowest criminal history category could face a sentencing guidelines range of 37 – 46 months (offense level of 21) to 108 – 135 months (offense level of 31). [61] The base offense level of 24 for §2Q1.1 would expose an offender only to approximately one-third the maximum statutory incarceration before any consideration of aggravating factors or departures.

To illustrate, take a defendant with a criminal history category of III convicted knowing disposal of a hazardous waste without a permit under the Resource Conservation and Recovery Act.[62] If the defendant were charged and convicted of knowing disposal of a hazardous waste without a permit and not a knowing endangerment violation, his sentence would be calculated under §2Q1.2. However, while a knowing disposal of hazardous waste without a permit could result in a recommended sentencing guidelines range of 135 – 168 months (offense level of 31, criminal history of III), the statutory maximum term of incarceration is five years, and so the sentence cannot exceed 60 months. On the other hand, if the defendant were charged and convicted of Resource Conservation and Recovery Act knowing endangerment, even though he is subject to a statutory maximum of 15 years, the recommended guidelines range under §2Q1.1 would be 63 - 78 months (offense level of 24, criminal history of III).

Sentencing guidelines for the worst offenders should result in a calculation at or near the statutory maximum; yet §2Q1.1 does not result in a sentencing range that includes the maximum fifteen year term of incarceration even for defendants with the most extensive criminal histories.[63] With a criminal history score of VI, an offense level of 29 results in a recommended guideline range of 151-188 months, or 12.6 – 15.7 years. We ask the Commission to increase the base offense level for §2Q1.1 to 29, so that the maximum of the guideline range properly reflects the heightened fifteen year maximum term of incarceration provided by statute. Increasing the offense level for §2Q1.1 to 29 would reflect the intent of Congress when it enacted the knowing endangerment provisions of these statutes. It would allow for a progressively higher term of incarceration at each criminal history level, to nearly the statutory maximum of fifteen years. It also would reflect that such offenses are taken more seriously and that just as the knowing endangerment statutory provisions carry a higher maximum term of incarceration, the sentencing guidelines should also result in a higher sentencing range.

V. Amend the Guidelines for Tax Offenses Involving Hidden Offshore Bank Accounts

[61] USSG §2Q1.2(b)(2) calls for an increase of nine levels "[i]f the offense resulted in a substantial likelihood of death or serious bodily injury."
[62] 42 U.S.C. § 6928(d)(2) (1976).
[63] § 13.02 *Offenses Involving the Environment, in* PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES (David Debold, et al. eds., 5th ed., 2014).

A top priority for the Department of Justice is combating the use of secret offshore bank accounts to violate the tax laws. Increased technical sophistication of financial instruments and the widespread use of the Internet have made it increasingly easy to move money around the world. According to reports, the use of secret offshore accounts to evade U.S. tax laws costs the Treasury at least $100 billion annually.[64] The United States has cracked down on tax evasion through criminal and civil enforcement actions, including successful enforcement actions against dozens of Swiss banks. Prompted by the threat of criminal prosecution, thousands of U.S. individuals have come forward voluntarily to disclose offshore accounts and pay back taxes and penalties.

On May 5, 2016, the Administration announced several important steps intended to strengthen the global financial system and provide greater transparency, in an effort to combat money laundering, corruption, and offshore tax evasion.[65] The announcements included new rules to increase transparency and disclosure requirements that will enhance law enforcement's ability to detect, deter, and disrupt money laundering, terrorist finance, and tax evasion.[66] The Administration also noted that disclosure of the so-called "Panama Papers" – millions of leaked documents reportedly revealing the use of anonymous offshore shell companies – not only brought the issues of illicit financial activity and tax evasion into the spotlight, but underscored the importance of deterring criminals and tax cheats from hiding their funds offshore. The Administration called upon Congress to take additional action to address these critical issues.

The success of that initiative, however, depends in large part in criminally prosecuting those who do not voluntary disclose. The linchpin of that effort is 31 U.S.C. § 5314 (records and reports on foreign financial agency transactions), which obligates U.S. citizens and resident aliens to report financial accounts in a foreign country with an aggregate value of more than $10,000.[67] When a defendant earns income from an offshore account and willfully conceals the existence of the account from the Government in order to avoid paying taxes on the income, the Tax Division charges violations of § 5314 under § 5322 (criminal penalties), which provides for a maximum penalty of 5 years, and an increased penalty of 10 years "while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period."[68]

Appendix A of the guidelines references § 5322 to USSG §2S1.3 (Money Laundering and Monetary Transaction Reporting). Section 2S1.3 provides a base offense level of 6, plus the number of offense levels from the table in §2B1.1 corresponding to the total amount that went unreported.[69] Significantly, however, §2S1.3(b)(3) provides that the offense level is reset back to 6 if the funds were income from a legal source and no sentencing enhancement under §2S1.3 applies.

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[64] *See, e.g.*, STAFF REP. S. PERM. SUBCOMM. ON INVESTIGATIONS, 111th Cong., TAX HAVEN BANKS AND U.S. TAX COMPLIANCE, at 1 (July 17, 2008).
[65] *See* Fact Sheet: Obama Administration Announces Steps to Strengthen Financial Transparency, and Combat Money Laundering, Corruption, and Tax Evasion (May 5, 2016), https://www.whitehouse.gov/the-press-office/2016/05/05/fact-sheet-obama-administration-announces-steps-strengthen-financial.
[66] *Id*.
[67] 31 U.S.C. § 5314 (2012).
[68] 31 U.S.C. § 5322(b) (2012).
[69] USSG §2S1.3(a)(2).

Notably, §2S1.3(b)(2) was added in 2002 in response to statutory amendments providing for the enhanced criminal penalty provisions under 31 U.S.C. § 5322(b).[70] Yet the guideline omits the language in the statute "while violating another law of the United States," thus failing to capture the full Congressional intent. As a result, if a defendant is sentenced as though the funds in the undisclosed foreign bank account were amassed legally and used for a lawful purpose, the Government's ability to avoid the reset to offense level 6 is largely limited to proving that the enhancement under §2S1.3(b)(2) applies; i.e., that the defendant "committed the [Title 31] offense as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period."

It is the Department's litigating position that a defendant's failure to pay tax on the income generated by unreported funds in an unreported foreign account satisfies the "pattern of unlawful activity" requirement because the conduct would violate both the tax laws and the offshore-account reporting requirement. But we believe adding the phrase "while violating another law of the United States" to §2S1.3(b)(2) would remove any ambiguity on that point, thus fulfilling the provision's purpose of "giv[ing] effect to the enhanced penalty provisions under 31 U.S.C. § 5322(b)."

Our proposed fix is simple and straightforward. We ask that the Commission amend USSG §2S1.3 so it matches the currently enacted statutory enhancement at 31 U.S.C. § 5322(b). The sentencing enhancement at §2S1.3(b)(2) should apply if the defendant committed a Title 31 offense "while violating another law of the United States or as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period." Such an amendment would ensure that the guidelines are consistent with current statute and that they properly reflect the intent of Congress.

VI. Clarification of § 2T1.1 (offenses involving income taxes and gift taxes, among other things), Application Note 1

We also ask that the Commission amend §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), Application Note 1, to make clear that loss in tax cases includes penalties and interest not only where a defendant's willful non-payment offense is charged under 26 U.S.C. § 7201 or § 7203, but also where such conduct is charged under a different statute, such as under 18 U.S.C. § 371 (Conspiracy).

Application Note 1 to §2T1.1 states that "tax loss" is defined in subsection (c), which states that "the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)." Application Note 1 also states that "[t]he tax does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203." Application Note 7 to §1B1.3 (Relevant Conduct), in turn, instructs that although "[a] particular

[70] *See* USSG app. C, vol. II, amend. 637, supp. at 244 (2002).

guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute," "use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute." "An example of this usage," the Application Note states, "is found in §2A3.4(a)(3) ('if the offense involved conduct described in 18 U.S.C. § 2242')."

In *United States v. Black*, a Seventh Circuit panel initially held that Application Note 1 to §2T1.1 categorically barred the inclusion of penalties and interest as the defendant had been convicted under 26 U.S.C. 7212(a) (corrupt or forcible interference with internal revenue laws), not § 7201 or § 7203; but the court held on panel rehearing that penalties and interest could be included because the defendant's obstructive conduct was intended to evade the payment of his tax debt (which also included penalties and interest), and thus "was tantamount to 26 U.S.C. § 7201 and § 7203 conduct."[71] In so ruling, the court stated while "it is not clear whether the 'cases under 26 U.S.C. § 7201 or § 7203" language requires at least a charge, "the absence of a statement in the guidelines asserting that the indictment must contain a charge under either statute supports our interpretation that it does not.[72]

To provide the clarity the Seventh Circuit noted was missing, Application Note 1 to §2T1.1 should be amended so it states that "[t]he tax does not include interest or penalties, except *where the offense involved* willful evasion of payment conduct described in 26 U.S.C. § 7201 *or* willful failure to pay conduct described in 26 U.S.C. § 7203." (Emphasis supplied to also suggest the disjunctive "or" is more appropriate.) Adding that language will make clear that, where the object of a defendant's tax crime was to evade the payment of a tax debt that included not only tax but penalties and interest, "what being evaded is what's owed," irrespective of the particular tax statute used.[73]

VII. Amend the Sophisticated Means Enhancement in §2T1.1(b)(2) and §2T1.4(b)(2) to Conform to the 2015 Amendment Narrowing the Enhancement for Sophisticated Means in §2B1.1(b)(1)((C)

In November 2015, the Sentencing Commission made a number of amendments related to fraud. One amendment was to the commentary for §2B1.1(b)(10)(C), the sophisticated means enhancement. The amendment to §2B1.1(b)(10)(C) narrowed the adjustment to cases in which the "defendant intentionally engaged in or caused conduct constituting sophisticated means"; previously the enhancement applied if "the offense otherwise involved sophisticated means." For clarity and consistency, the Commission should make conforming amendments to the commentary of the sophisticated means enhancements in §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or

[71] 815 F.3d 1048, 1055 (2016) *amending* 798 F.3d 570 (2015).
[72] *Id*. *Accord* United States v. Thomas, 635 F.3d 13, 17-18 (1st Cir. 2011) (Application Note 1 to USSG § 2T1.1 does not limit the inclusion of penalties and interest to defendants convicted of willful evasion of payment under 26 U.S.C. § 7201 or willful failure to pay under 26 U.S.C. § 7203).
[73] United States v. Josephberg, 562 F.3d 478, 503 (2d Cir. 2009).

Other Documents) and §2T1.4 (Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud).

VIII. Circuit Split Concerning Defendants Who Fraudulently Obtain Government Contracts Under the Small Business Administration by Misrepresenting Their Qualifications as a Small Disadvantaged Business (SDB)

Under the Small Business Jobs Act of 2010,[74] Federal agencies are to set-aside a certain proportion of contracts for "socially and economically disadvantaged individuals."[75] There is now a circuit split regarding whether courts should deduct from the sentencing loss calculation the fair market value of services rendered under contracts set aside for minority-owned businesses that have been obtained fraudulently.[76] The Commission should amend §2B1.1 (Theft, Property Destruction, and Fraud) to clarify that the "government benefits rule"[77] applies to these cases, and to clarify that the "credits against loss rule"[78] does not.

In contrast to the Department's proposed solution, some courts are allowing defendants to deduct from the loss calculation the value of the services rendered. In *Harris*, the defendant was convicted under 18 U.S.C. § 1343 (Fraud by wire, radio or television) in connection with a scheme to obtain government procurement contracts set aside by the Small Business Administration for minority-owned small businesses.[79] The Fifth Circuit held that the district court should have applied the "general rule for loss," such that the loss amount reflected not the total contract price, but rather the contract price less the fair market value of services rendered.[80]

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[74] Pub. L. No. 111-240, 124 Stat. 2504 (2010).

[75] 15 U.S.C.A. §644(g)(2)(A)-(B) (2015). "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudices or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities." 13 C.F.R. §124.103(a). Racial and ethnic minorities are presumed socially disadvantaged. §124.103(b).

[76] *Compare* United States v. Harris, No. 15-50106, 2016 WL 1720046, at *12-14 (5th Cir. Apr. 28, 2016) (rejecting the government benefits rule for procurement contracts) *and* United States v. Martin, 796 F.3d 1101, 1109 (9th Cir. 2015) (same), *with* United States v. Maxwell, 579 F.3d 1282, 1306 (11th Cir. 2009) (applying the government benefits rule in this context); United States v. Leahy, 464 F.3d 773, 789-790 (7th Cir. 2006) (same), *cert. denied*, 552 U.S. 811 (2007); *and* United States v. Brothers Constr. Co. of Ohio, 219 F.3d 300, 317-318 (4th Cir.) (same), *cert. denied*, 531 U.S. 1037 (2000).

[77] Set forth in USSG §2B1.1 cmt. n.3(F)(ii)(Government Benefits).

[78] As described in USSG §2B1.1 cmt. n.3 (E) (Credits Against Loss).

[79] Harris, a retired U.S. Army colonel, was a senior vice president with Luster, a defense contractor. Luster obtained two "set aside" government contracts, for $1.3 million, under Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(1)(A)-(B), (a)(4) which applies to small businesses owned and controlled by "socially and economically disadvantaged individuals." Luster did not qualify as such a business, so Harris used a "pass-through vehicle"—an SBA-approved Section 8(a) company called Tropical—to obtain the contracts. It was never intended that Tropical would do any work under the contracts. This was wire fraud, and the jury found Harris guilty and the court of appeals found the evidence sufficient to support the convictions. The advisory Guidelines range was 70 to 87 months, and the district court varied downward and sentenced Harris to 24 months.

[80] The general rule for loss is found at USSG §2B1.1 cmt. n.3(C) (Estimation of Loss), and it provides that judges have discretion in making a "reasonable estimate of the loss," and that the estimate shall be based upon available information such as the "fair market value of the property unlawfully taken." Since §2B1.1 cmt. n.3(E) (Credits Against Loss), further provides that "[l]oss shall be reduced by . . . the money returned, and the fair market value of the property returned and the services rendered," the result of applying the general rule in this context is that if the defendant completes the contract, there is virtually no loss.

In most of these cases (of lying about qualifying as a small disadvantaged business), this rule will result in a loss calculation of zero, no matter the size of the contract awarded, nor the profit gained. [81]

Other courts have applied the government benefits rule[82] and have not deducted from the loss calculation the value of the services rendered. In *United States v. Maxwell*, a large contracting corporation with offices nationwide was ineligible to apply for a procurement contracts set-aside for small businesses owned or operated by socially or economically disadvantaged individuals. To get around this obstacle, the firm illicitly employed a much smaller business that was qualified to apply for the specialized contracts. After the contract was procured, the ineligible larger firm performed all of the work, and the smaller firm served no commercially useful purpose. The smaller, qualifying firm would receive the payments and pass them onto the larger, non-qualifying firm, and receive a kickback as a result.[83]

The Eleventh Circuit opinion noted that two of its sister circuits had previously held that the government benefits rule should apply to fraud under this SBA program,[84] that a number of other courts came to the same conclusion,[85] applied the government benefits rule, and held that the district court should have applied the full value of the contract to the loss for purposes of §2B1.1.[86] Adding to the confusion, in *United States v. Nagle*, the Third Circuit declined to decide whether the government benefits rule applies, but held nevertheless that the loss was the face value of the contracts minus the fair market value of the services the defendants provided under the contracts.[87]

We brought this issue to the attention of the Commission in 2014, and we highlighted the fact that the Small Business Jobs Act of 2010[88] amended 15 U.S.C. § 632 to provide that the loss to the United States is to be based on the total amount expended on the contract whenever a

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[81] When no loss applies, USSG §2B1.1 provides for a base offense level of 7 (6 in some circumstances), which, before a three level reduction for pleading guilty, results in a recommended sentence range of 0-6 months for defendants with up to one criminal history point, which usually results in a sentence of probation.

[82] The special rule for government benefits at USSG §2B1.1 cmt. n.3 (F)(ii) (Government Benefits) provides that "In a case involving a government benefit . . . loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as they case may be."

[83] United States v. Maxwell, 579 F.3d 1282, 1289-1290 (11th Cir. 2009).

[84] "At least two of our sister circuits have held that the DBE program or a similarly structured municipal program are Government Benefits programs for purposes of § 2B1.1. *See* United States v. Leahy, 464 F.3d 773, 790 (7th Cir. 2006) (holding a city minority contracting program was a Government Benefits program under § 2F1.1 before it was consolidated with § 2B1.1); United States v. Bros. Constr. Co. of Ohio, 219 F.3d 300, 317-18 (4th Cir. 2000) (holding the fraudulent receipt of DBE funds involved the diversion of Government Benefits under the Sentencing Guidelines)." *Maxwell*, 579 F.3d at 1306.

[85] *Id*. at 1306 (citing to United States v. Tulio, 263 Fed. Appx. 258, 263 (3d Cir. 2008) (the Government Benefits provision of §2B1.1 applies to DBE funded contracts "because DBE and similar programs are "affirmative action program[s] aimed at giving exclusive opportunities to certain women and minority businesses," thus making them entitlement program payments.")); United States v. Leahy, 464 F.3d at 790; Bros. Constr. Co. of Ohio, 219 F.3d at 317-18; and Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 217 (2000) ("Congress has adopted a policy that favors contracting with small businesses owned and controlled by the socially and economically disadvantaged.").

[86] *Maxwell*, 579 F.3d at 1306 ("Thus, the appropriate amount of loss here should have been the entire value of the CSBE and DBE contracts that were diverted to the unintended recipient.").

[87] 803 F.3d 167, 179-183 & n.9 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1238 (2016).

[88] Pub. L. No. 124 Stat. 2504 (2010). *See* Wroblewski, *supra* at 14.

small business concern receives a government contract by misrepresentation. As we suggested in 2014, applying this "credits against loss" rule[89] to these cases is inconsistent with the policy objectives of the Small Business Administration, with current statute 15 U.S.C. § 632, with the Small Business Jobs Act of 2010, and with the intent of Congress.

The Commission should amend the commentary in §2B1.1 to clarify that the government benefits rule applies to cases in which defendants fraudulently obtain contracts by misrepresentation about their qualifications as a small disadvantaged business, and to clarify that the general rule and the credits against loss rule do not apply. This will ensure that those who defraud competitors and the Small Business Administration will be penalized for the whole cost of the contract they fraudulently obtain, which will properly disincentive such behavior.

IX. Commission Research: Re-sentencings Following *Johnson v. United States*

As the Commission is well aware, a number of issues remain unresolved following the Supreme Court's Decision in *Johnson v. United States*,[90] and, despite the recent amendments this year by the Commission to the definition of a crime of violence,[91] uncertainty remains. It would be helpful to the Department, and most likely for Congress as well, if the Commission studied and kept a record of all re-sentencings under *Johnson*. As you know, Congress has been evaluating various options for addressing federal statutes which include the language affected by the decision in *Johnson*, and we would like to work with the Commission to assist in the legislative process.

X. Commission Research: Suspended Sentences for Prior Convictions for Sexual Abuse of a Minor, Sexual assault, and Assault

We also ask that the Commission add to the many valuable studies it conducts each year the study of how suspended sentences for prior convictions for sexual abuse of a minor, sexual assault, and assault are being used to compute guideline ranges in illegal reentry offenses. We highlighted our concerns regarding suspended sentences during this year's amendments to the illegal reentry guideline, when we recommended that convictions which result in probated or suspended sentences, which often receive no criminal history points under the guidelines, should nevertheless not be excluded from receiving enhancements under the illegal reentry guideline (§2L1.2).[92] In our experience, many judges, in particular state court judges, will suspend a sentence if they know that a defendant is going to be deported by the Department of Homeland Security. It would be helpful to see how suspended sentences are incorporated within the new illegal reentry guideline, in practice.

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[89] USSG §2B1.1 cmt. n. (3)(E) (Credits Against Loss).
[90] 576 U.S. __, 135 S. Ct. 2551 (2015).
[91] *See* Amendment to the Sentencing Guidelines, January 21, 2016, http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF.pdf (effective August 1, 2016).
[92] MICHELLE MORALES, ACTING DIRECTOR, OFFICE OF POLICY AND LEGISLATION, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, COMMENT LETTER TO PATTI B. SARIS, CHAIR, U.S. SENTENCING COMM'N, 18 (Mar. 14, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160316/20160316_DOJ.pdf.

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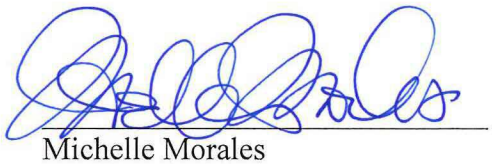
We appreciate the opportunity to provide the Commission with our views, comments, and suggestions and look forward to working with the Commission on the above projects and proposals.

Sincerely,



Michelle Morales
Acting Director, Office of Policy and Legislation

cc: Commissioners
Ken Cohen, Staff Director
Kathleen Grilli, General Counsel

APPENDIX A: Data from the National Forensic Laboratory Information System

(Note on source of data:[93])

Number of Cases Involving Particular Controlled Substances

		2011	2012	2013	2014	Total
Synthetic Cannabinoids	JWH-018 1-Pentyl-3-1-(1-Naphthoyl)Indole)	3,274	1,112	368	124	4,878
	AM-2201 (1-(5-Fluoropentyl)-3-(1-Naphthoyl)Indole)	7,483	14,678	1,250	312	23,723
Synthetic Cathinones	MDPV Methylenedioxypyrovalerone	3,678	3,694	1,118		8,816
	Methylone N-Methyl-3,4-Methylenedioxycathinone	1,816	4,257	10,621	3,843	20,537
	4-MMC,Mephedrone	338	71	33	6	448

[93] NFLIS queried March 19, 2015. Category query, Federal, state, and local forensic laboratories, by submission date, all drugs reported. DEA/OD/ODE/ODED.

DEPARTMENT OF THE TREASURY
ALCOHOL AND TOBACCO TAX AND TRADE BUREAU
Assistant Administrator, Field Operations
1310 G Street, NW, Room 200W
Washington, D.C. 20220

FEB 29 2016

AF-96265

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C., 20002-8002

Dear Chief Judge Saris:

On behalf of the U.S. Department of Treasury, Alcohol and Tobacco Tax and Trade Bureau (TTB), this letter recommends minor modifications to the United States Sentencing Commission's *Guidelines Manual* (Manual) as they pertain to certain alcohol and tobacco-related offenses under TTB jurisdiction.

A. Background

TTB is a Treasury Department agency responsible, in pertinent part, for enforcing and administering Chapters 51 and 52 of the Internal Revenue Code of 1986 (IRC), 26 U.S.C. §§ 5001 – 5763, which regulate and impose taxes upon alcohol and tobacco products produced in or imported into the United States.[1] The Manual currently addresses certain alcohol and tobacco-related offenses in Chapter 2, Part T, subpart 2 (Alcohol and Tobacco Taxes), Sections 2T2.1 and 2T2.2. The Introductory Comment to subpart 2 states:

> This subpart deals with offenses contained in Parts I-IV of Subchapter J of Chapter 51 of Subtitle E of Title 26, chiefly 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, and 5762, where the essence of the conduct is tax evasion or a regulatory violation. Because these offenses are no longer a major enforcement priority, no effort has been made to provide a section-by-section set of guidelines. Rather, the conduct is dealt with by dividing offenses into two broad categories: tax evasion offenses and regulatory offenses.

Section 2T2.1 deals with "tax evasion offenses" and the base level of the offense is determined by the tax table. Section 2T2.2 deals with "regulatory offenses" and the base level of these offenses is 4.

[1] TTB was established by the Homeland Security Act of 2002, from its predecessor agency, Bureau of Alcohol, Tobacco, and Firearms, United States Department of the Treasury. *See* 6 U.S.C. § 531(d) *and* Treas. Dep't Order 120-01 (revised), 68 Fed. Reg. 3583 (Jan. 24, 2003).

The Honorable Patti B. Saris

Recently, we discovered that the Manual's Appendix A, "Statutory Index," may categorize some tax evasion offenses as regulatory violations, a result that did not appear to be contemplated when the guidelines were adopted. For example, a recent TTB criminal investigation involved "export only" cigarettes manufactured in the United States and removed from the manufacturer's factory without payment of tax for transfer to an export warehouse (EW) and eventual exportation. This type of tax-free transfer is authorized under 26 U.S.C. § 5704(b). However, rather than being exported, the EW sold the cigarettes domestically and without payment of tax, in violation of 26 U.S.C. § 5762(a)(4). Although this crime resulted in a significant tax loss, Appendix A classifies it solely under section 2T2.2 (a regulatory offense).

This case led us to carefully review all TTB charges in the Manual's Appendix A. On the basis of such review, we recommend several modifications to Appendix A. These recommendations fall into three basic categories: (1) deleting several "statutes of conviction" which have been repealed or are solely regulatory in nature (and do not relate to criminal sanctions); (2) adding certain statutes that impose criminal penalties and do not currently appear in the Manual; and (3) modifying the applicable guideline for certain offenses.

B. Recommended Modifications to the Manual

IRC Section	Subject Matter	Recommended Action	Explanation
5148(1)	Cross reference to § 5691 penalty for nonpayment of special occupational tax	Delete from Appendix A	Repealed
5214(a)(1)	Withdrawal of distilled spirits from bonded premises free of tax or without payment of tax	Delete from Appendix A	This is not a criminal section with fine or sentence. Certain provisions are criminalized under § 5607.
5273(b)(2)	Prohibition on sale for internal human use of medicine or extracts from denatured distilled spirits	Delete from Appendix A	This is not a criminal section with fine or sentence. The conduct is criminalized under § 5607(1).

IRC Section	Subject Matter	Recommended Action	Explanation
5273(c)	Recovery of denatured distilled spirits for reuse in manufacturing	Delete from Appendix A	This is not a criminal section with fine or sentence instructions; see § 5607(4).
5291(a)	Return requirement for materials used in manufacture or recovery of spirits	Delete from Appendix A	This is not a criminal section with a fine or sentence. The conduct is criminalized under § 5605.
5601(a)	Alcohol-related criminal penalties	Keep in Appendix A as-is	This is a criminal section with a fine and/or sentence.
5602	Penalty for distiller tax fraud	Keep in Appendix A as-is	This is a criminal section with a fine and/or sentence.
5603	Penalty relating to records, returns and reports	Keep in Appendix A as-is	This is a criminal section with a fine and/or sentence.
5604(a)	Penalties relating to marks, brands and containers	Keep in Appendix A as-is	This is a criminal section with a fine and/or sentence.
5605	Penalty relating to return of materials used in manufacture of distilled spirits	Keep in Appendix A as-is	This is a criminal section with a fine and/or sentence.
5606	Penalty relating to containers of distilled spirits	List in Appendix A with Guideline 2T2.2	This is a criminal section with fine and/or sentence that imposes a penalty for violating § 5301 and it would constitute a regulatory violation. It is currently omitted from Appendix A.
5607	Penalty for unlawful use, recovery or concealment of denatures distilled spirits	Keep in Appendix A as-is	This is a criminal section with a fine and/or sentence.

IRC Section	Subject Matter	Recommended Action	Explanation
5608	Penalty for fraudulent drawback claims or unlawful relanding	Keep in Appendix A as-is	This is a criminal section with a fine and/or sentence.
5661	Penalty for violation of laws and regulations relating to wine	Keep in Appendix A as-is	This is a criminal section with a fine and/or sentence.
5662	Penalty for alteration of wine labels	Keep in Appendix A as-is	This is a criminal section with a fine and/or sentence.
5671	Penalty for evasion of beer tax and fraudulent noncompliance	Keep in Appendix A as-is	This is a criminal section with a fine and/or sentence.
5672	Brewer failure to keep required records, file returns or otherwise comply	List in Appendix A with Guideline 2T2.2	This is a criminal section with fine and/or sentence that would constitute a regulatory violation. It is currently omitted from Appendix A.
5674	Unlawful production or removal of beer	List in Appendix A with Guideline 2T2.2	This is a criminal section with fine and/or sentence that would constitute a regulatory violation. It is currently omitted from Appendix A.
5681(a)-(c)	Penalty relating to signs	List in Appendix A with Guideline 2T2.2	This is a criminal section with fine and/or sentence that would constitute a regulatory violation. It is currently omitted from Appendix A.
5682	Penalty for breaking locks or gaining access	List in Appendix A with Guideline 2T2.2	This is a criminal section with fine and/or sentence that would constitute a regulatory violation. It is currently omitted from Appendix A.

IRC Section	Subject Matter	Recommended Action	Explanation
5683	Penalty for removal of liquor under improper brands	List in Appendix A with Guideline 2T2.2	This is a criminal section with fine and/or sentence that would constitute a regulatory violation. It is currently omitted from Appendix A.
5684	Failure to timely pay alcohol-related tax	Delete from Appendix A	This provision is a civil penalty (not a criminal one).
5685(a) and (b)	Penalty for possession of explosives, firearms and devices for emitting gas	Keep in Appendix A as-is	This is a criminal section with a fine and/or sentence.
5686(a)	Penalty for possessing liquor or property intended for use in violating IRC Chapter 51	List in Appendix A with Guideline 2T2.2	This is a criminal section with fine and/or sentence that would constitute a regulatory violation. It is currently omitted from Appendix A.
5687	Penalty for offenses not specifically covered	List in Appendix A with Guideline 2T2.2	This is a criminal section with fine and/or sentence that would constitute a regulatory violation. It is currently omitted from Appendix A.
5691(a)	Penalty for nonpayment of special occupational tax	Delete from Appendix A and introductory comment to Guideline 2T2.1	Repealed
5731(c)	Failure to pay special occupational tax	List in Appendix A with Guideline 2T2.1	This is a criminal section with fine and/or sentence that would constitute a tax evasion offense. It is currently omitted from Appendix A.

IRC Section	Subject Matter	Recommended Action	Explanation
5751(a)(1), (2)	Packaging requirements for sale of tobacco and restriction on purchase/sale if tax not paid	Delete from Appendix A	This is not a criminal section with fine or sentence. The conduct is criminalized under § 5762(a)(5).
5752	Prohibition on tampering with labels	Delete from Appendix A	This is not a criminal section with fine or sentence. The conduct is criminalized under § 5762(a)(6).
5754	Restriction on import of previously exported tobacco products	Continue to exclude from Appendix A[2]	This is not a criminal section with fine or sentencing. The conduct is criminalized under § 5762(b)
5762	Tobacco-related criminal penalties	List in Appendix A with Guideline 2T2.1, 2T2.2	5762(a) offenses should generally be tax evasion offenses and 5762(b) offenses should generally be regulatory offenses. Listing it as recommended would conform this section to other similar sections. Currently, only 5762(a)(3) is listed with 2T2.1 Guideline.[3]

[2] Although section 5754 does not appear in the Manual's Appendix A, we included it in the table above as an example of an internal inconsistency between the Appendix's inclusion of certain statutes that are criminalized elsewhere and its exclusion of similarly situated statutes. If the Commission determines that 26 U.S.C. § 5751 should remain in Appendix A, § 5754 should also be included for consistency.

[3] Appendix A currently lists violations of various provisions in section 5762(a), but omits any reference to section 5762(b), which imposes criminal penalties for tobacco regulatory-related offenses not covered by section 5762(a). We recommend that Appendix A include section 5762 in its entirety. Additionally, the Appendix characterizes only section 5762(a)(3) as being a tax evasion-related offense when, as discussed above, our experience has shown that violations of other sections of section 5762 can result in substantial tax losses as well. For that reason, we recommend referencing both 2T2.1 (alcohol and tobacco tax-related offenses) and 2T2.2 (alcohol and tobacco regulatory offenses) for any violation of IRC section 5762(a). Violations of section 5762(b) should reference section 2T2.2.

C. Conclusion

Thank you for considering our proposals to amend the Manual's Appendix A as they relate to the alcohol and tobacco statutes within TTB's jurisdiction. We believe our suggestions will eliminate irrelevant or expired statutes; lead to consistency in the Appendix's treatment of similarly-situated alcohol and tobacco statutes; allow the government to pursue relevant charges for certain criminal conduct not currently addressed in the Manual; and provide greater flexibility when determining appropriate charges for criminal conduct that results in a tax loss to the United States.

If you have any questions or would like to discuss any of our proposals, do not hesitate to contact [redacted] or by email at [redacted]

Sincerely,

Thomas R. Crone
Assistant Administrator (Field Operations)

CC: Judge Charles R. Breyer
Ms. Dabney Friedrich
Ms. Rachel Barkow
Judge William H. Pryor, Jr.
Ms. Michelle Morales
Ms. J. Patricia Wilson Smoot

FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

Lyric Office Centre
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1634

Chair: Marjorie Meyers Phone: 713.718.4600

July 25, 2016

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

Re: Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2017

Dear Chief Judge Saris:

This letter offers the comments of the Federal Defender Sentencing Guideline Committee on the Commission's proposed priorities for the 2016-2017 amendment cycle. We appreciate that the Commission has proposed several priorities related to issues Defenders have requested the Commission consider.[1] We have previously commented on proposed priorities #1, 2, 4, and 5, and incorporate those comments by reference rather than repeat them.[2] The remainder of this

[1] Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 2 (May 26, 2016) (attached) (discussing alternatives to incarceration, modification of the definitions of prior crimes such as drug offenses, modifying Ch. 5 departure provisions, and acceptance of responsibility).

[2] *See, e.g.*, Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 2 (June 15, 2015) (encouraging Commission to devote its limited time and resources on "improving the advisory guideline system rather than getting immersed in a debate about presumptive guidelines"); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 6-7, 9-10 (May 12, 2014) (discussing how mandatory minimums are key source of sentencing disparity; how the Commission's *Booker* report overstates disparity caused by judges; encouraging the Commission to work with Congress to pass necessary sentencing reform legislation); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 25-31 (May 17, 2013) (in-depth discussion of how "the relevant conduct rules work directly against the goal of eliminating unwarranted disparity" and undermine other goals of the criminal justice system); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 20 (July 15, 2013) (discussing need to narrow the career offender guideline); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B.

letter offers a few additional comments on proposed priorities #4 and #5 and the other proposed priorities.

I. Proposed Priority #3 – Alternatives to Incarceration, Including Possible Amendments to Sentencing Tables and Other Provisions

Defenders are pleased to see that the Commission has proposed focusing on ways to encourage alternatives to incarceration. This is an excellent time to address this issue, as numerous stakeholders recently showed support for alternatives at the Alternative Sentencing Key-Stakeholder Summit (ASKS) at Georgetown University Law Center on March 7-8, 2016.[3] Alternatives to incarceration play a critical role in meeting the purposes of sentencing and are far better than imprisonment at reducing prison crowding, protecting public safety, and meeting a person's rehabilitative needs.[4] As numerous law enforcement officials recently pointed out to the presidential candidates: "over-relying on incarceration does not deter crime" and with "the same offenders reenter[ing] the criminal justice system time and time again, we must be creative and devise innovative programs to reduce recidivism, including job training, addiction counseling, and other productive activities."[5] Encouraging alternatives to incarceration is also

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Saris, Chair, U.S. Sentencing Comm'n (Nov. 25, 2015) (public comment and testimony of Molly Roth on "crimes of violence" and related issues).

[3] The Aleph Institute's ASKS Summit was put together by 24 organizations including The Association of Prosecuting Attorneys, The Coalition for Public Safety, Right on Crime, and The American Conservative Union Foundation. The "Summit Overview" described its purpose: "Alternative sentencing has been at the heart of improving public safety and includes successful sentencing, reentry and other fiscally responsible criminal justice policies and programs both in the U.S. and around the globe. As the U.S. starts 2016 with commitments from the President and Congress to pass meaningful federal criminal justice reform legislation, the time is right to evaluate the role alternative sentencing can play in furthering the key objectives of public safety and fiscal responsibility." http://askssummit.com.

[4] *See* Melissa Hamilton, *Prison-By-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration,* 51 Hous. L. Rev. 1322-23 (2014) ("Studies show that imprisonment does not protect public safety to the extent expected and may actually endanger future communities because of the criminogenic effects of prison. Another study found that defendants 'sentenced to prison failed more often and more quickly than offenders placed on probation and that incarcerated drug offenders had significantly higher recidivism rates than any other offenders.' Other experts acknowledge the likely diminishing returns of the increased rate of imprisonment and reductions in crime. As for prison capacity issues, experts agree that front-end changes, including diverting sentences from incarceration to probation, represent a best practice to alleviate prison overcrowding."). *See* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 25-26 (July 23, 2012) (citing numerous studies discussing the criminogenic effects of incarceration, how prison is not an effective way to reduce recidivism, and the positive impact of alternatives to incarceration on recidivism reduction).

consistent with the Department's Smart on Crime Initiative,[6] and National Drug Control Strategy.[7]

We have previously offered numerous suggestions on how the Commission may amend the guidelines to encourage alternatives to incarceration, including eliminating or at least further expanding the zones in the sentencing table and amending Chapter 5 to promote the use of non-prison sentences.[8]

Deleting or changing the zones on the sentencing table would go a long way to encouraging the use of alternatives to incarceration. As the Commission's report on alternatives notes: the low rate of eligibility for alternative sentences "primarily is due to the predominance of offenders whose sentencing ranges were in Zone D of the Sentencing Table, in which the guidelines provide for a term of imprisonment."[9] If the Commission changes the guidelines to encourage judges to focus on the in/out decision and modifies the sentencing table to allow non-incarceration sentences for individual falling within Zone D, it will be taking major steps toward reducing the costs of incarceration and adopting a sentencing system designed to divert

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[5] Letter of Association of Prosecuting Attorneys, Law Enforcement Leaders to Reduce Crime and Incarceration, Major Cities Chief Association, National District Attorneys Association, Police Foundation, to Donald Trump and Hillary Clinton (July 13, 2016), http://lawenforcementleaders.org/wp-content/uploads/2016/07/Law-Enforcement-Letter.pdf.

[6] U.S. Dep't of Justice, *FY 2017 Budget Request* ("Considering alternatives to incarceration for low-level, non-violent offenses strengthens our justice system and places a lower financial burden on the budget."), https://www.justice.gov/opa/pr/department-justice-fy-2017-budget-request.

[7] Executive Office of the President of the U.S., *National Drug Control Strategy* iii (2015) ("[w]e are reforming our criminal justice system, providing alternatives to incarceration for non-violent, substance-involved offenders"), https://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/2015_national_drug_control_strategy.pdf.

[8] *See* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 12-14 (June 15, 2015); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 12-14 (May 12, 2014); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 11-12 (Nov. 20, 201); Statement of Marjorie Meyers, Incoming Chair, Federal Defender Sentencing Guidelines Committee and Marianne Mariano, Federal Public Defender for the Western District of New York, at 1-39 (Mar. 17, 2010).

[9] USSC, *Alternative Sentencing in the Federal Criminal Justice System* 5 (2015). As to the finding that many individuals in Zones A through C did not receive probation or imprisonment with community conditions of confinement, the data do not reveal what percentage of those individuals were sentenced to time served and simply placed on supervised release. *Id*. Without such data, it cannot be inferred that the low rates of "alternative" sentences result from judicial reluctance to impose such sentences even when the individuals fall within Zones A, B, or C.

individuals "from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society."[10]

Encouraging alternatives to incarceration also means changing the culture of punishment inherent in post-Sentencing Reform Act practice. Since enactment of the guidelines, probation officers have focused on calculating the guideline range rather than providing extensive information about an individual's personal history that is critical to determining both culpability and the most appropriate intervention to promote rehabilitation.[11] To change that culture, the Commission should adopt policies that encourage probation officers and judges to acknowledge how an individual's personal history and characteristics (*e.g.*, mental health, cognitive and emotional status, traumatic brain injury, exposure to toxins, poverty, employment, education, and family and community connections) are both relevant to treatment needs and can help inform the appropriate alternative to incarceration.

As it continues studying alternatives to incarceration, we also suggest the Commission examine the guidelines from a therapeutic jurisprudence perspective. "Therapeutic jurisprudence 'asks us to look at law as it actually impacts people's lives' and focuses on the law's influence on emotional life and psychological well-being. It suggests that 'law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness.'"[12]

II. Proposed Priority #4 – Continuation of Multi-year Study of Definitions Related to Prior Convictions

We welcome the Commission's continued study of the various definitions relating to a defendant's prior convictions. Now that the Commission has modified the definitions of "crimes of violence," we urge the Commission to focus on the definition of drug offenses in the career offender guideline and issue a report to Congress about the need to repeal the career offender

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[10] USSC, *Alternative Sentencing in the Federal Criminal Justice System* 20 (2009).

[11] *See* Herbert J. Hoelter, *Sentencing Alternatives – Back to the Future*, 22 Fed. Sent'g Rep. 53 (2009) (discussing need for the Sentencing Commission and other agencies to change its approach to alternatives to incarceration). *See also* Ryan King, *A Change of Course: Developments in State Sentencing Policy and Their Implications for the Federal System*, 22 Fed. Sent'g Rep. 48 (2009) (discussing how guideline provisions that advise against non-prison sentences serve as barriers to alternatives to incarceration).

[12] Michael Perlin & Alison Lynch, *In The Wasteland of Your Mind: Criminology, Scientific Discoveries and the Criminal Process* 49 (2016) (forthcoming in Va. J. Crim. L) (citations omitted), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2726611. *See also* David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L. Sch. J. Hum. Rts. 759, 768 n.35 (1993).

provision of the Sentencing Reform Act, 28 U.S.C. § 994(h). As stated in our May 2016 letter to the Commission (attached), the severe sentences called for under the career offender guideline have caused an increasing number of courts to reject it. In FY 2015, only 25% of persons subject to the career offender guideline received a within range sentence (a drop from 27.5% in FY 2014); 45.9% received a government-sponsored below guideline range sentence; and 28.9% received a non-government sponsored below range sentence.[13] The over-inclusiveness of the career offender guideline also continues to have a disproportionate impact on Black people involved in the federal criminal justice system. In 2015, 19.8% of persons sentenced under the guidelines were Black, but a significantly larger percentage of persons – 56.9% – subject to the career offender guideline were Black.[14]

Defenders encourage the Commission to:

> narrow the reach of the career offender guideline to satisfy only the minimum requirements of 28 U.S.C. § 994(h) and the elements clause in 18 U.S.C. § 924(e)(2)(B)(i); if state drug offenses must be included, count only those that are analogous to the required federal offenses and punishable by a maximum term of ten years or more, consistent with 18 U.S.C. § 924(e)(2); count only convictions that are classified as felonies by the convicting jurisdiction, *see* 21 U.S.C. § 802(13), receive three points under §4A1.1(a), unless the only reason they receive three points is because of a sentence imposed on revocation pursuant to §4A1.2(k), and for which the defendant actually served at least one year and one month in prison.[15]

III. Proposed Priority #5 – Continuation of Multi-Year Study on Recidivism

Defenders believe that the Commission's study of recidivism could be useful to decision makers responsible for sentencing policy as well as to those who are imposing sentences in individual cases. We remain hopeful that the Commission will take steps to correct any misunderstanding flowing from the March 2016 report: *Recidivism Among Federal Offenders: A Comprehensive Overview*, regarding career offenders and armed career criminals.[16]

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[13] USSC, *FY 2015 Monitoring Dataset*; USSC, *Quick Facts: Career Offenders* (2015).

[14] *Id*.

[15] Statement of Molly Roth Before the U.S. Sentencing Comm'n, Washington D.C., at 2, 9 (Nov. 5, 2015) (this testimony contains a detailed discussion of why prior convictions should not be used to enhance offense levels and how the definition of drug offense should be narrowed).

[16] *See* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 4-6 (May 26, 2016) (attached).

IV. Proposed Priorities #6 and #7 – Study Report of the Tribal Issues Advisory Group and Treatment of Youthful Offenders

We address these two priorities together because of the related nature of the Commission's proposed priority to study youthful offenders, including possible amendments to Chapter 5, Part H, and two of the recommendations of the Tribal Issues Advisory Group – the recommendations to (a) amend §5H1.1 (Age), and (b) add a departure to Chapter 5, Part K "concerning juvenile and youthful offenders."[17] Defenders encourage the Commission to include these issues in the priorities for this amendment cycle and hope the Commission will follow the recommendations of the TIAG to expand the scope of the departure provisions for young people who are sentenced in federal court. While we question the role of departures in the current advisory system, if departures are to remain part of the guidelines, they must be expanded to advise courts to consider more characteristics of the individual being sentenced.[18] Such expansion would make the guidelines more consistent with current practice and the law under § 3553(a) that requires sentencing courts to consider a broader range of factors than currently recognized by the guidelines. For too long, the emphasis on the nature of the offense and marginalization of individual characteristics under the guidelines has created an imbalance in the sentencing decision making process.[19] This imbalance has elevated retribution over the other purposes of sentencing.[20] Changes such as those recommended by TIAG to expand the scope of the departure provisions on the basis of individual characteristics will assist in beginning to correct the imbalance and are important steps toward ensuring fair and just sentences for individuals sentenced in federal court.

V. Proposed Priority #8 – Study of Operation of Chapter 4, Including Feasibility of Using "Time Served" and Treatment of Revocation Sentences under §4A1.2(k)

Defenders support the Commission's proposal to study the operation of Chapter Four, Part A of the guidelines, "including (A) the feasibility and appropriateness of using the amount

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[17] USSC, *Report of the Tribal Issues Advisory Group*, at 1 (May 16, 2016).

[18] *See* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 3 (May 26, 2016) (attached).

[19] *See, e.g.*, Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 Stan. L. Rev. 277, 289 (2005) (guideline emphasis on offense conduct and criminal history and general irrelevance of individual characteristics makes "a particularly imbalanced sentencing decision making process").

[20] *See, e.g.*, David I. Shapiro, *Sentencing the Reformed Addict: Departure Under the Federal Sentencing Guidelines and the Problem of Drug Rehabilitation*, 91 Colum. L. Rev. 2051, 2055 (1991) ("the Commission's de-emphasis of offender characteristics marks the evolution toward a more retributive theory of punishment, with a strong emphasis on incapacitation (crime control) as well").

of time served," rather than the sentence imposed; and "(B) the treatment of revocation sentences under §4A1.2(k)."

As the Commission is aware, Defenders have encouraged the Commission to look at time served rather than sentence imposed when considering past criminal conduct.[21] Time served is a more accurate measure than sentence imposed of the punishment meted out by the convicting jurisdiction for a prior offense. The current rule of looking at the sentence imposed does not appropriately measure the severity of the prior offense and creates unwarranted disparity. In many jurisdictions, due to good time credits or parole, there is a significant gap between the sentence that is formally imposed and the actual punishment that is meted out. In other jurisdictions, the gap is much smaller. Due to the inconsistent practices between various jurisdictions, measuring severity of prior offenses by looking at sentence imposed creates unwarranted disparity. The length of a guideline recommended federal sentence should not turn on the happenstance of where a prior conviction occurred.

Counting revocation sentences (*see* §4A1.2(k)) furthers the injustice of the current criminal history rules. Chapter Four purports to measure "criminal" history, and the guidelines explain that "a defendant with a record of prior ***criminal*** behavior is more culpable than a first offender" and that "[g]eneral deterrence . . . dictates that a clear message be sent to society that repeated ***criminal*** behavior will aggravate the need for punishment with each occurrence."[22] In other words, the guidelines identify the conduct at issue to be criminal in nature. But revocations do not necessarily reflect criminal conduct. Research shows that in some jurisdictions, more than half of the revocations are for technical violations.[23] Revocations for technical violations such as "failed drug tests, failure to report, failure to meet financial obligations"[24] or failing to

[21] *See* Statement of Molly Roth Before the U.S. Sentencing Comm'n, Washington D.C., at 1 (Nov. 5, 2015); Statement of the Federal Public and Community Defenders submitted by Jon Sands, Chair, Sentencing Guidelines Committee of the Federal Public and Community Defenders, at 40 (Mar. 9, 2001) ("We believe time served is the better measure because time served is the actual punishment that has been meted out. Sentence imposed sets the maximum time that will be served, but most defendants do not serve the maximum because of good time credits or parole. Thus, a four-year prison term in one state may result in the same time served as a six-year term in another state.")

[22] USSG Ch.4, Pt.A, intro. comment. (emphasis added).

[23] *See* Ronald P. Corbett, Jr. *Probation and Mass Incarceration: The Ironies of Correctional Practice*, 28 Fed. Sent'g Rep. 278, 279-80 (Apr. 2016); Urban Institute, *The Justice Reinvestment Initiative: Experiences from the States*, at 2 (July 2013) ("A substantial portion of revocations – sometimes greater than half – are technical violations rather than new crimes."); The Pew Center on the States, *When Offenders Break the Rules*, at 3 (Nov. 2007) ("A significant number of returns, however, are solely for violations of the conditions of probation or parole…. In some states, these so-called 'technical' or 'condition' violators account for more than half of all those returned to prison.")

[24] *See* Corbett, *supra* note 23, at 279.

"observ[e] a curfew,"[25] should not be considered part of a person's "criminal" history. Moreover, including revocation sentences in the criminal history calculation exacerbates unwarranted disparity arising from the current criminal history rules because the revocation practices and rates may vary widely between jurisdictions.[26]

VI. Proposed Priority #9 – Study of Offenses Involving Methylone and Possible Amendments to the Guidelines

Defenders recommend that the Commission not spend limited resources studying offenses involving methylone or amend the guidelines at this time. The published request for comment does not indicate the reasons the Commission has proposed this priority. Methylone is one of over 30 synthetic substances that have been placed into Schedule I since 2010, temporarily or permanently, by either the Drug Enforcement Administration (DEA) or by Congress. Methylone was not a subject of the Synthetic Drug Abuse Prevention Act of 2012,[27] in which Congress placed 16 synthetic substances into Schedule I due to concerns that immediate action was needed. The DEA placed methylone into Schedule I temporarily in October 2011, and permanently in April, 2013.[28] Numerous other synthetic substances have been, or are being, considered for scheduling.

The Drug Equivalency Tables in USSG §2D1.1, comment. (n.8(D)) do not currently provide a marijuana equivalency for methylone or for many other synthetic substances recently scheduled. In such cases, §2D1.1, comment. (n.6) instructs courts to determine the base offense level using the marijuana equivalency for the most closely related controlled substance referenced in §2D1.1. This creates the potential for different courts to use different equivalencies.

For several reasons, Commission action at this time is unlikely to improve sentencing for methylone offenses. The Congressional Research Service noted that the National Office of Drug Control Policy considers synthetic cathinones such as methylone "understudied substances."[29] There is little confirmed data on patterns of use, distribution methods, or medical harms that could reliably inform sentencing policymaking. The available data show that "[c]alls [to poison control centers] regarding bath salts have declined each year since 2011 . . . The *Monitoring the*

[25] *Id.*at 280.

