United States Sentencing Commission

2023-2024 Amendment Cycle

Public Comment on Proposed Priorities

88 FR 39907

UNITED STATES SENTENCING COMMISSION

2023-2024 PUBLIC COMMENT
PROPOSED PRIORITIES
88 FR 39907

BAC2210-40

UNITED STATES SENTENCING COMMISSION

Proposed Priorities for Amendment Cycle

AGENCY: United States Sentencing Commission.

ACTION: Notice; Request for comment.

SUMMARY: As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, and in accordance with its Rules of Practice and Procedure, the United States Sentencing Commission is seeking comment on possible policy priorities for the amendment cycle ending May 1, 2024.

DATES: Public comment should be received by the Commission on or before **August 1, 2023**. Any public comment received after the close of the comment period may not be considered.

ADDRESSES: There are two methods for submitting public comment.

Electronic Submission of Comments. Comments may be submitted electronically via the Commission's Public Comment Submission Portal at https://comment.ussc.gov. Follow the online instructions for submitting comments.

Submission of Comments by Mail. Comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Priorities Comment.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502-4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

The Commission provides this notice identifying the possible policy priorities that the Commission expects to focus on during the amendment cycle ending May 1, 2024. While continuing to address legislation or other matters requiring more immediate action, the Commission has decided to limit its consideration of specific guidelines amendments

for this amendment cycle. Instead, in light of the 40th anniversary of the Sentencing Reform Act, the Commission anticipates undertaking a number of projects examining the degree to which current sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in the Sentencing Reform Act. *See* 28 U.S.C. 991(b)(2). The Commission expects to continue work on many of these priorities beyond the upcoming amendment cycle. The Commission invites comment on the proposed priorities set forth below, along with any additional priorities commenters believe the Commission should consider in the upcoming amendment cycle and beyond. Public comment should be sent to the Commission as indicated in the ADDRESSES section above.

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.

The proposed priorities for the amendment cycle ending May 1, 2024, are as follows:

(1) Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or amendments.

(2) Promotion of court-sponsored diversion and alternatives-to-incarceration programs by expanding the availability of information and organic documents pertaining to existing programs (*e.g.*, Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program) through the Commission's website and possible workshops and seminars sharing best practices for developing, implementing, and assessing such programs.

(3) Examination of the *Guidelines Manual*, including exploration of ways to simplify the guidelines and possible consideration of amendments that might be appropriate.

(4) Continuation of its multiyear study of the *Guidelines Manual* to address case law concerning the validity and enforceability of guideline commentary.

(5) Continued examination of the career offender guidelines, including (A) updating the data analyses and statutory recommendations set forth in the Commission's 2016 report to Congress, titled *Career Offender Sentencing Enhancements*; (B) devising and conducting workshops to discuss the scope and impact of the career offender guidelines, including discussion of possible alternative approaches to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense"; and (C) possible consideration of amendments that might be appropriate.

(6) Examination of the treatment of youthful offenders under the *Guidelines Manual*, including possible consideration of amendments that might be appropriate.

(7) Implementation of any legislation warranting Commission action.

(8) Resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. 991(b)(1)(B) and *Braxton v. United States*, 500 U.S. 344 (1991).

(9) Consideration of other miscellaneous issues coming to the Commission's attention.

(10) Further examination of federal sentencing practices on a variety of issues, possibly including: (A) the prevalence and nature of drug trafficking offenses involving methamphetamine; (B) drug trafficking offenses resulting in death or serious bodily injury; (C) comparison of sentences imposed in cases disposed of through trial versus plea; (D) continuation of the Commission's studies regarding recidivism; and (E) other areas of federal sentencing in need of additional research.

(11) Additional issues identified during the comment period.

AUTHORITY: 28 U.S.C. 994(a), (o); USSC Rules of Practice and Procedure 2.2, 5.2.

Carlton W. Reeves,

Chair.

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
United States District Court
333 Constitution Avenue, N.W., Room 4317
Washington, DC 20001

Honorable Cecilia M. Altonaga
Honorable Kenneth D. Bell
Honorable Mark J. Bennett
Honorable Terrence G. Berg
Honorable Edmond E. Chang
Honorable Dee D. Drell
Honorable Katherine Polk Failla
Honorable Charles B. Goodwin
Honorable Joseph Laplante
Honorable Patty Shwartz
Honorable Charles J. Williams

TELEPHONE
(202) 354-3020

Honorable Randolph D. Moss, Chair

August 1, 2023

Hon. Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chair Reeves and Members of the Sentencing Commission:

On behalf of the Committee on Criminal Law (Committee) of the Judicial Conference of the United States (Conference), we appreciate the opportunity to provide comment on the proposed priorities of the Sentencing Commission (Commission) for the 2023-2024 amendment cycle.

The Committee's jurisdiction within the Conference includes overseeing the federal probation and pretrial services system and reviewing issues relating to the administration of criminal law. The Committee provides comments about the Commission's proposed priorities for the 2023-2024 amendment cycle as part of its oversight role regarding sentencing guidelines and its monitoring role regarding the workload and operation of probation offices. The Judicial Conference has authorized the Committee to "act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including proposals that would increase the flexibility of the Guidelines."[1] Moreover, the Judicial

[1] JCUS-SEP 90, p. 69. In addition, the Judicial Conference "shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work." *See* 28 U.S.C. § 994(o).

Conference has resolved that "the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible."[2] Past testimony presented and comments submitted on behalf of the Committee have expressed support for Commission efforts to resolve ambiguity, simplify legal approaches, reduce uncertainty, and avoid unnecessary litigation and unwarranted disparity.

Discussion

The Committee has reviewed the Commission's proposed priorities for the 2023-2024 amendment cycle, and, as a general matter, we support the Commission's engagement on so many important areas of criminal administration and justice. Of these, the Committee is particularly supportive of the third proposed priority, which highlights the importance of finding ways, where appropriate, to simplify the guidelines. Beyond that general observation, we simply urge the Commission to bear in mind the limited resources of the judiciary—including the courts and the probation and pretrial services offices—during these times of heightened budgetary constraints.

Consistent with this concern, we offer the following particular input on the second proposed priority, which focuses on:

> Promotion of court-sponsored diversion and alternatives-to-incarceration programs by expanding the availability of information and organic documents pertaining to existing programs (*e.g.*, Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program) through the Commission's website and possible workshops and seminars sharing best practices for developing, implementing, and assessing such programs.

As a preliminary matter, it is not entirely clear (1) whether the priority merely seeks to promote access to additional information regarding diversion and alternatives-to-incarceration programs, leaving it to the courts and probation offices to assess whether and when these programs are best and most efficiently deployed, or (2) whether it is intended to express a preference for increased use of these programs more generally. To the extent the priority is focused on the former, the Committee strongly supports any effort to establish a clearinghouse or other forum for exchanging ideas, best practices, and information about these court-sponsored diversion and alternatives programs. Such a clearinghouse could help fill a gap in the existing informational resources available.[3]

However, to the extent the priority is intended to "promote" or to place the Commission's imprimatur on the various diversion and alternative programs set up by individual federal courts,

---

[2] JCUS-MAR 2005, p.15.

[3] The Commission's website includes in its mission statement a purpose to "collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public." Serving as a clearinghouse for information about these programs would appear to fit within that description.

the Committee urges the Commission to undertake broader conversations before taking any action. To start, these programs take a host of different forms, which are more or less resource intensive, which address different problems and concerns, and which may prove more or less effective in addressing the goals of sentencing and the positive reentry of those convicted of crimes. More generally, the "promotion of court-sponsored diversion and alternatives-to-incarceration programs" will likely require the expenditure of more time and resources by court staff and by pretrial and probation office personnel and, correspondingly, could pull scarce resources away from other programs.

To be clear, the Judicial Conference is supportive of judicial discretion in sentencing, including the flexibility afforded by diversion and alternatives to imprisonment.[4] Our Committee can also attest, based on members' personal experiences and anecdotal reports, that judges who participate in these programs often support their continued use. But rather than categorically promoting the use of these programs, which operate in such disparate ways, we urge the Commission to encourage further research into the efficacy and cost-effectiveness of these programs. The variety of existing programs and the innovations that courts continue to undertake should provide excellent opportunities for further study, and we support efforts to investigate which approaches produce the best results in the most cost-effective manner.

The Commission states in its Federal Register notice that, pursuant to 28 U.S.C. § 994(g), "it intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority." Although the Criminal Law Committee recognizes the importance of considering the budget and capacity of the Bureau of Prisons, it is necessary to pay similar attention to the limited resources of the courts and the pretrial and probation services system. Given current budgetary restraints, every new program requires a tradeoff and cuts to existing programs and activities. The best way to ensure that any such tradeoffs are worth the cost is to conduct the research necessary to evaluate the tangible and intangible benefits of the variety of court-sponsored programs.

Conclusion

The Committee appreciates the work of the Commission and the opportunity to comment on this ambitious list of proposed priorities for the 2023-24 amendment cycle. The Committee members look forward to working with the Commission to pursue initiatives that will improve the overall effectiveness of the sentencing guidelines and the fair administration of criminal justice. We remain available to assist in any way we can.

Respectfully submitted,

Randolph D. Moss, Chair

cc: Hon. Roslynn R. Mauskopf

---

[4] *See, e.g.,* JCUS-SEP 17, p. 11. *See also* JCUS-SEP 15, pp. 12-13; JCUS-SEP 95, p. 47.

Public Comment - Proposed 2023-2024 Priorities

Submitter:

District Judge Stephen Bough, Missouri, Western

Topics:

2. Alternatives to Incarceration and Court Diversion Programs

Comments:

I would strongly urge the USSC to look at a host of specialty courts. State court systems have led the charge of problem-solving courts such as veterans courts, trauma courts, drug courts, domestic violence courts, etc. Our current system is ineffective at preventing recidivism and is horribly inexpensive and locks up too large of a percentage of our population. Specialty courts do a better job on recidivism and cost. The guidelines should be amended to encourage the referral to a problem solving court for lower-level defendants.

Submitted on: June 16, 2023

Building a Successful Team in a Problem-Solving Court[1]–

The Western District of Missouri Model

By: Carie Allen, Stephen Bough, Lajuana Counts, Arthur Diaz, Jeffery McCarther, Katie Meister, and James Parker

Problem-solving courts work. We know that reentry programs and intensive supervision programs like drug courts are effective alternatives to incarceration that reduce recidivism. For example, the United States District Court for the Western District of Missouri's Reentry Court has an 85.7% success rate for graduates, meaning they complete their term of supervised release without any new charges.[2] A reduction of recidivism means hefty savings of tax-payer dollars. More importantly, successful problem-solving courts mean people engage in their communities, raise families, work productive jobs, and pay taxes. Politicians of all stripes have figured out that simply incarcerating drug addicts doesn't work: *"The incarceration level that we're seeing – we can't keep doing that. Locking them up is not the answer."* – Missouri Governor Mike Parson (R)[3] Courts and legislators and executive branches around the country are increasingly turning to problem solving courts to address the trauma, addictions, and behaviors that underly the criminal behavior.

---

[1] The model used in the Western District of Missouri was created in 2010 with the help and input from mostly state drug courts, most importantly the drug court in Jackson County, Missouri. We didn't create this program; it was simply adapted to fit our Court. Judge Ortrie D. Smith and Judge John T. Maughmer successfully guided this program until 2015 when Judge Bough took over as the judicial team member. The credit for our success lies with all the team members (probation, employees, US Attorneys, Public Defenders, counselors, and judges) who have led, cared, celebrated, and cried for the last 13 years.

[2] *Reentry Court*, U.S. COURTS FOR THE WESTERN DISTRICT OF MISSOURI, https://www.mow.uscourts.gov/reentry-court (last visited Jan. 31, 2023). Our comparators are individuals who were invited to participate in Reentry court but turned us down. We are enormously proud of our graduates.

[3] Celisa Calacal, *Missouri Governor Parson Signs Drug Treatment Court Bill Into Law*, KCUR 89.3, (Oct. 24, 2018), https://www.kcur.org/government/2018-10-24/missouri-governor-parson-signs-drug-treatment-court-bill-into-law/.

A one size fits all approach won't work. The team of the Western District of Missouri Reentry Court is providing a hopefully interesting look inside how we function. We are not perfect and even after 13 years, experience continues to teach us lessons. Section one of this article gives a brief background on our Reentry Program. Section two allows each member of the team to discuss their role and what they get out of participating in our specialty court. Each member of the team – A) Judge, B) Probation Office, C) Federal Public Defender, and D) U.S. Attorney are equal partners in our program. Each member has veto power over who gets invited to participate in the program Other key members include E) a Resource Specialist (a member of the probation office) and F) Mental Health Counselor (contracted from an outside agency). Section three concludes with some random advice for people who are looking to add a problem-solving court.

I. Western District of Missouri's Reentry Program

To understand the Western District of Missouri's Reentry Court, some discussion of specialty courts may be helpful. The first drug court was created in Miami, Florida in 1989, and the second was established in 1993 in Jackson County, Missouri, by former Senator Claire McCaskill.[4] Specialty programs have since expanded to address a host of societal ills, including drug courts, problem-solving courts, veterans' courts, and youthful offender courts. Specialty courts have fallen into two categories: (1) "back-end" programs which offenders participate in

[4] *Drug Court*, JACKSON CTY. COMBAT, https://www.jacksoncountycombat.com/168/Drug-Court (last visited Jan. 31, 2023).

after serving a term of imprisonment; or (2) "front-end" or no-entry programs where an individual typically doesn't go to prison.[5]

Since their creation, there has been an explosion of alternative courts across state court systems. For example, Minnesota has developed a variety of treatment courts, including an Adult Drug Court, DWI Court, Family Dependency Treatment Court, Juvenile Drug Court, Mental Health Court, and Veterans Court.[6] Missouri Governor Mike Parson signed bills expanding drug treatment courts to every county in Missouri and creating veteran's treatment courts, allowing for diversion programs for military members or veterans dealing with substance abuse or mental health conditions.[7] The BRIDGE program in the United States District of South Carolina was one of the first alternative-to-incarceration drug court programs. Over six years, the program saved taxpayers $3.5 million.[8] Of the 43 graduates during that time, only five of them had additional encounters with the law – an 89% success rate! Judge Brucie Hendricks runs the South Carolina program and noted "you need to get to the root of the problem – the substance abuse disorder – or you will have recidivism."[9] In Kansas City, Missouri, municipal court Chief Judge Courtney Wachal developed a Domestic Violence Court that "seeks to

---

[5] WILLIAM H. PRYOR, JR. ET AL., U.S. SENTENCING COMM'N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS at 6–7 (September 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf.
[6] *Treatment Courts*, MINNESOTA JUDICIAL BRANCH, https://www.mncourts.gov/Help-Topics/DrugCourts.aspx (last visited Jan. 31, 2023).
[7] Alisa Nelson, *Parson Signs Bill to Create Veterans' Treatment Courts in Missouri*, MISSOURINET (July 10, 2019), https://www.missourinet.com/2019/07/10/parson-signs-bill-to-create-veterans-treatment-courts-in-missouri/.
[8] The Honorable Judge Bruce Howe Hendricks, U.S. Dist. Ct. for the Dist. Of S.C., *Written Statement to U.S. Sentencing Commission – Drug Courts* (Mar. 2, 2017), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20170418/Hendricks.pdf.
[9] E-mail from the Honorable Judge Bruce Howe Hendricks, U.S. Dist. Ct. for the Dist. of SC, to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Feb. 3, 2023) (on file with author).

improve victim safety and hold offenders accountable through increased supervision and a holistic approach towards offender needs."[10]

While there are important distinctions between Reentry courts, the reality is that each program's intensive supervision and lack of adversarial approach results in successful avoidance of recidivism.[11] These alternative courts are not without critics "who contend that they are not effective in treating addiction and reducing recidivism, wrongly reduce the punishment of culpable offenders for their volitional conduct, or wrongly criminalize drug addicts rather than genuinely treat them."[12] However, the Department of Justice, National Institute of Justice, reports that "in an unprecedented longitudinal study that accumulated recidivism and cost analyses of drug court cohorts over 10 years, NIJ researchers found that drug courts may lower recidivism rates (re-arrests) and significantly lower costs."[13]

The Western District of Missouri's Reentry Court is an example of an extremely intensive back-end supervision program. Graduation from the program results in a substantial reduction of the term of supervised release and, hopefully, a wealth of tools and skills to avoid re-offending. Like other courts, we have a four-phase program that usually takes between one year to 18 months to complete.[14] Each of the four phases has different requirements for completion:

> Phase I: Attend five bi-weekly meetings, obtain employment, pass drug and alcohol testing for thirty-five days, and present a historical life inventory;

---

[10] *Domestic Violence Brochure*, KANSAS CITY MUNICIPAL DOMESTIC VIOLENCE COURT, https://www.kcmo.gov/home/showpublisheddocument/2472/637454368119570000 (last visited Jan. 31, 2023).
[11] PRYOR, JR. ET AL., *supra* note 5, at 5–7.
[12] *Id.* at 8.
[13] *Do Drug Courts Work? Findings From Drug Court Research*, NATIONAL INSTITUTE OF JUSTICE (May 11, 2008) https://nij.ojp.gov/topics/articles/do-drug-courts-work-findings-drug-court-research.
[14] *Reentry Court*, U.S. COURTS FOR THE WESTERN DISTRICT OF MISSOURI, https://www.mow.uscourts.gov/reentry-court (last visited Jan. 31, 2023).

Phase II: Attend eight bi-weekly meetings, continue steady employment, pass drug and alcohol testing for forty-five days, and present a "comprehensive relapse prevention plan;"

Phase III: Attend monthly meetings, maintain steady employment, be successful in substance abuse treatment, pass drug tests for sixty days, and participate in pro-social activities;

Phase IV: Attend monthly meetings, maintain steady employment, complete twenty-five hours of community service, pass drug tests for 133 days, and present a graduation speech.[15]

For each week of compliance, participants receive one week of credit towards their term of supervised release. If a participant violates any requirement (i.e., tests positive for a controlled substance) during a week, they may face additional sanctions, such as location monitoring or more counseling. Continued violations can result in removal from the program. Throughout the program, participants are treated by outside providers, subject to unannounced home and work visits from their probation officers, and rewarded with gift cards, praise, and fewer restrictions.[16] At the end of the program there is a party, gift card, graduation plaque, picture with the judge, graduation speeches, and an order reducing the term of supervised release.

II. Reentry Team Perspectives

Each member of our team has been on reentry court for years. We have seen folks graduate, buy homes, reunite with families, and pursue their dreams. We have seen people fail,

---

[15] U.S. Courts for the Western District of Missouri, *A Guide to Reentry Court Program* at 11–14, https://www.mow.uscourts.gov/sites/mow/files/ReentryCourtGuide.pdf.
[16] *Id.*

relapse and get treatment, then relapse again, and get kicked out of the program. The heart breaks hurt more, and the hallelujahs are more joyful in reentry court. The team has bonded and the traditional adversarial roles *mostly* melt away during the program. Outside of the program the U.S. Attorney goes back to trying criminal cases, the Public Defender keeps filing motions to suppress, the probation office keeps doing investigations, and the judges keep arraigning defendants and sentencing people to prison. As mentioned before, graduations from reentry court are especially meaningful, mostly because of the graduation speeches. We start off with each member of the team affirming the graduate in some way, then the graduate orally delivers a speech. Each person's personality shows in different ways, but a recent graduate, Timothy Farmer,[17] shined. His introductions and affirmations of each team member were heartwarming and serve to introduce each section below.

A. Judge – Stephen R. Bough & Lajuana Counts – Building a Team and Losing the Adversarial Role

> *So last but not least I would like to thank Judge Counts for being a part of this program. You always have such a glow when talking to us about what's next for us. So, thank you for that. And then you got Judge Bough, he will have you up thinking the night before on what positive thoughts[18] you are going to give him and what he has lined up for you next. With that being said, now it's my turn to have something lined up for him. I was told by Judge Bough that when I was done with this program that he would take me to lunch or dinner so I will be waiting on his call.*

Judge Lajuana Counts

Changing the trajectory of someone's life is what the Western District of Missouri's re-entry court is all about. Being a part of the team is one of the most rewarding aspects of our

---

[17] Mr. Farmer gave us permission to publish his graduation speech.
[18] Every session involves calling each participant up to the podium. The first question is always the same: "Tell me something positive."

lives. It is quite amazing to see the metamorphosis from anxiety to hesitancy to resolution to thankfulness in the participants in our re-entry program. It is not an easy feat to recover from a serious life-changing mishap within the legal system, but the journey with the assistance of the re-entry team, gives the men and women an opportunity to change the paths of their lives. It's simply amazing and so very gratifying to see the growth and satisfaction as someone graduates from the program. I was fortunate to become a part of this team when I started my career on the bench as a Magistrate Judge in 2018. When Judge Bough cannot be there, then I preside over the re-entry sessions. Otherwise, I am another voice and am able to add to the conversation as we celebrate the successes and navigate through the challenges that each participant experiences. We each rely upon our life experiences and backgrounds, both personally and professionally, to provide a holistic approach.

From my perspective, the tone for our program is set by the district judge, which permeates throughout the entire team. Each district judge, as well as each team member, from the inception of this program has poured their heart and soul, as well as their outside resources, into giving each of the participants all of the tools needed to navigate through our program. Our team's actions have shown each and every participant that we have a genuine vested interest in providing them every possible resource available – better paying jobs, decent affordable housing, educational opportunities, and mental and physical health support. The only thing that our team can't do is make a participant change – we've evidenced them wanting to change and actually making that decision to change throughout our program as we've held them accountable for their actions and treated them with respect, concern, and dignity. They are not numbers or statistics, they are human beings.

This program is not a "one size fits all" type of approach. We have a general game plan, but what we've learned over the years is to focus on each participants' individual needs. Our purpose is to be accessible, be straight-forward, and be reliable. Consistency between, with, and among all of the re-entry team is crucial to the success of each participant.

Judge Stephen R. Bough

I inherited a smooth running, well-staffed program that got great results. My job is to simply keep the car pointed in the right direction. Judge Ortrie Smith and Judge John Maughmer built the Reentry program along with countless Probation Officers, U.S. Attorneys, Public Defenders, and mental health providers. Like Judge Counts mentioned, those judges set the tone. Judges Smith and Maughmer were kind, gracious, and humorous men. They never took themselves seriously, but they did take pursuing justice as a high calling. These two judges were respectful and welcoming. When coming back to Reentry to watch folks graduate, they still greet everyone with a huge smile and a warm handshake. This approach is one of the many reasons for the program's success. Imagine the trauma of committing a crime, being prosecuted, being found guilty (plea or otherwise), and then being sentenced to the Bureau of Prisons. Now, you are being asked to return twice a month to the same courthouse where you were sentenced. The normal response is a polite "no, thank you." Of the many things I learned from these gentlemen, be kind. Every participant is greeted the same way with a request to "tell me something positive." I tell them we want them to graduate, that I understand it will take a full phase for them to trust me, and that I am proud that they joined us. No one expects a participant to be able to continually flout the rules, use drugs, or skip appointments. Everyone deserves a second chance in life and Reentry when they are being honest. In short, Judges Smith and

Maughmer showed me how to apply the golden rule to people in Reentry Court and I am grateful for the education.

B. Probation – Katie Meister – Probation Role and being Faithful to the Rules

> *I first heard about the REC (Reentry) program from Katie. She gave me her pitch and I told her I would think on it. Then the next thing you know here comes smooth talking Tony Wheatley (another probation officer on our team). So, Katie, I would like to personally thank you for letting me be a part of this program. The thing that got me is they have someone for everything that you need.*

As the Program Specialist for the U.S. Probation Office, developing strategies and programs that grow our district is a part of my core responsibilities. I oversee cases for our district that are in the Reentry Phase, at the Residential Reentry Center (RRC). Individuals returning to the community from incarceration are generally afforded a period of transition time at the RRC as part of their custody sentence. I become involved in the case during this timeframe, and I am the first point of contact for referral to the Reentry Court (REC) program. My role as a specialty court team member is mostly administrative. I track referrals, data, historical context, and speak for the overall fidelity of the program from an evidence-based perspective. Specialty courts allow team members from different agencies to view each other from a different viewpoint, one that is less adversarial and more collaboratively. Listening to varying viewpoints is an important part of the process, while staying true to the overall mission of the program. Moving forward, our district is moving less toward the Reentry Court model and focusing more on expanding our pre-trial treatment court. The treatment court model allows us to expand the types of cases we accept, be more inclusive toward all types of treatment needs (including trauma) and be very specific about services. We are excited to develop this program in 2023 and have several new participants on the cusp of being admitted to the program. Successful

completion of the treatment court ultimately results in the avoidance of incarceration for each individual and is a two-year, intensive process. Our office is not abandoning our mission to aid individuals in successful reentry, we are shifting our focus to adapt to the changes in legislation and in consideration of time and resources for the agencies that are involved in these programs. It is a very exciting time for our district as we venture toward growth of our treatment court, and we are so grateful to work for a district that allows us to develop programs that are driven by our desire to positively impact the lives of the participants.

