



National Association of Assistant United States Attorneys

Safeguarding Justice for All Americans

July 31, 2017

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

Dear Chief Judge Pryor:

The National Association of Assistant United States Attorneys (NAAUSA) submits the following comments in response to the Commission's request for comments on its tentative priorities for the coming year.

Introduction

The National Association of Assistant United States Attorneys represents the interests of 5,800 Assistant United States Attorneys employed by the Department of Justice and responsible for the prosecution of federal crimes and the handling of civil litigation throughout the United States. United States Attorneys and Assistant United States Attorneys are the gatekeepers of our federal system of justice. Our primary responsibility is to protect the innocent and convict the guilty.

As the representative of the interests of our Nation's frontline federal prosecutors, NAAUSA has significant reservations concerning the priorities set forth by the USSC. These priorities, as set forth in the Federal Register, appear to focus on continuing previous policies of finding ways to further reduce sentences of incarceration without regard to the impact upon public safety. Indeed, over the last several years, as sentences have trended downward and the federal prison population has decreased, particularly for those convicted of federal drug trafficking offenses, the crime rate has begun to rise. Of particular concern to NAAUSA is the significant increase in violent crime in many of our major cities since 2015.

The Uniform Crime Report (UCR) shows that the number of violent crimes increased by 3.9 percent in 2015.¹ In 2015, the murder rate increased by 10.8 percent, rape increased by 6.3 percent, robbery increased by 1.4 percent, and aggravated assault by 4.6 percent. *Id.* The 2016 Preliminary Semiannual Uniform Crime Report for the first six months of 2016 indicates that this disturbing trend of increasing violent crime rates is continuing. In the first six months of 2016, the number of violent crimes committed nationwide increased 5.3 percent from 2015, with murders up by 5.2 percent, rape up 3.5 percent, robbery up 3.2 percent, and aggravated assault up 6.5 percent.²

¹ <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-1>.

² <https://ucr.fbi.gov/crime-in-the-u.s/2016/preliminary-semiannual-uniform-crime-report-januaryjune-2016/tables/table-3>.

This disturbing increase in violent crime is occurring in an environment of an 11-year trend in lower sentences and a reduced federal prison population that stems in part from the U.S. Supreme Court's decision in *United States v. Booker*, and several amendments to the U.S. Sentencing Guidelines. These changes in federal sentencing have resulted in reduced sentences and the early release of thousands of convicted drug traffickers. All of this has occurred while recidivism rates remain abysmally high, with nearly 77 percent of drug offenders reoffending within 5 years of release nationwide.³

A survey of drug overdose deaths across the country published in the New York Times on June 5, 2017⁵ came to this conclusion:

Drug overdose deaths in 2016 most likely exceeded 59,000, the largest annual jump ever recorded in the United States, according to preliminary data compiled by The New York Times.

The death count is the latest consequence of an escalating public health crisis: opioid addiction, now made more deadly by an influx of illicitly manufactured fentanyl and similar drugs. Drug overdoses are now the leading cause of death among Americans under 50.

This massive increase in drug overdose deaths in the United States, fueled by the opioid epidemic,⁶ is further reason to delay any continuing efforts at lowering sentences in order to take time to evaluate what impacts the last 11 years of sentencing reductions have had on the public's safety.

Our general concerns with the overarching philosophy of seeking to further reduce federal sentences provides the backdrop for the more specific comments on your tentative list of priorities that follow.

Mandatory Minimums and Recidivism

The USSC's continued focus on studying ways to lower the federal incarceration rate by reducing or eliminating mandatory minimum sentences for convicted drug traffickers is, frankly, puzzling. The USSC's own statistics establish that in 2016, 62 percent of convicted drug offenders received below Guideline sentences, and less than half of drug offenders convicted of offenses carrying mandatory minimum sentences remained subject to those penalties at the time of sentencing.⁷ This has continued a years-long trend of reducing the number of drug offenders receiving mandatory minimum sentences.

Furthermore, to the extent that the USSC's focus on studying ways to lower sentences is motivated by the perception that there exists a problem with so-called "mass incarceration," it should be noted that of the 1.53 million prisoners⁸ incarcerated in the U.S., the total number of offenders in the custody of the Bureau of Prisons is only 187,513⁹, or 12.25 percent. In fact, the total number of federal

³ <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986>

⁵ <https://www.nytimes.com/interactive/2017/06/05/upshot/opioid-epidemic-drug-overdose-deaths-are-rising-faster-than-ever.html?mcubz=2&r=0>

⁶ <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates>

⁷ https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Drug_Trafficking_2016.pdf.