[26] *See, e.g.*, Pew, *supra* note 23, at 4.

[27] S. 3190, 112th Cong. (2012).

[28] *See* Lisa Sacco & Kristin Finklea, Cong. Research Serv., *Synthetic Drugs: Overview and Issues for Congress* 4 (2016), https://www.fas.org/sgp/crs/misc/R42066.pdf.

[29] *Id*. at 17 (citing Office of National Drug Control Policy, *National Drug Control Strategy 2013*, 10).

Future (MTF) survey results from 2015 indicate that annual prevalence rates for use of synthetic cannabinoids are down over the last two years while bath salt use remained low."[30]

While the Department of Health and Human Services (HHS) and the DEA found sufficient evidence of potential harms, and absence of approved medical uses, to recommend placing methylone in Schedule I, the evidence remains scant and insufficient for sentencing policy making. The HHS and DEA found that methylone has been "associated" with emergency room episodes and a handful of fatalities.[31] The instances described in the HHS report, however, include combinations of pre-existing medical conditions, multiple drug use, and ingestion of amounts far exceeding typical dosages. One subject reportedly ingested a "tea bag" amount of methylone and ethcathinone.[32] Many other drugs, including alcohol and pain relievers, are potentially lethal when ingested in such amounts.[33] Past experience has shown that early research into a new substance, such as crack cocaine, can be mistaken.[34] Policy based on such research can result in sentences that are too severe, but difficult to change.

This concern is especially great with methylone, which has been described in some accounts as most similar to MDMA ("ecstasy"), although with less potency and serotonin depletion.[35] Some stakeholders may argue that the simplest approach to methylone is to treat it as similar to MDMA, although weaker and less dangerous.[36] But we do not believe this would

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[30] *Id.* at summary.

[31] Schedules of Controlled Substances: Placement of Methylone into Schedule I, 78 Fed. Reg. 21818, 21820 (Apr. 12, 2013) (codified at 21 C.F.R. § 1308 (2013) (citing U.S. Dep't of Health and Human Services, *Basis for the Recommendation to Place 3,4-Methylenedioxymethcathinone (Methylone) and its Salts in Schedule I of the Controlled Substances Act (CSA)* (2012)).

[32] CindyBoulanger-Gobeil, et al., *Seizures and Hyponatremia Related to Ethcathinone and Methylone Poisoning*, 8 J. of Med. Toxicology 59, 60 (2012).

[33] Paul J. Hofer, *Ranking Drug Harms for Sentencing Policy*, Working Paper, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612654.

[34] U. S. Sentencing Comm'n, *Cocaine and Federal Sentencing Policy* 21-30 (2002) (discussing how the effects of prenatal exposure to crack cocaine are "significantly less severe than previously believed").

[35] University of Wisconsin School of Public Health, *News and Events: Study Suggests Possible Therapeutic Use for "Bath Salt" Designer Drugs*, (describing Baumann, et al., *The Designer Methcathinone Analogs, Mephedrone and Methylone, are Substrates for Monoamine Transporters in Brain Tissue*, 37 Neuropsychopharmacology 1192 (2012), which "shows that methylone does not deplete serotonin like MDMA does. These studies may open the door for it becoming more acceptable for clinical use in treating anxiety or PTSD."), http://www.med.wisc.edu/news-events/study-suggests-possible-use-for-bath-salt-designer-drugs/36980.

[36] *See, e.g., United States v. Marte*, 586 F. App'x 574 (11th Cir. 2014) (upholding decision that methylone was "most closely related" to MDMA, but "half as potent"); Brief of the United States at 13, *United*

result in reasonable guideline recommendations. After considering extensive scientific evidence, some courts have found that the guidelines concerning MDMA are too severe.[37] Before the Commission makes policy for methylone, it should correct its unsound policy toward MDMA.[38]

It also is impossible for the Commission to develop rational equivalencies for methylone offenses at the present time because the guideline sentences for other drugs are full of anomalies, resulting from their piecemeal development and dependence on congressional directives and mandatory minimums. The drug guidelines do not reflect any consistent rationale for drug sentencing. Commission analyses of drug penalties have emphasized or ignored numerous factors including: 1) the relative harmfulness of different drugs, either in isolation or compared to one or more other drugs; 2) typical dosage sizes, and the degree to which the drug is marketed in pure or diluted form; 3) the drug quantities that defendants performing various functional roles may be held accountable for under the relevant conduct guideline; 4) the dangerousness, or likely recidivism, of defendants trafficking in a particular drug; 5) methods of ingestion and collateral harms of use; 6) the prevalence of use among various demographic populations or involvement of these groups in trafficking; 7) possible deterrent effects of various penalty levels; 8) the relation of guideline penalties to statutory penalties, and the incentives or disincentives created by their interactions; 9) the effect of penalties on incentives for investigation and prosecution of particular controlled substance violations; 10) the effect of drug penalties on the prison population; and 11) congressional intent or sentiment, as expressed through legislation or formal or informal communications. The result of this inconsistent policymaking is a guideline without a rationale. Before the Commission includes another substance in the arcane guideline

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States v. Bellot, No. 15-13553-GG (11th Cir. June 1, 2016) (discussing presentence report using MDMA as "most closely related" substance to methylone).

[37] *See, e.g.*, American Civil Liberties Union, *Court Rejects Harsh Federal Drug Sentencing Guideline As Scientifically Unjustified* (2011) (discussing decisions in *United States v. McCarthy*, 2011 WL 1991146 (S.D.N.Y. May 2011 and a W.D. Wash case, which rejected the MDMA 500-to-1 ratio), https://www.aclu.org/news/court-rejects-harsh-federal-drug-sentencing-guideline-scientifically-unjustified; *United States v. Kamper*, 860 F. Supp. 2d 596, 603-604 (E.D. Tenn. 2012) (declining to adopt a new MDMA-to-marijuana ratio, but acknowledging that the "scientific support justifying the current … ratio has eroded significantly since the Commission adopted it in 2001); Transcript of Record at 7-9, *United States v. Dafang*, No. 14-00722 (D. Hawaii Feb. 2, 2015) (rejecting 500-to-1 MDMA ratio in favor of 200-to-1 ratio and noting that the reasons for the increase in the ratio has been discredited).

In FY 2014, MDMA received the highest rate (32.1%) of non-government sponsored below range sentences when compared to any other drug type. USSC, *Interactive Sourcebook* (FY 2014).

[38] *See* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 14 (May 17, 2013) (discussing how the findings relied on by the Commission to change the marijuana-to-MDMA equivalency from 35-to-1 to 500-to-1, have been discredited and should be revisited).

mechanics of drug type, quantity, and equivalencies, it should reconsider its prior decisions and seek relief from congressional micro-management of drug sentencing policy.

VII. Proposed Priority #10 – Implementation of Bipartisan Budget Act of 2015

Last cycle, in response to the Bipartisan Budget Act of 2015, which among other things added "new subdivisions criminalizing conspiracy to commit fraud for selected offense conduct already in three statutes," the Commission proposed amending the guidelines so that sections 408, 1011, and 1383a of Title 42, which currently are referenced to §2B1.1, would also be referenced to §2X1.1.[39] Following comment by members of Congress, the Justice Department and the Inspector General of the Social Security Administration, "suggesting that the change as initially proposed does not adequately address the type of cases and offenders covered by the new ten-year statutory maximum penalty," the Commission deferred action on the Act.[40]

Defenders believe it is already evident that no amendment other than that proposed by the Commission last year is necessary to implement the Bipartisan Budget Act of 2015. The current guidelines at §2B1.1, §3B1.3, and §3B1.1 are more than adequate to produce sufficiently (and often unduly) severe penalties for a broad range of offenses, including those addressed in the Bipartisan Budget Act.

Comments submitted to the Commission by the Office of the Inspector General of the Social Security Administration (OIG-SSA) and the Department of Justice reveal that the reason they seek changes to the guidelines that would lead to higher recommended sentences for a subset of people who commit certain types of social security fraud is the belief that increased penalties would result in "stronger deterrence to prevent these individuals [such as doctors, lawyers, claimant representatives, and SSA employees] from defrauding SSA."[41] But increasing penalties is not an efficient means to deter. First, research shows that "knowledge of sanction regimes is poor."[42] "[D]ecisions to refrain from crime are based on the mere knowledge that the behavior is legally prohibited or for other nonlegal considerations such as morality or fear of

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[39] Defenders had no objection to that amendment. *See* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 13 (Mar. 21, 2016).

[40] *See* Oral Remarks of the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, Public Meeting, Washington, D.C., Apr. 15, 2016, http://www.ussc.gov/policymaking/meetings-hearings/public-meeting-april-15-2016.

[41] Letter from Patrick P. O'Carroll, Jr., Inspector General of the Social Security Administration to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 3 (Mar. 11, 2016). *See also* Letter from Michelle Morales, Acting Director, Office of Policy and Legislation, Dep't of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 37-38 (Mar. 14, 2016).

[42] Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Just. 199, 204 (2013).

social sanctions."[43] In addition, "*certainty of apprehension* and not the severity of the legal consequence ensuing from apprehension is the more effective deterrent."[44] With increased penalties, more of the nation's limited resources will be inefficiently directed at the expensive proposition of incarcerating people for longer periods of time when the research shows that to maximize deterrence, limited funds may be best directed at catching people who commit the violations.

The purported need for higher recommended sentences does not square with information about what is happening in individual cases. Neither the government nor sentencing courts have indicated that the guidelines are too low in cases prosecuted under the three statutes at issue. In the last three years, 56.8% of defendants sentenced for a conviction under 42 U.S.C. § 408 received sentences within the guideline recommended range, 41.2% received sentences below the guideline recommended range, and only 2.0% received sentences above the guideline recommended range.[45] Similarly, for defendants convicted under 42 U.S.C. § 1383a(a) and sentenced under §2B1.1: 48.5% of defendants received sentences within the guideline recommended range, 51.4% received sentences below the guideline recommended range, and not one defendant received a sentence above the guideline recommended range.[46] No sentencing data is available on the third statute – 42 U.S.C. § 1011 – because no defendants have been convicted of violating it at any point in the past decade.[47]

The cases cited by the OIG-SSA in its comments to the Commission earlier this year also do not support the assertion that the current guidelines recommend sentences that are too low for offenses covered by the Act. Of the individuals named by the OIG-SSA, only three were convicted of any of the three statutes amended by the Bipartisan Budget Act, and in at least two of those cases[48] the government recommended a sentence within the guidelines.[49]

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[43] *Id.* And even for those "for whom sanction threats might affect their behavior, it is preposterous to assume that their perceptions conform to the realities of the legally available sanction options and their administration." *Id.*

[44] *Id.* at 201-202.

[45] USSC, *FY 2013- FY 2015 Monitoring Dataset*.

[46] *Id.*

[47] USSC, *FY 2006-2015 Monitoring Dataset*.

[48] In the third case, relevant documents regarding the government's recommended sentence are not publicly available on Pacer. *See* Roberto Velasquez, No. 3:12-cr-01750-BTM (S.D. Cal.).

[49] *United States v. Samuel Torres Crespo*, Nos. 13-538, 13-539 (D.P.R.), Plea Agreement, Dkt. No. 133 (filed Sept. 26, 2014), at 4. Mr. Torres-Crespo was sentenced to a term of 8 months imprisonment, with 3 years of supervised release. *Id.*, Judgment, Dkt. No. 203 (filed Jan. 8, 2016). *United States v. Wildo*

Absent any evidence that a new enhancement is necessary to serve the purposes of sentencing, the political decision by Congress to increase the statutory maximum for a certain subgroup of people is not alone a sufficient reason to inject additional complexity and severity into the guideline. Amending the guidelines to incorporate every possible factual permutation of the wide-variety of economic offenses that are referenced to §2B1.1 (and the applicable Chapter 3 guidelines) would add even more complexity to an already unwieldy guideline, which covers 5 pages plus 18 pages of commentary that sets forth complicated rules for calculating loss and applying the other 18 specific offense characteristics, many with several subparts. Applying this guideline is already difficult and time-consuming and can require lengthy sentencing hearings.

VIII. Proposed Priority #11 – Circuit Conflicts

We are unaware of any circuit conflicts that warrant the Commission's attention at this point.

IX. Proposed Priority #12 – Miscellaneous Guideline Application Issues, including "possible consideration of whether a defendant's denial of relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of §3E1.1"

We are pleased to see that the Commission plans to reconsider the rule on acceptance of responsibility so that persons who contest relevant conduct are not penalized with loss of acceptance points. The need for such a revision is discussed in our May 26, 2016 letter to the Commission, which is attached, as well as our June 15, 2015 letter.[50]

We also ask the Commission to consider the following, as mentioned in our May letter:

- Modify the provision that all persons sentenced under §4B1.2 are placed in criminal history category VI, especially because such an increase overstates the risk of recidivism.[51]

Vargas, Nos. 13-538, 13-539 (D.P.R.), Plea Agreement, Dkt. No. 114 (filed Sept. 19, 2014), at 4 ("The government will recommend a sentence at the lower end of the guidelines (18 months)."). Mr. Vargas was sentenced to a term of 18 months imprisonment with 3 years of supervised release. *Id.*, Judgment, Dkt. No. 176 (filed Apr. 14, 2015).

[50] Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 7-9 (June 15, 2015) (outlining reasons why the Commission should encourage fair adversarial hearings on the scope of relevant conduct and why a person who contests relevant conduct should not be denied acceptance of responsibility).

[51] The Commission's recent recidivism data show that the rearrest, reconviction, and reincarceration rates for persons sentenced under the career offender or Armed Career Criminal guidelines are lower than the rates for persons in criminal history categories IV through VI. USSC, *Recidivism Among Federal*

- Permit persons subject to the career offender guideline to receive a reduction in offense level if an adjustment under §3B1.2 (Mitigating Role) applies.

- Modify the "reasonably foreseeable" standard and heighten the mens rea required for jointly undertaken activity under the relevant conduct guideline.

- Widen the range of mitigating role adjustments, lower the mitigating role cap in §2D1.1, and establish a mitigating role cap in §2B1.1.[52]

X. Conclusion

As the Commission pursues it priorities for the 2016-2017 amendment cycle, we remain hopeful that it will take steps to improve the guidelines so that they reflect advances in knowledge of human behavior as it relates to the criminal justice process,[53] encourage alternatives to incarceration to better promote public safety and rehabilitation as well as reduce prison costs, and foster individualized sentencing that accounts for all of the § 3553(a) factors. We look forward to working with the Commission and its staff during the upcoming amendment cycle.

Very truly yours,
/s/ *Marjorie Meyers*
Marjorie Meyers
Federal Public Defender, S.D. Texas
Chair, Federal Defender Sentencing
Guidelines Committee

Offenders: A Comprehensive Overview, Appendices A-1, A-2, and A-3 (2016). The Commission's *Quick Facts* also shows that nearly sixty percent (59.1%) of persons sentenced under the career offender guideline in FY 2014 "would have had a Criminal History Category lower than VI if the career offender provision had not applied." USSC, *Quick Facts: Career Offenders* (2015).

[52] The Commission's data shows that a significant number of people who receive mitigating role adjustments also receive below guideline sentences. In FY 2013 - 2015, 28.1% of individuals who received a 4-level reduction for mitigating role also received a non-government sponsored below range sentence. USSC, *FY2013-2015 Monitoring Dataset*.

[53] 28 U.S.C. § 991(b)(1)(C).

Cc: Hon. Charles R. Breyer, Vice Chair
Dabney Friedrich, Commissioner
Rachel E. Barkow, Commissioner
Hon. William H. Pryor, Commissioner
Michelle Morales, Commissioner *Ex Officio*
J. Patricia Wilson Smoot, Commissioner *Ex Officio*
Kenneth Cohen, Staff Director
Kathleen Cooper Grilli, General Counsel

FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

Lyric Office Centre
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1634

Chair: Marjorie Meyers Phone: 713.718.4600

May 26, 2016

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

Re: Priorities for 2016-2017 and Comments on Ongoing Recidivism Study

Dear Judge Saris:

Pursuant to 28 U.S.C. § 994(o), this letter identifies the priorities that Defenders believe the Commission should address in the upcoming amendment cycle and comments on the Commission's recent report on recidivism and the need for data sharing. We also continue to urge the Commission to ask Congress to correct the current imbalance, where a representative of DOJ, but not the Defenders, has a voice at all Commission meetings and hearings. A Defender ex officio member of the Commission is long overdue and is essential to ensure the Commission receives meaningful information and feedback from a program that represents the vast majority of persons sentenced under the federal sentencing guidelines.

Despite significant changes to the guidelines on crimes of violence and immigration this year, and modest changes to the guidelines for economic crimes and drug offenses over the past few years, there is still much work to be done on the guidelines. Over the past two years, we have offered numerous suggestions to the Commission about possible priorities.[1] We incorporate those comments here and encourage the Commission to focus on the following issues for the next amendment cycle:

[1] Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n (May 12, 2014); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n (June 15, 2015).

- Create more options for alternatives to incarceration. This would be consistent with the Department's smart on crime initiative, which encourages the use of "alternatives to incarceration for low-level, non-violent offenses."[2]

- Narrow the career offender guideline so that it no longer includes state drug offenses that Congress did not specify should be included.[3]

- Modify the provision that all persons sentenced under §4B1.2 are placed in criminal history category VI, especially because such an increase overstates the risk of recidivism.[4]

- Permit persons subject to the career offender guideline to receive a reduction in offense level if an adjustment under §3B1.2 (Mitigating Role) applies.

- Modify the "reasonably foreseeable" standard and heighten the mens rea required for jointly undertaken activity under the relevant conduct guideline.

- Amend the rules on acceptance of responsibility so that persons who contest relevant conduct are not penalized with the loss of acceptance points.

- Widen the range of mitigating role adjustments, lower the mitigating role cap in §2D1.1, and establish a mitigating role cap in §2B1.1.[5]

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[2] Department of Justice, *FY 2017 Budget Request*, https://www.justice.gov/opa/pr/department-justice-fy-2017-budget-request.

[3] *See* 28 USC § 994(h)(2(B). The severe sentences called for under the career offender guideline have caused an increasing number of courts to reject it. In FY 2015, only 25% of persons subject to the career offender guideline received a within range sentence (a drop from 27.5% in FY 2014); 45.9% received a government- sponsored below guideline range sentence; and 28.9% received a non-government sponsored below range sentence. USSC, FY 2015 Monitoring Dataset; USSC, *Quick Facts: Career Offenders* (2015). The over-inclusiveness of the career offender guideline also continues to have a disproportionate impact on Black people involved in the federal criminal justice system. In 2015, 19.8% of persons sentenced under the guidelines were Black, but a significantly larger percentage of persons – 56.9% – subject to the career offender guideline were Black.

[4] The Commission's recent recidivism data shows that the rearrest, reconviction, and reincarceration rates for persons sentenced under the career offender or Armed Career Criminal guidelines are lower than the rates for persons in criminal history categories IV through VI. USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview*, Appendices A-1, A-2, and A-3 (2016). The Commission's Quick Facts report also shows that nearly sixty percent (59.1%) of persons sentenced under the career offender guideline in FY 2014 "would have had a Criminal History Category lower than VI if the career offender provision had not applied." USSC, *Quick Facts: Career Offenders* (2015).

[5] The Commission's data shows that a significant number of people who receive mitigating role adjustments also receive below guideline sentences. In FY 2013 - 2015, 28.1% of individuals who

- Delete or modify Ch. 5, Pt. H (Specific Offender Characteristics), which is out of sync with current sentencing practice that requires a court to consider all the factors under 18 USC §3553(a).[6]

- Make retroactive the amendments to the definitions of crimes of violence and the immigration guideline and modify §1B1.2 so that persons sentenced under the career offender guideline may be eligible for a sentence reduction.[7]

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received a 4-level reduction for mitigating role also received a non-government sponsored below range sentence. USSC, FY2013-2015 Monitoring Dataset.

[6] *See United States v. Gonzalez*, 2016 WL 815614, at 41 (D.N.M. 2016) (court declined to depart on basis of mental and emotional conditions, gambling and drug addiction, family relationships, but nonetheless granted a variance on these factors as well as in recognition of how "supervised release can go a long way in serving as an alternative to longer imprisonment"). *Compare* USSG §5H1.3 (mental and emotional condition must be present "to an unusual degree and distinguish the case from the typical cases covered from the guideline") *with* 18 U.S.C. § 3553(a) (court shall consider "history and characteristics of the defendant" and need to "provide the defendant with needed … medical care, or other correctional treatment in the most effective manner").

The Commission has acknowledged that the policy statements on "Specific Offender Characteristics" "are evolutionary in nature" and that "continuing research, experience, and analysis will result in modifications and revisions." USSG, Ch. 5, intro. comment. Yet, the guidelines have historically failed to follow such an evolutionary approach on how an individual's characteristics are relevant to all of the purposes of sentencing. *See* Thomas Hillier, *The Commission's Departure from an Evolutionary Amendment Process*, 4 Fed. Sent'g Rep. 45 (1991) (discussing how the Federal Courts Study Committee concluded that factors such as age and employment history are important considerations when imposing a just sentence).

In failing to acknowledge the significance of individual characteristics, the Commission has emphasized retribution to the detriment of the other purposes of sentencing. *See, e.g.*, David I. Shapiro, *Sentencing the Reformed Addict: Departure Under the Federal Sentencing Guidelines and the Problem of Drug Rehabilitation*, 91 Colum. L. Rev. 2051, 2055 (1991) (discussing how "the Commission's de-emphasis of offender characteristics marks the evolution toward a more retributive theory of punishment, with a strong emphasis on incapacitation (crime control) as well"). Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 Stan. L. Rev. 277, 289 (2005) (guideline emphasis on offense conduct and criminal history and general irrelevance of individual characteristics makes "a particularly imbalanced sentencing decision making process").

[7] The inability of the Commission to identify potential candidates for relief should not deter the Commission from making a substantive change in a guideline retroactive. The Commission only collects the statement of reasons form and the presentence report. The records available to the courts, prosecutors, defense counsel, and probation officers are far more substantial and would help identify candidates for relief. The efforts by defense counsel to identify those eligible for relief under *Johnson v. United States*, 135 S. Ct. 2251 (2015), demonstrate that it would not be overly burdensome to make the changes to the definitions of crimes of violence and the immigration guidelines retroactive.

In addition to the above priorities, we urge the Commission to take steps to release the data collected and used in its past and future published reports. This is important for a variety of reasons, including that it would allow additional analysis by researchers outside the Commission that could prevent or counteract misunderstandings that can arise from the limited findings of any given report. We make this request on the heels of concerns we have about misunderstandings that could arise from the Commission's March 2016 report, *Recidivism Among Federal Offenders: A Comprehensive Overview*. As a "broad overview," it was not designed to address any particular question about the effectiveness of federal sentences at achieving the purposes of sentencing. The research did not thoroughly evaluate particular guidelines, such as the criminal history rules, with respect to their effectiveness at predicting recidivism. But the effectiveness, racial impacts, and possibilities for improvement of these and other sentencing rules are matters of pressing national interest and importance. Policymakers and judges will naturally look to Commission reports for guidance, and may misconstrue the findings presented in the new report as an evaluation of these guidelines.

The report itself seems to treat the data presented as an evaluation of the criminal history rules. It cites *Measuring Recidivism* (2004), which was designed as such an evaluation, and claims that the 2004 report "confirmed that Chapter Four's criminal history provisions were working as designed, and recidivism rates rise as criminal history points increase and as Criminal History Categories increase."[8] This, however, is not what the 2004 report found**.** That analysis found no statistically significant difference in the recidivism rates of individuals assigned to CHC V and VI based on the existing Chapter Four rules.[9] Figure 7A in the new report shows the recidivism rates of individuals in each CHC. Those in CHC V and VI differ by 2.3 percent, the smallest difference among all CHCs, but no significance tests of this difference are reported. Readers are thus given no data or analysis to put in context the new report's statement that, like the 2004 report, "[t]he present analysis confirms that these criminal history provisions continue to work as designed."[10]

The 2004 analysis discovered why the recidivism rates of defendants in CHCs V and VI did not significantly differ: "offenders sentenced under the career offender guideline (§4B1.1) and the armed career criminal guideline (§4B1.4) can be assigned to criminal history category VI, even if they have fewer than 13 criminal history points, the minimum number of points

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[8] USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 18 (2016).

[9] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004).

[10] *Recidivisim Among Federal Offenders, supra* note 8, at 18.

otherwise needed for an offender to be placed in category VI."[11] When the statistical analysis correlating recidivism with CHC "was rerun for criminal history categories assigned based only on criminal history points, the statistical tests show that all categories are significantly different from one another, including categories V and VI."[12] In other words, the career offender and armed career criminal guidelines were found to make the CHC a worse predictor of recidivism than it would be without them. The career offender guidelines hinder the effectiveness of the criminal history rules at achieving the sentencing purpose of identifying individuals most in need of incapacitation. As described in another Commission report, this is an especially alarming result, given that these guidelines have a dramatic adverse impact on African-American defendants.[13]

These previous findings, which are not mentioned or tested in the new report, make certain conclusions in the new report misleading. The recent report claims:

> Other guideline provisions that account for an offender's prior crimes also serve *as good predictors of future recidivism*. For example, offenders designated under the guidelines as career offenders and armed career criminals receive substantially increased sentences because they are repeat offenders with serious criminal backgrounds. These offenders have substantially higher recidivism rates than other offenders in the study group. In fact, those two groups of offenders have the highest recidivism rates *of any group in this report*.[14]

The claim that career offenders and armed career criminals have the highest recidivism rates "of any group" is striking, particularly since it appears on a page showing three other groups that have higher recidivism rates than career offenders and armed career criminals. The "group" of "offenders by career offender/armed career criminal status," which is a statistical creation of the analysts, is shown in Figure 7B to have a recidivism rate of 69.5 percent.[15] Immediately below in Figure 7A, defendants in CHCs IV, V, and VI—groups formed by operation of the

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[11] *Measuring Recidivism*, *supra* note 9, at 9. The new report repeatedly, incorrectly states that "The total number of criminal history points determine the Criminal History Category (I-VI) to which the offender is assigned for the purpose of determine [*sic*] the sentencing guideline range." *Recidivism Among Federal Offenders*, *supra* note 8, at 10. *See also id*. at 18-19.

[12] *Measuring Recidivism*, *supra* note 9, at 9.

[13] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133-134 (2004).

[14] *Recidivism Among Federal Offenders*, *supra* note 8, at 19 (emphasis added).

[15] *Id*.

guidelines— are all shown to have higher recidivism rates (74.7%, 77.8%, and 80.1% respectively).[16]

Similarly, Figure 7B contrasts the recidivism rates of the Career Offender/Armed Career Offender "group" with a No Career Offender/Armed Career Offender group.[17] Little information is given to explain or motivate this comparison, but it appears to compare the combined population of defendants qualifying as career offenders and armed career offenders with *all other defendants*, including the majority who fall into CHC I and the 41.8 percent who receive no criminal history points. This is a highly disparate group. Without explanation and analysis of this data, the report lends itself to misinterpretation for politically charged purposes. Instead of fulfilling its role as a neutral fact finder, the Commission risks lending itself to opponents of sentencing reform.

Accordingly, we urge the Commission to take steps to counteract misunderstandings about its recent report on recidivism and release the data collected and used in its past and future published reports.

Conclusion

We are hopeful that the Commission will place these important issues on its priorities list and support a Defender ex officio member. We look forward to continuing to work with the Commission on matters related to federal sentencing policy.

Very truly yours,
/s/ *Marjorie Meyers*
Marjorie Meyers
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Cc: Hon. Charles R. Breyer, Vice Chair
Dabney Friedrich, Commissioner
Rachel E. Barkow, Commissioner
Hon. William H. Pryor, Commissioner
Michelle Morales, Commissioner *Ex Officio*
J. Patricia Wilson Smoot, Commissioner *Ex Officio*

[16] *Id.*

[17] *Id.*

Kenneth Cohen, Staff Director
Kathleen Cooper Grilli, General Counsel

United States Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

July 25, 2016

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

RE: Response to Request for Comment on Proposed Priorities for the Guidelines Amendment Cycle Ending May 1, 2017

Dear Chief Judge Saris:

On behalf of the Practitioners Advisory Group (PAG), we submit the following comments in response to the Commission's request for public comment on proposed priorities for the guidelines amendment cycle ending May 1, 2017. We also offer – and begin with – our proposal for an additional priority on the topic of Collateral Consequences.

PAG Proposed Priority on Collateral Consequences of Conviction

The collateral consequences of conviction – specifically, the legal penalties and restrictions that take effect automatically without regard to whether they are included in the court's judgment – can frequently be the most important aspect of punishment from a defendant's perspective. In a number of recent cases, courts have has imposed a more lenient sentence in consideration of the severe collateral consequences the defendant would experience. In other cases, courts have sought creative ways to relieve defendants from the effect of collateral consequences that persist long after the sentence has been fully served.

We briefly describe below the ways in which collateral consequences affect the work of sentencing courts. We urge the Commission to take this matter under advisement in the months ahead, looking toward a hearing in the spring.

1. Understanding collateral consequences and ensuring that a defendant has been notified about them

A federal court can and should inform itself about the collateral consequences that may

apply in a particular case when fashioning a sentence.[1] The court may ask the probation office for information about collateral consequences, and probation ought to be sufficiently informed about collateral consequences to provide accurate information to the sentencing court and to assist defendants with reentry and reintegration. Similarly, before accepting a guilty plea or imposing a sentence the court may ask defense counsel for reassurance that counsel has advised the defendant about applicable collateral consequences, if only as a prophylactic measure to guard against subsequent claims of ineffective assistance.[2]

While notice about collateral consequences may not be mandated in the federal system beyond the immigration context, such notice has been recognized as sound practice by the major national law reform and professional organizations of lawyers.[3] The "Model Penal Code: Sentencing" gives the sentencing commission responsibility for collecting collateral consequences and providing guidance to sentencing courts relating to their consideration of collateral consequences at and after sentencing.[4] The PAG believes that the Commission could usefully consider what if any role it might play in this regard.

2. Considering collateral consequences in imposing sentence

Sentencing courts have been increasingly aware in recent years of the devastating life-long effects of federal convictions in matters such as employment, housing, licensure, public benefits, and immigration status. Some courts have varied or departed downward from the guidelines in consideration of the severe collateral consequences to which a defendant is already exposed..[5] Some federal courts of appeal have upheld the relevance of collateral consequences

[1] A state-by-state searchable inventory of collateral consequences originally prepared by the American Bar Association is available at www.abacollateralconsequences.org.

[2] In state court the judicial advisement obligation may be more robust, both under the state constitution and applicable court rule, such as where sex offender registration or firearms dispossession may result from conviction. However, such notice has generally not been required in the federal system. Case law developments, notably in the past few years since the Supreme Court's decision in Padilla v. Kentucky, are described in Chapters 4 and 8 of Love, Roberts and Klingele, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW POLICY AND PRACTICE (West/NACDL, 2016 ed.).

[3] The Uniform Law Commission and the American Law Institute have both proposed that sentencing courts should ensure that a defendant has been informed about collateral consequences that might affect willingness to plead, and at sentencing. Both proposals also give sentencing courts the power to relieve particular mandatory consequences as early as sentencing, as New York and a few other states do. See Uniform Collateral Consequences of Conviction Act §§ 5, 6 (2010) (UCCCA); Model Penal Code: Sentencing, Tentative Draft No. 3, § 6x.04(1) (2014). The ABA Standards for Criminal Justice also impose this requirement. *See* Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standards 19-2.3, 19-2.4(b) (2003).

[4] *See* Model Penal Code: Sentencing, *supra* note 3, § 6x.02.

[5] One striking recent example is Judge Block's recent decision in *United States v. Nesbeth*, 2016 U.S. Dist. LEXIS 68731 (2016), which was the subject of considerable attention in the media**.** *See, e.g.*, Lincoln Caplan, *Why a Brooklyn Judge Refused to Send a Drug Courier to Prison*, The New Yorker, June 1, 2016, http://www.newyorker.com/news/news-desk/why-a-brooklyn-judge-refused-to-send-a-drug-courier-to-prison; Benjamin Weiser, *U.S. Judge's Striking Move in Felony Drug Case: Probation Not Prison*, N.Y. Times, May 25, 2016, http://www.nytimes.com/2016/05/26/nyregion/in-a-striking-move-brooklyn-judge-orders-probation-over-prison-in-felony-drug-case.html?_r=0.

to a determination of "just punishment" and the need for deterrence under 18 U.S.C. § 3553(a), allowing them as a basis for varying downwards from the guidelines range.[6] Others have disallowed variances based on collateral consequences because of the resulting risk of socioeconomic bias in favor of more privileged defendants who have the most to lose in the civil sphere.[7]

In light of the considerable uncertainty about the scope of a court's authority to adjust the quantum of punishment because of collateral consequences, the PAG strongly urges the Commission to make clear that it is appropriate for a court in certain circumstances to consider collateral consequences in determining a guideline sentence. They may also be a relevant consideration in deciding whether to approve a diversionary disposition, whose purpose frequently is to avoid or mitigate collateral consequences.

3. Relief from collateral consequences after service of sentence

The PAG also strongly encourages the Commission to consider the role of federal courts in mitigating the impact of collateral consequences after a defendant has served a sentence. As the Commission is aware, the issue of a federal court's inherent authority to expunge a conviction is currently pending in the Second Circuit court of appeals.[8] One district court in New York recently denied expungement citing lack of sufficient hardship, but granted the defendant a "Certificate of Rehabilitation" to enable her to overcome her inability to secure employment in her chosen profession because of her conviction.[9] Although a number of states now allow for expungement or sealing of some minor convictions, the effect of this type of relief is uneven from state to state and unclear even within a single state.[10] Moreover, it may not offer the kind of thorough mitigation that the PAG supports.[11]

The PAG urges the Commission to consider, in connection with any study of collateral consequences it may undertake, encouraging courts to deal creatively with collateral consequences through their inherent authority, and recommending to Congress that it consider

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[6] *See* cases collected and discussed at http://ccresourcecenter.org/wp-content/uploads/2016/05/CCRC-Federal-Sentencing-Collateral-Consequences-4-2016.pdf.

[7] *See, e.g., United States v. Morgan*, 2015 U.S. App. LEXIS 19402, *62 (10th Cir. 2015); *United States v. Musgrave*, 761 F.3d 602, 608 (6th Cir. 2014), and memorandum cited at note 5, *supra*.

[8] *Doe v. United States*, 110 F. Supp. 3d 448 (E.D.N.Y. 2015), pending in the Second Circuit (argued April 7, 2016).

[9] *Doe v. United States*, 2016 U.S. Dist. LEXIS 29162 (E.D.N.Y. 2016). *See also Stephenson v. United States*, 139 F. Supp. 3d 566 (E.D.N.Y. 2015) (expungement may be warranted in "extreme circumstances," but rehabilitated defendant "not in such dire straits").

[10] *See* Margaret Love, 50-State Comparison of Judicial Expungement, Sealing, and Set-aside, http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparisonjudicial-expungement-sealing-and-set-aside/.

[11] *See, e.g.*, http://ccresourcecenter.org/2015/03/19/new-york-times-editors-question-efficacy-of-expungement-laws/ (expressing doubts about the efficacy of expungement based on scope and effect); http://ccresourcecenter.org/2015/03/19/forgiving-v-forgetting-a-new-redemption-tool/ (the Marshall Project commending newly popular judicial "forgiving" remedies).

enacting the type of comprehensive relief contained in the law reform proposals cited in note 3. Overall, the PAG favors a comprehensive statutory scheme that would integrate collateral consequences into the sentencing system, and move closer to a system where the judiciary (with leadership from the Commission) rather than the legislature has primary responsibility for shaping and managing the penalties to be imposed in each particular case. Just as the court decides what sentence it will impose, the court also should play a central role in deciding which collateral consequences will apply and for how long. This approach gives sentencing courts new tools to further the rehabilitative goals of sentencing and to avoid issues of disproportionate severity.

Commission Priority 1: Mandatory Minimums

The PAG continues to oppose mandatory minimum sentences for all but the most serious offenders and respectfully requests that the Commission prioritize, through its work with Congress, policies and initiatives that aim to curtail the application of mandatory minimum sentences. Specifically, the PAG urges the Commission to continue focusing its efforts on the following priorities:

1. Continued examination of the scope and severity of statutory mandatory minimum penalties;

2. Expansion of qualifying factors for "safety valve" consideration under 18 U.S.C. § 3553(f) and § 5C1.2 of the guidelines; and

3. Elimination of mandatory "stacking" of penalties under 18 U.S.C. § 924(c).

The PAG is not alone in its opposition to mandatory minimum statutes. Our position is in line with most practitioners and advocates, those who work in the criminal justice system every day, as well as both houses of Congress and the President. On June 17, 2015, 130 former federal prosecutors, federal judges, state attorneys general, and other former high-ranking law enforcement officials from across the country called on Members of Congress to pass federal sentencing reform regarding minimum mandatory penalties.[12] As noted in their letter to the chairs and ranking members of the U.S. House and Senate Judiciary Committees, "[i]ndividuals most likely to receive a [federal] mandatory minimum sentence were street-level dealers, not serious and major drug dealers, kingpins, and importers."[13] Of the 22,000 federal drug offenders sentenced last year, "only seven percent had a leadership role in the crime and 84 percent did not possess or use guns or weapons."[14]

[12] *See* http://www.constitutionproject.org/documents/former-judges-and-prosecutors-back-federal-sentencing-reform-2/.

[13] *See*, http://www.constitutionproject.org/w_p-content/uploads/2015/06/SSA-letter_6-16-2015.pdf.

[14] *Id.*

These facts demonstrate that mandatory minimums as applied in practice are inconsistent with the intent of the law that created many of them: the Anti-Drug Abuse Act of 1986 ("ADAA"). The Commission's 2011 report to Congress on mandatory minimums recognized that the ADAA was supposed to apply mandatory minimums to kingpins, *i.e.*, "the masterminds who are really running these operations . . ."[15] But statistics demonstrate that this purpose has been frustrated. Long terms of incarceration for the vast majority of mid-level couriers, distributors and street-level dealers have had little impact on public safety. While imprisonment may temporarily disrupt a drug market, the "replacement effect"—whereby new recruits quickly replace those imprisoned for mid-level roles—negates the impact of incarceration on drug price, availability, or related crime.[16]

There is broad bipartisan support for dismantling the current system and applying reforms retroactively to tens of thousands of offenders currently serving mandatory minimum sentences. For example, in January 2016, the Charles Colson Task Force on Federal Corrections—a bipartisan commission appointed by Congress—released its final recommendations on reforms to the federal prison system.[17] The Task Force, recognizing the substantial human and financial costs of mandatory minimum sentences as well as their disproportionate effect on minorities, placed significant emphasis on the need for major reform of mandatory minimums.[18] To that end, the Task Force recommended the implementation of numerous reforms, including that:

- Congress repeal mandatory minimum penalties for drug offenses, except for drug kingpins, and make those changes apply retroactively;
- The Commission revise the Sentencing Guidelines to better account for factors that reflect role in and culpability for an offense;
- Congress pass legislation to allow judges to sentence below the mandatory minimum for certain weapon possession offenses, including 924(c) offenses; and

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[15] *See*, U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24 (Oct. 2011) (quoting Senate Minority Leader Robert Byrd).

[16] *See, e.g.*, Alfred Blumstein & Allen J. Beck, Population Growth in U.S. Prisons, 1980¬1996, 26 Crime & Just. 17, 57 (1999) ("Incarceration of even three hundred thousand drug offenders does little to reduce drug sales through deterrence or incapacitation as long as the drug market can simply recruit replacements.").

[17] "The Task Force was established by Congressional mandate in 2014 as a nine-person, bipartisan, blue ribbon panel charged with developing practical, data-driven recommendations to enhance public safety by creating a more just and efficient federal corrections system. Informed by over a year of fact-finding, rigorous data analysis, and discussions with key experts and stakeholders, the independent Task Force's recommendations to the US Congress, the President, and the Attorney General provide a blueprint for reforms to the federal corrections system that are sensible, cost-effective strategies to reduce crime and restore lives." CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS: TRANSFORMING PRISONS, RESTORING LIVES (JAN. 2016).

[18] CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS: TRANSFORMING PRISONS, RESTORING LIVES AT 20-28 (JAN. 2016)

- the Commission update its report on mandatory minimum penalties to identify those that produce unwarranted disparities or disproportionately severe sentences and recommend needed changes.[19]

Additionally, there are several bipartisan bills pending in Congress that are aimed at reducing the use and prevalence of mandatory minimum sentences. While the details differ, these proposed laws recognize that significant reform is needed to alleviate the tremendously harmful effects of minimum mandatory penalties. As a whole, these bills seek to eliminate or limit the application of many mandatory minimum provisions, increase the availability and use of safety valve provisions, and narrow the applicability of mandatory and consecutive penalties for gun possession under 18 U.S.C. § 924(c).

Among the bills currently pending are:

- The Sentencing Reform and Corrections Act of 2015 (S. 2123) was introduced in the U.S. Senate on October 1, 2015, and approved by the Senate Judiciary Committee by a bipartisan vote of 15 to 5 on October 22, 2015. Among other reforms, S. 2123 proposes a reduction of several mandatory minimum drug and gun sentences and would apply the reductions retroactively. The bill would also expand the applicability of the safety valve and allow offenders to earn time credit for completing rehabilitative programs in prison.

    - The Sentencing Reform Act (H.R. 3713) is the House companion bill to S. 2123. It was introduced on October 8, 2015, and passed by the House Judiciary Committee by voice vote on November 18, 2015.

- The Sensenbrenner-Scott Over-Criminalization Task Force Safe, Accountable, Fair, Effective Justice Reinvestment Act of 2015 (H.R. 2944) was introduced in the U.S. House of Representatives on June 25, 2015. This bill would limit the application of mandatory minimum drug sentences to the highest-level offenders. The bill also proposes an expansion of current safety valve provisions and the creation of new safety valve provisions as well as an amendment to 18 U.S.C. § 924(c) to fix the "stacking" problem so that multiple counts of 924(c) charges in the same indictment would no longer lead to stacked sentences.

- The Smarter Sentencing Act of 2015 was introduced in both the U.S. Senate (S. 502) and the U.S. House of Representatives (H.R. 920) on February 12, 2015. The Smarter Sentencing Act does not eliminate any

[19] *Id.* at xiv, 20-28. The Colson Task Force also recommended that Congress enact a "second look" resentencing provision that would that would permit anyone who has served more than 15 years to apply for resentencing before a judicial decisionmaker. *Id*. at xiv, 46-49.

mandatory minimums but would reduce many mandatory minimum drug penalties by 50 percent or more. The Act would also expand the application of the current safety valve for drug offenses to include offenders with three or fewer criminal history points.

- The Justice Safety Valve Act of 2015 was introduced in the U.S. Senate (S. 353) on February 3, 2015 and in the U.S. House of Representatives (H.R. 706) on February 4, 2015. This bill would create a new, expansive safety valve that would apply to all mandatory minimums. This would allow judges to sentence offenders below the mandatory minimum in a case in which the judge finds that the mandatory minimum sentence does not meet the goals of sentencing set forth in 18 U.S.C. § 3553(a).

The President has also recognized the need for these reforms. As of June 3, 2016, President Obama had commuted the sentences of hundreds of federal prisoners who were serving lengthy mandatory sentences for non-violent drug crimes.[20] As the administration recognizes, however, only legislation and changes to sentencing policies and procedures can bring about the systemic reform necessary to fix the current system.

In sum, there is widespread, bipartisan support from all of the various stakeholders to eliminate and reduce many of the existing mandatory sentencing provisions and to apply those changes retroactively. With these goals in mind, the PAG continues to support the Commission's efforts with Congress to bring about significant and meaningful reforms in the area of mandatory minimum sentences.

Priority 2: Guidelines Post-*Booker*

The PAG strongly supports the Commission's continuing study of new and different approaches to appropriately account for each defendant's role, culpability and relevant conduct in the guidelines. While some modest progress along these lines was made in the last two amendment cycles, we continue to urge the Commission to consider a much larger reconceptualization of the guidelines that would place primary focus on individual culpability and *mens rea* and not on simplistic (even if more easily measured) factors such as loss or drug quantity. We believe, as we have previously urged, that the ABA Task Force Report on the Reform of Federal Sentencing for Economic Crimes presents a sound and workable framework that could be expanded beyond economic crimes to the guidelines more broadly. We also agree with the Commissioners who in the past have acknowledged that concerns about tying punishment more closely and proportionately to culpability is an issue that the Commission should address across the guidelines manual for all offenders. The PAG looks forward to working with the Commission and other stakeholders to advance this critical reconsideration and recalibration of the overall structure and approach of the guidelines post-*Booker*.

[20] White House Press Release, "President Obama Has Now Commuted the Sentences of 348 Individuals" (June 3, 2016), available at: https://www.whitehouse.gov/blog/2016/03/30/president-obama-has-now-commuted-sentences-348-individuals.

Priority 3: Alternatives to Incarceration

The PAG continues to strongly support the Commission's efforts to encourage the use of alternatives to incarceration and diversionary dispositions. The Commission has observed that "the appeal of alternatives to incarceration has continued to increase in the wake of reports of the ever-growing prison population"[21] and recognized the importance of alternative sentences by updating its findings in 2015.[22] Yet, paradoxically, amidst calls for reductions in the nation's skyrocketing incarceration rate, courts are imposing alternative sentences at a decreasing rate. Despite the Supreme Court's decision in *Gall v. United States*, which reinforced sentencing courts' discretion to vary below the sentencing ranges recommended by the guidelines, federal courts are declining to utilize alternatives to incarceration, even where they have the discretion to do so.[23] The PAG supports the Commission addressing this seemingly anomalous trend. Moreover, a new report from the Justice Department's Inspector General finds that federal prosecutors are seeking diversionary dispositions far less frequently than seems warranted by the Department's "Smart on Crime" policy, another seemingly anomalous trend that ought to raise concerns.[24] We also refer the Commission to our discussion below regarding Priority 5 (recidivism).

The PAG respectfully makes the following recommendations:

1. The Commission should collect and distribute information about existing alternative sentencing programs, currently employed in some district courts, that are designed and intended to result in sentences that do not include prison terms, including community

[21] Courtney Semisch, United States Sentencing Commission, *Alternative Sentencing in the Federal Criminal Justice System* (Jan. 2009). available at: http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20090206_Alternatives.pdf.

[22] Courtney Semisch, United States Sentencing Commission, *Alternative Sentencing in the Federal Criminal Justice System* (June 2015). available at: http://www.ussc.gov/research/research-publications/2015-report-alternative-sentencing-federal-criminal-justice-system.

[23] *Id.*

[24] Office of the Inspector General, U.S. Department of Justice, Audit of the Department's Use of Pretrial Diversion and Diversion-Based Court Programs as Alternatives to Incarceration (July 2016) ("OIG Pretrial Diversion Report"), https://oig.justice.gov/reports/2016/a1619.pdf. In a taped summary of the report's findings, Inspector General Michael Horowitz noted that the report focused both on pre-trial diversion and court-based diversion:

> Our report found that, while the Department has taken some steps to make greater use of pretrial diversion programs, they remain underutilized by the Department, with their use varying widely among U.S. Attorneys across the country. In fact, we found nearly half of the districts rarely used pretrial diversion. We also determined that there were a significant number of additional low-level and non-violent offenders potentially suitable for pretrial diversion. By diverting those offenders from traditional court proceedings, the Department could have potentially saved millions of tax dollars in prison costs.

https://oig.justice.gov/multimedia/transcripts/video-07-14-16.pdf.

supervision programs, deferred adjudication, deferred sentencing and diversion options and community-based treatment. Some of these programs are currently employed in some districts, and some have incorporated into the federal system approaches that have been successfully utilized by state courts. In many instances, defendants entering these programs are diverted from the criminal justice system entirely because the charges against them are dismissed upon successful completion of the program. Two exemplary programs are described in *United States v. Leitch*, 2013 WL 753445 (E.D.N.Y. 2013).

2. The Commission should study the "Federal First Offender Act," 18 U.S.C. § 3607, which authorizes a disposition of prejudgment probation leading to dismissal of charges for misdemeanor drug possessors who have no prior drug convictions, and expungement of the record in cases where the defendant is youthful. In addition to avoiding prison, this authority also avoids the collateral consequences of conviction. A Commission study could assist in determining whether Congress should expand the authority in § 3607 to additional offenses and defendants, and inform the design of other deferred adjudication programs around the country. Similarly, effective state programs can serve as useful models for the federal system.[25]

3. The Commission should consider guideline amendments to provide for noncustodial sentences when appropriate, especially within Zones A and B. In the past, the Commission has noted that a significant percentage of defendants in Zones A and B do not receive the non-custodial sentences for which they are eligible.[26] Consistent with the directive of 28 U.S.S. § 994(j) that "[t]he Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense…," the PAG encourages the Commission to consider issuing commentary or a policy statement reminding judges of the availability of non-custodial sentencing options for defendants in Zones A and B, and commentary or a policy statement suggesting non-exclusive categories or examples of cases that merit imposition of non-incarceration sentences (*e.g.*, probation, half-way house, community service) upon appropriate fact-finding by the sentencing court pursuant to 28 USC 994(j).

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[25] See Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication As a Way of Avoiding Collateral Consequences*, 22 Fed. Sent'g. Rep. 6, 8 & nn. 21-22 (2009) (twenty states authorize expungement or sealing of the entire case record following successful completion of probation where judgment has been deferred, and another six states authorize withdrawal of the guilty plea and dismissal of the charges upon successful completion of a period of probation, but make no provision for expungement or sealing). Since this article was written, a number of additional states have implemented or expanded deferred adjudication mechanisms. See Love et al., supra note 1, § 7:18, pp. 499-506. The ALI's Model Penal Code: Sentencing contains useful proposals for Deferred Prosecution and Deferred Adjudication that do not depend upon a prior guilty plea. Tentative Draft # 3, *supra* note 2, §§ 6.02(A) and 6.02B, *See also* "Priority 5: Recidivism," *infra*, for additional discussion of these programs.

[26] *See* U.S. Sentencing Comm'n, *Alternative Sentencing in the Federal Criminal Justice System* at 3 (Jan. 2009) (noting that federal courts most often impose prison for offenders in each of the sentencing table zones "[d]espite the availability of alternative sentencing options for nearly one-fourth of federal offenders"), available at: http://www.ussc.gov/Research/Research_Projects/Alternatives/20090206_Alternatives.pdf.