C. Public Defender - Carie Allen – Support of the Participants as a Legal Advocate

Mr. Farmer didn't write anything about the Public Defender, Carie Allen, because he went through our program perfectly. He didn't have any issues, so Ms. Allen didn't have to use her legal talents.

Before going to law school, I always thought I wanted to be a social worker. As I was finishing undergrad, I was talked into going to law school by an attorney I did some volunteer work with. He assured me it was an excellent advanced degree, and I absolutely did not have to be a lawyer. I took the bait. Twenty-one years ago, I started my first job as a lawyer- a trial lawyer with the Missouri State Public Defender system. When I heard that first jury declare my client "not guilty," I was hooked.

All these years later, I am still a trial attorney, now with the Federal Public Defender. My role as a trial lawyer is one of zealous advocacy. I fight for my clients whether that means going to trial (and occasionally getting that illusive "not guilty") or, more often, fighting for a lower sentence.

When I started at the Federal Defender, I would hear the assigned attorney talk about going to Reentry. I had no understanding of this mysterious court. But, as time went on, I went to

some sessions, and learned that it was a team of people all there to help participants succeed after prison. A little over four years ago, I volunteered to be the Reentry attorney from the Federal Defender office. While there is always an aspect of social work in my job, twice a month, I now get to get my social worker fix.

Unlike my role as a trial attorney, Reentry is rarely adversarial. There are no "not guiltys" in Reentry Court. The primary goal is to be a team. And the team tries to do everything we can to do to lift the participants up. We all fight for them. And we all root for them. Often, we work together to come up with creative solutions for issues that the participants are going through. When a participant told us she was worried about her son, we encouraged her to sign him up for the Big Brothers program. We worked together to help a participant take care of warrants from traffic tickets that built up while he was in prison. We've rooted for many participants working towards their GEDs. Often, I am simply there as a cheerleader for people who need some cheering.

The Reentry participants are still my *clients*. Unlike anyone else in that courtroom, I owe them the duty of confidentiality and zealous advocacy. This comes into play when someone is not sailing through the program; when they are accruing violations, when they are losing weeks, when they've encountered a legal problem. I'm typically the one who steps in. At the beginning of the program, I always introduce myself and let the participants know that I am their attorney. I give them my card with my cell phone number, and I make it very clear that they can call me confidentially. I only share with the rest of the team with their permission.

Sometimes I play the role of the second counselor. Clients can call me to vent. They can tell me why they are frustrated and may want to drop out. I listen and I give them advice. Other times, they have received a violation. The most common one is positive tests for drugs or

alcohol. And this is when I step into my role as confidential advocate. I advise them of what their best options are in the situation. I let them know what the consequences will be. But, like in my typical trial work, my job is to advise, but not decide for them.

Participants don't always complete the program. On rare occasions, my client wants me to fight to stay in Reentry court, and that is what I do. More often, they have simply lost too many weeks, and cannot complete the program in the required time. In these cases, my clients know what is coming and understand that no amount of advocacy on my part can override the program's rules. I am always the one that makes the call to let them know. As a rule, we don't have them come to the next session to embarrass them by kicking them out in front of the other participants. I know this is appreciated.

I remain their attorney even if they don't get through Reentry court. This may mean I have to go to court with them and fight for them in front of another judge if they accrue more violations. And it might mean they call me to ask me legal questions. And sometimes, they will still call me to just to vent. I always want my role to be the person they can 100% trust to always act in their best interest.

I am the only person in the Reentry program that works with criminal defendants before their conviction and before they go to prison. I see how much success our participants have and how the team helps them get back on their feet. I have so many clients whom I know would benefit greatly from the program once they are released. Unfortunately, most don't qualify because of their criminal history. If there is one place where I am not always a "team player" that is in my hope to greatly expand who qualifies for the program. Kansas City has a serious gun-violence problem and one of the highest murder rates in the country. Giving as many people as

possible the resources - and cheerleaders - to help them get their lives back on track makes a difference. It's statistically proven to make a difference.

Like most of the other people in our Reentry team, I live in Kansas City. I love my city. I don't want my clients feel they must carry guns to feel safe. I don't want to fear for their safety when they are released. I want them to have a team that can help them find a safer place to live, who can give them the counseling to foster positive relationships, and who can ultimately make sure they will never go back to prison. This is what Reentry court does and why I always look forward to walking into that courtroom twice a month.

> US Attorney – Jeffrey McCarther – "*The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system.*"[19]
>
> *D. With that being said, my first REC appearance had me ready for it to by my last. First and foremost, I was walking back in the courthouse that I told myself I would never be in again. And then who else but the man who recommended the time – Jeff McCarther. Not sure if this was ever talked about or not in the courtroom, but Jim (the mental health counselor) sure knew about that after our sessions. Jim had nothing but positive things to say about Jeff. So next thing I know me and Jeff are doing community service together. So that opened my eyes up to sow that I can't be hateful of someone just doing their job when I was the one doing wrong. So, Jeff, I just want to tell you thank you for being part of this program. You helped me to see the federal system from a different view and perspective.*

The role of the criminal prosecutor in any given case typically ends at a defendant's sentencing hearing. Rarely, if ever, would a prosecutor call any sentencing hearing a "joyful" endeavor. At sentencing hearings, prosecutors must earnestly and dispassionately advocate for an

---

[19] American Bar Association, Criminal Justice Standards, Prosecution Function (4th edition 2017), Standard 3-1.2(f).

outcome that best serves the interests of justice. Often, that outcome is a term of imprisonment. For the defendant and their family, it's a somber occasion. At the conclusion of the hearing, the prosecutor closes the case and moves on to other matters – hoping, perhaps naively sometimes, that at the conclusion of the term of imprisonment, the defendant will have emerged reformed, ready to commit themself to pursuing a purposeful and lawful life. But, outside of a show cause or revocation hearing for violations committed while on supervised release after serving a term of imprisonment – which would mean things have not gone well – a prosecutor would rarely have any idea how any defendant fares post-incarceration. The ambit of post-incarceration supervision lies exclusively with the United States Probation Office, and there is no realistic opening for the prosecutor to step in. Reentry Court, however, allows for a window.

When I was first introduced to Reentry Court in 2015, I admit I was confused by the role of the United States Attorney's Office. The program was a post-incarceration, enhanced-supervision program, after all. Where does a prosecutor fit? After attending my first sessions of Reentry Court, my concerns were assuaged. The role of the United States Attorney's Office is to discuss, consider, advise, and work with all the partners in the program with the joint goal that the participants in the program succeed – for themselves and society. It can't be over-stated enough, the broad goal of the criminal justice system ***must*** be, for all participants in that system, that individuals reentering society post-incarceration become the absolute best person for which they are capable. With that premise central to Reentry Court, we take off our "adversarial hats" as we walk through the doors. Absent a discrete circumstance wherein a participant needs to discuss legal issues with the public defender, over the weeks and months of the program, all of the program partners are privy to the same information about a participant – the good and the bad. Invariably, in our discussion for any given participant, I am, for instance, far closer to the public defender on

"next steps" than we are apart from one another. All the team members experience disappointment when a participant fails, and we all experience joy and fulfillment when a participant betters themselves and reaches the zenith of graduation from the program.

As the prosecutor on the team, however, I am highly cognizant of what I represent to a Reentry Court participant. Likely, each participant's last interaction with the United States Attorney's Office in court was where a prosecutor was attempting to persuade a judge to incarcerate them for a longer period of time than the participant was hoping for. For that reason, I understand that I'm probably the last person each participant wants to see in court – especially for those I personally prosecuted. When a participant begins the program, I can never be certain whether I'm viewed by the participant as someone in their corner hoping all goes well in their life, an adversary anticipating a tumble backwards into an indictment, or something in-between. Regardless of the thought, it's important that the United States Attorney's Office is part of the program, and for the participants to see, week after week, and month after month, that even the prosecutor (who may have recommended their sentence of incarceration) has a vested and genuine interest in seeing them succeed.

E. Resource Specialist – Arthur Diaz - Connecting Client to Employment, Educational, Supportive Service and Financial Literacy Resources

> *They have the answer for everything or at least can point you in the right direction. Without even already knowing I had Mr. Diaz, he was trying to get me a GED and looking for me a job. Soon as I got in the program, I surprised him that I already had a GED and a job, but he had been around smooth-talking Tony too long so of course he talks me into doing a job resume anyway. So, thank you for that, Mr. Diaz.*

As the Community Resource Specialist for the U.S. Probation Office, I support the efforts of the supervising officers in helping our offenders' transition into the community.

Responsibilities include:

- Assisting offenders in finding employment and/or career training opportunities.

- Referring offenders to agencies for the provision of supportive services.
- Establishing and maintaining relationships with businesses and social service providers in the Kansas City metro area.
- Updating supervising officers on events and programs that could benefit our offenders.

My primary role in the Specialty Court is to provide employment and resource assistance thereby increasing the chances of a participant's successful completion of the program. However, there are times when more intensive coaching or support is required to address a participant with a problem.

Examples include:

- Assisting a participant who was struggling to maintain employment by holding "de-briefing" sessions after every shift for two weeks thus providing the opportunity to address issues that occurred in previous jobs.
- Providing referral to colleague at Legal Aid to help a participant who was confused about a possible sanction regarding his Social Security benefits.
- Advocating for a participant who needed help in securing Federal funds to enroll in CDL training class.
- Referring two participants to GED preparation classes and coordinating efforts with agency's staff.

I also take part in staffing sessions to review the progress of those in the program.

F. Mental Health Counselor - Jim Parker - Breaking Down Barriers to Personal Growth and Change

With that being said, who was all the crying and complaining to other than Jim. So learned to know me more than anyone in the program. He talked me into staying in the program numerous times. So, thank you for that, even though at the time I might had thought you was wrong but by the time I for to the house I realized you were right. So, I am glad that I was able to meet you and work with you in this program. You are a very special man so thank you for your services.

Professional counseling is a professional relationship that empowers diverse individuals, families, and groups to accomplish mental health, wellness, education, and career goals. Counselors work with clients on strategies to overcome obstacles and personal challenges that

they are facing.[20] There are not many people in the world who seek out the services of a counselor when everything in their lives is going great. To the contrary, people seek the services of a counselor when they have thoughts, emotions, or behaviors that are out of control, effecting their relationships and sense of well-being. Some clients bring goals or problems to the counseling sessions, while some are just there to fulfill the requirement of the program (Just checking the box). Some are willing to identify areas in their lives which need change, and some are not. The counselor for the Reentry Court Program does not judge clients, but meets them where they are, being of maximum service to the client.

The counselor in the Reentry Court Program spends a minimum of 18 hours with the client during their time in the program, which is more contact than any other member of the team, except for the probation officer. A barrier to overcome is the client's belief that the counselor will report everything that is said in counseling sessions to the probation officer. Clients have the right to confidentiality and the counselor has an ethical duty to protect that confidentiality. All clients sign a release of information to allow the counselor to speak to the probation officer and the Court for progress reports. The counselor will provide the least amount of detail on the progress in treatment to protect the client's confidentiality. Once the client understands this, they are much more likely to open to the counseling process and the real work begins. If a client becomes committed to the process, they can achieve their goals and experience more personal growth than they thought possible.

The counselor and probation officer work very closely together. I would speak to the probation officer at least once per week to discuss clients' progress in counseling. Then there

[20] *What is Professional Counseling*. American Counseling Ass'n.,https://www.counseling.org/aca-community/learn-aboutcounseling/what-is-counseling (last visited May 21, 2023)

were the times when I would receive a phone call first thing Monday morning from the probation officer. Those phone calls were rarely to provide a positive report on a client. Those calls did provide me with a topic to address with the client. This type of sharing of information about a client is something a "normal" counselor does not get. A "normal" counselor does not receive a call to inform them their client relapsed with a substance or is experiencing anxiety. These Monday morning phone calls were a source of information which provided topics to address in the next counseling session and goals to work toward.

I was the counselor for Reentry Court from 2019 to 2022. It was an honor to work with the Reentry Court team, but especially to clients in the program. The work I did with the clients was very difficult at times, but also very rewarding. It was difficult to work with a client who would fight the therapeutic process. These clients would often only speak of surface level issues while saying "everything is okay" or "I'm fine. Everything's fine." More than once, a client who did this would not make any changes in their lives, leading to bending, then breaking the rules of the program. It was painful when the client would break the rules one too many times, so they were dismissed from the program. Luckily, the painful times are overshadowed by the positive, rewarding times with clients. Watching a client change from someone who is apprehensive to speaking to a counselor to someone who is opening up, speaking about their feelings and processing difficulties in their life, is the reason counselors do what we do.

III. Recommendations and Conclusion

If there can ever be an agreement among all Americans, surely it is the criminal justice system is not working. The United States has the most expensive system, the highest recidivism rate, and incarcerates the highest percentage of our population. This is not the American

exceptionalism we expect. There is an obvious solution – problem-solving courts are cheaper and have improved recidivism rates. Each level of the criminal justice system needs to rethink the reluctance to fully embrace these innovations.

What is clear to all of us in the justice system is that one size does not fit all. Each human, each child, and each defendant come to a situation with different experiences, limits, and skills. Problem solving courts try to take a person where they are at and, if they are willing, go on a new path.

For the problem-solving court to work, all the parties to the program need to be on the same page. For judges, that means less adversarial or confrontational. For public defenders, modify the way they think of advocate role while respecting attorney client privilege. Prosecutors need the courage to advocate for success in the various programs, not just incarceration. Probation Officers have always tried to get people the help they need within the rules; welcome a collaborative approach. As with any team, respect and support for other members is vital. And when the graduation cake is sliced, generously partake!

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
350 WEST FIRST STREET, SUITE 4311
LOS ANGELES, CALIFORNIA 90012-4565

CHAMBERS OF
DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

July 31, 2023

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

By Electronic Submission to https://comments.ussc.gov.

Re: **CASA Program (CDCA) Comments on Promotion of Court-Sponsored Diversion and Alternatives-to-Incarceration Programs (2023-2024 Amendment Cycle)**

Dear Judge Reeves:

On behalf of our Conviction And Sentence Alternatives (CASA) Program and its various team members, I am pleased to offer the following additional comments regarding the Commission's continued interest in diversion and alternatives-to-incarceration (ATI) programs within the federal criminal justice system.

As I understand your current request for comments, the Commission is exploring how it may best *promote* the development, implementation, and assessment of federal diversion and alternatives-to-incarceration programs. Let me first say that this is a welcomed and long-overdue inquiry by any federal authority, as most programs have developed on an *ad hoc* basis through localized efforts with limited resources or support from our respective stakeholder's national administrative offices. We nonetheless believe that successful programs across the country have had a significant positive impact on participants, who have become productive members of the community and avoided many years of incarceration. As further described below, there is no doubt that the leadership and support of the

Commission can only add to the long-term stability and increased effectiveness of such programs that will benefit both participants and program teams alike.

I should note here that all stakeholder agencies have committed to the continued development of the programs in our District, through the assignment of dedicated personnel and by providing other supportive services. The Department of Justice has encouraged local United States Attorneys to engage in these alternative programs. Our United States Attorney's Office has been a partner since CASA's inception. The Office of the Federal Public Defender, with the support of the Defender Services Office of the Administrative Office of the United States Courts, has also committed personnel and other client supportive services (such as social workers) to CASA. The United States Probation and Pretrial Services Office has consistently shouldered much of the participants' treatment expenses, as well as the assignment of specialized personnel. The District Court continues to foster our alternative programs, having established dedicated court dockets, and our judicial officers routinely refer cases to these collaborative courts. Together, we also have identified a number of community partners for the benefit of our program participants. With that said, however, there remains much room for a coordinated and focused discussion both within and between these stakeholder offices for the institutional acceptance, growth, and administration of such programs.

At last count, the Federal Judicial Center currently lists no less than 146 "problem-solving" courts – 92 post-conviction, 40 pre-trial and 14 hybrid programs, including a handful of mental health and veteran treatment courts. These numbers indicate that there are likely hundreds of federal court judges, prosecutors, defenders, probation officers and other affiliated team members combined that are engaged in diversion and/or alternatives-to-incarceration programs throughout the country. Yet, we cannot easily identify our respective colleagues nor effectively communicate amongst these programs as we do not have a national platform in which to do so. Surely, all of our programs will benefit from an organizing authority that can assist with the development, implementation, and assessment of alternative, court-sponsored programs, and where we may access resources, receive training, and evaluate the nature of our interventions.

At the core of many, if not most, of this nation's collaborative courts we find that the informed application of evidence-based practices is critical to long-term success. As such, this calls upon jurists, legal practitioners, supervision officers, and others to better understand and address a participant's behavioral health needs, including substance use and mental disorders. This is not an easy task for any of our

stakeholders, particularly without focused training and the ready availability of relevant resources.

With the development of state drug courts in 1989, a handful of key national organizations were formed to provide necessary guidance, training, and funding for these innovative court programs. The non-profit National Association of Drug Court Professionals (recently rebranded as All Rise, https://allrise.org), for example, has spent the last 30 years in treatment court research, development of comprehensive training programs, and the publication of related materials. The Substance Abuse and Mental Health Administration (SAMHSA, https://samhsa.gov) is an excellent example of a long-standing government organization with proven expertise and programmatic assistance. These, and other experienced public and private organizations, are dedicated to assisting with the faithful application of therapeutic treatment models for better outcomes for affected individuals involved in the criminal justice system. While some of these resources are available to our federal programs on a limited basis, the reality is that most of their efforts – including the granting of federal funds – are provided to state courts given the budget restrictions that we face as federal agencies funded by Congress and the fact that we have no collective national policy guiding our diversion or ATI efforts.

In my previous letter to the Commission dated March 13, 2023, you will recall that our program recommended "an expedited descriptive survey of the practices of ATI courts. . . ." We continue to believe that programs like CASA, POP, SOS and others will become more effective with the compilation of a national directory of such programs, sharing written overviews, characteristics of the participants that are served, and the characteristics of the program itself (from admission criteria to post-completion alumni data). As this information is gathered, we may look for commonalities, identify successful best practices, address specific challenges that we face, and turn to developing appropriate standards and training modules for the development, implementation, and assessment of our federal programs. Indeed, a national collaborative effort amongst all stakeholders is needed, and the Commission can certainly be instrumental to this process.

Expanding the Availability of Information and Organic Documents through the Commission's Website

In addition to collecting descriptive information on our federal programs, we should include a *needs assessment* component to any such survey. By allowing each program to list what administrative, programmatic, and fiscal resources are necessary, we will identify specific items for continued team development, program

improvement, and participant success. This, in turn, should lead us to further explore prospective policy initiatives, including applicable *Guidelines Manual* amendments and commentary as previously suggested to the Commission.

The proposed leadership of the Commission as a national repository of program information and organic documents is a timely and welcomed prospect. This is true for a few reasons: it will signal that this important federal sentencing authority believes that diversion and ATI programs now merit a more serious examination and wide-spread application; it will serve as a focal point for all stakeholders to submit relevant program and research documentation and establish an organized, annotated bank of materials for any district interested in developing, implementing, and assessing such programs; and it will help form working partnerships with organizations such as All Rise, SAMHSA, the National Drug Court Resource Center (https://ndcrc.org/), the Council of State Governments Justice Center (https://csgjusticecenter.org/), the United States DOJ Office of Justice Programs and their related divisions (https://nij.ojp.gov/library/publications/drug-courts), and several others that have developed an expertise in diversion and ATI courts. The efforts of the Federal Judicial Center in this regard may also prove helpful to the development of this new national resource, as it has established a similar effort.

Proposing Workshops and Seminars on Best Practices for Developing, Implementing and Assessing Diversion and Alternative-to-Incarceration Programs

As stated above, treatment programs by design should rely heavily upon behavioral health principles on which we, as judges and other legal professionals, are simply not well trained. We need to partner with some of the recognized experts in this field. In addition to those organizations that are listed above, there are others that may assist our efforts in understanding and effectively applying these basic principles in a forensic setting – including addiction, mental health, and co-occurring and other neurological issues.

A quick glance at some of the All Rise training programs, for example, shows that they not only address these issues based upon years of research, but also engage in team and role-specific training programs for each stakeholder (https://allrise.org/about/division/treatment-court-institute/). In addition, the Hazelden Betty Ford Foundation has an extensive series of workbooks, curriculum models, and other training materials which can prove to be very helpful for day-to-day participant support (https://www.hazelden.org/store/publicpage/substance-use-

disorders-and-mental-health). While the Commission and collaborative court teams would tailor a program to fit the generic needs as well as nuances of any district, we need not "reinvent the wheel" when there are a good number of already proven resources addressing the therapeutic needs of participants.

We encourage the Commission to develop its own series of workshops and seminars, either as stand-alone events or in conjunction with other stakeholder programs. The Training Division of the Defender Services Office, as well as The Federal Judicial Center, for example, have a number of national seminars on various related topics throughout the year. The Commission, also engaged in annual training, reports and other materials, can effectively dedicate such an event to diversion and ATI programs and/or prepare other teaching materials such as webinars and materials written specifically for our federal audiences.

I understand that these suggested efforts take time and resources to effectively plan and produce. In addition to internal staff, I believe that the Commission may call upon Temporary Duty candidates from various agencies to assist with these projects. However you decide to proceed will only bring additional recognition and support for these life-changing programs. On behalf of our entire CASA Team in the Central District of California, I thank you and the Commission for your commitment and efforts and we look forward to working with you in the years to come.

Please feel free to contact me if you have any questions about these comments.

Sincerely,

Dolly M. Gee

Dolly M. Gee

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Magistrate Judge Veronica Duffy, South Dakota

Topics:

1. Bureau of Prisons Practices
2. Alternatives to Incarceration and Court Diversion Programs
3. Simplification/Structural Reform
4. Case Law Relating to Guideline Commentary
5. Career Offender Guideline/Categorical Approach
6. Youthful Offenders
7. Crime Legislation
8. Circuit Conflicts
9. Miscellaneous Guideline Application Issues
10. Research Topics
11. Other Suggested Priorities

Comments:

Your areas of study are stated so generally that there really is no notice and an opportunity to comment. For example, which Guidelines provisions will you be examining and what about them has attracted your interest? Are you looking to increase penalties or decrease or some other change?

Submitted on: June 16, 2023

U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

July 31, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

The Sentencing Reform Act of 1984 requires the Criminal Division of the Department of Justice to submit to the Commission, at least annually, a report commenting on the operation of the Sentencing Guidelines, suggesting changes to the Guidelines, and otherwise assessing the Commission's work.[1] We are pleased to submit this report pursuant to the Act. This report also responds to the Commission's Notice of Proposed Priorities ("Priorities") published last month in the Federal Register.[2]

I. Structural Review of Federal Sentencing

The Department of Justice fully supports the Commission's decision to undertake a multi-year evaluation of whether "current sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in the Sentencing Reform Act."[3] Last year in our annual report to the Commission, we highlighted the President's commitment to "rethinking the existing criminal justice system – whom we send to prison and for how long; how people are treated while incarcerated; how prepared they are to reenter society once they have served their time; and the racial inequities that lead to the disproportionate number of incarcerated Black and Brown people."[4] We agree with the Commission that now is the time to examine federal sentencing as a system; to look at the fundamental architecture of federal

[1] 28 U.S.C. § 994(o).
[2] U.S. SENT'G COMM'N, Notice of proposed 2023-2024 priorities and request for comment, 88 Fed. Reg. 39907 (June 20, 2023), https://www.federalregister.gov/documents/2023/06/20/2023-12991/proposed-priorities-for-amendment-cycle.
[3] *Id.*
[4] Proclamation No. 10171, 86 Fed. Reg. 17689 (Apr. 6, 2021), https://www.federalregister.gov/documents/2021/04/06/2021-07179/second-chance-month-2021.

sentencing and the federal Sentencing Guidelines; and to recommend a path forward for federal sentencing for the next twenty-five years or more.

