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National Campaign for Reform

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United States Sentencing Commission
One Columbus Circle, N.E. Suite 2-500, South Lobby
Washington D.C. 20002-8002
Attn: Public Affairs – Priorities Comment 82 FR 28381

Dear Honorable Judge Pryor,

This letter serves as a public comment to the Sentencing Commission's Proposed 2017-2018 Priorities 82 FR 28381. 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 regarding six proposed issues that the Commission should address as priorities during the upcoming amendment cycle.

1. 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.

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[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.

2. CCNCR 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.

3. In light of the recent United States Supreme Court holding in *Packingham v. North Carolina,* No. 15-1194 (decided June 19, 2017), CCNCR respectfully requests that the Commission consider amending U.S.S.G. § 5D1.3(d)(7)(B). The present guidelines recommend district courts to impose a "special" supervised release condition against sex offenders to limit their use of a computer or an interactive computer service in cases in which the defendant used such items. There is a circuit split as to how district courts may craft the Commission's recommended "special" condition within statutory and constitutional boundaries. For example, some circuits have upheld a condition restricting the defendant from accessing the Internet for the entirety of his supervised release term. *See*, *United States v. Zinn*, 321 F.3d 1084, 1093 (11th Cir. 2003) (holding that the Internet restriction does not violate defendant's First Amendment rights and is necessary and reasonable); *United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001) (upholding a complete ban on a convicted sex offender's Internet use while on supervised release); *United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001); *but see*, *United States v.*

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

White, 244 F.3d 1199, 1206 (10th Cir. 2001) (where the court cautioned against a computer Internet prohibition as too broad, and suggested the use of filtering software as a solution to a possible violation of the defendant's free speech).

On the other hand, some circuit courts have vacated a condition restricting the defendant from accessing the Internet as overly broad and one that imposes a greater deprivation of a defendant's First Amendment rights than is reasonably necessary. *See, United States v. Crume*, 422 F. 3d 728, 733 (8th Cir. 2005); *United States v. Voelker*, 489 F.3d 139, 145 (3d. Cir. 2007) (finding that the extraordinary breadth of this condition is the antithesis of a narrowly tailored sanction); *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003) (finding that the restriction sweeps more broadly and imposes a greater deprivation on the defendant's liberty than is necessary, and thus fails to satisfy the narrow tailoring requirement of § 3583(d)(2)).

While *Packingham* is not a case where the Petitioner was subject to Internet restrictions via a "special" condition of supervised release, the Supreme Court's unanimous holding does provide authoritative direction to the Commission. The Supreme Court determined that the First Amendment permits a State to enact specific, narrowly-tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor. *Packingham* at 2. However, "foreclosing access to social media altogether prevents users from engaging in the legitimate exercise of First Amendment rights…even convicted criminals - and in some instances especially convicted criminals - might receive legitimate benefits from these means for access to the world of ideas, particularly if they seek to reform and to pursue lawful and rewarding lives." *Id.* The Court concluded that the State may not enact a complete bar to the exercise of First Amendment rights on websites such as Face book, LinkedIn, and Twitter which are integral to the fabric of modern society and culture. *Packingham* at 3.

As it stands now, U.S.S.G. § 5D1.3(d)(7)(B) provides district courts the authority to impose a "special" condition that can prohibit a defendant from accessing the Internet entirely. But, the Internet is the very place where the social media sites are located in which the Supreme Court has held that even convicted sex offenders are afforded their exercise of First Amendment rights. As a solution, CCNCR suggests that the Commission amend U.S.S.G. § 5D1.3(d)(7)(B) to state that a district court may not restrict a defendant's access to the Internet and that the condition must be narrowly tailored to limit the defendant's access to specified web sites or Internet activity. This condition can be subject to measures to ensure a defendant's compliance, such as filtering software and/or inspection by the probation officer. CCNCR requests that this guidelines amendment be made retroactive. This will provide relief to defendants who are currently subject to a condition that restricts or prohibits Internet access, and it will prevent supervised release sanctions against defendants that simply possess or use a computer with Internet access. *See e.g. United States v. Cook*, No. 15-4473 (4th Cir. Feb. 4, 2016) (where defendant's supervised release was revoked for possessing a computer that had the capability to access to the Internet). CCNCR also believes that the suggested amendment to U.S.S.G. § 5D1.3(d)(7)(B) will resolve the circuit split as to the proper reach of this "special" condition, and strike the appropriate balance between the district courts' statutory sentencing duty under 18 U.S.C. § 3553(a) and the *Packingham* holding.

4. CCNCR requests that the Commission amend U.S.S.G. § 5K2.0 to include the defendant's collateral consequences of a felony conviction as grounds for a downward departure from the applicable sentencing guideline range. There is a circuit split as to whether the collateral consequences of conviction can legally be considered as 18 U.S.C. § 3553(a) factors when the district court fashions a sentence, and as the Tenth Circuit has stated, "the Supreme Court has not addressed the issue." *United States v. Morgan*, 2015 WL 6773933, at *20 (10th Cir. Nov. 6, 2015). The Sixth, Seventh, Tenth, and Eleventh Circuits have held that in fashioning a sentence that "must reflect the seriousness of the offense, promote respect for the law, and provide just punishment," as required under § 3553(a)(2), "the collateral consequences of the defendant's prosecution and conviction are 'impermissible factors.'" *See, United States v. Musgrave*, 761 F.3d 602, 608 (6th Cir. 2014).