4. The Commission also should consider modifying the zones contained in the Sentencing Table to increase the universe of defendants for whom a sentence other than imprisonment would be permitted under the guidelines. Such a revision would satisfy the purposes of federal sentencing: to fashion individualized sentences that are "sufficient, but not greater than necessary,"[27] to meet the statutory purposes of sentencing including the need "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[28] By modifying the minimum term requirements for Zone C, or collapsing Zones B and C, the guidelines can provide for community and home confinement alternatives to a greater number of defendants.[29] One approach that particularly commends itself to the PAG would be to eliminate the requirement for Zone C that at least half of the minimum term be served as actual imprisonment. This change would encourage courts to sentence Zone C defendants who are otherwise ineligible for probation to community custody after a lesser term of imprisonment in the way for which Zone B defendants are now eligible.

5. In its most recent report on alternative sentencing, the Commission reported data that raises concerns about the lower rates at which alternative sentences are imposed on Black and Hispanic defendants. The Commission has found that sentencing alternatives were more often imposed for White defendants than for other groups of defendants. The PAG requests that the Commission study and report on the reasons for this trend.

Priorities 4 and 8: Prior Convictions and Criminal History

The PAG supports the Commission's continued efforts to evaluate and modify the definitions appearing throughout the Guidelines Manual that relate to the nature of a defendant's prior conviction (*e.g.*, "crime of violence," aggravated felony," "violent felony," "drug trafficking offense," and "felony drug offense"). These definitions can impact the defendant's criminal history score as well as the offense level. The PAG believes the Commission should focus on the following items as part of this priority.

Crimes of Violence

a. Career Offender

The aftermath of *Johnson v. United States*, 576 U.S. __ (June 26, 2015), is still being sorted out by the courts. The Commission amended §4B1.1 and §4B1.2 of the guidelines in January, 2016, to reflect the Court's decision in *Johnson.* These new guidelines are effective August 1, 2016. On June 27, 2016, the Supreme Court granted certiorari in *Beckles v. United*

[27] 18 U.S.C. § 3553(a).

[28] 18 U.S.C. § 3553(a)(1)(D).

[29] J.P. Hanlon, *et al*., American Bar Ass'n, *Expanding the Zones: A Modest Proposal to Increase the Use of Alternatives to Incarceration in Federal Sentencing*, 24 Crim. Just. 26 (2010).

States, U.S. No. 15-8544. In *Beckles*, the Court will decide questions not answered in *Welch v. United States*, 578 U.S. ___ (2016); specifically, whether *Johnson* applies to the residual clause of the career offender guideline, and if so, whether *Johnson's* invalidation of the residual clause of the career offender guideline applies retroactively on collateral review and whether possession of a sawed-off shotgun remains a "crime of violence" after *Johnson*.

The amendments to the career offender guideline, which are set to take effect on August 1, 2016, already describe the proper inquiry for the enumerated offenses in the career offender guideline. The PAG recommends no additional changes to the guidelines relating to the nature of the defendant's prior conviction at this time, pending a decision by the Supreme Court in *Beckles*.

b. Armed Career Criminal Act. The Supreme Court's recent decision in *Mathis v. United States*, 579 U.S. ___ (2016), illustrates the Court's continued struggle to create a workable system to interpret the statutory definition of "violent felony" in the Armed Career Criminal Act. In *Mathis*, the Supreme Court clarified the categorical approach for enumerated crimes, holding that the state crime of burglary cannot qualify as an ACCA predicate if its elements are broader than those of the listed generic burglary offense. If the elements of the state crime are broader than the generic crime, a court cannot look to the underlying facts of the crime to find the crime is a "violent felony."

ACCA imposes a mandatory sentence of 15 years for the possession of a firearm by a convicted felon with no component of violence. . Using abstract categories of crimes, for which each state's definitions may differ, as the basis for a mandatory sentencing scheme is inherently problematic and will result in continued litigation; ACCA is fundamentally and irreparably flawed. The Commission should recommend to Congress that ACCA be eliminated. The statutory maximum penalty for violations of 18 U.S.C.§922(g) can be raised to 15 years, and the guidelines amended to take into consideration ACCA's goal of punishing recidivist criminals more harshly, create a workable framework for making that determination, and leave discretion as to the appropriate sentence with the courts.

Priority 5: Recidivism

In March 2016, the Commission released the results of its multi-year study on recidivism in the federal criminal justice system, entitled *Recidivism among Federal Offenders: A Comprehensive Overview* (hereinafter "*Study*"). The Commission has indicated it plans to issue additional reports as it continues this *Study*. The Commission cited these issues in this important area of criminal justice:

> (A) Examining which circumstances most strongly correlate with increased or reduced recidivism; (B) Making recommendations for how to best use the *Study*'s results to reduce costs of incarceration and to promote effectiveness of reentry programs; and (C) Considering amendments to the Sentencing Guidelines that may be appropriate in light of the *Study*'s results.

The PAG continues to support the Commission's important work, which will provide additional valuable data and provide an empirical basis for assessing opportunities to reduce the human, societal and financial costs associated with the overuse of incarceration. The PAG also believes that the Commission is uniquely suited to gather more data to help lawmakers and judges evaluate the risk-factors for recidivism; to use that data to make recommendations that will result in more effective rehabilitation programs; and to provide judges and probation officers with guidance and the analytical tools to reduce the risk of recidivism through the imposition of punishment and oversight that is not excessive, unnecessary, or perhaps even likely to increase the risk that an individual will re-offend.

A. Examining which circumstances most strongly correlate with increased or reduced recidivism

The *Study* provides a comprehensive analysis of the circumstances that correlate with increased or reduced recidivism. An understanding of these factors will assist all interested stakeholders in directing scarce resources in the most efficient and impactful way in order to reduce overall recidivism rates in the federal criminal justice system.

The main factors impacting recidivism are age and criminal history. Individuals released prior to age 21 had the highest re-arrest rate, at 67.6%, compared to 16.0% for those over 60 years old at the time of their release. These results suggest that many older individuals can be safely managed in the community without the need for lengthy periods of incarceration or supervision. Conversely, those who are more likely to re-offend should have the opportunity to receive more services aimed at job training and re-entry so as to minimize the risk of recidivism.

An individual's criminal history as calculated under the federal sentencing guidelines was also found to be closely correlated with recidivism rates. Re-arrest rates ranged from 33.8% for those in the lowest criminal history category to 80.1% for those in the highest criminal history category. This also suggests that sentencing courts can reliably look to criminal history as a guide for opportunities to minimize recidivism. Other factors, including offense type and educational level, were also associated with differing rates of recidivism but less strongly than age and criminal history.

More generally, the overall recidivism rate was 49.3% from the time of release to eight years. This includes the commission of new crimes as well as other violations of the technical conditions of an individual's probation or release. Roughly one-third (31.7%) of those studied were reconvicted (as opposed to just re-arrested), and one-quarter (24.6%) were re-incarcerated.

Moreover, less than a third of the re-arrested individuals were detained for violent crimes, with assault being the most common serious re-arrest offense (accounting for about one-fourth of all such arrests). On the other hand, non-violent arrests for crimes such as fraud, drug possession, and other nonviolent offenses accounted for more than two-thirds of all re-arrested individuals. And, again, most of the individuals who were re-arrested were not actually convicted of committing any new crimes.

Timing also plays an important role in determining a particular individual's likelihood of recidivating. Most of those who were re-arrested did so within the first two years of the follow-up period, with the median time to re-arrest being 21 months. The *Study*'s findings align with research showing that supervision has the greatest impact in terms of crime prevention when it is concentrated on those individuals who have recently re-entered the community.

Finally, and importantly, the *Study* also reveals that length of incarceration has little effect on recidivism. Except for very short sentences (less than 6 months), the rate of recidivism changes very little by length of prison sentence imposed (fluctuating between 50.8% for sentences between 6 months to 2 years, and 55.5% for sentences between 5 to 9 years). This data is consistent with earlier research showing that *long prison terms have little impact on public safety outcomes*. The National Research Council, for example, concluded in a 2014 report that "statutes mandating lengthy prison sentences cannot be justified on the basis of their effectiveness in preventing crime."[30] Of course, longer sentences may serve other legitimate purposes, including punishing offenders and incapacitating those who might have committed additional offenses had they not been incarcerated. The fact remains, however, that lengthy sentences of incarceration apparently do little to improve outcomes in terms of public safety and recidivism.

This is consistent with the experiences of the PAG – longer sentences do not reduce the likelihood of recidivism, and in some instances seem to increase the likelihood of recidivism when the longer term of imprisonment increases an offender's detachment from his community and severs the ties to the community that can contribute to successful re-entry. In the experience of the PAG, longer terms of imprisonment for offenders with minimal criminal history increase the likelihood that upon release, an offender will have few or no community connections and a dearth of opportunities for employment, housing, and stable relationships that increase the likelihood of successful re-entry. In those situations, a return to crime becomes for some offenders the default option.

Consequently, the PAG encourages the Commission to utilize the *Study*'s findings to develop and educate players in the criminal justice system about policies and practices that minimize rates of recidivism, without resort to overuse of incarceration or excessively lengthy detention that does not reduce the likelihood of recidivism and can increase the likelihood that offenders re-offend.

B. Making recommendations for how to best use the Study's results to reduce costs of incarceration and to promote effectiveness of reentry programs

Once we better understand the nature of recidivism among federal offenders as set forth in the *Study*, that information can be used to positively effect change within the criminal justice system.

[30] National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014), available at: http://www.nap.edu/read/18613/chapter/1.

President Obama and lawmakers on both sides of the aisle support criminal justice reform that will address prison overuse, curb excessive sentences and harsh collateral consequences, and facilitate successful reentry. Federal district judges have also written and spoken out about the need for reform.[31] The PAG believes that these initiatives ultimately will reduce the rate of recidivism, and that reduced recidivism will in turn spur additional reform by allowing scarce criminal justice resources to be employed more efficiently and effectively.

The *Study* indicates that of the approximately 80,000 sentences imposed each year for federal felonies and Class A misdemeanor offenses, 9 out of every 10 individuals receive sentences of imprisonment, while only 1 out 10 receive a sentence of probation. These numbers are astonishing and help explain why prisons are overcrowded, criminal justice resources are stretched to the breaking point, and more and more offenders with minimal criminal history leave prison more hardened than when they entered. To reduce the likelihood that over-incarceration contributes to increased recidivism, the Commission should explore alternatives to incarceration that use existing programs as models. Such programs can be implemented both before and after a prosecution has begun with the aim of reducing recidivism. It is the PAG's hope that the Commission will study the effectiveness of these alternative programs, including those listed immediately below, and recommend that the effective ones be used more frequently.

1. Counseling Programs

Some programs require individuals to plead guilty to a less serious offense with the prospect of avoiding any imprisonment by successfully completing programs that involve counseling in the areas of substance abuse, anger management, or employment opportunities. After successfully completing these programs, graduates may be permitted to withdraw their guilty pleas and avoid serving a prison sentence. By avoiding prison, these individuals maintain supportive connections to their communities and the essential support they need to eliminate the destructive influences that increase the likelihood they will re-offend. Moreover, they do not incur the stigma of a conviction that will deprive them of future employment opportunities, and the system does not incur the human and financial cost of incarceration. Despite the success of these programs, they are not widely used and are unavailable to individuals in most districts. The Commission should study these programs and undertake efforts to encourage their use more often and in more judicial districts throughout the United States.

[31] *See e.g.*, *United States v. Dokmeci*, 2016 WL 915185 (E.D.N.Y; March 9, 2016 [Gleeson, J.]) ('As a nation, . . . We need to make smart, bold choices about two things: (1) the lengths of the prison terms we impose on those who need to be imprisoned; and (2) the categories of defendants we routinely incarcerate who don't need to be imprisoned in the first place"); *United States v. Nesbeth*, *supra* note 5 (addressing the often "devastating" effect of collateral consequences); *see also* "Federal Judge Urges U.S. to 'Jettison the Madness of Mass Incarceration'" (N.Y. Times, June 23, 2016 reporting on Address of Hon. Raymond J. Dearie, former Chief Judge, E.D.N.Y., before the New York Criminal Bar Association; a copy of Judge Dearie's speech can be found at http://www.newyorklawjournal.com/id=1202760853093/Retool-Mandatory-Sentences?mcode=0&curindex=0&curpage=ALL.)

2. Pretrial Diversion Programs

Alternatives to incarceration, while laudable, do not address the underlying problem of the stigma a felony conviction carries and the attendant consequences of that conviction. Convicted individuals face driver's license suspensions, food stamp restrictions, welfare restrictions, voting restrictions, reduced employment eligibility, and many other collateral consequences that make successful re-entry more difficult and less likely to be successful. Many states have full or partial bans on welfare and food stamps for people who have felony drug convictions. Such limitations can have a crippling effect on the individual, who may have to support a family, yet is unable to rely on any of these important programs. One way to avoid the significant collateral consequences of a felony conviction is the underutilized but inexpensive and extremely successful pretrial diversion program.[32]

In the PAG's experience, prosecutors who utilize pretrial diversion have seen decreased recidivism among program participants. Those participants can avoid the stain of a conviction and the trauma and detachment of incarceration if they successfully complete diversion. In addition, programs and mechanisms similar to pretrial diversion, such as non-prosecution agreements (NPAs) and deferred prosecution agreements (DPA's), are often used in lieu of prosecuting corporations[33] in districts in which pretrial diversion for individuals is underemployed or not used at all. As a consequence, corporations more often avoid collateral consequences with an NPA or DPA that does not result in a conviction but that reduces the likelihood of recidivism. On the other hand, similarly-culpable individuals suffer the consequences of a conviction and incarceration and the concomitant increased likelihood of recidivism that could have avoided by the use of pretrial diversion.

The Justice Department's "Smart on Crime" strategy announced in 2013 recommends the increased use of diversionary dispositions, including court-based programs, but a new audit conducted by the Department's Office of Inspector General indicates that fewer than half of all districts are doing so.[34]

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[32] The United States Attorneys Manual ("USAM") provides the parameters of the program, and excludes those who are "1. Accused of an offense which, under existing Department guidelines, should be diverted to the State for prosecution; 2. A person with two or more prior felony convictions; 3. A public official or former public official accused of an offense arising out of an alleged violation of a public trust; or 4. Accused of an offense related to national security or foreign affairs." USAM 9-22.100. For those who are not excluded but "against whom a prosecutable case exists," United States Attorneys have discretion to divert prosecution following the procedures in USAM at 712. *See also* USAM 9-27.250 (encouraging prosecutors to consider an "adequate, non-criminal alternative to prosecution" for a person who has committed a federal offense but for whom some remedy other than a criminal sanction is appropriate).

[33] *See* USAM 9-28.100 (directing that "where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism").

[34] *See* OIG Pretrial Division Report, *supra* note 24. The OIG report notes that pretrial diversion and court-based diversion are being used in only about half of all districts.

Because pretrial diversion is used in some districts but not others, the Commission should begin by identifying those districts in which it has been successfully implemented. The Commission could also study the incidence of recidivism among pretrial diversion participants including corporations in those districts that avoid prosecution through entry into an NPA or DPA. The Commission could use the resulting data to identify the factors that contribute to decreased recidivism among pretrial diversion participants, publish the results of the data analysis,[35] and encourage the Department of Justice to expand the use of pretrial diversion programs across the United States. If the data supports the conclusion that corporations that enter into NPAs and DPAs rarely recidivate, the Commission could encourage the application of NPA and DPA principles to individuals who are appropriately suited to pretrial diversion. This data collection and analysis would allow the Commission to provide additional guidance to prosecutors to identify participants who might otherwise present an increased risk of recidivism resulting from conviction and needless incarceration if not afforded the opportunity for pretrial diversion. Additionally, such programs could help identify participants for whom pretrial diversion would further decrease the likelihood of recidivism.

The PAG also continues to encourage the Commission to study and report on federal and state programs already in place that provide for pretrial diversion or deferred adjudication, especially those that have proven most effective at reducing recidivism. As previously noted, one example worthy of study and expansion is the Federal First Offender Act, 18 U.S.C. § 3607, which authorizes a disposition of prejudgment probation for misdemeanor drug possessors who have no prior drug convictions, looking toward dismissal of charges in the event of successful completion, and expungement of the record in the case of youthful offenders.[36]

3. Sentencing Alternatives

The PAG notes research findings that overuse of incarceration increases the likelihood of recidivism, especially when low-risk individuals are sentenced to lengthy terms of incarceration that result in prolonged detachment from family, employers, and their community.[37] The *Study* supports this position by showing that longer sentences do not result in lower recidivism rates. This comports with common sense insofar as a term of incarceration that severs the connections between an offender and a stable support network increases the likelihood that that individual will revert to criminality upon release.

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[35] In, for example, a publication such as the Commission's *Alternative Sentencing in the Federal Criminal Justice System* (May 2015).

[36] In connection with such a study, the Commission may wish to consider how diversionary and other rehabilitative dispositions, including expungement and set-aside, are treated for purposes of calculating criminal history under 4A1.2.

[37] *See, e.g.*, Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* at 7 (2010) (discussing research results and citing Thomas Orsagh and Jong-Rong Chen, *The Effect of Time Served on Recidivism: An Interdisciplinary Theory*, Journal of Quantitative Criminology, 4(2):155-171 (1988)), available at: http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf.

The task, of course, is to identify low-risk offenders and to sentence them in a manner that keeps their connections to family, potential employment, and the community intact while reserving scarce reentry resources for higher-risk offenders who require more services in order to successfully avoid a return to crime. As discussed above, the *Study* has already identified two factors which are highly probative of an individual's likelihood to recidivate: criminal history and age at the time of release.

4. Re-Entry

In addition to diversion programs that are likely to decrease the likelihood of recidivism, the Commission should study re-entry programs that will help individuals to successfully re-enter the community and avoid returning to crime. The *Study* demonstrated that the critical time for individuals released from prison is the first two years. Focusing resources on this time period, therefore, should be a priority.

Concomitantly, the *Study* demonstrates that lengthy periods of probation or supervised release are unnecessary. The rate of recidivism drops precipitously after the second year of supervision.[38] Allowing participants to receive early termination from supervised release by completing an intensive program of counseling and treatment will divert resources to where they are most needed, and avoid expending resources on individuals who need little supervision and are unlikely to reoffend.

With the President and Congress discussing the allocation of increased resources toward reentry programs,[39] the Commission should look to state programs as a way of identifying the most effective use of resources for both low and higher-risk offenders who are re-entering their communities. By relying upon such research, along with the factors identified in the *Study* as having a close correlation with rates of recidivism, programs like those discussed herein can be tailored to maximize the chance that both types of offenders will not re-offend.

C. Considering amendments to the Sentencing Guidelines that may be appropriate in light of the Study's results

Another goal of the *Study* and the ongoing analysis should be to provide information that can be used to inform future amendments to the Sentencing Guidelines. As such, the Commission should consider guideline amendments that will encourage judges to give noncustodial sentences when appropriate, especially for individuals whose guideline range falls

[38] *Study*, at 16.

[39] *See* White House Office of the Press Secretary, "FACT SHEET: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly- Incarcerated" (Nov. 2, 2015) (discussing the Executive Branch efforts to mitigate "unnecessary collateral impacts of incarceration," in particular, advancement of "numerous effective reintegration strategies through the work of the Federal Interagency Reentry Council, whose mission is to reduce recidivism and victimization"), available at: https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation.

within Zones A, B and C. Indeed, 28 U.S.C. § 994(j) pointedly directs that "[t]he Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . ." (emphasis added). In light of this directive, the PAG encourages the Commission to consider issuing commentary or a policy statement further defining categories or examples of cases in which non-incarceration sentences (*e.g.*, probation, half-way house, and community service) are appropriate based upon the sentencing court's fact finding.

To assist in this effort, the PAG has already identified certain guidelines provisions that the Commission should consider amending in light of the *Study*'s findings.

1. 5B1.1 and 5C1.1

As discussed above in Priority 3 at paragraph 4, over-incarceration can be greatly reduced by revising guidelines Sections 5B1.1 and 5C1.1 to expand eligibility for probation to Zone C, and by recognizing, discussing, and encouraging the use of the alternatives to incarceration available to sentencing judges. With this change, individuals for whom imprisonment is unnecessary will not be exposed to an increased risk of recidivism as a result of the detachment from their community and institutionalization that accompanies incarceration. Such a change comports with the *Study*'s findings, as well, because there is no strong correlation between a higher final offense level (in, for example, Zone C of the Sentencing Table) and increased recidivism. *Study*, at 20. Furthermore, the *Study* determined that individuals with shorter sentences generally had lower recidivism rates. *Study*, at 22.

As the PAG has noted in its various submissions to the Commission, alternatives to incarceration are effective only when viewed as actual alternatives in fact. In the past, the Commission has noted that a significant percentage of those individuals with guidelines ranges in Zones A and B do not receive the non-custodial sentences for which they are eligible.[40] The *Study* supports the conclusion that needless use of incarceration for these individuals contributes to recidivism, prison overcrowding, and increased cost. We therefore encourage the Commission to address the overuse of incarceration by revising § 5B1.1 and § 5C1.1.

2. Other Recommendations

In addition to the guidelines amendments, the PAG urges the Commission to explore these other possible recommendations:

- Consistent with the overall policy goals of increasing the use of alternatives to incarceration, the Commission should consider revising the Chapter 7 Policy Statements to include alternatives to incarceration for supervised release violations.

[40] *See* U.S. Sentencing Comm'n, *Alternative Sentencing in the Federal Criminal Justice System* at 3 (Jan. 2009) (noting that federal courts most often impose prison sentences on those in each of the sentencing table zones "[d]espite the availability of alternative sentencing options for nearly one-fourth of federal offenders"), available at: http://www.ussc.gov/Research/Research_Projects/Alternatives/20090206_Alternatives.pdf.

- In recognition of the *Study*'s findings, the guidelines should emphasize certain factors that are tied to lower recidivism, including age and prior criminal history, as being important factors to consider relative to downward departures. This will help such individuals to receive sentences that maintain their ties to stable support.

- Similarly, the Commission should amend the § 5H1.1 policy statement related to age, to more accurately reflect the *Study*'s findings with respect to the role of age in recidivism rates.

- The Commission should develop pretrial diversion policy guidelines to encourage districts to adopt pretrial diversion programs.

Conclusion: the Commission Recidivism Study Can Bring About Dramatic Reform

The PAG is grateful that the Commission is continuing its important and comprehensive study. Meaningful study that results in a greater understanding of the factors that contribute to an increased risk of re-offense and a decreased risk of recidivism will bring about meaningful change. Reducing the risk of recidivism will reduce prison overcrowding and make our communities safer, and will allow individuals to reenter their communities with increased likelihood of success and redemption.

Priority 6: Tribal Issues

1. The PAG Supports Note and Commentary Additions to § 4A1.3 in Considering a Departure from the Guidelines for Tribal Court Convictions

The PAG agrees with the Tribal Issues Advisory Group's ("TIAG['s]") proposal to add an application note and commentary to USSG §4A1.3 "Departures Based on Inadequacy of Criminal History Category (Policy Statement)" to provide sufficiently specific guidance about when tribal court convictions may be considered for upward departure in the defendant's criminal history category. The PAG agrees that the following factors merit consideration, though none is intended to be determinative. Collectively, these factors reflect important considerations for sentencing courts, balancing the rights of defendants, the unique and important status of tribal courts, the need to avoid disparate sentences, and the aim of accurately assessing a defendant's criminal history.

a. Due Process Considerations

The PAG agrees that due process considerations are important to the upward departure analysis. While the proposed changes would provide additional context, the PAG believes that more guidance on the scope and criteria to be considered is needed, particularly in light of *United States v. Bryant*, 579 U.S. __ (June 2016), which held that uncounselled tribal convictions are not unconstitutional if the proceeding complied with the Indian Civil Rights Act.[41] The Court also held that that uncounselled misdemeanour convictions can be valid for upward departures.[42]

b. Tribal Exercise of Expanded Jurisdictions

The PAG agrees that it is important to consider whether the tribal court had expanded jurisdiction under the Tribal Law and Order Act and the Violence Against Women Act Reauthorization of 2013 when determining whether to depart upward. There are special circumstances where the prosecution of non-Indians[43] is allowed.[44] If expanded jurisdiction is relevant, courts should consider the circumstance(s) that gave rise to such expanded jurisdiction and the tribal court's ruling.

c. Possibility of "Double-counting" in Computing Criminal History Category

The PAG agrees that it is important to consider the potential for "double-counting" in computing the criminal history category to promote fairness and consistency in the guidelines calculation, even though the Double Jeopardy Clause does not apply to tribal court convictions.[45] More guidance should be provided to aid the assessment of whether the conduct underlying the punished offense is the same. Where the conduct is found to be the same, the tribal court conviction should not be taken into account.

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[41] *See U.S. v. Bryant*, 136 S.Ct. 1954, 1956 (2016) (stating that "The Indian Civil Rights Act of 1968 ("ICRA") . . . provides indigent defendants with a right to appointed counsel only for sentences exceeding one year. 25 U.S.C. § 1302(c)(2). ICRA's right to counsel therefore is not coextensive with the Sixth Amendment right.")

[42] *See id*. at 1965 (explaining that an uncounseled misdemeanor conviction . . . is also valid when used to enhance punishment at a subsequent conviction) (citing to *Nichols v. United States*, 511 U.S. 738, 748-49).

[43] *See* definition of "Indian" in May 2016 TIAG Report at 4.

[44] *See* ICRA, 25 U.S.C. § 1302(a)-(c) (codifying the Tribal Law and Order Act of 2010, which allows tribal courts to prosecute felonies, increases their sentencing authority, and requires certain due process safeguards); *see also* § 1304 (establishing a new "special domestic violence jurisdiction" to allow tribes to prosecute non-Indians who commit acts of domestic violence within the tribe's jurisdiction and requiring tribal courts to provide counsel to those defendants). *But see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) ("Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."); *United States v. Lara*, 541 U.S. 193, 227 (2004) ("[A]ny tribal exercise of criminal jurisdiction over nonmembers necessarily rests on a 'delegation' of federal power.").

[45] *See Lara*, 541 U.S. 193 (holding that Double Jeopardy did not bar federal prosecution after an Indian tribe had prosecuted and punished the defendant where the source of the tribal prosecution was federal power).

d. Similarity of Tribal Conviction Offense in Type and Age

The PAG agrees that courts should consider whether a tribal court conviction is for an offense that would otherwise be counted under USSG § 4A1.2 based on the type and age of the offense. Courts currently consider uncounted criminal records when deciding to depart upward from the guidelines.[46] Providing additional guidance on when to consider offense similarities between tribal court convictions and convictions that would otherwise be counted under USSG § 4A1.2 would allow more uniformity in upward departures.

e. Tribal Court's Express Desire for Consideration of Tribal Convictions in Federal Sentencing

The PAG agrees that greater consideration should be given to any formal expression by tribal courts of a desire for their court's convictions to be counted towards U.S. federal court sentences. While the current guidelines do not consider this factor, the proposed amendment provides only minimal assistance on this point. Additional research should be conducted to determine which tribal courts have expressed a desire for their convictions to be considered federally, how many courts have expressed such a desire, and whether those desires have specified the types of convictions that should be considered, among other considerations. In addition, , the underlying information regarding tribal courts' formal positions on the issue should be made readily available to federal courts.

2. The PAG Supports the TIAG's Proposal to Add a Definition for Court Protection Order in Section 1B1.1

The PAG generally supports TIAG's proposal to include a definition for "court protection order" that references 18 U.S.C.§ 2265 and 18 U.S.C.§ 2266 but suggests further revision to the proposed amendment once additional research is conducted. The PAG recommends clarifying the definition to promote greater uniformity in the application and scope of court protection orders. The PAG agrees that additional data should be collected to best assess the use of protection orders as enhancements in federal sentencing, including: their frequency; the issuing court; whether notice was provided to the defendant; and the type of offense. This data about protection orders should be analysed before considering any expansion of their use as enhancements because violations of court protection orders already trigger enhancements under USSG §§ 2A2.2, 2A6.1 and 2A6.2.

[46] *See United States v. Sayers*, 580 Fed. App'x. 497, 500 (8th Cir. 2014) ("[A]n upward variance of six months was appropriate, noting [defendant's] criminal history, which includes numerous tribal court convictions for which he did not receive criminal-history points."); *United States v. Sechrist*, 493 Fed. App'x. 778, 780 (7th Cir. 2012) (noting court's "mistrust of the guidelines range as calculated, which did not account for [defendant's] [] convictions in tribal court").

3. The PAG Supports the Policies Behind the TIAG's Proposed Changes to Sections 5H1.1 and 5K2.25 for the Age Policy Statement, But Recommends Further Revision to the Proposed Amendment.

a. Policy Behind the Proposed Changes

The PAG agrees with the TIAG's recommendation to focus on the rehabilitative nature of the juvenile justice system. The PAG also agrees with the TIAG's findings regarding the effects of treating juveniles like adults and sentencing them to detention or imprisonment. District courts applying §5H1.1 often have considered a defendant's age only generally, without conducting a more detailed analysis.[47] The guidelines only consider a youth's age in special circumstances and do not fully address the differences between juveniles and adults.

Recent Supreme Court jurisprudence highlights the important differences in psychological developments between juveniles and adults in sentencing. In *Roper v. Simmons*, the Supreme Court considered the imposition of a life sentence on a juvenile as opposed to an adult, noting: (i) children lack maturity and have an underdeveloped sense of responsibility; (ii) children are more vulnerable to negative influences and outside pressures; and (iii) a child's character and traits are not as "well formed" or fixed as an adult's.[48] In *Miller v. Alabama*, where a juvenile faced life imprisonment without parole for a murder he committed at 14-years old, the Court reaffirmed that children are constitutionally different from adults in sentencing because of their diminished culpability and greater prospects for reform.[49] That holding was extended in *Montgomery v. Louisiana*, where the court held that the *Miller* ruling applies retroactively to all inmates who were sentenced to life without parole previously.[50] The Supreme Court's reasoning, although applied to extreme sentences, is applicable here, as it demonstrates that children are different than adults under the law and thus should be treated differently. Thus, the PAG agrees with TIAG's policy that because juveniles have a greater chance of reform than adults, and

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[47] *See United States v. Logan*, Crim. No. WDQ-10-0203, 2015 WL 6437611, at *1 (D. Md. Oct. 21, 2015) (granting a downward departure because defendant was 48 years old); *United States v. Murphy*, No. 3:11-CV-559-P, 2011 WL 3204375, at *2 (D. Tex. July 26, 2011) (considering defendant's age in a motion to correct, vacate, or set aside the sentence); *United States v. Law*, 806 F.3d 1103, at 1106 (D.C. Cir. 2015) (finding that the district court considered defendant's age and health in determining sentence); *United States v. Jefferson*, 816 F.3d 1016, at 1021 (8th Cir. 2016) (rejecting defendant's argument that it was procedural error to not grant a downward departure due to defendant's young age at the time of the crimes because the decision to refuse downward departure is unreviewable).

[48] *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (holding that life imprisonment is an unconstitutional sentence for juveniles without consideration of special circumstances). *See also Graham v. Florida*, 560 U.S. 48, 68 (2010) (holding that a juvenile offender who did not commit homicide cannot be sentenced to life without parole) ("[A] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.").

[49] *Miller v. Alabama*, 132 S.Ct 2455, 2464 (2012) (holding that the penological justifications for imposing life without parole on juvenile offenders was so diminished that it was not constitutionally permissible).

[50] *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

because detention and imprisonment diminish that chance of reform, courts should focus on the rehabilitative nature of the juvenile justice system and not abandon those considerations for youthful offenders from Indian country.

b. Sections 5H1.1 and 5K2.25

The PAG recommends revising the proposed amendments because they are overbroad and, thus, are not likely to be implemented as a practical matter. However, additional study is needed to clarify the scope of the proposed amendments and facilitate their implementation. For example, the statement in Section 5H1.1 "in a case in which a sentence of imprisonment or detention may expose the defendant to anti-social peers" would apply to every young person sentenced to detention or imprisonment. Prisons and juvenile detention centers all house individuals who committed crimes, and those crimes are often considered an antisocial behavior. Including this amendment as proposed may result in a blanket departure for all juveniles, thus undermining the purpose of a "departure" from the guidelines. Additionally, the statement on "pro-social behaviors, activities, or relationships" is duplicative across both sections and requires clarification. Determining if a relationship, activity, or behavior is pro-social requires a subjective evaluation that may result in judges applying the provision unevenly. In particular, it is not clear how to discern what constitutes pro-social behavior.

The PAG acknowledges that there is little scholarship on how courts should address the differences between youth and adults in sentencing outside of capital punishment. As the PAG agrees in full with the policies behind the proposed changes to these sections, we would support language that can address the issue objectively and fairly.

Priority 7: Youthful Offenders

The PAG supports the Commission's proposal to study the Manual's treatment of youthful offenders. As the Supreme Court has recognized, in evaluating criminal responsibility, "children are constitutionally different from adults for sentencing purposes."[51] These differences manifest themselves in several ways:

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable to negative influences and outside pressures," including from their family and peers; they have limited "control over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be evidence of irretrievable depravity.[52]

[51] *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012).

[52] *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016) (citations omitted).

Indeed, scientific research has documented "that human brain development may not become complete until the age of twenty-five."[53] According to the Supreme Court, the fact that those under 25 are not fully formed adults should make a difference at sentencing. "Immaturity at the time of the offense conduct is not an inconsequential consideration" and "a sentencing court *should* account for age when inquiring into the conduct of a defendant." *Id.* (emphasis added).

Two provisions of the guidelines relating to youth merit particular scrutiny by the Commission. First, the Commission should re-examine the language of §5H1.1, which states that "age (including youth) *may* be relevant in determining whether a departure is warranted *if* considerations based on age . . . are present *to an unusual degree* and distinguish the case from the typical cases covered by the guidelines." USSG §5H1.1 (2015) (emphasis added). The PAG believes that the phrase "to an unusual degree" unnecessarily restricts a court's power to depart on the basis of youth. For example, some courts have interpreted this phrase to require the presence of factors in addition to youth before a case may be deemed "outside the heartland" and therefore meriting a departure.[54] Other courts, while recognizing that a defendant's youth may always be a relevant sentencing consideration, still hold that a defendant must be "very" young before a departure is warranted.[55] Because both approaches are in tension with the Supreme Court's continued focus on the lesser culpability of defendants in their early 20s, the Commission should consider removing the language from §5H1.1 that suggests that considerations based on age must be "present to an unusual degree and distinguish the case from the typical cases."

Second, the Commission should reconsider the inclusion of offenses committed prior to age 18 in calculating a defendant's Criminal History Category, both under §4A1.2 and the relevant provisions of the Career Offender guidelines, §§4B1.1 and 4B1.2. It is the view of the PAG that both sections sweep too broadly in counting offenses committed prior to age 18. As currently drafted, §4A1.2(d): (1) assigns a full three points for offenses committed prior to age 18 if the defendant was sentenced as an adult and received a sentence of incarceration of more than a year and a day; (2) assigns two points if the defendant was sentenced either as an adult or a juvenile to 60 days and was released from incarceration within five years of the offense; and (3) assigns one point for any adult or juvenile sentence, even if such sentence did not involve incarceration, so long as that sentence was imposed within five years of the instant offense. USSG §4A1.2(d) (2015). Though the Career Offender guidelines only count prior offenses that are nominally "adult convictions," these include offenses committed prior to age eighteen if the conviction 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

[53] *Gall v. United States*, 552 U.S. 38, 58 (2007).

[54] *See United States v. Gonzalez-Lopez*, No. 11-cr-3002 (JB), 2012 WL 3150350 (D.N.M. July 27, 2012); *see also, e.g.*, *United States v. Nichols*, 527 F. App'x 344, 348 (6th Cir. 2013) ("[A] sentencing court must identify 'exceptional circumstances' to grant a downward departure on this basis [of age].").

[55] *See, e.g.*, *United States v. Rivera-Gonzalez*, 778 F.3d 45, 50 (1st Cir. 2015) (finding that age may be present "to an unusual degree . . . when a defendant is either very young or very old").

defendant's eighteenth birthday, if the defendant was expressly prosecuted as an adult)."[56]

The PAG believes that counting *any* offenses committed prior to age 18 in calculating a defendant's Criminal History Category raises several problems. First, assigning criminal history points when a juvenile was sentenced as an adult in the underlying jurisdiction ignores the substantial evidence that, regardless of whether the proceeding was "adult" or "juvenile," those under 18 bear lesser culpability for their actions.[57]

Second, state jurisdictions have different practices with respect to when individuals under the age of 18 are sentenced as "adults."[58] As a result, similarly situated defendants may end up with substantially different criminal history scores, simply by virtue of the different state rules concerning the treatment of juvenile offenses. Such unwarranted disparities in sentencing are precisely what the guidelines were designed to avoid.

Third, juvenile offenders in many state jurisdictions are technically sentenced as adults – thereby triggering points under Chapter 4 – but are nonetheless subject to the protections of the state's juvenile court system.[59]

Finally, the guidelines count even purely juvenile convictions toward the criminal history category so long as the convictions (or the time spent in custody) fall within five years of the instant offense. *See* USSG §4A1.2(d). The PAG believes that counting juvenile offenses, no matter how close in time to the federal offense, is inappropriate. As a general matter, state juvenile court systems were intended to exempt the juvenile from the "routine of the criminal process" and place him in "an intimate, informal, and protective proceeding."[60] In contrast to adult criminal proceedings, in which "a finding of guilt establishes that they have chosen to engage in conduct . . . reprehensible and injurious," and defendants are "branded and treated" as

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[56] The Circuits have split as to whether the guidelines distinguish between adult and criminal *sentences* – in addition to adult and criminal *convictions*. *Compare Gregory v. United States*, 591 F.3d 964, 967 (7th Cir. 2010) (affirming career offender status based on robbery committed while defendant was a juvenile, because "[t]he critical question is whether the juvenile was convicted as an adult, not how he was sentenced") *with United States v. Mason*, 284 F.3d 555, 560 (4th Cir. 2002) ("[I]f [the defendant's] conviction is to be counted for career offender purposes, he must have received an adult conviction *and an adult sentence of imprisonment*.") (Emphasis added).

[57] *Gall v. United States*, 552 U.S. 38, 58 (2007).

[58] *See, e.g., United States v. Moorer*,383 F.3d 164, 169 (3d Cir. 2004) (noting that New Jersey law, which does not "permit a judge to impose a juvenile 'sentence' based on an adult conviction for a crime" is "in marked contrast to the West Virginia law . . . which explicitly allows for a defendant under eighteen to be sentenced under juvenile delinquency law even after being convicted under adult jurisdiction"); *United States v. Clark*, 55 F. App'x 678, 679 (4th Cir. 2003) (noting that there is a "West Virginia sentencing scheme permit[ing] a defendant under eighteen who was convicted as an adult to be sentenced as a juvenile delinquent," but that "North Carolina has no analogous statutory provision").

[59] *See, e.g., United States v. Jones*, 260, 264 (2d Cir. 2005) (noting that "[y]outhful offender status carries with it certain benefits, such as privacy protections," and "New York [State] Courts do not use youthful offender adjudications as predicates for enhanced sentencing," but that federal courts have "still found it appropriate to consider the adjudications for federal sentencing purposes").

[60] *McKeiver v. Pennsylvania*, 403 U.S. 528, 546, 548 (1971).

blameworthy, "[r]eprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or other forces beyond their control."[61] Accordingly, the juvenile justice system is "aimed at rehabilitation," rather than deterrence or punishment.[62]

The inclusion of juvenile adjudications in calculating an adult's Criminal History Category has the effect of retroactively punishing him for his youthful misconduct.[63] Because this outcome is inconsistent with the largely rehabilitative purposes of most states' juvenile justice systems, and moreover in tension with the prevailing consensus that juvenile offenders should be treated differently, the Commission should consider amending §4A1.2 to exclude juvenile adjudications from the calculation of an individual's Criminal History Category.

Priority 10: Implementation of the Bipartisan Budget Act of 2015, Pub. L. 114-74

Under 42 USC §§ 408, 1101 and 1383a, it is a federal crime to provide false statements or representations of material fact in connection with applications for Social Security benefits. The Bipartisan Budget Act of 2015, Pub. L. 114-75, recently amended those statutes, first, by adding new conspiracy offenses to each statutory provision, *see* 42 USC §§ 408(a)(9), 1011(a)(5), 1383a(a)(5), and second, by increasing the statutory maximum from five years to ten years in prison for a person "who receives a fee or other income for services performed in connection with" a determination for Social Security benefits, or "is a physician or other health care provider who submits or causes the submission of medical or other evidence in connection with any such determination . . . ." *See* 42 USC §§ 408(a), 1011(a), 1383a(a).

During the 2016 amendment cycle, the Commission proposed referencing the new conspiracy offenses established by the Act to USSG §2X1.1, and also sought comment on whether the guidelines covered by the proposed amendment (§§2B1.1 and 2X1.1) adequately account for the new offenses. With regard to the new ten year statutory maximum applicable to the subset of defendants set forth above, the Commission did not propose any guideline amendments but rather sought comment on whether the guidelines should be amended to specifically address those fraud cases and, if so, how.

The PAG submitted a letter to the Commission approving the reference to §2X1.1 and stating its position that the guidelines already adequately address the subset of Social Security

[61] *Id.* at 551-52.

[62] *Id.*; *see also Application of Gault*, 387 U.S. 1, 16 (1967) (noting that, in reforming the juvenile justice system, "[t]he apparent rigidities, technicalities and harshness . . . in both substantive and procedural criminal law were . . . discarded" and "the child was to be 'treated' and 'rehabilitated'").

[63] *See Gregory*, 591 F.3d at 967 ("Minors convicted as adults are sometimes (perhaps often) sentenced more leniently under juvenile criminal codes, . . . if they persist in a life of crime, however, the career offender guidelines call for a lengthier sentence."); *United States v. Driskell*, 277 F.3d 150, 156 (2d Cir. 2002) (noting that, although New York's youthful offender statute provides juveniles with "certain privacy protections," the "previously adjudicated youthful offender who recidivates . . . loses some of these protections as New York courts frequently consider his prior youthful offender adjudication at sentencing.").

fraud cases that will now be subject to an increased statutory maximum. *See* PAG letter to USSC (March 18, 2016 at 20-21. Additionally, the PAG urged the Commission to clarify that §3B1.1 does not and should not apply to cases lacking a factual basis for the enhancement. *See id.* at 23 (noting that the enhancement "should not apply, for example, to a claimant's representative who does not have a position of trust vis-à-vis the Social Security Administration, despite the fact that s/he might have a position of trust vis-à-vis the claimant"). Three members of Congress, the Department of Justice, and the Inspector General of the Social Security Administration also submitted comments, urging the Commission to add special offense characteristics to §2B1.1 and/or expand the scope of §3B1.1 in order to ensure that the guidelines recommend higher sentences as a matter of course for the subset of defendants subject to the increased statutory maximum.[64] The Commission determined that the issue merited additional study before making a final policy decision, and has now listed it as a priority for the 2017 amendment cycle.

The PAG continues to adhere to its position that the Commission should not amend §2B1.1 simply to increase recommended sentencing ranges for individuals convicted of Social Security fraud, or a subset of those individuals, as a matter of course. As recognized by myriad stakeholders, §2B1.1 is already overly complicated and unwieldy, and too often results in overly harsh sentencing recommendations. The Commission is right to resist the temptation to add a new specific offense level or application note in automatic response to the increased statutory maximums established by the Act.

The Commission is also right to study the issues – and, in particular, to review sentencing data –before making a determination that the guidelines under- or over-punish a particular class of defendants. To that end, PAG recommends that the Commission study the rates of downward and upward departures and variances in Social Security fraud cases involving the newly increased statutory maximum in order to better assess the adequacy of current sentence recommendations and the need for adjustments to those recommendations, if any. PAG looks forward to working with the Commission on this and the other proposed priorities in the upcoming amendment cycle.

Priority 12: Relevant Conduct

The PAG recommends that the Commission amend application notes 1(A) and (3) to guideline Section 3E1.1 to eliminate references to relevant conduct, including the language stating that a defendant who "falsely denies" or "frivolously contests" relevant conduct is ineligible for acceptance of responsibility credit. While the language of the commentary suggests that its application will be limited to affirmative efforts by a defendant to proffer false testimony or evidence, in practice, these provisions put a defendant at risk of an increased sentence for doing nothing more than putting the government to its proof for allegations of conduct outside the offense of conviction.

[64] The Federal Public and Community Defenders submitted comments approving of the Commission's proposed reference to §2X1.1, and using sentencing statistics to support their position that guideline recommendations in Social Security fraud cases are frequently too high and never too low.

Because relevant conduct is evaluated under a preponderance of the evidence standard and already plays such an expansive role in determining a sentence, extending the concept of acceptance of responsibility to include relevant conduct has *Apprendi* implications (because of the potential for adding increasing sentencing ranges for conduct that neither is admitted nor determined to exist by a jury). But more fundamentally, denying acceptance of responsibility credit to a defendant who has fully admitted the offense of conviction, simply because he has challenged the government's theory of relevant conduct or challenged relevant conduct-related evidence raises serious due process concerns. Other provisions of the guidelines already allow a judge to deny acceptance credit, and even to add obstruction points, if a defendant offers false testimony or evidence. There simply is no need, and no basis in fundamental fairness, to include language in commentary notes 1(A) and (3) that invites judges to characterize a challenge to a government's version of the offense as a "false denial," or a "frivolous" challenge. Because such "findings" regarding a defendant's challenge of the evidence are made under the lowest standard of proof, and subject to the highest level of appellate deference, the inevitable effect is to chill the rights of defendants to put the government to its proof, as is the defendant's right.

Although application note 1(A) states that "a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction," the only option this leaves in practice—silently accepting the government's version of relevant conduct—accomplishes much the same result. Further, the application note's statement that "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with the acceptance of responsibility" strongly discourages defendants from challenging relevant conduct at all if they want to receive the credit, while doing nothing to discourage false testimony, which is already prohibited. Courts regularly deny the acceptance credit when defendants challenge the government's evidence regarding relevant conduct, often as part of contesting the application of other sentencing enhancements.

Just one example of this is *United States v. Burns*.[65] There, the defendant pleaded guilty to being a felon in possession of a firearm, but challenged the PSR's finding that he had used the gun in an attempted murder and that therefore his sentence should be determined using a cross-reference for that uncharged crime. The defendant, who did not testify at the sentencing hearing, disputed that he had the requisite *mens rea* for attempted murder and contended that the guidelines range for aggravated assault should have applied instead. Because of that challenge, the district court denied the acceptance of responsibility credit, and the Fourth Circuit affirmed, citing the guidelines commentary: "Because falsely denying relevant conduct is 'inconsistent with the acceptance of responsibility,' U.S.S.G. §3E1.1 cmt. n. 1(A), the district court did not err by denying Burns a three-level reduction."[66]

[65] 781 F.3d 688 (4th Cir.), *cert. denied* 135 S. Ct. 2872 (2015).

[66] *Id. See also, e.g., United States v. Edwards*, 635 F. App'x 186 (6th Cir. 2015) (affirming district court's decision to deny acceptance credit because drug defendant had "frivolously denied conduct relevant to the leadership-role enhancement"); *United States v. Sandidge*, 784 F.3d 1055 (7th Cir. 2015) (affirming district court's decision to deny acceptance credit because defendant contested the factual basis for a four-level enhancement based on relevant conduct). In none of the cases above did the defendant testify at sentencing. Rather, relying on the language of the

The PAG believes that the Commission should recognize and address the practical reality that, as currently written, the application notes make it difficult for a defendant to challenge relevant conduct without jeopardizing his eligibility for the acceptance of responsibility credit. Revising the language of the application note would clarify that a defendant who has pleaded guilty to the offense of conviction and has otherwise accepted responsibility based on the factors set forth in the application note, can contest relevant conduct and remain eligible for the credit.

Although "[a] defendant who enters a guilty plea is not entitled to an adjustment under [§3E1.1] as a matter of right," as Application Note 3 states, a defendant's guilty plea before trial and truthful admission of the conduct comprising the offense should "constitute significant evidence of acceptance of responsibility," regardless of the position the defendant takes regarding relevant conduct. This is especially true because the government controls the charges and must consent to plea agreements. Challenging relevant conduct that can affect sentencing enhancements does not alter whether a defendant has accepted responsibility for his offense; either way, he is admitting guilt and allowing the government to forego a trial.

The proposed modifications are not intended to be, and would not serve as, a license for defendants to offer false testimony or evidence. If a defendant testifies untruthfully or otherwise attempts to mislead the court with false evidence, the guidelines already contain avenues for addressing such conduct in a way that will preclude acceptance of responsibility credit. Rather, the changes suggested here are intended to make clear the fundamental difference between simply challenging the government's proof regarding relevant conduct, and falsely denying" an allegation.

The PAG recognizes that the line between "relevant conduct" and "conduct comprising the offense" may not always be clear. However, this will vary on a case-by-case basis and is best determined by the sentencing court. Accordingly, the PAG recommends revising the application notes in the guideline commentary as follows:

1. *In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:*

   (A) truthfully admitting the conduct comprising the offense(s) of conviction~~, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with the acceptance of responsibility~~.

   . . .

application note, courts characterized appropriate sentencing arguments as "frivolously contesting" or a "falsely denying" relevant conduct and denied the acceptance credit.

3. *Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction~~, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A))~~, will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.*

CONCLUSION

On behalf of our members, who work with the guidelines on a daily basis, we appreciate the opportunity to offer the PAG's input for the 2016 amendment cycle. We look forward to an opportunity for further discussion as the proposed changes are finalized.

Sincerely,

Eric A. Tirschwell, Chair
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-8404 telephone
(212) 715-8394 facsimile
etirschwell@kramerlevin.com

Nanci Clarence, Vice Chair
Clarence Dyer & Cohen LLP
899 Ellis Street
San Francisco, CA 94109
(415) 874-4566 telephone
(415) 749-1694 facsimile
nclarence@clarencedyer.com

cc: Hon. Charles R. Breyer, Vice Chair
Hon. Dabney Friedrich
Hon. Rachel Barkow
Hon. William H. Pryor, Jr.
Commissioner Michelle Morales
Commissioner J. Patricia Wilson Smoot
Kenneth Cohen, Chief of Staff
Kathleen Grilli, General Counsel

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

July 22, 2016

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

Dear Judge Saris,

The Probation Officers Advisory Group (POAG) met in Washington, D.C., on June 29 and 30, 2016, to discuss and formulate recommendations to the United States Sentencing Commission regarding the Commission's Notice of Proposed Priorities and ongoing POAG concerns. POAG comments on the selected Proposed Priorities and proposes additional issues for consideration.

POAG generally discussed the overall structure of the guidelines, simplification and how the guideline system can promote proportionality while accounting for relative culpability. POAG believes the guideline system is not broken and is an effective mechanism in the sentencing process. We recognize that guideline "simplification" has been on the Commission's long-term agenda for many years and should remain a priority. All the commentary herein seeks to forward the Commission's long-term work with regard to *Priority #2* to promote simplicity to the sentencing guidelines and improve the system.