The Commission has itself recognized the disconnect between the legal landscape created by the Supreme Court's Sixth Amendment jurisprudence and the structure of the Guidelines, which was crafted in a different legal context based on different assumptions.[5] The complexity of the current guidelines system – with its numerous aggravating and mitigating factors requiring multifaceted legal and factual determinations – reflects a pre-*Booker* framework that now leads to unnecessary inefficiencies and gross disparities. The rigid structure of the Guidelines is ill-suited to the holistic analysis required by 18 U.S.C. § 3553(a). It leads to extensive litigation at both the district and appellate court levels, often of marginal value in light of the § 3553 analysis to come. And the Commission's own data has shown that the current sentencing structure has led to significant disparities, with some judges adhering closely to the Guidelines while others deviate from them considerably.

Comprehensive reform will be a lengthy process and require extensive engagement with all federal criminal justice stakeholders. Nonetheless, we believe that this work is long overdue. Piecemeal reform has not adequately addressed the challenges facing federal sentencing. Structural reform – including simplification – is essential to achieving equal justice under law, improving public safety, and restoring public trust.

We look forward to the work ahead and the extensive engagement it will entail.

a. The Categorical Approach and the Career Offender Guideline

We believe a comprehensive examination of the Guidelines will ultimately lead to better sentencing policy and also offer solutions to many of the difficult issues that the Commission has long heard about from stakeholders. One of those issues is the categorical approach to determining what constitutes a crime of violence and a controlled substance offense under the Guidelines. We join the chorus of judges, probation officers, and practitioners who urge the Commission to reform the categorical approach and career offender guideline.

This Commission began considering this issue during the last amendment cycle, but it ultimately deferred action. While the Commission has received several different reform proposals, there is general agreement on the goals underlying reform: eliminate the unwarranted sentencing disparities resulting from application of the categorical approach and better identify repeat offenders who pose a significant threat to public safety. The application of the categorical approach to the Guidelines' "crime of violence" and "controlled substance offense" definitions has resulted in extensive litigation and produced unwarranted disparities and nonsensical sentencing results. Changing the crime of violence definition could substantially reduce these disparities, permit sentencing courts to appropriately exercise their discretion in assessing the offense conduct underlying a prior conviction, provide appropriately enhanced penalties for

---

[5] *See* U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2012), https://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing.

violent and dangerous offenders, and dramatically reduce the litigation burden. We remain eager to work with the Commission on these issues.[6]

As the Department explained during the last amendment cycle, we also recognize the legitimate concerns about the severity levels associated with many recidivist provisions, including the career offender guideline.[7] Indeed, the Attorney General has encouraged prosecutors to recommend variances in certain career offender cases, acknowledging the increasing rate of below-guideline sentences in these cases. We hope as part of its review, the Commission will update its research on the career offender guideline and ultimately consider proposing legislation that will allow the Commission greater flexibility in setting penalties for repeat offenders under the Guidelines.

b. The Validity of Guideline Commentary

Another structural issue ripe for review is the validity of guideline commentary. As the Commission is well aware, recent appellate decisions have called into question the authoritativeness of guideline commentary, provisions that serve a critical role in interpreting and explaining individual guidelines. Under this evolving line of case law, guideline commentary is left in a precarious position.[8] For example, courts have recently split as to whether the loss calculation under §2B1.1 includes intended loss.[9] Because commentary pervades the Guidelines, some have noted that "the current structure of the entire Manual itself is called into question" by these decisions.[10] The Supreme Court has repeatedly denied *certiorari* in cases presenting this issue, making Commission action imperative. We support a legislative proposal to protect and preserve the validity of the commentary as well as other steps the Commission could take to address this problem, such as moving commentary into the guideline text.

c. Acquitted conduct

During the previous amendment year, the Commission proposed amendments addressing the treatment of acquitted conduct, but ultimately deferred action on the issue.[11] The Supreme Court recently denied several petitions for writs of *certiorari* challenging the constitutionality of using acquitted conduct at sentencing under the Fifth and Sixth Amendments. Several justices

---

[6] Letter from Kenneth Polite, Jr., Assistant Attorney General, Criminal Division, U.S. Dep't of Justice, and Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Dep't of Justice, to the U.S. Sent'g Comm'n on the Dep't of Justice's Priorities for the 2022 Amendment Cycle (Sep. 12, 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/doj.pdf.

[7] Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Dep't of Justice, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (Feb. 27, 2023).

[8] *United States v. Riccardi*, 989 F.3d 476, 484-85 (6th Cir. 2021) (describing the complexities involved in citing guideline commentary)

[9] *Compare, e.g.*, *United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022) (holding that the loss enhancement in the guideline's commentary impermissibly expands the word "loss" to include both intended and actual loss), with *United States v. You*, No. 22-5442, 2023 WL 4446497 (6th Cir. July 11, 2023) (holding that "loss" in §2B1.1 includes "intended loss" as defined by the guidelines commentary).

[10] Memorandum from the Honorable Charles R. Breyer, Acting Chair, U.S. Sent'g Comm'n (Mar. 12, 2021).

[11] *See U.S. Sent'g Comm'n Public Meeting on April 5, 2023*, at 22-23; U.S. Sent'g Comm'n, Proposed Amendments to the Sentencing Guidelines (Feb. 2, 2023).

wrote or joined statements respecting the denial of *certiorari* and indicated that the Court was deferring to the Commission to consider acquitted conduct in the first instance.[12]

The Department appreciates the Commission's continued interest and careful consideration of this issue. As explained during the last amendment cycle, the Department's position is that acquitted conduct generally cannot practically be distinguished from the definition of relevant conduct.[13] Likewise, any change should not unduly restrict judicial factfinding, create unnecessary confusion and litigation burdening the courts, or result in sentences that fail to account for the full range of a defendant's conduct.[14] We therefore believe the most appropriate path forward is through broader reform and simplification of the Guidelines' architecture, which could address many of the concerns raised by the Commission and litigants regarding the treatment of acquitted conduct and relevant conduct.

d. Alternatives-to-Incarceration and Diversion Programs

We share the Commission's goals of promoting court-sponsored diversion and alternatives-to-incarceration programs. As reflected in Department policy, as well as the extensive financial and technical resources the Department provides to state and local governments, the Department strongly supports the use of alternatives-to-incarceration programs, pretrial diversion programs, and problem-solving courts, in appropriate cases.[15]

As the Commission examines the structure of federal sentencing and the Guidelines, we encourage it to consider how these programs could be incorporated into the Guidelines'

---

[12] *McClinton v. United States*, 600 U. S. ____ (2023) (Sotomayor, J., statement respecting denial of *certiorari*) ("The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted conduct sentencing in the coming year. If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented."); *id.* (Kavanaugh, J., statement respecting denial of *certiorari*) ("The use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions. But the Sentencing Commission is currently considering the issue. It is appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant *certiorari* in a case involving the use of acquitted conduct."); *id.* (Alito, J., statement respecting denial of *certiorari*) ("no one should misinterpret my colleagues' statements as an effort to persuade the Sentencing Commission to alter its longstanding decision that acquitted conduct may be taken into account at sentencing" because even "if the Commission eventually decides on policy grounds that such conduct should not be considered in federal sentencing proceedings, that decision will not affect state courts").

[13] Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Dep't of Justice, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ3.pdf.

[14] *Id.*

[15] In his December 16, 2022, memorandum regarding charging, pleas, and sentencing, the Attorney General stated that every U.S. Attorney's Office "should develop an appropriate pretrial diversion policy." Memorandum for All Federal Prosecutors from Merrick Garland, Attorney General, Regarding Additional Department Policies Regarding Charges, Pleas, and Sentencing in Drug Cases (Dec. 16, 2022), https://www.justice.gov/media/1265321/dl?inline. On February 10, 2023, the Department updated the Justice Manual to reflect that pretrial diversion programs "provide prosecutors with another tool – in addition to the traditional criminal justice process – to ensure accountability for criminal conduct, protect the public by reducing rates of recidivism, conserve prosecutive and judicial resources, and provide opportunities for treatment, rehabilitation, and community correction." The Justice Manual now reflects that "[e]ach U.S. Attorney's Office shall develop and implement a policy on the use of pretrial diversion appropriate for the Office's district." U.S. DEP'T OF JUST., JUST. MANUAL § 9-22.010 (2018).

structure. These programs, when crafted well, help foster trust and legitimacy with the communities we serve, reduce government costs, and produce just outcomes for victims and offenders. More research is needed, however, to identify the elements that lead to success of these programs at the federal level as well as how the programs should interact with the Guidelines. We believe the Commission has an important role to play in assessing programs, convening stakeholders to develop and discuss best practices, and providing guidance to courts on best practices and opportunities for more comprehensive deployment of these programs.

e. BOP Practices

The Commission has expressed an interest in "assessing the degree to which certain practices of the Bureau of Prisons ("BOP") are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)."[16] The Department is committed to supporting BOP as it pursues its dual mission to "foster a humane and secure environment" and "to ensure public safety by preparing individuals for successful reentry" into the community.[17] We look forward to continuing the dialogue with the Commission about BOP's operations and practices.

The Department and BOP take seriously their responsibility to ensure that adults in custody return to their communities fully prepared to be good neighbors. Since assuming her post last August, BOP Director Colette Peters has focused on reinvigorating the Bureau's mission and values. This includes through full implementation of the First Step Act, which plays a key role in promoting successful reentry for adults in custody. The Department recently published its comprehensive annual report on its progress in implementing the First Step Act, including its work to maximize the availability of time credits; enhance the use of home confinement and prerelease custody; increase capacity and participation in evidence-based programming to reduce recidivism; expand mental health and substance use treatment programs; and enhance reentry programs and practices.[18]

The Department is also deeply concerned by instances where BOP has failed to live up its mission, including egregious instances of abuse perpetrated by BOP personnel. As the Deputy Attorney General recently explained, it is "a top priority at the highest levels of the Department" to root out and prevent abuse of those in its custody.[19] Last year, the Deputy Attorney General asked officials and experts from across the Department to form an Advisory Group to address this issue. The group identified more than 50 recommendations to enhance the prevention, reporting, investigation, prosecution, and discipline of these crimes, and the Deputy Attorney General directed the immediate implementation of each recommendation. Over the summer, the Department has sent Sexual Abuse Facility Enhancement and Review ("SAFER") teams to visit women's facilities in each of BOP's six regions and engage with leadership, staff, and women in

[16] *Supra* note 2.
[17] *Agency Pillars*, Bureau of Prisons (last visited June 7, 2023). https://www.bop.gov/about/agency/agency_pillars.jsp.
[18] The full report is available here: https://www.ojp.gov/first-step-act-annual-report-april-2023.
[19] Lisa O. Monaco, Deputy Attorney General, U.S. Dep't of Justice, Remarks at Bureau of Prisons Warden Training (Apr. 25, 2023), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-bop-warden-training.

custody at those facilities.[20] These teams are focused on ensuring safer environments for all in the BOP's custody and care. Likewise, as the Department represented before this Commission last amendment cycle, in appropriate cases, it will support a sentence reduction for an individual who suffered sexual assault, or physical abuse resulting in serious bodily injury, committed by a correctional officer or other employee of the BOP while in custody. Indeed, just last week, the BOP Director moved for compassionate release for the victim of a sexual assault that was committed by a BOP employee as established by a conviction in a criminal case.

The Department and BOP also welcome proper oversight of BOP operations. The Inspector General plays an essential role in overseeing BOP, and between January 1, 2021, and July 1, 2023, the Office of the Inspector General ("OIG") has released more than 40 unique reports that address BOP.[21] OIG has also received funding to hire 16 new employees to support a BOP interdisciplinary team that will help identify, assess, and track significant risks in BOP programs and operations. In addition to increasing OIG's investigative capacity, these new personnel will allow OIG to increase its oversight work, including audits, evaluations, and inspections. Indeed, OIG has recently established a proactive, unannounced BOP inspection program informed by ongoing investigations, audits, risk assessments, and other related work. Likewise, the Department is working with Congress to identify problems and solutions. Since January 2021, the U.S. Government Accountability Office (GAO) has published 19 reports addressing BOP.[22] In the last two years, Congress has held four hearings on conditions at BOP, and in the last year, Director Peters has testified twice before Congress and is scheduled to testify a third time this fall.

We look forward to sharing more about our ongoing efforts with the Commission in the coming months.

II. <u>Critical Public Safety Issues</u>

The Department strongly urges the Commission to address two critical issues of national public safety: the epidemics of fentanyl[23] poisoning[24] and firearms violence. While we understand the Commission's decision to limit its consideration of amendments this cycle, these pressing matters of public safety continue to demand the Commission's urgent attention. We

---

[20] Press Release, U.S. Dep't of Justice, Office of Public Affairs, Readout of the First SAFER Team Visit to FCI Tallahassee (June 12, 2023), https://www.justice.gov/opa/pr/readout-first-safer-team-visit-fci-tallahassee.

[21] U.S. Dep't of Justice, Office of the Inspector General, Reports, https://oig.justice.gov/reports?keys=&field_publication_date_value=2021-01-01&field_publication_date_value_1=2023-07-01&field_doj_component_target_id=141&field_report_type_target_id=All&field_location_country_code=All&sort_by=field_publication_date_value&sort_order=DESC&items_per_page=25 (last visited July 28, 2023).

[22] U.S. Government Accountability Office, Reports & Testimonies, https://www.gao.gov/reports-testimonies?f%5B0%5D=by_agency_name%3ABureau%20of%20Prisons&f%5B1%5D=date%3Astart%2B2021-01-01%2Bend%2B2023-07-01 (last visited July 28, 2023).

[23] For purposes of this letter, all references to fentanyl include fentanyl, fentanyl analogues, and fentanyl related substances.

[24] Centers for Disease Control and Prevention, *Provisional Data Shows U.S. Drug Overdose Deaths Top 100,000 in 2022*, NATIONAL CENTER FOR HEALTH STATISTICS BLOG (May 18, 2023), https://blogs.cdc.gov/nchs/2023/05/18/7365/#:~:text=Findings%3A,2022%2C%20from%20107%2C573%20to%20105%2C452.

thank the Commission for the initial steps it took last amendment cycle to address these issues, but substantial work remains. Anomalies in the guidelines governing fentanyl and firearms offenses create significant and unwarranted sentencing disparities. While we appreciate that sentencing policy alone cannot solve these issues, the Commission has a critical role to play, as each lie at the core of federal sentencing policy and practice. Because they can be addressed with discrete amendments to the Guidelines, the Commission should identify each as priorities this amendment year.

a. The Fentanyl Epidemic

Fentanyl has transformed drug use and abuse across the country, leading to death and other harm at extraordinary scale. Fentanyl is cheap to make, easy to disguise, and all too often, deadly to those who take it. According to the Centers for Disease Control and Prevention, the United States experienced more than 105,000 deaths from drug poisonings during 2022.[25] More than three-fourths of these deaths were from synthetic opioids – primarily fentanyl – with the number of deaths attributed to fentanyl continuing to increase from previous years.[26] Fueling the problem is the ease with which fentanyl can be produced, bought, and sold, as cartels use the dark web to operate with increased anonymity[27] and turn to social media[28] to market "to unsuspecting children, young adults, and members of the public who think they are getting legitimate prescription drugs" but are actually purchasing potentially fatal doses of fentanyl.[29] Fentanyl is the leading cause of death for Americans between the ages of 18 to 45.[30] Further exacerbating the fentanyl epidemic is the increasing prevalence of xylazine, which potentially renders lifesaving medications, like naloxone, less effective in treating overdoses.[31] We urge the Commission to combat this public safety threat and consider the following proposals.

---

[25] *Id*.
[26] *Id*.
[27] Press Release, Drug Enforcement Administration, Fentanyl distributor who used the dark web and crypto currency sentenced to 30 years in federal prison (Oct. 3, 2019), https://www.dea.gov/press-releases/2019/10/03/fentanyl-distributor-who-used-dark-web-and-crypto-currency-sentenced-30.
[28] Press Release, Drug Enforcement Administration, Drug Enforcement Administration announces seizure of over 379 million deadly does of fentanyl in 2022 (Dec. 20, 2022), https://www.dea.gov/press-releases/2022/12/20/drug-enforcement-administration-announces-seizure-over-379-million-deadly; Glenn Kessler, *DEA said it seized enough fentanyl to kill us all. The claim adds up*, WASH. POST, Jan. 20, 2023, https://www.washingtonpost.com/politics/2023/01/20/dea-said-it-seized-enough-fentanyl-kill-us-all-claim-adds-up/.
[29] Press Release, Drug Enforcement Administration, Fentanyl Deaths Climbing, DEA Washington Continues the Fight (Feb. 16, 2022), https://www.dea.gov/stories/2022/2022-02/2022-02-16/fentanyl-deaths-climbing-dea-washington-continues-fight.
[30] Centers for Disease Control and Prevention, National Center for Health Statistics, *U.S. Overdose Deaths In 2021 Increased Half as Much as in 2020 – But Are Still Up 15%*, https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm (Synthetic opioids caused 71,238 deaths in 2021, up from 57,834 the year before.); Center for Disease Control and Prevention, "Data Analysis & Resources" (last reviewed June 1, 2022), https://www.cdc.gov/opioids/data/analysis-resources.html. Fentanyl appears to be the leading cause of death amongst 18- to 45-year-olds in 2019 and 2020, but not among all America adults. *See* Nusaiba Mizan, *Fact-check: Is fentanyl the leading cause of death among American adults?*, EL PASO TIMES (Feb. 2, 2023), https://www.elpasotimes.com/story/news/2023/02/02/fentanyl-overdose-cause-of-death-among-adults-greg-abbott/69867350007/.
[31] DRUG ENFORCEMENT ADMINISTRATION JOINT INTELLIGENCE REPORT, THE GROWING THREAT OF XYLAZINE AND ITS MIXTURE WITH ILLICIT DRUGS (Oct. 2022) at 2-4, https://www.dea.gov/sites/default/files/2022-12/The%20Growing%20Threat%20of%20Xylazine%20and%20its%20Mixture%20with%20Illicit%20Drugs.pdf.

i. Distributing Drugs to Minors and Using Direct Communication via Online Platforms or the Dark Web

The Centers for Disease Control reported a surge in overdose deaths in individuals under the age of 21: between 2019 and 2020, overdose deaths among those 14 to 18 years old increased 94%; between the second half of 2019 and the same period in 2021, the median monthly overdose deaths among those 10 to 19 years old increased 109%, with approximately 90% of those deaths involving opioids.[32] The widespread availability of illicit fentanyl, the proliferation of fake pills resembling prescription drugs but containing fentanyl or other unlawful controlled substances, and the ease of purchasing pills through social media have increased the fatal overdose risk among adolescents.[33] Compounding the problem is traffickers' use of social media and anonymizing technologies to directly connect with and sell dangerous fentanyl to children and young adults.

We recommend two amendments to combat this problem. First, we recommend that the Commission provide an enhancement applicable to all distributions of controlled substances to children and young adults under 21. Second, we also recommend that the Commission expand application of the existing enhancements in §2D1.1(b)(7) to apply to drug traffickers who use direct private communications associated with interactive computer services and to provide further enhancements for those who use anonymizing technologies to avoid detection. The existing mass-marketing enhancement does not cover distribution through direct electronic communication or the use of anonymizing technologies that evade detection,[34] and we urge the Commission to close these gaps.

ii. Distributing Fentanyl Mixed with Xylazine

Fentanyl alone can be lethal, but fentanyl mixed with xylazine is appreciably deadlier. Xylazine is a non-opiate sedative, analgesic, and muscle relaxant that is not currently controlled under federal law and is only authorized for veterinary use in the United States. The Drug Enforcement Administration ("DEA") reports that the "detection of xylazine in drug mixtures – particularly in combination with fentanyl – is increasing across the country."[35] Compounding the problem, xylazine can render lifesaving medications, like naloxone, less effective in treating

[32] Centers for Disease Control and Prevention, *Drug Overdose Deaths Among Persons Aged 10–19 Years — United States, July 2019–December 2021*, 71(50);1576–1582 (Dec. 16, 2022), https://www.cdc.gov/mmwr/volumes/71/wr/mm7150a2.htm

[33] Friedman J, Godvin M, et.al., *Trends in drug overdose deaths among US adolescents*, January 2010 to June 2021. JAMA 2022;327:1398–400; O'Donnell J, Tanz LJ, Gladden RM, Davis NL, Bitting J. *Trends in and characteristics of drug overdose deaths involving illicitly manufactured fentanyls—United States, 2019–2020*. MMWR Morb Mortal Wkly Rep 2021;70:1740–6.

[34] USSG §2D1.1, comment. (n.13). *See, e.g.*, *United States v. Victoria Martinez*, 2020 WL 5823325 (5th Cir. Sept. 30, 2020) (affirming application of §2D1.1 (b)(7) enhancement when defendant posted to 3,100 Facebook friends that she had bags available and a co-conspirator sold through Facebook groups); *United States v. Perz*, 2021 WL 1111404 (5th Cir. March 23, 2021) (affirming application of §2D1.1(b)(7) when Facebook messenger and Facebook used to solicit large numbers of persons to buy drugs); *United States v. Margenat-Castro*, 2018 WL 5805923 (11th Cir. Nov. 6, 2018) (noting that district court applied §2D1.1(b)(7) enhancement when website and social media board used to further drug distribution).

[35] U.S. DRUG ENFORCEMENT AGENCY, *The Growing Threat of Xylazine and its Mixture with Illicit Drugs*, *supra* note 33 at 2-4.

overdoses.[36] The Director of the Office of National Drug Control Policy has designated fentanyl adulterated or associated with xylazine as an emerging threat.[37] To address this threat and assist with "the whole-of-government response,"[38] the Commission should consider amending the Guidelines to account for convictions involving fentanyl that is adulterated with xylazine. The Department would be pleased to work with the Commission on appropriate language for such an amendment.

iii. Death Resulting and Serious Bodily Injury

Fentanyl and other drugs have generated unprecedented numbers of overdose deaths. Federal statutes impose lengthy mandatory-minimum sentences – and the Guidelines provide high base offense levels – when the offense of conviction establishes that death or serious bodily injury resulted from distribution.[39] But, consistent with the Department's charging policy,[40] there may be particular cases where the circumstances suggest that it is inappropriate to pursue charges carrying a 20-year mandatory term of imprisonment.[41] Even where a mandatory minimum sentence is inappropriate, however, the Guidelines should still provide for a just punishment that appropriately reflects the defendant's culpability.[42]

The current Guidelines provide for a sentencing enhancement for resulting death or serious bodily injury only when the defendant is charged and convicted under a provision carrying a mandatory term of imprisonment. This may lead to an unwarranted disparity between defendants convicted of charges carrying mandatory terms of imprisonment and defendants who engaged in the same or similar conduct, but who were not charged with an offense carrying a mandatory minimum sentence. Although the Guidelines provide for an upward departure when

---

[36] *Id*.

[37] Press Release, The White House, Biden-Harris Administration Designates Fentanyl Combined with Xylazine as an Emerging Threat to the United States (April 12, 2023), https://www.whitehouse.gov/ondcp/briefing-room/2023/04/12/biden-harris-administration-designates-fentanyl-combined-with-xylazine-as-an-emerging-threat-to-the-united-states/.

[38] *Id.*

[39] Multiple circuits have held that these enhancements do not apply unless death or serious bodily injury was an element of the crime of conviction. *See, e.g.*, *United States v. Lawler*, 818 F.3d 281, 285 (7th Cir. 2016). However, some courts have suggested that the guideline enhancement can be available without a statutory conviction. *See, e.g., Young v. Antonelli*, 982 F.3d 914, 919 (4th Cir. 2020) (finding Supreme Court's but-for causation requirement for death resulting applies in application of death resulting guideline under §2D1.1).

