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July 31, 2017

The Honorable William H. Pryor, Jr.
Acting Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002

Re: The Pew Charitable Trusts Public Comment on Possible Policy Priorities for the Amendment Cycle Ending May 1, 2018

Dear Judge Pryor:

The Pew Charitable Trusts submits these comments in response to the Commission's request for comments on possible policy priorities for the amendment cycle ending May 1, 2018. Pew recommends the Commission enact the following amendments proposed last year: Proposed Amendment One, relating to new guideline ranges for first offenders and increased availability of alternatives to incarceration for low-level offenders, and Proposed Amendment Four, relating to criminal history issues. A wide range of research shows that these proposed amendments are on firm ground, and Pew urges their adoption.

Pew's Public Safety Performance Project helps states advance fiscally sound, data-driven policies and practices in adult and juvenile sentencing and corrections that protect public safety, hold offenders accountable, and control corrections costs. The project collaborates with policy leaders and criminal justice stakeholders to develop policy options based on analysis of their jurisdiction's particular challenges, the most rigorous research, and lessons learned from other states. Pew and its partners, including the federal Bureau of Justice Assistance, the Council of State Governments Justice Center, and the Crime and Justice Institute, have worked with more than 30 states to develop such policies as part of the Justice Reinvestment Initiative, which was formally established by Congress and the Department of Justice in 2010.

The Public Safety Performance Project also provides technical assistance to federal policymakers as they consider sentencing and corrections policy changes to the federal criminal justice system. The project has commented on previous amendments proposed by the U.S. Sentencing Commission and worked with members of Congress on pending legislation.

The Federal Prison Population

Despite some recent decline, from 1980 to 2016, the federal prison population increased from approximately 24,000 to nearly 190,000 people, making it the largest prison system in the

nation.¹ The largest share of this population is drug offenders, which has doubled since 1980 and makes up nearly half of the total population.² Many of these individuals were not leaders of their drug distribution networks: more than a quarter of federal drug offenders have been sentenced as “couriers” or “mules,” the lowest-level trafficking roles on the Commission’s culpability scale.³

The large federal drug offender population is due in part to longer sentences and more time served. From 1980 to 2011, the average prison sentence imposed on drug offenders increased 36 percent, even as it decreased by three percent for all other offense types.⁴ These increases are due primarily to mandatory minimum sentence laws and compulsory sentence enhancements enacted by Congress in the 1980s and 1990s.⁵ In addition to sentence length, the Sentencing Reform Act of 1984 also required offenders to serve 85 percent of their sentence before being eligible for release, and eliminated federal parole.⁶

The long-term growth of the federal prison population, driven in large part by the increased incarceration of drug offenders, has led to a parallel surge in cost. Federal spending on prison has risen nearly 600 percent since 1980, from \$970 million to more than \$6.6 billion in inflation-adjusted dollars.⁷

The increased incarceration of drug offenders has not led to more public safety. Data suggests that despite federal prison population growth, illegal drug prices have decreased and use has increased.⁸ The retail prices of cocaine, heroin, and methamphetamine have all decreased,

¹ The Pew Charitable Trusts. (2015). *Federal Prison System Shows Dramatic Long-Term Growth*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/02/federal-prison-system-shows-dramatic-long-term-growth>

² The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return>

³ The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return>

⁴ The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return>

⁵ The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return>

⁶ The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return>

⁷ The Pew Charitable Trusts. (2015). *Federal Prison System Shows Dramatic Long-Term Growth*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/02/federal-prison-system-shows-dramatic-long-term-growth>

⁸ The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return>

indicating a wider availability, while the share of Americans who admitted to using an illegal drug increased to 9.2 percent in 2012.⁹

Both the state and federal prison populations have increased sharply since 1980. However, state prison populations began to decline between 2007 and 2015 as dozens of states participated in the Justice Reinvestment Initiative and made evidence-based policy changes to control prison growth and costs while reducing recidivism.¹⁰ While the federal criminal justice system is different from the state systems, many of the lessons learned from the state experiences with justice reinvestment can be adapted and applied to the federal corrections system. The Commission's Drugs Minus Two amendments took a step in this direction and Pew commends the Commission for these efforts.

Research Backs Alternatives to Incarceration

Proposed Amendment One, relating to new guideline ranges for first offenders and increased availability of alternatives to incarceration for low-level offenders, is backed by research and similar policies enacted in states.