Priority #1 – Expansion of the Safety Valve and "Stacking" of Penalities Under 18 U.S.C. § 924(c)

POAG welcomes the Commission's consideration of expanding the "safety valve." We suggest the Commission consider the expansion to include defendants in Criminal History Category II with the following exceptions. POAG believes defendants in Criminal History Category II with three criminal history points pursuant to United States Sentencing Guideline (USSG) §4A1.1(a), or two of their three criminal history points pursuant to USSG §4A1.1(d), present a greater likelihood of recidivism, and should not receive the benefit of the "safety valve."

POAG supports the Commission's work with Congress and other interested parties on elimination of the mandatory "stacking" of penalties under 18 U.S.C. § 924(c), and to develop appropriate guideline amendments in response to any related legislation. The determination to charge one or multiple 18 U.S.C. § 924(c) counts, not only varies greatly across the country but also within in a single district. This practice leads to large sentencing disparities. As each additional 18 U.S.C. § 924(c) carries an additional 25 year mandatory minimum consecutive to any other sentence, eliminating the mandatory stacking will encourage less disparity and consistency in sentencing practice.

Priority #3 – Alternatives to Incarceration/Re-Zoning of Sentencing Table

POAG makes reference to its submission to the Commission dated July 17, 2015 and reaffirms its proposal to bifurcate the Sentencing Table into two zones. Although the four-zone system has been the paradigm of federal sentencing throughout the life of the guidelines, it may be time to rethink this approach. POAG believes that probation-only sentences can be leveraged to meet the Commission's goals of simplifying the guidelines and encouraging cost-effective measures to reduce the federal prison population.

Operationally, within the new Zone B (current Zone D), there would be no changes in application – the minimum term needs to be satisfied with a sentence of imprisonment. The new Zone A, however, would encompass current Zones A through C and would authorize imposition of a probationary term anywhere in the new Zone A. Probation could be imposed alone or in combination with any of the sentencing alternatives that currently exist within Zones B and C. With this change, the Commission may want to revisit the line of demarcation separating the two zones.

While the applicable guideline imprisonment range would no longer proscribe location monitoring (LM) and community confinement in probationary dispositions, POAG believes courts will continue to use these options where appropriate. However, Courts will have more flexibility to impose straight-probation in the situations where they currently depart or impose variances to achieve the same result – thereby increasing the number of within guideline sentences the system produces.

POAG observes the current blanket approach to LM and community confinement may have unintended consequences on low-risk defendants – ultimately increasing their risks of recidivism through over-supervision. Any individual subject to LM requirement is supervised in the community at the equivalent level as a high risk case (throughout the life of the LM condition). Research in community corrections has clearly established that over-supervising low risk cases increases the likelihood of supervision failures through either recidivism or technical violations.

Additionally, POAG asks that the Commission consider the impact this blanket location monitoring paradigm has on supervision resources. The over-supervision of low risk cases reduces the amount of time a field officer can devote to true high risk/high need cases.

POAG believes the Commission should encourage Courts to expand the use of probation-only sentences. The U.S. Probation System is leveraging evidence-based approaches to supervision that account for risk and are utilizing cognitive behavioral techniques in case management – to include Staff Training Aimed at Reducing Re-arrest (STARR) strategies. By providing more judicial discretion within a two-zone system, Courts would have increased flexibility to use an array of alternatives to incarceration and tailor those sentences commensurate with the risks presented.

Priority #3 – Creation of Criminal History Category Zero

POAG encourages the Commission to explore the creation of a criminal history category zero within the Sentencing Table. According to the recently released recidivism study completed by the U.S. Sentencing Commission (*Recidivism Among Federal Offenders: A Comprehensive Review, March 2016),* offenders with zero criminal history points had a 30.2% re-arrest rate compared to a 46.9% re-arrest rate for offenders with one criminal history point. This data provides justification to explore an expansion to the Sentencing Table to include a stand-alone category for offenders with zero criminal history points.

A new criminal history category zero will further individualize federal sentencing and provide Courts flexibility to utilize alternatives to imprisonment upon a class of offenders shown to recidivate at a statistically lower rate than defendants sentenced with one or more criminal history points.

Priority #4 – Crime of Violence Proposal

POAG has examined the proposed priorities related to the issues of the Career Offender guidelines, the illegal reentry guideline, and the Armed Career Criminal Act. While our comments on the illegal reentry guideline and the Armed Career Criminal Act will be brief, POAG has a substantial recommendation regarding the Career Offender guideline that could dramatically enhance the guideline's ease of application, clarity, and proportionality, while reducing disparity. The focus of POAG's recommendation is based upon what is commonly referred to as the "Enumerated Crimes Clause," in which the USSG provides a list of offenses under USSG §4B1.2(a)(2) that are to be considered *per se* crimes of violence.

Crime of Violence as of August 1, 2016

The "Enumerated Crimes Clause" under USSG §4B1.2(a) as of August 1, 2016, will likely read: "The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that – (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 28 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." Many of these offenses now enumerated under USSG §4B1.2(a)(2) were previously enumerated under USSG §4B1.2, comment. (n.1). Placing them

into the main body of USSG §4B1.2(a)(2) will not substantively adjust the approach the Courts have used to determine whether or not a conviction is one of those enumerated offenses. The Supreme Court of the United States' interpretation of the "Enumerated Crimes Clause" under USSG §4B1.2(a)(2) as applied to a defendant's conviction under the state statute by a similar title is to begin with a comparison of the generic definition of the enumerated offense to the definition of the state statute. If the state statute is broader than the generic definition, then it can never qualify under the enumerated clause, regardless of whether the defendant's conduct resulting in the conviction would have constituted a conviction under the generic definition. Many, if not most, states do not use the generic definitions of these crimes. As such, this procedure (i.e. the comparison procedure) must be used frequently as convictions under different state statutes with the enumerated titles present themselves. Difficulties analyzing the generic definition and the state statutory definition has been the source of much consternation and frustration amongst those trying to apply the guidelines. It has also created sentencing disparity between those who have engaged in violent criminal conduct in states with statutes that closely follow the generic definition as opposed to those who have engaged in the same violent criminal conduct in states with statutes that are broader than the generic definition.

The Commission's studies have shown that individuals who have committed a "crime of violence" as their instant offense or that have an ACCA or Career Offender predicate that is a "violent felony" or a "crime of violence" have a higher rate of recidivism. If a District Judge uses the correct approach, the current state of the "Enumerated Crimes Clause" could allow a person who engaged in violent conduct to avoid a sentence commensurate with his or her conduct. For example, two defendants convicted of similar robberies in different states could face vastly different federal sentencing guideline calculations for essentially the same conduct. One defendant could be classified as a career offender by virtue of his or her robbery conviction, while the other defendant could avoid the career offender classification simply because of the wording of the statute under which he or she was convicted. This outcome is antithetical to the statutory purposes of sentencing. The outcome is also that the "crime of violence" guideline may result in these individuals not receiving the harsher penalties that are necessary to deter them from future criminal conduct. Not much can be done in connection with the "Elements Clause" (USSG §4B1.2(a)(1)) as the language in that clause requires a complex evaluation of the individual elements of each offense and can create disparity based on the various state statutes. However, the Commission can adjust the "Enumerated Crimes Clause" to create a more simplified, proportional, and uniform result.

The true strength of the "Enumerated Crimes Clause" is in its power to create a *per se* list of offenses for which a conviction is to be considered a crime of violence, regardless of whether it has an element that includes the use, attempted use, or threatened use of physical or violent force against the person of another; the listed offenses are violent because the Commission has determined that those offenses are violent. The current operation of the "Enumerated Crimes Clause" undermines the clause's potential because it leaves the definition for these crimes vacant, thus to be filled by a Judicial presumption that the generic form of the offense is intended. POAG respectfully recommends that the clarity and simplicity of the clause be returned by the Commission authoring language to fill this vacuum, providing better guidance regarding the Commission's intent.

POAG respectfully recommends that the Commission specifically and expressly disavow the use of the generic definition. POAG further recommends the Commission construct an explanation of the provision at USSG §4B1.2(a)(2) to express that any federal or state statute that shares a title of the offenses in the enumerated list or involves a weapon described in 26 U.S.C. § 5845(a) or an explosive material as defined, is a "crime of violence" under USSG §4B1.1 and §4B1.2. This would make the current enumerated list more inclusive.

POAG discussed the "Enumerated Crimes Clause" recommendation at length. During our discussion, we considered this suggestion to work well for the guideline enumerated crimes clause (as opposed to the Armed Career Criminal Act) because it captured the violent criminals (who have higher recidivism rates) while still remaining advisory, allowing the United States District Judges the discretion to depart or vary from the guideline range. Another concern that was voiced was related to instances when a defendant may have committed one of these enumerated offenses through some form of non-violent, *de minimus* activity. After some discussion, POAG unanimously agreed that the severity of the enumerated crimes almost never resulted in a conviction for non-violent conduct and that if this should occur, perhaps a departure or reliance on judicial discretion would allow for a just result (similar to the overrepresentation of criminal history or in consideration of factors listed at 18 U.S.C. § 3553(a)). POAG also observed that if such a change occurs, the guideline becomes substantially different from the language at 18 U.S.C. § 924(e), which it initially mirrored. However, with the recent August 1, 2016, alteration to the guideline, the mirrored language has already become different, and further changes that are in line with the intent of the guidelines are preferred.

The approach listed above is one that works for the guidelines because they are advisory. POAG respectfully recommends that the USSC encourage Congress to take on the issue of refining the definition of "violent felony" in 18 U.S.C. § 924(e). We sincerely hope that the Congress will consider the language currently there, view the case law on these issues to gain a sense of where the application of that provision does not align with their intent, and change the law accordingly.

Priority #8 – Time Served and Calculation of Criminal History Category

While the Commission's continuing work on of the operation of Chapter Four is worthy of review, POAG is concerned with using "time served" as a basis to calculate the criminal history score. Notably, this issue has been raised, in previous years; however, the position of POAG remains consistent. POAG is unamimous in opposition to using "time served" and offers the following reasons for why this approach is problematic in practice.

Most crucial in determining what term a defendant served for a prior conviction, is obtaining well recorded and valid documentation. POAG members universally experience difficulties obtaining information from state department of corrections regarding time served calculation issues. Records are often compartmentalized within specific facilities at the state, county and local levels and they are notoriously difficult to interpret. Some systems are automated and some are memorialized in handwritten notes kept by caseworkers. In the case of multiple undischarged terms running at once it is often impossible to know what time is being attributed to specific

convictions and dockets. These document availability, or inavailibility, issues could present major criminal history scoring problems.

Even in the event that records are obtained, the likelihood the documentation is reliable to determine the actual time served, is another hurdle. Criminal record queries and court documents generally do not include information on entry and exit dates, so the task of determining the period of time an offender is incarcerated will fall on presentence writers. Unfortunately, not all jurisdictions are managed equally and the ability to obtain this information from local and state facilities can be cumbersome to near impossible. In seeking correctional records outside of their judicial district, probation officers will be forced to navigate unfamiliar state systems.

Also of great concern is discerning the intent of the sentencing judge (sentence imposed) versus practicality (sentence served). Understandably there are some jurisdictions where it is clear that the sentence imposed will result in time served. As an example, a judge in Jurisdiction A and a judge in Jurisdiction B, impose a sentence of five years for a defendant in each of their respective jurisdictions for similar offenses. The defendant in Jurisdiction A is an inmate in a facility which is overcrowded. In an effort to reduce the prison population, the defendant in Jurisdiction A is released earlier. In this scenario, if both defendants recidivate, the defendant from Jurisdiction A may be subject to a lesser criminal history score than the defendant from Jurisdiction B. Utilizing the federal guidelines, assigning criminal history points solely based on time served as opposed to the sentence imposed creates a greater divide and disparity.

The second issue concerning the "time served" method is, assuming records are available, the complexity of calculating the "time served" amount. Calculation issues will arise from penal and rehabilitative controls, such as furloughs, work-release, halfway house, and home confinement. Multiple convictions resulting in one term of incarceration will also cause calculation problems. The "time served" method would create unwarranted sentencing disparities with similarily situated defendants.

Finally, it was also believed that a "time served" sentence could be prejudicial to those offenders who served a lengthier sentence simply because of their inability to make bail. Under a "time served" method, these individuals have the potential to be punished more harshly. In this situation, there may be two similar defendants with different financial resources. At the time of sentencing, one defendant may have actually "served" a greater sentence, only due to his/her lack of financial resources.

With regard to counting revocation sentences in criminal history scoring, POAG members are in unanimous agreement that there should be no change to USSG §4A1.2(k). Revocation sentences should continue to be observed as part of the punishment for the original offense. POAG believes that revocation sentences in the criminal history calculus strike to the heart of a defendant's risk of recidivism. The guidelines already limit the impact of the same revocation applying to multiple sentences under USSG §4A1.2, comment. (n.11) (The term of imprisonment imposed on the revocation is added to the sentence that will result in the greatest increase in criminal history points as opposed to adding it to each sentence). POAG recommends this section be unchanged.

Priority #9 – Methylone and other Synthetic Drugs

POAG supports the Commission's priority to study Methylone and strongly encourages this analysis be expanded to include other designer drugs such as synthetic cathinones and smokeable synthetic cannabinoids – more commonly known by the street names "Molly," "Bath Salts," "K2" and "Spice." These substances are a growing trend nationwide and Courts are experiencing application difficulties in Chapter Two analysis. These cases often require expert testimony in lengthy evidentiary proceedings and Courts are investing significant time and resources resolving these application issues.

POAG recommends the Commission study the feasibility of setting marijuana equivalencies for the most commonly prosecuted synthetic or designer drugs. This action would relieve courts of the burdensome process of applying the three-part test at USSG §2D1.1, comment. (n.6), in determing the most closely related controlled substance.

Priority #12 – Acceptance of Responsibility

Under USSG §3E1.1, a defendant who "falsely denies" or "frivolously contests" relevant conduct has acted in a manner inconsistent with acceptance of responsibility. Significant disparities were revealed as POAG members discussed the issue of how relevant conduct and acceptance of responsibility are viewed and applied among individual judges, districts, divisions, and circuits.

POAG discussed how the interpretation of this sentence in the commentary may be a contributing factor to the disparate application of the acceptance of responsibility guideline. Remedies the Commission could consider include removing the "falsely denies" or "frivolously contests" language or limiting the scope of USSG §3E1.1 to the elements of the offense, rather than relevant conduct. Relevant conduct is a broad concept and includes dismissed conduct. Presently, in order to be eligible for an acceptance of responsibility reduction, defendants are required to admit to (or not deny) additional alleged conduct based upon a preponderance of the evidence, when they have already admitted the elements of the offense of conviction that would have had to have been proven beyond a reasonable doubt had they taken the case to trial.

POAG observed that defendants may not pursue objections they feel are valid out of concern they will jeopardize their eligibility for acceptance of responsibility. Removing this commentary would create balance with the government, who does not have any consequence to consider when they decide which enhancements to pursue. Such balance will assist in ensuring that the Court is being presented with all of the facts in making findings that will determine the length of the defendant's sentence.

Whether a defendant is eligible for a three-level reduction has a significant impact on the determination of the advisory guideline imprisonment range. The impact on the determination of a defendant's offense level is further emphasized when their eligibility for an acceptance of responsibility reduction is tied to other guidelines, such as the two-level adjustment for obstruction of justice. Therefore, POAG recommends that the Commission consider addressing this issue.

Other Issues – Repeat and Dangerous Sex Offender Against Minors

USSG §4B1.5, Repeat and Dangerous Sex Offender Against Minors, provides an enhancement for offenders whose instant offense of conviction is a sex offense committed against a minor and who present a continuing danger to the public.

Specifically, USSG §4B1.5(a) provides two options for determining the offense level for offenders who commit a covered sex crime, when USSG §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one prior sex offense conviction. In these instances, the offense level is the greater of: (a)(1)(A) the offense level determined under Chapters Two and Three, or (a)(1)(B) the offense level from a table similar to the table contained in the Career Offender guideline, and (a)(2), the criminal history category shall be the greater of (A) the criminal history category determined under Chapter Four, Part A, or (B) criminal history category V.

USSG §4B1.5(b) sets forth the guidelines for determining the offense level for defendants who have committed a covered sex crime and neither USSG §4B1.1 (Career Offender) nor USSG §4B1.5(a) applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct. In those instances, under (b)(1), the offense level shall be 5 plus the offense level determined under Chapters Two and Three, but shall not be less than 22, and under (b)(2), the criminal history category shall be determined under Chapter Four, Part A. This application can result in a disparity in the guideline range between offenders who have a prior conviction and those who do not, and whose offense conduct is similar.

The following example has been provided to demonstrate the disparity that is created. The example involves a real case involving a husband and wife who engaged in the same criminal conduct; however, the husband had a prior sex offense conviction:

The wife was convicted of Production of Child Pornography with a statutory term of imprisonment of 15 to 30 years. She molested multiple minors on several occasions, which constitutes a pattern of prohibited sexual contact with children, and has **no prior sex offense conviction**.

Base Offense Level [USSG §2G2.1]:	32
SOC for Offense Involving a Minor Under 12 [USSG §2G2.1(b)(1)(A)]:	+4
SOC for Offense Involving a Sexual Act/Contact [USSG §2G2.1(b)(2)(A)]:	+2
SOC for Defendant Being a Parent/Legal Guardian [USSG §2G2.1(b)(5):	+2
Adjusted Offense Level:	40
Chapter 4 Enhancement [USSG §4B1.5(b)(1)]:	+5
Acceptance of Responsibility:	-3
Total Offense Level:	42
Criminal History Category [USSG §4B1.5(b)(2)]:	I

The husband was convicted of Production of Child Pornography with a statutory term of imprisonment of 25 to 50 years. He molested multiple minors on several occasions, which constitutes a pattern of prohibited sexual contact with children, and has **one prior sex offense conviction**.

Base Offense Level [USSG §2G2.1]:	32
SOC for Offense Involving a Minor Under 12 [USSG §2G2.1(b)(1)(A)]:	+4
SOC for Offense Involving a Sexual Act/Contact [USSG §2G2.1(b)(2)(A)]:	+2
SOC for Defendant Being a Parent/Legal Guardian [USSG §2G2.1(b)(5):	+2
Adjusted Offense Level:	40
Chapter 4 Enhancement [USSG §4B1.5(a)(1)(A)]:	40
Acceptance of Responsibility:	-3
Total Offense Level:	37
Criminal History Category [USSG §4B1.5(a)(2)(B)]:	V

The guideline as it is currently written provides a 5-level increase for a defendant who has no prior sex offense conviction. This application can, in many cases, result in a lower total offense level for the defendant who has a prior conviction and, therefore, presents an even greater continuing danger to the public, as opposed to a defendant with no such conviction.

The POAG's suggestion for eliminating this disparity is to add at the beginning of the guideline that the **greater** of USSG §4B1.5(a) or (b) is applied with regard to the determination of the offense level, if the defendant has one or more prior sex offense convictions. Further, if the defendant has one or more prior sex offense convictions, then the criminal history category is to be determined under USSG §4B1.5(a)(2). Otherwise, the criminal history category is to be determined under USSG §4B1.5(b)(2).

Other Issues – Credit Against Loss in Mortgage Fraud

POAG has determined an issue in the way "loss" is calculated in mortgage fraud cases. Application Note 3(E) at USSG §2B1.1, instructs that loss shall be reduced by the following: (ii), "*In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing*." And at (iii), "*Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by plea, trial or plea of nolo contendere*."

POAG found that by following these instructions, calculating mortgage fraud losses is impractical and problematic. Many of these cases do not involve a single property but rather numerous properties. Typically, the final presentence report has a calculation that includes loss amounts on many properties being calculated by "fair market value" at the time of plea or verdict for those properties not yet disposed. For properties which have been disposed of, the loss is

the amount the victim has recovered by sale of said property. In many instances, sentencing takes place long after the final presentence report is prepared. The problem lies with those properties that are disposed of *after* the final presentence report has been submitted to the court, but *before* sentencing. In those situations, the probation office must retrieve the final presentence report from the court and both parties, and recalculate loss.

Additionally, in a different scenario, as directed at (iii), when the property has not been disposed of by sentencing, we are instructed to use the fair market value of the property at the time of plea or verdict. Many mortgage fraud cases involve not only numerous properties, but many defendants. Situations arise where a defendant, depending on the date of his guilty plea or verdict, may have a different loss figure for the *same* property as other defendants. POAG suggests that the instructions be revised to determine that the value of the property is the fair market value at the time of the indictment, or detection of the offense.

Other Issues – Relevant Conduct Commentary

USSG §1B1.3 contains a significant number of examples for application in determining relevant conduct for a particular defendant. These examples are no longer as current or relevant given changes in society and prosecutorial focus. POAG recommends the Commission consider updating this section by replacing the existing examples with examples which are more applicable to contemporary criminal behavior and prosecution.

Other Issues – Technical Issues

POAG notes that for a conviction of Failure to Surrender for Service of Sentence, charged under 18 U.S.C. § 3146(a)(2), Appendix A of the Guidelines Manual does not provide direction to a guideline section based on the offense statute; rather, the Appendix lists the penalty statute, i.e., 18 U.S.C. § 3146(b)(1)(A), which directs the reader to USSG §2J1.5. A similar issue is seen in Chapter Two with the drug penalty statutes listed at USSG §2D1.1(a)(1) through (a)(4) for guideline application purposes. POAG brings these anomalies to the Commission's attention for review and/or correction.

POAG requests the Commission consider an update to USSG §2B1.1. Under USSG §2B1.1(a)(1), the base offense level is 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more. There has been some confusion as to what is meant by "referenced to this guideline." There is a definition offered at USSG §2B1.1, comment. (n.2(A)); however, this definition is often misinterpreted, particularly in the case of a conviction for money laundering (18 U.S.C. § 1956). In such a case, Appendix A "references" to USSG §2S1.1, and then USSG §2S1.1(a) references to USSG §2B1.1 if the underlying offense involved fraud. In this scenario, however, the base offense level under USSG §2B1.1 is 6 because the defendant was not convicted of an offense referenced to that guideline as defined in the commentary. POAG believes it would be helpful if the word "directly" is added to "referenced" at subsection (a)(1) or if an example involving a conviction for money laundering is added to USSG §2B1.1, comment. (n.2).

In closing, POAG appreciates the opportunity to express its concerns and the willingness of the Commission to consider issues we believe are important. POAG believes that over the course of nearly thirty years of Sentencing Guidelines, the Commission has done well to respond to issues from the field and we hope this feedback assists in forwarding positive change to federal sentencing policy. Should you have any further questions or require any clarification regarding the issues detailed above, please do not hesitate to contact us.

Respectfully,

Probation Officers Advisory Group
July 2016

VICTIMS ADVISORY GROUP

To the United States Sentencing Commission

July 25, 2016

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

RE: Victim Advisory Group (VAG) Priorities for the Amendment Cycle ending May 1, 2017.

Chairman Saris and Members of the Commission:

The Victims Advisory Group (VAG) respectfully submits the following recommendations to the Commission for amendment cycle ending May 1, 2017. As the Commission is aware, victims must be an integral part of all criminal proceedings and have the right to be treated with respect and fairness. *See* 18 U.S.C. § 3771. The sentencing guidelines must reflect a strategic policy that insures the rights of victims are addressed by providing victims with participatory rights including being heard on issues such as restitution. The VAG supports the following priorities for the Commission to consider and their impact on victims of crime.

I. **Continuation of its work with Congress and other interested parties on statutory mandatory minimum penalties to implement the recommendations set forth in the 2011 report to Congress titled, " Mandatory Minimum Penalties in the Federal Criminal Justice System" including its recommendations regarding the severity and scope of mandatory minimum penalties, consideration of expanding the safety valve at 18 U.S.C § 3553 (f), and elimination of the mandatory "stacking" under 18 U.S.C § 924 (c), and to develop appropriate guideline amendments in response to any related legislation.**

Commission tentative priority:

(1) The VAG appreciates the Commission's efforts to work with Congress and other interested parties on statutory mandatory minimum penalties to implement the recommendation set forth in the 2011 report to Congress and its impact on victims. However, the VAG does not support any reduction or expansion of the safety valve legislation in 18 U.S.C § 3553 (f). The VAG shares the concern of the Commission regarding fair, equitable, and consistent sentencing. Such a framework insures that both victims and defendants are treated appropriately during sentencing. However, the creation of the Guidelines and the utilization of mandatory minimum sentences have been bedrock mechanisms to insure that courts implement sentences elected representatives have required on behalf of the community. Any expansion or reduction of safety valve legislation risks a return to indeterminate sentencing in which defendants are disparately punished and victims' interests are inadequately considered. The VAG supports the existing language that captures the 5 points that the court can consider in the reduction of sentences. In addition, the VAG also supports the existing language under 18 U.S.C § 924(c) regarding the mandatory stacking penalties and opposes the elimination or any modification of this statute.

II. **Continuation of the multi-year study of statutory and guideline definition relating to the nature of a defendant's prior conviction (e.g. "crime of violence," "aggravated felony,", " violent felony," "drug trafficking offense," and felony drug offense") and the impact of such definitions on the relevant statutory and guideline provision (e.g. career offender, illegal reentry, and armed career criminal), possibly including recommendations to Congress on any statutory changes that may be appropriate and development of guideline amendments that may be appropriate.**

Commission tentative priority:

(4) The VAG recommends expanding the definition under U.S.S.G Section 4B11(a)(1) to include the following:

The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year that,

1) Has as an element the use, attempted use, or threatened use of physical force against the person of another. [1];or
2) Enumerated offenses that include: Rape, Murder, Terrorism, Arson, Weapons of Mass Destruction, Robbery, Extortion, Voluntary Manslaughter, Aggravated Assault, Kidnapping, Burglary, Forcible Sex Act; or
3) Crimes whose relevant facts the court could consider in determining a crime of violence occurred.

1 Consistent with Voisine v. United States (2016).

This amendment would eliminate the problematic clause that was highlighted in Johnson *v U.S.* 676 U.S. __ (2015). In addition, by adopting a uniform approach for the definition of "crime of violence," as well as providing an expansive list of enumerated crimes, it will reduce the potential for sentencing disparity between similarly situated defendants. Moreover, allowing courts discretion to include relevant facts and circumstances to determine whether the crime is a "crime of violence" will allow for further protection of victims and consistency of application.

Victim Protection
If the USSC is inclined to adopt a new definition of "crime of violence" the VAG urges the commission not to consider any retroactive application of the law. Since "crime of violence" involves victims of crime, re-litigating the application of a new definition for convicted individuals would be devastating to victims and would cause further trauma.

Murder Definition
The VAG further offers comments on the proposed definition of Murder which would include offenses in which the defendant causes the death of another in the course of committing a felony. The VAG supports the proposed definition which provides clarity and avoids the complexity of applying the many various statutes that enumerate each type of felony crime and thus present differing definitions and applications. Adopting a single application, it will provide for a consistent interpretation and make it easier for victims to understand.

Aggravated Assault Definition
Finally the VAG further offers comments on the proposal to expand the definition of "aggravated assault." The USSC currently proposed definition of "aggravated assault" does not include an aggravating factor that victims have a special status or classification. The VAG supports the expanded definition of aggravated assault based on the classification of a protected class of individuals. The VAG recommends expanding aggravated assault classification to include victims who are first responders, minors, elderly, teachers, pregnant women, athletic officials, military, clergy and public officials. Often these are the types of victims that interface with the public frequently and should be protected against any attempt to cause physical injury based on their occupation or status.

III. Study of the findings and recommendations contained in the May 2016 Report issued by the Commission's Tribal Issues Advisory Group and consideration of any amendment to the Guidelines Manual that may be appropriate in light of the information obtained from such study.

Commission tentative priority:

(6) The VAG recommends the Commission adopt the following recommendations outlined in the Tribal Issues Advisory Group May 2016 Report to the Commission. The VAG was represented in the drafting and in support of this report:

(A) Adding an application note and commentary to USSG §4A1.3 to assist in determining when tribal court convictions may be considered for a possible upward departure in the defendant's criminal history category;

(B) Including in USSG §1B1.1 a definition of "court protection order;"

(C) Amending USSG §5H1.1 regarding the "age" policy statement; and

(D) Adding a departure concerning juvenile and youthful offenders as in USSG §5K2.25.

(E) Establishing a standing advisory group on tribal issues to assist the Commission on changes to the Guidelines impacting American Indian defendants, to advise and assist in tribal consultation, and to form the basis for a new TIAG when appropriate;

(F) Creating a process for the collection of better data on federal court sentencing to allow for study of the protection order provisions of the Guidelines and analysis of sentencing disparity; and

(G) Revisions to the Juvenile Delinquency Act, 18 U.S.C. § 5032, to require federal consultation with tribes in certain juvenile case prosecutions.

IV. Study of the operation of Chapter Four, Part A of the Guidelines Manual including (A) the feasibility and appropriateness of using the amount of time served by an offender, as opposed to the sentence imposed, for purposes of calculating criminal history under Chapter Four, and (B) the treatment of revocation sentences under § 4A1.2(k).

Commission tentative priority:

(8) The VAG recommends that the Commission study the operation of Chapter Four, Part A of the Guidelines Manual, including (A) the feasibility and appropriateness of using the amount of time served by an offender, as opposed to the sentence imposed, for purposes of calculating criminal history under Chapter Four; and (B) the treatment of revocation sentences under §4A1.2(k) as it pertains to victim impact.

As a practical matter, it is certainly feasible to use the actual time served by an offender, as opposed to using the original sentence imposed by the sentencing court, in calculating criminal history. This data is easily available to federal courts. The question, however, for this Commission is whether it is appropriate to use what will nearly always be a lighter sentence in calculating criminal history. One of the chief purposes of using criminal history in placing defendants on the guidelines grid is to assess future risk by considering past criminal behavior. An honest assessment of the severity of that past criminal behavior is critical in addressing the overall purposes of punishment, which include the protection of society, retribution for criminal behavior, and potential rehabilitation likelihood.

Victims have the right to that honest assessment, and to the maximum protection confinement offers from those who have shown a proclivity to victimize. Offenders with criminal history have inarguably shown such a proclivity. In our justice system, judges at state and federal levels weigh a variety of factors in pronouncing a sentence upon an offender. In most courtrooms, the sentence is pronounced after a hearing at which both prosecution and defense lawyers submit evidence in aggravation and mitigation. The sentencing judge, then, is in the best position to

analyze that evidence, judge its credibility, and weigh the extent to which the offender's crime has harmed victims and society. No subsequent judge, by necessity judging a cold document record, is in that same superior position. Documents cannot convey witness credibility, the offender's remorse, or lack thereof, or the true impact of any victim testimony or statements. Truly then, the sentencing judge is the person with the superior perspective on all the factors of the crime and the appropriate punishment.

Once the sentence is pronounced, the actual time served by an offender is largely out of the control of the sentencing judge. While that judge, as noted above, is in a vastly superior position to assess the appropriate sentence than any later person assessing such, nonetheless many offenders are offered early release for a variety of reasons that have little or nothing to do with the offense conduct or impact on victims. Rather, future reviewers of that conviction and sentence may be factoring in completely unrelated issues such as prison overcrowding, "good behavior" while incarcerated, or even new legislative priorities leading to early release. None of these factors negate the sentencing decisions by the court of conviction.

Furthermore, such an approach will undermine one of the purposes of the Sentencing Guidelines: uniform sentencing. A defendant who commits a previous crime in a jurisdiction with an overcrowded prison system may serve a substantially lesser sentence than a defendant who commits the exact same crime in another part of the country. Notwithstanding that both defendants engaged in the same previous criminal conduct, one defendant will be deemed as less dangerous due to where he committed his crime, not the content and harm of his criminal act. Such a system of sentencing is unfair to defendants and victims alike and undermines the purpose of the Sentencing Guidelines.

Therefore, these other factors do not, and cannot, truly represent the harm as assessed by the sentencing court. As such, time served is completely insufficient in assessing the true criminal conduct underlying a prior conviction. Federal judges imposing sentence have the best information in assessing an offender's true history so that they can make informed decisions about how that history should impact the current sentencing calculation. Victims deserve to have criminal history calculations that reflect that reality. Criminal history calculations are only meaningful for victims if they reflect the wisdom and judgment of the original sentencing courts in the best position to assess the most appropriate sentence that reflects all the factors of the offender, the crime committed, and the resultant harm to victims and society. Our opinion, then, is that while feasible, it is not appropriate to utilize time served in calculating criminal history categories. Rather, the current system utilizing sentence imposed serves the best interests of victims and society at large.

V. **Consideration of any miscellaneous guideline application issues coming to the Commission's attention from case law and other sources, including possible consideration of whether a defendant's denial of relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of §3E1.1**

Commission tentative priority:

(12) The Relevant conduct Provision, as defined in Section 1B1.3 of the Sentencing Guidelines, is of interested to the Victim's Advisory Group ("VAG") when such conduct involves actual or intended harm to a victim or victims.

As it is currently defined in the Guidelines at §§1B1.3(a)(1) and (a)(3), relevant conduct is basically all criminal activity which the defendant committed, encouraged, or knew that others were committing that was part of the jointly undertaken criminal activity. Such conduct must be in furtherance of that activity and must meet the following criteria:

1. Be in the scope of the jointly undertaken activity;
2. Furthered the jointly undertaken criminal activity; and,
3. Was reasonably foreseeable to the defendant.

Through the years acceptance of responsibility has focused on the offense(s) of conviction and relevant conduct. To receive the benefit of the acceptance of responsibility reduction, the defendant must accept responsibility for the behavior comprising the offense(s) of conviction and either admit the relevant conduct or not falsely deny such conduct. A reduction for acceptance of responsibility can be considered for those defendants who accept responsibility for the offense(s) of conviction and choose to remain silent with respect to any relevant conduct. But a defendant who frivolously or falsely denies relevant conduct is considered to have not to have accepted responsibility for the criminal activity. Over the years there has been much debate between the circuits and with the Sentencing Commission concerning the treatment of relevant conduct within the operation of §3E1.1.

As noted in the 2015 guidelines manual, the operation of §3E1.1, "…recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed [within the application notes] is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility." (pg. 376.) In the debate over the acceptance of responsibility provision there has been discussion on whether the actions taken by the defendant should demonstrate genuine remorse for the criminal conduct and any harm caused to any victim(s). There is some belief that the expression of remorse needs to be something other than a response to the judge's questions during a change of plea hearing. There is also the belief that a statement which appears to accept responsibility can be negated by ongoing or new criminal behavior or credible evidence that the defendant's acceptance of responsibility is the result only of his belief that a conviction would be inevitable. What is of note is that the operation of the acceptance of responsibility provision is fact based and the defendant's credibility and attitude are critical to making the determination on whether the reduction should be applied.

This last provision is crucial with respect to relevant conduct which involves a victim or victims. If the defendant has made a statement that he or she accepts responsibility for the conduct involved in the offense(s) of conviction and refuses to make any statement regarding relevant conduct, the court rightfully can consider that the criteria for a reduction under §3E1.1(a) have been met. However, if the defendant minimizes involvement in conduct which harmed a victim

or victims, it is the respectful assessment of the VAG that failing to acknowledge such conduct is contrary to demonstrating genuine remorse or clearly showing acceptance of responsibility.

The VAG respectfully recommends that the current language in §3E1.1 be retained, specifically the language in U.S.S.G §3E1.1, comment (n.1(A)). When a defendant falsely denies or frivolously contests relevant conduct involving victims which the sentencing court has determined to be factually accurate, the defendant has not "clearly demonstrated acceptance of responsibility" (USSG §3E1.1(a), 2015. pg. 374.) Such conduct should not receive the benefit of the two level reduction in the offense level computations. The denial of the reduction by the sentencing court may be viewed by the victim(s) of the defendant's action as an acknowledgement of the harm caused by the full scope of the defendant's conduct.

Conclusion

We respectfully request that the Commission consider these issues in the next amendment cycle. We look forward to working with the Commission to insure that the needs and concerns of crime victims are fully reflected in the sentencing guidelines.

Should you have any further questions or require any clarification regarding these proposals, please feel free to contact us.

Respectfully,

Victims Advisory Group
July 2016

UNITED STATES
PROBATION AND PRETRIAL SERVICES

CHIEFS ADVISORY GROUP

July 25, 2016

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20008

Dear Judge Saris:

On behalf of the Probation and Pretrial Chiefs Advisory Group (CAG), I write to comment on the Commission's Notice of 2017 Proposed Priorities. The CAG is concerned with Priority No. 8, which suggests reexamining the feasibility of using amount of time served following a criminal conviction, as opposed to actual sentence imposed, in assessing a defendant's criminal history under Chapter Four of the Guidelines Manual. The CAG renews previous objections by the probation and pretrial community[1] to this approach on three grounds: (1) incarceration records are difficult to access and often unreliable, (2) decisions regarding inmate release generally are made outside the judicial process, resulting in potential for disparate percentages of actual time served, and (3) practical challenges exist in computing time served for complex sentences.

Officers make every reasonable effort to secure and verify sentencing documents when assessing a defendant's criminal history. These documents are subject to scrutiny by all parties to the case and usually maintained by the original court of jurisdiction. Records of incarceration are much more difficult to obtain and validate, due to wide variations in the management practices, resources, and technological capabilities among federal, state, and local penal institutions and jails. Most records are originated by the incarcerating institution according to its independent, internal record keeping and retention system. This often results in inconsistent, incomplete, or unreliable information. The Judicial Conference's Committee on Criminal Law was recently briefed by Patrick A. Woods, the 2015-2016 Supreme Court Fellow for the Sentencing Commission, on some of the challenges that may arise from moving to a "time served" model for assessing the seriousness of an offender's prior crimes. The Committee was

[1] March 12, 2001, AO Public Comment summarizing statements of former CAG members, http://www.src-project.org/wp-content/pdfs/public-comment/ussc_publiccomment_200103/0001605.pdf.

also provided a draft of Woods' forthcoming paper on the subject. See Patrick A. Woods, Assessing Time Served (July 6, 2016) (unpublished draft Supreme Court Fellows Program research paper). According to the draft paper, Mr. Woods conducted an informal review of public state incarceration databases and identified a pattern of inconsistency in both the amount and quality of available data related to time served, which supports longstanding reports by officers.

In addition to the lack of consistent, accessible documentation regarding time actually served by a defendant, the CAG notes that decisions regarding inmate release generally are made by incarcerating officials without input from sentencing courts. Instead, the appropriate amount of time served becomes an extrajudicial determination made according to institutional policies and regulations, and may be impacted by a defendant's conduct during incarceration, institutional overcrowding, inadequate funding, lack of programmatic options, or other practical considerations not relevant to the sentencing factors set forth at 18 U.S.C. § 3553(a).

Finally, even with reliable incarceration records reflecting some degree of uniformity in inmate release practices, computing actual time served poses unique challenges. Procedures or guidelines would be required to assess time served for sentences containing multiple counts of varying terms of detention; multiple sentences served concurrently or consecutively; sentences subject to multiple jurisdictions; sentences served in more than one institution due to detainers or administrative holds; and sentences served following revocation of terms of probation, supervised release, or parole. The potential complexities involved in identifying the actual sentence for which a defendant served time seem inconsistent with Proposed Priority No. 2 promoting overall simplification of the Guidelines and continued efforts to reduce sentencing disparity.

Given the inherent challenges associated with relying on a time served approach to calculate a defendant's criminal history, the CAG recommends the Commission continue to promote the current operation of Chapter Four and its use of sentence imposed in calculating a defendant's criminal history. We appreciate the opportunity to comment. Please feel free to contact me with any questions.

Respectfully,

Anthony M. San Giacomo
Chief U.S. Probation Officer

cc: Honorable Irene M. Keeley
Honorable Ricardo S. Martinez
Matthew Rowland
CAG Members

the CAMPAIGN for the FAIR SENTENCING of YOUTH

July 19, 2016

Chief Judge Patti B. Saris
Chair, United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Attention: Public Affairs—Priorities Comment

CC: Judge Charles R. Breyer, Ms. Dabney Friedrich, Ms. Rachel Barkow, Judge William H. Pryor, Jr., Ms. Michelle Morales, Ms. J. Patricia Wilson Smoot

RE: Comments addressing Federal Register Number 216-13681; Support for Potential Priority (7) to Study the Treatment of Youthful Offenders

Dear Chair Saris and Commissioners,

Thank you very much for the opportunity to provide public comment on possible priority issues for the United States Sentencing Commission to consider in its next amendment cycle. The Campaign for the Fair Sentencing of Youth ("the Campaign") ***strongly supports*** potential priority issue (7), "Study of the treatment of youthful offenders under the Guidelines Manual, including possible amendments to Chapter Five, Part H."[1] The Campaign requests that the Sentencing Commission prioritize updating the Sentencing Guidelines as applied to youth during this amendment cycle. The current Sentencing Guidelines have not yet been revised to account for ongoing advancements in our understanding of adolescent brain and behavioral development, as well as recent U.S. Supreme Court decisions. In most cases where youth face life sentences in the federal system, application of the Sentencing Guidelines is unconstitutional.

Children under eighteen can be transferred for criminal prosecution in the federal system for a range of crimes, including drug offenses, firearms possession, and violent crimes.[2] Between 1999 and 2008, 1,335 children were committed as adults to the Federal Bureau of Prisons for crimes committed while under age 18.[3] Twenty-seven federal inmates are *currently* under age eighteen.[4] As previously referenced, a sizable number of children are convicted as adults in the

[1] U.S. Sentencing Commission, Proposed Priorities for Amendment Cycle, Federal Register Number 2016-13681.
[2] 18 U.S.C. § 5032.
[3] Juvenile Offenders and Victims: 2014 National Report, National Center for Juvenile Justice and Office of Juvenile Justice and Delinquency Prevention, at 110, available at http://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf.
[4] Federal Bureau of Prison Statistics, Age, available at http://www.bop.gov/about/statistics/statistics_inmate_age.jsp.

federal system and are sentenced under provisions that fail to reference critical youth-related mitigating factors.

The U.S. Supreme Court has repeatedly concluded children are constitutionally different than adults in criminal sentencing

Throughout the last decade, the United States Supreme Court has repeatedly concluded that children are constitutionally different than adults for the purpose of criminal sentencing. In *Roper v. Simmons* (2005), the Court struck down the death penalty for children, finding that it violated the 8th Amendment's prohibition against cruel and unusual punishment.[5] The Court emphasized empirical research demonstrating that children are developmentally different than adults and have a unique capacity to grow and change as they mature.[6] In *Graham v. Florida* (2010), the Court struck down life-without-parole sentences for non-homicide offenses, holding that states must give children a "realistic opportunity to obtain release."[7]

In *Miller v. Alabama* (2012), the Court struck down mandatory life-without-parole sentences for youth convicted of homicide offenses and ruled that sentencing courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" any time a child faces a potential life-without-parole sentence.[8] *Miller* also requires that if a child is facing a sentence of life in prison, sentencing judges must consider certain factors related to the child's age and his or her prospects for reform. These factors include, but are not limited to, age at the time of the offense, impetuosity, family and community environment, ability to appreciate the risks and consequences of their conduct, intellectual capacity, peer or familial pressure, involvement in the child welfare system, traumatic history, level of participation in the offense, capacity for rehabilitation, and any other mitigating factor or circumstance.[9]

This past January, the U.S. Supreme Court ruled in *Montgomery v. Louisiana* that the *Miller* decision applies retroactively to individuals serving mandatory life-without-release sentences for crimes they committed while under age 18.[10] As the Court explains in *Montgomery*, the *Miller* decision "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in 'light of the distinctive attributes of youth.'"[11] The Court went on to hold that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "unfortunate yet transient immaturity.'"[12] For the vast majority of children who even commit homicide-related crimes, life without any possibility of release is an unconstitutional sentence. As the Court noted, "*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility

[5] *Roper v. Simmons*, 543 U.S. 551 (2005).
[6] *Id.*
[7] *Graham v. Florida*, 130 S. Ct. 2011 (2010).
[8] *Miller v. Alabama*, 132 S. Ct. 2455 (2012).
[9] *Id.* at 2468.
[10] *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).
[11] *Id.* at 734.
[12] *Id*.

…*Miller*'s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution."[13]

Advances in adolescent developmental research demonstrate an empirical basis for treating youth differently than adults

The Sentencing Guidelines have not yet been revised to account for consistent scientific advancements in adolescent brain and behavioral development. As many parents and educators could verify from personal experience, the adolescent brain is not fully mature even at age 18.[14] Empirical studies have repeatedly shown that the brains of youth are not fully developed, making it difficult for them to consider the long-term impact of their actions, control their emotions and impulses, and evaluate risks and rewards in the same way as adults.[15] Youth as a whole are more vulnerable, more susceptible to peer pressure, and more heavily influenced by their surrounding environments, which they rarely can control.[16] Due to the plasticity of their developing brains, however, children also possess a unique capacity for change and rehabilitation.[17]

The Sentencing Guidelines are unconstitutional under *Graham*, *Miller*, and *Montgomery* and ignore scientific understanding about adolescent development

The U.S. Sentencing Guidelines should be updated to comply with *Graham*, *Miller*, *Montgomery*, and modern scientific understanding of adolescent development. For individuals convicted of first degree murder, the only recommended sentence in the Guidelines is life, which in the federal system means life without any opportunity of release.[18] Additionally, through stacking of charges, it is possible for a youth to receive a *de facto* life sentence for a non-homicide offense. Although not binding, the Guidelines fail to comply with *Montgomery*, *Miller*, and *Graham* because they mandate life sentences for youth in the absence of judicial discretion and fail to provide a meaningful opportunity for release. The use of the U.S. Sentencing Guidelines in any resentencing or prospective sentencing of any individual who faces a life or *de facto* life sentence for a crime they committed as a child would be unconstitutional as a result of *Graham*, *Miller*, and *Montgomery*. Under the federal sentencing laws, there is no provision for parole; thus any sentence for homicide offenses that imposes life or its equivalent on a youth is constitutionally suspect under *Miller* and *Montgomery*. Any sentence that imposes life or its equivalent on a youth for non-homicide offenses is unconstitutional under *Graham*.

The Guidelines consider youth to be an optional consideration only in unique circumstances, stating "[a]ge (including youth) may be relevant in determining whether a

[13] *Id.* at 736
[14] Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 ANN. REV. CLINICAL PSYCHOL. 459 (2009).
[15] *Id*; Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 DEVELOPMENTAL REV. 78 (2008).
[16] Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 ANN. REV. CLINICAL PSYCHOL. 459 (2009); Dustin Albert & Laurence Steinberg, Peer Influences on Adolescent Risk Behavior, in INHIBITORY CONTROL AND DRUG ABUSE PREVENTION: FROM RESEARCH TO TRANSLATION (Michael Bardo et al. eds., 2011).
[17] Jay N. Giedd, The Teen Brain: Insights from Neuroimaging, 42 J. OF ADOLESCENT HEALTH 335 (2008); Mark Lipsey et al., Effective Intervention for Serious Juvenile Offenders, JUV. JUST. BULL. 4-6 (2000).
[18] U.S. Sentencing Commission Guidelines Manual §2A1.1, Commentary, Application Notes 2(A).

departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."[19] By making considerations of youth an exception rather than the rule, the Guidelines ignore the key premise of *Miller*, which mandates consideration of age. Rather than evaluating youth-related features as mitigating factors, the Guidelines explicitly state "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted,"[20] a statement that is antithetical to the core holdings of *Miller* and *Montgomery*. Additionally, the Guidelines fail to require consideration of a youth's ability to be rehabilitated. Sentencing judges must consider whether a youth's offense reflects "unfortunate yet transient immaturity"[21] or "permanent incorrigibility" [22] before imposing the harshest of penalties, yet the propensity toward rehabilitation that youth possess is not considered as a characteristic of these specific offenders. The Commission should update the Guidelines to ensure that federal judges who sentence youth explicitly consider youth-related mitigating factors in full compliance with recent U.S. Supreme Court jurisprudence and current adolescent brain development.

State Models for the U.S. Sentencing Commission to Consider for Amendments to Chapter 5, Part H of the Guidelines Manual

The U.S. Sentencing Commission should remedy the Constitutional defects of the Sentencing Guidelines under *Graham*, *Miller*, and *Montgomery*, by requiring judges to consider relevant youth-related mitigating factors when sentencing children in the federal criminal justice system. Recent legislative initiatives at the state-level are instructive to see how legislators around the country are incorporating advancements in juvenile brain and behavioral developments science into their sentencing laws for children.

West Virginia's House Bill 4210 from 2014 stands out as a model for what judges should consider if and when they are sentencing children in adult criminal court. For all children being sentenced in West Virginia, regardless of the level of offense, the judge must consider a series of factors that treat children unique from adults.[23] These factors include the child's age at the time of the offense, family and community environment, ability to appreciate the risks and consequences of their conduct, the role of peer pressure in the incident, level of participation in the offense, and the child's history of trauma.[24] Additionally, the judge must consider a comprehensive mental health evaluation, school records, any history in the child welfare system, and the child's capacity for rehabilitation.[25] This robust list of factors the judge must consider enable judges to fully understand the life circumstances of every child sitting before them and tailor an age-appropriate sentence accordingly. These factors are characterized as "mitigating" thus encouraging judges to impose less severe punishment than they otherwise would have on an adult offender.

[19] U.S. Sentencing Commission Guidelines Manual §5H1.1.
[20] U.S. Sentencing Commission Guidelines Manual §5H1.12.
[21] *Montgomery*, 136 S. Ct. at 734 (2016).
[22] *Id.* at 736.
[23] H.B. 4210, 81 Leg., 2d Sess. (W.Va. 2014).
[24] *Id.*
[25] *Id.*

In 2015, the Nevada legislature passed Assembly Bill 267, which requires judges sentencing children in adult criminal court to "consider the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth."[26] While this is more limited than the West Virginia model, it requires judges to consider age as a mitigating factor and encourages them to consider the recent principles enunciated by the U.S. Supreme Court, namely, that kids are different from adult offenders.. The explicit recognition of the diminished culpability of juveniles in the law implies that a departure from a more severe "adult" sentence is warranted.

Senate Bill 796 from 2015 in Connecticut offers an intermediary approach between West Virginia and Nevada. For all children in Connecticut convicted of A and B felonies, meaning the most serious of felony offenses, judges must consider the youth's age, the features of adolescence, and psychological and scientific evidence demonstrating the difference between adolescent and adult brain development, and must consider a presentence report addressing these factors.[27] Specifically, the court must "[c]onsider, if the court proposes to sentence the child to a lengthy sentence under which it is likely that the child will die while incarcerated, how the scientific and psychological evidence [] counsels against such a sentence."[28] This encourages the judiciary to be mindful of how children should be treated differently when facing the most severe penalties.