[40] The Attorney General has instructed prosecutors that "charges that subject a defendant to a mandatory minimum sentence should ordinarily be reserved for instances in which the remaining charges would not sufficiently reflect the seriousness of the defendant's criminal conduct, danger to the community, harm to victims and such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." Memorandum for All Federal Prosecutors from Merrick Garland, Attorney General, Regarding Additional Department Policies Regarding Charges, Pleas, and Sentencing in Drug Cases (Dec. 16, 2022), https://www.justice.gov/media/1265321/dl?inline (alterations and internal quotation marks omitted).

[41] In instances where death or serious bodily injury results, the "safety valve" would not provide a remedy to avoid application of the mandatory minimum sentences. 18 U.S.C. § 3553(f); USSG §5C1.2.

[42] The Attorney General's guidance to federal prosecutors also addressed the use of mandatory minimums, including guidance specific to drug cases brought under Title 21 of the United States Code. Memorandum for All Federal Prosecutors from Merrick Garland, Attorney General, Regarding Additional Department Policies Regarding Charges, Pleas, and Sentencing in Drug Cases (Dec. 16, 2022).

death or serious bodily injury results,[43] these departures and variances can also result in inconsistencies and disparities. Courts and litigants would benefit from guidance in the form of a reformed guideline enhancement that meaningfully accounts for death or serious bodily injury resulting from drug distribution, regardless of whether charges carrying mandatory terms of imprisonment were brought. We recommend that the Commission adopt a new base offense level and enhancements – lower than those applicable when a mandatory minimum is charged but higher than that applicable to drug distribution that does not result in death.

iv. Drugs and Multiple or Especially Dangerous Firearms

The current Guidelines provide for an enhancement if the defendant possessed a dangerous weapon or firearm to "reflect the increased danger of violence when drug traffickers possess weapons."[44] But this enhancement fails to account for the increased public safety risk posed by traffickers who possess multiple weapons or especially dangerous weapons while trafficking drugs.[45] We recommend that the Commission consider an enhancement for possession of especially dangerous firearms or quantities of firearms, including three or more firearms, a semiautomatic firearm capable of accepting a large capacity magazine, or a firearm as described in 26 U.S.C. § 5845. Consistent with the current Guidelines, we do not propose that this enhancement be used in conjunction with violations of 18 U.S.C. § 924(c).[46]

b. Firearms Violence

Too many Americans are dying from firearms violence. Recognizing this "public health crisis,"[47] the President and the Attorney General announced a strategy to "combat the epidemic of gun violence and other violent crime,"[48] which we continue to update to reflect new approaches, new threats, and new evidence-based interventions.[49] Last year, Congress passed the Bipartisan Safer Communities Act ("BSCA"), which strengthened federal firearms laws in several critical aspects.[50] And the Commission promulgated amendments during the last amendment year to, *inter alia*, address the threat of unlicensed and untraceable ghost guns,

---

[43] USSG §§5K2.1-5K2.2. *See, e.g.*, *United States v. Watley*, 46 F.4th 707, 717-18 (8th Cir. 2022) (affirming upward departures under §§5K2.1 and 5K2.2 where defendant sold drugs that caused one individual to overdose and another to die).
[44] USSG §2D1.1(b)(1), app. n.11(A).
[45] *See, e.g., United States v. Fairchild*, 189 F.3d 769, 779 (8th Cir. 1999) (affirming two-level firearms enhancement for defendant who possessed 32 firearms). The First Circuit has rejected an upward variance premised upon a defendant's possession of multiple firearms when the defendant had received a two-level enhancement under USSG §2D1.1(b)(1). *United States v. Ortiz-Rodriguez*, 789 F.3d 15, 19-20 (1st Cir. 2015) (vacating and remanding for resentencing due to inadequate explanation of the basis of a large variance from the guidelines range).
[46] USSG §2K2.4, comment. n.4.
[47] President Biden and Attorney General Garland, Remarks on Gun Crime Prevention Strategy (June 23, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/23/remarks-by-president-biden-and-attorney-general-garland-on-gun-crime-prevention-strategy/.
[48] *Id*.
[49] Press Release, U.S. Department of Justice Office of Public Affairs, FACT SHEET: Update on Justice Department's Ongoing Efforts to Tackle Gun Violence (June 14, 2023), https://www.justice.gov/opa/pr/fact-sheet-update-justice-department-s-ongoing-efforts-tackle-gun-violence.
[50] Pub. L. No. 117-159, 136 Stat. 1313 (2022).

incorporate the new straw-purchasing and firearms-trafficking offenses created by BSCA, and provide mitigating adjustments for duress and domestic violence.

While we applaud the Commission's efforts thus far, more change is needed. Current anomalies in §2K1.1 result in sentences that do not reflect the severity and dangerousness of conduct occurring in many cases. Simplification of the Guidelines' architecture – especially for the firearms guideline – would help address the inequities created by this confusing and often misapplied provision.[51] We also recommend tailored guideline changes such as revising the definition of "firearm" in the application notes and ensuring that defendants with prior domestic-violence and firearm-related convictions are treated like other recidivists.[52]

i. Definition of Firearm in Application Note 1

Machinegun conversion devices have emerged as an extraordinary threat to public safety. Also called "auto sears," "switches," or "Glock switches,"[53] these devices, which the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") reports "are flooding our communities,"[54] convert "an already dangerous firearm into an extremely dangerous machinegun."[55] They are cheaply produced – sometimes at home, using a 3D printer – and designed to turn a semiautomatic firearm into an automatic machinegun.

Many courts, however, have construed the definition of "firearm" in Application Note 1 to §2K2.1 to exclude machinegun conversion devices. The application note refers only to "firearms" as defined by 18 U.S.C. § 921(a)(3), which courts have held does not include machinegun conversion devices. It does not reference "firearms" as defined by 26 U.S.C. § 5845(a), which expressly includes such devices. As a result, the application note may be understood to exclude some of the most dangerous weapons in circulation.[56] Indeed, most courts to consider the question have held that machinegun conversion devices are not firearms under

[51] Letter from Lisa Monaco, Department of Justice Deputy Attorney General, to U.S. Sent'g Comm'n Celebrating the Commissioners Confirmations and Reiterating Policy Priorities (Oct. 17, 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/doj-dag.pdf.

[52] Although we are focusing on these priorities, we also renew our requests from last cycle that the Commission: (1) apply BSCA's sentencing adjustments to prohibited persons, as well as straw purchasers; (2) adopt an offense-level increase greater than two levels in the new provision, §2K2.1(b)(5)(B), directed at a defendant engaged in straw purchasing or trafficking, to implement BSCA; (3) create a new enhancement for burglaries or robberies of Federal Firearm Licensees (FFLs); (4) create a new enhancement for transfers to minors; (5) create a new enhancement when a defendant has three or more predicate convictions for crimes of violence or drug-trafficking offenses; and (6) eliminate the use of any categorical approach in the Guidelines, including in Section 2K2.1.

[53] These devices have the same purpose, but auto sears convert AR-15 variant rifles to automatic firearms and switches or "Glock switches" convert Glock-variant semi-automatic pistols into automatic handguns.

[54] Chip Brownlee, *ATF Director Urges Action on Auto Sears 'Flooding Our Communities'*, THE TRACE, Mar. 1, 2023, https://www.thetrace.org/2023/03/atf-auto-sears-dettelbach-machine-gun/.

[55] *United States v. Hixson*, 624 F. Supp. 3d 930, 940 (N.D. Ill. 2022) ("The dangerousness manifests itself not only in the sheer number of bullets that can be emptied from the magazine in the blink of an eye but also in the resulting lack of control of the firearm when discharging it.")

[56] Section 921(a)(3) broadly defines "firearm," whereas § 5845(a) limits the definition of "firearm" to a narrower class of weapons. 28 U.S.C. § 5845(a), (b); 18 U.S.C. § 921(a)(3).

Section 921(a)(3)[57] and, as a result, generally do not trigger §2K2.1's enhancements for multiple firearms, firearms-trafficking, and use of a firearm in connection with another crime.[58] This is a perverse result, as the statutory scheme and the Guidelines were drafted on the presumption that Section 5845(a) weapons are a *more* dangerous subset of Section 921(a)(3) weapons.[59] We recommend that the Commission amend the definition in Application Note 1 to make clear that it includes firearms under *both* Section 5845(a) and Section 921(a)(3).

ii. Recidivism Enhancement for Prior Domestic-Violence and Firearm-Related Convictions

Two categories of prior convictions qualify for the recidivism enhancement in §2K2.1 – violent felonies and drug-trafficking crimes. Defendants with prior misdemeanor domestic-violence convictions or prior firearm-related convictions who then commit additional firearms offenses do not currently qualify. We recommend that the Commission incorporate these two especially dangerous categories of prior convictions as qualifying predicates for §2K2.1's recidivism enhancement, as each represents exactly the type of aggravated conduct that the enhancements should target.

Domestic-violence offenders who unlawfully possess firearms pose a significant public-safety risk. Congress enacted 18 U.S.C. § 922(g)(9) – which prohibits gun possession by anyone convicted of a misdemeanor crime of domestic violence – precisely because "existing felon-in-possession laws were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'"[60] Regrettably, "most of those who commit family violence are never even prosecuted" and when they are, roughly "one-third of the cases that would be considered felonies if committed by strangers are instead filed as misdemeanors."[61] The presence of a firearm substantially increases the lethality of these offenses.[62] Homicide is a leading cause of death of young women, with intimate-partner violence accounting for half of those murders.[63] More than

---

[57] *See, e.g., Hixson*, 624 F. Supp. 3d 930, 936, 941-42; *but see United States v. Hunter*, 843 F. Supp. 235, 256 (E.D. Mich. 1994) (expressing the minority view that "conversion kits are . . . themselves 'weapons' under § 921(a)(3)" because "that section clearly envisions machineguns as weapons").

[58] *Hixson*, 624 F. Supp. 3d at 941–42 ("[T]he advisory Sentencing Guidelines range . . . of 30 – 37 months woefully underrepresents the seriousness of the offenses. In particular, the range completely ignores the Glock switches, which Congress has defined as machineguns. Sentencing Mr. Hixson within the sentencing range does not account for the possession, sale, and distribution of the Glock switches.").

[59] Sawed-off shotguns, short-barreled rifles, and machineguns qualify as firearms under § 921(a) and, because of their dangerousness, are subject to additional restrictions under 28 U.S.C. § 5861. Thus, when condensing the three prior firearms guidelines into what is now §2K2.1 in 1991, the Commission structured application note 1 to broadly define "firearms" for the purposes of the Guideline as a whole under § 921(a)(3) but reserved the narrower definition of "firearm" in § 5845(a) for the enhancements involving the most dangerous firearms in §2K2.1(a)(1), (3), and (5) to Section 5845(a).

[60] *United States v. Hayes*, 555 U.S. 415, 426 (2009) (quoting 142 Cong. Rec. S10377-01 (1996) (statement of Sen. Lautenberg)).

[61] 142 Cong. Rec. S10377-78.

[62] DEP'T OF JUSTICE, *Firearms and Domestic Violence: The Intersections* (Dec. 13, 2016), https://www.justice.gov/archives/ovw/blog/firearms-and-domestic-violence-intersections.

[63] Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014*, 66 MMWR MORBIDITY AND MORTALITY WEEKLY REPORT 741 (2017), https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm?s_cid=mm6628a1_w.

half of male-perpetrated intimate partner homicides are by a firearm and studies have shown a correlation between limiting access to firearms for intimate-partner violence offenders and lower rates of intimate partner homicide.[64] And incidents of domestic violence are one of the more frequent circumstances of firearm homicide of children younger than 13 years old.[65] As Senator Lautenberg – the sponsor of what would become Section 922(g)(9) – put it, "all too often, the only difference between a battered woman and a dead woman is the presence of a gun."[66] We appreciate that when it adopted the new trafficking enhancement during the last amendment cycle, the Commission equated misdemeanor crimes of domestic violence with felony crimes of violence, and we urge the Commission to treat these offenses equivalently for the purposes of the recidivism enhancement as well.

Similarly, firearm offenders with prior firearm-related convictions pose an acute risk to public safety. As the Commission has observed, firearms offenders recidivate at a higher rate than non-firearms offenders. In its recidivism report focusing on firearms offenders, the Commission reported that "[o]ver two-thirds (68.1%) of firearms offenders were rearrested for a new crime during the eight-year follow-up period compared to less than half of non-firearms offenders (46.3%)."[67] And "nearly half of the §2K2.1 offenders had previously been convicted of a weapons offense (44.2%)."[68] Firearms offenders are not only more likely to reoffend but are also more likely to commit a future violent crime.[69] Section 2K2.1 should reflect the Commission's findings regarding the danger posed by repeat firearms offenders. Accordingly, we agree with the recommendation put forward last amendment year by the Probation Officers Advisory Group to adopt a recidivism enhancement for prior firearm-related convictions.

---

[64] Websdale N, Ferraro K, Barger SD. *The domestic violence fatality review clearinghouse: introduction to a new National Data System with a focus on firearms*, INJ EPIDEMIOL. 2019 6:6. doi: 10.1186/s40621-019-0182-2. PMID: 31245255; PMCID: PMC6582678, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6582678/.

[65] Zeoli, A. M., Goldstick, J., Mauri, A., Wallin, M., Goyal, M., Cunningham, R., & FACTS Consortium (2019). The association of firearm laws with firearm outcomes among children and adolescents: a scoping review. *Journal of Behavioral Medicine,* 42(4), 741–762. https://doi.org/10.1007/s10865-019-00063-y; Fowler, K.A., Dahlberg, L.L., Haileyesus, T., Gutierrez, C., & Bacon, S. (2017). Children firearm injuries in the United States. *Pediatrics*, 140, e20162486.

[66] 142 Cong. Rec. S10377. There is also a strong correlation between domestic violence and mass shootings. According to one peer-reviewed study, 59.1% of mass shootings between 2014-19 were domestic violence-related and, in 68.2% of mass shootings, the perpetrator either killed at least one partner or family member or had a history of domestic violence. *See* Lisa B. Geller, et. al., *The role of domestic violence in fatal mass shootings in the United States, 2014–2019* (2021), https://injepijournal.biomedcentral.com/articles/10.1186/s40621-021-00330-0.

[67] U.S. SENT'G COMM'N, *Recidivism Among Federal Firearm Offenders* (2019), at 4, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190627_Recidivism_Firearms.pdf.

[68] U.S. SENT'G COMM'N, *What Do Federal Firearms Offenses Really Look Like?* at 20, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf.

[69] Compared to non-firearms offenders, "a greater percentage of firearms offenders were rearrested for a violent crime as the most serious new offense." U.S. SENT'G COMM'N, *Recidivism Among Federal Firearm Offenders* at 19.

iii. Simplification of Section 2K2.1

Last year, the Department urged the Commission to undertake a broad review of §2K2.1.[70] We continue to support efforts to simplify this complicated and often-misapplied guideline. As currently drafted, §2K2.1 provides eight different base offense levels that depend on various factors, including the type of offense, the defendant's prior criminal history, and the type of firearm(s) involved. Converting the base offense level enhancements for dangerous firearms and prior serious crimes into specific offense characteristics would significantly reduce the complexity of the calculation and allow the type of offense to dictate the base offense level. The current complex structure undermines pretrial resolution of these cases, as parties are often unable to agree on the appropriate base offense level – which may change when the Probation Office uncovers additional predicate offenses or applies the categorical approach in a manner contrary to the parties' expectations. Simplifying the base offense level structure will also make it easier for the Commission to research and analyze §2K2.1 sentencing data to better inform future amendments.

III. Other Critical and Discrete Sentencing Issues

While we recognize that the Commission's proposed priorities and addressing the two most pressing national public safety priorities discussed above will leave little room for other issues, we identify here several that we think are important and deserve the Commission's attention in the coming amendment years.

a. Cocaine Sentencing Policy

For almost thirty years, there has been no greater symbol of racial inequity in sentencing policy than the disparity between offenses involving crack cocaine and those involving powder cocaine. In December 2022, the Attorney General instructed federal prosecutors to "promote the equivalent treatment of crack and powder cocaine offenses" through their charging decisions and sentencing recommendations.[71] The Commission has likewise recognized the unwarranted disparity between crack and powder cocaine and played a leading role in reform efforts.[72]

---

[70] Letter from Lisa Monaco, Department of Justice Deputy Attorney General, to U.S. Sent'g Comm'n Celebrating the Commissioners Confirmations and Reiterating Policy Priorities (Oct. 17, 2022).

[71] The Attorney General observed that "mandatory minimum sentences based on drug type and quantity have resulted in disproportionately severe sentences for certain defendants and perceived and actual racial disparities in the criminal justice system." He thus instructed prosecutors to decline to charge the quantity necessary to trigger a mandatory minimum for certain low-level, non-violent drug offenses where the defendant does not have ties to large-scale criminal organizations or a significant criminal history. Memorandum for All Federal Prosecutors from Merrick Garland, Attorney General, Regarding Additional Department Policies Regarding Charges, Pleas, and Sentencing in Drug Cases (Dec. 16, 2022).

[72] *See* U.S. SENT'G COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf; U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 131–33 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.

While this issue is now primarily one for Congress, the Commission can and should take action, too. First, the Commission should advocate for the enactment of the EQUAL Act to remedy the current disparity.[73] Second, the Commission should remind sentencing courts of their obligation, when considering Section 3553(a) factors, to consider the pharmacological similarities between powder and crack cocaine and whether it is appropriate to impose a variance consistent with the relevant base offense level for powder cocaine. Analysis and advocacy by the Commission, the Judiciary, the Administration, and many non-governmental organizations led to the enactment of the Fair Sentencing Act of 2010. The Commission's subsequent conforming amendments to the Guidelines, and application of those amendments to thousands of incarcerated individuals, were supported by the Judiciary and by the Department and have made an important contribution to equity in sentencing. The same model can help achieve enactment of the EQUAL Act and other necessary legislative reforms.

b. Human Smuggling Organizations

On June 27, 2022, forty-six migrants were found dead inside a sweltering tractor-trailer vehicle abandoned on the side of a road near San Antonio, Texas.[74] Although this incident was one of the deadliest in recent history, similar tragedies have occurred for years.[75] To address the threats posed by transnational human smuggling networks, the Attorney General established Joint Task Force Alpha comprising agents and personnel from the Departments of Justice and Homeland Security.[76] The President and the Secretary of Homeland Security also announced an Executive Branch-wide effort to disrupt and dismantle human smuggling efforts in Latin America and along the Southwest border.[77] Congress's objective in Section 1324 of Title 8 was clear: to provide increased punishment for each additional noncitizen smuggled.[78] The Guidelines, however, do not presently effectuate this intent. We continue to urge the Commission to review the guideline for smuggling offenses, §2L1.1, and to amend it to account for the grave victimization – including of children (regardless of whether they are "unaccompanied") – caused by human smuggling, such as sexual assault, serious bodily injury, and death."[79]

---

[73] Eliminating a Quantifiably Unjust Application of the Law Act or the EQUAL Act, S.79, 117th Cong. (2021).
[74] *See* Arelis R. Hernández, et. al., *46 Migrants Found Dead in Texas Inside Sweltering Tractor-Trailer*, WASH. POST (June 28, 2022), https://www.washingtonpost.com/nation/2022/06/27/migrants-dead-texas/.
[75] *See, e.g.*, Eva Ruth Moravec, et. al., *9 People Dead After at Least 39 Were Found Packed in a Sweltering Tractor-Trailer in San Antonio*, WASH. POST (July 23, 2017), https://www.washingtonpost.com/national/at-least-39-people-found-packed-into-sweltering-tractor-trailer-in-san-antonio/2017/07/23/c160b680-3b41-43ab-9e9c-cf133a3ca683_story.html.
[76] *See, e.g.,* U.S. DEP'T OF JUSTICE, *Attorney General Announces Initiatives to Combat Human Smuggling and Trafficking and to Fight Corruption in Central America* (June 7, 2021), https://www.justice.gov/opa/pr/attorney-general-announces-initiatives-combat-human-smuggling-and-trafficking-and-fight.
[77] The White House, *Fact Sheet: The Los Angeles Declaration on Migration and Protection U.S. Government and Foreign Partner Deliverables*, (June 10, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/fact-sheet-the-los-angeles-declaration-on-migration-and-protection-u-s-government-and-foreign-partner-deliverables/.
[78] 8 U.S.C. § 1324(a)(1)(B).
[79] Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Dep't of Justice, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (Sept. 12, 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/doj.pdf; Letter from Alejandro Mayorkas, Secretary, Dep't of Homeland Security, to the Honorable Carlton W. Reeves, Chair, U.S.

c. Evasion of Export Controls and Sanctions

Finally, the Commission should act to address an important matter of national security – evasion of export controls and sanctions. Earlier this year, the Department of Justice and the Department of Commerce's Bureau of Industry and Security launched the Disruptive Technology Strike Force to strengthen supply chains and protect critical technological assets.[80] As the Deputy Attorney General explained when announcing the Task Force, "[t]oday, autocrats seek tactical advantage through the acquisition, use, and abuse of America's most innovative technology. They use it to enhance their military capabilities, support mass surveillance programs that enable human rights abuses and all together undermine our values."[81] The Strike Force "will bring together the Justice and Commerce Departments' expertise to strike back against adversaries trying to siphon off our most advanced technology."[82]

We anticipate that the Strike Force will send a letter to the Commission further explaining its proposal for amending the Guidelines to better address this threat. In short, under the Export Administration Regulations (EAR) and the Commerce Control List (CCL), export controls related to national security can carry various designations, including "NS" (National Security), "MT" (Missile Technology), "RS" (Regional Stability), " CB" (Proliferation of Chemical and Biological Weapons), "AT" (Anti-Terrorism), or "NP" (Nuclear Nonproliferation).[83] The EAR also separately controls exports to military end-users and certain foreign entities whose activities are contrary to national security policy interests.[84] In addition, sanctions and embargoes ordered pursuant to the International Emergency Economic Powers Act control the export of goods and services to certain countries and foreign entities to protect national security.[85] However, §2M5.1 refers specifically to "national security controls," which may cause sentencing courts to erroneously conclude that only goods controlled for "NS" reasons under the EAR and the CCL qualify in assessing both the base offense level and the applicability of a departure. The Strike Force recommends amending §2M5.1 to clarify that the

---

Sent'g Comm'n (Oct. 16, 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/dhs.pdf; Letter from Kenneth Blanco, Assistant Attorney General, and Zachary Bolitho, Counsel to the Deputy Attorney General, to the Honorable William H. Pryor Jr., Chair, U.S. Sent'g Comm'n (July 31, 2017), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/DOJ.pdf; *See* Letter from Sarah R. Saldaña, Dir., U.S. Immigr. and Customs Enf't, to Chief Judge Patti B. Saris, Chair, U.S. Sent'g Comm'n (Jan. 15, 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20160321/DHS.pdf.

[80] U.S. DEP'T. OF JUSTICE, *Justice and Commerce Departments Announce Creation of Disruptive Technology Strike Force*, (Feb. 16, 2023), https://www.justice.gov/opa/pr/justice-and-commerce-departments-announce-creation-disruptive-technology-strike-force.

[81] *Id.*

[82] *Id.*

[83] BUREAU OF INDUSTRY AND SECURITY, DEP'T OF COMMERCE, UNOFFICIAL ELECTRONIC EXPORT ADMINISTRATION REGULATION FILES, https://www.bis.doc.gov/index.php/regulations/export-administration-regulations-ear (last visited July 7, 2023); BUREAU OF INDUSTRY AND SECURITY, DEP'T OF COMMERCE, SUPPLEMENT NO. 4 TO PART 774 – COMMERCE CONTROL LIST ORDER OF REVIEW, https://www.bis.doc.gov/index.php/documents/regulations-docs/13-commerce-control-list-index/file (last visited July 7, 2023).

[84] *Id.*; BUREAU OF INDUSTRY AND SECURITY, DEP'T OF COMMERCE, SUPPLEMENT NO. 7 TO PART 774 – 'MILITARY END-USER' (MEU) LIST, https://www.bis.doc.gov/index.php/documents/regulations-docs/13-commerce-control-list-index/file (last visited July 12, 2023).

