James Arbaugh
[redacted]
FCI Fort Dix
P.O. Box 2000
Joint Base MDL, NJ 08640

3-October-2022

United States Sentencing Commission
Attention: Public Affairs / Priorities Comment
One Columbus Circle, N.E. Suite 2-500
South Lobby
Washington, DC 20002-8002

Re: Comments on Sentencing Commission Priorities

Dear Members of the United States Sentencing Commission:

I am an inmate in federal prison, and write to express my appreciation for the work you are doing and to affirm your planned priorities. As someone with inside experience of the sentencing guidelines, I can provides a unique prospective to give helpful feedback.

I feel strongly of the importance of the following identified priorities:

(1) 1B1.13 - Reduction in Sentence.
(7) Studies on recidivism and the treatment of defendants with zero criminal history points.
(11) Simplify the guidelines while promoting the statutory purposes of sentencing.
(12) Diversion and alternatives-to-incarceration programs.
(13)(A) 3D1.2 - Grouping of Closely Related Counts.

As you consider priority eleven (11), how to simplify the guidelines and statutory purposes of sentencing, it is important to integrate the guidelines to the statutory maximum sentence allowable. Ideally, if all possible guideline enhancements for aggravating factors were applied in a given case, the guideline sentence would not exceed the statutory maximum. In some classes of crimes, particularly sex offenses, the guidelines for a typical case are at or beyond the statutory maximum.

In particular, consider cases of child exploitation, production, distribution, receipt or possession of child pornography. Most of these cases are given the following enhancements:

§ 2G2.2(b)(4) - material with sadistic or masochistic conduct
§ 2G2.2(b)(6) - use of a computer
§ 2G2.2(b)(7) - number of images involved

Because most cases receive these enhancements, they become "useless" and contribute to a guideline sentence at or above the statutory maximum. Frequently, judges do not have the backbone to give a downward variance accordingly. Those that do are scrutinized severely. Consider the confirmation hearings of Justice Ketanji Brown Jackson.

In cases of sexual abuse, there is no guideline consideration for the severity of the sexual act. 18 U.S.C. § 2246(2) describes a "sexual act" to include anything from (A) forced sodomy/intercourse to (D) simply touching the genitalia to cause sexual arousal. There is no guideline enhancement for more severe conduct.

The age of the victim becomes a primary consideration according to the guidelines sentence, particularly for a conviction under 18 U.S.C. § 2423(c). There is sentencing disparity between the guideline used, § 2G1.3(b)(5)(B) - "the offense involved a minor who had not attained the age of 12 years, increase by 8 levels", and other guidelines. The enhancement used for other sex offenses is at least half. Consider:

§ 2A3.1(b)(2) - increase by 4 levels
§ 2A3.4(b)(1) - increase by 4 levels
§ 2G2.1(b)(1)(A) - increase by 4 levels
§ 2G2.2(b)(2) - increase by 2 levels
§ 2G2.6(b)(1)(A) - increase by 4 levels

Accordingly, the § 2G1.3(b)(5)(B) enhancement should be reduced from 8 levels to 2 to 4 levels to prevent sentencing disparity.

The age issue is again double-counted under § 2G1.3(b)(2)(B) for Undue Influence because "some degree of undue influence" exists whenever an age disparity of at least ten years exists between a minor and another participant in the prohibited sexual conduct. § 2G1.3(b)(2)(B) cmt. n. 3. It would be a very rare case where there was not an age disparity, and the undue influence enhancement would not apply. The note should be modified not to apply the Undue Influence enhancement for age disparity alone.

I appreciate your work to revise and improve the sentencing guidelines which will make for more equitable sentencing.

Sincerely,

From:	~^! AUGUSTIN, ~^!ABRAHAM ASHLEY
Subject:	[External] ***Request to Staff*** AUGUSTIN, ABRAHAM, [redacted]
Date:	Thursday, October 13, 2022 8:20:20 PM

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To: U.S. Commission
Inmate Work Assignment: Unicor

ATTENTION

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Inmate Message Below

I recommed that the offense level for kidnaping, 18 U.S.C. Section 1201, be differentiated between offenses that occurred on the 3 normal levels in society: (1) kidnaping for economic/financial gain, (2) kidnaping for sexual exploitation, and (3) kidnaping due to drug deal gone wrong. In the last one, the so-called kidnaped victim cheated the offender and therefore contributed to the offense. The offense level for this type of offense should not begin at the same offense level as the first two types. And also there is no statutory maximum for kidnaping. It is from 0 to life. Unlike carjacking, hobbs act, and bank robbery that has a statutory maximum of 20 years if death does not result, kidnaping has no statutory maximum. Therefore, judges will met out sentences for kidnaping due to a drug deal gone wrong at a higher level than say for other offenses like carjacking where actual violence occurred and victims got hurt. This needs to be changed.

From: ~^! BARNES, ~^!LEE ADIERE
Subject: [External] ***Request to Staff*** BARNES, LEE, [redacted]
Date: Friday, October 14, 2022 7:49:59 AM

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To:
Inmate Work Assignment: unicore

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Inmate Message Below

i wanted to talk about the fundamental policy disagreement with the methamphetamines sentencing guidelines i believe that all methamphetamines should all be treated as the same drug for example a person who meth gets tested and it comes back 80% pure its increase in the guidelines versus the same person who gets caugt with the same drugs dont get the meth tested his guideline range twice as much lesser than the other person whos drugs got tested

From: ~^! BERRYHILL, ~^!HOMER LEE
Subject: [External] ***Request to Staff*** BERRYHILL, HOMER, [redacted]
Date: Friday, October 14, 2022 8:06:15 AM

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To: Sentencing commission
Inmate Work Assignment: NA

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Inmate Message Below

REGARDING: U.S.S.G 3E1.1(A)(B) "ACCEPTANCE OF RESPONSIBILITY BENEFIT" WHEN 5G1.1(A) STATUTORY MINIMUM APPLIED IT RENDER 3E1.1(A)(B) 3-LEVEL REDUCTION FORM REDUCING A DENFENDANT ACTUAL SENTENCE UNDER U.S.C 843(B)(D) USE OF A COMMUNICATION FACILITY. GIVEN YOU 3-LEVEL REDUCTION IS APPLIED TO THE GUIDELINE BASE LEVEL (THAT YOUR NOT SENTENCE TO) RATHER THEN YOUR ACTUAL SENTENCE UNDER 5G1.1(A) WHICH AFTER ACCEPTING RESPONSIBILITY YOU RECEIVED THE SAME SENTENCE. SO YOUR GETTING NO BENEFIT FOR ACCEPTING RESPONSIBILITY FOR YOU CRIME. THE SENTENCING COMMISSION PURPOSE OF 3E1.1(A)(B) WAS TO GIVE A DEFENDANT THE BENEFIT OF A "LOWER SENTENCE" FOR ACCEPTING RESPONSIBILITY FOR YOUR CRIME. FOR YEARS THIS ERROR IN THE GUIDELINE HAS BEEN DENING PEOPLE THE BENEFIT OF ACCEPTING RESPONSIBILITY UNDER U.S.S.G 3E1.1(A(B) AND IS UNFAIR TO THE DEFENDANTS WHO PSR STATED THAT A DEFENDANT ACCEPTED FULL RESPONSIBILITY BUT RECEIVE NO BENEFIT BECAUSE 5G1.1(A) RENDER 3E1.1(A)(b) FROM REDUCING A DEFENDANT ACTUAL SENTENCE. THIS ISSUE HAPPEN TO ME AT SENTENCE. COULD YOU PLEASE LOOK INTO THIS ERROR. THANK YOU HOMER BERRYHILL

From: ~^! BREWER, ~^!EDWARD FRANK
Subject: [External] ***Request to Staff*** BREWER, EDWARD, [redacted]
Date: Monday, October 17, 2022 9:06:29 AM

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To: Sentencing Commision
Inmate Work Assignment: N/A

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Inmate Message Below

Hello there, I am reaching out to to explain that it is urgent that all party's involved understand that when passing these new law's, that you have to start making retroactive laws mandatory and not leaving them to the discretion of judges, because judges are being bias in there act's in a manner that cannot be challenged because bias is not challengeable based on a judges rulings and or court order.

My name is Edward Frank Brewer from the Northern District of Iowa, Case [redacted], every law that has passed in the last 14 years was supposed to apply to me cause the only prior felony I have is out of Chicago Illinois for simple possession with out intent, which is a "USER" charge not a drug trafficking offense, and my current charge is for 5 and 1 half ounces of crack cocaine, and no violence is attached to my current charge, and I received 370 months that later was reduced thanks to you and you (Sentencing Commission) alone, to 240 months. No since then, several other laws has passed to fix the sentencing disparity between crack and powder, but I have been repeatedly denied, now at first it's based on what may appear to be statutory reasoning, but then the FIRST STEP ACT was denied based on discretion alone, when in fact this law was made specifically for my kind of case[s]. And as part of that denial she starts of attacking me for filing and fighting my case all these years which is vindictive prosecution in retaliation of me flexing my constitutional rights to fight my case, and all other reasons for her (judge Linda Reade) discretion is based on facts that I Brewer has already received several sentencing enhancements for and would still receive in the new sentence, so there was no valid reason for denying me the First Step Act, and before that I was denied the Amendment 782 (All Drugs Minus 2) because of my statutory mandatory minimum of 240 month/20 years, but the First Step Act took away said mandatory minimum, and thus I now qualify, and was denied again.....

like I am in here with people who did not cooperate with the government and who were caught with 3x to 10x what I was charged with and they did not get 33% of my sentence, so at what time am I going to be shown compassion. My son asked me when he was about 11 years old what did I really do to be in here, and I said I was convicted for selling drugs, and he said I had to have done something else and I said "why you say that son" and he said "my friend dad or uncle went to jail 3 years ago for killing a man, and he just came home after only being gone 3 years, so what you did had to be worst than murder."

I did not even know how to explain this part of the system to him, its heart breaking.....
But we have to leaving it to the sole discretion of the judges and make it more mandatory for it to work, cause some judges have a personal hidden dislike for some defendants and or their charges and will deny relief while concealing the true reason for that denial.

Thank you for your time, this is my comment, please take heed. GOD BLESS YOU & YOURS.