While many crimes may warrant prison terms purely for purposes of punishment, a growing body of research demonstrates that prison terms are not more likely to reduce recidivism than noncustodial sanctions.¹¹ Researchers have matched samples of offenders sent to prison with those sent to non-custodial sanctions and have consistently found no differences in re-arrest or re-conviction rates both in short-term and in long-term analyses, even when controlling for individuals' education, employment, drug abuse status, and current offense.¹² For some offenders, including drug offenders, technical violators, and first-time offenders, studies have shown that prison can actually increase the likelihood of recidivism.¹³

⁹ The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return>

¹⁰ The Pew Charitable Trusts. (2015). *Growth in Federal Prison System Exceeds States'*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/01/growth-in-federal-prison-system-exceeds-states>

¹¹ Villettaz, Patrice, Glwadys Gilleron, and Martin Killian. (2015). *The Effects on Reoffending of Custodial vs Non-Custodial Sanctions: An Updated Systematic Review of the State of Knowledge*. Campbell Systematic Reviews. Retrieved from <http://www.campbellcollaboration.org/lib/project/22/>

¹² Villettaz, Patrice, Glwadys Gilleron, and Martin Killian. (2015). *The Effects on Reoffending of Custodial vs Non-Custodial Sanctions: An Updated Systematic Review of the State of Knowledge*. Campbell Systematic Reviews, Retrieved from <http://www.campbellcollaboration.org/lib/project/22/>

¹³ Spohn, Cassia and David Holleran (2002). *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*. *Criminology*, 40: 329–358.; E. K. Drake & S. Aos (2012). *Confinement for Technical Violations of Community Supervision: Is There an Effect on Felony Recidivism?* (Document No. 12-07-1201). Olympia: Washington State Institute for Public Policy.; Nieuwbeerta, P, Daniel Nagin, and AAJ Blokland (2009). *Assessing the impact of first-time imprisonment on offenders' subsequent criminal career development: a matched samples comparison*. *Journal of Quantitative Criminology* 25 (3), 227-257.

At the same time, the incapacitation of lower-level federal offenders has not been shown to significantly disrupt the drug trade.¹⁴ Research indicates that low-level drug offenders are easily replaced if they are arrested and incarcerated, allowing drug trafficking to continue with minimal disruption.¹⁵ Nor has research found that sentences for these offenders had a significant deterrent effect, if any at all.¹⁶

Despite this Research, Probation Remains an Underutilized Option in Federal Corrections

Over the past 30 years, prison has become the dominant sanction in the federal corrections system.¹⁷ In 1980, less than half of all federal offenders received prison sentences, but as of 2014, nine in 10 offenders received prison sentences.¹⁸ Federal courts sentenced 2,300 fewer offenders to probation in 2014 than in 1980, even though their caseload nearly tripled during that span.¹⁹

The reduction of the use of probation is largely due to sentencing laws and federal sentencing guidelines.²⁰ The aforementioned Sentencing Reform Act of 1984 created the Commission and charged it with promulgating guidelines that judges were required to follow during sentencing. These guidelines mandated imprisonment for a variety of offenses, and despite the U.S. Supreme Court's holding in *United States v. Booker (2005)* that the guidelines must be considered advisory, not mandatory, many lower-level offenders continue to receive prison sentences when probation may be more appropriate, less expensive, and equally effective.²¹

¹⁴ The Pew Charitable Trusts. (2015). *Federal Drug Sentencing Laws Bring High Cost, Low Return*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return>

¹⁵ Mark A.R. Kleiman. (2004). *Toward (More Nearly) Optimal Sentencing for Drug Offenders*. *Criminology & Public Policy* 3, no. 3: 435–440. Retrieved from <https://drive.google.com/file/d/0B6taQDF0rdAwYnJNTDU2bDVBNFU/edit>

¹⁶ National Research Council. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. 83. Retrieved from <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>

¹⁷ The Pew Charitable Trusts. (2016). *More Prison, Less Probation for Federal Offenders*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/more-prison-less-probation-for-federal-offenders>

¹⁸ The Pew Charitable Trusts. (2016). *More Prison, Less Probation for Federal Offenders*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/more-prison-less-probation-for-federal-offenders>

¹⁹ The Pew Charitable Trusts. (2016). *More Prison, Less Probation for Federal Offenders*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/more-prison-less-probation-for-federal-offenders>

²⁰ The Pew Charitable Trusts. (2016). *More Prison, Less Probation for Federal Offenders*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/more-prison-less-probation-for-federal-offenders>

²¹ The Pew Charitable Trusts. (2016). *More Prison, Less Probation for Federal Offenders*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/more-prison-less-probation-for-federal-offenders>

At the same time, at least 18 states have successfully increased diversion to supervision and seen a reduction in recidivism and costs.²² In 2007, Texas expanded diversion options in the probation and parole system by 4,500 beds for technical violations of supervision, transitional treatment, and substance abuse treatment.²³ When combined with additional reforms, this policy mitigated growth by about 9,000 beds and saved the state \$441 million within a few years, part of which was reinvested to fund recidivism reduction programming.²⁴

In 2013, South Dakota passed the Public Safety Improvement Act to avoid spending \$207 million to build two new prisons and instead invest some of those dollars in recidivism reduction efforts.²⁵ The new policies and funding helped raise the state's parole success rate from 37 percent of offenders in FY 2012 to 65 percent in FY 2015.²⁶

Similarly, in 2016, Alaska established a new diversion sentencing option and adopted several policies to limit the use of prison as a sanction for nonviolent offenders.²⁷ In conjunction with other reforms, these changes are expected to reduce Alaska's prison population by 13 percent and save the state \$380 million, part of which will be used to fund evidence-based prison alternatives and victims' services programs.²⁸

Federal Length of Stay has Increased, Driven in Part by Sentencing Enhancements Tied to Criminal History

Proposed Amendment Four, concerning changes to how criminal history points are calculated and when downward departures are appropriate, is backed by research and similar to policies developed in states.