[85] *United States v. McKeeve*, 131 F.3d 1, 14 (1st Cir.1997) (holding that export of computer equipment to Libya, which was subject to an embargo, was evasion of national security controls).

provision applies to *all* "controls related to national security," and revising the accompanying application note to ensure that sanctions, embargoes, anti-terrorism, missile technology, regional stability, proliferation of chemical and biological weapons, nuclear nonproliferation, and military and WMD end-user and entity-specific controls are included.

* * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions, and we look forward to working with the Commission on all of the issues in the coming amendment year.

Sincerely,

Jonathan J. Wroblewski

Jonathan J. Wroblewski
Director, Office of Policy and Legislation
Criminal Division
U.S. Department of Justice
ex-officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director
Kathleen Grilli, General Counsel

U.S. Department of Justice
National Security Division

U.S. Department of Commerce
Bureau of Industry and Security

Office of the Assistant Attorney General *Washington, D.C. 20530*

Office of the Assistant Secretary for Export Enforcement

August 1, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

We write in support of the U.S. Department of Justice's (DOJ) proposed amendment to §2M5.1 of the federal Sentencing Guidelines and accompanying application note, which recommends that §2M5.1 be clarified so that it unambiguously applies to *all* controls related to national security.

On February 16, 2023, DOJ and the Department of Commerce launched the Disruptive Technology Strike Force—which the undersigned lead—to counter efforts by nation-state adversaries who engage in unlawful conduct in their efforts to acquire sensitive technologies such as those related to supercomputing, artificial intelligence, and advanced manufacturing equipment. In the wrong hands, these types of sensitive technologies pose profound risks to national security that are further compounded when such technology is intended to enhance adversaries' military capabilities or support mass surveillance programs that enable human rights abuses. The Strike Force brings together federal prosecutors and agents from across the country to target illicit actors, strengthen supply chains, and, ultimately, protect critical technological assets. Enforcement actions, including criminal prosecutions, are paramount to this effort. Such enforcement actions serve to ensure that those who violate U.S. laws by willfully facilitating the transfer of emerging technologies to foreign adversaries are brought to justice. In addition, enforcement actions promote general deterrence against future unlawful conduct and raise the costs to foreign adversaries of pursuing sensitive technology in violation of U.S. law.

Even as the transfer of disruptive technology to foreign adversaries presents a national security concern of the highest order, the seriousness of these violations has not been consistently recognized by courts applying the existing Guidelines. As discussed in DOJ's

annual report commenting on the operation of the Sentencing Guidelines, under §2M5.1, a Base Offense Level of 26 applies if "national security controls" or other types of controls—those relating to the proliferation of nuclear, biological, or chemical weapons or materials—were evaded. This current formulation risks an unduly narrow reading of the phrase "national security controls" to apply only where there was the unlawful export of items bearing the "NS" (for National Security) designation under the Export Administration Regulations (EAR). Beyond those controls bearing the NS designation, there exists a broader array of export controls under the EAR for which the underlying basis is plainly related to national security, including controls for missile technology, regional stability, and anti-terrorism. Although they may not bear the NS designation, which is a term of art under the EAR, each of these inherently implicates critical national security concerns.

Along with these specific control designations, the Government also takes additional steps to protect national security by restricting the flow of goods, money, and services where necessary. The EAR, for example, restricts exports to certain military end-users and certain foreign entities where the Government has determined that their receipt of certain exports presents an unacceptable security risk. In addition, sanctions and country embargoes imposed pursuant to the International Emergency Economic Powers Act are grounded in the need to protect the national security of the United States by providing additional controls on the export of goods and services to certain countries. We strongly encourage the Commission to ensure that the language of §2M5.1 unambiguously encompasses the full spectrum of national security-related controls, including those that could apply to the transfer of goods and services.

Clarifying the broad application of §2M5.1 would reinforce the conclusion reached by multiple courts that §2M5.1's reference to "national security controls" encompasses the broader definition of "national security" and is not a limitation tied to the specific NS designation under the EAR. *See, e.g.*, *United States v. Hanna*, 661 F.3d 271, 293 (6th Cir. 2011) (applying §2M5.1(a)(1) to a violation of Iraq embargo because "in Executive Orders like the Iraq embargo, the President determines that a particular country poses a 'threat to the national security' of the country"); *United States v. Elashyi*, 554 F.3d 480, 508 (5th Cir. 2008) (applying § 2M5.1(a)(1) to export violations involving Libya and Syria because "[t]he President, exercising the power vested in him by Congress, determined that it was a threat to national security to allow the unlicensed and unauthorized sale of certain goods, including computers, to anyone in those countries"); *United States v. McKeeve*, 131 F.3d 1, 14 (1st Cir. 1997) (reasoning that, because "[t]he embargo is an exercise of executive power authorized by IEEPA to deal with any unusual and extraordinary threat . . . to the national security," it "is intended as a national security control" (internal citation and quotation marks omitted); *United States v. Shetterly*, 971 F.2d 67, 76 (7th Cir. 1992) (noting that the higher base offense level under §2M5.1 applied because "[o]ne of the bases of [export controls] is to protect national security").

Notwithstanding this weight of the case law, however, at least one court recently interpreted §2M5.1's reference to "national security controls" to apply only where an offense involves those items designated NS pursuant to the EAR. In a 2019 sentencing decision in the Middle District of Pennsylvania, the court granted the defendant's request to apply a base level offense of 14 pursuant to §2M5.1 because the items were not designated NS under the EAR. *See* Order, ECF No. 61, *United States v. Komoroski*, 3:CR-17-156 (M.D. Penn. Dec. 11, 2019)

("*Komoroski*"), at 2-3. The court reached this conclusion despite the fact that the defendant was convicted for attempting to send to Russia export-controlled rifle scopes that were advertised as having been designed to U.S. Marine Corps specifications and were controlled because, among other reasons, they were subject to a United Nations embargo. *See id*; United States' Sent. Mem., ECF No. 51, *Komoroski*, at 2-3. To help ensure that the Guideline is applied consistently across all districts, we support revising §2M5.1 to confirm that it applies to all "controls relating to national security" and revising the accompanying application note to ensure that sanctions, embargoes, anti-terrorism, missile technology, regional stability, proliferation of chemical and biological weapons, nuclear nonproliferation, military and WMD end-users and end-uses, and entity-specific controls are included.

We thank you for your attention to this important issue, and we welcome the opportunity to speak with you further to discuss our concerns, as appropriate.

Sincerely,

Matthew G. Olsen
Assistant Attorney General
National Security Division
U.S. Department of Justice
Co-Lead of the Disruptive Technology Strike Force

Matthew S. Axelrod
Assistant Secretary for Export Enforcement
Bureau of Industry and Security
U.S. Department of Commerce
Co-Lead of the Disruptive Technology Strike Force

cc: Commissioners
Kenneth Cohen, Staff Director
Kathleen Grilli, General Counsel

Inspector General

August 1, 2023

Kathleen Cooper Grilli, General Counsel
United States Sentencing Commission
One Columbus Circle NE, Suite 2-500
Washington, DC 20002-8002

Dear Ms. Cooper Grilli,

I am writing to request the assistance of the United States Sentencing Commission (Commission) to consider including language in the Commission's 2024 Guidelines Manual to add a 2-point sentencing enhancement for those cases involving theft from the National Archives and Record Administration (NARA). By way of background, I have included an assessment (see attachment) of this matter conducted by my staff during 2019 after a federal judge expressed concerns about gaps in the sentencing guidelines that prevent 2-point sentencing enhancement for thefts of NARA's holdings. Increased sentences would offer additional accountability and deterrence against theft from NARA's facilities nationwide.

Consistent with other provisions in the sentencing guidelines, thefts of historically significant federal records entrusted to NARA should also get the 2-point sentencing enhancement that thefts of cultural heritage resources and museums do. Thank you in advance for your assistance with this important matter. We believe that enhancing the penalties for theft from NARA will serve to better protect historically significant and irreplaceable federal records.

Best regards,

Dr. Brett M. Baker
Inspector General

Attachment:
NARA-C-19-0203-A Limited Assessment of the United States Sentencing Commission's Sentencing Guidelines Regarding Theft of NARA's Holdings.

DATE: October 9, 2019

FROM: James E. Springs, Inspector General

TO: David Ferriero, Archivist of the United States (A)

SUBJECT: NARA-C-19-0203-A

Limited Assessment of the United States Sentencing Commission's Sentencing Guidelines Regarding Theft of NARA's Holdings

NARA's Office of Inspector General (OIG), Office of Investigations (OI) performed a limited assessment of the procedures for recommending incarceration time ranges for the theft of NARA holdings. This assessment was conceived after a Federal judge expressed concerns about existing sentencing deficiencies related to thefts of NARA's holdings. Increased sentences would offer additional deterrence against theft from NARA's facilities nationwide.

Historically significant holdings are at high risk for theft from archival institutions such as NARA. During the last decade, NARA experienced several high-profile thefts of its holdings, including two cases prosecuted in the United States District Court for the Southern District of Maryland (United States District Court), located in Greenbelt, Maryland. In both cases, the United States District Court used the United States Sentencing Commission's (USSC) Sentencing Guidelines (Sentencing Guidelines) to help calculate the defendants' periods of incarceration.

The goals of this assessment were to:

1) Examine how the United States District Court used the Sentencing Guidelines to help calculate and implement periods of incarceration for two noteworthy defendants;
2) Review sentencing enhancements currently contained in the Sentencing Guidelines that, if available in circumstances involving theft specifically from a NARA facility, would have recommended longer terms of incarceration for both defendants;
3) Review how the recommended sentencing ranges for two high-profile defendants may have changed had the aforementioned enhancement been available; and
4) Consider possible ways to address the discrepancy between sentencing recommendations for the theft of NARA's holdings and the sentencing recommendations for thefts of other types of historical items.

BAKCROUND AND SCOPE

The OI investigated two significant cases involving multiple thefts of holdings from NARA's Archives II facility in College Park, Maryland, by former NARA employee Leslie Waffen and

researcher Antonin DeHays. Both of these defendants were prosecuted by the United States Attorney's Office, which made sentencing recommendations in consultation with the Sentencing Guidelines. The Sentencing Guidelines use a point system to calculate a score, which then determines the recommended sentencing range. In these two particular cases, the defendants received sentences that fell within the recommended range from the Sentencing Guidelines. However, the Federal judge assigned to one sentencing indicated they believed the recommended range from the Sentencing Guidelines was not reflective of the severity of the crimes, commenting,

> *"I note that the Sentencing Guidelines contemplate additional enhancements in analogous contexts. USSG § 2B1.1(b)(5) gives a 2-level enhancement when the theft involves trafficking in property from a national cemetery or veterans' memorial USSG § 2B1.5 imposes a higher offense level for theft of a cultural heritage resource which includes items from a national monument or memorial, a National Historic Landmark, or a museum, and includes additional enhancements if the item is a funerary object, or cultural property, and if the sale was for financial gain, or repeated conduct. The National Archives is not listed within that definition – but it should be. There is no reason that theft from the Archives should not be considered equally reprehensible as theft from a National Memorial or a museum."*

If holdings archived at NARA were defined as "*cultural heritage resources*," for example, then the sentencing range would have allowed for enhancements resulting in a more appropriate punishment.

As a result, the OI considered whether NARA holdings could be technically defined as "*cultural heritage resources*." The OI also analyzed the sentencing for Waffen and DeHays, and compared the results to the potential outcomes had sentencing enhancements been applied. Finally, the OI reviewed USSC procedures and examined previous legislative actions resulting in increased sentencing recommendations for theft from other Federal institutions. It is possible that the stakeholders who could address this disparity in sentencing recommendations are unaware of the situation, and may need to be informed.

OBSERVATIONS

US Sentencing Commission (USSC)

The Sentencing Guidelines are issued by the USSC, an independent agency in the Judicial branch. The USSC amends the Sentencing Guidelines on an annual cycle ending May 1st each year. The cycle starts when the USSC develops priorities and publishes them in the Federal Register for public comment. Once final priorities are established, amendments are proposed and published for public comment. USSC members then vote on final amendments. The USSC is composed of seven members appointed by the President and confirmed by the Senate. They serve staggered six-year terms. The USSC must have at least four voting members for a quorum,

and amendments must receive four votes to be adopted. The amendments are then sent to Congress, who must have at least 180 days to review them. Congress may pass legislation modifying or disapproving the changes. However, the USSC does not currently have a quorum, and cannot promulgate any amendments to the Sentencing Guidelines.

Using the Sentencing Guidelines

Following the Supreme Court's ruling in *United States v. Booker, 543 U.S. 220 (2005)*, imposing a Federal sentence is a multi-step process.[1] After making appropriate findings of fact, the court must initially determine the applicable advisory range using the Sentencing Guidelines. Crimes have a numerical "Base Offense Level" which is then either increased or decreased by set amounts, referred to as levels, for particular situations. The Sentencing Guidelines promote the basic aim of the Sentencing Reform Act to ensure "similar sentences for those who have committed similar crimes in similar ways."[2] Sentencing courts are required to consider the guidelines' sentencing range. However, courts must undertake an individualized assessment of the facts of each case and may deviate from the advisory range.

Courts are to impose a sentence "sufficient, but not greater than necessary" to comply with the purposes of sentencing. The purposes are:

- to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- to afford adequate deterrence to criminal conduct;
- to protect the public from further crimes of the defendant; and
- to provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner.

Guidelines Currently Relevant to NARA's Theft Cases: Section 2B1.1

Section 2B1.1, *Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States*, of the sentencing guidelines is applicable to Federal criminal theft cases involving NARA. The United States District Court utilized section 2B1.1 to determine the sentencing ranges for Waffen and DeHays. Waffen and DeHays were both convicted of theft of government property (NARA artifacts), in violation of 18 U.S.C. § 641. Waffen stole thousands of historically significant sound recordings preserved and archived at NARA. DeHays stole hundreds of historically significant WWII U.S. "dog tags", many of which were recovered from the wreckage of downed planes, and other U.S. military artifacts preserved and archived at NARA.

Section 2B1.1 does not have any enhancements for stealing historical artifacts, such as NARA holdings. However, it does have enhancements for stealing from certain historical institutions.

---

[1] See *United States v. Moreland, 437 F.3d 424 (4th Cir. 2006).*
[2] See *Booker, 125 S. Ct. at 760.*

For example, it states if "the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by 2 levels."

Enhanced Sentencing for Cultural Heritage Resources: Section 2B1.5

Another section, Section 2B1.5, *Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources* specially addresses theft of cultural heritage resources by increasing the sentence recommendation. First, this section has a higher Base Offense Level. Second, it provides an additional two-point enhancement if the "cultural heritage resource or paleontological resource" was taken from the national park system; a National Historic Landmark; a national monument, memorial, marine sanctuary, cemetery or veterans memorial; a museum; or the World Heritage List. The Sentencing Guidelines specifically define what a "cultural heritage resource" is by incorporating the definitions used for other related terms in ten sections of the U.S. Code. Unfortunately, none of these definitions would cover historical items accessioned into NARA's holdings. Arguably, the closest is the incorporated definition of an "object of cultural heritage" from the statute on theft of major artwork from museums. An "object of cultural heritage" means an object that is over 100 years old and worth in excess of $5,000, or worth at least $100,000, regardless of age.

Reviewing Past Cases

In the cases of both Waffen and DeHays, the U.S. Government was required to use Section 2B1.1 to calculate the sentencing range since NARA's holdings did not qualify for the definition of a cultural heritage resource. The Sentencing Guidelines range for Waffen was 18 to 24 months imprisonment, and he was sentenced to 18 months. Had Section 2B1.5 been available, the recommended sentencing range would likely have been 24 to 30 months. The Sentencing Guidelines range for DeHays was 10 to 16 months imprisonment, and he was sentenced to one day less than 12 months. Had Section 2B1.5 been available, the recommended sentencing range would likely have been 15 to 24 months.

When discussing the definition of a cultural heritage resource during the course of DeHays' sentencing hearing, the sentencing judge stated "[t]he National Archives is not listed within that definition – but it should be. There is no reason that theft from the Archives should not be considered equally reprehensible as theft from a National Memorial or a museum."

Options for Change

There are two main options for changing the Sentencing Guidelines to be able to more appropriately account for the seriousness of thefts from NARA's holdings. First, Section 2B1.1 could be amended to add a provision similar to the one for national cemeteries and veterans' memorials. For example, a new Section 2B1.1(b)(21) could be added stating "(21) If the offense involved theft of, damage to, destruction of, or trafficking in, any of the permanent holdings of the National Archives and Records Administration, increase by 2 levels."

Further, the Sentencing Guidelines' definition of "cultural heritage resource" could be amended to include NARA's accessioned holdings. A new paragraph (vii) could be added to the Application Note 1 of the Commentary to Section 2B1.5 stating "(vii) Any item, document, or record of any form accessioned into the permanent holdings of the National Archives and Records Administration."

As stated above, amendments to the Sentencing Guidelines can be proposed and published by the USSC after public comment and a Congressional review period. Congress can also direct changes to the Sentencing Guidelines. For example, Public Law 105-101 directed the USSC to review and amend the Sentencing Guidelines "to provide a sentencing enhancement of not less than two levels for any offense against the property of a national cemetery." Stakeholders may not be aware how the current Sentencing Guidelines treat thefts from NARA as less severe than thefts from museums and other cultural institutions. If alerted to this discrepancy, stakeholders in Congress may decide to address it. Additionally, this may be an issue the USSC would consider as a "proposed priority" at the start of next spring's annual amendment cycle.

CONCLUSION

Our limited assessment determined that thefts of NARA's historic holdings are categorically being treated differently than thefts from other culturally significant institutions. One reason is NARA's holdings are excluded from the definition of "cultural heritage resources." This has resulted in lower recommended sentences for two high profile thefts from NARA. However, there are ways other bodies such as the USSC or Congress could cure this disparity. These stakeholders may not be aware of the current condition.

The OI is providing you with results of this assessment for informational purposes, and does not require a response. Should you have any questions or concerns regarding this assessment, please contact Jason Metrick, Assistant Inspector General for Investigations, at 301-837-2941.

cc: Debra Wall, Deputy Archivist of the United States (N)
William Bosanko, Chief Operating Officer (C)
Micah Cheatham, Chief of Management and Administration (M)

FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

801 I Street, 3rd Floor
Sacramento, California 95814

Chair: Heather Williams Phone: 916.498.5700

August 1, 2023

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Defender Comment on the 2023–2024 Proposed Priorities

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide our comments on the Commission's 2023–2024 proposed priorities.[1] We appreciated working with the Commission last year, were encouraged by our July meeting, and hope the Commission will continue and expand its commitment to "operate in a deliberative, empirically based, and inclusive manner" this year.[2]

Indeed, operating inclusively is particularly important this year, as the Commission's proposed priorities list could have a significant, far-reaching impact on federal sentencing. Priorities like simplifying the guidelines (Priority 3) and addressing the commentary's validity and enforceability (Priority 4) target the foundations of our sentencing guidelines system, having the potential to change the way the system operates. Other priorities, like continued career offender guideline review (Priority 5) and potential amendments to youthful offense treatment (Priority 6) could ameliorate longstanding racial inequities and result in fairer sentences better reflecting the advancement of scientific, psychological, and sociological knowledge. And Priorities 1 (assessing the Bureau of Prisons (BOP)) and 2 (promoting

---

[1] *See* USSC Proposed Priorities for Amendment Cycle, 88 Fed. Reg. 39907-01 (June 20, 2023) ("USSC Proposed Priorities"), https://tinyurl.com/2hu7cv83.

[2] Remarks of Carlton W. Reeves, Chair of the U.S. Sent'g Comm'n, Washington, D.C., at 4 (Oct. 28, 2022), https://tinyurl.com/92746mhp.

alternatives to incarceration (ATI) and diversion programs) could impact how much time our clients serve in prison—and how they spend that time. Defender involvement and insight on these priorities, related research, and proposed amendments are critical.[3]

Below are our comments on the Commission's proposed priorities. We also encourage the Commission to revisit our May 24, 2023 Annual Letter and reconsider prioritizing the issues we raised there.[4]

---

[3] As mentioned, our Commission Liaison Subcommittee appreciated the opportunity to meet with the Commission last month. Working with the Commission to identify ways to increase Defender involvement during this, and future, amendment cycles is a long-time goal.

[4] *See* Letter from Michael Caruso, Chair, Fed. Defenders Sent'g Guidelines Comm. to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (May 24, 2023) ("Defenders' 2023–2024 Annual Letter").

Table of Contents

I. Proposed Priority No. 1: Bureau of Prisons 4

II. Proposed Priority No. 2: Promotion of ATI and Diversion Programs 6

III. Proposed Priority No. 3: Simplification of the Guidelines 7

IV. Proposed Priority No. 5: Career Offender 8

- A. Updating the data analyses and statutory recommendations set forth in the Commission's 2016 Career Offender Report 8
- B. Devising and conducting workshops to discuss the career offender guideline's scope and impact, including discussing possible alternative approaches to the "categorical approach." 10
- C. Possible consideration of other appropriate amendments. 12

V. Proposed Priority No. 6: Offenses Committed by Youths 12

VI. Proposed Priority No. 9: Other Issues 14

- A. Technical Amendment Correcting §2D1.1(a)(1) and (a)(3) 14
- B. Reform the Drug Trafficking Guidelines 16
- C. Prohibit Acquitted Conduct 17
- D. *Mens Rea* Reform 18

I. Proposed Priority No. 1: Bureau of Prisons

Defenders are pleased the Commission proposed prioritizing an assessment of whether BOP practices effectively meet the purposes of sentencing and is considering recommendations and amendments to ensure individuals sentenced to prison serve no more BOP time than necessary.[5] The Defenders have long litigated and advocated for greater availability of community corrections and against sentence calculation and programming rules that extend sentences.

The relevant BOP history and the Commission's statutory directive are set out in Stephen R. Sady's October 2022 Federal Sentencing Reporter article, attached to this letter.[6] The Commission should consider and adopt each of the article's proposed recommendations; each is already authorized by statute. BOP's failure to fully implement congressionally approved measures has inevitably resulted in over-incarceration: greater prison time than needed to accomplish the goals of federal sentencing. The specific recommendations include greater access to and availability of community corrections (reentry centers and home confinement), permitting full calculation of time in pretrial custody for immigration detention and concurrent sentences, and full eligibility for mitigating programs such as the residential drug abuse program. BOP's failure to fully utilize ameliorative statutes results in wasted and expensive time behind bars and limitations on the reach of rehabilitative programs. The Commission should act decisively to counteract the skewing of guidelines sentences toward longer and harsher prison time by using its resources and expertise to recommend execution of sentences with full implementation of available ameliorative statutes.

In addition, the Commission should explore possible amendments to ensure that prison conditions and BOP mismanagement are considered on the front

---

[5] *See* USSC Proposed Priorities, at 39907.

[6] *See* Stephen R. Sady, *Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes that Reduce Prison Time*, 35 Fed. Sent'g Rep. 12 (2022).

end.[7] From overcrowded, understaffed, and crumbling facilities[8] to insufficient medical care[9] and instances of sexual and physical abuse,[10]

---

[7] For instance, the Commission could lower the ranges on the sentencing table, amend §5G1.3 to better encourage judges to account for all time in custody, or create a downward departure to account for the conditions under which a sentence to BOP custody would be served.

[8] *See, e.g.*, Fed. Bureau of Prisons, *Federal Bureau of Prisons Factsheet* (May 12, 2023), https://tinyurl.com/2p93eut9 (reporting BOP's population increased in FY 2021 and BOP "continues to experience substantial crowding in medium and high security facilities"); Glenn Thrush, *Short on Staff, Prisons Enlist Teachers and Case Managers as Guards*, N.Y. Times (May 1, 2023), https://tinyurl.com/52njy3h8 (reporting a "staffing crisis" in many federal prisons and that, as of March 2023, 21 percent of Congressionally-funded correctional officer positions remain unfilled); Dep't of Justice Office of Inspector Gen., *The Federal Bureau of Prisons' Efforts to Maintain and Construct Institutions* 5, 26 (May 3, 2023), https://tinyurl.com/227b39zb (recognizing BOP facilities are aging and deteriorating, and all 123 institutions require maintenance, with three in critical stages of disrepair).