From:	~^! CARTER, ~^!GERRY F
Subject:	[External] ***Request to Staff*** CARTER, GERRY, [redacted]
Date:	Sunday, October 16, 2022 6:35:21 PM

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To:
Inmate Work Assignment: Cart orderly/Suicide comp

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Inmate Message Below

Part One

My name is Gerry Carter [redacted] I am a 37 year old African American male. I am currently serving a mandatory minimum 30 year sentence at F.C.I. Williamsburg in Salters, S.C. I was convicted of conspiracy to distribute methamphetamine, as well as having a firearm in relation to a drug trafficking crime. The mandatory minimum for those offenses is 15 years. Though I never got caught with drugs nor guns in my possession, the conspiracy laws are what allowed the government to charge me. Nevertheless, I pled guilty & accepted responsibility for my actions.

How I ended up with a mandatory minimum of 30 is because the government enhanced my sentence another 15 years for my past marijuana offenses. Currently marijuana id a schedule 1 controlled substance, categorized more dangerous than cocain, meth, & fentanyl which is leading the nation in fatal overdoses.

I was enhanced for a substance that has been legalized & or decriminalized in more than half of the states in the nation. So, I actually was criminalized, penalized, served my time, & suffered way more consequences one can imagine for the same plant others are legally making millions.

On both occasions I was charged with felony possession (2003 & 2011) for weed I purchased to smoke. On both occasions I had less than an ounce which constitutes misdemeanor possession, but because I had multiple individual baggies (the way I'd purchased it) they charged me with distribution & intent to distribute which is a violation of Georgia controlled substances act.

Recently President Biden pardoned those with simple possession of marijuana federal offenses, stating "no one should be in prison for using marijuana". Well, that's exactly what happened to me, not once but twice & it allowed the federal government to double my sentence. I appreciate the President's efforts, however, there is no one in federal custody currently with federal simple possession of marijuana convictions. Nevertheless, there are those of us who have been convicted for having small amounts of marijuana & have been enhanced because of those convictions as a career offender or 851 like in my case.

Then comes the conflict of different circuit courts. Federal law is federal law but the circuits choose how to apply that law differently from other circuits. Then even if a person has a valid argument that holds merit, a judge can deny that person relief based on his or her own bias

In this day in time we are stuck in the web of an unjust justice system where the guidelines are uneven, judges hold grudges, & prosecutors over prosecute in a race to give out as much time they can possibly give. At this point it's like a game....

From: ~^! DAHDA, ~^!ROOSEVELT
Subject: [External] ***Request to Staff*** DAHDA, ROOSEVELT, [redacted], SST-F-A
Date: Thursday, October 13, 2022 4:50:15 PM

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To: U.S. Sentencing Commissioners
Inmate Work Assignment: INT/WHSE

ATTENTION

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Inmate Message Below

UNITED STATES SENTENCING COMMISSIONERS:

Please consider making another amendment to the guidelines that would decrease the drug equivalency table by two points all across the board, or for each drug and or its isomers. Similar to Amendment 782, this time adopt a different approach to how drug quantity was determined, and whether there was a sufficient evidence to make a reasonable determination before proceeding with sentencing the defendant to a statutory maximum or mandatory minimum sentence.

Also, please consider narrowing the three part test outlined in Amendment 790. Add commentary to the guidelines that assist the Court in making determinations regarding the defendant's role in the offense, and/or scope of involvement. The Courts still struggle to accurately determine a defendants scope in the offense. Examples and commentary are needed to better assist the Court in the exercise of this three-prong test, as it is not being exercised evenly throughout the nation. Thank you.

From: ~^! FISHER, ~^!KEITH SR
Subject: [External] ***Request to Staff*** FISHER, KEITH, [redacted], FTD-V-B
Date: Friday, October 14, 2022 9:06:40 AM

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To: PubAffairs@ussc.gov
Inmate Work Assignment: Law Library

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Inmate Message Below

I would like to address the issue of this draconian and unconstitutional improper expansion commentary of the federal sentencing guidelines. The big issue for years has been this "intended loss" vs. "actual loss" debacle. How on God's Green Earth can you punish a defendant for something he has not done at all, where any reasonable person would say actual means actual. In the federal sentencing guidelines there is no definition for the word loss, but yet for many years, defendants have been punished for these Nostradamus predictions from these federal prosecutors which has added years to defendants lives.

Also the issue of the measurement of loss should follow the case law of U.S. v. Treadwell, 593 F.3d 1011 (9th Cir. 2009). It is my comment that we should follow the case law of this case and its wording is clearly and conclusively correct stating: "LOSS SERVES AS A MEASURE OF THE SERIOUSNESS OF THE OFFENSE" and the defendant's relatively culpability and is a "PRINCIPAL FACTOR in determining the offense level.

Well then I ask how can I have a loss amount of $424.62 and my sentence is 99 months? You can't make this stuff up and the U.S. Sentencing Commission needs to be aware that Judges and Prosecutors are circumventing your guidelines so we (defendants) say what is the point of writing them. They use them (guidelines) when they want to punish defendants and don't use them when they help defendants.

This system is broken, has been for years and has been ignored for years and in need of much help but one of the first things we need to clear up is the improper expansion of the commentary to the guidelines. The poster child case(s) are U.S. v. Riccardi, 989 F.3d (6th Cir. 2019) and U.S. v. Nasir, 982 F.3d 144 (3rd Cir. 2020).

I offer my thanks in advance for your time, patience and professionalism in these matters.

Warmest Regards,

Keith Fisher [redacted]
FCI Fort Dix
P.O. Box 2000
Joint Base MDL, NJ 08640

United States Sentencing Commission
One Columbus Circle, NE
Suite 2500, South Lobby
Washington, D.C. 20002 8002
Attention: Public Affairs – Priorities Comment

October 16, 2022

Re: Proposed Amendment of Sentencing Guidelines

Dear Members of the Commission:

My name is Daniela Gozes-Wagner. I am writing this letter to respectfully ask that you please consider including the Loss Amount Sentencing Guideline (2B1.1(1)(b)) as a priority for amendment. I am living testament to the devastating consequences that can result from this guideline, and I ask that you please change this law so that people no longer have to experience what I, my family, and so many others have suffered and continue to suffer.

My life has always revolved around my desire to be a loving mother. I suffer from a genetic condition, similar to Marfan's syndrome, which affects my heart and joints and has left me with only one kidney. Due to these chronic health issues, becoming pregnant was considered high risk, but thankfully my efforts were rewarded with my two wonderful children, Austin and Julia. As a single mother, I struggled to make ends meet and support Austin and Julia. I worked as an employee in a medical office, received only a modest salary (a total of $387,000 over a period of five years) and lived a very modest life. I drove an old car, we lived in a very small apartment, and I used all of my income to provide for me and my children.

When the federal government began investigating my employers for medical fraud, they offered me a plea deal. Unable to even think about leaving my two young children for such an amount of time, I went to trial. Even though my only compensation was a modest salary, after my trial and conviction I was sentenced based on a "loss amount" of more than $25 million. This loss amount resulted from my employers' fraud that started long before I joined the company. When I was hired, unbeknownst to me, the government was already investigating my employers' long-running scheme, and at my trial, the prosecutors even acquiesced that I did not know about the fraud during the first two years of my employment.

Yet, just because of this loss amount, my sentencing guidelines increased, from 30 to 37 months to 324 to 405 months. In other words, this single factor – the loss amount – turned my guideline sentence from one of around three years into one of nearly 30 years. I was sentenced to 20 years, yet by pleading guilty, none of my bosses (who orchestrated and ran the fraud scheme and who made millions in ill-gotten gains) received a sentence of more than six years – even though they were far more culpable than I was.

My son Austin (15 at the time) cried uncontrollably at my sentencing, and when he asked the judge if he could give me one last hug before I was remanded to prison, his request was denied. Austin and Julia were forced live on different continents: Julia moved in with my mother in Israel, and Austin was forced to live with his father, who is a registered sex offender. Julia missed me so much that when she visited me in prison, she asked if she could move into the prison just so that she could be with me.

I was facing almost two decades in prison when I was blessed to receive the support of so many kind individuals and organizations for my release from prison through Executive Clemency. Over 130 former judges and high-ranking DOJ officials, including six former Attorneys General (John Ashcroft, Ramsey Clark, Peter Keisler (acting), Ed Meese, Michael Mukasey and Matt Whitaker (acting), as well as former FBI Director Louis Freeh and former Solicitor General Kenneth Starr), filed an Amici Brief denouncing the excessive length of my sentence. This Amici Brief included the following statement:

> *"Ms. Gozes-Wagner's co-defendants, who were the masterminds, principals, and beneficiaries of the wrongdoing, all received much shorter sentences than she did. Prosecutors and judges must have determined that prison terms of only five and six years were sufficient for their much more culpable conduct. It is thus impossible to understand what proper purposes were served by Ms. Gozes-Wagner's extreme sentence."*

Over 100 former judges and prosecutors also submitted a letter to the White House requesting clemency consideration.

In December 2020, after spending three years in prison, my prayers were answered. I received Executive Clemency and was released from prison. I don't know how to explain the feeling of experiencing this miracle – in one instant, to be taken from a place of despair and hopelessness to a place of warmth and love. Tears streamed down my face (and my children's faces) when I was released. It still feels like a dream to me. I had given up all hope and was lifted out of despair. I cherish every moment with my children, and for each of these moments I thank everyone who supported me.

I beg that you consider changing the very harsh sentencing law that almost destroyed my life. Countless others are not as fortunate as I was and remain in prison because of this law. I hope and pray that this will finally be addressed, and that others will never have to go through this pain.

Respectfully,

Daniela Gozes-Wagner

October 2, 2022

TO:
U.S. Sentencing Commission
ATTN: Public Affairs Priorities Comment
1 Columbus Circle NE
Suite 2-500
Washington, D.C. 20002-8002

FROM:
Daniel Heath [redacted]
FCI Fort Dix
PO Box 2000
Joint Base MDL, NJ 08640

RE: Comments on Commission Priorities

Sentencing Commission,

How refreshing to hear that we have a Sentencing Commission after a long period of abeyance. Thank you for publishing a proposed list of priorities for your upcoming session of work. I would like to personally urge your attentiveness to the following priorities:

1. A Complete Overhaul of §1B1.13

I am in total agreement with your proposed list that attention to §1B1.13 should be your utmost priority. Since passage of the First Step Act (FSA) BOP inmates, BOP administration, and US Courts have been in a quandary about which circumstances rise to the standard of "extraordinary and compelling" under 18 U.S.C. §3582.