Each of these models draws on the experiences of very geographically and politically diverse jurisdictions within the United States. The diversity and recurring themes of the various models is instructive in how the U.S. Sentencing Commission can adopt and apply widely accepted principles to treat child offenders differently than adult offenders based on advancements in brain science and Constitutional jurisprudence. It should also be noted, that all 3 states eliminated life without the possibility of parole or release as a sentencing option for child offenders. Instead, these states opted to focus on rehabilitating child offenders which should be the overarching goal of the juvenile and/or criminal justice system when it comes to children.

We would strongly encourage the Commission to amend Chapter 5, Part H of the Guidelines Manual to require the consideration of mitigating factors similar to those found in West Virginia, Nevada, and Connecticut anytime a child is being sentenced by a federal judge for any offense, as well as explicitly counsel against judges imposing a life or de facto life sentence on a child offender based on the reasoning and rationale of the U.S. Supreme Court in *Graham, Miller,* and *Montgomery*.

The U.S. Sentencing Commission should make youth sentencing a priority

The Campaign for the Fair Sentencing of Youth believes it is critical for the U.S. Sentencing Commission to address the role of the Sentencing Guidelines in cases where youth are convicted of crimes as adults. The Sentencing Guidelines were created for use with adults. Their application to children under eighteen fails to recognize the evolving science and law

[26] A.B. 267, 78th Reg. Sess. (Nev. 2015)
[27] S.B. 796, Jan. Sess. (Conn. 2015).
[28] *Id.*

finding that youth are developmentally and constitutionally different from adults. Although the Sentencing Guidelines are not mandatory for federal judges, they are persuasive instruction to judges conducting sentencings in the federal criminal justice system and influence prosecutors' decisions. Judges and prosecutors utilize the Sentencing Guidelines in making decisions that have long-term implications for defendants and the community. Judges, prosecutors, and youthful defendants would all benefit from guidance as to how judges should properly consider age-related mitigating factors at sentencing. Therefore, the Campaign strongly supports potential priority issue (7). In considering this priority, the Campaign respectfully request that the Commission revise the Sentencing Guidelines to account for the ways that youth differ from adults and the means by which judges should consider these differences at sentencing. Alternatively, the Commission should explicitly preclude application of the Sentencing Guidelines to youth. Thank you for your serious consideration of potential priority issue (7).

Sincerely,

Jody Kent Lavy
Director, The Campaign for the Fair Sentencing of Youth

July 25, 2016

United States Sentencing Commission
1 Columbus Circle NE
Washington, DC 20544

Comments on Proposed Priorities for Amendment Cycle (81 FR 37241)

The Drug Policy Alliance welcomes the opportunity to comment on the United States Sentencing Commission's proposed policy issue work for the amendment cycle ending May 1, 2017. As the leading organization in the United States committed to advancing drug policies grounded in science, compassion, health, and human rights, the Drug Policy Alliance advocates for the implementation of evidence-based policies and practices that addresses harms associated with drug use and misuse.

The Drug Policy Alliance has long worked to advance state- and federal-level policy reforms that reduce mass incarceration by changing police practices, repealing sentencing disparities, and rolling back harsh mandatory minimum sentences.

We are glad that the Commission is committed to implement the recommendations set forth in the Commission's 2011 report to Congress, titled *Mandatory Minimum Penalties in the Federal Criminal Justice System*, especially its recommendations regarding the severity and scope of mandatory minimum penalties, consideration of expanding the "safety valve" at 18 U.S.C. § 3553(f), and elimination of the mandatory "stacking" of penalties under 18 U.S.C. § 924(c). Although this is briefly mentioned in the report, the Commission should place additional emphasis on the appropriateness of using drug quantities as a primary factor in sentencing, due to the many other factors that better pinpoint an individual's role.

The Justice Policy Institute has found that mandatory minimum sentences have a disproportionate impact on poor and disadvantaged defendants. Additionally, numerous social scientists and public policy analysts have found little evidence to suggest that mandatory minimum sentences actually deter individuals from committing offenses. This holds especially true for drug offenses, where the individual may be suffering from problematic drug use that impairs their judgment. Proponents of mandatory minimums argue that they ensure consistent sentencing, but when the system already disproportionately affects some groups, mandatory minimums do not serve to uphold fairness but rather to increase inequality.

Many individuals convicted of an offense carrying a mandatory minimum penalty are able to obtain relief from that penalty through the "safety valve" exception to such sentences, which requires courts to sentence without regard the mandatory minimum punishment when certain conditions are met. Individuals convicted of powder cocaine offenses obtained relief from a mandatory minimum through the safety valve most often in fiscal year 2015, in 22.7 percent of all powder cocaine cases in which a mandatory minimum penalty applied. In contrast, only 3.6 percent of crack cocaine offenders obtained this relief. This difference is due largely to the differing criminal histories of powder cocaine and crack cocaine offenders, which the Sentencing Commission acknowledges. However, they do not acknowledge the underlying forces behind these criminal histories.

Drug Policy Alliance | 925 15th Street NW, 2nd Floor, Washington, DC 20005
202.216.0035 voice | 202.216.0803 fax | www.drugpolicy.org

We are the Drug Policy Alliance.

People of color experience discrimination at every stage of the judicial system and are more likely to be stopped, searched, arrested, convicted, and saddled with a lifelong criminal record. This is particularly the case for drug law violations. African Americans comprise 13 percent of the U.S. population, and are consistently documented to use drugs at similar rates to people of other races. But African Americans comprise 31 percent of those arrested for drug law violations.

In light of this information, the Sentencing Commission must realize that its current system of using criminal history as the main determinant of safety valve qualification only enforces and worsens the already existing racial injustices in our criminal justice system. In fiscal year 2015, 58.3 percent of those convicted of powder cocaine offenses were assigned to Criminal History Category I (offenders with a criminal history score under the sentencing guidelines of zero or one), compared to just 18.6 percent in crack cocaine cases. Those convicted of crack cocaine offenses are much more likely to be African American than those convicted of powder cocaine offenses. And African Americans as a whole are more likely to be sentenced than any other race under a mandatory minimum. Until the Sentencing Commission takes steps to account for the discrimination that African Americans already face in the criminal justice system, they will only be worsening the problem.

We also encourage the Commission to further the use of alternatives to incarceration by amending the Sentencing Table in Chapter 5, Part A to expand Zones A, B, and C. This is especially crucial for drug-related convictions, as probation allows individuals to remain in their communities while also receiving treatment that can address their substance use. Unfortunately, many prisons, due to their limited resources, lack consistent and thorough programming to address substance use. As a result, when individuals are released, they find themselves ill-equipped to avoid the issues that led to their conviction in the first place. By expanding the use of probation (through which substance misuse programs can be imposed), the Commission can do its part to curb drug misuse in a vulnerable population.

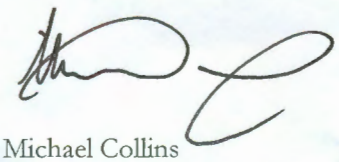
We are glad that the Commission is planning to continue its multi-year study of definitions relating to the nature of a defendant's prior conviction and the impact of such definitions on the relevant statutory and guideline provisions. The Commission should consider limiting the use of the terms "felony drug offense" and "controlled substance offense" to the greatest extent possible. In light of the different state laws, an individual in one state may amass controlled substance offenses or felony drug offenses while an individual in another state does not, despite committing similar offenses. This creates a disparity in federal sentencing, where individuals are being labelled differently despite having identical criminal histories. Moreover, the Commission should reconsider its equation of controlled substance offenses and crimes of violence in determining career offender status. This status has severe consequences for sentencing, and to make controlled substance offenses on the same level as crimes of violence does not accurately reflect their effect on society. Additionally, we urge the Commission to amend its "armed career criminal" definition to remove possession of a firearm in connection with a controlled substance offense. Again, this is a definition with serious consequences, and it should only target those who deserve it most. It is the far greater good for these definitions to err on the side of leniency.

Under the Commission's current policy, the court, pursuant to 21 U.S.C. § 862, may deny the eligibility for certain federal benefits of any individual convicted of distribution or possession of a controlled substance. While there are caveats for those who are

cooperating as witnesses, and for those who complete drug treatment programs, this will still harm many individuals convicted of drug offenses. Again, the Commission must prioritize curbing future drug use and preventing recidivism. By stripping individuals of federal benefits, the Commission makes it that much harder for them to get their life back on track. It is not hard to see how this policy would make it easier for an individual to return to drug misuse or distribution.

We thank the Commission for the opportunity to comment.

Sincerely,



Michael Collins
Deputy Director, Office of National Affairs

Thank you for the opportunity to review the US Sentencing Commission's Proposed Priorities for the Amendment Cycle ending May 1, 2017. As the Convener of the Episcopal Diocese of Arizona's Prison Ministry Program, I can attest to the seriousness with which our team reviewed the proposed priorities and the earnestness of our suggested priority issue.

We applaud the US Sentencing Commission's stated priorities for the upcoming Amendment Cycle in particular the focus on mandatory minimum penalties, alternatives to incarceration, and recommendations that will reduce recidivism and promote effective re-entry. In addition to the twelve proposed priorities, we respectfully request that the Commission consider the recommendation presented in the attached document as a priority issue for the Amendment Cycle ending May 1, 2017.

Again, thank you for allowing us to participate in this process. We will be following the upcoming Amendment Cycle with intense interest.

Respectfully,

Rev. Kimberly Crecca
Convener, Diocese of AZ Prison Ministry Program
Episcopal Diocese of Arizona

Suggested Priority Policy Issue
for United States Sentencing Commission
Amendment Cycle ending May 1, 2017

This document is presented on behalf of the Episcopal Diocese of AZ Prison Ministry Program with the approval of our Bishop. As members of the faith community, we believe that no person is beyond redemption. Therefore, we request that the US Sentencing Commission recommend the elimination of the death penalty as a sentencing option for murder and other capital crimes. Rather, judges and juries should have the opportunity to consider mitigating circumstances when sentencing individuals accused of murder or a capital offense and the maximum punishment options should be a life sentence or life without parole. A number of factors support this recommendation.

When our legal system executes a criminal defendant but the person is later exonerated, it is catastrophic for our judicial system and undermines our system of laws. A March, 2014 report in the Proceedings of the National Academy of Sciences (PNAS) ("Rate of False Conviction of Criminal Defendants Who are Sentenced to Death" Samuel R. Gross, Barbara O'Brien, Chen Huc, and Edward H. Kennedy) estimates "that if all death-sentenced defendants remained under sentence of death indefinitely, at least 4.1% would be exonerated. We conclude that this is a conservative estimate of the proportion of false conviction among death sentences in the United States."

Erroneous application of the death penalty on innocent people has resulted in a drop in support for that punishment in our country. According to the Pew Research Center's latest national survey of 1,500 adults conducted March 25-29, 2015, support for the death penalty is steadily declining in the US to an all time low of 56% in favor and 38% opposed. In addition, the survey reported that "71% of Americans say there is some risk that an innocent person will be put to death. Only about a quarter (26%) say there are adequate safeguards in place to make sure that does not happen." The survey also indicated that "about six-in-ten (61%) say the death penalty does not deter people from committing serious crimes; 35% say it does deter serious crime."

A June 2007 study conducted by the Death Penalty Information Center ("A Crisis of Confidence: Americans' Doubts About the Death Penalty") states, "For many Americans, their patience with the death penalty is wearing thin. Only 39% of the public expressed either complete or 'quite a bit' of confidence that the justice system sentences only the guilty to death. A strong majority of 75% of those polled believe that we need a higher standard of proof for guilt in death penalty cases. The standard of "proof beyond a reasonable doubt" may be sufficient when an inmate will still be alive if new evidence overturns his conviction. But before the state should be allowed to execute an individual, a higher degree of confidence that it has charged the right person is required."

In addition, the Death Penalty Information Center's report found "Most Americans have been affected by the news of so many exonerations in death penalty cases. Only 37% said that such news had no effect on their position on the death penalty. Sixty percent (60%) of

Americans said that these wrongful convictions had either lessened their support for the death penalty or strengthened their already existing opposition."

Amnesty International reports that "Since 1990, an average of three countries each year have abolished the death penalty, and today over two-thirds of the world's nations have ended capital punishment in law or practice." Further studies conducted by Amnesty International in 2014 indicated that the US ranks 5th in the world among nations that continue to use the death penalty as punishment for certain crimes. "China again carried out more executions than the rest of the world put together. Amnesty International believes thousands are executed and sentenced to death there every year, but with numbers kept a state secret the true figure is impossible to determine. The other countries making up the world's top five executioners in 2014 were Iran (289 officially announced and at least 454 more that were not acknowledged by the authorities), Saudi Arabia (at least 90), Iraq (at least 61) and the USA (35)." In an article from 2012 published in the International Business Times, "The US was the only western country to have carried out judicial executions last year [2011] and the 43 executions in the country ranked it fifth in the world in capital punishment, behind China, Iran, Saudi Arabia and Iraq as reported by Amnesty International."

Amnesty International's study also found that there has been a significant drop in the number of executions carried out in countries that support the death penalty, "Excluding China, at least 607 executions were known to have been carried out in 2014, compared to 778 in 2013, a drop of more than 20 percent. Executions were recorded in 22 countries in 2014, the same number as the year before. This is a significant decrease from 20 years ago in 1995, when Amnesty International recorded executions in 42 countries, highlighting the clear global trend of states moving away from the death penalty."

According to Annotation 6 of the Eighth Amendment, the US Supreme Court held in *Coker v Georgia*, that "the standard under the Eighth Amendment was that punishments are barred when they are 'excessive' in relation to the crime committed. A 'punishment is excessive' and unconstitutional if it makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." The imposition of a death sentence on an innocent individual results in an 'excessive' punishment as defined by the US Supreme Court.

In light of the growing trend among the nations of the world to abolish the death penalty and the changed attitudes of the American public with regard to the potential to execute innocent individuals, we request that the US Sentencing Commission make replacing the death penalty with the options for a life sentence or life without parole a priority issue for the Amendment Cycle ending May 1, 2017.

Respectfully submitted by,

Rev. Kimberly Crecca
Convener, Diocesan Prison Ministry Program
Episcopal Diocese of Arizona
July 21, 2016

July 25, 2016

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Priorities for the Amendment Cycle

Dear Judge Saris:

We write on behalf of the members, board, and staff of FAMM in response to the Commission's proposed priorities for the 2017 amendment cycle. As always, we are pleased to provide the Commission our reactions and suggestions. Every decision the Commission makes affects our members and, as such, they and we are keenly interested in the process of establishing priorities.

Currently, over 37,000 federal prisoners and their loved ones hear from FAMM on a routine basis -- and we hear back from many of them. We provide them updates on legislation and important court decisions that could touch their lives. We also provide them Commission news that could involve them. We seek their input and stories to help us decide our agenda and to illustrate our concerns. What we learn from them helps guide our own priorities.

We also work to give prisoners and their loved ones a voice in the process, encouraging them to communicate with the Commission directly on matters that affect them. As you have acknowledged, many of them do.[1]

We told our members of the current Issue for Comment and you will have heard directly from many of them. We are pleased to add our voice to theirs.

We generally support the proposed priorities and use this letter to express our special interest in several of them.

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[1] *See, e.g.*, Chief Judge Patti B. Saris, Chair, U. S. Sentencing Com'n, Remarks for Public Meeting at 1 (July 14, 2014) (noting that the Commission had received 60,000 letters from the public responding to the proposal to make the so-called "drugs minus two" amendment retroactive), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140718/PM_Chairs_Remarks.pdf; *see also*, U.S. Sentencing Comm'n, Public Meeting Minutes at 2 (June 30, 2011) (noting that the Chair announced the receipt of 43,500 letters in support of making the so-called "crack minus two" guideline amendment retroactive), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110630/Meeting_Minutes.pdf.

(1) Continuation of work with Congress and others on mandatory minimum penalties.

We are pleased to support the Commission's renewed commitment to address mandatory minimum penalties. The Commission's focus on these ill-conceived statutes is essential to wider sentencing and criminal justice reform.

In encouraging mandatory minimum penalty reform, the Commission finds itself in good company. The last several years have seen important efforts by each of the branches of government to address unduly harsh sentences.

For example, the Department of Justice has taken some steps to address mandatory sentencing. The former Attorney General issued memoranda in 2013 and 2014 directing prosecutors to avoid charging cases in a manner that invoke mandatory penalties, including the harshest recidivist penalties, except in certain circumstances.[2]

The President's clemency initiative aims to identify prisoners serving sentences that would not be imposed today due to changes in law or policy made subsequent to the prisoner's conviction.[3] The effort has freed hundreds of prisoners serving such sentences.[4] It cannot, however, correct all such sentences or fix the terms defendants are currently subject to under statutes the Commission has identified as in need of change, such as the stacking provision of 18 U.S.C. § 924(c) and the length of drug mandatory minimums. The President correctly identified Congress as the only body capable of the kind of fundamental change needed. In May, following a meeting with former federal prisoners who had received commutations he said, among other things:

> While I will continue to review clemency applications, only Congress can bring about the lasting changes we need to federal sentencing. That is why I am encouraged by the bipartisan efforts in Congress to reform federal sentencing laws, particularly on overly harsh mandatory minimum sentences for nonviolent drug offenses. Because it just doesn't make sense to require a nonviolent drug

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[2] *See*, Memorandum from Attorney General Eric Holder, "Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases" (Aug. 12, 2013), *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf; *see also*, Memorandum from Attorney General Eric Holder, "Guidance Regarding § 851 Enhancements in Plea Negotiations" (Sept. 24, 2014), *available at* https://www.fd.org/docs/select-topics/sentencing-resources/memorandum-to-all-federal-prosecutors-from-eric-h-holder-jr-attorney-general-on-851-enhancements-in-plea-negotiations.pdf?sfvrsn=6.

[3] *See* U.S. Dep't of Justice, Press Release, "Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants" (Apr. 23, 2014), available at: https://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new

[4] *See* U.S. Dep't of Justice, Office of the Pardon Attorney, "Commutations Granted by President Obama 2009-2016," available at: https://www.justice.gov/pardon/obama-commutations (last visited July 23, 2016).

> offender to serve 20 years, or in some cases, life, in prison. An excessive punishment like that doesn't fit the crime. It's not serving taxpayers, and it's not making us safer.[5]

Meanwhile, the Commission has made important changes to the guidelines, including the three reductions to crack and drug guideline sentencing, starting in 2007, that were made fully retroactive. But, the Commission considers that it can only go so far in lowering guidelines associated with mandatory minimum sentences. It has rejected calls to delink the drug guidelines from the associated mandatory minimums, despite its acknowledged authority to do so.[6] So advances in this area, while welcome and significant, are limited.

The Commission has also contributed to the current interest in mandatory minimum reform with research and data and its 2011 report on mandatory sentencing. Many of its recommendations for reform helped inform congressional bills in the current legislative session. These include the recommendation that Congress amend 18 U.S.C. § 924(c) to make it a "true recidivist" statute by providing that the enhanced penalties for a second or subsequent offense apply only to true prior convictions.[7]

Meanwhile, bills in Congress have moved beyond what many thought would be possible in an election year, as Republicans and Democrats found common cause in sentencing reform. The immediate future of sentencing reform bills in Congress is at best uncertain.[8] But whatever the outcome, the work in Congress this year can only help inform efforts in the coming legislative sessions. The Commission's steadfast commitment to encourage that Congress address the scope and severity of mandatory penalties; expand the safety valve; and eliminate stacking, as well as its ongoing work to provide important data and analysis to lawmakers is commendable and timely. We are pleased to support it.

(2) Post-*Booker* guidelines.

FAMM reiterates its guarded support for the Commission's proposal to study guideline simplification and redrafting with the aim of promoting proportionality and

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[5] President Barack Obama, "A Nation of Second Chances," (May 5, 2016), *available at* https://medium.com/the-white-house/a-nation-of-second-chances-bc35d820ec79#.ezhqohl4u.

[6] U.S. SENTENCING COMM'N, *The History of the Child Pornography Guidelines* 44-46 (2009) (explaining that when Congress establishes a mandatory minimum penalty, the Commission has four approaches available to it, including to select a base offense level without regard to the mandatory minimum), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.

[7] The Smarter Sentencing Act (S. 502, H.R. 920), the Safe Justice Act (H.R. 2944), and the Sentencing Reform and Corrections Act (S. 2123) all adopted this proposal.

[8] Alexander Bolton, *Criminal Sentencing Bill Tests McConnell-Grassley Relationship*, THE HILL (July 7, 2016), *available at* http://thehill.com/homenews/senate/286767-criminal-sentencing-bill-tests-mcconnell-grassley-relationship.

guarding against unwarranted sentencing disparities, while accounting for culpability and role. As we have advised on multiple occasions, however, we remain firmly opposed to proposals that would effect changes while imposing mandatory or presumptive constraints on judicial discretion to do justice in individual cases.[9] Imposing mandatory or presumptive restraints on judges in all cases governed by the guidelines would extend to every case the harms the Commission has identified with respect to mandatory minimums that apply to only some crimes.

We are not alone in our opposition to such measures, as many stakeholders and interested parties have opposed the post-*Booker* reforms proposed by the Commission in 2012.[10] The injustices of the pre-*Booker* regime are well known; judges routinely decried the sentences they were forced to impose under mandatory guidelines.[11] But, *Booker* was not made retroactive and thousands of pre-*Booker* prisoners remain behind bars years longer than their post-*Booker* counterparts will. In fact, such pre-*Booker* cases are considered by Clemency Project 2014[12] to state a claim that the sentence would be substantially lower if imposed today. As a co-founder, Screener and Steering Committee member of Clemency Project 2014, the undersigned has reviewed nearly 2,000 briefs, examining arguments that the prisoner meets the initiative criteria. Chief among those criteria is that the applicant would likely receive a substantially lower sentence if sentenced today due to an intervening change in law or policy. The advent of advisory guidelines is just such a change, as *Booker* and its progeny both removed the mandatory grip of the guidelines and required a judge to impose a sentence in accord with the dictates of 18 U.S.C. § 3553(a). Post- *Booker* sentences are routinely lower than those imposed prior to *Booker* because of the individualized inquiry judges conduct.

We understand the Commission's interest in reviewing sentencing rules that were written for a different time and under very different assumptions. As we previously advised, in conducting this review, the Commission would do well to revisit the work of the American Bar Association Task Force on the Reform of Economic Crime

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[9] *See, e.g.,* Letter from Mary Price and Julie Stewart to Patti B. Saris at 4-5 (July 27, 2015), *available at*: http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/FAMM.pdf; *see also*, Statement of Mary Price Before the U.S. Sentencing Comm'n Public Hearing on Federal Sentencing Options After Booker (Feb. 16, 2012), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120216/Testimony_16_FAMM.pdf.

[10] *See* U.S. SENTENCING COMM'N, Agenda from Feb. 16, 2012, Hearing on Federal Sentencing Options After Booker (including statements against mandatory guidelines from witnesses including judges, practitioners, law professors, and community groups), *available at* http://www.ussc.gov/amendment-process/public-hearings-and-meetings/20120216/agenda-february-16-2012.

[11] See David Zlotnick, *National Interest*: *Shouting Into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS UNIV. L. REVIEW 644 (2004), *available at* http://docs.rwu.edu/cgi/viewcontent.cgi?article=1315&context=rwu_LR.

[12] Clemency Project 2014 is a working group of the American Bar Association, the American Civil Liberties Union, FAMM, the Federal Public and Community Defenders, and the National Association of Criminal Defense Lawyers. Through its efforts, the participating organizations are identifying potential clemency petitioners and recruiting and training volunteer lawyers to assist them in securing clemency.

Sentencing.[13] FAMM was a member of the Task Force along with law professors, judges, advocacy organizations, and members of the federal defense bar, including the Federal Public and Community Defenders. Together we reviewed and examined ways to improve sentencing under the fraud guideline.

There is much to recommend the bold approach the Task Force took. We reimagined federal guideline sentencing for economic crimes and in doing so drafted one way out of the box our federal sentencing system had been stuck in since the promulgation of the original guideline grid.

The Task Force wanted to be sure that one feature of assessing culpability did not dominate the guideline process. We worked into our draft a way to lessen the overbearing influence of loss on the ultimate guideline calculation. Our model would remove redundant enhancements that drive sentences too high in many cases. Most importantly, our proposed guideline would contain genuine discretion; not discretion to ignore or evade the guideline, but discretion within the process to help judges achieve a proportionate and just sentence. Our draft provided, as part of the guideline calculation process, a means of assessing and weighing factors that could bear on blameworthiness. Rather than finding a fact and assigning it some pre-ordained enhancement or adjustment, our model directed judges to consider a series of factors and weigh and balance them in the context of the overall harm.

The Commission of course did not adopt this proposal. The draft in our view has important features that commend it to the attention of anyone seeking to draft a new system of guidelines. Its rich and nuanced approach is far superior to the factor and enhancement laden on presently in use.

(3) Statutory and guideline definitions relating to the nature and impact of a defendant's prior convictions.

We wholeheartedly support this ongoing work by the Commission. We underscore our abiding concern with the career offender guideline which consistently proposes tragically harsh sentences on a finding of two prior felony convictions for a crime of violence or drug trafficking offense. In 2014, 50 percent of career offenders received sentences between 10 and 20 years and an additional 14 percent more received sentences longer than 20 years.[14] These numbers would likely have been much higher but for variances and departures which are routinely used in career offender cases. In 2014, only

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[13] AMERICAN BAR ASS'N, *Criminal Justice Section Task Force on the Reform of Economic Crime Sentencing, available at* http://www.americanbar.org/groups/criminal_justice/economic_crimes_taskforce.html.

[14] U.S. SENTENCING COMM'N, *Quick Facts: Career Offenders* (*Quick Facts*) *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf.

27.5 percent of career offenders were sentenced within the recommended guideline range.[15]

As the Commission knows, our interest in this area is especially informed by the experiences of our members sentenced as career offenders. The stories they tell us belie the label "career offender."

Paul Fields is one such "career offender." His crime was to sell marijuana while following his favorite bands around the United States. He has served seven of the 15 and ½ years to which he was sentenced for growing 256 marijuana plants. He made no money from his crime --selling a drug that is now legal in four states. He had no history of violence.

We have known Paul for a number of years as a gentle, caring father to his seven-year-old daughter and devoted husband and son. He is a career offender because he sustained prior drug convictions. Now he serves a sentence that ought to be reserved for a lifelong recidivist or a drug kingpin. The career offender label has added 13 years to his ordinary guideline sentence.[16]

We believe there are lots of people like Paul Fields in prison who are serving excessive terms as career offenders. We wrote to our members earlier this year regarding how they came to be sentenced as career offenders. We heard from hundreds of prisoners. Many told similar tales of very limited criminal histories, short or no prior terms of incarceration, and/or extremely minor instant offenses, including convictions for as little as 5 grams of crack cocaine. These prisoners were subjected to sentencing ranges as long as 360 months to life. The majority are drug offenders. But, because they were sentenced as career offenders, those with drug convictions could not benefit from retroactive application of the various reductions made by the Commission to the drug guidelines.

The career offender label often grossly exaggerates the defendant's actual criminality and history. Many of these prisoners appear to have committed very low-level priors and consequently had served very short terms for them. This is an area we strongly encourage you to address in the coming year. Prior felonies should be of a nature and severity that warrant labeling the defendant as having embarked on a career in crime. Reassessing which prior felonies deserve to be counted toward career offender status could lessen the injustice of this sentencing scheme.

To underscore the urgency of this appeal, we want to share several of the stories our members shared.

- One prisoner faced a judge who opened the sentencing by saying "[t]hese things are hard." Why? The defendant had been convicted in the past for two drug offenses when he was 19 and 21 that involved a total of 1.88 grams of crack cocaine. He had served no time behind bars. His instant

[15] *Id.*
[16] To see Paul's full profile visit the FAMM website at: http://famm.org/paul-fields/.

offense -- being involved in a crack cocaine conspiracy -- was serious but did not warrant the 262 months he was facing. He was not yet 30 years old.

- Another very low-level career offender was sentenced to 327 months for her addiction-driven crack cocaine crime. Her instant offense -- conspiracy to distribute crack cocaine -- involved all told, 1.8 kilograms of crack cocaine. Prior to that, she had been convicted of felonies involving user-quantities of the drug (totalling13 grams in all) and had been sentenced to probation in one case and to a halfway house in the other. Neither sentence quelled her need for the drug nor separated her from her drug dealing, abusive boyfriend. Nor did they prepare her to spend the next 27 years of her life incarcerated.

- Another career offender had served a very short term behind bars (21 days in all) for two minor hand-to-hand drug sales. His instant offense involved a large amount of drugs, but his sentence of 262 dwarfed that for serious crimes of violence and exceeded the sentence he would have received under an ordinary guideline calculation.

These non-violent, low level, and for all intents and purposes first-time offenders, are condemned to serve sentences that far exceed those for much more serious crimes. In 2014, the average career offender sentence fell to 147 months, well below the average guideline minimum for career offenders of 207 months.[17] Meanwhile in 2014, the average sentence for sexual abuse was lower (134 months) as was that for robbery (78 months). Only murder and kidnapping sentences were longer, at 273 and 201 months, respectively.[18]

While the career offender guideline is responsive to a congressional mandate, the way that priors are assessed is within the control of the Commission. The Commission has exercised its discretion to cabin somewhat the impact of the guideline and we think it can do more. For example, the guideline credits acceptance of responsibility,[19] imposes staleness limits on priors,[20] and excludes simple possession felonies from the countable predicates.[21] Now it is time to limit the impact of priors in ways that ensure only the most serious repeat offenders, those who deserve to called career offenders, are subject to this enhanced penalty.

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[17] Quick Facts.
[18] U.S. SENTENCING COMM'N, *2014 Sourcebook of Federal Sentencing Statistics*, Tbl. 13, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table13.pdf
[19] U.S.S.G. § 4B1.1.
[20] U.S.S.G. § 4A1.2(e).
[21] U.S.S.G. § 4B1.2(b).

(4) Additional Observations.

We again encourage the Commission to address the undue severity of sentences for child pornography offenses and eliminate the acquitted conduct rule.

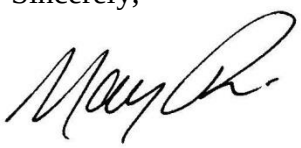
Non-contact child pornography guidelines result in some of the most severe sentences called for under the sentencing guidelines. We applaud the Commission's message to Congress that it address the disturbing sentencing of receipt and possession offenses.[22] But the Commission has the authority to act on its own to ameliorate many of the features of guideline sentencing for child pornography non-contact offenses. We hear from a number of members serving these outlandish sentences and ask again[23] that the Commission identify and propose changes it can make, absent congressional action.

While the Commission made some salutary changes to U.S.S.G § 1B1.3, it elected to retain acquitted conduct as the basis for calculating offense levels. Using conduct that has been tested at trial and of which the defendant has been found not guilty undermines citizens' view of our justice system as fair and balanced. It is a rule out of step with the modern effort to make sentencing more rational, just and cost-effective. It should be eliminated.

Conclusion

Thank you for considering our views. We look forward to working with you in this amendment cycle.

Sincerely,



Mary Price
General Counsel.

[22] U.S. SENTENCING COMM'N, *Report to the Congress: Federal Child Pornography Offenses* (2012).
[23] *See* Letter from Julie Stewart and Mary Price to Chief Judge Patti B. Saris at 7-8 (July 27, 2015), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/FAMM.pdf.

As Indian People's Action we are sending the analysis that was done here in the state of Montana around the HIGH incarceration of Native Americans. We are hoping that this will help your U.S sentencing commission. Montana doesn't classify data by race which helps the state continue their racial profiling and over sentencing of our Native Americans compared to the Non-natives. Thank you for your time on this matter. Any questions feel free to contact me.

Regards,

Michaelynn

Indian People's Action

Native American Analysis of the Montana Department of Corrections 2015 Biennial Report

Preliminary Analysis
November 2015

Indian People's Action

EXECUTIVE SUMMARY

The Montana Department of Corrections (DOC) releases a report every two years documenting its activities and the underlying conditions within which it operated during the two prior fiscal years. Each report outlines the major initiatives undertaken, accomplishments, and key indicators for the period covered. Following the release of the 2013 Biennial Report, a Native American analysis of its findings was completed for Indian People's Action. This work is a follow-up to the 2013 analysis in applying a Native American analysis to the 2015 report. Unlike the 2013 analysis this work pulls from multiple sources, including both the 2013 and 2015 Biennial Reports as well as a 2014 report completed for the DOC by the Pew Research Center, the 2013 Montana Board of Crime Control Biennial Report, and Department of Justice statistics. Like the previous analysis, this work does not provide a synopsis of the 2015 Biennial Report, but instead presents an issue-based analysis and critique of the report's findings as they relate to American Indians.

The Montana Board of Crime Control, and agency dedicated to preventing and addressing crime defines *Disproportionate Minority Contact* in relation to the unequal distribution of minority youth who are over-represented in Montana's Juvenile Justice System (BOCC, 2014). While the DOC Biennial Reports do not focus on disproportionate minority contact, they present data indicating the perpetuation of the over-representation of American Indians in the corrections system and other race-related issues in the DOC.

The following analysis traces trends in DOC performance in the period 2011 to 2014. While the 2013 Biennial Report projected the continued slow increase of the overall offender population (DOC, 2013: 5), growth in the prison population prompted the DOC and Montana Governor's Office to request assistance from the National Governors' Association Center for Best Practices and the Pew Charitable Trust to assess factors driving the increase and "to identify potential policy options for improving public safety, holding offices accountable, and containing corrections cost" (Pew, 2015: 1). The request for assistance from these agencies indicates acknowledgement of problems within the DOC.

A challenge in examining the DOC performance based on the 2013 and 2015 reports is inconsistency in the data. Perhaps reflecting ongoing issues in the DOC that lead to the request for assistance from Pew and the Governors' Association, the 2015 Biennial Report contains LESS information than the 2013 report.

In examining trends and practices in the corrections system, it must be noted that Montana is one of seven states housing at least 20% of its inmate population in private prisons as at December 31, 2014 with 38.7% of Montana inmates residing in private prisons – with only New Mexico reporting a higher proportion (Carson, 2015). In spite of this high proportion and DOC alternative to prison programs, the Department of Justice shows that on December 31, 2014, Montana prisons were operating at 100.5% capacity (Carson, 2015).

BACKGROUND

A formatting note before starting: Following the example of the *Native American Analysis of the Montana Department of Corrections 2013 Biennial Report*, this report quotes extensively from the DOC reports. Quotations drawn from the 2013 and 2015 Biennial Reports are italicized to allow for ease of identification.

The Executive Summary of the 2013 Montana Department of Corrections Biennial Report heralded that report as displaying:

> *a corrections system that remains innovative and dedicated to the use of alternatives to prison that deal with offenders' individualize[d] needs and risks. It is a system with an incarceration rate that continues to be below the national average and a recidivism rate where fewer than four out of every 10 offenders return to prison within three years of release.* (DOC, 2013: 5)

The 2013 Executive Summary further noted its programs that were:

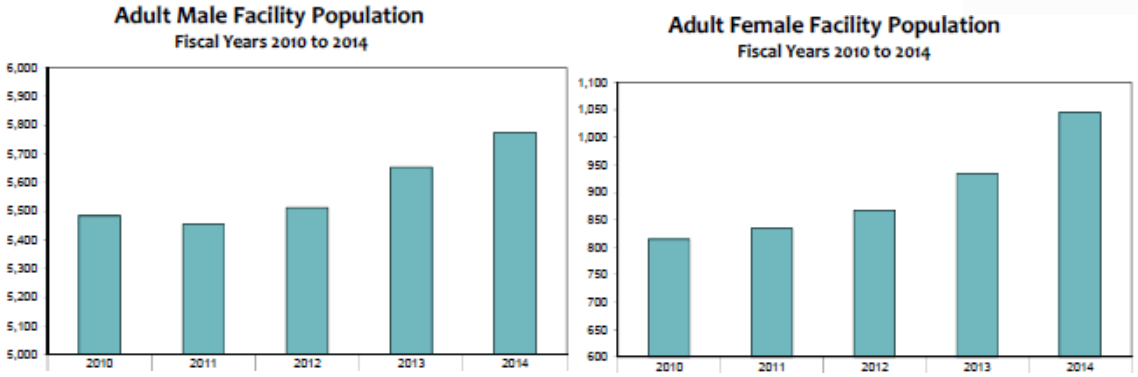
> *successful in diverting offenders from prison by addressing the underlying needs of offenders that contribute to criminal behavior. This philosophy that one size cannot fit all carries over into the community where specialized probation and parole officers have dedicated caseloads…* (DOC, 2013: 5)

The list of those especially catered to included: sex offenders, felony drunken drivers, and those with chemical dependency and mental health issues. A notable omission from this list was American Indian offenders. This omission seems to contradict the DOC philosophy against applying standardized one-size-fits-all approaches to dealing with offenders.

Instead of highlighting the success of initiatives outlined in the 2013 Biennial Report, the Executive Summary of the 2015 Biennial Report spoke of "*changes in direction"* with the DOC taking "*a deeper look at the factors driving the corrections population, at our system design and at programs proven to work in communities throughout the nation*" (DOC, 2015: 7, 6). This deeper look was prompted by increases in prison population and involved analysis conducted by the Pew Charitable Trust. Like past DOC policies and strategies this analysis ignored the specific needs of American Indians within the Montana corrections system.

TRENDS IN THE DOC POPULATION

The 2015 Biennial DOC Report covers a period when the population of DOC adult facilities increased. Compared to the period from 2010 to 2012 when the adult male population increased 0.05% and the female population 6.5%, from 2012 to 2014 the adult male population in facilities increased 4.4% and the adult female population 20.5%.



Source: (DOC, 2015: A-7)

ADULT FACILITY POPULATION					
	2010	2011	2012	2013	2014
Men	4,484 2.0%	5,454 -0.5%	5,212 1.1%	5,653 2.6%	5,775 2.2%
Women	814 5.7%	834 2.5%	867 4.0%	934 7.7%	1,045 11.9%

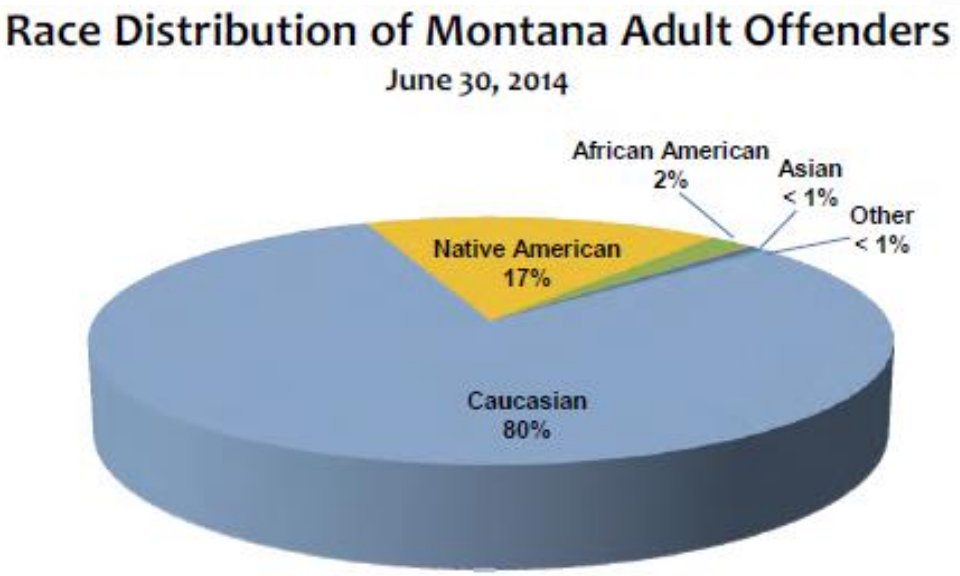
The impact of these increases is borne disproportionately by American Indians given their over-representation within the DOC system.

GROSS OVER-REPRESENTATION IN FACILITY POPULATIONS

The DOC system continues to be characterized by the over-representation of American Indians, particularly in the prison population.

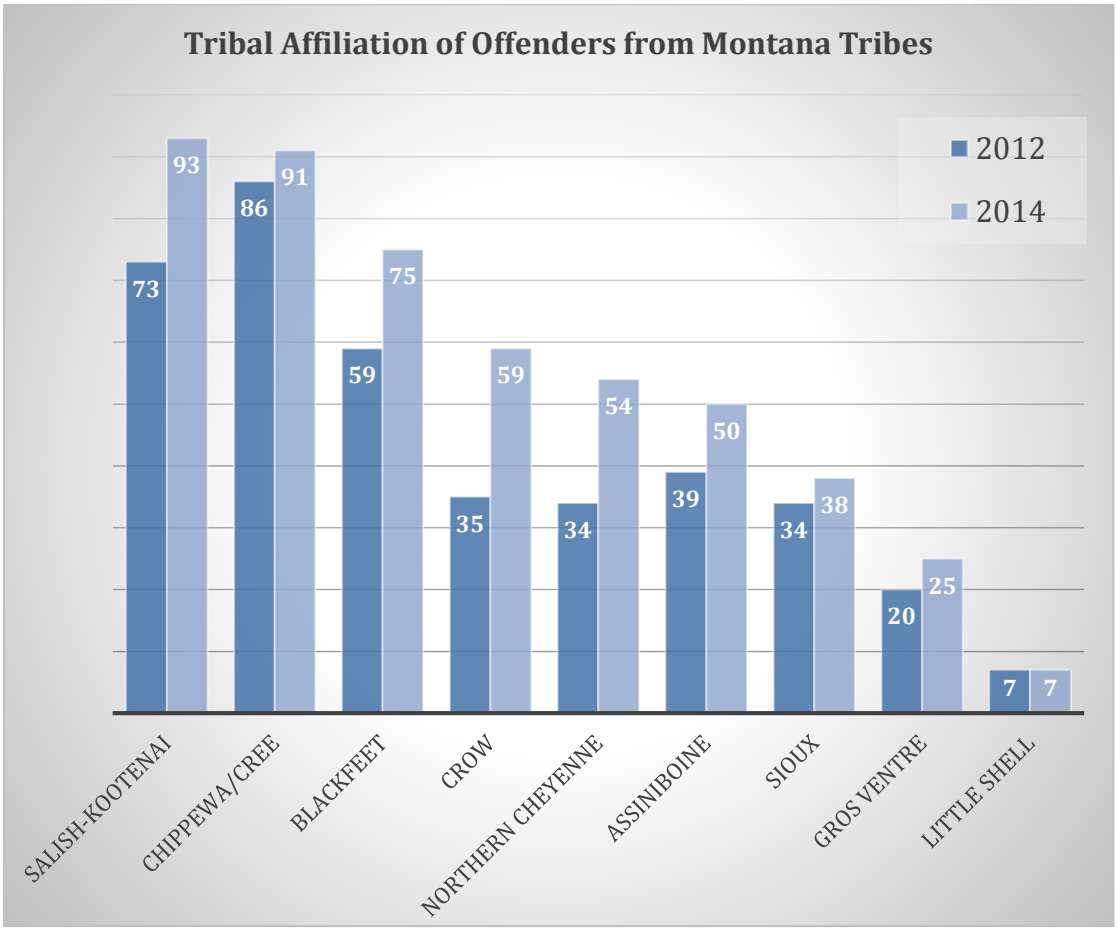
> *Based on self-reporting by offenders, American Indians continue to be over-represented in the corrections system. Although they make up about 7 percent of Montana's overall population, American Indians account for more than 17 percent of the total number of offenders under department supervision. This includes offenders anywhere in the corrections system, from prison to parole and probation. All other minorities represent less than 4 percent of the offender population"* (DOC, 2015: A-16).

While the number of "other minorities" decreased from the 5.6% reported in 2013, the proportion of American Indians has remained unchanged at 17%. As the 2013 and 2015 reports state*: Offenders identifying themselves as American India also have the opportunity to identify a tribal affiliation, if any. That information is collected at whatever point they enter the correction system*" (DOC, 2015: A-16; DOC, 2013: A-17). The percentage of Hispanics in the DOC system dropped from 2.2% in 2012 to less than 1% in 2014.



Source: DOC (2015: A-16)

That majority of American Indians in corrections system are affiliated with Montana Tribes – with 79% of American Indians in 2012 and 77% in 2014 stating a Montana affiliation. Approximately 11% of American Indians claimed an out of state tribal affiliation as reported in the 2013 and 2015 DOC reports, with the remainder giving their affiliation as 'unknown' or 'other.' As in 2013, it is likely that the number of American Indians in the Corrections system is understated as some individuals may prefer not to be classified as American Indian for fear of stigmatization.



Source: DOC (2013: A-17) and DOC (2015: A-16)

While American Indians enter the DOC system in a disproportionate rate compared to the general population, the over-representation is exacerbated as American Indians in the DOC are more likely to be held in secure facilities.

MALE PRISON	2008	2009	2010	2011	2012	2013	2014
Caucasian	77%	77%	77%	77%	77%	77%	77%
American Indian	20%	20%	19%	20%	20%	20%	20%
African American	3%	3%	3%	3%	3%	3%	3%
Other Minority	0%	0%	1%	0%	0%	0%	0%

> *One out of every five incarcerated male offenders is American Indian. That is almost three times higher than the rate at which natives are represented in the general Montana population. The proportion of the prison population that is native has changed little since 2008, but increased to 20 percent since 1997.* (DOC, 2015: F-5; DOC, 2013: G-6)

Perhaps reflecting DOC indifference to this situation, the wording used in the 2013 and 2015 Biennial Reports is almost identical.

What is interesting to note is that while the number of women in corrections facilities has increased, the proportion of American Indian women in prisons has remained unchanged.

FEMALE PRISON	2008	2009	2010	2011	2012	2013	2014
Caucasian	69%	66%	64%	66%	64%	65%	64%
American Indian	29%	33%	33%	33%	36%	35%	33%
African American	1%	1%	2%	1%	1%	0.5%	2%
Other Minority	1%	0%	1%	1%	0%	0.5%	1%

Echoing the wording used to discuss American Indian men in prison, the 2013 report states:

> *Indian. Although American Indians are just seven percent of the general Montana population, they make up 33 percent of the female prison population, and 17 percent of the total Montana offender population. In 1997, American Indians accounted for 30 percent of the female prison population.* (DOC, 2015: G-5)

The relative stability of the percentage of American Indians residing in prisons does noted seem credible given the increase in the adult facility population documented earlier – particularly for women. Consistency in these numbers suggests a problem with data collection and/or analysis.

We are currently conducting further analysis of this.

GROSS UNDER-REPRESENTATION IN DOC STAFFING

The disproportionate number of American Indians in the corrections system is paralleled by the relatively few American Indians employed by the DOC. The 2013 Biennial Report contained an entire section devoted to Staff Serves – the division providing:

> *human resource and Native American cultural services, legal defense and general counsel support; criminal and administrative investigation services, employee and organizational development and training programs, and department policy management*" (DOC, 2013: 35).

Although Native American cultural services are listed second in order of division activity in the 2013 report, the DOC seems to have made little effort to hire a representative workforce as is evident in staffing trends. In spite of American Indians composing approximately 7% of the Montana population and 17.4% of Montana offenders as at June 30, 2012 (DOC, 2013: A-16) – and higher proportions of the prison population as noted above, a mere 1.1% of DOC employees in 2012 were American Indian.

June 2012	DOC Employees	Montana Offenders
Caucasian	91.8%	77.5%
American Indian	1.1%	17.4%
African American	0.4%	1.9%
Hispanic	1.2%	2.2%
Asian	0.3%	0.4%
Not Specified	5.2%	0.7%

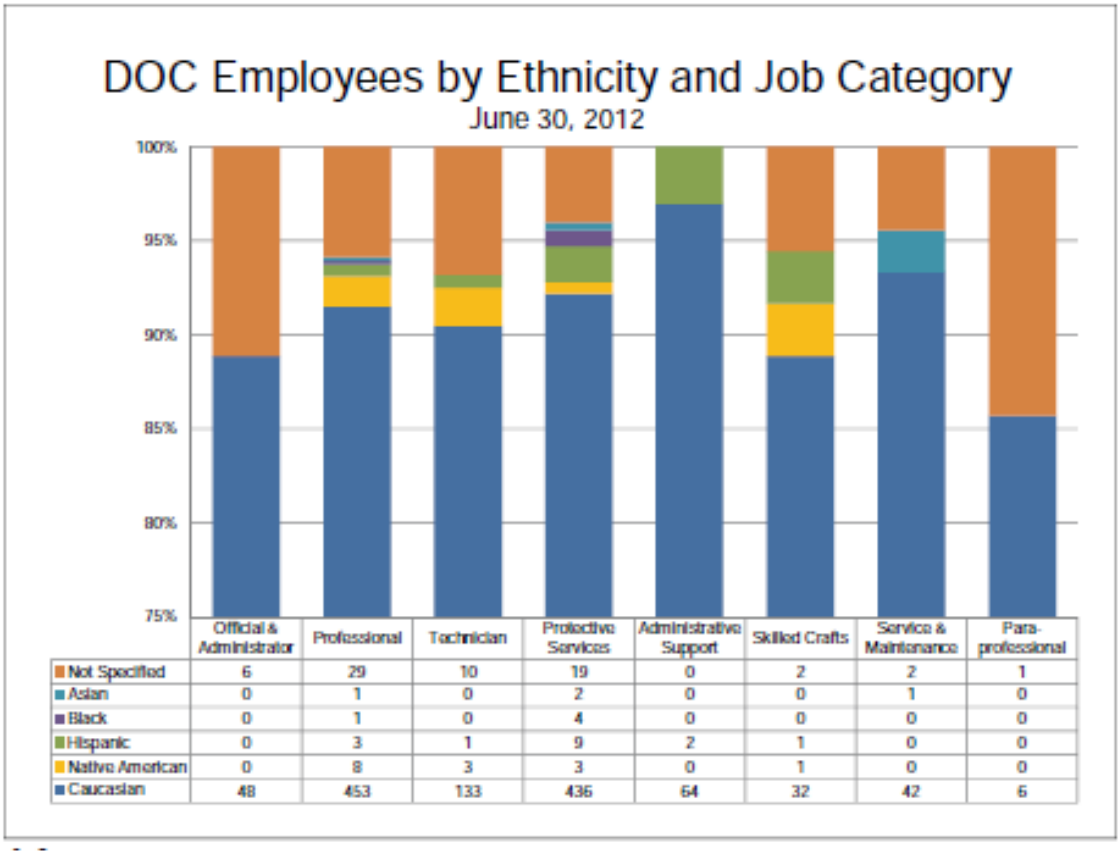
Rather than addressing issues with the ethnic breakdown of DOC employees, the 2013 report assumes it away: "*As is the case with most Montana employers and reflecting the state's overall population, the Department of Corrections' work force is predominantly Caucasian. Minorities account for only 3 percent of the department employees, which is lower than their representation in the state's total population"* DOC (2013: I-2) .They then go on to discuss the high turnover of DOC staff – particularly those employed in secure facilities. High staff turnover would provide opportunities for the DOC to diversify its workforce. In addition to American Indians, a further 4.5% of Montana offenders self-identified as minorities. Yet in 2012, almost 92% of the DOC workforce was Caucasian. It is interesting to note that in 2012 the DOC hired more Hispanic staff than American Indian.