[9] *See, e.g.*, Statement of Heather E. Williams, Before the U.S. Sentencing Comm'n, Washington D.C. at 4, n.11 (Feb. 24, 2023) (collecting Inspector General reports of BOP's catastrophic response to the COVID-19 Pandemic); U.S. Dep't of Justice, Office of the Inspector Gen., *Audit of the Federal Bureau of Prisons Comprehensive Medical Services Contracts Awarded to the University of Massachusetts Medical School* i (2022), https://tinyurl.com/mr32k98f ("BOP did not have a reliable, consistent process in place to evaluate timeliness or quality of inmate healthcare"); U.S. Dep't of Justice, Office of the Inspector Gen., *Review of the Federal Bureau of Prisons' Management of Its Female Inmate Population* i–ii (2018), https://bityl.co/GxND (identifying failure to provide appropriate care to women in custody); U.S. Dep't of Justice, Office of the Inspector Gen., *Review of the Federal Bureau of Prisons' Use of Restrictive Housing for Inmates with Mental Illness* i–ii (2017), https://bityl.co/GxN9 (identifying BOP's failure to provide adequate treatment for incarcerated people with mental illness); U.S. Dep't of Justice, *Department of Justice Efforts to Ensure that Restrictive Housing in Federal Detention Facilities is Used Rarely, Applied Fairly, and Subject to Reasonable Constraints, and to Implement Other Legal Requirements and Policy Recommendations* 6 (2023), https://bit.ly/3S99999 (finding that "restrictive housing placements have increased by 29% since . . . 2016. . . .").

[10] *See, e.g.*, Williams Statement, at 2–6 (describing reported abuse in BOP); Washington Lawyers' Comm. for Civil Rights & Urban Affs., *Cruel and Usual: An Investigation into Prison Abuse at USP Thomson* 3 (2023), https://tinyurl.com/3rv5ybux (exposing "extreme physical and psychological abuse" and "abusive and obstructive staff behavior" at USP Thomson and recognizing "similar issues are pervasive in the other [BOP] facilities"). *See also* Staff Rep. S.

evidence of BOP mismanagement is plentiful. This Commission—and sentencing judges—cannot identify a sentence that is "sufficient but not greater than necessary" without knowing the conditions under which the individual's time will be served.[11]

Defender involvement in this priority is essential. We represent the vast majority of individuals who serve BOP time. Among Defender ranks are attorneys with expertise in BOP computation, its administrative policies and procedures, and BOP-related litigation. We are eager to share our insights and our clients' experiences with the Commission as it assesses BOP's effectiveness, identifies areas needing improvement, and develops recommendations and amendments.

II. Proposed Priority No. 2: Promotion of ATI and Diversion Programs

Defenders appreciate the Commission's proposal to promote alternative sentences by increasing access to information pertaining to ATI and diversion programs.[12] As we explained last year,[13] alternative sentences are far too rare—in Fiscal Year 2022, less than 7 percent of sentences were to probation or fine only.[14] Yet "[t]he case for use of community punishments in a rational

Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov't Affs., *Sexual Abuse of Female Inmates in Federal Prisons* at 1 & Ex. 1 (2022), https://bityl.co/H9sF; U.S. Dep't of Justice, *Report and Recommendations Concerning the Department of Justice's Response to Sexual Misconduct by Employees of the Federal Bureau of Prisons* 4 (2022), https://bityl.co/GxJW.

[11] *See* 18 U.S.C. § 3553(a). Indeed, while imprisonment conditions are relevant to all purposes of sentencing, § 3553(a)(2)(D) explicitly requires sentencing courts identify the need for the sentence imposed to provide the convicted person "with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

[12] *See* USSC Proposed Priorities, at 39907.

[13] *See* Letter from Michael Caruso, Chair, Fed. Defenders Sent'g Guidelines Comm. to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n at 18 (Oct. 17, 2022).

[14] *See* USSC, *FY 2022 Sourcebook of Federal Sentencing Statistics*, fig. 6 (2023), https://tinyurl.com/5n6p6y3y.

society is a no-brainer."[15] Community-based corrections are more effective than prison at rehabilitation and reducing recidivism.[16]

Defenders remain eager to work with the Commission on this priority, including any workshop, seminar, or assessment development and presentation related to these important programs. We also ask the Commission to consider amending the guidelines to encourage alternative sentences for anyone demonstrating presentence rehabilitation, regardless of their ATI or diversionary program participation.[17]

III. Proposed Priority No. 3: Simplification of the Guidelines

Defenders support any efforts to make the guidelines fairer and better aligned to our advisory guideline scheme, including those simplifying guidelines applications. A great place to start is amending Chapter 5 to better reflect modern, post-*Booker* sentencing practices. For instance, the tension between Chapter 5's restrictive policy statements and the sentencing court's expansive duty under § 3553(a) to consider our client's history and characteristics causes confusion about how the sentence should account for personal mitigation.[18] And, as noted in our Annual Letter, some of Chapter

---

[15] Michael Tonry, *Community Punishments*, in 4 Reforming Criminal Justice: Punishment, Incarceration, and Release 187 (2017), https://bityl.co/HTae.

[16] *See* Federal Public and Community Defenders Comment on Alternatives-to-Incarceration Programs (Proposal 10), at 1–2 & accompanying notes (Mar. 14, 2023).

[17] *See id.* at 3–5.

[18] *See, e.g.*, Letter from Hon. Robert Holmes Bell, U.S. District Court for the Western District of Michigan, to the U.S. Sent'g Comm'n, at 1–2 (Mar. 1, 2010) (noting that Chapter 5H has been "troubling" from its inception as it conflicts with § 3553(a) and recounting a pre-*Booker* sentencing over which he presided and experienced "difficulties . . . attempting to bring the factor found in §5H1.11 in line with [the individual's] 'history and characteristics'"); *cf. United States v. Eversole*, 487 F.3d 1024, 1036 (6th Cir. 2007) (Merritt, J., dissenting) ("The sentencing courts should forget about the Guidelines when they conflict with the clear statutory rules. It is clear that the statutory rule limiting punishment to a sentence 'not greater than necessary,' combined with the language of rehabilitation contemplating 'medical care or other correctional treatment' has been cast aside and not even considered in this case.").

5's policy statements conflict with one another[19] and with policies contained elsewhere in the guidelines.[20] This further complicates and confuses guidelines application.

Defenders would potentially also support other simplification endeavors better promoting sentences "sufficient, but not greater than necessary."[21] We look forward to working with the Commission to identify guideline system areas needing improvement and ways to improve them.

IV. Proposed Priority No. 5: Career Offender

In its proposed priorities, the Commission lists three potential areas of "[c]ontinued examination of the career offender guidelines," including:

> (1) updating the Commission's 2016 report to Congress,
>
> (2) spearheading workshops and discussions on the career offender guideline and possible alternatives to the categorical approach, and
>
> (3) consideration of appropriate amendments.[22]

We commend the Commission for charting a cautious, thoughtful, inclusive, and data-driven approach to any further career offender guideline amendments, and address each of these three areas below.

A. Updating the data analyses and statutory recommendations set forth in the Commission's 2016 Career Offender Report.

The 2016 Career Offender Report is broadly cited for: (a) concluding that those in a drug-trafficking-only pathway to career offender status have a significantly lower recidivism rate than other career offenders, and (b) recommending Congress amend 28 U.S.C. § 994(h) to exclude these

---

[19] *See* Defenders' 2023–2024 Annual Letter, at 20 n.91 (observing that a disadvantaged upbringing is "not relevant" in determining whether a departure is warranted, §5H1.12, but mental and emotional conditions—which could be related to a disadvantaged childhood—"may be relevant," §5H1.3).

[20] *See id.* at 18 n.80 (addressing the disconnect between the family circumstances policy statement, §5H1.6, and the Commission's recently adopted policy statement on reductions in sentence, §1B1.13).

[21] 18 U.S.C. § 3553(a).

[22] *See* USSC Proposed Priorities, at 39907.

individuals.[23] We welcome any narrowing of the directive. But years of data demonstrate the career offender guideline is overly punitive, lacks a principled basis, and exacerbates racial disparity in federal sentencing—whether triggered by "controlled substance offenses" or "crimes of violence."[24]

In § II.B of Defenders' Comment on the Commission's 2023 guideline amendment Proposals 4B and 6, we encouraged the Commission to update its 2016 Report by:

> (1) articulating the justification for the career offender guideline,
>
> (2) identifying the category of individuals, if any, for which a near-maximum career-offender sentence would be the least punishment necessary under the articulated justification, and
>
> (3) striving toward a guideline that captures only individuals in the identified category.[25]

If there is no principled justification for imposing near-maximum sentences based on criteria the career offender directive identifies, the Commission should say so.[26] We are eager to discuss these and other suggestions with the Commission.

One can read the 2016 Report's emphasis on relief for those in the drug-trafficking-only pathway to suggest that data support near-maximum career-offender sentences for those in the mixed and violent-only pathways.[27] The

---

[23] *See* USSC, *Report to Congress: Career Offender Enhancements* 25–45 (2016) ("*Career Offender Report*"), https://tinyurl.com/bdz8cfdb.

[24] *See* Statement of Juval O. Scott Before the U.S. Sent'g Comm'n, Washington, D.C., at 1, 3–12 (Mar. 8, 2023) ("J. Scott Statement").

[25] *See* Federal Public and Community Defenders Comment on Circuit Conflict re: Controlled Substance Offense (Proposal 4B) and Proposals to Amend Career Offender Guideline (Proposal 6), at 4–10 (Mar. 14, 2023) ("Defenders' 2023 Career Offender Comment").

[26] *See id.* at 10.

[27] *See Career Offender Report*, at 41 (reporting "drug trafficking only offenders" had the "lowest rate of recidivism," and explaining how this supports "the Commission's conclusion that they should not be subjected to the same recidivist enhancements as the other career offenders").

Commission can take steps to examine this assumption. Two specific points bear repeating here.

First, for those convicted of crimes of violence, the Commission can compare the recidivism rates between those assigned career offender status with those not assigned such status.[28] As our recent Comment noted, the Commission's 2022 report on recidivism of persons committing violent offenses reported that, as a group, those placed in CHC VI based on their career-offender or armed-career-criminal status had a 65 percent recidivism rate—lower than the CHC III group's 66.3 percent rate.[29]

Second, given the broad academic consensus that longer sentences do *not* serve as either a specific or general deterrent, the Commission can study how incarceration interacts with crime-prevention goals.[30] The Commission's 2022 report concluding incarceration sentences of longer than five years have a preventative effect is an outlier conclusion in the academic literature.[31] We encourage the Commission to collaborate with other experts to explore a more comprehensive understanding of the interactions between incarceration and crime prevention.

B. Devising and conducting workshops to discuss the career offender guideline's scope and impact, including discussing possible alternative approaches to the "categorical approach."

Defenders look forward to consulting with the Commission as it devises workshops to discuss the career offender guideline's scope and impact. No

---

[28] *See* Defenders' 2023 Career Offender Comment, at 7–8.

[29] *See id.* at 8 & n.15 (citing, *inter alia*, USSC, *Recidivism of Federal Violent Offenders Released in 2010* 29 fig. 14 (2022), https://tinyurl.com/2mwju7xt).

[30] *See* Statement of Michael Carter Before the U.S. Sent'g Comm'n, Washington, D.C., at 13–14 (Mar. 7, 2023); Defenders' 2023 Career Offender Comment, at 9–10 & accompanying notes.

[31] *See* USSC, *Length of Incarceration and Recidivism* (2022); Tina Woehr & Allison Bruning, *Limitations of the Commission's 'Length of Incarceration and Recidivism' Report*, 35 Fed. Sent'g Rep. 43, 43–46 (2022), https://bit.ly/3ZEBo2y; *see also* J. Scott Statement & accompanying notes.

such discussion would be complete without hearing from those most directly affected by the guideline:

- individuals sentenced under the guideline, their families and community members, and their attorneys,
- jurists who have thought deeply about this guideline who could provide insight into the 20 percent judicial compliance rate,[32] and
- criminologists who could help tease out what, if any, principled penological purpose this guideline serves.

As for workshops discussing possible alternative approaches to the Supreme Court's categorical approach, such workshops ideally would permit federal judges, attorneys, and probation officers to discuss frankly, in a problem-solving environment, why the categorical approach stirs controversy and what alternatives would look like. Workshops should include state court practitioners to discuss why much of the presentence report's information—information derived from arrest reports, court records, and other documents—is unreliable for imposing draconian sentencing enhancements.[33]

As we suggest in our Comment, the categorical approach may, like democracy, be the worst system except for all the other systems.[34] Frank discussions may uncover solutions other than abandoning the approach the Supreme Court has long mandated for statutory criminal enhancements and immigration matters. Perhaps, for example, probation officers could be relieved of the obligation to perform this analysis. The Commission could devise and provide additional training and resources for judges and attorneys. We do not pretend to know the answers but are eager to help the Commission find solutions.

---

[32] *See* USSC, *Quick Facts: Career Offenders* (July 2023), https://tinyurl.com/mcwwfwf2 (reporting 20.2 percent of sentences within range).

[33] *See, e.g.,* Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 106–07 (Mar. 8, 2023) (Susan Lin).

[34] *See* Defenders' 2023 Career Offender Comment, at 11; *see also* J. Scott Statement, at 3–12.

C. Possible consideration of other appropriate amendments.

As we expressed, the career offender guideline should be contracted, not further expanded, given its role in our federal criminal legal system as an unjustified driver of mass incarceration and racial disparity.[35] Again, Defenders stand ready to explore with the Commission avenues to narrow the guideline consistent with § 994(h)[36] and explore what it can recommend to Congress to achieve real reform.

V. Proposed Priority No. 6: Offenses Committed by Youths

Defenders commend the Commission for considering amendments to the guidelines' treatment of youth-committed offenses.[37] Reforming the guidelines' treatment of both current and prior youth-committed offenses is critical to reflect significant advancements in human knowledge and to avoid unwarranted disparities.

Research on brain development confirms the guidelines' treatment of youth offenses is outdated and unfair. Years ago, this Commission recognized the

[35] *See* Defenders' 2023 Career Offender Comment, at 2–4. -

[36] *See, e.g., id.* at 22–26; Statement of Michael Caruso Before the U.S. Sent'g Comm'n, Washington D.C., at 22–23, 25–28 (Mar. 7, 2023) (proposing contracting the definition of "controlled substance offense" to those offenses enumerated in 28 U.S.C. § 994(h)); Letter from Natasha Sen & Patrick Nash, Practitioner's Advisory Group, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 22 & n.2 (Mar. 14, 2023); Letter from Natasha Sen & Patrick Nash, Practitioner's Advisory Group, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 2 (Sept. 23, 2023) (recommending the Commission conform the "career offender" definitions to the First Step Act's definitions of "serious drug felony" and "serious violent felony").

[37] The Guidelines Manual does not define "youth." However, in its 2017 report on youth-committed offenses, the Commission defined youth as "25 years old or younger at the time of sentencing." In adopting this definition, the Commission's decision was informed by "recent case law and neuroscience research in which there is a growing recognition that people may not gain full reasoning skills and abilities until they reach age 25 on average." USSC, *Youthful Offenders in the Federal System* 5 (2017) ("*Youth Offense Report*"), https://tinyurl.com/5n8v62ah. For this letter, and consistent with the research, "offenses committed by youths" refer to offenses committed by people in mid-20s or younger.

available research indicates youths are simply different than adults.[38] In fact, decades of developmental neuroscience and behavioral psychology research evinces young people are less culpable than older people whose brains and character traits are more fully formed. Neuroscientific studies reveal "the areas of the brain that govern impulse control, planning, and foresight of consequences mature slowly over the course of adolescence and into early adulthood, while the arousal of the limbic system around puberty increases sensation seeking in early adolescence."[39] Consistent with these findings, "[a] large body of behavioral research confirms that adolescents are more impulsive, risk-seeking, subject to peer influence, and inclined to focus on immediate consequences of their choices than are adults."[40]

Strong policy reasons exist to change the guidelines' treatment of youth-committed offenses as well. As we explained in previous letters, treating youthful offenses—particularly those committed by people younger than age 18—like adult offenses results in numerous unwarranted disparities and perpetuates racial and ethnic inequities.[41]

---

[38] *See Youth Offense Report*, at 5–7 (summarizing case law and neuroscience research).

[39] Elizabeth S. Scott, "*Children are Different": Constitutional Values and Justice Policy*, 11 Ohio St. J. Crim. L. 71, 87 (2013); Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 Psychol. Pub. Pol'y & L. 410, 414–15 (2017) (describing brain imaging studies evidencing immaturity in the young person's brain regions critical to executive function and heightened responsiveness in the socioemotional incentive-processing system, which taxes the capacities for self-regulation)*; see also Graham v. Florida*, 560 U.S. 48, 68 (2010) ("[P]arts of the brain involved in behavior control continue to mature through late adolescence.").

[40] Scott, *supra* note 39, at 87; *see also* Steinberg, *supra* note 39, at 413–14 (discussing behavioral studies revealing that compared to adults, youth are more impulsive, more likely to engage in sensation-seeking, more likely to succumb to peer pressure, and more likely to consider immediate gratification than the future consequences of their actions); Elizabeth Cauffman et al., *How Developmental Science Influences Juvenile Justice Reform*, 8 UC Irvine L. Rev. 21, 28–29 (2018) (same); *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (recognizing three behavioral "gaps" between adolescents and adults that illustrate the reduced culpability of adolescents who commit crime).

[41] *See, e.g.*, Letter from Michael Caruso, Chair, Fed. Sent'g Guidelines Comm., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Guidelines Comm'n at 21–22 & accompanying notes (Sept. 14, 2022); Letter from Marjorie Meyers, Chair, Fed. Def.

The Commission should start with amending §4A1.2(d). Defenders have repeatedly requested that the Commission amend the criminal history rules to exclude all offenses committed prior to age 18 from the criminal history score.[42] The Commission might even consider based on the recognized research whether prior convictions committed by persons ages 18 to mid-20s also deserve amended treatment.

In addition to amending the guidelines' treatment of prior youth-committed offenses, the Commission should reconsider its treatment of *instant* offenses committed by youths.[43] The guidelines should account for recognized brain development research and the Commission should encourage courts to consider this research when calculating the guidelines and imposing appropriate sentences for offenses committed by people in their mid-20s or younger.

VI. Proposed Priority No. 9: Other Issues the Commission Should Prioritize

A. Technical Amendment Correcting §2D1.1(a)(1) and (a)(3).

The Commission should add to this cycle's priorities a technical amendment to §§2D1.1(a)(1) and (3) to correct a longstanding application problem, the impact of which will be exacerbated by the Commission's 2023 §2D1.1

Sent'g Guidelines Comm., to the Hon. William H. Pryor, Jr., Acting Chair, U.S. Sent'g Comm'n 2–3, 20–34 (Feb. 20, 2017); *see also* United States Commission on Civil Rights, *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, 48 (2019), https://tinyurl.com/fd6spcwb (discussing data showing Black and multiracial students with disabilities were overrepresented in school-related arrests and referrals to law enforcement in two different academic years); American Civil Liberties Union, *School-to-Prison Pipeline Infographic* (2016), https://tinyurl.com/3jwn3ucu (noting "[z]ero-tolerance" policies that "criminalize minor infractions of school rules" have "resulted in Black students facing disproportionately harsher punishment than white students in public schools").

[42] *See, e.g.*, Letter from Marjorie Meyers, Chair, Fed. Def. Sent'g Guidelines Comm., to the Hon. William H. Pryor, Jr., Acting Chair, U.S. Sent'g Comm'n 2–3, 20–34 (Feb. 20, 2017); Defenders' 2022–2023 Annual Letter at 20–22; Defenders' 2023–2024 Annual Letter. At a bare minimum the Commission should revise Chapter 4 to exclude juvenile adjudications from the criminal history score.

[43] *See generally* §5H1.1.

Amendment.[44] As amended, §2D1.1(a)(1)(B) is likely to be interpreted to recommend a guideline sentence of life in cases where the statutory minimum sentence is not life, but twenty years.[45]

We understand §2D1.1(a)(1) and (3) base offense levels are intended to "apply only in the case of a conviction under circumstances specified in the statutes cited."[46] Thus, for example, §2D1.1(a)(1) should recommend a life sentence only for an individual convicted of distribution resulting in death or serious-bodily injury, where the government filed a § 851 information, and the court sustained it. This understanding comports with the language of these guidelines and their amendment history and purpose.[47] But courts have long applied those elevated base offense levels regardless of whether the offense of conviction established the death- or serious-bodily-injury resulting element, and even where the government declined to seek the statutorily specified § 851 enhancement.[48] That is to say, courts apply §2D1.1(a)(1) base offense level 43 (which calls for a guideline life sentence for all criminal history categories) even in cases where the "circumstances specified in the statutes cited" are *not* met. This is a longstanding problem impacting a small number of individuals—but that impact is severe.[49]

---

[44] *See* USSC Notice of Submission to Congress of amendments to the sentencing guidelines effective November 1, 2023, 88 Fed Reg. 28254-01, 28263 (May 3, 2023), https://tinyurl.com/3fmtwhdk (2023 Adopted Amendments).

[45] *See id.*; Federal Public and Community Defenders Comment on First Step Act—Drug Offenses (Proposal 2), at 1–2 (Mar. 14, 2023) (Defenders' 2023 Comment on FSA—Drug Offenses); Statement of Michael Caruso, Before the U.S. Sent'g Comm'n, Washington D.C. at 9–14 (Mar. 7, 2023) ("Caruso Statement on FSA—Drug Offenses").

[46] USSC App. C, Amend. 123, Reason for Amendment (Nov. 1, 1989); *see also* USSC App. C, Amend. 727, Reason for Amendment (Nov. 1, 2009).

[47] *See* Caruso Statement on FSA—Drug Offenses, at 12.

[48] *See, e.g., United States v. Johnson*, 706 F.3d 728, 732–33 (6th Cir. 2023); *see also* Caruso Statement on FSA—Drug Offenses, at 12–13 (explaining that, of the 107 individuals assigned enhanced base offense levels under §2D1.1(a)(1) or (a)(3) in the last five years, only 30 were subject to § 851 informations).

[49] *See* Caruso Statement on FSA—Drug Offenses, at 12–13.

The 2023 §2D.1.1 Amendment will exacerbate this problem because it incorporates an anomaly from the First Step Act setting a *lower* bar to trigger a mandatory-life sentence for those convicted of trafficking only a detectable amount of Schedule I and II controlled substances, than for those convicted of a mandatory-minimum-triggering quantity.[50] In clear terms: those convicted of the least drug amount will more easily be subject to a mandatory-life sentence than those convicted of mandatory minimum amounts.

The Department of Justice recognizes "Sections 841(b)(1)(C) and 960(b)(3) [now] prescribe a mandatory sentence of life imprisonment upon a lesser showing than that required under Section 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), and 960(b)(2)."[51] And "to promote consistency in sentencing under Sections 841(b)(1) and 960(b), the Department" has thus directed prosecutors, "as a matter of policy not to seek a mandatory sentence of life imprisonment under Section 841(b)(1)(C) or 960(b)(3) unless a defendant's prior conviction meets the statutory definition of a 'serious drug felony' or 'serious violent felony.'"[52] Simply put, the Department will not seek a mandatory life sentence for § 841(b)(1)(C) offenses if a similarly-situated individual would not be eligible for that sentence if convicted of §§ 841(b)(1)(A) or (B). But, as amended, §2D1.1(a)(1)(B) will still recommend a life sentence for these individuals.

B. Reform the Drug Trafficking Guidelines.

Defenders strongly encourage the Commission to reconsider prioritizing reforms to §2D1.1, as set forth in our Annual Letter.[53] For the reasons articulated there, section §2D1.1 should be delinked from the statutory mandatory minimums and should focus instead on role-based culpability. At a bare minimum, the Commission should lower the guidelines for methamphetamine (actual) and "Ice" to eliminate the irrational purity-based distinctions in methamphetamine offense levels.

---

[50] *See* 2023 Adopted Amendments, at 28263.

[51] U.S. Dep't of Justice, *First Step Act Annual Report* 50 (Apr. 2022), https://tinyurl.com/22b4hm6a.

[52] *Id.*

[53] *See* Defenders 2023–2024 Annual Letter, at 3–13.