As you address §1B1.13 I specifically ask that you heed the call of the FSA Title VI Sec 603(b) and truly help to "Increas[e] the Use and Transparency of Compassionate Release." The Commission was tasked by Congress with doing the proper amount of research to give guidance to the BOP and Federal Courts on which situations should compel them to consider a reduction in sentence for an inmate.

Specifically, I hope that you will expand the current

categories in §1B1.13 commentary, give the BOP Director and Federal Judges more free reign to consider inmates on an individual basis, and rely on case law to get a sense of situations that District Judges have found to be extraordinary and compelling.

Even more narrow, I ask that you include a provision on being a caregiver to any family member who may need assistance due to disability. Judges in at least 10 Federal Circuits have found it extraordinary and compelling that an inmate needs to be a caregiver to a parent, adult child, grandparent, or other extended family member. (See Attachment) I request that such situation is included in your revised §1B1.13.

2. Consideration of §4A1.1

In particular, I ask that you pay close attention to research regarding convicted persons with zero criminal history points, in which a criminal conviction represents truly aberrant behavior. Please consider reduced sentence guidelines for such inmates, and please make any changes retroactive.

3. Changes to Guidelines Used to Calculate Range in Offenses of Sexual Nature

I am thankful that you plan to visit §2G1.3 in some way. Please take a look at changes needed for all guidelines in this sector. For instance, please consider getting rid of "computer enhancements." In an age when practically every crime in this category involves a "computer device" such behavior is no longer an aggravating factor. Please consider completely altering or dropping altogether "picture count" provisions such as in §2G2.2. With the proliferation of high speed internet it is quite impossible to infer the severity of a crime by number of images or videos downloaded.

I ask you again to use recidivism rate research for first time offenders in this category in comparison to other crimes to lower sentence ranges commiserate with other felonies.

Thank you for your time and consideration, and I am praying God's blessings on you as you go about fulfilling your duties.

Sincerely,

Daniel Heath

From: ~^! IROEGBULEM, ~^!ALLEN
Subject: [External] ***Request to Staff*** IROEGBULEM, ALLEN, [redacted], THP-D-B
Date: Thursday, October 13, 2022 6:50:21 PM

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To: U.S. Sentencing Commisssion
Inmate Work Assignment: D2 orderly

ATTENTION

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Inmate Message Below

I am not sure if this applies to the president announcement but I am shooting my shot so to speak, since it applies to me. I am writing you in regards to the Retro active amendment; Removing all simple marijuna possession cases, from relevant conduct and criminal history score due to the presidential pardon for simple marijuna possession. I have many of those convictions and they were used in my sentencing, state and federal. I was wondering if I may apply to any of these changes. Please and thank you.

From: Joshua William Jackson [redacted]
MCFP Springfield
P.O. Box 4000
Springfield, MO 65801

To: The Honorable United States Sentencing Commission,

I would like to make a comment on the Sentencing Guidelines and proposed amendments as per the notice on 9.29.2022. My name is Joshua William Jackson and I am the criminal defendant in Case No.: 3:16-CR-0196-L-1, in the Northern District of Texas. During my initial case, I proceeded Pro Se, and due to confusion and complications by my Sentencing Judge, I was sentenced to more than 110 months higher than what my sentencing Guidelines would have been, had they been properly applied..

Since then I have been focused on helping others around the nation (at the facilities where I am) resolve issues regarding the Sentencing Guidelines, and other issues. I would like to make requests and speak on proposed amendments that I have both experienced and personally witnessed.

USSG 1B1.13 - Compassionate Release

The original Compassionate Release Guidelines were extremely rigid and gave very few reasons for a petitioner or the Court to consider if a petitioner has an "extraordinary or compelling circumstance". As we have noticed over the last 4 years, many reasons can be considered Extraordinary and Compelling. Some of the reasons I would like to be considered are based on Supreme Court Cases that have gone into effect since the passage of the First Step Act;

*Gall, Molina-Martinez, and Rosales-Mireles - Misapplication of the United States Sentencing Guidelines:

One issue I have seen more often than not is when a Court during the Sentencing Hearing makes a grave misapplication of the Guidelines despite clear and concise instructions from the Sentencing Commission that have led to years (sometimes decades) in additional Incarceration.

In Gall, the Supreme Court explained that a Misapplication of the United States Guidelines can affect the entire sentencing proceeding. But after the issue has been made, it is nearly impossible for some inmates to amend the issue regardless of how clear the error was. There are so many procedural hurdles that prevent adequate review that families are stuck with a human-made error that would have otherwise not been an issue. Because the 3553(a) Factors also heavily rely on the Guidelines and the Sentencing Range the fact that Guidelines were misapplied could impact the entire Judicial Proceeding.

This was confirmed further in Molina-Martinez then Rosales-Mireles which explained that when the Guideline issue is clear, it can and most often should be resentenced. As mentioned before there are a number of procedural hurdles that would prevent an issue from being raised, and if a Court decides to ignore the issue, there is no chance for appellant review.

The 18 USC 3582 would provide a window for sentences that are unconstitutionally long to be reduced and errors made at a sentencing hearing to be resolved in a positive way that would also promote respect for the law, and fairness in the Courts.

Example:

I was charged in a three count Superseding Information with violating Use of a Facility of Interstate Commerce to Aid a Racketeering Enterprise 18 USC 1952(a)(3)(A) in violation of Texas Penal Code 43.02 (Prostitution), Illegal Receipt of a Firearm by a Person Under Indictment, 18 USC 922(n) and 924(a)(1)(D) and Cyberbullying 18 USC 2261A(2) and (b+5). My underlying offense for the Aiding Racketeering charge (1952) was Tex. Pen. Co. 43.02. Which is a Class B misdemeanor.

18 USC 1952 falls under the United States Sentencing Guidelines of 2E1.2. The Second Application Note states that if underlying conduct violates state law, the Court must determine the Most Analogous Federal Offense and use the Guidelines

(See 2E1.2 cmt. n. 2). In my case the Court did not understand that 18 USC 1952 could be violated by a state law and did not understand that the Sentencing Commission had directed the Court to determine the most analogous Federal Offense to the charged underlying conduct.

Instead of my offense level being 20 bringing me a guideline range of 37-46 months, it ended up being 34 bringing my range to 168-210. That is nearly a decade of a difference in regards to the Guidelines, based on what is essentially a simple mistake.

I am not 7 years into an incorrect sentence because the Court still doesn't understand the guidelines despite the Langley Decision from 1990. (United States v. Donald Langley, 5th Cir 1990). Because of the complexity of the 2E1.2 Guidelines I have no recourse to fix an illegal sentence because the Judge still doesn't understand the clear instructions in 2E1.2 cmt. n. 2.

If the 1B1.13 Guidelines were to also consider Misapplication of the United States Sentencing Guidelines and Extraordinary and Compelling issue, then it would require Courts to consider Guidelines issues and how appropriate a sentence is for a defendant after the issue has been resolved. Numerous Courts around the nation in the last four years have decided that a Misapplication of the Guidelines does in fact require Resentencing to preserve the interest of justice, fairness, and the public reputation of the Court.

*Concepcion - Intervening Changes in law

One of the major things that affect Defendants is when a law changes in their favor after serving a 30 year sentence because it is discovered that the issue was reversible. But without it being made retroactive, The inmate would still serve a sentence they would not have to serve otherwise.

The truth is, it was once said, to even serve one day of additional time in prison then is necessary would be a violation of due process and civil liberties, I believe by allowing Courts to not only consider the Misapplication of Guidelines but amended Guidelines and Intervening Changes in law, it would allow for a fair consideration between similar defendants (3553(a)(6)) and it would give people chances to reunite with their families after the laws change.

Next, I would like to request an amendment to USSG 2E1.2(a)(2) and cmt. n. 2:

As mentioned before I was charged with 18 USC 1952(a)(3)(A) in violation of Texas Penal Code 43.02, in Count 1 of my Superseding Information. 18 USC 1952 is in the statutory appendix of 2E1.2, which is pretty straightforward. The problem came when my Court didn't understand the language in Application Note 2.

Application Note 2 states that if underlying conduct violates state law, then the Court must determine the most analogous Federal Offense and use the guidelines (a)(2).

While the reading is clear the understanding was not for my Judge Sam A. Lindsay. It lead to an increase of more than 110 months in my federal guidelines and forced my 3 five year sentences to be run consecutively.

Texas Penal Code 43.02 is Prostitution in the State of Texas, a Class C Misdemeanor at best. But the Court stated that it "did not deal with state charges" despite the Guidelines stating specifically, "to find an Analogous Federal Offense to the underlying state conduct."

I believe if the Guidelines were a bit more clear, it would prevent issues like this in the future. I would propose something similar to;

Application Note 2: If the charged underlying conduct violates State Law,(ie a State Penal Code) the Court must first Determine the Most Analagous Federal Offense to the charged Underlying State Code, and use the applicable Federal Guidelines. If the charged underlying conduct violates Federal Law, the Court is to use the Federal Guidelines for the charged conduct.

This would stop the confusion with District Courts, and Appellant Courts (like in United States v. Langley {5th Cir. 1990} and my own case United States v. Jackson {N.D.Tex. 2016}) It would also reduce the risk of inappropriate sentences based on the misapplication of the United States Guidelines and errors in Sentencings.

Also by clarifying the Application Note, it would reduce the chance of Gall, Molina-Martinez, and Rosales-Mireles issues at the District Court Level. It would also allow more comfort in Guilty Pleas and confidence in the Sentencing Procedure. Even though the Guidelines are merely "advisory", the Court is still required to accurately calculate the Guidelines for the 3553(a) Factors.

The chances of inflated sentences are drastically reduced when there is clear instruction that can not be misconstrued.