2015 DOC EMPLOYEE PROFILE	
Male	57.5%
Female	42.3%
Minority	3%
Union Member	66%
Average Age	45
Average Years State Service	10
Average Salary	$39,565

The 2015 Biennial Report includes no section on the workforce, perhaps because so little has changed. The section of the report from the Director's Office includes an employee profile table (DOC, 2015: 12). Little progress was made by the DOC in minority hiring between 2012 and 2014, as the DOC minority workforce appears stable over the periods covered in these two reports with total minority employment stagnating at 3%. Given the high levels of staff turnover commented on in the 2013 report, lack of improvement in minority hiring represents a massive missed opportunity for the DOC – or perhaps a lack of commitment or leadership in implementing policies that are more responsive to the needs of those within the corrections system.

Instead of data on the ethnic background of staff, the 2015 report includes a new indicator: the average number of year's employment within the state sector. Given the high turnover in the DOC – particularly in secure facilities – the emphasis on prior state sector experience may present a barrier to increasing American Indian participation in the DOC workforce.

Below is the 2013 ethnic breakdown of DOC employees by job category.



	Official & Administrator	Professional	Technician	Protective Services	Administrative Support	Skilled Crafts	Service & Maintenance	Para-professional
Not Specified	6	29	10	19	0	2	2	1
Asian	0	1	0	2	0	0	1	0
Black	0	1	0	4	0	0	0	0
Hispanic	0	3	1	9	2	1	0	0
Native American	0	8	3	3	0	1	0	0
Caucasian	48	453	133	436	64	32	42	6

Source: DOC (2013: I-3)

In 2012 the DOC employed 40 minority staff, including 15 American Indians. With a total of 1,323 reflected in the table above, if American Indians were hired at a rate proportional to the state population, the DOC should have recruited 93 African American staff, or over 6 times the number stated in the 2013 report. In 2012 the DOC employed more Hispanic than American Indian staff. The entire 48 official and administrative positions were held by Caucasians. Of the 15 American Indian staff: 8 were classified as professional, 3 as technical, 3 as protective services and 1 as skilled crafts. By contrast the majority of African American and Hispanic DOC staff were classified as protective services.

LIMITED OR TOKEN ENGAGEMENT

Both the 2013 and 2015 reports emphasize the role of the American Indian Liaison – and contain pictures of sweat lodges and other cultural activities. In the Director's Office section of the 2015 report, the role of the American Indian Liaison is mentioned just after the responsibilities of the Director himself are outlined. The 2013 report outlined the responsibilities of the American Indian liaison:

> *serves as the department's authority to provide knowledgeable guidance to department staff on Native American spiritual and cultural issues within the environment of sound correctional practices. The liaison regularly meets with the governor's Indian affairs coordinator, tribal officials, Indian Alliance Center staffs, Montana-Wyoming Tribal Leaders Council members, and other American Indian representatives to ensure ongoing communication regarding department activities, programs and initiatives. The liaison communicates with American Indian offenders and their families to listen to concerns and develop solutions that take into consideration the cultural and spiritual needs of native offenders. The liaison provides training on American Indian cultural practices and helps recruit prospective employees from within the native community and at state and tribal colleges.* (DOC, 2013: 37).

Elevated from a paragraph in the 2013 report, a section of the 2015 report – just before discussion of division activities – was dedicated to the American Indian Liaison in the 2015 report. The responsibilities of the American Indian Liaison were also expanded to:

- *establish working relationships and communication channels with the eight established tribal councils in Montana*
- *identifying American Indian cultural needs in department programs and facilities, and their impact on correctional policies and practices*
- *communicating with inmates and their families, crime victims and others who have questions or concerns about American Indian culture and correctional practices*
- *providing training and information to corrections staff on American Indian culture in relation to correctional practices* (DOJ, 2015: 16).

With this extensive mandate, the American Indian Liaison seems to be a single position within the DOC, with no staff reporting to him. Although the individual in this position acts as the "technical advisor to department staff" (DOC, 2015: 16), the position does not appear in the DOC organizational chart (DOC, 2015: 46). The role of the American Indian Liaison seems to be limited to cultural matters and external relations rather than integral to planning and strategy formation.

Perhaps by oversight, but it is interesting that while functions falling under the umbrella of the Director's Office – such as Executive Office, Human Resources & Professional Development, Investigations Office, Legal Office, and Quality Assurance Office – are indicated in a note to the Organizational Chart included in the 2015 report, the American Indian Liaison is not included in this list. It may be that the DOC and/or Director's Office are ambivalent about where exactly the American Indian Liaison fits within the organization. While the functions of the American Indian Liaison are mentioned second only to those of the Director in the section covering the Director's Office (DOC, 2015: 12), the section of the report dedicated to the American Indian Liaison (DOC, 2015: 17) comes after sections for Victim Programs and Board of Pardons and Parole.

Among DOC accomplishments the 2013 report noted three specifically related to American Indians (DOC, 2013: 6):

- 10 American cultural awareness training courses among its accomplishments
- the continuation of specialized probation and parole officers focusing on Native American offenders and those with co-occurring mental health and addiction problems in spite of the end of federal funding
- the initiation of dialogue between "Montana Women's Prison inmates and tribal members from Montana and Wyoming to promote cultural and traditional programs within the prison and to focus on Native American offender's reentry into their communities.

The 2015 biennial report noted two accomplishments related to American Indians (DOC, 2015: 9):

- Hiring a replacement for the American Indian liaison
- Revision of the Department's American Indian cultural awareness class – that is now available to staff throughout the state, and is included as part of basic training at the Montana Law Enforcement Academy

While these activities seem laudable, it must be noted that the specialized probation and parole programs were initiated under federal funding and thus may reflect national rather than state priorities. Also, this program is not mention in the 2015 report. The other issue raised by these activities is: with barely over 1% of DOC employees in 2012 being American Indian, who is implementing them? Given such low levels of American Indian employment, how successful can such programs targeting American Indians be?

Only two accomplishments listed in the 2015 Report relate to American Indians – with the first of these representing a continuation of the status quo, rather than a new initiative. Listing the hiring of a replacement American Indian Liaison as an accomplishment indicates problems with DOC organizational culture, since no other hire is listed as an accomplishment – let alone a position below the official/administrative level. The second American Indian related accomplishment documented in the 2015 report relates to cultural awareness programs that ironically in all likelihood fall at least partially under the mandate of the American Indian Liaison.

CONCLUSIONS

The Executive Summary of the 2015 DOC Report states that: *a vision without a plan is a hallucination.* It goes on to detail how: *A core team of staff representing each division within the Department of Corrections has developed a system blueprint and detailed plan – the* ***Montana Adult Offender Reentry Initiative Framework –*** *that bring our reentry vision into focus*" (DOC, 2015: 6). This brings things back to the analysis completed by the Pew Charitable Trust that was completed between July and November 2014. In

identifying factors related to increases in increases in the prison population in the period after the 2013 Report, Pew formulated findings after consultation with "a wide range of stakeholders from across the state including the judiciary, prosecutors, public defenders, sheriffs, and advocacy groups" (Pew, 2014:1). This 'wide range of stakeholders from across the state' excludes any mention of Montana Tribes, their leaders, elders, or any other form of American Indian representation. In fact the Pew report makes no mention of race, or American Indians at all, in their 10 page report. Given the disproportionate number of American Indians in the DOC system, this is an alarming omission that cannot be compensated for by the single position of an American Indian Liaison with the DOC.

As a cultural advisory position that does not fall within the DOC decision making apparatus and is apparently without strategic input, the American Indian Liaison seems to have been excluded from this planning process. Pulling from the Pew Report, the DOC acknowledges that a successful reentry process for offenders must:

- *assess each offender entering the state correctional system to determine which treatment services, programs and skills he or she needs to be successful in the community upon release*
- *assist each offender in developing a reentry plan that includes his or her educational, employment, treatment and housing needs in the community*
- *coordinate the offender's reentry plan with the vocational training, education and treatment services provided during his or her incarceration*
- *use community organizations and other agencies to assist in meeting the needs of offenders reentering the community, including education, vocational training, employment, housing, treatment and family support* (DOC, 2015: 6)

How can attempts at such individualized assessments and community coordination be meaningful for American Indian offenders considering the lack of strategic input from American Indians in formulating this framework and the low numbers of American Indians working within the corrections system?

Given the continued over-representation of American Indians among Montana offenders, any plan without the input and involvement of American Indian staff within the DOC and Tribal leaders in the larger community can only be considered as essentially incomplete. Thus, like the 2013 initiatives, the Montana Adult Offender Reentry Initiative seems ill-conceived in terms of meeting the needs of American Indians. Without a change in the DOC approach to decision making, and a staffing policy to increase the number of American Indians employed by the DOC it is difficult to foresee any program implemented as being successful in helping American Indian offenders return to the community and reducing the rate number of American Indian men and women in the DOC system.

REFERENCES

Carson, E. A. 2015. "Prisoners in 2014." Department of Justice, Office of Programs, Bureau of Statistics.

Hartney, C. and L. Vuong. 2009. *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System*. National Council on Crime and Delinquency.

Montana Board of Crime Control (BOCC). 2013. *Montana Board of Crime Control Biennial Report, 2012-2013.*

Montana Department of Corrections (DOC). 2013. *Montana Department of Corrections 2013 Biennial Report.*

Montana Department of Corrections (DOC). 2015. *Montana Department of Corrections 2015 Biennial Report.*

Pew Research Center. 2014. "Policy for improving public safety, holding offenders accountable, and containing corrections costs in Montana." Report to the Montana Governor's Office and the Department of Corrections.

Greetings,

My name is Cheri Sicard and I am the director of the Marijuna Lifer Project (wwwmarijuanaliferproject.org). We advocate on behalf of federal prisoners serving LIFE SENTENCES for nonviolent marijuana offenses. Likewise we feel one of the most important things the sentencing commission can do is to give those with a sentence of Life Without Parole an avenue for relief. No non-violent offender should be warehoused away until they die, yet that is what we have happening in this country. Please, please, please address this egregious miscarriage of justice and restore some kind of parole procedures for these prisoners. I would also ask that compassionate release be more widely used. We have many senior citizens, such as 81 year old Antonio Bascaro, 77 year old Leopoldo Hernandez-Miranda, and 66 year old Paul Free, who are elderly and in poor health. They are sentenced for nonviolent marijuana offenses and have been incarcerated for decades. Please expand compassionate release so these men and others like them can go home and be properly cared for by their families.

Thank you.

Cheri Scard
Director, Marijuana Lifer Project (www.MarijuanaLiferProject.org)
310-753-9457
2727 Anaheim St. #4914
Long Beach, CA 90804

National Black Law Students Association

Redefining Sentencing and the Age of Majority

A Recommendation for Making Sentences more Proportional with Adolescent Cognitive Development

Derick Dailey, National Chair

Maureen Edobor, National Attorney General

Jeremy McLymont, National Director of Social Action

Keyawna Griffith, National Internal Chief of Staff

I. INTRODUCTION

In America, a person is no longer a juvenile once they reach the age of eighteen.[1] As a result, they may be punished as an adult for any crime they commit.[2] The number that signifies the beginning of adulthood is called the "age of majority."[3] The age of majority has been shaped by history, ethics, and custom. It is an arbitrary number that could have easily been designated at another age, such as seventeen or nineteen, under the rationale that was originally used to establish it. Instead of basing the age of majority on archaic traditions, science and recent Supreme Court decisions should be used to determine the difference between a juvenile and an adult due to the analysis these institutions use to reach conclusions. Current research indicates that individuals are not fully capable of making rational decisions under stressful circumstances until they are twenty-five.[4] Recent Supreme Court decisions correlate with this research by acknowledging how youth are different from adults. The sentencing guidelines should be informed by both current, scientific research and the Supreme Court. In doing so, they should provide an automatic point reduction to individuals who are under the age of twenty-five when they are sentenced.

II. HISTORICAL DEVELOPMENT OF THE AGE OF MAJORITY

The rationale behind the current age of majority is outdated. Age twenty-one was selected as the common law age of majority during the middle ages.[5] The age of majority was later changed to eighteen during the 1960s.[6] The social and political construct of the age of majority throughout history demonstrate the arbitrariness of the current boundary dividing juveniles and adults.

There is no clear explanation as to why twenty-one was ultimately selected as the age of majority during the Middle Ages.[7] It was accepted as a result of historical military trends across various societies as opposed to an analytical rationale.[8] Twenty-one was recognized as the common law age of majority in Europe during the Middle Ages because most men could presumably carry armor at this point.[9] However, this presumption was neither a universal truth nor supported by scientific data.[10] While societies outside of the United States used military aptitude to distinguish between childhood and adulthood, they designated different ages as the

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[1] *See e.g.,* Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights*, 14 TEX. J. ON C.L. & C.R. 27, 30 (2008) (stating that individuals may be criminally punished as adults at age eighteen); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 563-64 (2000) (discussing the history and purpose of the age of majority).
[2] Sarabyn, *supra* note 1, at 58.
[3] *See id.*
[4] *See* Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE AND TREATMENT 449, 450, 456 (2013).
[5] *See* Scott, *supra* note 1, at 558–64.
[6] *Id.* at 563.
[7] *See* T. E. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22, 29–31 (1960) (explaining the development of the age of majority in various societies).
[8] *See* Scott, *supra* note 1, at 547, 558–59 (discussing the history and purpose of the age of majority); James, *supra* note 7, at 22–25 (explaining the development of the age of majority in various societies).
[9] *See* Scott, *supra* note 1, at 558.
[10] *See* James, *supra* note 7, at 22–25 (explaining the development of the age of majority in various societies); Scott, *supra* note 1, at 558–64.

majority.[11] For example, barbarian tribes and France selected fifteen because individuals were considered to be ready for combat at that age.[12] History illustrates that societies used the same subjective reasoning to designate different ages as the beginning of adulthood. The historical development of the age of majority reveals that military aptitude did not consistently correlate with one specific age, suggesting that there was no logical reason for ultimately designating twenty-one as the age of majority.

The enactment of the Twenty-Sixth Amendment in 1971 dismissed twenty-one as the age of majority by extending the right to vote to those who are at least eighteen.[13] An empirical claim regarding the psychological maturation of eighteen-year-olds influenced the enactment.[14] The claim suggested that people mostly complete psychological maturity at eighteen, making them capable of participating in democracy and being held accountable under criminal law.[15] This finding suggests that legal status should correspond with "developmental maturity."[16] Although this idea is sound, current research demonstrates that the empirical claim that influenced the decision to lower the age of majority is no longer accurate.[17] Therefore, the age of majority should be adjusted to correspond with current research so that individuals receive sentences that are proportional to their developmental maturity.

III. NEUROLOGICAL RESEARCH

"It is well established that the brain undergoes a 'rewiring' process that is not complete until approximately 25 years of age."[18] During this rewiring process, the brain becomes more efficient at processing information, multitasking, and problem solving.[19] The process also influences mood swings, anxiety and decreased impulse control.[20] In addition, developmental activity influences adolescents to engage in more risky behavior than adults.[21] The maturation that adolescent brains experience indicates that the adolescent stage consists of learning how to make the most appropriate decisions under stressful circumstances.[22]

The prefrontal cortex prolongs the rewiring process because it is one of the last regions in the brain to fully develop.[23] It significantly impacts an adolescent's balancing of "short-term rewards with long term goals, impulse control and delayed gratification, modulation of intense emotions, shifting and adjusting behavior when situations change, foreseeing and weighing possible consequences of behavior, simultaneously considering multiple streams of information

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[11] *See* James, *supra* note 7, at 22–25 (1960).
[12] *See id.* at 24.
[13] *See* Scott, *supra* note 1, at 563–64 (discussing the history and purpose of the age of majority).
[14] *See id.* at 563; *see generally id.* at 566–75.
[15] *See* Scott, *supra* note 1, at 562.
[16] *Id.* at 560.
[17] *See* Arain, *supra* note 4, at 450.
[18] *Id.*; B. J. Casey et al., *The Adolescent Brain*, 10.1196 NEW YORK ACADEMY OF SCIENCES 111, 111, 114 (2008).
[19] *See* Arain et al., *supra* note 4, at 452.
[20] *See id.*
[21] *See* Casey et al., *supra* note 18, at 117, 119, 120.
[22] *See generally* Iroise Dumontheil, *Development of the Social Brain During Adolescence*, 21 PSICOLOGÍA EDUCATIVA 117 (2015); Arain et al., *supra* note 4.
[23] Arain et al., *supra* note 4, at 453.

when faced with complex and challenging information, inhibiting inappropriate behavior and initiating appropriate behavior, forming strategies and planning, organizing thoughts and problem solving, focusing attention, considering future and making predictions."[24] Underdeveloped prefrontal regions hinder adolescents from reacting rationally in emotionally charged situations.[25] Current research implicates that adolescents do not have the same cognitive capacity as adults until they reach twenty-five.

IV. SUPREME COURT PRECEDENT

Recent Supreme Court cases suggest that society is beginning to rethink the way it punishes juvenile offenders in the criminal justice system. The Court has declared that it is a flaw in criminal procedure to ignore a defendant's youth and there are constitutional limitations to the types of sentences that a juvenile can receive.[26] Under *Roper v. Simmons* and *Miller v. Alabama* it is unconstitutional to sentence juveniles to death or life in prison without the possibility of parole.[27] The Supreme Court based its decision on the vulnerability of juvenile offenders. Youth years are riddled with immaturity, irresponsibility, impetuousness and recklessness.[28] This acknowledges that a youthful offender's thought processes are inferior to that of adults and that the nature of human development does not provide juveniles with complete autonomy over their decisions.

Supporting this conclusion, the Supreme Court quoted scientific evidence from a brief filed by the American Psychological Association stating, "[i]t is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance."[29] Society should not expect youths, whose brains are not fully developed, to think and act like adults, just as a society does not expect a ten-year-old to master Calculus.

There is no legitimate justification to sentence a youth to death or life without parole. It is wrong to believe that juvenile offenders will forever be prone to criminality. Common sense, science, and the Supreme Court all acknowledge that the deficiencies (recklessness, irresponsibility, and immaturity) present in juvenile offenders are consistently reformed with time.[30] Thus, the death penalty or life without parole serve no purpose. The argument for deterrence is weak because juveniles "--immaturity, recklessness, and impetuosity--make them less likely to consider potential punishment."[31] The case for retribution is similarly weak because it is related to an offender's blameworthiness which the Supreme Court has acknowledged less efficacious with juveniles as it is with adults because adults are more blameworthy.[32]

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[24] *Id.*
[25] *See* Arain et al., *supra* note 4, at 456.
[26] *See* Miller v. Alabama, 132 U.S. 2455, 2466 (2012).
[27] *See id.* at 2461.
[28] *See id.* at 2467.
[29] *Id.* at 2464 n.5.
[30] *See id.* at 2465.
[31] *Id.*
[32] *See id.*

The Supreme Court has also held that a Juvenile's background should be considered during sentencing.[33] Background is important because it gives insight into why a juvenile may have committed certain crimes. A youth's background consists of things like socio-economic status, family and parental relationships, and even regular friendships. The court described youthfulness as "a moment and condition of life when a person may be most susceptible to influence and to psychological damage."[34]

V. SOLUTION

This comment requests that the Guidelines be modified to accurately represent what the scientific data proves. The data shows that the human brain, and specifically the prefrontal cortex, is not fully developed until the age of twenty-five. A modification should be implemented in order to better protect our youth from draconian sentencing guidelines.

The simplest way to modify the guidelines would be to create a system mandating that those under the age of twenty-five are considered youthful offenders who are subjected to fewer sentencing points by virtue of the fact that their brain is not fully developed. These young people are therefore less culpable for their acts and more amenable to rehabilitation. This system of sentencing would automatically reduce and limit the sentencing points that youthful offenders can accumulate. The exact deduction of points afforded to these youthful offenders would have to be calculated carefully, and it may take some time to come up with a working system. However, the need for careful consideration is not an excuse to ignore the emergent science on brain development. The neurological research justifies an automatic point reduction for these youthful offenders because scientific research is a better guide than the arbitrary age of majority. The proposed point reduction system would be similar to the current federal Safety Valve. Under current federal sentencing an offender has the chance to secure a Safety Valve which lowers the points the offender has accumulated for their crimes, ultimately lowering the offender's potential time in prison.

This modification to the federal sentencing guidelines is recommended at a time when political candidates claim to want to reform the criminal justice system. If the criminal justice system is broken, our society should begin to enact changes. Mass incarceration is not something America should be proud of. America has to be more efficient and intelligent about the way it punishes its citizens, especially its youth. America must question whether the prison system is truly rehabilitative because it seems as though the criminal justice system is only concerned with retribution. The future is in the hands of the youth; America can do better, it must do better.

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[33] *See id.* at 2467.
[34] Eddings v. Okla, 455 U.S. 104,115 (1982).

I would like to offer the following comments regarding the Proposed Priorities for Amendment Cycle (81 FR 37241).

I would strongly oppose using the amount of the time served by an offender as opposed to the sentence imposed. It is not reasonable to think that a USPO can obtain the actual length of time the defendant served, especially on some county cases. We struggle, at times, just to confirm the amount of time a defendant served in Texas Department of Corrections. Trying to get that other information from other counties and states would be difficult. Especially if the conviction is old. The record keeping system in some jurisdictions is significantly lacking. At times, it is difficult to find someone who is willing to research that information. For instance, getting any kind of record from California or New York is almost impossible. There is also the issue of trying to determine how much credit for time served a defendant received. We are lucky because many Texas judgments have that information. However, Texas is an exception. At one time, this might have been easier; however, now most offices do the minimum when responding to collateral requests, if they even respond. If there were a national system that logged all of that information, that would be different. Since there isn't, it is unreasonable. Additionally, it is not fair to defendants. Some states allow a defendant to be released after serving 1/3 of their time. Others don't release a defendant until later, for whatever reason.

Issues in crime of violence determinations (as a result of categorical approach)

First, the term crime of violence has two separate meanings in the guidelines (U.S.S.G. § 2L and 4B). There is no consistency.

The modified categorical approach applies to statutes that are divisible. Specifically, some statutes punish conduct that falls within the definition of a crime of violence in one part and in other parts, the statute might not punish conduct that meets the definition of a crime of violence. It then falls upon the Probation Office to determine what part of the statute the defendant was convicted. For example, in counties surrounding Harris County, some counties charge a defendant and specifically identify conduct in the Indictment that meets the definition of crime of violence; however, the judgment is generic (ie. Deadly conduct, burglary of a habitation). It takes considerable time in some cases to determine what part of the statute the defendant pled guilty. Sometimes, it is impossible to make a determination.

Another example is California Health and Safety Code 11352(a), which defines numerous drug crimes. Some of the crimes listed are drug trafficking crimes, while other, like transportation of a controlled substance, is not. Depending on how the defendant was charged, it takes research to determine what part of the statute a defendant was convicted. Typically, in old stated cases that originated in California, additional documentation is necessary because they only have abstract judgments. The same problem is presented with old state convictions in California for sexual abuse of a minor.

The issue gets more complicated when you are dealing with some circuits who have found that, for example, robbery (an enumerated offense), is not a crime of violence. Every state has their own statute for robbery and in some circuits, robbery is a crime of violence, and in others it is not. To further complicate the issues, considerable litigation occurs when two or more circuits have decided it is not a crime of violence, but our circuit (the 5th Circuit) has determined that is a crime of violence.

In the United States vs. Del Carmen Gomez (2012, 4th Circuit), the appeals court issued a **37 page opinion** after the defendant, who had been convicted of illegal re-entry, objected the Government's assertion that her prior conviction for child abuse under Maryland law amounted to a crime of violence for purposes of the U.S.S.G. § 2L1.2(b)(1)(A)(ii)

sentencing enhancement. Most of the opinion addressed issues pertaining to the modified categorical approach. The lengthiness of the opinion when addressing the modified categorical approach is not an exception.

The categorical approach leads to unintended consequences because the term crime of violence and aggravated felony are too generic.

For purposes of demonstrating the complexity of definitions regarding crime of violence, I have outlined the different definitions of crime of violence, etc. below. PSI writers are responsible for interpreting each definition. Perhaps, if a district does not have immigration cases, they don't feel overwhelmed by the complexity (and number) of definitions; however, in border states, this is an issue.

Crime of Violence Defined

COV for U.S.S.G. § 2L1.2(b)(1)(A)(ii) is defined at U.S.S.G. § 2L1.2

Means any of the following offense under federal, state, or local law: murder, manslaughter, kidnaping, aggravated assault, forcible sex offenses (including 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), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, 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**. (Note: does not mention property)

Note: Does not include substantial risk of physical force against the person or property; no requirement of 1 year imprisonment; and it may not be an aggravated felony (+8 or (b)(2))

COV for U.S.S.G. § 2L1.2(b)(1)(C) under aggravated felony is defined at 18 U.S.C. § 16

(a) an offense that has the element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony, and that, by its nature, **involves a substantial risk** that physical force against the **person or property** of another may be used in the course of committing the offense. (Note: (b) does not mirror +16 COV) (this definition is broader than the definition at 2L because it encompasses the use of force against property).

Notes: 1 year imprisonment required

DRUG TRAFFICKING OFFENSES

U.S.S.G. § 2L1.2(b)(1)(A) and (B) (For DTO)

Means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or **offer to sell** a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Note: If you have a case which only convicts defendant for **offer to sell**, it is a +16, **but** it does not meet the definition at 8 U.S.C. § 1101(a)(43), which means it is not a 1326(b)(2) case nor could it get a +8 for being an aggravated felony.

U.S.S.G. § 2L1.2(b)(1)(C) - +8 or 1326(b)(2) conviction

"aggravated felony" means any illicit trafficking in any controlled substance as defined in 21 U.S.C. § 802 including a drug trafficking crime as defined 18 U.S.C. § 924(c)(2)

21 U.S.C. § 802

The term controlled substance means a drug or other substance, or immediate precursor, included in Schedule I, II, III, IV, or V of part B of this subchapter.

(8) The terms "deliver" or "deliver" mean the **actual, constructive, or attempted transfer** of a controlled substance or a listed chemical, whether

or not there exists an agency relationship. *(Note: Does not include offer to sell.)*

U.S.S.G. § 4B1.2

Crime of Violence – any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –

1. Has an element the use, attempted use, or threatened use of physical force against the person of another, or

2. Is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Controlled substance offense: Any offense under federal or state law punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, dispensing of a controlled substance or the possession of a controlled substance with intent to manufacture, import, export, distribute or dispense.

Linda Wright-Bailey
United States Probation Officer
Eastern District of Texas/Tyler Division

Public Affairs

From: Cotter, Michael ([redacted])
Sent: Monday, July 25, 2016 3:48 PM
To: Public Affairs
Subject: Federal Register Notice of Proposed 2017 Priorities and Request for Public Comment

Good afternoon,

As U.S. Attorney for the District of Montana and Chair of the Attorney General Advisory Committee-Native American Issues Subcommittee I am submitting my comments regarding the study of the findings and recommendations contained in the May 2016 Report issued by the Commission's Tribal Issues Advisory Group..

The last sentence on the bottom of page 6 continuing to the top of page 7 of the Report of the Tribal Issues Advisory Group reads:

"*The TIAG recommends a similar cross-section for the standing advisory group on tribal issues of one to two federal judges, one official from the Department of Interior, one Representative of the Department of Justice, one federal public defender representative, one tribal judge, and one or two at large members who are Native Americans or work in the Indian Country*." Report of the Tribal Issues Advisory Group, (May 16, 2016) at pp. 6-7.

My recommended change is:

"That the U.S. Sentencing Commission create a standing Indian country working group, similar to the TIAG, which will advise the U.S. Sentencing Commission regarding sentencing issues in Indian country. The proposed working group should contain a cross-section of subject matter experts with a total of 6 to 9 members, to include one or two federal judges, one official from the Department of Interior, two representatives from the Department of Justice (one United States Attorney who is a member of the Attorney General Advisory Committee's Native American Issues Subcommittee and one from the Office of Tribal Justice to ensure that tribal and prosecutorial views are represented), one federal public defender, one tribal judge, and one or two at-large members who are Native Americans or who work in Indian country."

Thank you,

Michael W. Cotter
United States Attorney
District of Montana

Dear Sentencing Committee,

Please do away with the conspiracy laws, mandatory minimums, draconian sentences that don't fit the crime and that insane 924c Stacking law that makes no sense from a numerical standpoint or a taxpayer's standpoint.

I work with well over 260 federal inmates many of them fall into both aforementioned categories.

Malik King
Prison Outreach Coordinator

Federal sentencing reform will have positive effect on Native American communities
By Rep. G. Bruce Meyers, Enrolled member of the Chippewa Cree Tribe of Montana

Native American girls face the highest rates of incarceration of any ethnic group. They are five times as likely as white girls to be sentenced to do time in a juvenile detention facility. Incarceration rates for Native American women are also disproportionately high.

For you this is probably just a startling statistic—for me it hits very close to home. My daughter is currently in her twelfth year of a twenty-year sentence for drug possession.

It's an all-too-common story on the reservation: our young people making serious mistakes with drugs and being sentenced to lengthy stretches in federal prison. When they go away, they leave behind their families and their culture. Sometimes they leave behind their own children, creating a cycle that is incredibly difficult to break.

There is no doubt the drug epidemic on our reservations is one of the greatest challenges we face. But it has also become clear that the main thing we've done to combat that epidemic—lock away the people who use drugs for decades—has not accomplished what we need it to.

Native Americans make up a disproportionate population in our prisons. Because crimes on the reservation are prosecuted in federal court, this is especially true for the percentage of Native Americans in federal prison.

Part of the reason Native Americans are so overrepresented when it comes to incarceration is due to the mandatory minimum laws that were enacted by Congress in the 1990s. The mandatory minimum movement was intended to bring more consistency to federal sentencing by restricting the discretion of judges and setting in place rules to guide the appropriate sentence for similar crimes.

The majority of criminals behind bars today were sentenced under these mandatory minimum regulations. And most of those are incarcerated for non-violent drug offenses.

But the high incarceration rates, especially among minority groups, that resulted from mandatory minimums have also resulted in prison overcrowding and have become very expensive.

Those factors have prompted a real bi-partisan movement in Congress to reform judicial sentencing. That's come in the form of a bill called the Sentencing Reform and Corrections Act of 2015 (SRCA), which would reduce mandatory minimums for nonviolent drug offenders from ten to five years, and give more discretion to judges in sentences for first-time offenders.

To be clear, the bill would actually increase sentences for serious drug offenders—those who are involved in production, distribution, or gang activity related to drug trafficking.

We need to continue to be tough on the individuals who have brought the scourge of drugs to our communities. But I believe more leniency is needed for our young people who make the serious mistake of using drugs. The SRCA will allow judges to do what they should be doing—judging each case and each individual on their own unique circumstance.

Senator Daines recently co-sponsored the SRCA, along with 14 Republican and 19 Democratic colleagues in the Senate. For that, I want to say a heartfelt thank you to our Senator.

With significant and growing bi-partisan support, there is a very good chance for the SRCA to pass into law this year. That's a rare occurrence in Congress these days, but it's heartening to see it's possible. The only thing holding up a vote is Majority Leader Mitch McConnell. I hope you'll join me in encouraging him to put this important measure on the schedule.

We have to do something for the thousands of Native American women who are behind bars, away from their families and their communities. Drugs have decimated our reservations, but lengthy prison sentences have not stemmed their impact, and have arguably made the situation on the reservation worse. Please help bring my daughter back to her supportive family, community, friends and relatives. She has applied for clemency and her appeal is currently under review by the Commutation Review Board.

Rep. G. Bruce Meyers is a member of the Chippewa Cree Tribe from Box Elder. He represents House District 32, which includes the Rocky Boy's Indian Reservation and the Fort Belknap Indian Reservation. He serves on the House Judiciary committee.

Representative G. Bruce Meyers, House District 32-Montana State Legislature

Honorable Patti B. Saris
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington DC 20002-8002

Re: Public Comment on Proposed Priorities for 2017

Dear Chief Judge Saris and Members of the Commission,

I write to comment on a possible priority policy issue. The Commission has identified as a tentative priority "possible approaches to (A) simplify the operation of the guidelines, promote proportionality, and reduce sentencing disparities; and (B) appropriately account for the defendant's role, culpability, and relevant conduct." One way to move towards all of these goals would be to alter Guideline §2D1.1 so as to use an individual's personal financial gain taken from narcotics activity as the primary driver in the determination of an offense level, rather than the amount of narcotics a conspiracy or individual is shown to have manufactured, distributed, or possessed with the intent to distribute.

Below, I will lay out the problems addressed, the benefits of reform, the challenges that may be created by such a change, and three possible models for incorporating personal profit as a key metric in narcotics sentencing.

I. Problems Addressed

Currently, because of the structure and importance of the Drug Quantity Table at Guideline §2D1.1(c), the primary input of sentence computation in narcotics cases is the weight of the drugs at issue, either by an individual or conspiracy. However, weight of narcotics is not a good proxy for culpability because it unfairly punishes the actions of too many low-level traffickers. If a true kingpin imports 150 kilograms of cocaine into the country and pays a trucker $1,000 to haul it, both of them fall under Guideline §2D1.1(c)(2), which provides for a base offense level of 36. While guideline sections §3B1.1 & 1.2 (distinguishing roles in the offense)

provide some level of differentiation, that differentiation will likely be at most a swing of six offense levels.

We all know that the one-off trucker is not nearly as culpable as the kingpin, but the guidelines don't reflect that because weight-driven sentences are mandated by Guideline §2D1.1(c). Sentencing judges have chafed at the resulting failure of proportionality ever since the beginning of the guideline era.

The false proxy of narcotics weight creates problems with proportionality and disparities because it too often obscures actual role and culpability. Moreover, it imposes a complexity to the guidelines that is unnecessary.

The proportionality problem is ubiquitous, particularly for conspiracies. When we tag all members of a conspiracy with the same base offense level based on the weight of narcotics distributed, manufactured, or possessed with intent to distribute, we obliterate any sense of proportionality: The trucker and the kingpin have the same base offense level, despite the fact that one gets rich while the other does not and one is indispensible to the organization while the other is easily replaced. That proportionality problem has real consequences. When we treat a loader or trucker like a kingpin, we do nothing to solve the problems of narcotics trafficking, since those actors are easily replaced.

Disparity is created as well, driven by this false proxy. Some judges and prosecutors see the injustice in this embedded disproportionality, and adjust for it. Others do not. When the guidelines produce a perceived unfairness through false proportionality, we see an unusual number of disparities between "proportion-seeking" and "rule-following" judges and prosecutors. The former tend to depart or vary downward from the guidelines and the latter do not. Historically, this dynamic was most acute in crack sentences.

The current system is also too complex. The weight-driven metric currently built into Guideline 2D1.1(c) requires two complicated mechanisms. One is the Drug Quantity Table itself, which has to approximate dosage amounts and the relative harm of various narcotics—a framework built on estimates and incapable of variation for regional difference and shifts over time. The second is the complex formula for

combining different sorts of narcotics into a single offense group, by equating them to an "equivalent" amount of marijuana.

II. Benefits of a profit-based metric

In the world of markets generally, it is easy to identify those who create, lead, and sustain a successful business—that is, those who are most crucial to its success. That's because markets reward those more valuable, less replaceable people with the largest share of personal financial gain. The CEO or CFO of Wal-Mart is paid much more than a greeter or cashier, because that person has specialized skills that are rare and particularly valued. A market naturally creates a culpability ranking: The amount of money each person takes from the enterprise.

Illegal narcotics function as a market. We should differentiate offense levels within that market based on the personal financial gain each player receives rather than the weight of the narcotics handled by the enterprise as a whole. We don't need to create a false metric when a natural one already has been created by market forces.

If weight is replaced by personal financial gain as a chief metric in drug sentencing, a truer sense of proportionality is achieved compared to current practice. Those who benefited the most and who had the most valuable skills will be most severely punished. Those who benefited less and had more easily replaceable skills will be relatively less severely punished. Even in non-conspiracy cases, personal profit will provide a clear picture of how successful—and thus, how dangerous—a particular offender was. This device also allows relevant conduct to be used in a way consistent with the rest of the Guidelines, albeit in a more effective form.

Moreover, solving the proportionality problem embedded in the current Guideline §2D1.1 will help eliminate disparities. Fewer low-level defendants will qualify for severe advisory sentences, leading to fewer departures and thus fewer disparities.

Simplicity is also served by this change. With this reform, the entirety of Guideline §2D1.1(c), the Drug Quantity Table, is excised. The need to identify and differentiate usage amounts of dozens of drugs is thus eliminated. The formula to "combine" drugs and equate them to an amount of marijuana will also become a thing of the past—the metric of personal

profit will cover all drugs in the same way, using market forces rather than USSC estimates as a determinant. Importantly, a personal profit-based system will inherently reflect regional variations and changes over time in a way that the present system cannot.

III. Challenges

A. The interaction between statute and guideline

If a personal profit-based guideline is used for narcotics, it will provide a different metric than is found in 21 U.S.C. §841(b), which is structured by weight thresholds for various narcotics. However, conflict between the two is clearly resolved in favor of the statute. Further, the Commission has (with "drugs minus two") already unhitched the guideline from the statute, as the bottom of the guideline range is now below the "cliff" created by the statute.

B. Proving up profit amounts

As is currently true with drug weights, the prosecution would have to prove up profit amounts if an enhanced sentence based on personal financial gain will apply. In significant cases, this work is in large part already being done in service of money laundering counts and forfeitures. Moreover, the need to prove up personal financial gain will normally replace, not add to, the need to prove up drug weights.

Prosecutors, of course, won't have to prove up personal financial gain in every case—only in those cases where they seek an enhanced sentence. This new mechanism may create an incentive for prosecutors to be more intentional and consistent in the way that they enhance cases, since resources might dictate that it isn't possible to do so in every case. The resulting focus on the most culpable will increase proportionality while more efficiently disrupting narcotics markets by removing those actors who are most difficult to replace.

C. Retroactivity

Unlike some reforms, it would be difficult to make this change retroactive. While simple changes in the weight metric (such as drugs minus two) can be made retroactive with a simple recalculation, the same is not

true of the reform suggested here. This would likely be only a prospective amendment.

D. Altering conspiracy rules

Assessing the financial gain taken by an individual rather than the conspiracy as a whole would alter traditional ideas relating to conspiracy. However, those traditional rules (as applied to sentencing) have led to injustice and merit re-examination in this narrow context.

IV. Models of Execution

Below are three models of how a reformed Guideline §2D1.1 could accomplish these goals.

Model 1

In this model, the Drug Quantity Table at §2D1.1(c) is replaced by adding new base offense levels rooted in personal profit to §2D1.1(a):

§2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

[(1) –(4) unchanged]

(5) **12**, if the individual defendant profited from drug trafficking in an amount of $10,000 or less over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.

(6) **14**, if the individual defendant profited from drug trafficking in an amount over $10,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.

(7) **16**, if the individual defendant profited from drug trafficking in an amount less than $25,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.

(8) **18**, if the individual defendant profited from drug trafficking in an amount over $50,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.

(9) **22**, if the individual defendant profited from drug trafficking in an amount more than $100,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.

(10) **26**, if the individual defendant profited from drug trafficking in an amount more than $250,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.

(11) **30**, if the individual defendant profited from drug trafficking in an amount more than $500,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.

(12) **34**, if the individual defendant profited from drug trafficking in an amount more than $1,000,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.

(13) **38**, if the individual defendant profited from drug trafficking in an amount more than $5,000,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute

or manufacture.

Model 2

In this model, personal profit is considered on top of base offense levels structured consistently with 21 U.S.C. §841(b):

§2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

[(1) –(4) unchanged]

(5) **6**, if the defendant is subject to 21 U.S.C. §841(b)(1)(C), 21 U.S.C. §841(b)(1)(D), 21 U.S.C. §841(b)(2), or 21 U.S.C. §841(b)(3); or

(6) **12**, if the defendant is charged pursuant to 21 U.S.C. §841(b)(1)(B), in compliance with 21 U.S.C. §851.

(7) **18**, if the defendant is charged pursuant to 21 U.S.C. §841(b)(1)(A), in compliance with 21 U.S.C. §851.

(8) [current text of (5), absent the reference to the "Drug Quantity Table"]

(b) Specific Offense Characteristics

(1) If an individual defendant profited from drug trafficking in an amount over $10,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **1** level.

(2) If an individual defendant profited from drug trafficking in an amount over $25,000 over a one-year period (ending with the last known distribution, manufacture, or

possession with intent to distribute or manufacture), increase by **2** levels.

(3) If an individual defendant profited from drug trafficking in an amount over $50,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **4** levels.

(4) If an individual defendant profited from drug trafficking in an amount over $100,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **6** levels.

(5) If an individual defendant profited from drug trafficking in an amount over $250,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **10** levels.

(6) If an individual defendant profited from drug trafficking in an amount over $500,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **14** levels.

(7) If an individual defendant profited from drug trafficking in an amount over $1,000,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **18** levels.

(8) If an individual defendant profited from drug trafficking in an amount over $5,000,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **24** levels.

(9-24): Current text of 1-16.

Model 3:

Finally, the most elegant solution might be to simply combine the narcotics guideline with the theft/fraud guideline, and have the amount of personal profit follow the metric of loss amount already built into Guideline §2B1.1(b).

The text of §2B1.1 would remain largely unchanged, with the simple addition of the term "personal profit in a narcotics case" to the term "loss" as used in §2B1.1(b)(1) and the addition of sentencing enhancements and safety valve provisions currently contained in §2D1.1 other than in §2D1.1(c).

Conclusion

The benefits created by a profit-centered drug guideline would outweigh the challenges. In terms of accomplishing the goals already identified by the Commission (including proportionality, simplicity, and reduction of disparities), a profit-centered approach to narcotics may be the best bet.

Thank you for your consideration of these and other public comments.

Mark Osler
Robert and Marion Short
Professor of Law
Univ. of St. Thomas (MN)

Incarceration Within American and Nordic Prisons: Comparison of National and International Policies

Katie Ward, Amy J. Longaker, Jessica Williams, Amber Naylor, Chad A Rose, and Cynthia G. Simpson

Abstract

Prison systems throughout the world exist to enforce societal rules, maintain the safety of the general population, provide punitive sentences to offenders, and rehabilitate prisoners. While the goals of global prison systems are relatively common, the United States incarcerates more citizens per capita when compared to other European countries. In addition to the high incarceration rate, the U.S. also maintains a relatively high rate of recidivism, suggesting the U.S. prison system does not effectively rehabilitate American prisoners. Therefore, it is critical to explore the successful components of other European prison systems in order to establish stronger and more effective programs in the U.S.. The present manuscript compares the general prison functioning of the U.S. prison system to Nordic prison systems. Given this comparison, Nordic prison systems appear to do a more efficient job at reducing recidivism, providing educational services, and rehabilitating prisoners. Therefore, U.S. policymakers should consider viable options for alternative services and punitive approaches for American offenders.

The United States incarcerates more people per capita than most western European countries and Canada (Mauer, 2003), and many of those imprisoned within the U.S. will be released and rearrested within three years (Langan & Levin, 2002). While research has indicated that some prisons and programs are successful at educating and rehabilitating inmates to reduce recidivism, the majority of prisons exist to protect the public and punish the offender (French & Gendreau, 2006; Langan & Levin, 2002). Although protecting the general public should be the primary function of prison systems, increased attention should be placed on educating and rehabilitating inmates to prevent cyclic nature of offence, arrest, release, and repeat.

Many prisons in the U.S. are privately operated on behalf of the public by such conglomerates as the Corrections Corporations of America and The GEO Group (Gran & Henry, 2008). While these entities exist to serve the primary function of the prison system, these companies are for profit, and are compensated for rehabilitation success. In fact, the more incarcerates who remain in the system, the more lucrative the enterprise becomes. Consequently, rehabilitation and educational services do not generally factor in to the bottom line of these corporations when compared to construction fees, management salaries, and employee wages (Gran & Henry, 2008).

In general, the U.S. prison system is often unsuccessful at rehabilitating inmates based on the high rates of recidivism (Langan & Levin, 2002). Major impediments to rehabilitation within the U.S. prison system includes the lack of drug rehabilitation programs, overall lack of funding for rehabilitation programs, and mandatory sentencing laws for certain crimes which may force some into prisons who then learn criminal behavior from their peers while incarcerated (Mauer, 2011). The purpose of this review is to discuss and compare the success and methods of prisons in the U.S. and abroad to rehabilitate inmates while applying general behavioral principles.

Predictors for Escalated Incarceration Rates in the U.S.

Research has demonstrated that the prison system functions, in many ways, as a receptacle for groups facing systematic challenges such as failed or inadequate educational opportunities, unemployment, reliance upon public assistance, and involvement in criminal activity (Austin, Bruce, Carroll, McCall, & Richards, 2001). High school dropouts represent the majority demographic among those on public assistance and/or incarcerated (Stanard,

2003). Dropouts are more likely to be unemployed, dependent upon public assistance, earn less in the workforce, and end up in the legal system. (Stanard, 2003). In fact, early school failure and inadequate schooling (e.g., ineffective teaching methods, problematic disciplinary practices, lack of educational resources, lack of parental involvement) serves as a predictor of increased dropout rates (Christie, Jolivette, & Nelson, 2005).

A series of studies have focused on behavioral patterns and disciplinary actions taken toward students who eventually drop out of school and become entrenched in the legal system. This body of literature suggests that students who consistently violate school rules are more likely to be punished, and as these individuals progress in age, the rule violations often increase in frequency and severity, which results in a steady escalation in the applied sanctions (Casella, 2001; Christle et al., 2005; Gottfredson, 2001). This escalation in sanctions can lead to negative labels and exclusions from peer groups, which can create a self-fulfilling prophecy and result in a cycle of antisocial behavior that can be difficult to break (Casella, 2001; Gottfredson, 2001). Therefore, this cycle of punishment, which often begins at school, could lead to a cycle of illegal activities, arrests, and incarceration.

Profitability

In addition to educational predictors, the privatization of U.S. prisons may impede the rehabilitation and education of the nation's prisoners. Fundamentally, private prisons are often quite profitable for investors, while creating jobs and stimulating local economies. As such, the political will to finance prisons is not driven by altruistic sentiment to rehabilitate (Coyle, 2003). Meanwhile, the U.S. prison population is rising over two million with expenditures that eclipse $35 billion annually, resulting in both prison expansion and new prison construction (Coyle, 2003). In addition to the cost associated with prison expansion, increased expenditures are necessary for the supervision of prisoners and, ideally, the implementation of rehabilitative programs both within and outside of the prison walls (Coyle, 2003). While programs within the prison itself are necessary, external rehabilitative programs help reduce recidivism, which requires ongoing expenditures for the supervision of released offenders (Coyle, 2003). However, the initial link to reduce recidivism may be entrenched within the educational system.

Examination of National and International Policies

The U.S. penal system is often portrayed among the American populace as being tough on crime. To the rest of the western world, the penal system in the United States is viewed as a broken system, where the U.S. policy of mass incarceration is the epitome of ineffective practice (Mallory, 2006). While this is a tough critique, the American incarceration rate is the highest in the world at over 714 per 100,000 U.S. citizens (Walmsley, 2008). This rate is strikingly higher than that of other southern and western European countries, whose average incarceration rate is only 95 per 100,000 citizens (Stern, 2002; Walmsley, 2008). America's higher rate of incarceration might be acceptable if it resulted in a safer society. However, it can be argued that the escalated rates of incarceration do not increase societal safety based on the consistently high rates of overall crimes, violent crimes, and recidivism rate. Consequently, one could reasonably conclude that the United States' political agenda for increasing punishment to decrease crime yields an ineffective result. Therefore, in the current form, the U.S. prison system inadequately deters crimes and is ineffective at rehabilitating offenders. Ironically, the U.S. penal system inadvertently encourages antisocial behavior (Mallory, 2006).

In contrast, when examining crime rates, the percent of population that is imprisoned, and the recidivism rate in Nordic countries, the statistics demonstrate that Nordic penal systems are more successful at deterring future criminal activity when compared to the U.S. (Walmsley, 2008). The Nordic approach to punishment, the setup of their prisons, and the public perception of the purpose of the penal system are fundamentally different than the US. For example, when Norway implemented the prison model used in Denmark, Finland, and Sweden, the prison

population dropped from 200 per 100,000 people in 1950 to 65 per 100,000 people in 2004 (Von Hofer, 2007). Similarly, an experimental Dutch prison was created to minimize costs and increase inmate success following release, where inmate rights are of paramount concern and the ultimate goal is to teach offenders that their choices have consequences, both good and bad (Kenis, Kruyen, Baaijens, & Barneveld, 2010). Though each Nordic country's (i.e., Norway, Sweden, Finland, Denmark) laws and prison policies vary slightly, as a whole the Nordic penal system deviates from that of other countries with higher rates of incarceration and recidivism, resulting in more favorable outcomes for the rehabilitation and education of offenders.

Nordic Prison Overview

Conceivably, many Americans conceptualize their global understanding of prison through their beliefs, experiences, and media portrayal of the national legal system. Consequently, it may be difficult to conceive of a prison system that does not rely almost exclusively on punitive measures, but rather attends to the rights and rehabilitation of inmates. In contrast to the American Prison System, the framework of the Nordic Prison System serves to rehabilitate inmates to directly address recidivism (Pratt, 2008). For example, while the largest Nordic prison houses approximately 350 inmates, the majority of these prisons are relatively small and house around 100 inmates (Pratt, 2008). The philosophy behind the limited prison size is to maintain several active prisons in many different parts of the country, allowing prisoners to reside in closer proximity to their family and home environment (Pratt, 2008). Consequently, Nordic prisoners can maintain their roots in their communities and family bonds, while receiving rehabilitation services within the prison walls.

