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National Campaign for Reform

February 9, 2017

Honorable Judge William H, Pryor, Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E. Suite 2-500
Washington D.C. 20002-8002
Attn: Public Affairs

RE: Proposed Amendments to Section §4C1.1 (First Offenders) of the Sentencing Guidelines

To whom it may concern,

This letter serves as a public comment to the United States Sentencing Commission's proposed amendment regarding the addition of §4C1.1 (First Offenders). We, Caution Click National Campaign for Reform (CCNCR), support the Commission's efforts to provide relief to "first offenders" as defined and proposed in the December 19, 2016 edition of the Federal Register. (81 FR 92003 and 81 FR 92021). We also support the Commission's efforts to enforce the proposed relief as retroactive to those who qualify as a "first offender". We agree with the Commission's empirically based approach in determining that "first offenders" generally pose the lowest risk of recidivism. Additionally, CCNCR respectfully offers the following comments to the Commission regarding relevant changes in other provisions of the Guidelines Manual if §4C1.1 were to be promulgated.

In 2012, the Commission provided an exhaustive report to Congress entitled Federal Child Pornography Offenses. The Commission noted that its policy[1] for recommending the maximum term of supervised release for those convicted of sex offenses was made prior to the enactment of the 2003 PROTECT Act[2]. The Commission recognized a need to amend this policy "in a manner that provides guidance to judges to impose a term of supervised release within the statutory range of five years to a lifetime term that is tailored to an individual offender's risk and corresponding need for supervision[3]". CCNCR encourages the Commission to revisit this initiative consistent with "first offenders" convicted of a non-production child pornography offense that have no history of sexual contact with children. In such cases, a policy statement recommending the imposition of the minimum mandatory term of 5 years of supervised release is appropriate. CCNCR suggests that this proposed policy change be made retroactive to those defendants who qualify.

[1]U.S.S.G. §5D1.2(b).

[2]The PROTECT Act increased the supervised release term for those convicted of sex offenses to a statutory range of 5 years to life.

[3]http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212- federal-child-pornography-offenses/Full_Report_to_Congress.pdf at page xix.

CCNCR also requests that the Commission exclude 18 U.S.C.§ 2252(a) from the "crime of violence" definition under U.S.S.G. §4B1.2. The United States Supreme Court defines "crime of violence" within the United States Code as violent force capable of causing physical pain or injury to another person. See, *Leocal v. Ashcroft,* 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (interpreting "crime of violence" definition in 18 U.S.C. § 16); *Johnson v. United States*, 130 S.Ct. 1265, **1271** (2010) (interpreting "crime of violence" definition in 18 U.S.C. § 924(c)(3)). Contrary to these decisions, 18 U.S.C. § 3156(a)(4)(C) includes any felony under chapter 110 as a "crime of violence" even though the required elements of violent physical force are not present within the plain statutory language of 18 U.S.C. § 2252(a).

To further complicate matters, the Commission's definition of "crime of violence" provides enumerated offenses which includes "forcible sex offenses". In 2016, the Commission amended the definition of "forcible sex offense" as an offense with an element where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The Commission commented that this definition is consistent with U.S.S.G. § 2L1.2, and that certain forcible sex offenses which do not expressly include as an element the use, attempted use, or threatened use of physical force against the person of another should nevertheless constitute "crimes of violence" under §4B1.2.[4] However, for the purposes of U.S.S.G. §2L1.2(b)(1), the terms "child pornography offense" and "crime of violence" are separately and exclusively defined. *See*, Commentary Application Note 1(B)(ii),(iii). This suggests that a violation under 18 U.S.C. § 2252(a) is neither a "forcible sex offense" nor a "crime of violence". To avoid the inconsistencies within the United States Code and the United States Sentencing Guidelines, we request that the Sentencing Commission consider amending its §4B1.2 Commentary to specifically exclude 18 U.S.C. 2252(a) from the "crime of violence" definition. CCNCR respectfully asserts that this change is appropriate and consistent with the Supreme Court's decisions.

To conclude, CCNCR expresses gratitude to the United States Sentencing Commission for the opportunity to provide public comment to its proposed amendments, and for the Commission's dedication to create and change its policies in a manner that reflects a careful analysis of law, empirical data, and public commentary.

Kind regards,
Gail Colletta

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cc: Rachel E. Barkow, Commissioner
Ms. J. Patricia Wilson Smoot, Ex-officio representing the US Parole Commission
Mr. Jonathan J. Wroblewski, Designated ex-officio representing the Attorney General

[4] http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF.pdf at page 4.