C. Prohibit Acquitted Conduct.

The right to trial by jury has deep-rooted, historical foundations. In *Apprendi v. New Jersey*, the Supreme Court recognized:

> "To guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of our civil and political liberties," trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours."[54]

Using acquitted conduct to increase the sentencing guidelines range under §1B1.3 ("acquitted conduct sentencing") is antithetical to this important principle. The Commission considered eliminating or limiting acquitted conduct sentencing at least four times in the past, dating back over thirty years.[55] Regretfully, it has not yet done so. But this Commission can remedy the injustice of acquitted conduct sentencing now.

One month ago, when the Supreme Court denied certiorari in *McClinton v. United States*, Justices Sotomayor, Kavanaugh, Gorsuch, and Barrett explained their denial should not be misinterpreted to signal the Court's lack of concern over the "important questions" raised by acquitted conduct sentencing.[56] Instead, these Justices denied certiorari precisely because this Commission committed itself to resolving questions around acquitted conduct

---

[54] 530 U.S. 466, 477 (2000) (alteration in original) (first quoting 2 J. Story, Commentaries on the Constitution of the United States 540–41 (4th ed. 1873); and then quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)).

[55] *See* 88 Fed. Reg. 7180, 7224–7225 (2023); 62 Fed. Reg. 152, 161–62 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832, 62,832, 62,848 (1992).

[56] *McClinton v. United States*, 600 U.S. ----, 143 S. Ct. 2400, 2401 (2023) (Sotomayor, J., statement respecting denial of cert.) ("As many jurists have noted, the use of acquitted conduct to increase a [person's] Sentencing Guidelines range and sentence raises important questions that go to the fairness and perceived fairness of the criminal justice system."); *id.* at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., statement respecting denial of cert.) ("The use of acquitted conduct to alter a [person's] Sentencing Guidelines range raises important questions.").

sentencing "in the coming year."[57] Defenders hope to see acquitted conduct sentencing on the Commission's final priority list and remain eager to work with the Commission to eliminate or restrict acquitted conduct sentencing during the upcoming amendment cycle.

D. *Mens Rea* Reform.

This year the Commission should also prioritize *mens rea* reform throughout the Guideline Manual: it should remove strict liability or negligence enhancements and heighten the mental intent required under the relevant conduct provision for jointly undertaken criminal activity.[58]

At a minimum, the Commission should finish what it started earlier this year by reforming §2K2.1(b)(4). While Defenders were disappointed by the newly added privately manufactured firearms (PMFs) enhancement, we were pleased to at least see the Commission recognize the importance of *mens rea* in that enhancement.[59] But the reasons for adding a *mens rea* requirement to that enhancement apply equally to stolen firearms and firearms with an altered or obliterated serial number.[60] Indeed, in its *Reason for Amendment*, the Commission indicated it added PMFs to §2K2.1(b)(4) because "there is no meaningful distinction between a firearm with an obliterated serial number . . . and a firearm not marked with a serial number."[61] Recognizing this, the Commission should add a knowledge or willful blindness requirement to the rest of §2K2.1(b)(4).

---

[57] *Id.* at 2403 (Sotomayor, J., statement respecting denial of cert.); *see also id.* (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., statement respecting denial of cert.) ("[T]he Sentencing Commission is currently considering the issue [of the use of acquitted conduct to raise the guideline range]. It is appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant certiorari in a case involving the use of acquitted conduct.").

[58] *See* Defenders' 2022–2023 Annual Letter, at 9–12.

[59] *See* 2023 Adopted Amendments, at 28267 ("[S]ubsection (b)(4)(B)(ii) only applies if the defendant knew or had reason to believe that the firearm involved in the offense was not otherwise marked with a serial number . . . or was willfully blind to or consciously avoided knowledge of such fact.").

[60] *See* Defenders' 2023–2024 Annual Letter, at 27.

[61] 2023 Adopted Amendments, at 28269.

* * * *

As always, the Defenders appreciate the Commission considering our viewpoints, experience, and unique knowledge, and look forward to working with the Commission this year.

Very truly yours,

Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Attachment

cc (w/ attach.): Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex Officio*
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes That Reduce Prison Time

STEPHEN R. SADY

Chief Deputy Federal Public Defender, District of Oregon

I. Introduction

As the U.S. Sentencing Commission revives after years without a quorum, a top priority should be addressing a statutory duty that has been neglected since the Commission's inception: the mandatory obligation, under 28 U.S.C. § 994(g), to "make recommendations concerning any change or expansion in the nature or capacity of [correctional] facilities and services that might become necessary as a result of the guidelines promulgated." In 1987, when the Federal Sentencing Guidelines came into effect, there were fewer than 50,000 prisoners in the federal system; since then, that number has tripled to more than 150,000 federal prisoners. Although Congress has repeatedly provided options and directives that would reduce the time defendants spend in prison, the Federal Bureau of Prisons (BOP) has failed to implement the full scope of the available authority, resulting in expensive and pointless overincarceration.

The newly constituted Commission's role in making recommendations to the BOP is informed by history: the thirty-five years since the effective date of the Sentencing Reform Act. Congress "intended that the Commission make recommendations as to any changes in th[e correctional system's] capacity that it believes to be necessary in light of its sentencing guidelines."[1] Nevertheless, to date, the Commission has done little to exercise its recommendation mandate, despite the need to balance the greater length of guidelines sentences with full availability of ameliorative programming.

With a new BOP Director coming aboard, now is the time to exercise that authority. The Commission should prioritize making recommendations based on the practical realities of how the BOP carries out its responsibilities. A decade ago, the Government Accountability Office and the Federal Public and Community Defenders provided information regarding a wide range of simple and fair reforms that could be implemented without new legislation to close the huge gap between what sentencing statutes allow and how the BOP carries out its authority,[2] yet little change resulted. Many of those same simple reforms remain available today, with additional ameliorative statutes now in play.

This Article looks first to the history that demonstrates the urgent need for the Commission to act now to provide specific programmatic advice to the BOP. Setting out the statutory bases and history of implementation under each ameliorative statute, it then offers thirteen specific recommendations that the Commission should make to the BOP, regarding six ameliorative programs: community corrections, the Residential Drug Abuse Program (RDAP), sentence computation rules, consecutive/concurrent sentencing rules, boot camp, and earned time credits. Each of the suggested recommendations calls for simple administrative fixes, without any new legislation, and each recommendation could conserve millions in taxpayer dollars and permit men and women to return to their families days, weeks, and months earlier. The key recommendations can be summarized as follows:

- Increase the availability of community corrections commensurate with repeated statutory directives for greater use of residential reentry centers and home confinement (18 U.S.C. § 3624(c)).
- Expand eligibility and availability of sentence reductions under RDAP by (1) allowing individuals with detainers to both participate in the program and receive sentence reductions, (2) maximizing the length of sentence reductions and community corrections for those who successfully complete the residential program, and (3) eliminating mere firearm possession as a disqualification for sentence reductions (18 U.S.C. § 3621(e)).
- Eliminate three sentence computation rules that create longer sentences: (1) pretrial custody credit should include time in immigration detention (18 U.S.C. § 3585(b)); (2) state concurrent sentences should receive either pretrial custody credit or nunc pro tunc designation to avoid creating de facto consecutive sentences (18 U.S.C. §§ 3584(a) and 3585(b)); and (3) good time credits should be awarded for time in state custody on partially concurrent sentences (18 U.S.C. §§ 3585(b), 3584(a), and 3624(b)).

Federal Sentencing Reporter, Vol. 35, No. 1, pp. 12–23, ISSN 1053-9867, electronic ISSN 1533-8363.
© 2022 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Reprints and Permissions web page, https://www.ucpress.edu/journals/reprints-permissions. DOI: https://doi.org/10.1525/fsr.2022.35.1.12.

- Implement broader statutory and guideline standards to file compassionate release motions any time extraordinary and compelling reasons exist, leaving to the sentencing judge the decision whether the sentence reduction should be granted (18 U.S.C. § 3582(c)(1)(A)(i)).
- Revive the boot camp program to provide nonviolent offenders sentence reductions and expanded community corrections (18 U.S.C. § 4046(a) and 28 C.F.R. § 524.31(b)).
- Fully implement the First Step Act's earned time credit program (18 U.S.C. §§ 3632(d) and 3624(g)).

II. The Need for Commission Action and the Existing Statutory Bases for Reform

A. In the Absence of the Sentencing Commission Exercising Its Statutory Obligation to Make Recommendations Regarding Correctional Resources and Programs, Individuals Have Served More Time Than Necessary in Prison

The Commission has defined itself, for the most part, by developing the Sentencing Table's offense levels and criminal history categories, amending the guidelines, and studying the effects of guidelines and sentencing statutes. Although these front-end functions guide the sentences imposed, the execution of sentences—back-end policies and practices—has largely been ignored. But Congress understood connection between the sentences imposed and how those sentences are carried out. It directed that the Commission "shall make recommendations concerning any change or expansion in the nature or capacity of [penal, correctional, and other] facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter."[3]

The Commission's statutory role in providing recommendations is essential. Prisoners themselves are virtually voiceless regarding their conditions of confinement. Advocacy groups' suggestions can be administratively shrugged off. Litigation carried out by the few attorneys with the expertise to make their way through the procedural quagmire of administrative law face the limitless resources of a multi billion-dollar agency that takes advantage of every procedural obstacle. The Commission has unique power to offer insight and influence, given its institutional expertise and statutorily conferred authority.

As the United States has achieved notoriety for its rates of incarceration,[4] the Commission has occasionally taken steps to offset overly punitive sentencing, such as its work against the discriminatory and irrational 100:1 crack to powder cocaine ratio and the general reduction of Drug Quantity Table offense levels in Amendment 782. But on back-end resources and programs, the Commission has been mostly silent. Meanwhile, federal prisoners' sentences are de facto increased by the BOP's weak or nonexistent implementation of ameliorative statutes.

For example, the Commission developed the Sentencing Table's months in prison assuming, based on 18 U.S.C. § 3624(b), that individuals would receive good time credits at the rate of fifty-four days per year, or 15% of the sentence imposed.[5] In implementing the same statute, however, the BOP provided only forty-seven days for every year of the term of imprisonment, or 12.8% good time credits, by granting credit based on the time actually served rather than the sentence imposed.[6] Despite years of controversy over good time credits, the Commission did nothing to either adjust its own sentencing tables or recommend that the BOP implement the good time credit statute consistently with the Commission's calibration. Finally, in the First Step Act of 2018, Congress clarified that the Commission's means of calculating good time credit was correct.[7] But in the meantime, for thirty-one years, well-behaved prisoners have been over-serving time in prison by days, weeks, and months—with millions of taxpayer dollars wasted.[8]

In deciding whether to act on its congressional power to make recommendations to the BOP, the reanimated Commission may ask itself: Why would the BOP be stinting in providing inmates with sentence reductions, community corrections, credit for time served, and good time credit authorized by statute? After years of litigating against the BOP, I cannot provide the "why," but I can attest to the existence of a deeply entrenched institutional bias that—despite overcrowded prisons and dangerous staff-to-inmate ratios—always bends toward greater prison time. The history of each recommendation demonstrates the BOP's institutional resistance to ameliorative reform and the need for Commission advocacy.

B. Each Recommendation Has the Potential to Reduce Unnecessary Prison Time Through Administrative Action Based on Existing Statutory Language

Since the effective date of the guidelines era, the problem of overincarceration has been well known but ineffectively addressed. Even the Department of Justice, in a 1994 study that led to the RDAP and boot camp programs, recognized that sentences for nonviolent offenders were too long, and even longer for noncitizens.[9] Yet, while ameliorative statutes exist, the history of each back-end program discussed in this Article—from community corrections, to sentence reductions and sentence calculations, to compassionate release—illustrates the same pattern of unnecessary prison time served due to BOP inaction or stinting implementation. Thus, each of the suggested recommendations the Commission should make to the BOP originates in the statutes enacted as part of the Sentencing Reform Act or by later amendments, and each can be administratively implemented to reduce prison time without the need for any new legislation.

III. Suggested Sentencing Commission Recommendations to the Bureau of Prisons

A.The Sentencing Commission Should Recommend Greater Use of Community Corrections Under 18 U.S.C. § 3624(c)

When Congress abolished parole in the Sentencing Reform Act, the statute left in place a mechanism for "prerelease custody," also known as "community corrections"—placing federal prisoners in the community for a period of adjustment near the end of their terms of imprisonment and before the commencement of their terms of supervised release. Persons in community corrections—residential reentry centers and home confinement—continue to be in the custody of the BOP serving their terms of imprisonment. The determination of transfer to community corrections is based on the same individualized factors listed in 18 U.S.C. § 3621(b) that guide institutional placement. Congress has consistently placed increasing emphasis on the importance of community corrections to promote rehabilitation, to bring down prison populations, and to save taxpayer money on incarceration ($120.59 per prisoner per day for federal prison, $97.44 for residential reentry centers, $55.00 for home confinement).[10] But the BOP has not followed the congressional lead on greater access to residential reentry centers, even cutting back in recent years on their limited availability. The Commission should recommend expansion of residential reentry centers and home confinement and the adoption of rules maximizing their use.

Recommendation 1. The BOP should expand its capacity for community corrections by providing more funding for existing resources and contracting with more reentry centers to house individuals closer to their permanent residences.

The Sentencing Reform Act originally said very little about what constituted pre-release custody, but it required that the BOP "shall"—to the extent practical—assure that "a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry."[11] In 1990, Congress added home confinement as an authorized component of prerelease custody.[12] And for almost twenty years, community corrections received little congressional attention.

Since then, Congress has consistently ramped up the expected use of community corrections. In April 2008, with strong bipartisan support, Congress passed the Second Chance Act, which doubled the permissible time for prerelease custody to community corrections from six months to one year.[13] The new one-year maximum includes both placement in a residential reentry center and home confinement of up to six months or 10% of the sentence, whichever is less.[14]

In a separate section of the Second Chance Act, Congress created a "Federal prisoner reentry initiative," confirming its goal to expand the use of community corrections.[15] The initiative directed the Attorney General and the BOP, subject to available appropriations, to use "the maximum allowable period in a community confinement facility" as an incentive for participation in programming.[16] The initiative also directed the Attorney General "to modify the procedures and policies" to improve transition to the community.[17]

Following the Second Chance Act, Congress continued to encourage expanded use of community corrections. In the First Step Act, Congress amended § 3621(b) to require that the BOP place defendants in facilities, which include residential reentry centers, "as close as practicable to the prisoner's primary residence,"[18] and amended § 3624(c)(2) to direct that the BOP "shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement *for the maximum amount of time* permitted under this paragraph."[19] Most directly, Congress stated, "The Director of the Bureau of Prisons shall ensure there is sufficient prerelease custody capacity to accommodate all eligible prisoners."[20] Then, in response to the nationwide coronavirus pandemic, Congress passed the CARES Act, which expanded the potential time a prisoner may spend on home confinement during the emergency.[21]

Despite Congress's authorization of more and longer use of community corrections, the BOP has cut back on contracts and defunded reentry centers. As documented in submissions to the BOP and to Congress, the BOP's practices have shrunk the ability to provide community corrections by

- failing to renew contracts with reentry centers and doing so without consulting the chief judge of the judicial district affected;
- decreasing the number of reentry beds and significantly reducing the minimum number of beds for which it will guarantee payment; and
- decreasing the amount of pre-release time, with the average length "likely to decline to about 120–125 days."[22]

As a consequence, many people are left without adequate reentry services. In Oregon, after the Lane County Sheriff ended its contract with the BOP to provide reentry services, the BOP withdrew its solicitation for a new reentry center, eliminating beds for men and women coming home to central Oregon. Similarly, the BOP cut the number of beds under contract at Portland's Northwest Regional Reentry Center in its last contract revision, from 120 beds to 76 beds, reducing services by more than a third. Oregon is just one example of the nationwide failure to provide local resources for the critical task of transitioning citizens from prisons to our communities.[23]

The BOP's reduced support of community corrections runs exactly opposite to congressional policies expanding the availability of rehabilitative resources that return individuals to their families and communities sooner. The Commission should strongly recommend increased use of community corrections as individuals complete their terms of imprisonment.

Recommendation 2. The BOP should promulgate a regulation guiding community corrections placement pursuant to 18 U.S.C. § 3624(c)(6) that includes: (a) the presumptive maximum use of pre-release community corrections; (b) earlier placement in reentry centers followed by home confinement if, in the absence of the CARES Act emergency, home confinement is limited to six months; and (c) clear directives to eliminate the informal six-month-or-less norm for community corrections.

In the Second Chance Act, when Congress expanded community corrections authority from six months to one year, it also directed the BOP to promulgate regulations within ninety days regarding the "sufficient duration" of community placements:

> The Director of the Bureau of Prisons *shall issue regulations* not later than 90 days after enactment, which shall ensure that placement in a community correctional facility is
>
> (A) conducted in a manner consistent with § 3621(b) of this title;
>
> (B) determined on an individual basis; and
>
> (C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.[24]

On October 21, 2008, "well past" the ninety-day deadline, the BOP issued an interim rule that did little more than repeat the statutory language.[25] The actual practice on the ground remained unchanged, as informal rules maintained the pre–Second Chance Act six-month limit on community corrections absent exceptional circumstances.[26] In any event, the interim rule was deemed invalid because the BOP did not provide notice-and-comment required by the Administrative Procedure Act.[27]

Over a decade after the mandatory ninety-day deadline, the BOP still has not promulgated a valid final regulation as required by 18 U.S.C. § 3624(c)(6). Although advocacy groups criticized the BOP's proposed interim rule for its failure to provide greater access to community corrections,[28] little has changed.

The Commission should recommend that the BOP adopt the main themes of the 2011 comments on its interim rule. First, the individualized decision regarding transfer to community corrections should begin with a presumption of the maximum available community corrections, with considerations for delay informed by the individual designation considerations in § 3621(b). Second, in the absence of the pandemic emergency, the time in community corrections should contemplate stacking the residential reentry component on available home confinement to reach the maximum available pre-release custody. Third, the rule should explicitly reject the pre–Second Chance Act six-month limit to community corrections.

B. The Sentencing Commission Should Recommend Greater Use of Sentence Reductions and Community Corrections Under the Residential Drug Abuse Program Authorized by 18 U.S.C. § 3621(e)

In 1990, Congress mandated the creation of BOP programs to address prisoners' needs for substance abuse treatment, which included in-prison residential treatment: RDAP.[29] But few prisoners enrolled in the rigorous residential program. In 1994, Congress enacted 18 U.S.C. § 3621(e)(2)(B) to incentivize participation in RDAP by offering a sentence reduction of up to one year for nonviolent offenders.[30] Congress explicitly recognized reduction of prison overcrowding as a benefit of the program: "To the greatest extent possible, BOP shall prioritize the participation of nonviolent offenders in [RDAP] in a way that maximizes the benefit of sentence reduction opportunities for reducing the inmate population."[31]

The Commission has found RDAP effective at reducing recidivism.[32] But the BOP has systematically underutilized the statutory authority to reduce sentences in three basic ways: (1) by failing to allow prisoners with detainers to participate; (2) by only allowing participation at the end of the sentence, resulting in shorter sentence reductions; and (3) by disqualifying individuals with mere gun possession from early release.

Recommendation 3. The BOP should allow all statutorily eligible prisoners, including those with detainers, to participate in RDAP and receive the § 3621(e) sentence reduction.

Beginning in 1997, Congress required the BOP to provide residential treatment to "all eligible prisoners."[33] Congress defined the term "eligible prisoner" with only two criteria: a documented substance abuse problem and a willingness to participate in residential treatment.[34] The statute also defined "residential substance abuse treatment" as in-prison individual and group treatment, set apart from the general prison population, lasting at least six months.[35] The statutory early release incentive is available to a subset of eligible prisoners: those with nonviolent offenses who successfully complete the residential program.[36]

As first implemented, the BOP permitted all "eligible prisoners" to participate in RDAP and to receive the early release incentive if they met the statutory nonviolent offense criteria, regardless of detainers.[37] Since then, however, the BOP has administratively disqualified individuals with detainers—either for an immigration hold or due to a pending state case—from participating in RDAP and receiving the available sentence reduction, despite the mandatory statutory language regarding participation.[38]

How did this happen? Although the statute clearly defines residential treatment as *in-prison* treatment, the BOP added a new community-based component, to be completed during pre-release custody. This effectively excluded from RDAP participation anyone ineligible for community corrections—those with immigration holds or

state detainers. The BOP based its new requirement on a misconstrued comment from the American Psychiatric Association (APA) that favored more than one monthly session during the *transitional* component of RDAP—the time in BOP custody between residential treatment and release.[39] Although the APA corrected the BOP's erroneous understanding of its comment, explaining that all eligible prisoners should benefit from RDAP, regardless of detainers,[40] the BOP's regulation continues to exclude thousands of prisoners with detainers from eligibility for the sentence reduction by adding a third requirement for sentence reduction eligibility found nowhere in the statute: the ability to participate in community corrections.[41] For citizens of other countries, the disqualification not only precludes participation in a beneficial treatment program, but prevents them from receiving sentence reductions available to similarly situated U.S. citizens whose sentences can be reduced by up to a year.

The BOP had an institutional incentive to adopt this narrower and statutorily suspect definition of "all eligible prisoners." After originally reporting shortfalls in RDAP availability, the BOP simply redefined "eligible prisoners" to exclude those who could not be transferred to community corrections because of detainers.[42] Thus, the BOP administratively cut, with no statutory basis, the 33.6% of the 56,926 defendants sentenced in 2021 who were not U.S. citizens, plus those with state detainers, from the ability to even participate in RDAP.[43]

The Commission should strongly recommend that all eligible prisoners be able to participate in RDAP and to receive the sentence reduction incentive for successful completion of the in-prison residential and transitional components, if statutorily eligible, regardless of detainers. The Commission's recommendation not only would address overincarceration and rehabilitation but would carry out the statutory duty to avoid unwarranted disparities, especially disparities that frequently involve harsher treatment for racial minorities from other countries.

Recommendation 4. The BOP should encourage maximum sentence reductions and community corrections for successful completion of RDAP through earlier entry and greater availability of the program.

The sentence reduction authorized by Congress for successful completion of RDAP is "up to one year." But the BOP has consistently granted less than one year. The main reason for this insufficient utilization of statutory relief is that prisoners are not placed in RDAP until close to their projected release date. The lack of beds available in the program often results in a glut of need as sentences approach expiration.

Failing to fully implement the § 3621(e) sentence reduction program is inconsistent with Congress's aim for the program to "maximize[] . . . opportunities for reducing the inmate population."[44] In *Close v. Thomas*, the Ninth Circuit commented that the BOP's stinting administration of RDAP and the program's "insufficient capacity" had "created a troubling situation that calls for a legislative or regulatory remedy."[45]

By delaying entry and having insufficient beds, the BOP not only shortens sentence reductions but also limits time in community corrections. Even before the First Step Act, BOP rules favored maximum community corrections for RDAP participants.[46] Under the First Step Act's earned time credit program, RDAP is an evidence-based recidivism reduction program that authorizes even earlier community corrections.[47] And in-prison transitional programming is available when completion of the residential component results in additional time before community corrections placement or release. By following its own policies on community corrections, the BOP can increase the length of RDAP sentence reductions and decrease time behind prison walls.

The regulatory fix is easy: expand the availability of this excellent program and do not delay entry. The Commission should recommend that the BOP fund sufficient beds for all eligible prisoners, that participants should be able to enter RDAP earlier in their terms of imprisonment, and that the BOP should improve the in-prison transition program after the residential component is completed.

Recommendation 5. The BOP should not categorically disqualify nonviolent offenders from § 3621(e) sentence reductions based on the mere possession of firearms.

The sentence reduction statute broadly authorizes sentence reductions to any "prisoner convicted of a nonviolent offense" who successfully completes RDAP. But the BOP has greatly narrowed eligibility by treating the mere possession of a firearm as a disqualification.[48] The BOP has had trouble administratively articulating a reason for this disqualification, and there is no empirically based justification for the disqualification.