Nordic prison facilities. Nordic prisons typically fall under one of two categories: open prisons and closed prisons. These categories are generally stepwise in restrictiveness, where the typical inmate will first go to a closed, more restrictive, prison where they will serve the majority of their sentence (Baer & Ravneberg, 2008; Pratt, 2008). Toward the end of the prison sentence, the inmate will be transferred to an open prison, that serves as the foundation for inmate rehabilitation; allowing the offenders more freedoms, more relaxed surroundings, fewer security measures, and more programs aimed at societal reintegration (Baer & Ravneberg, 2008; Pratt, 2008). For example, in one Dutch open prison, creative cost-cutting measures led to increased socializing behavior by housing six inmates in a spacious cell, that includes typical daily amenities, designed to promote positive social interactions and independence (Kenis et al., 2010). The traditional Nordic cell, however, is located on a wing off of the prison's main corridor, where each wing has a central common room that contains a television and a small kitchen (Pratt, 2008).

In addition to the cell accommodations, barriers such as fences and walls are eliminated when possible (Pratt, 2008). While closed prisons maintain tight perimeters and security checks, most open prisons allow offenders to freely roam the grounds, lock their own doors, and earn in town privileges (Pratt, 2008). Given this level of freedom, many open prisons utilize technology as a means for accounting for and tracking the location of their prisoners (Kenis et al., 2010). Consequently, this level of surveillance has produced both a safer environment and increases in socializing behaviors as offenders seek to maximize the reinforcement for acceptable behavior (Kenis et al., 2010). Overall, the goal of open prisons is to shorten the physical and social distance between prison and the outside world; however, the prisons also employ strict procedures, surveillance, mandatory chores, deprivations, and sanctions that the general public does not endure (Pratt, 2008).

Nordic prison staff. Attitudes of staff, especially prison guards, are thought to directly influence the success of correctional rehabilitation programs and the successful reintegration of prisoners after their release (Kjelsberg, Skoglund, & Rustad, 2007). The make up of prison guards within a prison is carefully analyzed to maximize the success of the inmates, where prisons employ guards who vary in gender, age, and level of education (Pratt, 2008). Interestingly, working as a prison guard is a desirable vocation, which is very competitive and selective in Nordic

countries (Pratt, 2008). Training includes two years of mentoring prior to independent supervision of inmates, where trainees establish an understanding of punitive policies, political influences, and public perception that serves as the foundation for the connection between the structure of the system and reform (Pratt, 2008).

Punitive Policies, Political Influences, and Public Perception

Some of our most important contributions to understanding the functionality prison systems stemmed from ethnographic methods (Austin & Irwin, 2001; Irwin, 1970/1987, 1980, 1985; Jacobs, 1977; Owen, 1998; Richards, 1990, 1995; Sykes 1956, 1958; Sykes & Messinger, 1960). Over the past few decades, a number of studies have questioned the utility of incarceration as an effective means of reducing crime rates. For example, Blumstein, Cohen, and Nagin (1978) and Blumstein, Cohen, Roth, and Visher (1986) concluded that there is no systematic evidence suggesting general incapacitation and selective incapacitation has had or could have a major impact on crime rates. Similarly, Sherman and colleagues (1998), suggested that while the incarceration of persons who will continue to commit crimes would reduce crime rates, "the number of crimes prevented by locking up each additional offender declines with diminishing returns as less active and less serious offenders are incarcerated (p. 8)."

American policies. At the present time, American prison reform efforts face major challenges due to the changing political landscape, public perception of the penal system, and the continuing national recession. Specifically, living conditions within the prisons are often viewed as an additional means of punishment (Mauer, 2011). Warden Norton, a character in The Shawshank Redemption (Marvin & Darabont, 1994) gives one of the most famous, albeit fictional, accounts of prisons in American culture, "[as] [f]ar as [politicians] are concerned, there's only three ways to spend the taxpayer's hard-earned money when it come to prisons. More walls. More bars. More guards." A high prison population has been one of many constraints toward establishing effective rehabilitative programs, especially in the face of limited budgets and the increasing recession.

Conceivably, prisons may also create a space for criminal networking that may further facilitate criminal activity. Linsky and Strauss (1986) found that states with the highest incarceration rates maintained the highest crime rates. Specifically, some attribute the increase in criminal activity to a lack of prison supervision (LaGrange & Silverman, 1999), or exposure to misbehavior (Longshore & Turner, 1998). Given the high rates of incarceration in the U.S., and the predictive factors associated with the cyclic nature of incarceration and recidivism, penal system reform must start to emerge as a legislative priority.

International policies. In Scandinavia, it is believed that the prison conditions should parallel real-world conditions as closely as possible (Pratt, 2008). The Finnish Department of Prison and Probation (2004) has suggested that punishment is not the elimination of basic needs; it is simply the loss of liberty, demonstrating that the Finnish believe in "gentle justice" which focuses on decreased recidivism through rehabilitation of prisoners (Ekunwe, Jones, & Mullin, 2010). Similarly, policy statements in the Netherlands are aimed at the resocialization and reintegration of inmates (Schinkel, 2003). **Overall, Nordic offenders are not stripped of their basic rights**; their independence is restricted while they receive rehabilitation services to deter future criminal activity (Von Hofer & Marvin, 2001).

Education Programs

America. Fundamentally, there is an inverse relationship between rates of recidivism and level of education, where the higher the level of education, the less likely the person is to be rearrested or imprisoned (Coylewright, 2004). For example, Coylewright (2004) suggested that:

Every dollar spent on education yields more than two dollars in savings from avoiding reincarceration alone. This is significant in an era of state budget pressures when our national (state and federal) corrections budget consumes more than $50 billion a year (p. 403).

Yet, the mere implementation of these programs has been a challenge. According to Coylewright (2004), only 33% of offenders receive educational training prior to release. However, critics suggest that only specific components or domains of education assist in reducing recidivism. For example, Adams and colleagues (1994) found that education within the prison is only effective at reducing recidivism when the prison population has very little education to begin with, and when this population receives at least 200 hours of educational services.

International. In direct contrast to American prison systems, education is a high priority within the Nordic prison system and is considered to be a right of the incarcerated individual. Education is provided to the extent that the offender wishes to participate, and guards are taught to encourage them to further their education. Prisoners have the option of attending school full time, and the prisons offer all levels of education including university degrees, which can be accessed via distance education (Pratt, 2008).

Occupational Programs

American occupational programs. Occupational programs in the United States seek to develop offenders' vocational skills in order to ensure their reintegration into society as working and productive members. Like educational programs, occupational programs also suffer from budgetary cutbacks and restraints associated with an increase in recidivism for participating offenders (Petersilia, 1999). America's overall decrease in the recidivism rate may be due to some vocational programs requiring a diploma or GED to participate, thus making it difficult to determine the extent to which vocational training was responsible for the recidivism decrease (Lawrence, 2004). This education criterion excludes a large portion of offenders from participating in the program. By the same token, occupational programs may be effectively implemented but prove fruitless because of little support finding employment once released from prison (Lawrence, 2004). More specifically, there needs to be consistent treatment and a support network for offenders both inside and outside of the prison walls, especially in vocational programs.

International occupational programs. Fundamentally, the success of the Nordic model is contingent upon the country's ability to secure potential employers. For example, the Danish welfare state has effectively embedded policies that keep their prison model functional within the surrounding community (Lacey, 2010). This program includes helping offenders locate and secure jobs within the public sector that will maintain them following their release. Consequently, these work programs are instituted for individuals who have demonstrated the ability to engage in gainful employment, while maintaining socially appropriate behaviors.

In Finland, eligible inmates are sent to "labor camps" where they are compensated with a normal wage for completed work. In turn, these earnings are used for them to pay for their own expenses; including rent, utilities, food, and taxes. Additionally, these eligible individuals are able to save money and provide for their families, or in some cases, send financial compensation to the families of their victims (Kenis et al., 2010; Pratt, 2008). For example, Bastoy Prison, which is the model open prison in Norway, attempts to foster a sense of responsibility among the inmates by providing employment opportunities based on documented behavioral patterns and the development of trusting relationships between the inmate and prison administration (Pratt, 2008).

Mental Health and Substance Abuse Programs

American mental health and substance abuse programs. The criminal justice system has a duty to care for

prisoners with physical disabilities; however, some argue that treatment of psychological illnesses and drug addictions are not the responsibility of the system (*Estelle v. Gamble*, 1976). However, the number of rehabilitative programs is disproportionate to the number of inmates (Mumola, 1999; Mumola & Karberg, 2007), where between 70-85% of those incarcerated are in need of alcohol or substance abuse treatment, and only 13% of these inmates ever receive treatment (McCaffrey, 1998). While most states reported having Therapeutic Communities (TC) or federally funded Residential Substance Abuse Treatment centers, these programs are unable to service many prisoners with substance abuse histories due to size limitations (Austin & Irwin, 2001). Similarly, effective psychotherapy is essentially nonexistent for individual prisoners, because group therapy is the most prevalent in the prison setting (Coylewright, 2004). Consequently, group therapy is often ineffective due to the fear of being perceived as weak by revealing too much personal information, or for being too cooperative with the prison administrators (Coylewright, 2004). Therefore, effective reform requires a reassessment of the legal system's duty to provide psychological and substance abuse treatment.

International mental health and substance abuse programs. One common thread between American and Nordic prison systems is that the majority of offenders are commonly substance abusers prior to incarceration (Friestad & Hansen, 2004; Mumola & Karberg, 2007). However, the Nordic prison systems offer substance abuse and mental health counseling to their inmates. For example, in the Netherlands, all healthcare, including mental health, is viewed as a right for all individuals, including prisoners (Bulten, Vissers, & Oei, 2008). According to Lobmaier, Kornor, Kunoe, and Bjorndal (2008), the most effective way to get a prisoner to accept treatment was through rapport development and the urging of a trusted staff member. Unfortunately, when an offender with drug dependency is released, it is reported that as many as 90% of them return to drugs (Butzin, Martin, & Inciardi, 2005).

Behavioral Programs

American behavioral programs. Community-based behavioral programs have traditionally focused on providing intensive behavioral support through services and community involvement, where programs' structures and service provisions are guided by research on social learning conceptualizations of criminal behavior (Gendreau, 1996). Gendreau (1996) explains that these programs incorporate theory, empirical data, and practice to create a space for the inmates' behavioral growth and development. Based on the responsivity principle, these programs last a few months and apply behavioral approaches toward rehabilitating high-risk offenders, with a concrete aim of developing interpersonal skills. Therapists train and supervise the offenders in real-life, interpersonal and constructive projects, where contingencies are enforced by weighting reinforcers and punishers at a rate of at least 4 to 1. According to Gendreau and Ross (1981), reductions in recidivism routinely ranged from 25% to 60%, with the greatest reductions found for community-based programs.

International behavioral programs. In contrast to the typical U.S. model, the Dutch DCL prison uses a systematic behavioral system to ensure that desired behaviors are reinforced and undesired behaviors are either punished or extinguished. For example, prisoners plan their own schedules and are given choices regarding their preferred activities, where these choices serve as reinforcers and lead to increased independence (Kenis et al., 2010). In addition to choice activities, prisoners can earn monetary compensation for appropriate behaviors, which can earn increased privileges and access to social activities (e.g., television, phone calls, visiting hours, different accommodations; Kenis et al., 2010). Overall, policymakers selected this model to increase inmates' behavioral responsibilities, and this model was more cost effective for inmates who were incarcerated for more than four months (Kenis et al., 2010).

Conclusion

The current view on the treatment of prisoners in the United States is that an increase in punishment yields a decrease in crime rates (French & Gendreau, 2006; Langan & Levin 2002). In reality, the U.S. crime and recidivism rate is higher than that of any other country (Langan & Levin, 2002; Mauer, 2003). Considering the relationship between individuals who are undereducated and incarcerated (Stanard, 2003), there seems to be an obvious need to reform the current education system. In contrast, other countries have models for prison systems that seem to be more effective at reducing recidivism and crime; most notably, Nordic prisons employ a philosophy of rehabilitation to decrease recidivism (Kjelsberg, et al., 2007). Consequently, the United States may possibly benefit from a decrease in recidivism by widely adopting features from the Nordic prison systems.

http://www.dropoutprevention.org/engage/incarceration-within-american-and-nordic-prisons/

Our system only increases recidivism the way it is currently designed. Lengthier sentences and mandatory minimums are not effective methods of reducing crime. The longer someone is incarcerated, the longer they are away from their families. Children of incarcerated parents are more likely to enter the criminal justice system themselves. Facilities do not make visitation easily accessible or comfortable for children, especially children from low-income families. The prisons are usually hundreds of miles away and visitation is costly. It is widely known that visitation decreases recidivism so why is visiting made extremely difficult and cost-prohibitive? Perhaps we can utilize methods that are already proven to be effective in other countries such as Finland and Norway. We cannot dehumanize incarcerated people and then expect them to behave more humanely when they reenter society, especially when they face so many barriers upon release. from housing discrimination, employment discrimination, and unrealistic goals of supervision, formerly incarcerated people are being set up to fail. When people are desperate they will return to what they know, and in this case that would be committing more crimes. Is the goal of incarceration not to reduce crime? Lengthy sentences do not do that. The longer they are away from society, the more difficult reentry and reintegration becomes. This is a multi-faceted issue that requires legislative actions and it cannot be solved with one or two changes. That being said, the USSC can contribute to a truly rehabilitative system by abolishing mandatory minimums and focusing on what is going to be most the most **effective** method of preventing more crime. Stacking and career offender/criminal guidelines should also be abolished. If an individual has already served time for a particular crime, they should not be sentenced to additional time for that same crime. The goal of sentencing should be to effectively rehabilitate and prevent future crime. Perhaps if successful reentry was not made nearly impossible then our recidivism rate would not be so high.

Please remember that people in prisons are human beings and find it in your heart to have compassion and empathy for them. They are mothers, fathers, brothers, sons, and daughters. These people have families and nothing happens in a vacuum. When you sentence them, you sentence their families as well.

Thank you for your consideration,

Stephanie Staco, MA, MHC-LP, CASAC-T

Recommendation to the United States Sentencing Commission requesting that a policy statement be implemented advising that Offense Level 43'S recommendation of life without parole be reduced to 360 months – life without parole for offenders in criminal history category I AND II who are convicted of a nonviolent crime. (For Those Left Behind to Die Amendment)

RESPECTFULLY SUBMITTED ON JULY 25TH, 2016 BY:

Jason Hernandez, first Latino to receive clemency from President Barack Obama, Founder of Crack Open the Door

[redacted]

And

Corena White, Instructor of Government

[redacted]

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A. **Summary of Problem and Solution to the United States Sentencing Guideline Offense Level 43**

The founding principles of the United States include life, liberty and the pursuit of happiness. With these maxims a legal system was built to codify the new Republic's vision. The Bill of Rights protected citizens against government interference. The revolutionary due process amendments set America apart from other world powers and because of them citizens live a secure life.

However, at many points throughout United States' history laws were made with insidious intentions. For example, drug laws dating back to the 1880s were aimed at racial groups; the opium laws impacted Chinese immigrants. Then, in 1971 President Nixon declared a "war on drugs." The definition of the word war, a state of armed conflict of different groups within a country, established the language, policies and consequences of the drug war. Life without parole (LWOP) sentencing is one consequence of decade's long failure in policy. Furthermore, LWOP terms are anachronistic to the due process protections enumerated in the U.S. Constitution.

One might ask, "How can possession of a crack pipe warrant a LWOP sentence and not violate the Eighth Amendment?" Several federal judges have openly condemned the policy not only for principled reasons, but also for moral implications to the person sentenced, and their family who will also be irrevocably harmed by LWOP. Americans must want what is best even for the least among us. For if the most vulnerable citizens are unduly harmed by a government policy, then said policy does not meet the standard of America's legal system.

The problem presented is that the United States Sentencing Guidelines recommends life without parole for any defendant who falls into Offense Level 43. This is despite the fact a defendant could be:

(1) A non-violent offender

(2) A first time offender

(3) A juvenile; and, indeed

(4) All the above.

What makes Level 43 all the more cruel and unusual is that the sentence of life without parole is determined not by a judge or jury, but rather, what amounts to a mathematical equation? There

seems to be no other sentencing process that determines when life without parole for nonviolent offenders should be implemented other than the Sentencing Guidelines.

Because the severity of life without parole, Level 43 should be amended in one of two ways:

A) Offense Level 43 CHC I and II should be changed from the current version:

LEVEL	***I***	***II***	***III***	***IV***	***V***	***VI***
43	***(0-1)***	***(2-3)***	***(4, 5, 6,)***	***(7, 8, 9)***	***(10, 11, 12)***	***(13 or more)***
	LIFE	***LIFE***	***LIFE***	***LIFE***	***LIFE***	***LIFE***

To reflect:

LEVEL	***I***	***II***	***III***	***IV***	***V***	***VI***
43	***(0-1)***	***(2-3)***	***(4, 5, 6,)***	***(7, 8, 9,)***	***(10, 11, 12)***	***(13 or more)***
	360-life	***360-life***	***LIFE***	***LIFE***	***LIFE***	***LIFE***

Or the Commission could include a policy statement or commentary advising United States District Courts of the following:

-2-

(B) ***When a court is sentencing a nonviolent offender who has attained an offense level of 43 or higher, the starting point shall not be LIFE, but rather 360 months-life. This benchmark will (1) allow a sentencing court to consider the defendant's characteristics, potential for rehabilitation, and the other factors set forth in Title 18 USC 3553(a), and (2) to impose a sentence that the Court may feel will not only sufficiently punish the defendant for his criminal conduct, but will also allow the defendant to obtain the goal of reformation and rehabilitation and once again re-enter society.***

President Obama has taken major steps in rectifying the unjust and racially disparate impact Offense Level 43 has had on nonviolent offenders by becoming the first president to ever commute the sentences of dozens of prisoners serving life without parole. It is assumed that the next president will not be as forgiving and understanding as President Obama and those serving life without parole will ultimately be left behind to die in prison.

Thus, in the interest of justice, the recommendations stated above should not only be implemented, but also made retroactive to allow District Courts the discretion to predetermine whether a previous sentence of LWOP was required to satisfy the goals set forth in Section 3553(a)

B. Why the Sentencing Commission Should amend Offense Level 43's Recommendation of LWOP for nonviolent offenders in criminal history Category I and II

(1) OFFENSE LEVEL 43 MAKES NO DISTINCTION BETWEEN OFFENDERS WITH MINIMAL TO NO CRIMINAL HISTORY FROM THOSE WHO ARE CONSIDERED HABITUAL OFFENDERS

As currently constructed offense level one through forty- two of the Guidelines Sentencing table share one or two important characteristics: For instance, each one of these offense levels gives courts a recommended sentencing range to choose from (e.g., offense level 32 CHC I recommends 121-151 months imprisonment). Second, each offense levels recommended sentencing range increases in years the more criminal history points a defendant has (e.g., offense level 34 CHC I recommends 151-180 months and offense level 34 CHC VI recommends 262-327 months: 111-170 month increase).

However, in formulating the sentences for offense level 43 the Sentencing Commission abandoned not only one, but both of these approaches. Under level 43, it makes no difference if a defendant is a first time offender or a career offender, because only one sentence is recommended - LWOP.

The Commission has published three reports on recidivism acknowledging that the criminal history rules were never based on empirical evidence. **(1)** The same reports also established that offenders with minimal to no criminal history points "have substantially lower recidivism

rates than offenders who are in Criminal History Category IV, V, and VI." The Commission has also found that there is "no correlations between recidivism and the Guidelines offense level. Whether an offender has a low or high guideline offense level, recidivism rates are similar." However, despite these findings offense level 43 continues to hold offenders in all six criminal categories equally culpable.

(2) THERE IS A NATIONAL CONSENSUS AGAINST IMPRISONING NON-VIOLENT OFFENDERS WITH MINIMAL TO NO CRIMINAL HISTORY TO LIFE WITHOUT PAROLE

A review of the criminal punishments enacted within this country seems to produce only two states that mandate a sentence of life without parole for an offender with no criminal history who commits a felony that is not a "crime of violence." **(2)** However, there are several states that have recidivist statutes that do allow or mandate courts to impose life sentences on defendants for non-violent offenses.

(3) There are numerous federal criminal statutes that authorize LWOP to be imposed as the maximum sentence. Most of these statutes involve drug trafficking, racketeering, and firearms crimes. Additionally, there are federal criminal statutes that mandate LWOP for cases such as killing a federal or government employee, piracy, repeat offenses involving drugs or weapons.

(4) The Guidelines provide for a mandatory LWOP sentence in only four types of crimes. These involve murder, treason, certain drug offenses, and certain firearms offenses that are committed by career offenders. However, under the Guidelines, any crime can be subject to a recommendation of life without parole if the defendant attains level 43 of the Sentencing Table, even if the maximum punishment for the crime set by statute does not authorize such a severe

punishment these sentences are called "de facto LWOP;" wherein the sentences are ran consecutively equaling a sentence of more than 470 months. This appears to be the only sentencing scheme in the nation to do so.

Sentencing Court's across the county have spoken out against LWOP sentences for nonviolent offenders **(5)** And since the Guidelines have been rendered advisory courts are more likely to depart from Level 43's recommendation of LWOP when sentencing first time and/or nonviolent offenders. **(6) (7)**

Of the 3,281 inmates serving LWOP for a non-violent crime in the United States, more than 2,000 of these sentences are being served by federal inmates. **(8)** This is a disturbing comparison when one takes into account that of 2.2 million individuals imprisoned in the United States, 2 million of them are incarcerated in state prisons and the remaining 200,000 are housed in federal facilities. It is not known how many federal inmates are serving LWOP as a result of Offense Level 43, but a study by the Commission shows that in 2013 there were 153 defendants sentenced to LWOP and that 67 of these sentences were based on the Guidelines not a statute. **(9)** Nor is known how many of the additional 1,983 federal inmates who are serving “de facto life sentences” non-violent offenders are.

(3) <u>THERE IS A GLOBAL CONSENSUS AGAINST IMPRISONING FIRST TIME NON VIOLENT OFFENDERS TO LIFE WITHOUT PAROLE</u>

The United States is among the minority of countries (20%) known to researchers as having life without parole sentences. **(10)** The vast majority of countries that do allow such punishment have high restrictions on when life without parole can be issued. Such as only for murder or two

or more convictions of life sentence eligible crimes. **(11)** Whereas in the United States LWOP can be recommended, under the Sentencing Guidelines for example, for a non-violent crime such as drug dealing or fraud.

(12) Currently, there are around 5,500 inmates in the Bureau of Prisons serving LWOP for violent and nonviolent crimes. **(13)** In contrast, this population dwarfs other nations that share our Anglo-American heritage, and by the leading members of the Western community. For instance, there are 59 individuals serving such sentences in Australia **(14)**, 41 in England **(15)**, and 37 in the Netherlands.

(16) The United States as party to the International Covenant on Civil and Political Rights has agreed that the essential aim of its correctional system shall be reformation and social rehabilitation. **(17)** Regional Human Rights experts have agreed that long sentences can undermine the rehabilitative purpose of corrections. As the Special Rapporteur on Prisons and Conditions in Africa has stated, "Punishments which attack the dignity and integrity of the human being, such as long-term and life imprisonment, run contrary to the essence of imprisonment. **(18)** Thus it would appear that offense level 43's recommendation of LWOP (regardless of what crime is committed) contradicts not only this country's obligation to the International Community, but is also a sentencing practice rejected by a great majority of the civilized world. **(19)**

(4) LIFE WITHOUT PAROLE IS A CRUEL AND UNUSUAL PUNISHMENT

Life without parole is the second most severe penalty permitted by law. It is true that a death sentence is unique in its severity and irrevocability: yet LWOP sentences share some characteristics with death sentences that are shared by no other sentences. **(20)** The offender serving LWOP is not executed, but the sentence alters the offender's life by a forfeiture. It deprives the convict of the most basic liberties without giving hope of restoration. As one jurist observed, LWOP "means denial of hope; it means that good behavior and character improvement are immaterial;' it means that whatever the future might hold in store for the mind and spirit of (the convict), he will remain in prison for the rest of his days." **(21)** Indeed, some believe it to be more humane to execute an individual than "to keep them in prison until they actually die of old age or disease."

(22) Because LWOP forswears altogether the rehabilitative idea, the penalty rest on a determination that the offender has committed criminal conduct so atrocious that he is irredeemable, incapable of rehabilitation, and will be a danger to society for the rest of his life. **(23)** It is a determination primarily made by a judge or jury if certain set elements are present. The Guidelines, on the other hand, makes this same condemnation of a defendant based solely on a mathematical equation, which is calculated on a "preponderance of the evidence finding" by a sentencing court.

Furthermore, the Commission's rejection of rehabilitation for all offenders in level 43 goes beyond a mere expressive judgment. Federal inmates serving LWOP are normally required to serve the initial eight-to-twelve years in a United States Penitentiary; **(24)** prisons which are known to have "a predatory environment...engendered by gangs, racial tensions, overcrowding, weapons, violence and sexual assaults." **(25)** Because in such prisons safety and security

override rehabilitation, programs are limited and without substance. And in prisons where vocational training and other rehabilitative programs are available inmates serving LWOP are not allowed to participate in them or are passed over for prisoners with release dates.

This despite offenders in Criminal History Category I and II are in most need of and receptive to rehabilitation. **(26)**

5. Federal Life Sentences without Parole and Minorities

Although the Sentencing Commission's Report does not state how many of the offenders serving LWOP for a nonviolent or violent offense are minorities, it is reasonable to concluded that at least 75%, if not more, are minorities based on the racial breakdown of the 153 LWOP sentences given in 2013: **(27)**

Blacks-45.0%
Whites-24.8%
Hispanics-24.2%
Asian, Native Americans
And others- 6.0%

As the Clemency Report stated, "The [Commission's] new report offers strong statistical proof that federal life sentences are used vigorously against minorities and mostly for nonviolent offenses. **(28)** With minorities making up one third of the United States population the Clemency Report's conclusion cannot be refuted.

C. AMEND OFFENSE LEVEL 43

In 2005, the U.S. Supreme Court ruled in *U.S. v. Booker* that the Sentencing Guidelines were no longer mandatory when sentencing a defendant. Under the approach set forth by the Supreme Court, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing, and are "subject to review by the court of appeals for "unreasonableness." The Supreme Court has continued to stress the importance of the Sentencing Guideline in following cases. See *Gall v. U.S*., 128 S. Ct. 588 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and initial benchmark" at sentencing).

Because there is no empirical data, research, or studies that demonstrate that a first time nonviolent offender is irredeemable, incorrigible, or incapable of rehabilitation, Offense Level 43's recommendation of LWOP for all offenders must not be the benchmark and should be amended to reflect one of the following:

(A) Offense Level 43 CHC I and II should be changed from the current version:

LEVEL	I	II	III	IV	V	VI
43	(0-1)	(2-3)	(4, 5, 6,)	(7, 8, 9)	(10, 11, 12)	(13 or more)
	LIFE	LIFE	LIFE	LIFE	LIFE	LIFE

To reflect:

LEVEL	I	II	III	IV	V	VI
43	(0-1)	(2-3)	(4, 5, 6,)	(7, 8, 9,)	(10, 11, 12)	(13 or more)
	360-life	360-life	LIFE	LIFE	LIFE	LIFE

(29)

Or the Commission could include a policy statement or commentary advising district courts of the following:

When a court is sentencing a nonviolent offender who has attained an offense level of 43 or higher, the starting point shall not be LIFE, but rather 360 months-life. This benchmark will (1) allow a sentencing court to consider the defendant's characteristics, potential for rehabilitation, and the other factors set forth in Title 18 USC 3553(a), and (2) to impose a sentence that the Court may feel will not only sufficiently punish the defendant for his criminal conduct, but will also allow the defendant to obtain the goal of reformation and rehabilitation and once again re-enter society.

Then, in the interest of justice, this Amendment should be made retroactive to allow district courts the discretion to predetermine whether a previous sentence of LWOP was required to satisfy the goals set forth in 3553(a).

THEREFORE, it is prayed that the Sentencing Commission make revising offense level 43 a priority in accordance with the recommendations set forth herein.

Respectfully Submitted,

Jason Hernandez, first Latino to receive Clemency from President Barack Obama, and Founder of Crack Open the Door.

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1. U.S. Sentencing Comm'n, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines (May 2004): U.S. Sentencing Comm'n Recidivism and the First Offender (May 2004): U.S. Sentencing Comm'n, A Comparison Of The Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Comm'n Salient Factor Score (January 2005).

2. See Alabama Code 13A-12-231(2)(d)(provides LWOP for a first time offender who possesses 10 kilograms or more of cocaine); And Michigan's "650 Lifer Law" which made LWOP mandatory for any offender possessing more than 650 grams of cocaine or heroin.

3. See Nevada Rev. Stat. Sections 207.010(1).

4. See generally SENT., COMM'N MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011) (hereinafter Mandatory Minimum Report).

5. See U.S. v. Miller, 2010 U.S. Dist. LEXIS 79763 (Dist. of Minn. 2010) ("The Court has no hesitancy in stating that a mandatory life sentence without the possibility of parole is vastly too long for this defendant. []...he accumulated a dreadful criminal record - and at an early age....but a non-discretionary sentence, assuring he will die of old age in federal prison, is too heavy a burden.").

6. See U.S. v. Faulkenberry, 759 F.Supp.2d 915 (S.D. Ohio 2010)(despite obtaining an offense level of 47 for fraud violations district judge imposes sentence of only 120 months): and U.S. v. Watt, 707 F.Supp.2d 149 (D. Mass. 2010)(despite obtaining an offense level of 43 for fraud violations district court imposes sentence of 24 months).

7. The Supreme Court stated in Roper v. Simmons, 543 U.S. 551, 563-64 (2005) that in determining whether a punishment is "cruel and unusual" a factor to be considered is the "objective indicia of society's standards, as expressed in legislative enactments and state practice."

8. See Jennifer Turner, ACLU Report, A Living Death: Life Without Parole for Nonviolent Offenses. (Nov. 13, 2013).

9. See U.S.S.C. Report, Life Sentences in the Federal System, p. 9 (2015)

10. See University of San Francisco's Report entitled Cruel and Unusual: U.S. Sentencing Practices in a Global Context, at p.8

11. Cruel and unusual, supra at p.24.

12. Under 18 USC Section 1341 a defendant cannot be sentenced to more than thirty years. Nevertheless, a defendant convicted for fraud can still attain an offense level of 43, and under such circumstances the Guidelines instruct courts that if the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the counts shall run consecutively..." See U.S.S.G. 5G1.2 (d); and also U.S. v. Okun, 453 Fed. Appx. 364 (4th Cir. 2011) (where defendant obtained an offense level of 43 for Ponzi Scheme district court imposed consecutive sentences equaling 1200 months to equal recommendation of LWOP); U.S. v. Lewis, 594 F.3d 1270 (10th Cir. 2010) (sentenced to 330 years as a result of obtaining offense level 43 for fraud); United States v. Robert Allen Stanford, (sentenced to 150 years for fraud under Guidelines).

13. There are 1,983 people serving de facto life sentences in the federal system. It is not known how many of these violent or non-violent offenders are

14. See Englan Vinter and Others v. United Kingdom, App. Nos. 66069189 and 3986/10 Eur.Ct.H.R., 37 (2012)

15. Vinter, supra note 12, para. 37

16. Dirk Van Zyl Smit, Outlawing Irreducible Life Sentences, Europe On The Brink? 23 Fed.Sent.R.39, 41 (2010).

17. International Covenant on Civil and Political Rights, Dec. 16, 1996, S. Treaty Doc. No. 95-20 (1992 Art. 10(3) 999 U.N.T.S. 171

18. African Commission On Human And Peoples Rights, Reports Of The Special Rapporteur On Prison Conditions In Africa.

19. See Thompson v. Oklahoma, 487 U.S. 815, 830 (1998)(In ruling that a 14-year-old convicted of murder could not be executed the Supreme Court stated, "We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual" and "by other nations that share our Anglo-American heritage...").

20. See Graham v. Florida, 176 L.Ed.2d 825, 842 (2010) (Kennedy, Justice).

21. Naovarath v. State, 105 Nev. 525, 526, 779 P.2d 944 (1989).

22. Holberg v. State, 38 S.W.3d, 140 (Tex.Crim.App. 2000); and S v. Hehemia Tjiji, April 9, 1991 (unreported) quoted in Nanibia Supreme Court Feb. 6, 1996, S v. Tcoeib, (10 SACR (MnS)(1996) ("The concept of life imprisonment destroys human dignity reducing a prisoner to a number behind the walls of jail waiting only for death to set him free.")

23. Harmelin v. Michigan, 115 L.Ed. 836, 887 (1991)(Justice Stevens dissent)("Because [LWOP] does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any consideration of reform or rehabilitation for the perpetrator. Serious as this defendant's crime was, (drug possession) I believe it is irrational to conclude every similar offender is wholly incorrigible.")

24. See Bureau of Prisons Program Statement 5100.08(1)(Inmate Security Designation and Custody Classification)("A male inmate with more than 30 years remaining to serve (including non-parolable LIFE sentences) will be housed in a High Security Level Institution unless the [Public Safety factor] has been waived.").

25. Quoting U.S. v. Silks, 1995 U.S.App.LEXIS 35355 (9th Cir. 1995): Holt v. Bledsoe, 2011 U.S. Dist.LEXIS 73631 (Mid.Penn. 2011)("Inmate-on-inmate violence is common and uncontrollable at USP Lewisburg."); Penson v. Pacheco, 2011 U.S.Dist.LEXIS 52856 (D.Colo.2011)("...USP Victorville housed violent prison gangs and was where dozens of assaults and a murdered had occurred."): Jones v. Willingham, 248 F.Supp. 791 (Kansas 1965 (describing USP's as "powder keg[s]".): and Leah Caldwell's Article in Prison Legal News, Sept. 2005 p.10-13 entitled "USP Beaumont, Texas: Murder and Mayhem In The Thunder Dome.").

26. See Graham v. Florida, 176 L.Ed.2d at 846 ("...the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence [LWOP for juveniles], all the more evident.").

27. U.S.S.C. Report, Life Sentences in the Federal System (2015): at page .7

28. See http//clemencyreport.org/new-report-most-federal-life-sentences-given-to-minorities/

29. See U.S. v. Heath, 840 F.Supp.2d 129 (USDF (1993)(district court recommending Offense Level be reduced from LIFE to 399 months-LIFE, after observing that "the sentencing of defendant in the instant crack cocaine case caused the court to face squarely a gaping, inexplicable omission in the sentencing table of the Sentencing Guidelines.")

30. S. v. Dodo, 2001 (3) SA 382, 404 (CC) at Paragraph 38 (S. Africa)("To attempt to justify any period of penal incarceration, let alone imprisonment for life....without inquiring into the proportionality between the offenses and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity..."); and U.S. v. Miller, 2010 U.S. Dist. LEXIS 79763 (Dist. Minn. 2010)("The Court is of the view that the Supreme Court will visit the next decade the issue of whether mandatory life sentences for nonviolent crimes committed by adults offends the prohibition against cruel and unusual punishment....However, I am reluctant to predict the outcome of such a review. Were this Court a member of the Supreme Court, this Court would follow the reasoning of Justice Kennedy in Graham v. Florida, and conclude that such a sentencing regime that resulted in the defendant's life sentence does violate the Eighth Amendment

Public Affairs

From: Linda Robinson [redacted]
Sent: Monday, July 25, 2016 9:07 AM
To: Public Affairs
Subject: Public Comments to the Proposed 2017 Priorities of the United States Sentencing Commission

Dear Sirs/Madams,

I am writing in response to your request for public input on the proposed priorities for the next Amendment Cycle (81 FR 37241). For several years, I have followed with great interest the efforts that your commission has put into trying to pass legislation to make our prison system work more efficiently and more cost effective. It seems to me that Congress could do it all very quickly and in the best interest to all, if they would just put themselves in the shoes of the many families whose lives are so greatly affected. There are legal issues most certainly, but there are also moral issues that should be considered before sentencing. Your recommendations and the time you put into making them are useless unless Congress acts on them. Year after year nothing is done. It is time that they are made to listen. America the Land of the free has become the land with more people in prison than any other country. This is despicable to say the least.

These are my thoughts:

1. Mandatory minimum penalties could be a good thing. However, anything over a year for each charge is counter-productive. Safety valves should be in place that expand and create more ways that the court can allow shortened sentences than is allowed by mandatory minimums. Prosecutors should not be allowed to lie and coerce confessions by threatening family members or other innocent people in a suspect's life. Judges should be caring professionals who carefully consider all aspects of the case. There are always factors that are case specific, and these should be brought before the jury. Prison is life changing for inmates and the people who love them. For those who get unnecessarily long sentences it is a life sentence for all the family. In any case, prison destroys the family unit. Over long periods of time and distance, contact is lost and inmates are forgotten, especially when those that care pass away. As these long time inmates age the cost of incarceration increases. When an inmate gets out at an old age, there is nothing for them. They often can't work and have no one to care for their needs.

Mandatory "stacking" of penalties under 18 U.S.C. 924(c) should be completely eliminated, or re-write the law so that only a "true recidivist" is penalized. Adding time for something for which one has not been convicted is not justice. Also, reduce the length of the mandatory minimum sentences. I strongly feel that anyone has the right to protect their property and family. Sometimes, "stacking" is the result of one simply exercising his/her second amendment right to bare arms---be it for protecting, or feeding a family.

As an educator I can speak to the certainty that money spent on keeping so many in prison should be spent on identifying and educating these at risk people. Higher education should be obtainable in or out of prison. On the job training is one of the best things that I have seen done. It works when the program helps the client find and keep jobs. Sentencing law-breakers to school, on the job training, or community service would benefit everybody. Yes, educating costs money. So does keeping people in jails. Utilize the abilities of inmates to teach culture, painting, computer literacy, masonry, carpentry, drama, music, etc.

For the sake of millions, PLEASE REINSTATE A FEDERAL PAROLE SYSTEM! Everyone deserves a chance to show the world they have changed for the better. Doing this in correlation with follow-up education/training could possibly be an answer to becoming a more effective prison system.

2, The Commission should certainly continue examination of the guidelines post-Booker, and make recommendation for statutory changes and guideline amendments. Simplify the operation of the guidelines, promote proportionality, and reduce sentencing disparities. Of course, the defendant's role, culpability, and relevant conduct should be considered be it good or bad. I do believe that there should be sentencing guidelines for each crime ---just not a minimum of five years, because there have been times when a person got far less than he/she should have simply because he was a person of means. However, as previously stated many criminal act's have extenuating circumstances that should be considered carefully and compassionately.

Another thing that really bothers me is how inmates are disciplined. They can't prove how they are treated with disrespect and actually abused because nobody will speak up in fear of retaliation (this does happen). EVERY correctional officer should have to wear cameras for the entire time they are inside prison walls. This would put an end to verbal and physical abuse for themselves and the inmate population. Also, stop putting mentally ill people in prison---send them to a hospital for treatment, so that they have a chance to heal. Prison life does not heal anything. If anything, the problem worsens and we pay for it down the line.

3. Certainly we need to find alternatives to incarceration. Drug Programs, Parenting and Life Skills training, GED classes, On the Job Training and any other approaches to educating our citizens. There are so many illiterate people in America and prisons are full of the results. It truly is a vicious circle. Please amend the Sentencing Table in Chapter 5, Part A and any other relevant provisions in the Guideline Manual.

4. Change the definitions relating to the nature of a defendant's conviction. A "crime of violence" should be one that involves injury or death, if it is done maliciously on purpose. An "aggravated felony" should be omitted. It is after all just another crime, so charge it as such. A "crime of violence" is already a felony. The term "violent felony" is redundant. "Drug trafficking" is a felony. However, it should only apply to drug cartels or an organized group who get rich duping the poor and the ignorant. The term "felony drug offense" is covered in all the other terms, in my opinion. A career offender should be defined as one who commits many crimes over a certain number of years. An armed career criminal should be one that has caused injury or death more than once. This criminal should not be sentenced to life or unnecessarily long sentences. "Three Strikes You're Out" should be against the law on a Federal level. These laws are unfair to so many people. People can and do change if they are educated and shown that they are worth something. Many can become a great citizen when given the chance. A system of parole would help in this situation. The immigration problem is not going away. Rather, spend money identifying and getting them naturalized as citizens. They have a lot to offer just a immigrants have since the beginning of America. Perhaps, it is time to follow Canada's approach for those who simply wish to work. It seems to be working for them.

5. We do need statistics, so continue the multi-year study of recidivism (and tabulate the reasons), as stated in your priorities.

6. Study the findings and recommendations in the May 2016 Report issued by the Commission's Tribal issues Advisory Group. Make appropriate amendments to the Guidelines Manual. As a Native American, I believe that tribes should have their own prisons. Maybe it is time to consider segregation of entire prison locations. It would be hard for the families as the distance might be too great for visiting. However, I could see with some thought to utilization and renaming of some existing prisons instate that this could work. Results: Less gangs and more cultural cohesiveness. It would take some work, but I think worth considering.

7. You should study the treatment of youthful offenders in order to make and/or eliminate amendments that are necessary so that our "lost" children have a chance to find success in life. Laws that put seven year old children

behind bars giving them more access to seasoned inmates is just wrong. Studies have shown that the brain of the under twenty-five year old has not developed the capability of foresight, therefore, we are punishing our youth for doing things that they in a certain sense cannot control. Mental ill children need our help. As a nation we should value the innocence of our babies.

8. Study the feasibility and appropriateness of using the amount of time served, instead of, the sentence imposed in calculating criminal history, and how sentence revocations are handled.

9. Study how or why 3,4-Methylenedioxy-N-methylcathinone should or should not be a criminal offense. I don't think I know enough about this to discuss it.

10. Implement Bipartisan Budget Act of 2015 and any other crime legislation enacted during the 114th and 115th Congress that warrants a response.

11. Resolve the conflict in the interpretation of federal guidelines by circuit courts. The conflict is probably caused by differing opinions concerning harsh sentences.

12. Consider miscellaneous issues from case law and other sources. Especially, realize that some inmates are actually innocent, and can't in good conscience accept responsibility for some or all the crimes for which they are convicted.

In conclusion, I really hope that your Commission will carefully think about my ideas and will try to see my viewpoint even if you do not agree with my assertions. Thank you for this opportunity to express my opinions.

Linda Robinson

Public Affairs

From: Din Celaj [redacted]
Sent: Monday, July 25, 2016 7:47 AM
To: Public Affairs; Public Comment
Subject: Public Affairs / Priority comment - Keep 924c Reform as top priority. THE WHOLE STORY!

From:
* CELAJ, DIN
Re:
Jul 24, 2016, 9:50 PM
Hello, My Name Is Din Celaj.

I hope that this letter reaches you in the best of health and spirits. If you are now reading this, Thank you for taking the time out of your busy & demanding schedule. Please let me first start off by apologizing for just writing out of the blue like this. This is not a regular practice of mine, And I ensure you, that your time is very much appreciated. Any help, advise, guidance, counsel, or assistance, that you may offer is very much needed.

Once again, my name is Din Celaj and I am a New York prisoner housed in the Federal Custody at the United States Federal Penitentiary located in Coleman Florida. I am in a very dire situation in which injustice is in total contradiction of the justice provided by the constitution on which this country was FOUNDED.

On July 8th 2007, I was arrested & held without bond, as I awaited trial on a 13 count federal indictment in the southern district of New York. At the conclusion of my trial on October 2nd 2009. I was found guilty of 11 out of 13 counts. Then on July 8th 2010, I was sentenced to an aggregated term of (601) months (50) years and (1) Month in prison. The late federal district court judge, The Honorable Robert P. Patterson, gave me a (30) DAY sentence which included all charges with the exception of two 924c gun charges. For the two gun charges alone, I received (50) years. Furthermore, The Honorable Judge Patterson stated the only reason he gave me the (50) years was because of no other choice of options, the gun charges carried a mandatory minimum.

Initially, The Government Requested a sentence of (63) years, But the Judge Patterson disapproved. If the laws were different and mandatory minimum sentences were not binding, Then the Judge Patterson could have given me a more adequate sentence, which would have been much lower by a substantial amount, To fit the actual crime. I know that being a convicted felon diminishes my credibility & upright standing. I know that you have to, and will take my words with a grain of salt & plenty of caution, but still, I am going to be as genuine as humanly possible, truthful & honest, In hopes that my words will register some weight of credibility with you.

I understand that, yes ! Robbery under any circumstances is wrong, no matter how someone may try to justify their reason, because the end does not justify the means. But adequate punishment & appropriate sentence should be looked at. Ask yourself, would you punish a mentally challenged person, the same as a completely sane person. Or would you discipline a 5 year old the same as a 16 year old. Or is a teacher held to the same standards as a student.

At the time of my crime, I was 23 years old a young man just coming in to adult hood. In my still maturing mind, I was blindly under an illusion that, if I only robbed the same drug dealers who were destroying the community & no one got hurt, then everything would be fine. I was so wrong and there are no excuses for my actions. But a (50) year sentence for two gun charges in which no one was hurt, Is just too HARSH and absolutely ludicrous. (50) years Is a life sentence In which a person will more then likely DIE in prison. It is a death sentence. The harsh nature of the United States Sentencing Guidelines, Is no secret. From the drug laws to immigration, U.S. vs Blakely, U.S vs Booker, New Jersey vs Apprendi, The mandatory minimum sentences are destroying the foundation of this beautiful country :

* Families Are Being Torn Apart.
* Longer Prison Terms, Lead To Higher Recidivism Rates.
* The Cost Of Housing One Inmate For A Year Is Equal To That Of 3 Full Time Minimum Wage Workers, Which Can Be A Little Over $ 70,000.
* Billions of dollars are being spent on incarceration, which could be easily & more wisely spent on strengthening the infrastructure such as : Education, Technology, Disease Control, Public Housing, Healthcare, Military, And Adult Vocational Training, To put Americans back to work, instead of coming home after 20 years of Incarceration and resulting back to crime. When are we going to actually put into practice the phrase : " REHABILITATION OVER INCARCERATION ".

Before coming to America as an immigrate, I was born on October 10th 1983 In the small southern European Nation of Albania, where genocide was running rapid, and survival was scarce. I was the fourth of five children born to Bajram & Rushe Celaj. Growing up on a hills side village, under privileged & poverty stricken, my father had no choice but to leave our family when I was 6 years old, to come to American in hopes of starting a better life for us. Once my father left, Life in Albania was extremely hard for my mother. Alone with my four other siblings, I had to watch my mother struggle just so we could have something to eat. More times then less, we would get by on just one meal a day.

A year after my father left, my mother was savagely & viciously attacked, As my uncle attempted to RAPE her infront of me. Fortunately I was able to hit him on the head with a stick & call for help. In 1995, My father was finally able to bring my whole family to the United States.
We arrived in New York City, and from the moment that the airplane first flew over the City, my young eyes & mind were AWE STRUCK. I along with my brothers (Jetmir and Jerry), my sisters (Selvie and Sadie), And parents, moved into a one bed room apartment in the Bronx. My parents had obtained nightly jobs cleaning office buildings. No one in our family spoke any English.

Coming to America, I was full of hope that I would finally be able to persue an education, but unbeknownst to me, social & economic aspects of life played a big part in who you are even in American Educational Institutions. I was enrolled into school, and because I spoke no English, I was constantly picked on by all of the kids. Being as though my family was poor, my clothes were cheap & usually hand-me-downs from thrift stores or donated to our family by people in the community. For these reasons, instead of receiving an education, all I did was learn how to fight at school. Adventually I was suspended from school because of an incident in which two boys in my class were making fun of a Mexican girl who spoke no English either, When she started to cry, I was so hurt, It made me so upset that I assaulted the two boys & was kicked out of school. After that incident, I never went back to school.

With my parents working at night & mostly sleeping during the day, it left me with plenty of unsupervised time to rip & run the streets doing as I saw fit. I started hanging around the older guys, and in return for their friendship, I would do things for them. Such as, steal cars, hold drugs and whatever else they could manipulate me into doing.

I was young, naive, stupid & extremely lonely, looking for some sort of acceptance in a country where I felt outcasted & rejected.

Even with all of the mischief & crime I was being introduced to, I still held onto my caring, loving sensitive, protective & maternal nature. With my mother's attempted rape still fresh in my mind & forever burned into my memory, I kept an instinctive & protective eye out for oppression, especially female oppression. I have always been one to lend a helping hand. I would help all the older ladies that lived in my building and around the way with everything from carrying their food bags, getting their cars out of the snow, holding hands to cross the streets, making sure they were safe and much more.

Sadly, At the age of 17, I went to New York State Prison for burglary, and spend five years there. To be perfectly Honest, At that point in my life, all I could think about was getting out of prison & doing more crime. Adventually, I did get out of prison & also committed more crime, Namely, the one I am in prison for now. I stole from drug dealers, stole cars, stole

& sold drugs, I even robbed a few drug dealers. Even though the potential was there, through all of my crimes no one was HURT.

December 7th 2012, I married the love of my life, my girlfriend Nicole while in prison. She is the best thing that has ever happened to me in this life time. I know what love is now, I know how to love and be loved and all that is because of her. We have no kids, we love kids more then anything in this world and yet we are scared to death that we might never get the chance to have kids because of the time I have in prison. My mother in-law is 75 years old, my wife has no brothers or sisters. My wife is a very good person and has never in her life been in any trouble. I have grown in many ways because of her. I just want to be able to one day get out of prison and be a good husband to her and god willing a good father to a cute little boy or girl. I have made mistakes and big ones. I should pay for what I did. But 50 years for what I did is a death sentence and it could not be justice in anyway not in a beautiful country like this one. I stay up at night and cant sleep because of the regrets I have for what I have done. I could be the poster CHILD for the words " SORRY AND REGRET ".

My beautiful wife together with my family and members of " FAMM " (Families, Against, Mandatory, Minimums) We continue to fight, against the unconstitutional, unjustified & overly harsh mandatory minimum sentences.

50 years for two gun charges is cruel & unusual punishment as defined by the United States Constitution. I will be looking forward to your response, in hopes that we can talk about the mandatory minimum sentences. If not, could you please point me in the right direction of someone who can help me.

Once again, thank you very much for your time and for reading this letter, Your help and time is very very very much appreciated.

Thank you and may god bless you.
Din Celaj.

Sent from my iPhone
Nicole

Public Affairs

From: Debra Bennett [redacted]
Sent: Sunday, July 03, 2016 9:21 PM
To: Public Affairs
Subject: RE: COMMENTS/ 924(c) Stacking provisions ELIMINATED

Date:7.3.16

From: Debra Bennett
[redacted]

SUBJECT RE: COMMENTS/ 924(c) Stacking provisions ELIMINATED

U.S. Sentencing Commission:

I unequivocally concur with the United States Sentencing Commission's recommendation to amend 18 U.S.C. 924(c) and strongly urge your agency to introduce or pass legislation and guideline that will eliminate 924(c) stacking provision. This illogical practice causes individuals without prior violent convictions or prior felonies to be condemned to hard sentences that average 20 years and in some cases exceed 300 YEARS!