If this is made retroactive as well, I would finally fix a sentence that is currently 4 years past it's prime.

I believe by showing an example of what 18 USC 1952(a)(3)(A) looks like and then explaining how to find the most analogous Federal Offense to any given state offense, would also help judges who are confused by the statutes or guidelines instructions. Other Guidelines show examples of how to apply the application notes. I believe 2E1.2 also needs to have explanations or examples because 18 USC 1952 is considered a complex charge due to its dual statute nature, and how it can be violated by both Federal and State laws in the same statute or multiple underlying offenses. (2E1.2 cmt. n. 1)

USSG 2X5.2 - Class A Misdemeanors:

While I was in COurt with United States Distict Judge Sam A. Lindsay, he could not understand that Class A Misdmeanors not listed in the statutory appendex of 2X5.2 still fell under 2X5.2 if it was not listed in another Federal Guideline.

I believe there are a number of Judges who have made a similar mistake and it can lead to potentially decades of additional prison time for defendants based on an issue ultimately caused by a Courts failure to understand the law.

I would like to request that 18 USC 1384 - Prostitution on or Near a Military Base or Establishment be added to the statutory appendix of USSG 2X5.2, as it is a Class A Misdemeanor but could accidentally fall under another statutory appendix if left unchecked, unclear, or decided.

The issue affected me directly because of Tex. Pen. Co. 43.02 and 18 USC 1384 are nearly identical with the exception of the Federalizing Element. If 18 USC 1384 was listed in the Guidelines of 2X5.2 it would have greatly reduced the risk of the Guidelines being misapplied in my case and my sentence being enhanced by 110+ months.

USSG 3E1.1 - Acceptance of Responsibility

I would like to also address the issue of the Government withholding Acceptance of Responsibility based on objections to the PSR based on a misapplication of the Guidelines.

Many federal inmates feel as if they are conned into pleading guilty with the bait of a lesser offense only to be enhanced based on "irrelevant conduct" that had been dismissed or never charged at all. Then if the defendant practices his rights to object, the Government withholds the acceptance of responsibility. It makes a mockery of the justice system because it shows that the Government does not have to honor a plea agreement it crafted, and then most of the time Inmates can not even withdraw the plea based on the duplicity they feel during their sentence that Justice was not served.

Acquitted Conduct:

I would also like to request not only Acquitted but uncharged conduct and conduct outside of the offense of conviction be removed from "relevant conduct".

Joshua William Jackson [redacted]
MCFP Springfield
P.O. Box 4000
Springfield, MO 65801-4000

From: ~^! SMITH, ~^!JOHNNY
Subject: [External] ***Request to Staff*** SMITH, JOHNNY, [redacted]
Date: Thursday, October 13, 2022 6:05:30 PM

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To: Sentencing Commission
Inmate Work Assignment: Suicide Watch Companion

ATTENTION

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Inmate Message Below

Dear Sir/Ma'am,

First, thank you for allowing me the opportunity to speak with you. It is a rare thing indeed. Seldom do inmates, the ones directly affected by the changes you institute, get the opportunity to voice their opinions and concerns. I am both honored and humbled by the prospect of having my voice heard.

That said, and in the spirit of brevity, I belong to a class of offenders that are often forgotten about, or purposely ignored. I am a sex offender. I know, and I understand if you wish to stop reading now. I am used to that. However, if you are still with me - hear me. I made a mistake. Yes, I could go on and on about upbringing and boy's homes and being mistreated by adults I idolized, but the truth is, I made a mistake. I sewed a scarlet letter "P" on my back and now I wear it as a mark of shame. It has made me a social pariah. It has destroyed my military career, my marriage, my relationship with my family and siblings, my work career and every other aspect of my life. For my crime I received way too much time, 24 and a half years. But, even after I "do the time," I will still pay for my crime for the rest of my life. On a positive note, my case is still on appeal.

My question for you is simple, when does it end? When will I have finally paid my debt to society? The truth is, never. Which is, well, a travesty considering every other crime has a date wherein the punishment actually ends. Not so with sex offenders. Just ask The Adam Walsh Foundation, SORNA and the Federal Court System. I will never pay my debt - even though sex offenders have a less than 4% recidivism rate. I will forever wear a scarlet letter "P" on my back. It would seem the courts and BOP agree that this is right and just as they offer no programs that reduce the amount of incarceration we face, or send us home sooner. But they will give time off to drug offenders even though their recidivism rates are somewhere about 43%. I don't even qualify for FSA time credits, but neither do terrorists. I firmly believe that "Incarceration without Rehabilitation is Discrimination." (You can use that, it's original and mine.) When will you, The Sentencing Commission, start giving sex offenders the benefit of the doubt and begin treating us as though we are actually human? When will it be "our" turn? Have I not bled enough for you?

If I sound a bit frustrated, I am. And, I apologize for that. Thank you for hearing me. I have much more to say, but I am out of time to say it.

Johnny Smith
[redacted]

From: ~^! MEDRANO, ~^!DAVID
Subject: [External] ***Request to Staff*** MEDRANO, DAVID, [redacted], TEX-C-B
Date: Thursday, October 13, 2022 5:49:07 PM

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To: sentencing commission
Inmate Work Assignment: rec mod unit

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I wanted to speak on how we inmates through out the prison system have been doing hard time during the covid 19 pandemic and wanted to see if there would be some kind of consideration on not being able to see our family and also the loss of family members do to the pandemic. It would be nice to have another 2 points across the board to get closer to being home. Thank you and God bless

---

~~FROM: [redacted]~~
~~TO: Health Services LOW~~
~~SUBJECT: ***Request to Staff*** MURRAY, AARON, [redacted], COL-B-D~~
~~DATE: 10/02/2022 01:05:14 PM~~

~~To: Delete~~
~~Inmate Work Assignment: N/A~~

October 1, 2022

United States Sentencing Commission
ATTN: Public Affairs-Priorities Comment
1 Columbus Circle, NE, Suite 2500, South Lobby
Washington, DC 20002-8002

RE: Public Comment on Proposed Priorities for
Amendment Cycle Ending May 1, 2023

Dear Sentencing Commission,

My name is Aaron Murray and I am a federal prisoner at the Federal Correction Complex- Coleman Low in Coleman, Florida. During my incarceration, I received my paralegal certification and have held a position as the Legal Clerk in the prison's Law Library. Over the last several years, I have been in contact with Carrie Wilson of this Commission and I am aware that you periodically review comments and recommendations from inmates regarding potential changes to the sentencing guidelines. Therefore, I am offering several comments on possible policy priorities for the amendment cycle ending May 1, 2023.

My comments to the proposed priorities for the amendment cycle, that were enumerated by this Commission, are as follows:

(1) Consideration of possible amendments to 1B1.13 (Reduction in Term of Imprisonment under 18 U.S.C. 3582(c)(1)(A) (Policy Statement)).
The First Step Act plainly intended that federal judges be allowed an independent and individualized consideration on whether to grant a sentence reduction or compassionate release. Despite the Eleventh Circuit's erroneous conclusion in UNITED STATES V. BRYANT, 996 F.3d 1243 (11th Cir. May 7, 2021), every other Circuit has concluded that U.S.S.G. 1B1.13 is not an applicable policy statement for defendant filed motions. While 1B1.13 needs to be updated, it is important to remember that the Guidelines are advisory and that, even absent a policy statement, federal judges have authority to adjudicate whether a defendant has offered "extraordinary and compelling reasons" warranting relief. The 3582 statute merely requires that courts' decisions on sentence reductions and compassionate releases be "consistent with" any applicable policy statement. 18 U.S.C. 3582(c)(1)(A). As the Seventh Circuit put it, "'Consistent with' differs from 'authorized by.'" UNITED STATES V. GUNN,, 980 F.3d at 1180 (7th Cir. Nov. 20, 2020). Congress delegated the authority to determine the meaning of "extraordinary and compelling reasons" to this Commission. See 28 U.S.C. 944(t). While this Commission "shall DESCRIBE what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples," (944(t)), you do not have the authority to "define" what can be considered "extraordinary and compelling." Therefore, district courts, directly authorized by Congress, have the inherent equitable power to grant a reduction in sentence or compassionate release for any reason beside rehabilitation alone. See 28 U.S.C. 994(t). Thus this Commission must update the 1B1.13 Guideline to include defendant filed motions while providing guidance to district courts on what can be considered "extraordinary and compelling."

~~FROM: [redacted]~~
~~TO: Health Services LOW~~
~~SUBJECT: ***Request to Staff*** MURRAY, AARON, [redacted] COL-B-D~~
~~DATE: 10/02/2022 01:28:55 PM~~

~~To: Delete~~
~~Inmate Work Assignment: N/A~~

(7) Consideration of possible amendments to the Guidelines Manual relating to criminal history to address the treatment of defendants with zero criminal history points.

-This Commission has performed numerous studies on how an offender's background and age effect recidivism. However, despite having zero criminal history points, many criminal defendants receive similar or greater sentences than those who have a much worse criminal history. With statutory minimums and maximums, the way most courts calculate guideline ranges do not account for defendants with zero criminal history points and who have no or low risk of recidivism. I propose that a first-time offender "safety-valve"guideline be created and that the Probation Office's Pre-Sentencing Report include a defendant's recidivism risk level prior to sentencing.

As this commission is aware, some first-time offenders are eligible for safety-valve relief under 18 U.S.C. 3553(f). However, most defendants do not meet the criteria for this reduction. Although district courts cannot sentence a defendant under the mandatory minimum, a new Guideline should be created to standardize how courts treat defendants with zero criminal history points. Just like U.S.S.G. 5K1.1, a court should be authorized to grant a downward departure for first-time offenders with zero criminal history points. In the Federal Sentencing Guidelines Manual, this new Guideline an be added under Chapter Five, Part K-Departures.

As far as including a defendant's risk of recidivism in the Probation Officer's PSR, this information would assist district courts with imposing an appropriate sentence. A defendant's risk or recidivism is currently not being considered at sentencing, despite being related to multiple factors under 3553(a)(2). The Department of Justice has already released a risk assessment tool, known as PATTERN, as required by 18 U.S.C. 3553(a)(2). Among other things, PATTERN was designed to evaluate "the recidivism risk or each prisoner as part of the intake process, and classify each prisoner as having minimum, low, medium, or high risk for recidivism." 19 U.S.C. 3632(a)(1). Therefore, it is reasonable to conclude that the Probation Office, the Department of Justice, and the Bureau of Prisons could work together to calculate a defendant's recidivism risk level prior to the district court's sentencing.