On the other side of the ledger, the Fourth Circuit has viewed the loss of a defendant's "teaching certificate and his state pension as a result of his conduct" as appropriate sentencing considerations, "consistent with § 3553(a)'s directive that the sentence reflect the need for 'just punishment' and 'adequate deterrence'". *United States v. Pauley*, 511 F.3d 468, 474-75 (4th Cir. 2007). The Second Circuit also embraces collateral consequences as bearing upon the concept of 'just punishment'. *United States v. Thavaraja*, 740 F.3d 253, 262-63 (2d. Cir. 2014) (where the circuit court recognized that deportation is a permissible § 3553(a) factor); *see also, United States v. Nesbeth*, No. 15-CR-18(FB) (E.D.N.Y. May 25, 2016) (where the court sentenced the defendant to probation rather than prison, in part "because of a number of statutory and regulatory collateral consequences she will face as a convicted felon"). Furthermore, under the Court Security Improvement Act of 2007, Congress has expressed continuing interest in the collateral consequences of criminal sentencing by directing the Department of Justice's National Institute of Justice to perform a comprehensive study that catalogued a multitude of federal and state statutes and regulations that impose collateral consequences. According to the National Institute of Justice, there are more than 44,000 separate collateral consequences imposed by the state and federal systems combined[5].

CCNCR believes that amending U.S.S.G. § 5K2.0 to include the defendant's collateral consequences of a felony conviction as grounds for a downward departure from the applicable sentencing guideline range will resolve the split among the circuit courts and is appropriately consistent with Congress' awareness that collateral consequences are issues that impact criminal sentencing.

5. CCNCR respectfully requests that the Commission consider all aspects of sentencing of non-production child pornography offenses for the Proposed 2017-2018 Priorities. Empirical evidence indicates that non-production child pornography offenders are not only qualitatively different from other sexual offenders, but they are also substantially different from violent and contact sexual offenders. In 2012, the Practitioners Advisory Group, a standing Advisory Group of the Sentencing Commission, offered recommendations based on empirical data. Each of the points remains accurate

[5] http://www.nij.gov/topics/couirts/pages/collateral-consequences-inventory.aspx

and are further substantiated by continual research. In a communication dated February 13, 2012[6], a brief reminder of the recommendations includes that:

- ✓ Child Pornography Offenders Differ in Their Levels of Culpability
- ✓ The Child Pornography Guideline Enhancements Should Better Distinguish Offenders on The Basis of Relative Culpability

As part of its statutory authority and responsibility to analyze sentencing issues and promulgate sound policy within the Guidelines, it is imperative that the Commission continues it priority of studies related to child pornography offenses. Often times, as with the PROTECT Act, Congress demands the judiciary to enforce laws that are not created by using a fact-based approach. This myopic viewpoint deflects attention from the truth regarding sexual abuse. CCNCR encourages the Commission to exercise its role to effectuate sentencing policy for child pornography offenders that is commensurate to the facts and scientific evidence regarding their offense characteristics and culpability. To that end, CCNCR supports the initiatives proposed by Marjorie A. Meyers, Federal Public Defender, in her public comment letter to the Commission dated August 26, 2011[7]. In brief, the referenced portion of her letter proposes the elimination or modification of the U.S.S.G. § 2G2.2(b) sentencing enhancements for possession of child pornography.

6. There are potential remedies to working with low risk child pornography offenders. One solution would be to implement a "Pretrial Diversion" program for low risk, first time child pornography offenders. This diverts a low risk group from the traditional criminal justice system into a community based supervision and treatment program, similar to the one administered by the U.S. Probation Service. Diversion programs are intended to save prosecutorial and judicial resources for concentration on major cases, and to provide, where appropriate, a vehicle for restitution to communities and victims of crime. The overwhelming majority of current scientific and legal evidence supports the contention that those convicted of first-time child pornography possession pose the least risk to the public. Diversion programs offer the ideal win-win situation for the government, public, and offender. CCNCR believes that the available empirical evidence and the interest of justice support the following positions:

(a). Use the CPORT Model[8] or a similar body of credible work as a resource for determining the predictability of reoffending. This model of *predictors to reoffend* can serve to provide an excellent tool for sentencing guidelines and the determination for alternative sentences such as diversion programs.

(b). Offer diversion programs for first-time offenders with no previous criminal behaviors, accompanied by a period of successful treatment by a qualified practitioner.

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[6] http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215

[7] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public comment/20110826/Defender-Priorites-Comments_2011-2012.pdf *See*, pages 6-16.

[8] http://www.internetbehavior.com/watsa2017/cport_guide_manual.pdf

Such alternative sentencing would be far less costly to the tax payer and provide for resources that can be better applied for those who pose a higher risk to the community.

(c). After successful completion of all requirements, the offender will not be placed on a public registry of any kind. In the event an offender demonstrated any criminal behavior, the diversionary opportunity would be revoked.

(d). Reduce the category of child pornography possession from a 'violent' offense to 'non-violent' offense. It is important to note that in many studies of sex offenders, the example of child pornography possession is defined as a non-violent offense because it does not involve physical contact with a person; whereas, a violent offense is defined as a charge or conviction for a sexual or non-sexual offense involving physical contact with a victim.

In conclusion, CCNCR believes that the Commission should add the six issues contained in this letter to its priorities for the upcoming amendment cycle. 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.

Respectfully,

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