Extreme sentences like these that involve no personal injury or physical harm go against fair punishment and just sentencing. Testimony throughout the country from judges, prosecutors and defense attorney's alike have repeatedly identified the stacking penalties of section 924(c) as frequently producing unjust and severe sentences. Your 2011 repost to Congress (titled "Mandatory Minimum Penalties in the Federal Criminal Justice System") has highlighted racial disparities as well.

I suggest the following be remedied as soon as possible:

-The U.S. Sentencing Commission should ELIMINATE the "stacking requirement and amend 19 USC 924(c) to give the sentencing court discretion to impose sentences for multiple violations of section 924(c), concurrently.

- The U.S. Sentencing Commission should consider amending 18 U.S.C. 924(c) so that the enhanced mandatory minimum penalties for a "second or subsequent" offense apply only to prior convictions, and should also consider amending the penalties for such offenses to shorter terms.

- The U.S. Sentencing Commission should make these changes apply RETROACTIVELY

- The U.S. Sentencing Commission should consider legislation that establishes laws that would assist FIRST-TIME offenders by applying less severe (punishment) sentencing guidelines.

I expect and pray that these recommendations, and my concerns, will be addressed in a timely manner. There are to many lives at stake, and thousands of families have already suffered far too long. Please help.

I respectfully submit these recommendations and suggestions.
Debra L. Bennett

_____
Signature

Public Affairs

From: [redacted]
Sent: Monday, July 25, 2016 10:07 PM
To: Public Affairs
Subject: John Franklin

To whom it may concern:

I am writing requesting that attention and reconsideration of the mandatory sentencing 884(i) (arson) enhanced with 924 (c)(1)(B)(ii) (use of a destructive device), especially when the device is a Molotov cocktail used to start a fire solely on property.

My brother received a 35 year sentence which seems unjust for the crime committed. The American trust is in the court system to decide what is just and fair for crimes committed versus a mandatory sentence which does not require the knowledge, wisdom, and consideration of our democratic justice system.

Thank you in advance for your consideration,

Nila Franklin Schwab
[redacted]

Public Affairs

From: Terri Day [redacted]
Sent: Friday, June 24, 2016 1:12 AM
To: Public Affairs
Subject: Attention: Public Affairs – Priorities Comment

I fully support FAMM (Families Against Mandatory Minimums) and RSOL (Reform Sex Offender Laws) because my 25 yro son was given a mandatory minimum sentence that even the judge felt was outrageous and unjust. My son was threatened with life in prison if he took his case to trial because they promised him he would lose. My son paid for and passed lie detector tests and psychological exams that proved beyond a doubt that he was not, nor has he ever been a sexual predator. It was of no help to his case and he has served 5 years now of a 15 year sentence and has been labeled a child predator. My son was connected to an online file sharing program that had pornography as well as some child pornography. My son was a network specialist and is very good on computers. He now has a Lifetime sentence of never being able to work on computers again.

My son had two jobs and had saved enough money to buy his own home and he was supporting his disabled wife at the time of his arrest. His dad had recently passed away and he was having some emotional problems at the time because of it. My son had a nervous break down after being incarcerated and instead of receiving counselling or treatment, he was put in solitary confinement several times and most recently for 75 days with no air conditioning in the hottest part of last summer (2015.) He also had impacted wisdom teeth at the time that was causing unbearable pain. That is cruel and inhumane treatment. I am not familiar with each sentencing law or guideline that exactly pertains to my son's case. I just know that almost all of the ones I've read need to change because of the injustice and suffering that they cause and how they leave people without any hope of a life in or out of prison. Hopelessness doesn't belong in this country or in our prisons. I pray with all my heart that there still are compassionate people left in positions of power that really do care and can make the changes that need to be made.

I have copied information from the RSOL website: http://nationalrsol.org/ because they express mine and many other millions of people's visions and missions for this cause.

Our Vision:

RSOL envisions effective, fact-based sexual offense laws and policies which promote public safety, safeguard civil liberties, honor human dignity, and offer holistic prevention, healing, and restoration.

Our Mission:

RSOL will promote laws and programs:

limiting registry access strictly to law enforcement agencies; terminating registry requirements upon completion of a court-imposed sentence; reversing retroactively applied restrictions; reforming civil commitment processes; rehumanizing, rehabilitating, and reintegrating former offenders; increasing public safety by reducing sexual offenses; and reducing acts of discrimination, hatred, and violence directed at sexual offenders.
Our Goals:

RSOL will:

promote laws targeting harmful acts rather than entire classes of people; promote limiting registry access to law enforcement agencies only; support removal of residency and proximity restrictions against registrants after their court-imposed sentence is satisfied; support litigation and legislation which remove or prevent retroactive increases in

registration requirements and restrictions; advocate to limit post-prison civil commitment strictly to extraordinary cases where the state proves that the person presents a danger to the community; promote treatment of civilly committed persons with the goal of reintegration back into society; advocate for review and removal of currently committed persons who do not meet the dangerousness criteria, without imposing an additional financial burden on those persons; promote laws which replace lifetime supervision/parole with a system that includes ongoing assessments for termination of supervision; encourage fair and balanced trials, proportional sentencing, reasonable statutes of limitation, and the elimination of mandatory minimum sentencing; discourage discrimination, violence, and vigilantism toward those accused or convicted of a sexual offense; seek out and support programs which effectively reintegrate and rehabilitate former offenders; seek out and support programs which effectively prevent new sexual offenses through intervention and community education; and promote healthy, trusting human interaction by replacing fear and panic with solid facts and reason.
Our Assertions:

Sex offender registries were originally presented as a means for tracking persons convicted of the most heinous offenses, but their reach has expanded exponentially to include even teen sexting and consensual relations between young people; Public registries provide no measurable protection for children or the general public yet endanger the well being of children and family members of registrants; Public registration, proximity restrictions, and residency restrictions that are extended beyond an individual's sentence are punitive and thereby violate protected constitutional rights; Evidence-based policies and programs can reliably reduce new sexual offenses and thus make our communities safer.
The misinformation and stigmatization used to justify harsh sexual offense laws undermine the welfare of society, creating unnecessary panic and distrust; Choosing to set apart any group of people and deny them civil, constitutional, and human rights threatens the rights of every person in our nation.

With Respect and Broken-heartedness,
Terri Day

Public Affairs

From: [redacted]
Sent: Saturday, July 02, 2016 10:25 AM
To: Public Affairs
Subject: (no subject)

United States Sentencing Commission
Attention: Public Affairs – Priorities Comment

I am writing to express my concern about our country's use of outdated sentencing guidelines for child pornography offenses. Please consider my argument for reassessing the outdated guidelines used to determine mandatory minimums for this and countless other offenses.

The PRODUCTION of child pornography is the real crime in need of harsh sentencing. Concentrate on the perpetrators responsible for this hideous treachery as well as the websites that allow such filth to be accessed. If child pornography is a crime then regulate the access of such horrible material. Putting away a person who LOOKS at these photos, videos and the such is senseless and a waste of tax payer dollars. Disgusting thoughts aside-a majority of these offenders have not harmed a child (individuals like my nephew fall into this category). Until there is more concentration on cracking down on the websites allowing this smut to be shown-the problem will NEVER be solved and more and more people will be needlessly put away because of the lack of attention to the root of the problem.

That being said, the mandatory minimums are automatic prison terms decided by Congress, not judges-you have the power to change these guidelines to better fit the current cyber structure. These predetermined prison sentences are based solely on a generalized criteria from years past and not on the individual case which is creating a one-size-fits-all punishment. This means that in thousands of cases every year, the punishment does not fit the crime or the offender. Our prisons are bursting at the seams with many inmates who could benefit from rehabilitation rather than a prison sentence which is costing taxpayers billions a year to support.

I am not saying that every inmate can be rehabilitated-many consider prison a lifestyle choice; however, there are a select few who want to have a second chance-a second chance rehabilitation programs could offer.

In addition to rehabilitation programs in lieu of lengthy prison sentences-the lack of rehabilitation programs WITHIN our prison systems practically guarantees that the recidivism rates remain high as well. It is appalling that no one can see the benefits these programs can provide. Do we want to solve the behaviors behind the crimes or babysit behaviors until they are able to commit the crime again? At least TRY to salvage the individual by considering all aspects of the character and lifestyle of the individual instead of placing the same judgment on different situations because it is morally unacceptable. That person may not fit the monster label as badly as the next person.

We've ruined enough lives and wasted enough money because of the mandatory minimum sentences carried out due to an outdated guideline structure. It's time to reverse course. I ask you to introduce or support federal legislation to reform or abolish mandatory minimum sentencing laws today. Remove outdated guidelines for more sensible, relevant, actions as well as using more discriminatory techniques to determine the severity of ANY crime, including child pornography offenders (WITH the exception of the PRODUCERS and EXPLOITATION of such trash) instead of adopting a "one size fits all" campaign. Just locking an individual away does not always fix the problem and MANY individuals do not deserve the sentences mandatory minimums require.

Thank you for hearing my voice... I have faith that you will consider all of our voices on this issue. Have faith in our suggestions please-we have faith in you.

Sincerely,

Barbara VanVolkenburg

Public Affairs

From: Bill Egert [redacted]
Sent: Sunday, July 24, 2016 9:58 PM
To: Public Affairs
Subject: U.S.S.C.Request for Public Comment RE: Proposed 2017 Priorities

Hubert W. Egert
[redacted]

July 24, 2016

Dear U.S. Sentencing Commission Members,

Your assigning priority attention to continuation of work involving "Mandatory Minimum Penalties" is appreciated. Without question, it is essential work to better meet a host of needs, public and judicial.

I have reviewed the Attorney Generals August 12, 2013 Memorandum concerning Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases and respectfully bring the following to your attention.

I note that the Memorandum mandating refined charging policies towards eliminating unduly harsh or long sentences for certain non-violent, low level drug offenders appears to be a forward looking action matter. It says nothing as to directing retroactive actions for certain non-violent, low level drug offenders who are imprisoned and received enhanced unduly harsh or long sentences prior to the refined charging policy. The lack of retroactive action where such cases exist, whether enhanced sentences were arrived at through plea agreement or jury trial, is not in my lay person opinion, fair administration of justice. This is a matter of importance deserving of your attention.

Relative to the above and on a personal note, I am a retired 83 year old senior citizen concerned for my 39 year old grandson, Donavan Michael [redacted] Donavan is currently incarcerated at the Atwater United States Penitentiary, California.He is serving an enhanced life sentence. The federal felony charge for which Donavan was convicted by jury trial involved a non-violent drug offense. On September 23, 2010 he was sentenced [redacted] to a term of life without the possibility of parole for his role in an alleged drug conspiracy. His sentence was enhanced as a result of the Court taking into account his prior convictions by the State of North Dakota. These prior convictions were non-violent low level drug offenses and involved possession of methamphetamine [redacted] and possession of drug paraphernalia [redacted] Donavan, unfortunately became a drug user at a young age and turned to low level dealer to support his drug addiction. He has been incarcerated by federal authorities since April 12,2009. I find his sentence incomprehensible and that he is left with no hope as to retroactive fair administration of justice???

To conclude, I thank you for your important work and for allowing public comment.

Sincerely,

Sgd. Hubert W. Egert

Public Affairs

From: [redacted]
Sent: Monday, June 13, 2016 9:08 PM
To: Public Affairs
Subject: suggestions for sentence reform

I understand the commission is asking for any public feedback on sentence reform. First I would like to say being a tax paying citizen of this great nation our prison system is broken. Recidivism exists. Prison is not rehabilitating.. Prisons cost tax payers a lot of money. is this a business? Or is this a system built to reform and promote success after a person has served his time. All law abiding citizens want a prisoner to be reformed so that he does not commit the crimes again..

I do not believe in mandatory minimums. I feel the sentence should reflect the seriousness of the crime but not have a minimum to serve just because you must serve a certain amount of time for the crime. Each case should be evaluated by its own seriousness. I do not believe in minimums at all. I do however believe in maximum sentence terms because if you have a prosecutor or judge who may have personal interests they should not sentence a person beyond a reasonable time. If a non violent felon is serving minimum sentences but are model prisoners who have family to return to, why not let them serve time in their own home, eat their own food etc. this would save the taxpayers a lot of money. They can be monitored and given jobs to learn how to work in a trade so that they can become model citizens. If they fail then they are given consequences for their failure. We need to try some new plans especially for non violent crimes. Some of the mandatory sentences are just on a federal level many states do not stack or have mandatory minimums. Please rethink these laws they are just keeping people in prisons who could be better rehabilitated outside sooner then later.
Our government clearly needs to rethink the sentence guidelines especially minimum terms and stacking .
thank you for your time and consideration.

Public Affairs

From: [redacted]
Sent: Sunday, June 19, 2016 10:57 AM
To: Public Affairs
Subject: Sentencing Guidelines

To whom it may concern:

I am writing this letter cause I am under the understanding that the sentencing commission is accepting public input. It is my humble opinion that the criminal justice system, in far too many situations, especially those based around drug offenses is no longer about public safety or rehabilitation. First and foremost we must end mandatory minimum guidelines. They are almost always way to severe. In many cases these guidelines are putting low level "drug dealers" with no history of violence behind bars for 10,15,25 years. The reason I put quotations around drug dealers is that far to often the laws conclude that after a certain amount of drug is discovered then they must be dealers when in fact many of them are simply just users with a pill bottle full of a prescription drug with no intention of selling. Those sentences are often harsher then sentences for, child molestation, sexual assault, and rape. Secondly many of these inmates are first time offenders. We need to give first time offenders shorter prison sentences. Maybe one option would be more supervised release and less prison time. The reality now more then ever is that prisons have almost zero rehabilitation in them. The programs for rehabilitation are few and far between, often in professions that convicted felons cannot even gain employment. Yet those programs are paid for by the prisoners family. Many times creating an undue burden upon the family in false hopes that it may benefit there loved one upon release from prison. Then to make matters worse if they get transferred before they complete the program, often the program is not available at the next prison. No reimbursement to the family. So basically they just threw there hard earned money away.
Last, but definitely not least, is this country's decision to go towards private prisons. Privatization of prisons has led to longer sentencing mainly on drug offenses, as the federal government pays for the detention of drug offenders, not murderers or rapists or violent criminals. No just drug offenses. Privatization of prisons is today's form of slavery. Corporations are making millions of dollars behind housing low level drug offenders for unreasonably long sentences. Instead of dumping millions of not billions of dollars into housing drug offenders, and fattening the pockets of already extremely wealthy corporations who only view the inmates as dollars. Maybe we should use more of that money on drug treatment programs, on vocational training for inmates. Real training in fields they can actually obtain employment. This war on drugs or at minimum the way we have elected to fight this war on drugs has been a complete failure. We have one of the highest incarceration rates in the world, yet claim to be home of the free. As a country we have one of the highest rates of drug use and abuse in both minors and adults, yet to receive treatment in most cases you must spend substantial amounts of money on private drug rehabilitation programs. It is our duty as Americans to correct these issues before they take another generation of our people.
In closing it is my opinion that we need to end mandatory minimums for drug offenses, offer more supervised release and less prison time for first time offenders and abolish this catastrophic decision to turn our people in cattle for these corporations to exploit. Please take the time and the effort to right this wrong we have elected to impose on our own people. These decisions effect everyone these days. There is no family who has not been negatively impacted by drugs. Now is the time to take drastic measures to ensure that both your kids and mine along with our future grandchildren and generations beyond will not have to face this uphill battle alone. Thank you for your time and once again I encourage you to take bold steps to solve these problems and rid the system of the corporate greed.

Corey Martin
[redacted]

Public Affairs

From: Nicole Celaj [redacted]
Sent: Saturday, July 16, 2016 3:20 PM
To: Public Affairs
Cc: Public Comment
Subject: Statutory Mandatory Minimum Sentencing is Unjust

United States Sentencing Commission
One Columbus Circle,
NE Suite 2-500, South Lobby
Washington, DC 200002-8002

Re: Statutory Mandatory Minimum Sentencing is Unjust

Good afternoon Chair Saris

I am writing on behalf of my husband Din Celaj & our family. We plead to be heard & seek to find relief from these life-like "mandatory minimum" sentences. Mandatory stacking of penalties is unjust & cruel. We must expand the safety valve & find relief for 924(c). Sentencing should be appropriate & better development of guidelines for re-entry must be established.

My husband was literally sentenced to "1 month time served" for all his crimes, however has just completed his 9th year in prison. The judge knew that he could not escape the stacking provision set-up for 924-c, & therefore was as lenient as possible leaving only the mandatory minimum that he had no control over.

My husband was arrested at 23 years old. Din did not hurt anyone & it's not fair to him or our family that he should serve 50 years for victimless crimes. He has grown up so much in the 9 years he has been away & he deserves another chance to live as a law abiding person & he will do just that if given the chance. Long ago he was a young wild uneducated boy from Albania who pretty much grew up in the streets learning life lessons from all the wrong people & he was not mature enough to see the consequences of his actions. Today he is 32 years old & a very different man. He yearns to be free & live a quiet life. We yearn to have a family of our own & the window is quickly closing.

I don't quite understand how the law can be so vague yet so definite at the same time. People are locked up & because it is categorized as "violent" aka having a gun while committing a crime = 25 years minimum. How can this really be so? He knocked on a door to a home that no-one was supposed to be home. When the housekeeper answered he walked away… = no crime committed. Still he is locked up as a violent felon because his co-defendants say they were there for a robbery & that he had a gun. It wasn't used. It wasn't even pulled out. No-one was even aware of its presence – so this should not be considered violent & he should not receive 25 years for doing this X2.

We know that he did a lot of stupid things but he never hurt anyone & he deserves to have another chance. We think that the sentence should fit the crime & he has done more than enough time already. We think that you should bring back parole & give these young men a chance to live on the right side of the law.

Respectfully

Nicole Celaj

July 15, 2016

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DE 20002-8002

Re. Proposed Priorities for Amendment Cycle

This letter is in response to your request for public comment on the Commission's proposed priorities for the amendment cycle ending May 1, 2017. In particular, I would like to address your "study of approaches to encourage the use of alternatives to incarceration". While it is gratifying to see this topic on your agenda for the coming year, it is nevertheless concerning that the focus is on further study rather than action and I believe it is important to comment on that.

First, let me acknowledge that I am currently an inmate at a large low security federal prison, which may discredit what I have to say; however, I would offer the suggestion that those caught up in the brutal absurdity of this system have an insight that should be carefully considered.

The facility I am in houses hundreds of non-violent, first-time offenders along with a substantial population of elderly and medically impaired inmates. It is impossible to live among this particular population and not ask if this one-size-fits-all system is really the best alternative for our society, or is it really a monumental and unnecessary waste of human potential and tax payer dollars.

As the commission is well aware, over the past 30+ years the incarceration rate in this country has exploded to a level that is now generally acknowledged to be unsustainable. Unbelievably, the United States incarcerates it's citizens at a rate that is many times that of other Western democracies such as Canada, England and Germany.

This at a time that our country is running a deficit approaching $20 trillion and we are facing increasing pressure against a wide array of challenges: military demands in the Middle East, increased national security against terrorism here at home, management of the immigration issue, the rebuilding of our infrastructure, improving our educational system - on and on. Yet, we continue to spend billions upon billions of dollars on a medieval incarceration scheme that often creates more problems than it solves.

Members of the Commission, it is long past time for some honesty in dealing with this system: it is not working, we can't afford it and the American people are not being told the truth about what their dollars are buying. Since Congress has repeatedly shown itself incapable of dealing with this in a forthright manner the door is open for the Commission to step up and take an aggressive lead in crafting the corrections that are so obviously needed.

With that said, and with no disrespect intended, it is hard to imagine why this issue requires more study. There have already been hundreds of studies, the testimony of countless federal judges, the convening of special congressional commissions and an avalanche of criminal justice data. Additionally, other leading democracies around the world have already shown that there are intelligent alternatives to the wasteful, ineffective and damaging institution of the American prison system.

Of course to make any real progress it will require the political courage to move our country away from our current mass-incarceration, vengeance-based mentality to a system that deals effectively with those who are a true threat to society while employing more productive alternatives for the many thousands of non-violent, first-time offenders who pose no threat whatsoever.

Everyone understands that if a crime is committed there are and should be consequences; however, since the 1980s our criminal justice system has evolved into a mechanism that hands out increasingly harsh punishments against a wide array of offenses without effectively weighing the costs of that punishment against the benefits to society. The federal system makes no effort whatsoever to evaluate individual offenders in terms of their actual threat to society, the true impact of their crime or their likelihood of repeating the crime. Other countries are already doing this and individual states are making an effort to do so. As a Texas legislator said when addressing the needs of that state, "We need to do a better job of differentiating between dangerous people and somebody we're simply mad at." The federal government has fallen behind the thought leaders in this area rather than providing the leadership the American people expect.

For many thousands of incarcerated individuals there are numerous alternatives to a traditional prison sentence that would make much more sense in terms of cost, public safety and even lower recidivism rates while still effectively dealing with the offense. Some combination of things like fines, restitution, community service and treatment programs along with electronic monitoring or home confinement would deal with the first time offender in a meaningful way without creating an undue burden on society. This approach would also provide a better path for those convicted of a crime to continue on as productive members of society rather than being crushed by a harsh and unforgiving system.

Perhaps one of the most pressing needs for alternatives to incarceration is for elderly and medically afflicted individuals. The BOP's Compassionate Release Program could help but as you've seen it is rarely used. Additionally, as the DOJ inspector general report clearly showed, the BOP is not well equipped to deal with the needs of these inmates within a traditional prison environment. In the vast majority of cases, these individuals are not a threat to society and home confinement would accomplish the broad needs of society at a much lower cost to taxpayers. I urge the Commission to address this need in particular.

We also need to be honest about the severity of the punishment that is too often used today: it has gone much too far. Over the past several decades our system has moved well beyond anything that could be considered fair punishment to a point where lives and families are simply being destroyed. We went through two hundred years of our history without these draconian measures - has human psychology suddenly changed to require these steps? Where in our constitution was it ever envisioned that the government's obliteration of a man's life was a fair response to the commission of a crime? Why is it only in recent years that this practice has somehow become the norm? What has the benefit of this radical turn been to our society?

Members of the Commission, it is obvious to even the most casual observer that we have reached an inflection point in this country. As we have seen with the recent racial tensions affecting us all, a profound lack of trust and respect for the criminal justice system that our Congress has crafted over the past several decades rests at the very foundation of the anger that many people are feeling.

Regardless of political affiliation the American people are fed up with the inept bumbling of our government and it's various agencies. They are sick and tired of being lied to. They have had it with a government that can't solve pressing problems, or even talk about them in a productive way. They are especially fed up with having their tax dollars needlessly squandered.
As an important part of our justice system I urge you to stop the endless studying and begin to make the changes that are so obviously needed - and to do so with the urgency that the American people are demanding.

Thank you,
Gary Schneider

Public Affairs

From: Jana Wilkerson [redacted]
Sent: Tuesday, June 14, 2016 2:33 PM
To: Public Affairs
Cc: [redacted]
Subject: Public Comment: Sentencing Issues 2017 Meeting

Importance: High

Good Afternoon,

I would like to present the issue of retroactivity for the deleting of the burglary of dwelling as a enumerated offense as a crime of violence. Now that this has been removed from the enumerated offense it needs to be discussed about making this retroactive. My husband was given 17 years in a Federal prison due to him being careered on a burglary charge back from 1999. If this was to be made retroactive his time would be reduced and the time will only be for the current charge verses additional time for crimes he has already done the time for. So I ask that this issue is proposed for new or amended guidelines going into the 2017 meeting.

Thank You,

Jana Wilkerson
Account Manager
Strategic Accounts

Public Affairs

From: [redacted]
Sent: Thursday, June 16, 2016 7:43 AM
To: Public Affairs
Subject: Non-violent drug offenders

I have love ones serving long sentences for non-violent drug offenses for small quantities of crack. Can you all consider doing a 2 level reduction for career offenders who didn't get any relief for none of the crack law. Thank you for your consideration.

Public Affairs

From: chesery artis [redacted]
Sent: Wednesday, June 29, 2016 6:41 AM
To: Public Affairs
Subject: Vagueness of Crimes of Violence Definition

There has been great stride in defining the robbery definition, but how do you plan on attacking what truly is a crime of violence when addressing arson, my husband was charged with burning an unoccupied commercial building (as it states in his PSR), that was not surrounded by any residential dwellings in close proximity,yet this charge was used as a predicate offense to sentence him as a career offender, does this situation fit the standards of residual clause, because crime of violence is defined as the threat of physical use to another or property,but if this is a commercial dwelling that is unoccupied, where is the violence,whom is the violence against???

Public Affairs

From: Davida Perry [redacted]
Sent: Thursday, June 23, 2016 10:10 AM
To: Public Affairs
Subject: Public Comment on Proposed Priorities for 2017

I think they need to fix the career offender guideline. My husband got convicted in 2011 and got sentenced 7 1/2 years for small amount of drugs because he had two priors from 1996-1997 . What I can't understand is that he already served his time for those crimes and the other person that got caught with him; didn't have any felonys so that went to rehab and got time served and it was dismissed. This justice system makes no damn sense. You wanna lock someone up for a small amount of drugs when their are kingpins out here making millions !!! Thank you, Davida Perry

Sent from my iPhone

Public Affairs

From: Tera Creque [redacted]
Sent: Thursday, June 23, 2016 10:28 AM
To: Public Affairs
Subject: Reform

Hello,

My name is Tera Creque and my boyfriend is serving time on an enhanced sentence in Beaumont at the federal penetenfiary. We are 2yrs into a 15year sentence. He is indeed a habitual/repeat offender. He indeed needs to serve time. But not 15yrs for 5grams of meth. Nobody was hurt and or killed. One of his priors was shooting at an unoccupied vehicle. One of those rounds did shatter a window by accident. That is dangerous. Yes I agree.

My boyfriend and I are both recovering addicts. He has been in and out of prison almost 20+ Yrs. Basically since he was 14. He is now almost 36 with no education and no true rehab. He will be in his late 40s when he is released if nothing changes. My concern is this man has never been given a chance. Where is TRUE rehab? Where are beneficial programs in prison? Why such a long sentence? Makes absolutely no sense. Why are we crippling our men over drugs? Drugs aren't going to go away so why the over punishment? We all pay our dues. We must. But these long sentences are unjust. They are and its obvious more and more why they are. Its money and its unfair. You got to treat the problem. Not the symptom. Prison is treating the symptom.

My boyfriend can't even be my husband. We are not getting married in prison. Yes he has a past. I do to. But I some how turned my life around and have become a firefighter/EMT. I currently work in an ER where the demographics are poor and full of drugs. Its sad. I remember those days. I don't know how I'm not strung out or dead. But I'm not. Took almost 20yrs to figure it out. But I did and I'm here now.

I would appreciate if you can reconsider retroacting the new amended Career Offender guidelines that are dropping in August. I would also like if you guys could cut the 85% to 50% or something for time served. Just decreasing that alone would help with inflation. I mean its just unjust and unfair. The federal government is like "Mommy Dearest" when it comes to sentencing. Lol. Seriously. Enough already. Can we get real justice please.

Tera Creque

[redacted]

Public Affairs

From: Carlos Buenrostro [redacted]
Sent: Wednesday, July 13, 2016 6:17 PM
To: Public Affairs
Subject: Public Affairs – Priorities Comment

Beloved members of the U.S. Sentencing Commission,

My name is Carlos Buenrostro. I am a 37-year old electronics technician, and life-long resident of Stockton, California. First off, I would like to commend your entire staff, on the great strides you have taken in making our criminal justice system smarter, fairer, and more humane. Your diligence and commitment, to making new positive changes, to federal sentencing laws that have shattered so many lives and families is greatly appreciated and long overdue. Due to your tireless work and persistent efforts, the American people can commence to repair the damage done by a criminal justice system which has for far too long been cruel, unjust, and inefficient. However, as you're all very well aware, there are still many issues regarding our current sentencing guidelines that must be addressed and repaired.

I am reaching out to you today because I know first-hand, what it feels like to be a member of a family that has been shattered by our country's outdated laws. My father, Jose Luis Buenrostro #08589-097, has spent the past 21 years of his life in the federal prison system, where he is currently serving a "LIFE" sentence for a non-violent drug offence. My father was given a "LIFE" sentence due to sentencing enhancements he received under Section 4B1.1. My father has been incarcerated so long, that my daughter who is now 17 years old and off to college this fall, has lived all of her life knowing her grandfather only behind bars. The same goes for all of his grandsons and granddaughters, and yet they love him dearly and wish whole heartedly more than anything in the world, that he could one day come home. He has suffered the loss of his mother, father, a sister, and a brother while incarcerated. He has now exhausted all opportunities to appeal and because of outdated laws that are now recognized as unjust, my father faces spending the rest of his life in prison.

I believe the enhancements under Section 4B1.1 should be a top priority to be addressed by the Commission during the upcoming amendment cycle, because they are undoubtedly unfair and unjust. The Commission should look more closely into the sentencing enhancements given to people due to their prior convictions under Section 4B1.1, because they unfairly allow the courts to sentence a person to a "LIFE" sentence after their second offense, even if that offence is a minor drug offense. These enhancements create sentences that are unjust for two reasons: (1) the person has already paid their debt to society by serving whatever time they were given for that offence and (2) the courts can use that prior conviction to sentence a person to "LIFE", no matter the amount of drugs involved, resulting in unnecessarily cruel and harsh sentences for thousands of prisoners. The extensively long sentences given to people due to these unjust enhancements, are especially harsh to those with no history of violence on their record. The courts use not only the statute punishment, but in addition, they punish people further with these enhancements resulting in unnecessarily lengthy sentences, which for many are excessive and unfair. In most cases, the enhancements under Section 4B1.1 are the main reason a person receives a life sentence, including my father's.

These enhancements should be amended to clearly state under what circumstances a "LIFE" sentence is applicable and appropriate. As the law stands now, a person convicted on their second offence for a simple drug possession charge of a couple of grams, receives the same punishment for a third offence, as a person convicted for distributing multiple kilograms and committing an act of violence on their second offence. The result is far too many people being incarcerated for far too long, costing tax payers billions of dollars and filling

up jail cells which could be more appropriately used to incarcerate dangerous violent people who truly pose a danger to society. By providing amendments that add clarity to these enhancements, the commission could effectively help reduce the nations cost of incarceration and overcapacity of prisons. Many prisoners who have been locked up for far too long and have already paid their debt to society, would receive substantial sentence reductions which would free up government funds and make room for people who truly deserve to be in prison for "LIFE". There have been murderers, rapists, kidnappers, sex offenders, and child molesters who have been able to come home to their families before my father, and thousands of other prisoners with similar circumstances who have already served extensively long prison sentences, which I believe makes a mockery of our justice system.

For these reasons, I whole heartedly and respectfully ask the members United States Sentencing Commission, to do what's right, and continue their great work in reforming our countries mandatory minimum sentencing guidelines which are without a doubt inefficient, unfair, and unjust. I greatly admire, respect, and commend the work you all do, and your tireless efforts to reform our criminal justice system. With these new positive changes, future generations will not have to endure the great pain, suffering, and emptiness caused by these unjust laws that have placed such a great burden on so many American families, for far too long. I would like to thank you for your time and consideration in reading this letter. May God bless you all, and may God bless the United States of America.

Most Respectfully,

Carlos Buenrostro

Sent from Outlook

Andre Cooper 7/19/16

[redacted]

Re: Juvenile Life Amendments

Dear Committee,

I would like to make a comment and, or suggest to propose a new guideline amendment and make it retroactive based on several Supreme Court decisions that says sentencing juvenile to life sentences violate the Eighth Amendment.

Well, I'm writing the commission, personally, because I am doing a life sentence for crimes that were based on juvenile conduct. I'm in deseparate need of help from an unconstitutional life sentence.

I'm a 37 year old Black man. I came to prison at the age of 23 yrs old and left two sons at the tender age of 3 years old. One of my sons' mother died in a car accident two months before I was incarcerated. He was left to live with his grandmother while I faced a federal indictment. My other son was left to be raised by his teenage mother without the help or assistance of me because of incarceration.

My sentence is in violation of the Eighth Amendment. This is so based on several significant Supreme Court decisions, which the latest one is called, Miller v. Alabama and Montgomery v Louisiana.

Now, I was alleged to be part of this violent cocaine RICO enterprise. A small street gang, not affiliated with a cartel or anything of

that nature or size. This enterprise started in or around the year of 1996 and lasted all the way up until December of 2002. I was 16 years old at the time this enterprise was started.

Now that time frame is importnant, pertaining to my age at the start of the RICO enterprise because I was charged and convicted for murder and aiding and abetting other violent crimes in furtherance of this RICO enterprise.

The Government through its cooperating witnessess could attest to this fact that, the initial agreementto form the enterprise, sell drugs and commit violent crimes were established at the age of 16 years old. Thus, this agreement was considered towards the determination of my guilt at trial.

Without going into the depth of the evidence, I was found guilty based on my juvenile conduct(agreement) to sell drugs and murder people to protect the enterprise that was established at the age of 16 years old. The Miller case helps my cause but I'm unbale to get any relief for a number of reasons.

With that being the case, I ask that this committee take into account that the sentencing guidelines are unconstitutional, as applied to juvenile offenders because they do not account for the legally recognized diminished culpability of youth.

I ask that your committee take this up in the next session, and take into consideration the defendants with RICO and VICAR cases that started in the conspiracy as juveniles but got indicted in their mid-twenties.

With that being the case, I would like to thank you in advance for your time and patience.

Sincerely,

Mr. Kareem J. Currence
[redacted]

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500, South Lobby
Public Affairs-- Priorities Comment
Washington, D.C. 20002-8002

July 8, 2016

Re: Public Comment on Proposed Priorities for the Sentencing Guidelines for 2017.

Dear Person(s) of interest:

This letter hereby is my public comment, underlying the United States Sentencing Commission's proposed priorities for the 2017 Amendment Cycle -- ending May 1, 2017.

Thus, I have a few suggestions and little to relatively unknown issues plaguing the sentencing courts and defendants alike; which I believe this Commission ought to consider or at least take a look at.

First, I would like to commend the Commission's recognition (as identified by the Commission, as tentative priority number 8), which is: Study of the operation of Chapter Four, Part A of the Guidelines Manual, including (A) the feasibility and appropriateness of using the amount of time served by an offender, as opposed to the sentence imposed, for purposes of calculating criminal history under Chapter Four.

Thus, I believe this study is long overdue and that if the Commission's study on this particular issue culminates to the level of an actual amendment -- that that particular amendment be made retroactive. Because, the convicting jurisdiction of a said offense, should have always factored into how serious the said offense was viewed in individual circumstances.

Second, and my final issue is, that there continues to be a crack/powder a 100:1 disparity embedded (or rather incorporated) in the Career Offender Guideline, U.S.S.G. § 4B1.1. To wit: United States v. Knox, 573 F.3d 441 (7th Cir. 2009) (acknowleding the 100:1 crack/powder disparity that exist in the career offender guidelines); United States v. Knox, 496 Fed. App'x. 649 (7th Cir. 2012)(discussing the quagmire of the Fair Sentencing Act of 2010 and the fact that the career offender guideline under § 4B1.1 does not account and adjust for the 100:1 crack/powder disparity in the career offender guideline to set ranges that will reflect the statute's (21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B)) 18:1 ratio for crack/powder disparity.

Moreover, the crack/powder disparity still exist in the career offender guideline -- even after the statutory change -- and creates an "unwarranted" sentencing disparity of similarly situated defendants (under the career offender guideline).

Cordially,
/s/ Kareem J. Currence

Public Affairs

From: Lia Thao [redacted]
Sent: Tuesday, June 14, 2016 10:20 PM
To: Public Affairs
Subject: Proposed Priorities for 2017

Please can you reconsider these in the coming year? This would give so many families hope for their loved ones to get a chance of coming home.

- Remove the bar on safety valve relief in any case in which a gun was merely present, even if the gun was legally owned and not used in the offense, or was possessed by a codefendant
- Allow federal prisoners with a gun possession (but was not used in the offense) to earn time credits for completing rehabilitative programs and "cash in" those time credits at the end of their sentences for a transfer to a different type of supervision, such as a halfway house;

Thank you.

Public Affairs

From: Joe Jones [redacted]
Sent: Wednesday, June 15, 2016 10:19 PM
To: Public Affairs
Subject: Suggestion: Acquitted Conduct

Please consider doing away with the "2A1.1 cross reference sentencing provision." Thank you for hearing me out.

Public Affairs

From: Mary Roberts [redacted]
Sent: Sunday, June 19, 2016 3:37 PM
To: Public Affairs
Subject: Proposed Priorities for Amendment Cycle (81 FR 37241)

Judge Saris and Members of the USSC,

For the first time in the few years I've been paying attention, Child Pornography crimes are off the list. Please don't give up on this issue. The types of people that are getting caught up in CP are not all monsters, child molesters and rapists. Some are very innocent people that have gotten caught up in something they never intended to be involved in. Some may be guilty of the crime of possession, but are not the type of people that would harm a child and certainly not the type of people that have ever had to defend themselves on the street much less in prison with a label of Sex offender. Some of them are our children! Even others are children with Autism or Asbergers. IT SHOULD BE A CRIME TO THROW SOMEONE WITH AUTISM OR ASBERGERS IN PRISON!!

It's been my experience in talking to several people who were convicted of possession of CP, that it started with what developed into an addiction to adult pornography. Before they knew it, they were finding CP readily available for viewing…click of a mouse or the emails come to them unsolicited. They are not pedophiles and have no interest in children…it was the about the images. When my son was 8 years old and doing homework, he typed in the word "country" but misspelled it and what came up introduced him to a world of pornography. He didn't need to sign in or prove he was an adult. Try it yourself…there is plenty to see without joining a website. That was where his addiction started. It's a shame I never knew until 14 years later when he would receive emails he never asked for with CP images in them and his life was over.

I'm not trying to say that CP shouldn't be illegal….far from it. But ALL of it should be wiped clean from the internet – adult and child porn. And I no longer believe for a minute that it can't be done. Too many GOOD people are falling prey to this industry and with our laws (which should never be so cruel that they scare a person literally to death), there is no where to go except to homelessness and despair. And their families go with them.

Too many people are getting caught up in adult pornography and it's becoming a major problem. As a divorced woman trying to date again, I was appalled that this is what the majority of people are spending their time on. And in the process, they make one click and a virus downloads multiple images and they are ruined for life. The FBI may have even planted that virus to catch anyone who views the images. It's no secret that law enforcement has been trying to entrap anyone they can….for what…budget money??? THESE ARE OUR LIVES THEY ARE PLAYING WITH!!!!

Pornography of any kind needs to be removed from the internet and that should cure the CP problem except for those who are determined to find it and are members of secret websites that share the images….those people belong in prison.

Thank you,

Public Affairs

From: Jan Tillotson [redacted]
Sent: Tuesday, July 05, 2016 7:44 PM
To: Public Affairs
Subject: comments

To Whom It May Concern:

I am writing to you today to express my disappointment with your failure to appropriately address all of the inappropriate sentencing enhancements in relationship to the child pornography laws. I would also like to encourage you to reinstate this issue as a priority for 2017.

The 2010 study that your commission conducted in conjunction with APA clearly found that many of these enhancements are outdated and inappropriate for the current environment. The study also concluded that non contact offenders have both exceptionally low recidivism rates and are highly unlikely to become contact offenders. The study found that because of these enhancements that non-contact offenders often receive much greater penalties than do contact sexual offenders.

These laws are rapidly increasing an already overpopulated prison population. They are incarcerating many otherwise non-criminal first-time offenders, which is destroying families and harming more children than they are actually protecting. Despite these facts determined by your commission you have failed to provide real justice to these men and their families. On the other hand you have recently reduced the sentences of non-violent drug dealers whose actions are far more likely to lead ultimately to child abuse and neglect than are the actions of peer to peer down loaders of child pornography. The only noticeable reason for these decisions seems to be politics rather than justice. It is my understanding that your duty as commissioners is to seek justice for all, even the unpopular and not just another unnecessary political body. I encourage you to have the courage to do what is right rather than what is popular. Thank you.

Jan Tillotson, LSW, CLC
Certified Health Coach

Public Affairs

From: Claudia Maceo [redacted]
Sent: Monday, July 25, 2016 9:14 PM
To: Public Affairs
Subject: US Sentencing Commission

I have a loved one in the BOP who is serving 80 months for transporting child pornography. He is currently housed in the unairconditioned FCI Seagoville while temperatures reach 100 degrees daily. Fortunately he has the resources to purchase two fans and has a bed near a window. While this may not seem particularly punitive, we all know that individual's temperatures flare when the summer temperatures rise. I first petition that these conditions be improved, especially while some inmates enjoy air conditioned housing in the same facility. This is an inequity that seems psychologically punitive.

When I was first informed about this inmate's crime, I was devastated. I could hardly imagine any crime more depraved. One of the lowest moments of my life, and no doubt his life, was listening to the FBI cite the details of his crime at his bond hearing. I am not sure at what point I realized that the man I felt I knew was still in that body that was arrested. I am a Christian, and I realized that God loves him as much as he loves me. At some point, the inmate I care about also discovered that.

Since then, I have read many reports and research about why men, in particular, are drawn to this crime. After two plus years of writing to him almost daily and visiting him almost monthly, I find it appalling that there is such an ineffective system for addressing the reason for his incarceration.
1) Pornography can be an addiction like alcohol or drugs. The interventions and treatment must address this act as an addiction.
2) People who transport child pornography cannot seek psychological help without fear of arrest. There MUST be an intervention step before that happens.
3) It seems clear that the threat of incarceration is not an deterrent for the transporters for child porn. The numbers of perpetrators is huge and growing. The numbers are including younger people who are committing this crime.
4) It is my impression that the number of children who are being abused has not dropped. (I do not personally have numbers for this.)
5) It is my impression that, were he not in the RDAP program for alcohol addictive behaviors that he also had, he would be receiving NO treatment for this other addiction.
6) People in general abhor and fear anyone accused of child abuse, especially related to sex abuse and exploitation. Even within the prison system, the Sex Offenders are considered the lowest of the low and are somewhat protected by assigning them to specific prisons where they are still the bottom of the offender pecking order. I know that there is much to be grateful for there since to be in a more diverse population of inmates, there could be much more violent consequences.

However, until there is more education for the public in general, I maintain that the children who have been abused will continue to unduly suffer from the subtle message that they are tainted by a crime that is considered so heinous.

We must find a way to understand and help those for whom this temptation is more and more available and for whom addictions are emerging in them unwittingly right under their parents' noses. I hear about young unsupervised children gaining access to these porn sites where they might find a normal outlet for their emerging desires, like young people have for generations through magazines. We must communicate fear-free, accurate information about sexuality.

Thank you for your work in improving this part of our justice system.
Claudia Maceo

Public Affairs

From: Terry Hearn [redacted]
Sent: Thursday, July 21, 2016 9:49 AM
To: Public Affairs
Subject: For and to Public Comment on Proposed Priorities of 2017

I would like to make a public comment and request a change to the USSG's regarding the drug weight calculation for a prescription pharmaceutical drug called Dilaudid (hydromorphone) under 2D1.1(c), showing that the way these pills are calculated for sentencing and guideline purposes is arbitrary and create huge unwanted disparities between defendants.

Currently, the guidelines calculate the weight of Dilaudid based on the TOTAL weight of the pill, not the NET actual drug weight of the controlled substance. So for instance, a 8mg pill of dilaudid (containing 8mg's of hydromorphone) can weigh up to 150 mg's, because the pills weight is almost all fillers and binders, and that total weight of the pill is being treated as the weight of the controlled substance. The Dilaudid pill has fillers and binders in order to make the pill a practical size and digestible which take up to 95% of the weight of the pill. These fillers do not increase the quantity of the controlled substance for sale, the pills are still only sold and marketed based on the actual amount of controlled substance. The net or actual controlled substance weight is just a fraction of the total weight of the pill. These fillers are totally irrelevant to the controlled substance and in the calculation of the drug weight.

Furthermore, there are numerous drug manufacturers that make this drug, including generics, which all have different size and weights of the pill but the same amount of drug in it. This creates a huge disparity among defendants who are selling the exact same amount of hydromorphone just because of the different manufacturer of the pill uses more or less filler, and will be responsible for completely different amounts of the drug according to the guidelines, and will be arbitrarily subjected to different punishments. Pharmacies carry this drug and the total weight of pill can vary anywhere from a range of 15-150mgs - for the same amount of controlled substance, 8mg of hydromorphone. Also, no defendants ever sell, buy, transfer, prescribe or distribute these drugs based on the total weight of the pill, they always use the net drug weight. For example, defendant can be charged with 1000 8 mg pills of hydromorpone and another defendant can be charged with only 100 8 mg pills of hydromorphone, but because of the huge differences in the total weight of the pills depending on the manufacturer, the guidelines will calculate them to have the same drug weight, even though the one person had 10 times the quantity of the other.

Additionally, the total weight of these pills are not listed anywhere, so the person does not even know how much the pills weigh. The DEA, FDA, Drug Manufacturers, prescription drug websites, and other medical books never list the total weight of these pills. These pills originally come from pharmacies or doctors, and both dispense this drug and prescribe the dose based on the drug weight, not the total weight.

Moreover, the United States Sentencing Commission back in 2003 did correctly see and fix some disparities in sentencing for prescription pills, by voting and approved Amendment 657, which determined to treat the drug weight of oxycodone pills by the actual net weight of the controlled substance, not the total weight of the pill. However, it only applied to oxycodone, not hyrdromorphone. There is no reason that this drug weight calculation should differ between these very similar prescription meds. They are very similar drugs, both used for moderate pain relief, in the same opiod drug family, and both are classified by the DEA as schedule II drugs.

Therefore, based on these facts and history of the Sentencing Commissions prior Amendment 657, please amend the USSG's to reflect the same changes that Amendment 657 had on oxycodone to apply to hyromorphone also,

by having the guidelines use the net weight of the actual drug, not the total weight of the pill, to calculate the weight used for guideline purposes. This will correct the huge sentencing disparities and the arbitrary use of a total weight. It is not fair for people to be subjected to 20 times the actual weight of the drug by using the total pill weight, and especially in light of the fact that the USSC amended the guidelines to fix this problem when it relates to oxycodone in 2003. For the last 13 years people charged with hydromorphone have faced unproportional punishment when compares to people charges with oxycodone.

Public Affairs

From: Vanessa Ruiz-Huerta [redacted]
Sent: Monday, July 25, 2016 11:38 PM
To: Public Affairs
Subject: Priorities Comment

July 25, 2016

United States Sentencing Commission
Attention: Public Affairs – Priorities Comment
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002.

pubaffairs@ussc.gov

Comment on Possible Priority Policy Issues for the

Amendment Cycle ending May 1, 2017 of

The United States Sentencing Commission.

Today, most can agree on the need for criminal justice system reform and the need to reduce our very high incarceration rates. Reintroduction of some judicial discretion and a effort to simplify the operation of the sentencing guidelines to promote proportionality and reduce sentencing disparities would help. Prosecutorial charging behavior is an area in dire need of study and reform. Aggressive prosecutorial charging decisions can put pressure on defendants to accept bad plea deals rather than face very long sentences (created by overcharging). The extreme differential and imbalance of power and resources places poor and minority

defendants between a rock and a hard place at plea bargaining negotiations where more than ninety percent of cases are decided. Nowhere is this more true then in drug conspiracy cases given the false proxy of narcotics weights. Any sense of proportionality is lost and it creates disparities between actual roles and culpability when prosecutorial overcharging occurs.

Accounting for the **individual** defendant's role, culpability, and relevant conduct should be basic to our system of justice. Thank you for your service on The United States Sentencing Commission. A defendants race or resources should never determine their sentence. Again, Thank You.

Public Affairs

From: YEMI ADEYALE [redacted]
Sent: Tuesday, June 28, 2016 10:40 PM
To: Public Affairs
Subject: Fwd: Public Comment on Proposed Priorities for 2017

God is good

-----Original Message-----
From: YEMI ADEYALE [redacted]
To: pubaffairs <pubaffairs@ussc.gov>
Sent: Fri, Jun 24, 2016 1:44 pm
Subject: Public Comment on Proposed Priorities for 2017

Dear Sir Madam.

I will real like you to look into reducing the sentence of those people that have really changed and working toward making a better life for themselves regardless of why they are in prison as long as they are not violent criminals.

It seems to me that the only people that are getting some attention are drug offenders.

My son was sentenced to 7 years imprison in 2013 for $6000 credit card fraud. He's about to finish his masters degree behind bars, and after he is done he will still have at least 2 years or more to serve instead of using what he learnt to move himself forward and have a better life.

If people are seeing the positive move inmate are making behind bars, they should give them the opportunity to proof themselves on the outside.

Can someone seriously look into this.

Sincerely,

Oluyemi Adeyale

God is good

Public Affairs

From: Carolyn Chaney [redacted]
Sent: Saturday, June 25, 2016 1:20 AM
To: Public Affairs
Subject: ZoAnn Brown [redacted]

For a number of years I have been corresponding with ZoAnn Brown, a prisoner at [redacted]. ZoAnn was convicted of a non-violent drug offense and sentenced to 24y4m **without possibility of parole**. At the time of her arrest in November 2005, ZoAnn was addicted to and also selling methamphetamine. ZoAnn had a court-appointed attorney, and she pleaded guilty to possessing with intent to distribute 500 grams or more of a methamphetamine mixture containing 50 grams or more of actual methamphetamine. Although the mandatory minimum sentence was 10 years, ZoAnn's sentence was enhanced, due to the quantity of drugs involved. I have gotten to know ZoAnn through a letter writing ministry of the Unitarian Universalist Association. Now, over ten years into her sentence, ZoAnn has turned her life around in prison. She writes, “Prison has changed my life - taught me coping skills. I can't honestly say that I am glad I came to prison, but the road I was on was a path of destruction. I just know it will not take me 292 months to learn my lesson - I have already learned it - I want a second chance at life.” ZoAnn has overcome her drug addiction. She is active in prison life, and she has served as a clerk in the commissary and the horticulture department. She dances in the church group, where she is an active member. She was selected to leave prison to visit with school groups and tell her story, as an example to others.

ZoAnn’s continued incarceration breaks my heart. Where is the justice in locking up a young mother for 24+ years? What is wrong with a system that throws away a person for being an addict, but gives parole for murderers and rapists? Why do we not offer treatment for addictions, instead of prisons?

Please tell me, what can I do to help find justice for ZoAnn Brown? What can you do to right the wrong being done to ZoAnn and others like her?

Carolyn Chaney
[redacted]

"Tell me, what is it you plan to do with your one wild and precious life?" Mary Oliver