(9) Consideration of possible amendments to the Guidelines Manual to prohibit the use of acquitted conduct in applying the guidelines.

-Using acquitted conduct at sentencing is anathema to Due Process and the fundamental fairness of justice embodied in the Constitution. District courts should not have the authority to use conduct that the jury found a defendant innocent of to increase a sentence. However, while not using acquitted conduct is important, there are several other types of conduct that deserve this Commission's scrutiny.

Uncharged conduct, especially conduct that is in-and-of-itself a separate charge, should not be considered at sentencing. This uncharged conduct never appeared before a grand jury and criminal defendants never received fair notice. Prosecutors have full discretion to present this conduct to a grand jury to receive an indictment or superseding indictment. it is unfair to add uncharged conduct into a PSR for enhancement purposes and, besides objections to the PSR at sentencing, defendants have no way to defend themselves against this conduct.

Not only does uncharged conduct fly in the face of the legal axiom that criminal defendants are innocent until proven guilty, but so does using dismissed conduct to enhance a sentence. There are many reasons prosecutors choose to dismiss charges. Whether is is the result of a plea deal or lack of evidence to bring that charge to trial, defendants should not receive enhanced sentences for charges that were dismissed.

District courts use both uncharged conduct and dismissed conduct at sentencing through the "preponderance of evidence" standard, instead of the stricter "beyond reasonable doubt" standard that is required for a jury to convict. Thus, any conduct not admitted to in a plea agreement or found by jury at trial should not be used at sentencing. Therefore, this Commission should ensure that the Constitution and Bill or Rights is upheld to guide courts in not utilizing acquitted, dismissed, and uncharged conduct at sentencing.

~~FROM: [redacted]~~
~~TO: Health Services LOW~~
~~SUBJECT: ***Request to Staff*** MURRAY, AARON, [redacted] COL-B-D~~
~~DATE: 10/02/2022 01:56:17 PM~~

~~To: Delete~~
~~Inmate Work Assignment: N/A~~

(12) Multiyear study of court-sponsored diversion and alternatives-to-incarceration programs (e.g., Pretrial Opportunity Program, CASA Program, SOS Program), including consideration of possible amendments to the Guidelines Manual that might be appropriate.

-The federal prison system is full of first-time, nonviolent offenders who have a very low risk of recidivism. In light of the COVID-19 pandemic and the CARES Act of 2020, this fact became perfectly clear. The Attorney General was granted permission by Congress to place federal prisoners on home confinement. Thousands of prisoners were granted home confinement placement and all indicators so far show that this program has been a success. In addition, many criminal defendants are granted bond and placed on Pretrial Services monitoring pending trial, proving that they are capable of following the law while on court monitoring without incarceration. Alternatives-to-incarceration programs will not only assist with the current overpopulation problem federal prisons are currently experiencing, especially now that private prisons have been shutdown, but it will also save the taxpayers the cost of incarcerating nonviolent and low risk criminals. Therefore, the federal criminal justice system needs more rehabilitation programs in lieu of prison sentences. Anything this Commission can do to help increase alternatives-to-incarceration programs would benefit not only criminal defendants, but society as a whole.

(13) Consideration of other miscellaneous issues, including possible amendments to (A) 3D1.2 (Grouping of Closely Related Counts) to address the interactions between 2G1.3 and 3D1.2(d).

-In many cases, the U.S. Sentencing Guidelines sentencing range will roughly approximate a sentence that would achieve the objectives of 18 U.S.C. 3553(a). These ranges are typically the product of this Commission's careful study, and are based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions. But not all Guidelines possess this pedigree. And where a Guideline does not reflect the careful study of this Commission, it is likely not a reliable indicator of this Commission's perspective on a fair sentence. As numerous courts and commentators have explained, the child pornography Guidelines are by and large not the result of this Commission's expertise, nor based on careful study and empirical data. See HENDERSON, 649 F,3d at 960-63; UNITED STATES V. DORVEE, 616 F.3d 174, 184-86 (2nd Cir. 2010). Instead, 2G2.2 is the result of two decades' worth of Congressional directives-at times actively opposed by this Commission-that have continually ratcheted up penalties and piled on enhancements. HENDERSON, 649 F.3d at 960-63; DORVEE, 616 F.3d at 184-86; see also generally Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines (2009).

Of course, Congress' active role in shaping 2G2.2 is not in and of itself reason to question the Guideline's wisdom or efficacy. The real problem, as courts across the country have recognized, is that 2G2.2 simply does not work. GROBER, 624 F.3d at 607-10; HENDERSON, 649 F.3d at 960-63; DORVEE, 616 F.3d at 184-86; UNITED STATES V. DIAZ, 720 F. Supp. 2d 1039, 1041-42 (E.D. Wis. 2010)(collecting cases). Rather than carefully differentiating between offenders based on their culpability and dangerousness, 2G2.2 consists of a hodgepodge of outdated enhancements than apply in nearly every case. DORVEE, 616 F.3d at 186. As a result, this Guideline routinely results in sentencing ranges near or exceeding the statutory maximum, even in run-of-the-mill cases involving first-time offenders. Id.

This broken Guideline has not escaped this Commission's attention. Following several years of research, you issued a comprehensive report on 2G2.2. United States Sentencing Commission, Report to Congress: Federal Child Pornography Offenses (Dec. 2012). However, while this Commission recommended major revisions to the Guideline, you left it to the discretion of Congress because of its extensive involvement in crafting that Guideline. However, Congress has shown, time and time again, that politics prevents it from correcting this Guideline. The Senate's Confirmation Hearing for Justice Ketanji Brown Jackson made it perfectly clear that Congress will NEVER act to correct this problem. Thus, this Commission has an independent duty to correct 2G2.2 and the child pornography Guidelines.

Respectfully Submitted,
Aaron Murray

Aaron Murray
[redacted], [redacted]
FCC Coleman Low
P.O. Box 1031
Coleman, FL 33521-1031

From: ~^! PATTERSON, ~^!GARFIELD
Subject: [External] ***Request to Staff*** PATTERSON, GARFIELD, [REDACTED], OTV-G-A
Date: Thursday, October 13, 2022 7:35:57 PM

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To: U.S. Sentencing Commission
Inmate Work Assignment: Commissary

ATTENTION

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Inmate Message Below

First I would like to say,thankyou for considering people as my self.
I have been Incarcerated since 1996, for first degree murder under the pre-booker guideline level 43.
And five years for the firearm charge,under the under the abrogated 1995 Bailey rule.
So, I am asking for the commission to consider prisoners' with these type of sentence,after so many years has grown develop
from the youthful behavior and are now just lingering in prison for a crime which we are sorry for,that was committed when we were in our twenties,and now we are in our fifties and up.
Incarceration is benifitual but after certain amount of years it transform from rehabilitation to some unknown.
I think that life sentence should be "cap" at thirty years. This is enough time for any human
being to reflect on his\her action from the day they were born,and reform themselves in a positive way were they can amend the wrong that was cause in any way possible,if its even something harmful from out some one way.
Thankyou, Yours Truly

From: ~^! PURDY, ~^!JEFFREY COLIN
Subject: [External] ***Request to Staff*** PURDY, JEFFREY, [REDACTED], SST-B-A
Date: Friday, October 14, 2022 11:35:26 AM

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To:
Inmate Work Assignment: Unassigned

ATTENTION

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Inmate Message Below

The US Sentencing Commission should look into adding a guideline relating to the conditions inmates, especially pre-trial/pre-sentencing inmates had to face during Covid-19. Making a guideline would be appropriate if it was an exceptional circumstance of harsh prison/jail conditions in light of a Global Pandemic. The Guideline should be made retrospectively to individuals who have no mandatory minimums and can recieve a sentencing reduction.

United States Sentencing Commission
One Columbus Circle, NE
Suite 2500, South Lobby
Washington, D.C. 20002 8002
Attention: Public Affairs – Priorities Comment

October 16, 2022

Dear Members of the Commission:

My name is Sarah Schmukler. I am interested in criminal justice and writing this letter after the follwing issue has been brought to my attention and wondering if this might be something the commission would take a look at and consider:

This submission is to correct how insider trading is punished by the loss table or in this case, the gain is completely disconnected from the heart of the crime, we are not proposing to do away with the loss table rather, for this particular crime, to correct how the commission should have punished it to begin with here is why our suggestion is based on the multiple case law and that treating it as the guidelines do now goes against the logic of the law

§2B1.4. Insider Trading:

Because the victims and their losses are difficult if not impossible to identify, the gain, i.e., the total increase in value realized through trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information, is employed instead of the victims' losses.

Insider trading is a very simple concept that seems to have been made complex by a series of court decision. It is a species of embezzlement where the property (the Material Non Public Information) is misused without the source of the information knowledge/permissions. the heart of the offense is the breach of duty, the gain has nothing to do with it in fact as Judge Rakoff puts it "Mr. Rajaratnam's gain, though a product of that breach, is not even part of the legal theory under which the Government here proceeded, which would have held Gupta guilty even if Rajaratnam had not made a cent."E.g., United States v. Gupta, 904 F. Supp. 2d (S.D.N.Y. 2012). Therefore the enhancement of sentencing by the gain has nothing to do with the crime and should not be considered at sentencing for the following reasons we submit that the enhancement of gain should be abandoned for another process such as the number of MNPI passed or the number of different company traded, which is the heart of the crime.

Anonymous Market Participants Are Not the Victims of Insider Trading

Any argument that generic market participants who may have been counterparties to the criminal's trades constitute victims who suffered an economic loss is also fundamentally incorrect. As numerous courts and commentators have found, “Congress has never treated [insider trading] as a fraud on investors, the Securities Exchange Commission has explicitly opposed any such legislation, and the Supreme Court has rejected any attempt to extend coverage of the securities fraud laws on such a theory.” E.g., United States v. Gupta, 904 F. Supp. 2d 349, 352 (S.D.N.Y. 2012).

