



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

October 10, 2017

RE: Public Comment on USSC's "First Offenders/Alternatives to Incarceration" Proposed Amendment

Dear Judge Pryor:

The undersigned applaud the Sentencing Commission's consideration of an amendment to increase the availability of sentences of alternatives to incarceration within the federal sentencing guidelines. The Sentencing Reform Act of 1984 which created the guideline system wisely recognized the appropriateness of non-incarceration sentences in certain cases.¹ Since that time criminological research has underscored Congress's assumptions, and evidence suggests that a broader cohort of people than at present could be sentenced within the federal system more efficiently without incarceration. Doing so would not compromise public safety, but would save tax dollars, preserve families and enhance rehabilitation.

According to Commission data, approximately 10 percent of people sentenced in federal court during 2016 received a sentence of probation only or probation with conditions of confinement, often meaning home confinement or electronic monitoring, in Sentencing Zones A and B respectively.² In contrast, at the state level 31 percent of people sentenced on felony charges received a sentence of probation only or some other non-incarceration penalty such as fines, treatment or community service.³ While there are distinctions between federal and state criminal justice systems, many more people convicted of low-level federal offenses with limited criminal histories should be considered for non-incarceration sentences.

Below we address some of the Commission's specific issues for comment for proposed amendment #3 – "First Offenders/Alternatives to Incarceration."

Part A: First Offenders

1. The Commission's most recent sentencing data finds 45 percent of people sentenced in federal court had minimal or no criminal history and qualified for the lowest criminal history category (CHC I).⁴ The Commission's recidivism studies found those with a CHC I had a rearrest rate of 33.8 percent up to eight years after sentence completion compared to a rate of 80.1 percent for people with the highest criminal history category (CHC VI).⁵ For purposes of applying offense level reductions for "first offenders" as

¹ See 28 U.S.C. § 994(j).

² *2016 Annual Report and 2016 Sourcebook of Federal Sentencing Statistics* (pp. S-28, Rep.). (2017). Washington, DC: U.S. Sentencing Commission.

³ Rosenmerkel, S., Durose, M., & Farole, D., Jr., Ph.D. (2009). *Felony Sentences in State Courts, 2006 – Statistical Tables* (p. 2, Rep.). Bureau of Justice Statistics. doi:<https://www.bjs.gov/content/pub/pdf/fssc06st.pdf>

⁴ *2016 Annual Report and 2016 Sourcebook of Federal Sentencing Statistics* (pp. S-46, Rep.). (2017). Washington, DC: U.S. Sentencing Commission.

⁵ Kyckelhahn, T., Ph.D., & Cooper, T., M.A. (2017). *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* (p. 8, Rep.). Washington, DC: U.S. Sentencing Commission.

doi:https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-CH.pdf

proposed in this amendment, we suggest considering a larger cohort that includes all those in CHC I, including defendants with one criminal history point. Defendants qualifying for one criminal history point have relatively minor backgrounds that could be the consequence of a juvenile offense resulting in no detention or a misdemeanor crime resulting in as little as 30 days of incarceration.⁶ Even though Commission studies find a higher rearrest rate among those with one criminal history point compared to those with no criminal history point, the rate is still significantly lower than state rates of recidivism.⁷

2. It is noteworthy that the Commission's research did not find a strong correlation between the severity of offense levels and rates of recidivism. This finding is an important indicator for the Commission in determining how best to adjust offense level scores for those deemed to be "first offenders" under this proposed amendment. We recommend that an offense level reduction extend along the full offense level scale and that multiple offense level reductions apply to all "first offenders" sentenced to 24 months or less. This adjustment seems particularly justified given that decades of research have found that imprisonment brings about negative individual-level changes that can harm re-integration upon release.⁸
3. The Commission should revisit how it implements statutory directives that exclude people "convicted of a crime of violence or an otherwise serious offense" from qualifying for an alternative sentence. We believe the Commission's threshold for seriousness is set too low. Indeed, people previously eligible for an alternative prior to implementation of the guidelines are now excluded, including people convicted of minor property offenses or low-level bank-teller embezzlers.⁹ In addition, the broad exclusion does not adequately account for the statutory directive that the guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."¹⁰

Part B: Consolidation of Zones B and C in the Sentencing Table

1. The Commission should reconsider its overly restrictive approach in regard to offense level qualifications for newly proposed Sentencing Zones A and B. In this process it is important to examine the potential recidivism rates of the convicted individuals considered for an alternative sentence in the context of their presence or absence in their communities. Some studies suggest high levels of incarceration disrupt a community's stability, weakening the forces of informal social control in ways that result in more crime. Moreover, research compiled by the Robina Institute of Criminal Law and Criminal Justice reports that in comparisons of recidivism outcomes between incarceration and community sanctions either no differences emerge or "custody is associated with higher rates of re-offending than community sentences"; this is sometimes described as the "criminogenic effect" of incarceration.¹¹ While we support the Commission's consolidation of Zones B and C we recommend that newly proposed Zone B be extended to sentences of 24 months. The changes should apply to all offenses.

Additional Comments

⁶ *Primer: Criminal History* (pp. 2-8, Rep.). (2017). Washington, DC: U.S. Sentencing Commission.

doi:https://www.usc.gov/sites/default/files/pdf/training/primers/2017_Primer_Criminal_History.pdf

⁷ Hunt, K., Ph.D, & Dumville, R. (2016). *Recidivism Among Federal Offenders: A Comprehensive Overview* (pp. 8-18, Rep.). Washington, DC: U.S. Sentencing Commission. doi:https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

⁸ National Research Council. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/18613>.

⁹ Tonry, M. (1996). *Sentencing Matters*. New York, NY: Oxford University Press.

