



COMMITTEE ON CRIMINAL LAW  
of the  
JUDICIAL CONFERENCE OF THE UNITED STATES  
United States District Court  
700 Stewart Street, Room 13134  
Seattle, WA 98101-1271

Honorable Alan J. Baverman  
Honorable Curtis Lynn Collier  
Honorable Denise L. Cote  
Honorable P.K. Holmes III  
Honorable Ellen Segal Huvelle  
Honorable C. Darnell Jones II  
Honorable Dale A. Kimball  
Honorable William T. Lawrence  
Honorable Liam O'Grady  
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**Honorable Ricardo S. Martinez, Chair**

July 31, 2017

Honorable William H. Pryor, Jr.  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Dear Judge Pryor:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, I appreciate the opportunity to provide comment on proposed priorities for the guideline amendment cycle ending May 1, 2018. 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.<sup>1</sup> Under this broad jurisdictional statement, the Criminal Law 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 procedures, sentencing, and sentencing guidelines; and (3) monitors the workload and operations of probation offices.

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<sup>1</sup> Jurisdiction of Committees of the Judicial Conference of the United States (as approved by the Executive Committee, effective March 14, 2017).

After carefully considering the proposed priorities, we offer the following comments to highlight issues of particular interest or concern to the Criminal Law Committee (the Committee), as well as to identify proposed priorities related to positions of the Judicial Conference.

- *Proposed Priority 1:* The Committee continues to support the Commission’s work toward simplifying the operation of the guidelines, promoting proportionality, and reducing sentencing disparities. With regard to the study of sentencing disparities, we believe it is important for the Commission to reflect the wide variety of statistical methodologies that have been developed by social scientists to study this complicated matter. We also believe it is necessary to consistently consider how to improve the accuracy and completeness of data on sentencing decisions to ensure that studies account for the wide variety of factors considered by judges. Decisions to sentence outside the guidelines range may be based on unmeasured factors (e.g., offender characteristics such as employment status) that are related to the sentencing factors under 18 U.S.C. 3553(a). We believe such data will assist the Commission in its ongoing efforts to study the operation of the guidelines and improve them as necessary, and we are willing to continue working closely with the Commission to improve data collection and record keeping procedures. Finally, we believe any evaluation of the guidelines system must account for changes in disparity caused by other system actors such as prosecutors in order to understand the level of disparity not just at sentencing but also at the presentencing stage. We urge the Commission to work with Congress and the Department of Justice to improve data collection to enable this type of study.
- *Proposed Priority 3:* The Committee agrees that the Commission’s proposals related to career offenders would promote greater consistency and fairness in sentencing. Earlier this year the Judicial Conference accepted our recommendation to support a request to Congress that would (1) amend 28 U.S.C. § 994(h) to require that an offender have committed a felony “crime of violence” either as the instant offense of conviction or as one of the required predicate convictions in order to more effectively differentiate between career offenders with different types of criminal records; and (2) adopt the definition of “crime of violence” in section 4B1.2 of the *Guidelines Manual* (effective August 1, 2016) as a basis for a new statutory definition for the term “violent felony” in the Armed Career Criminal Act (18 U.S.C. § 924(e)), and the definitions of “crime of violence” in 18 U.S.C. § 16 and 18 U.S.C. § 924(c) in order to avoid unnecessary complexity and inefficient use of resources by litigants and the courts.<sup>2</sup>
- *Proposed Priority 4:* The Commission is well aware of the Judicial Conference’s longstanding position opposing mandatory minimum penalties and its support of legislative efforts such as expansion of the “safety valve” at 18 U.S.C. 3553(f). Mandatory minimum sentences waste valuable taxpayer dollars, create tremendous injustice in sentencing, undermine guideline sentencing, and ultimately foster a lack of

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<sup>2</sup> JCUS-MAR 17, pp. 10-11.

confidence in the criminal justice system. For over sixty years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentencing provisions and has supported measures for their repeal or to ameliorate their effects.<sup>3</sup> The Judicial Conference also supports the Commission in its work in pursuit of an amendment to 18 U.S.C. § 924(c) to preclude the stacking of counts and make clear that additional penalties apply only when, prior to the commission of such offense, one or more convictions of such person have become final.<sup>4</sup>

- *Proposed Priority 8:* The Commission’s proposed priorities for the May 1, 2017, amendment cycle included examining the feasibility of using the amount of time served by a defendant as opposed to length of sentence imposed for purposes of calculating criminal history; and the Committee previously expressed serious concerns with this approach.<sup>5</sup> While the current iteration of the priority appears narrower in scope, we respectfully restate our concerns with replacing time imposed with time served on three grounds. First, incarceration records regarding the length of time served by an inmate are difficult to access and often unreliable. Second, decisions regarding inmate release generally are made by correctional officials and may be informed by factors 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 institution due to detainers; sentences served following revocation of terms of community supervision; and sentences that included a lengthy term of pretrial detention.
- *Proposed Priority 9:* The Committee notes that the Judicial Conference considered proposals for restructuring the sentencing table as early as 1990. At that time, the Judicial Conference recommended amendments to the guidelines that would reduce the required term of imprisonment for split sentences from half of the minimum term to one month and permit straight probation for two additional offense levels in category I of the sentencing table by expanding the bottom of Zone A. In providing these recommendations, the Conference noted that criminal history category I included “first offenders,” and offered an accompanying table illustrating an expanded Zone A and consolidated Zones B and C.<sup>6</sup> The Committee later expressed its support of an amendment proposed by the Commission that would have expanded Zone B to include

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<sup>3</sup> JCUS-SEP 53, p. 29; JCUS-SEP 13, p. 17.

<sup>4</sup> JCUS-MAR 09, p. 16.

<sup>5</sup> July 20, 2016, letter from Hon. Irene Keeley, Chair, Committee on Criminal Law, to Hon. Patti B. Saris, Chair, U.S. Sentencing Commission; July 25, 2016, letter from Anthony M. San Giacomo, Chair, Chiefs Advisory Group, to Hon. Patti B. Saris, Chair, U.S. Sentencing Commission.

<sup>6</sup>1990 Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines.

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Zone C of the sentencing table in an effort to both “eliminate the complexity of having four zones” and “afford the sentencing judge adequate discretion to sentence defendants.”<sup>7</sup>

Thank you again for the opportunity to comment on the Commission’s proposed priorities for the May 1, 2018, amendment cycle. The Criminal Law Committee is committed to collaborating with the Commission to pursue initiatives that will improve overall effectiveness of the sentencing guidelines and the fair administration of criminal justice. We remain available to assist in any way we can.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ricardo S. Martinez', with a large, stylized flourish at the end.

Ricardo S. Martinez

cc: Members of the Criminal Law Committee  
Members of the U.S. Sentencing Commission  
Matthew G. Rowland  
Kenneth P. Cohen

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<sup>7</sup> March 13, 2002, letter from Hon. Sim Lake, Chair, Sentencing Guideline Subcommittee, Committee on Criminal Law, to Chair and Members of the U.S. Sentencing Commission.