Liability for insider trading initially arose from the idea that an insider should not be allowed to use their access to confidential information to trade with stockholders of their company. See, e.g., Chiarella v. United States, 445 U.S. 222, 227-228 (1980). In such cases, the duty to disclose inside information or abstain from trading “arose from (i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure.” Id. This “classical theory” of insider trading liability was then expanded into what is now called the “misappropriation theory” of liability. The misappropriation theory turns on the idea that “[a] company’s confidential information … qualifies as property to which the company has a right of exclusive use.” United States v O’Hagan, 521 U.S. 642, 654 (1997). Such a breach “defrauds the principal of the exclusive use of that information.” Id. at 652 (emphasis added). Whereas the classical theory focuses on the duty owed from one trading party to another, the misappropriation theory focuses on the duty owed to the source of the information. Id. at 652-53.

Insider trading liability for individuals who receive confidential information from corporate insiders – often referred to as “tippees” – similarly first arose under the “classical theory,” but now usually relies on the “misappropriation theory.” The misappropriation theory “outlaws trading on the basis of nonpublic information by a corporate ‘outsider’ in breach of a duty owed not to a trading party, but to the source of the information.” Id. (emphasis added). The tippee assumes the duty owed by the insider “not because they receive[d] inside information, but rather because it [was] made available to them improperly.” Dirks v. SEC, 463 U.S. 646, 660 (1983) (emphasis in original). In general, information is improperly made available when “the insider receives a direct or indirect personal benefit from the disclosure.” Id. at 663; see also Salman v. United States, 137 S. Ct. 420, 428 (2016) (tippee acquires and breaches duty owed by tipper “by trading on the information with full knowledge that it had been improperly disclosed”).

As elaborated above, O'Hagan and Salman make clear that the "victim" in misappropriation theory insider trading cases is the individual or entity to which the fiduciary duty is owed. See O'Hagan, 521 U.S. at 652 ("the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information") (emphasis added); Salman, 137 S. Ct. at 428 (tipper "breached his duty of trust and confidence to [his employer] and its clients") (emphasis added). Nowhere in the relevant statutes, regulations, or case law is there a suggestion that an average citizen to whom the tipper and tippee owe no fiduciary duty, or indeed, the United States government, is a victim of insider trading.

<u>Restitution as measure of lose to the victims</u>

As is the case following any insider trading conviction, the defendants are ordered to forfeit the profits he collected from his illicit trading activity. Rarely a restitution order is entered, when it is its in general for the legal fees occurred by source of the information.

As a result, "restitution is calculated based on the victim's loss, while forfeiture is based on the offender's gain." Id. (citing United States v. McGinty, 610 F.3d 1242, 1247 (10th Cir. 2010)). Although a forfeiture amount may sometimes be used to pay the victims, that cannot be the case following an insider trading conviction, nor should it be. As is noted above, it is well established that "particular investors who trade without the benefit of inside information are not properly understood as the direct and proximate victims of those that do." Letter to the Honorable Laura T. Swain Regarding Application of Class Counsel to Be Heard in Connection with Plea Document filed by USA at 1, United States v. S.A.C. Capital Advisors, L.P., 1:13-cr-00541 (S.D.N.Y. Nov. 8, 2013). It would therefore be inapposite to demand restitution from an insider trading defendant where (a) particular victims are difficult – if not impossible – to identify and (b) the specific losses incurred similarly cannot be quantified.

Therefore we submit that the lose table is inappropriate for sentencing as supported by case law.

<u>Sentencing Guideline recommendation for 2B.1.4</u>

Base offense should be reduce at least to 6 to mimic the 2B.1.1 Fraud. As Justice Ginsburg explains in the O'hagan decision "a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information" United States v O'Hagan, 521 U.S. 642, 654 (1997)

In common law jurisdictions, as a criminal offense, fraud takes many different forms, some general (e.g., theft by false pretense) and some specific to particular categories of victims or misconduct (e.g., bank fraud, insurance fraud, forgery). The elements of fraud as a crime similarly vary. The requisite elements of perhaps the most general form of criminal fraud, theft by false pretense, are the intentional deception of a victim by false representation or pretense with the intent of persuading the victim to part with property and with the victim parting with property in reliance on the representation or pretense and with the perpetrator intending to keep the property from the victim. In other words total depravation of that property
It seems logic that the general fraud is the worst of the both, it makes then no sense that insider trading base offense to be 8 and not 6

Respectfully,

Sarah Schmukler

Attention: Public Affairs – Priorities Comment

Thank you for the opportunity to offer commentary on the United States Sentencing Commission's (the Commission, USSC) possible policy priorities for the amendment cycle ending May 1, 2023.

As an impacted family member of an adult currently in Federal custody it is reassuring to know that the Commission is now fully staffed and able to wholly focus on its mission. I am focused on the parts of the Commission's mission pertaining to continuously establishing and amending federal sentencing guidelines for the judicial branch and assisting other branches in developing effective and efficient crime policy as it pertains to Child Pornography (CP) and other sexual offenses. I hope my input will encourage the USSC to reform existing sentencing guidelines for those convicted of these types of offenses using empirical evidence and facts, resulting in meaningful changes to current laws in sentencing, custody, and registries, spur the introduction and passage of practical, effective future legislation, and inspire significant prison oversight and reform. Let me be clear, I do not condone any child pornography. I believe all of it should be removed from the internet where demand creation increases its use exponentially and fuels addiction; however, the goal of my response is not to debate over how child pornography offenders should be punished. Instead, I seek to expose serious problems with current federal child pornography law 18 U.S.C. § 2252 that warrants correction.

"Pursuant to 28 U.S.C. § 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority." Despite having only 5 % of the global population, the United States has 25% of its prisoners. The COVID-19 pandemic shined a spotlight on the overwhelming challenges that Federal and State governments face on a daily basis due to mass incarceration. The magnitude of those problems is growing exponentially because of the dramatic increase in recent years. The Commission's own publication, *Quick Facts – Federal Offenders in Prison – January 2022*, highlights the endemic growth of the Federal prison population. 88.5% of offenders (adults in custody) were sentenced within the past ten years with **67.2%** of those incarcerated within the Federal Bureau of Prisons sentenced within the last 5 years!

> 1) People do not understand modern technology as it relates to the law, causing an erosion of Fourth Amendment rights and violations of the Eighth Amendment. A compelling case for the need to revise both sentencing guidelines and poorly written statutes to stop the violation of interception and privacy laws is made by Bonnie Burkhardt, author of *Manufacturing Criminals: Fourth Amendment Decay in the Electronic Age.* (ISBN: 979-8-5844281-8-1). I urge every member of the Commission to read this book as it considers its priorities and the issue of reducing costs of incarceration and overcapacity of prisons. There are numerous adults currently in custody because of violations of interception laws.
>
> 2) The Commission's current child pornography Guidelines have been widely criticized for imposing illogically harsh punishments and disparate sentences among similarly situated defendants. The laws and sentencing guidelines for noncontact sexual offenses like child pornography (digital and video visual images of minors) were written decades ago when analog film reels, photographs, and print media were the only available formats

and exchanged largely through U.S. Mail, common carriers, and person-to-person physical exchange. The laws and guidelines have not kept up with changes to digital and mobile technology. Today, virtually all illegal images and videos are accessed online instantaneously through internet access via digital devices such as computers, tablets and cellular phones. The sentencing enhancements, the extra points added to sentencing guidelines for internet access, need to be removed because they are resulting in unrealistically long sentences.

In the August, 2021 article by attorney Joseph Abrams, *Why Sentence Disparity in Federal Non-Production Child Pornography Cases Continues to Increase*, Mr. Abrams discusses how recent enhancements in the last decade to laws like the Protect Act have increased sentences across all non-production cases using the Commission's Federal Sentencing of Child Pornography Non-Production Offenses, June 2021 to support his argument. Sentences for possession, receipt, and distribution ranged from less than one month imprisonment to 240 months' imprisonment. There was significant sentence disparity in each group of cases, with the starkest disparity occurring in the possession and distribution cases, where sentences ranged from non-custodial terms to decades in prison. Per Abrams,

> "Four of the six enhancements to the 2013 Protect Act, amounting to a combined 13 offense levels, have become so ubiquitous that they now apply in nearly all cases. For example, for fiscal year 2019, the 2-level enhancements each for use of a computer and images depicting victims under age 12 applied in over 95% of all cases. Further, the 4-level enhancement for images depicting sadistic or masochistic conduct applied in 84.0% of cases, while the 5-level enhancement for 600 or more images applied in 77.2% of all cases."

Abrams presents a compelling case for revaluating sentencing guidelines for these offenses. In cases of nonproduction related offenses, many judges agree the USSC Guidelines are too harsh.

3) Distribution: Drug distribution, also known as drug trafficking, involves transportation and the unlawful import of illegal drugs and controlled substances for sale. Distribution connotes a financial transaction, and a perception of people importing and selling large quantities of drugs for profit.

Stephen L. Bacon published a May, 2011 article in the University of Miami Law Review entitled *A Distinction Without a Difference: "Receipt" and "Possession" of Child Pornography and the Double Jeopardy Problem.* Mr. Bacon sees no meaningful distinction between "receiving" child pornography (§ 2252 carries a mandatory minimum sentence) and "possessing" child pornography (§ 2252A (a)(5)(B) carries no mandatory minimum sentence) or a logical reason to punish "receiving" child pornography more severely than "possessing" it. In the article, Bacon presents a brief historical overview of federal child pornography legislation, focusing specifically on how "receipt" came to be punished more severely than "possession."

Mr. Bacon also explains how 18 U.S.C. § 2252 became law as part of the Protection of Children Against Sexual Exploitation Act of 1977.