¹⁰ See 28 U.S.C. § 994(g)

¹¹ Frase, R. S., Roberts, J. V., Hester, R., & Mitchell, K. L. (2015). *Criminal History Enhancements Sourcebook*. Robina Institute of Criminal Law and Criminal Justice.

1. We are concerned about the Commission’s findings of a downward trend in judges’ use of alternative sentences even among those already eligible under current guidelines. In 2014, only about 30 percent of people who were eligible to receive a non-prison sentence were sentenced to an alternative.¹² One explanation is that non-citizens account for a majority of persons whose sentence falls into the alternative sentencing zones; as of 2014 non-citizens comprised 66.7% of people sentenced in Zone A and 63.8% of people sentenced in Zone B. According to the Commission, “non-citizens, as a practical matter, are ineligible for most alternatives because of their status as deportable aliens (resulting in immigration detainers that prevent their release into the community).”¹³ We urge the Commission to examine the utility of this apparent automatic exclusion from alternative sentences based on immigration status. Research has shown that incarceration for immigration offenses - comprising 72 percent of non-citizen convictions¹⁴ - is extremely costly, is not serving its intended deterrent purpose, and is harming the basic rights of non-citizens, all of which argues for allowing some of these individuals to qualify for alternative sentencing arrangements.¹⁵ The 28 percent of non-citizens with other types of convictions¹⁶ should also be eligible for alternatives if they fall into the alternative sentencing zones. Some non-citizens in Bureau of Prisons custody do not have ICE detainers on file; importantly, a federal criminal conviction does not automatically make a non-citizen deportable under current immigration law. In addition, people serving probation sentences remain under correctional supervision. If ICE seeks to pursue the removal of such individuals, the government will be able to locate them. Implementing harsher penalties on non-citizens simply because of their immigration status, without regard to any other factors, is cruel, unfair and a poor use of resources.
2. We share in the broad concerns about safety and conditions within Bureau of Prisons facilities articulated by the Department of Justice’s Office of Inspector General.¹⁷ Moreover, recent policy shifts at the Department of Justice are likely to increase the prison population,¹⁸ which will exacerbate current conditions and increase community discontent with the federal criminal justice system. As a result, in the interest of fairness, human rights law’s recognition of the importance of retroactive application of new laws that reduce sentences, and to help address Bureau of Prisons population concerns, we support Commission action to apply any amendment to expand alternatives to incarceration and reduce offense levels retroactively.

¹² Semisch, C. R., Ph.D. . (2015). *Alternative Sentencing in the Federal Criminal Justice System* (p. 5, Rep.). Washington, DC: U.S. Sentencing Commission. doi:https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf

¹³ Semisch, C. R., Ph.D. . (2015). *Alternative Sentencing in the Federal Criminal Justice System* (p. 6, Rep.). Washington, DC: U.S. Sentencing Commission. doi:https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf

¹⁴ *Quick Facts: Non-U.S. Citizen Federal Offenders*. (2017). Washington, DC: U.S. Sentencing Commission. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Non-Citizens_FY16.pdf

¹⁵ Human Rights Watch, “Turning Migrants Into Criminals: The Harmful Impact of US Border Prosecutions,” May 22, 2013, <https://www.hrw.org/report/2013/05/22/turning-migrants-criminals/harmful-impact-us-border-prosecutions>. Grassroots Leadership and Justice Strategies, “Indefensible: A Decade of Mass Incarceration of Migrants Prosecuted for Crossing the Border,” July 2016, <https://grassrootsleadership.org/reports/indefensible-decade-mass-incarceration-migrants-prosecuted-crossing-border>.

¹⁶ *Quick Facts: Non-U.S. Citizen Federal Offenders*. (2017). Washington, DC: U.S. Sentencing Commission.

¹⁷ *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons* (Rep.). (2016). Office of the Inspector General, U.S. Department of Justice . doi:<https://oig.justice.gov/reports/2016/e1606.pdf#page=1>

¹⁸ Reinhard, B. (2017, June 8). Federal Prison Population Expected to Grow Under Trump. *The Wall Street Journal*. <https://www.wsj.com/articles/federal-prison-population-expected-to-grow-under-trump-1496953721>

3. To the extent that eligibility for alternatives to incarceration is based in part on criminal history scores there is the potential for exacerbating existing racial disparities in incarceration. African American defendants are more likely to have a criminal history than white defendants, some of which can be attributed to heightened levels of law enforcement in communities of color. We urge the Commission to monitor levels of racial disparity that may result from any new guideline adjustments and to propose strategies to address it. One policy to consider is to exclude all convictions over 10-years-old from consideration in criminal history calculations.

We believe that Commission action to lower guideline ranges and extend alternative sentencing options in cases previously excluded would be an important step in addressing system challenges and could produce increased fairness. The Commission should extend these opportunities to a more diverse cohort than is currently permissible in its issues for comment. Extending non-incarceration sentencing options to a larger group in line with the above comments would be an important step in easing the disproportionate sentencing under the federal guidelines.

Sincerely,



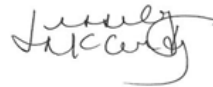
Marc Mauer
Executive Director
The Sentencing Project



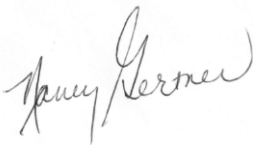
Alison Leal Parker
Director, US Program
Human Rights Watch



Ana Garcia-Ashley
Executive Director
Gamaliel



Jesselyn McCurdy
Deputy Director, Washington Legislative Office
American Civil Liberties Union



Judge Nancy Gertner (Ret)
Senior Lecturer Harvard Law School