Lengths of stay in the federal prison system have increased since 1980, in part due to criminal history enhancements. These increases have occurred despite a lack of evidence that longer

²² The Pew Charitable Trusts. (2016). *33 States Reform Criminal Justice Policies Through Justice Reinvestment*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/11/33-states-reform-criminal-justice-policies-through-justice-reinvestment>

²³ Levin, Marc. (2011). *The Texas Model: Adult Corrections Reform: Lower Crime, Lower Costs*. Texas Public Policy Foundation. Retrieved from <http://www.texaspolicy.com/library/doclib/2011-09-PB44-TexasModel-AdultCorrections-CEJ-MarcLevin.pdf>

²⁴ Levin, Marc. (2011). *The Texas Model: Adult Corrections Reform: Lower Crime, Lower Costs*. Texas Public Policy Foundation. Retrieved from <http://www.texaspolicy.com/library/doclib/2011-09-PB44-TexasModel-AdultCorrections-CEJ-MarcLevin.pdf>

²⁵ The Pew Charitable Trusts. (2013). *South Dakota's 2013 Criminal Justice Reforms*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/reports/0001/01/01/south-dakotas-2013-criminal-justice-initiative>

²⁶ Public Safety Improvement Act Oversight Council. (2015). *South Dakota Public Safety Improvement Act 2015 Annual Report*. Retrieved from <http://psia.sd.gov/PDFs/PSIA%202015%20Annual%20Report.pdf>

²⁷ The Pew Charitable Trusts. (2016). *Alaska's Criminal Justice Reforms*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/12/alaskas-criminal-justice-reforms>

²⁸ The Pew Charitable Trusts. (2016). *Alaska's Criminal Justice Reforms*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/12/alaskas-criminal-justice-reforms>

prison terms improve recidivism outcomes.²⁹ The best measurement for whether longer lengths of stay reduce recidivism is whether similar offenders, when subjected to different terms of incarceration, recidivate at different levels.³⁰ The most rigorous research studies find no significant effect, positive or negative, of longer prison terms on recidivism rates.³¹

States are transforming this research into evidence-based policy. In 2014, for example, the Utah Commission on Criminal and Juvenile Justice, a bipartisan, inter-branch task force that included legislators, judges, prosecutors and other stakeholders, issued a report explaining how the “criminal history score currently double-counts certain elements, resulting in higher scores and, consequently, longer lengths of stay in prison.”³²

Later that year, the Utah State Legislature passed H.B. 348, which was signed into law by the Governor. Along with a wide variety of other sentencing and corrections policies, H.B. 348 reduced criminal history points for lower-level offenses, eliminated factors already counted in another criminal history categories, and removed factors that are not major indicators of risk of recidivism.³³ The law is expected to save Utah more than \$500 million over 20 years, avert all projected prison population growth, and reduce recidivism rates.³⁴

Conclusion

The Commission and Department of Justice have made multiple efforts to safely stem the growth of the federal prison system and those efforts are paying off: the Bureau of Prisons now holds about 190,000 inmates, some 30,000 fewer than at the peak in 2012. Yet, the federal system remains by far the largest in the nation and research indicates further reductions are possible and can be achieved without jeopardizing public safety. The size of the federal population is due in large part to increased sentences and lengths of stay for drug offenders which were driven by laws passed by Congress in the 1980s and 1990s. However, the best criminogenic research and lessons from evidence-based state reforms demonstrate that alternatives to incarceration for lower-level offenders and revisions to criminal history score calculations can reduce recidivism and help to focus the most expensive correctional resources on the most chronic, violent offenders. The Commission can be confident that research

²⁹ National Research Council. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 78. Retrieved from <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>

³⁰ Nagin, Daniel, Francis T. Cullen, and Cheryl Leo Jonson. (2009). *Imprisonment and Reoffending*. The University of Chicago.

³¹ Nagin, Daniel, Francis T. Cullen, and Cheryl Leo Jonson. (2009). *Imprisonment and Reoffending*. The University of Chicago.

³² Utah Commission on Criminal and Juvenile Justice. (2014). *Justice Reinvestment Report*, 15. Retrieved from https://justice.utah.gov/Documents/CCJJ/Reports/Justice_Reinvestment_Report_2014.pdf

³³ The Pew Charitable Trusts. (2015). *Utah's 2015 Criminal Justice Reforms*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/06/utahs-2015-criminal-justice-reforms>

³⁴ The Pew Charitable Trusts. (2015). *Utah's 2015 Criminal Justice Reforms*. Retrieved from <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/06/utahs-2015-criminal-justice-reforms>

indicates that Proposed Amendments One and Four will hold offenders accountable while achieving a better public safety return on taxpayer dollars.

Sincerely,

Adam Gelb
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The Pew Charitable Trusts