⁸ https://www.bjs.gov/content/pub/pdf/p15_sum.pdf

⁹ https://www.bop.gov/about/statistics/population_statistics.jsp

prisoners is at its lowest level since 2004.¹⁰ Simply stated, we are not engaged in mass incarceration of offenders at the federal level.

Many of those who received mandatory minimum sentences made their sentences, in essence, mandatory by refusing to cooperate with law enforcement. First-time offenders and those who choose to cooperate are frequently able to avoid any minimum sentences that may have applied to the crimes they committed. They do so by earning safety-valve or substantial assistance relief, something those pushing the sentence reduction agenda often fail to mention.

Furthermore, USSC data, as well as the personal experience of numerous federal prosecutors, confirms that mandatory minimum sentences lead to greater cooperation from federal defendants, particularly those most well positioned to provide substantial assistance. Such cooperation is often needed to hold the most culpable criminals fully accountable for their crimes. A drop of even 1 or 2 percent in the cooperation rate means, in real terms, hundreds of fewer cooperating defendants and much less evidence for federal prosecutions of those most responsible.

The current federal minimum sentencing structure, part of which was designed to counteract the crime wave our nation endured from the 1970's into the 1990's, strikes an appropriate balance between judicial discretion and minimum sentencing and contributed to a nearly 20-year crime decline and thousands of fewer victims.

Unfortunately, crime in many locations throughout our nation is no longer on the decline. Rather than continuing to look for ways to further reduce the sentences of offenders convicted of serious federal crimes, NAAUSA respectfully suggests that the USSC's priorities at this point in time should be focused on studying the impact that the sentencing reduction agenda of the last 11 years has had on the crime rate, recidivism rates, and the safety of the public.

Career Offender

NAAUSA strongly opposes the Commission's stated intention to "focus on offenders who have committed at least one 'crime of violence'" at the cost of reducing or eliminating the consideration of recidivist drug traffickers from the application of the career offender enhancement -- at precisely the time in our nation's history when illegal drugs are killing more people than ever. Again, we urge the USSC to carefully study the correlation between lenient sentences for drug offenders and the rising crime rate in the United States before urging Congress to further reduce the penalties for drug crimes.

As for the definition of "crime of violence," we believe that a common sense, easy to apply definition of that term is critical to put offenders on notice of exactly what conduct will trigger the application of this enhancement. We urge the Commission to explore legislative options to address aspects of the federal sentencing process that have greatly exacerbated the effects of *Johnson* and similar decisions. One such aspect is the application of the categorical approach in determining whether a particular past or present crime qualifies as a violent crime or is a specifically enumerated crime like murder or burglary or drug trafficking. The categorical approach focuses upon theoretical possibilities about how a crime could be committed instead of upon realistic conclusions about how it actually was committed in a particular case.

Instead, NAAUSA fully supports legislative efforts to direct that federal statutory and sentencing guideline enhancements addressing violent crime and/or recidivism be triggered not only if a particular

¹⁰ https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops

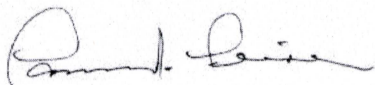
crime categorically qualifies under a particular definition in the abstract, but also if a particular crime *was actually committed* in a manner that fits within the definition, regardless of how it theoretically could have been committed. In making this determination, judges should be free to consider any credible evidence. Moreover, judges should be free to consider the particular means by which a crime was committed and should not be restricted to consideration of only its bare elements.

Conclusion

As the nation's federal prosecutors, who seek first and foremost to protect the innocent and seek justice, we will be affected daily by the consequences of your efforts to amend the sentencing guidelines, and to seek changes to the federal criminal statutes. While NAAUSA agrees with many of the stated priority *topics* in your tentative list, we urge you to carefully consider the current climate of escalating drug overdose deaths and rising violent crime rates before pursuing further reductions in the sentencing guidelines applicable to federal offenses.

Thank you for your consideration of our viewpoint. As you continue to research and report on these issues, we would welcome the opportunity to appear at any public hearings to present the lessons learned from our experience at the front lines of the federal criminal justice system.

Respectfully submitted,



Lawrence J. Leiser
President