> "As enacted in 1978, § 2252 was much narrower in scope than it is today because Congress's original intent was to thwart the widespread commercialization of child pornography. The earliest version of § 2252 punished those "distributing" i.e. transporting, shipping, distributing, or receiving child pornography in interstate or foreign commerce for the purpose of sale. Congress passed the Child Protection Act of 1984 which amended § 2252 and made non-commercial trafficking a federal crime. The original version of 18 U.S.C. § 2252(a)(2) punished "[a]ny person who. . . knowingly receive[d] for the purpose of sale or distribution for sale, or knowingly s[old] or distribute[d] for sale, any" child pornography. To effectuate the intended change in § 2252's scope, Congress made two simple changes to the language found in § 2252(a)(2). First, Congress eliminated the requirement that "receiving" child pornography be "for the purpose of sale or distribution for sale" from the statute altogether. Congress also struck the language requiring "distribution" to be "for sale." The resulting § 2252(a)(2) simply punishes "[a]ny person who . . . knowingly receives, or distributes" child pornography. The amendments to § 2252(a)(2) gave federal law enforcement officials more authority to frustrate the dissemination of child pornography that was being exchanged, not just sold. Perhaps more significantly however, the amendments created an entirely new class of offenders that received and subsequently possessed child pornography for personal use, whether the images were bought or exchanged. The amended version of § 2252(a)(2) does not require proof that the defendant intends to distribute or profit from child pornography once it is received—it simply requires proof that the defendant knowingly received contraband images… The new class of personal-use receivers created by § 2252(a)(2) would become the focus of federal law enforcement officials looking to collapse the child pornography market by cutting end-user demand. "

However, § 2252 imposes a mandatory five-year minimum sentence for defendants convicted of "receiving" child pornography, but "possessing" child pornography carries no mandatory minimum sentence. There is no such distinction between traffickers who "distribute," transport, ship, or receive child pornography in interstate or foreign commerce for the purpose of sale and offenders that subsequently electronically exchange child pornography for personal use with no intent to commercialize or profit financially. Similar to discretion judges have when imposing lengthier sentences for "receipt" vs. "possession," judges should have the same discretion when sentencing for "distribution" (commercialization, sale, or profit) vs. "transmission" (electronically transmitting visual images for personal use).

A separate charge for "Transmission" should be created for first time offenders with no prior criminal history who were transmitting images for personal use e.g. teenage sexting, a charge which, like possession, has no mandatory minimum sentence and allows for judicial sentencing discretion. Mental health issues, addiction, and trauma associated with many who view and transmit these images for personal use (and not to profit financially) are beyond the scope of this response; however "transmission" more accurately describes the offense. Allowing judges sentencing discretion would lower the cost of incarceration,

reduce over-crowding, end mass incarceration, and provide more opportunity for rehabilitation. The Commission's *June 2021 Federal Sentencing of Child Pornography Non-production Offenses* data shows that 86.1% of those convicted of possession, receipt, or distribution of child pornography have little or no criminal history. 86.1% have a criminal history of CHC 1. The report shows that this same population has an extremely low sexual recidivism rate of 4.3% sexual recidivism after 3 years of release. Most were placed in low security institutions when incarcerated, so the data supports the low security risk of this approach.

4) Last century's "War on Drugs" sought to collapse the market for illegal drugs by pursuing and prosecuting individuals who are addicted or use drugs for personal use, instead of pursuing the cartels and large drug suppliers. Today law enforcement pursues the cartels and large distributors. Drug users are treated for addiction instead of arrested. Congress and law enforcement's attempts to thwart the widespread commercialization of child pornography and collapse the child pornography market by pursuing pornography-addicted individuals or individuals who view and transmit images for personal use has been a colossal failure. The Child Sexual Abuse Material (CSAM) marketplace has grown exponentially and sadly, it is thriving.

The Department of Justice, state and local law enforcement, Congress, state legislatures, and the Commission should be focused on pursuing the social media companies and websites, the true "Cartels" of CSAM, who knowingly host child pornography images and videos for profit, and who are political mega-donors. Congress must repeal the Section 230 protections the Social Media companies enjoy and pass tough legislation imposing penalties on those who knowingly or unknowingly host CSAM, which almost anyone can easily access from all of these sites. One such site, Kik.com is a prominent host, well known for its CSAM sites and chatrooms.

The social media companies argue they cannot keep up with the proliferation of CSAM on their sites, yet have algorithms sensitive enough to remove a post or private message and ban a user for sending "misinformation" about COVID-19. Their defense is implausible. The United States Sentencing Commission must do its part by imposing harsh punishment guidelines and sentencing enhancements for the large social media companies: the "CSAM Cartels."

5) The overcrowding in both Federal and state prison systems, insufficient staffing resulting in deaths, myriad instances of medical neglect, failure to carry out rehabilitation programs, apply timely and accurate First Step Act of 2018 (FSA) credits, and numerous other challenges as a result of our nation's mass incarceration, require reexamination and revision of our sentencing guidelines for all convictions.

My family member in custody is experiencing ongoing medical neglect from the Federal Bureau of Prisons (BOP) since his intake. While in U.S. Marshall Service custody, he received his prescription medication for anxiety and major depressive disorder. Upon arrival at his current BOP facility, his medication was abruptly withdrawn because it was not on the BOP formulary. Sudden withdrawal is contraindicated for abruptly stopping this medication and can cause serious side effects including suicide. After the sudden withdrawal, he received no medical attention, and was put into "**14 day** COVID-19"

quarantine (not for a disciplinary issue) which lasted nearly **2 months**, even though he was fully vaccinated and tested negative. During his extended quarantine, he languished in his cell without medication, commissary, or recreation. Our family was terrified he would not survive the long self-contained confinement after his medication was withdrawn. Impacted families "do the time" along with their loved ones and suffer too. Even though my family member's security classification is low, he was only allowed out of his cell for 3 hours per week: one hour each on Mondays, Wednesdays, and Fridays. He had to exercise, bathe, and make telephone calls in that hour. 6 months after intake he was dispensed medication that would cause him severe side effects, as stated in the BOP medical paperwork. He declined that medication, and is still without his medication.

My family member also has multiple traumatic brain injuries and a brain lesion. Despite the judge's order that he receive treatment for them, imaging results, a treatment plan, and a report stating that without Vestibular Physical Therapy his prognosis is dire – all included in his paperwork - he was sent to a Care Level 1 facility where he has received no treatment. He was excoriated by the medical staff for requesting his medication and Physical Therapy, causing him to fear retaliation if he completes the BOP administrative process paperwork. He currently experiences balance issues and working memory difficulties which are worsening. For other examples of BOP medical neglect and the challenges of mass incarceration, please see:

https://reason.com/2022/10/10/judge-holds-federal-bureau-of-prisons-in-contempt-for-allowing-man-to-waste-away-from-untreated-cancer/

https://storage.courtlistener.com/recap/gov.uscourts.flmd.265888/gov.uscourts.flmd.265888.140.0.pdf

https://www.forbes.com/sites/walterpavlo/2022/10/13/inspector-general-report-expresses-concern-over-bureau-of-prisons-handling-of-misconduct-investigations/?sh=4085d23828f2

https://www.washingtonpost.com/opinions/2022/09/29/prison-release-covid-pandemic-incarceration/

Referring first time offenders with no prior criminal history to Pre-trial Diversion programs, consequently rehabilitating and eliminating the incarceration of numerous first time offenders, while also implementing Circle of Support and Accountability (CoSA) Programs for returning citizens, is a superior solution to address mass incarceration of this population. The USSC's own recidivism statistics support these approaches, as does the 2017 Department of Justice SMART Office SOMAPI report, which documents the low recidivism risk of individuals convicted of most sex offenses.

On 1 September 2021, the **Annual Determination of Average Cost of Incarceration Fee (COIF)** Notice was published in the Federal Register. The Notice published the Fiscal Years (FY) 2019 and FY 2020 "COIFs for Federal inmates in a Federal facility."

- The FY 2020 COIF per Federal inmate in a Federal facility rose to **$39,924.00** from $35,347 in FY2019,
    - The 1 year COIF increase is $**4,577.00 per person**, an increase of **11.5%.**

    - The daily COIF increase from FY2019 to FY 2020 **$1.53 per inmate**.
- The COIF increase from FY2019 to FY2020 is approximately **$696,415,000.00** based on a FY 2020 Federal inmate population of 152,156.
- The FY 2020 Federal Reserve Annualized Inflation Rate Consumer Price Index **(CPI) is 1.3%,**
- ***The FY2020 COIF increase of 11.5% is noticeably higher than the 1.3% 2020 CPI.***

The FY2021 Annual Determination of Average Cost of Incarceration Fee (COIF) Notice has not been published

- FY 2021 CPI increased to **7.1%.**
- FY 2022 CPI increased to **8.2%** (published 13 October, 2022)
- The FY 2022 COIF will be based on an inmate population of **153,079**.

Although the FY 2021 and FY 2022 COIFs are not yet known, it is clear the costs of mass incarceration will continue to rise and require a larger portion of American's tax dollars to maintain.

Utilizing Pretrial Diversion for first time offenders with no prior criminal history for charges with documented low recidivism rates will save hundreds of thousands of dollars per inmate by keeping the individual in treatment and out of prison. Reducing prison stays by implementing CoSA Reentry programs, expanding eligible convictions with documented low recidivism rates for participation in First Step Act, RDAP, and other BOP sentence reduction programs will save tens of millions of tax dollars, reducing Federal COIF fees significantly, without jeopardizing public safety.

In *Contextualizing the Policy and Pragmatics of Reintegrating Sex Offenders,* Katherine J. Fox describes the CoSA model, and how

> "Long-term incarceration can reduce normal coping and social skills and, hence, the ability to adapt to less structured lives upon release. Reentry planning for all types of offenders tends to address housing, employment, substance abuse, mental health issues, and other documented risk factors but tends to neglect the social needs of offenders. The CoSA model is designed to be a volunteer-based support network surrounding an offender who is at risk for reoffending, in part, because of his or her isolation. Professionals consult on the periphery, but the basis for the model is the inclusion of offenders into a group of ordinary, supportive citizens. Social bonds and inclusion are keystone features of desistance from crime."

During the last decade, the U.S. federal government was in the process of funding an expansion of the CoSA model for the reintegration of sex offenders, so Ms. Fox's written analysis contributed to the policy considerations in structuring CoSA programs (U.S. Department of Justice, 2012).

In the article *Can circles of support and accountability (CoSA) significantly reduce sexual recidivism? Results from a 2020 randomized controlled trial in Minnesota*, Grant Duwe noted results suggest

> "MnCOSA significantly reduced sexual recidivism, lowering the risk of rearrest for a new sex offense by 88%. In addition, MnCOSA significantly decreased all four measures of general recidivism, with reductions ranging in size from 49 to 57%. As a result of the reduction in recidivism, findings from the cost– benefit analysis reveal the program has generated an estimated $2 million in costs avoided to the state, resulting in a benefit of $40,923 per participant. For every dollar spent on MnCOSA, the program has yielded an estimated benefit of $3.73."

Mr. Duwe concluded that "although difficult to implement, the CoSA model is a cost-effective intervention for sex offenders that could also be applied to other correctional populations with a high risk of violent recidivism."

6) For reasons listed in the previous section, including the lowest same crime recidivism rates and the nearly nonexistent criminal history rates, the Commission should prioritize the expansion of the First Step Act of 2018 (FSA) with immediate priority reconsideration and the subsequent inclusion of 18 U.S.C. § 2252 (a) (2). Most individuals with a sex offense in their background are currently excluded from participating in FSA programs and accumulating FSA credits for early release, despite the Commission's own 2021 report data showing this group has lower general recidivism rates than all other convictions and the lowest same crime recidivism rates, yet other offenders with higher recidivism rates are allowed to participate. The Commission might consider expanding FSA participation programs to allow accrual and application of FSA early release credits to include convictions with low recidivism rates currently classified as violent. Allowing early release for individuals in this low security risk, low recidivism group will alleviate prison overcrowding and lower incarceration costs without jeopardizing public safety. As stated, USSC's own 2021 data shows that 86.1% of all individuals convicted of sex offenses have little or no criminal history and are CHC1. These individuals should be eligible to receive these credits precisely because such a high percentage of this population are classified as and domiciled in low security.

The BOP's Compassionate Care program should also be expanded to include more individuals with convictions with low recidivism rates, lower the age for release, and expand the program to include caring for infirmed senior family members who have no one else to care for them.

7) Low security individuals have already been vetted by the Designation and Sentence Computation Center (DSCC) and have been determined to be of low security risk with a low chance of reoffending, and little risk to public safety, yet ***even noncontact first time offenders with no criminal history are systematically excluded from programs that give other adults in custody who are not convicted of sex offenses sentence reductions***. The Commission should revisit and strongly encourage the judicial and legislative branches to expand laws to include individuals convicted of certain sexual offenses because they are less likely to recidivate and return to prison.

Successfully completing the Residential Drug Abuse Program (RDAP) reduces sentences for adults in custody with other criminal convictions by up to one year. Even with judicial recommendation, individuals convicted of sex offenses with much lower recidivism rates,

who complete the program, are unlikely to enjoy the same sentence reduction. Life Connections is another Federal BOP program that offers sentence reductions of up to one year for individuals with various criminal convictions, but not persons with sex offense convictions. With overcrowded prisons, a deeply-ingrained culture**,** structural issues, and increasing scrutiny from Congress**,** including a bill recently introduced to bring in third party independent oversight of the BOP, it would be fiscally prudent and logical to increase accessibility to sentence reductions to populations with low recidivism rates who are unlikely to return to prison.

8) DSSC vetted individuals**,** with point equivalency to minimum security in the Federal Bureau of Prison (BOP) systems, are not allowed to be classified as minimum security or reside in any minimum security camps. There are only 3 low security satellite camps in the entire Federal BOP system where an individual with a sex offense conviction can reside, yet the Commission's *Quick Facts – Federal Offenders in Prison – January 2022* lists 15,760 adults in custody for a sex offense conviction; approximately 86%, or 13,554 of these individuals with no criminal history should have eligibility for minimum security camps. Providing adults in custody with the opportunity to live in the lowest security environment they qualify for improves safety and morale for both the incarcerated individual and corrections officers. It facilitates reentry, lessens the chances of recidivism, rearrests, and return to incarceration, thereby lowering the cost of incarceration. The lower the level of security required, the lower the cost of incarcerating the individual.

Impacted families like mine, look to the Commission for leadership to revise and recommend realistic sentencing guidelines which keep up with changes to technology. We are counting on your non-partisan reach to communicate to judges and both parties in Congress the need to enact common sense legislation based on recidivism rates and statistics like the Commission's own research, not fear and hysteria from incendiary comments**,** such as "frightening and high" recidivism rates, based on discredited research.

Please feel free to contact me if you have any questions or require additional information. Thank you, Sentencing Commission members, for requesting public commentary and for reading my letter.

Respectfully,

Elena Scott

Elena Scott
[redacted]
[redacted]

From: ~^! SHARP, ~^!ROBERT CARL
Subject: [External] ***Request to Staff*** SHARP, ROBERT, [redacted], MCD-B-A
Date: Thursday, October 13, 2022 8:06:18 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: US Sent. Commission
Inmate Work Assignment: FSA Program Tutor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

RE: USSG Amendment 806
I am messaging you about USSG Chapter 2 (c)(E)(i), regarding synthetic cannabinoid sentencing ratios. In 2018 the commission added this chapter regarding synthetic cannabinoids, specifically U.S.S.G. Supplement to Appendix C, Amendment 806, is what I am referencing. This amendment regards the sentencing ratio for synthetic cannabinoids, commonly referred to as k2 or spice. The Sentencing Commission found that the ratio for sentencing in these cases should be 167:1 (to marijuana) and that in cases where the product contains a small amount a large amount of inert plant material the court may vary down from the sentencing ratio of 167:1.
This Amendment was not made retroactive.
While many courts around the nation used their discretion to vary down from the government's recommendations of this 167:1 ratio, (See: US v Abuzuhrieh, case no. 1:14-cr-03604-MV, D. of New Mexico; US v Hurley, 842 F. 3d 170, 173 (1st Cir. 2016); US v Hossain, case no. 15-cr-14034-MIDDLEBROOKS, S.D. of FL.; US v Ritchie, case no. 2:15-CR-0285-APG-EJY, D. of Nevada) as was suggested later in Amendment 806, several defendants in the Northern District of Iowa didn't benefit from this change and the court there, under the Hon. Chief Justice Linda R. Reade, choose to sentence many defendants to the 167:1 ratio who had synthetic cannabinoid potpourri (k2 that had a large amount of inert plant material in it) (see: US v Ramos, 814 F.3d 910, 918 (8th Cir 2016) and US v Sharp, case no. 15-cr-31-LRR, N.D. Iowa). While the dissenting justice in Ramos suggested the changes later made by the commission, the 8th Cir. decided that 167:1 was appropriate for all defendants sentenced for synthetic cannabinoids. This has left a lot of defendants with grossly disproportionate sentences from the N.D. of Iowa and in the 8th Circuit. I myself received a sentence of 360 months for synthetic cannabinoid potpourri that I believed was legal because of this ratio. If my ratio was lowered to the 1:1 ratio I would face a guideline range now of about 35-45 months. This ratio caused a grossly disproportionate sentence in my case, and many others in the 8th Circuit.
I am requesting the Commission to make Amendment 806 retroactive, or in the alternative, allow defendant's to request retroactivity for this through compassionate relief motions. Thank you for your consideration in this matter.

From: ~^! STEPHENS, ~^!JEFFREY [redacted]@inmatemessage.com>
Sent: Sunday, October 16, 2022 6:29 PM
Subject: [External] ***Request to Staff*** STEPHENS, JEFFREY, [redacted], SET-D-B

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To:
Inmate Work Assignment: None

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Hello,

My name is Jeffrey Stephens, ([redacted]), and I am currently an inmate at FDC SeaTac.

I would like to formally request that the Sentencing Commission considers reducing the guidelines for MDMA.

The MDMA guidelines fail to promote the sentencing goals of 18 U.S.C. 3553(a). 1g of MDMA is equivalent to 500g of cannabis flower (compare, 1g of cocaine is equivalent to 200g of cannibis flower). MDMA, at least relative to similarly weighted substances, does not generally result in addiction. The vast majority of MDMA users are occasional, recreational users who otherwise are normal and productive members of society. MDMA is currently used therapeutically in certain clinical settings, including for PTSD and interpersonal relationship therapy. Many recreational(illicit) users use it principally for therapeutic purposes.

It is clear that here the Guidelines provisions for MDMA do not exemplify the Commission's exercise of its characteristic institutional role.

See United States v. Ysidro Diaz, No 11-CR-00821-2 (JG), 2013 U.S. Dist. LEXIS 11386, 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013). In Diaz, Judge Gleeson thoughtfully critiqued the drug-trafficking guidelines, providing a comprehensive policy disagreement with the Guidelines for heroin, cocaine, and crack offenses that also applies to MDMA offenses. He discussed the flawed creation of the drug Guidelines and how they are not based on empirical data and national experience. Judge Gleeson described the overly punitive weight-driven regime. He analyzed the pattern of sentencing to conclude that the drug-trafficking offenses have never been heartlands. Judge Gleeson discussed the relationship between the drug Guidelines and the problem of mass incarceration, saying "[p]erhaps the best indication that the Guidelines ranges for drug trafficking offenses are excessively severe is the dramatic impact they have had on the federal prison population despite the fact that judges so frequently sentence well below them." Until systematic changes can be made, Gleeson recommended "lower[ing] the ranges in drug trafficking cases by a third."

Gleeson also points out that according to the Commission's national data for drug-trafficking offenses in 2012, 42.9% of the sentences were within the Guidelines range, 0.9% were above, and 56.3% were below. U.S. Sentencing Comm'n, 2012 Sourcebook of Federal Sentencing Statistics, Table 27A. Of the sentences below the guidelines range, 37% were government sponsored and 19.3% were nongovernment sponsored. He writes that "[a]ggravating circumstances occur just as frequently as mitigating ones, so if the Commission had gotten it right, the number of sentences below the applicable range would be at least roughly equal to the number of the above-range sentences." This pattern indicates that the Guidelines range for MDMA offenses is not typical and needs to be adjusted.

In the first Guidelines Manual, the Commission described the Guidelines as an evolving system that the Commission would shape over time. It's time to evolve the system. MDMA is not as dangerous as its guidelines would suggest. It needs to be adjusted based on real empirical data. It is time to follow through on the commitment to continually revise the Guidelines in light of real experience and data.