The initial litigation regarding gun possessors established that they are statutorily eligible nonviolent offenders within the meaning of § 3621(e). In May 1995, the BOP promulgated a regulation that defined the statutory term "nonviolent offense" as the converse of "crime of violence" as defined in 18 U.S.C. § 924(c).[49] At the same time, through a program statement, the BOP deemed individuals to be statutorily ineligible for a sentence reduction based on convictions involving the mere possession of a firearm, including being a felon in possession of a firearm (18 U.S.C. § 922(g)) or drug trafficking with a two-level specific offense characteristic for possession of a weapon.[50] The courts generally held that the program statement was inconsistent with the statute because, under the relevant statutes, gun possession and drug trafficking are nonviolent offenses.[51]

After the first wave of litigation, the BOP conceded that gun possessors were statutorily eligible for sentence reductions but published an interim rule and accompanying program statement that modified the crime of violence construct by substituting the Director's discretion to disqualify § 922(g) offenders and drug offenders with

a gun enhancement.[52] Ultimately, the Supreme Court upheld the BOP's discretionary authority to disqualify additional classes of statutorily eligible prisoners from the sentence reduction incentive.[53] But the lower courts, over years of litigation, found the interim rule invalid for violation of notice-and-comment under § 553(b) of the Administrative Procedure Act,[54] and a later iteration of the same rule was deemed arbitrary and capricious under § 706(2)(A) because the BOP "failed to set forth a rationale for its decision[.]"[55] This litigation history explains why, from 1995 to 2012,[56] hundreds of gun-possessing defendants were deemed eligible through court orders and BOP Operations Memorandums that implemented Ninth Circuit decisions.

The BOP has generated empirical evidence that prisoners who successfully complete RDAP have lower rates of recidivism.[57] The same appears to be true regarding prisoners who were initially disqualified from the § 3621(e) sentence reduction solely on the basis of gun possession and then successfully completed RDAP. The BOP should change its rule to establish that mere gun possessors, who are nonviolent within the meaning of the statute, should be deemed categorically eligible for sentence reductions for successful completion of RDAP.

C. The Sentencing Commission Should Recommend That the BOP Eliminate Sentence Computation Rules That Increase Prison Time

The BOP administers sentences through the Sentence Computation Manual.[58] For years, the Manual has increased sentences by failing to count time in official detention, by creating de facto consecutive sentences, and by failing to provide good time credits for the concurrent portion of federal sentences served in state custody. The BOP's practices, which appear to be inconsistent with the relevant statutes, are amenable to administrative correction to reduce overincarceration and to administer sentences fairly.

Recommendation 6. The BOP should provide pretrial custody credit for post-arrest time in immigration detention because it constitutes official detention under 18 U.S.C. § 3585(b).

Congress specifically instructed that all pretrial time in "official detention" after the offense should be credited against the federal term of imprisonment, as long as the time is not credited against another sentence.[59] Defendants can spend days, weeks, and sometimes months in immigration custody before their first appearance in federal court. Although immigration detention involves the same lost liberty as other pretrial custody,[60] the Manual instructs sentence calculators to refuse to count that time as "official detention."[61] The Ninth Circuit explicitly addressed the BOP program statement and found it to be inconsistent with the statute.[62] Nevertheless, the BOP continues to follow its Manual, creating dead time that prolongs incarceration for citizens of other countries.

Under the plain meaning of "official detention," defendants should receive credit for time served in U.S. Immigration and Customs Enforcement (ICE) custody. Failure to provide credit perpetuates unwarranted disparity of similarly situated defendants. For example, a person who robs a bank, who is first held in state custody for thirty days before being released to federal custody when the state case is dismissed, will receive full credit for the thirty days spent in state custody against the federal bank-robbery sentence. But a citizen of another country who spends thirty days in ICE custody before being charged in federal court will not receive credit against any later federal sentence. The Commission should strongly recommend that the BOP delete Manual language on immigration custody and explicitly identify immigration custody as "official detention" for the purposes of computing pretrial custody credit.

Recommendation 7. The BOP should eliminate de facto consecutive sentences under 18 U.S.C. § 3584(b).

The BOP's regional counsel once called the interaction between state and federal concurrent and consecutive sentences one of the "most confusing and least understood" areas of federal sentencing law.[63] The origin of that complexity is the BOP's interpretation of the pretrial custody statute (§ 3585(b)) to treat a state concurrent sentence, even one explicitly imposed to run concurrently with the prior federal sentence, as "another sentence" that forecloses federal credit. The following scenario is not unusual:

- A state arrest places a person in the state's primary jurisdiction.
- The federal prosecutor then files a writ of habeas corpus ad prosequendum to pursue a federal prosecution against the same person.
- The federal judge imposes a sentence that is silent on whether the federal sentence should run concurrently or consecutively with the yet-to-be-imposed state sentence.
- After the federal prosecution is complete, the person returns to state court, where the state judge orders the state sentence to run concurrently with the federal sentence.

In this scenario, under the BOP's existing policies, all of the time in primary state custody is credited only against the state sentence, even while the defendant is physically in federal custody during the execution of the writ of habeas corpus ad prosequendum. And the federal sentence does not commence until the state sentence is fully satisfied. Thus, the BOP executes such sentences as de facto consecutive, even though no judge ever ordered the sentence to run consecutively and the state judgment explicitly intends concurrency. This administrative decision increases time in custody by months and years.

There are two simple solutions that would allow the sentences in the above scenario to be executed concurrently, both as to pretrial credit and once the sentences are imposed. First, the BOP should administratively deem an

expressly concurrent sentence as not "another sentence" within the meaning of § 3585(b).[64] Then, the pretrial custody would be credited as any other sentence. Second, the BOP should not make the quintessential judicial decision of concurrency. Currently, once the federal sentence is imposed, the BOP conducts its own evaluation of whether the federal sentence should be allowed to commence while the individual remains in state custody serving the state sentence, through the discretionary nunc pro tunc (retroactive) designation of the state facility for service of the federal sentence. The constitutional problems with an executive-branch agency usurping the judicial role of deciding the concurrency questions are substantial.[65] And when the federal judgment is silent, respect for the state judge's concurrency decision avoids defendants serving more time than any judge determined was necessary to accomplish the purposes of sentencing.

The Commission should recommend that the BOP revise its sentence calculation procedures to avoid de facto creation of consecutive sentences. Instead, when the federal judgment is silent and the state judgment orders concurrency, the BOP should execute the sentences to run concurrently by not treating the state sentence as "another sentence" for pretrial credit purposes or by requiring nunc pro tunc designation to the state facility.

Recommendation 8. The BOP should provide good time credits on time adjusted to achieve concurrency under 18 U.S.C. § 3624(b).

The BOP's interpretation of § 3584(b) also creates problems when, after a state sentence has been imposed, the federal judge exercises authority under 18 U.S.C. § 3584(a) to run the sentence concurrently. Because the BOP treats the state judgment as "another sentence," despite the federal judge's concurrency order, the time in state custody prior to arriving in federal court will not be credited under § 3585(b). From the multiple amendments to U.S.S.G. § 5G1.3, the general work-around, under the guidelines, has been for the federal sentencing judge to adjust the term of imprisonment down by the amount of time in state custody prior to the federal sentencing, with a notation in the judgment that the adjustment is to achieve concurrency due to the manner in which the BOP forecloses prior custody credits under § 3585(b).[66]

This awkward way of achieving full concurrency routinely creates unwarranted disparity because the BOP does not consider the credited time in state custody to be part of the federal sentence and refuses to award good time credits under 18 U.S.C. § 3624(b) to well-behaved prisoners for that time. This is different than how the BOP treats other types of pre-sentence custody credit. For time credited under 18 U.S.C. § 3585(b), the BOP awards good conduct time credit, even when that time is served in state custody. In response to litigation regarding the disparities caused by forcing the concurrent portion of a federal sentence—which can be months or years long—to be served day-for-day, the BOP asserted that sentencing judges may grant a further variance to provide the good time credits: "A defendant whose federal sentencing has been long delayed may seek a variance based on the lost opportunity for good conduct time credit, which the sentencing court has the discretion to grant."[67]

But variances are an inappropriate and inadequate way of achieving full concurrency including good time credits. Defendants would first need to be aware that they were not going to receive good time credits, then realize, despite no mention in the Guidelines Manual, that a variance should be requested, then depend on discretion rather than the BOP's normal awarding of earned good time credits. And the wholesale loss of good time credits can create large unwarranted disparities by treating similarly situated defendants differently in terms of actual custody, particularly because the amount of time in state custody often depends on whether the individual exercised various pretrial and trial rights. Thus, similarly situated defendants end up serving varying times of actual custody based on the failure to grant good time credits, even when the total sentence intended by the judge is identical, based on the arbitrary timing of sentencing.[68]

The Commission should recommend that the BOP revise its sentence calculation rules to award good time credits earned during the concurrent part of an adjusted sentence.

D. The Sentencing Commission Should Recommend That the BOP Revise Its Rule on Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A)(i) and Submit Motions on Behalf of Eligible Prisoners, Leaving Solely to the Judge the Decision Whether the Motion Should Be Granted

The Sentencing Reform Act included the compassionate release statute that, as originally written, authorized the sentencing judge, only upon motion of the BOP, to reduce the term of imprisonment after considering the factors set forth in 18 U.S.C. § 3553(a), if "extraordinary and compelling reasons" warrant such a reduction.[69] Congress viewed § 3582(c) as a mechanism to fill the "substantial void in the sentencing system" left by the repeal of discretionary judicial review of sentences under old Rule 35(b) while providing a "safety valve" otherwise unavailable.[70] "The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations."[71]

Congress expressly delegated to the Commission the task of describing and providing examples of "extraordinary and compelling reasons."[72] Until 2007, however, the Commission failed to do so, leaving the BOP to create and apply its own criteria. The BOP's policies created in that gap time were so restrictive that motions were rarely filed and many individuals died before the agency even decided whether to file.[73] Federal defenders and advocacy groups pointed out the numerous ways in which the BOP rules thwarted congressional intent, particularly because the BOP's policies allowed it to assess other factors, besides the

existence of extraordinary and compelling reasons, and to refuse to exercise its motion-filing authority when it thought the motion should be denied (which was almost always).[74] The BOP's implementation of compassionate release was recognized as a miserable failure, resulting in needless and expensive incarceration.[75]

In 2016, the Commission expanded the definition of "extraordinary and compelling reasons" and "encouraged" the BOP in its gatekeeper role to bring motions for reduction in sentence more frequently, whenever a person met the Commission's criteria.[76] The Commission also noted that the BOP could find that extraordinary and compelling reasons existed beyond those explicitly identified by the Commission.[77] But the BOP's rules, although updated, did not adopt all of the Commission's standards and continued to include prejudging whether the motion should be granted, not simply whether extraordinary and compelling reasons existed.[78]

Then the First Step Act changed everything by providing an avenue for defendant-initiated compassionate release motions.[79] As the Commission has recognized, the courts have developed a robust area of law construing "extraordinary and compelling reasons" in the absence of an applicable policy statement and have applied those standards during the coronavirus pandemic, resulting in thousands of reduced sentences.[80] But only 1% of the compassionate release motions originated with the BOP, despite the First Step Act's mechanisms encouraging such filings.

Recommendation 9. The BOP should file compassionate release motions when it factually identifies potential extraordinary and compelling reasons, without prejudging the merits of the sentence reduction, and it should adopt Commission standards while expanding potential reasons for compassionate release.

The Commission should recommend that the BOP administer its part of the compassionate release statute in three ways that assume its proper role while keeping sentencing discretion with the judge.

First, the BOP should act quickly on reduction in sentence requests. The amended statute permits persons in prison to file their own motions directly with the sentencing court thirty days after having submitted a request to the warden. For cases of terminal illness, Congress specifically required even swifter action. The BOP must "notify the defendant's attorney, partner, and family members that they may prepare and submit" a request for compassionate release on the defendant's behalf within seventy-two hours of the diagnosis, and the BOP must process sentence reduction requests in those cases within fourteen days.[81] These provisions should result in the BOP making decisions whether or not to file sentence reduction motions without waiting for exhaustion of prisoners' requests.

Second, the BOP should eliminate the policies under which it prejudges the merits of a compassionate release motion instead of simply identifying the potential factual bases for extraordinary and compelling reasons. As the Commission and Congress recognize, whether a motion to reduce sentence *should* be granted is purely a judicial question. The BOP's current rules—that require it to assess, for example, whether release would "minimize" the severity of the offense—usurp the judicial role in deciding whether a sentence reduction is warranted under the § 3553(a) factors.

Third, the BOP should incorporate the Commission's examples of "extraordinary and compelling reasons" into its program statement, consistently with Congress's delegation of that authority to the Commission. And the BOP should expand its criteria to include additional factors favoring a finding of extraordinary and compelling reasons for compassionate release, such as the district court's failure to anticipate developments that take place after the first sentence that "produces unfairness to the defendant[.]"[82]

E. The Sentencing Commission Should Recommend That the BOP Revive the Boot Camp Program, with Sentence Reduction and Expanded Community Corrections as Benefits for Completion

Both Congress and the Commission determined that, to avoid overincarceration of defendants with little criminal history, a sentence to thirty months or less could be served by six months of boot camp, a six-months sentence reduction, and the remaining time in community corrections.[83] The boot camp program, also known as "shock incarceration," provided not only substantially less time in prison but a disciplined environment for job training, education, substance abuse treatment, and counseling.[84] In 2004, with no prior notice, the BOP defunded the program, purportedly for fiscal reasons.[85] But the slapdash fiscal assessment included no accounting for the huge savings from decreased prison time or for the enormous difference in the lives of individuals with scant criminal history and convictions for low-level offenses who returned to their communities months and years earlier. The BOP should reinstitute this alternative to prison because of the rehabilitative benefits, the reduction of incarceration rates, and the long-term fiscal savings.[86]

Recommendation 10. The BOP should reinstate the boot camp program in accordance with its congressional authorization and the implementing regulation, which include both a six-month sentence reduction and expansion of community corrections.

The Commission promulgated a guideline addressing the boot camp program that is still on the books: U.S.S.G. § 5F1.7. This sentencing option, now illusory, should be available in the real world. The Commission should recommend that the BOP reinstate the boot camp program for people with qualifying offenses who want to participate. By doing so, the BOP would reduce prison costs in the long run and prevent overincarceration.

The program "has the benefit of returning very low risk offenders sooner to their families and their jobs,"

contributing to "inmate family stability, which criminological research shows to be a key element in reducing juvenile delinquency and crime among future generations."[87] The boot camp program was well received by almost all participants in the federal system. The Commission should recommend that the BOP both revive and expand the program, identifying eligible inmates upon designation and providing them the opportunity to participate immediately upon the commencement of their sentences, both to offer an incentive for good behavior and to allow earlier placement in residential reentry centers.

F. The Sentencing Commission Should Recommend That the BOP Fully Implement the First Step Act's Earned Time Credit Program (18 U.S.C. § 3632)

A major innovation of the First Step Act was the new earned time credit program, which allowed eligible individuals in BOP custody to earn earlier transfer to pre-release custody or earlier supervised release by participation in "evidence-based recidivism reduction programming or productive activities."[88] The groundbreaking aspect of the new program was its call for a new "risk and needs assessment system" to gauge each person's recidivism risk and assign them to individualized recidivism-reducing programming based on their "specific criminogenic needs."[89] By incentivizing programming, Congress aimed to promote public safety while reducing time behind bars.[90] The program's anticipated cost savings from shorter sentences could then be "reinvested" into further recidivism reduction programming.[91]

But the BOP's rollout of the earned time credit system was not smooth: for years, the BOP delayed the implementing regulation and included restrictions that undermined the program's intent.[92] The risk assessment tool was also plagued by errors.[93] Fortunately, some early glitches have been corrected, and the regulations promulgated in January 2022 take a more expansive approach to awarding and applying credits. However, three areas should be the subject of Commission recommendations.

Recommendation 11. The BOP should expand funding for the rehabilitative programs that result in lower PATTERN scores.

PATTERN, the risk assessment tool adopted by the BOP to assess each individual's risk of recidivism, is a key part of the earned time credit program. PATTERN uses both static and dynamic factors to score individuals into four categories of recidivism risk: minimum, low, medium, and high.[94] Those categories are critical to earning time credits and receiving the intended benefits. Minimum- and low-risk individuals earn more credits for every thirty days of programming, and they receive the benefit of an actual sentence reduction when sufficient credits are accrued.[95] Medium- and high-risk individuals, by contrast, earn fewer credits, they can only receive earlier pre-release custody, not an actual sentence reduction, and there are additional barriers to obtaining that benefit.[96]

As a result, it is critically important that individuals have a realistic opportunity to reduce their recidivism risk category while they are serving their sentences. In fact, Congress required that the risk assessment system be "dynamic," such that scores "can reasonably be expected to change" on the basis of progress and regression in prison.[97] Thus, PATTERN scores go down when individuals complete rehabilitative, educational, and vocational programming. But prisoners can receive those score reductions only when programming is available—and, too often, the types of programs recognized as effective are either overcommitted or nonexistent in certain facilities.[98] Full implementation of the First Step Act should include strong recommendations in favor of expanded availability of the types of programs that reduce recidivism.[99]

Recommendation 12. The BOP should promulgate rules for transferring individuals with medium- and high-risk scores to pre-release custody so long as they have maintained good institutional conduct and have productively engaged in available programming.

By statute, individuals assessed as minimum- or low-risk under PATTERN can easily apply their credits to obtain earlier release or transfer to pre-release custody.[100] By contrast, those assessed as medium- or high-risk must satisfy additional criteria. Specifically, they must have shown a "demonstrated recidivism risk reduction," and they must have a transfer petition approved by the warden after the determination that

(aa) the prisoner would not be a danger to society if transferred to pre-release custody or supervised release;

(bb) the prisoner has made a good faith effort to lower recidivism risk through participation in recidivism reduction programs or productive activities; and

(cc) the prisoner is unlikely to recidivate.[101]

At present, the BOP has no existing policy or regulation governing the exercise of this "warden exception." Instead, the BOP has treated those with medium and high PATTERN scores as categorically ineligible for transfer to pre-release custody. In other words, only those prisoners who are both eligible to earn time credits based on their offense of conviction *and* assessed as minimum- or low-risk are currently receiving any benefit from the First Step Act's programming incentive. That amounts to just one in five prisoners (20.49%).[102] This is particularly problematic given that the PATTERN scoring system is not racially neutral. Well over half of African American men in custody (57%) are scored as medium- or high-risk, compared to just one-third of white men (35%).[103]

But there are many prisoners who, despite scoring higher on PATTERN, have demonstrated through good prison conduct, completion of prison programming, and individualized evaluations that they do not constitute a significant risk in the community. The BOP should adopt a policy for exercising the warden discretion identified in

the statute that includes factors evidencing efforts to reduce recidivism risk, such as no disciplinary write-ups for the previous twelve months, responsible prison job performance, and completion of rehabilitative programs.

Recommendation 13. The BOP should revoke its informal rule that purports to categorically exclude persons with detainers and eighteen months or less remaining on their sentences from eligibility for sentence reductions based on earned time credits.

On September 8, 2022, the BOP, in an informal inmate message, announced the categorical exclusion of two groups from sentence reductions based on earned time credits: (1) persons with eighteen months or less remaining on their sentences and (2) persons with detainers.[104] Both groups were statutorily eligible for sentence reductions before the BOP adopted the general disqualifications. These dramatic new restrictions, issued in violation of the Administrative Procedure Act's notice-and-comment requirements, promote unwarranted sentencing disparity, undermine congressional policies, and probably violate the underlying provisions of the First Step Act. The Commission should recommend that the informal rule be dropped.

IV. Conclusion

Congress instructed the Sentencing Commission to recommend changes to the nature or capacity of the BOP. These recommendations should include that the BOP administratively change practices that are resulting in defendants spending too much time in prison, receiving less rehabilitative programming, and wasting millions in taxpayer dollars. Right now, sentenced persons are spending more time in prison than is necessary to accomplish the legitimate goals of sentencing, often resulting in unwarranted sentencing disparities. Through greater funding of rehabilitative programs, which can lower the time in prison for some, the BOP's long-term fiscal interests are served while assuring that statutory rehabilitative goals and methods are not shortchanged or abandoned. At this critical juncture, with both a newly constituted Commission and a newly installed BOP Director, the Commission should offer the BOP a full range of statutorily permitted recommendations that will ameliorate the overuse of prison and promote the greater use of community corrections.

Notes

1 S. Rep. No. 98–225, at 175 (1983).

2 Government Accountability Office, Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison (Feb. 2012); Thomas W. Hillier III et al., Federal Public and Community Defenders, GAO Report Reveals Multiple Ways to End the Waste of Millions on Unnecessary Over-incarceration (Apr. 4, 2012).

3 28 U.S.C. § 994(g).

4 "The United States has less than 5 percent of the world's population, yet nearly 25 percent of its prisoners." American Bar Association, ABA Ten Principles to Reduce Mass Incarceration (Aug. 2022) (adopted by the House of Delegates in Revised Resolution 604).

5 Recognizing that the statutory fifty-four days in 18 U.S.C. § 3624(b) is almost exactly 15% of 365, the Commission adjusted the ranges in the Sentencing Table for good time credit "that would be earned under the guidelines" by adding 15% to the baseline. U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 23 (1987).

6 Max Hellman, *Barber v. Thomas: The Supreme Court's Interpretation of the Federal Good Time Credits Statute is Undermining Sentencing Reform*, 42 McGeorge L. Rev. 873, 879–80 (2011).

7 First Step Act of 2018, Pub. L. No. 115–391, § 102(b)(1)(B), 132 Stat. 5194, 5210–13 (Dec. 21, 2018); Staff of S. Comm. on the Judiciary, 115th Cong., S.3649, The First Step Act Section-by-Section Summary 3 (Nov. 15, 2018) ("Amends Section 3624 of title 18 of the U.S. Code *to clarify* congressional intent behind good time credit[.]") (emphasis added).

8 "And if the only way to call attention to the human implications of this case is to speak in terms of economics, then it should be noted that the Court's interpretation comes at a cost to the taxpayers of untold millions of dollars." Barber v. Thomas, 560 U.S. 474, 494 (2010) (Kennedy, J., dissenting).

9 U.S. Dep't of Justice, An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories 4 (Feb. 1994).

10 Annual Determination of Average Cost of Incarceration Fee, 86 Fed. Reg. 49060 (Sept. 2, 2021); Home Confinement Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 87 Fed. Reg. 36787 (Aug. 31, 2021).

11 18 U.S.C. § 3624(c) (1987). The statute also institutionalized cooperation with the probation office during this transition, now codified as 18 U.S.C. § 3624(c)(3): "The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such prerelease custody."

12 Crime Control Act of 1990, Pub. L. No. 101–647, § 2902, 104 Stat. 4789, 4913; 18 U.S.C. 3624(c) (1990) ("The authority provided by this subsection may be used to place a prisoner in home confinement.").

13 18 U.S.C. § 3624(c) (2008).

14 18 U.S.C. § 3624(c)(1) and (2) (2008).

15 34 U.S.C. § 60541.

16 34 U.S.C. § 60541(a)(2)(A).

17 34 U.S.C. § 60541(c)(2).

18 First Step Act of 2018, Pub. L. No. 115–391, § 601, 132 Stat. 5194, 5237 (2018); 18 U.S.C. § 3621(b) (2018).

19 18 U.S.C. § 3624(c)(2) (2018) (emphasis added).

20 18 U.S.C. § 3624(g)(11).

21 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, § 12003(b)(2), 134 Stat. 281, 516 (2020).

22 Statement of David E. Patton, Before the Judiciary Committee of the House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security, Oversight Hearing on "The Federal Bureau of Prisons and Implementation of the First Step Act," at 10–11 and Exhibit B (Oct. 17, 2019)

23 *Id.*, Exhibit B at 4–6.

24 18 U.S.C. § 3624(c)(6) (2008) (emphasis added).

25 Sacora v. Thomas, 628 F.3d 1059, 1063 (9th Cir. 2010) (citing Pre-Release Community Confinement, 73 Fed. Reg. 62440-01 (Oct. 21, 2008) (codified at 28 C.F.R. §§ 570. 20–.22)).

26 *See Sacora*, 628 F.3d at 1063–64 (describing the informal rules).

27 *Id.* at 1065 ("The district court granted the petition [for class of federal habeas petitioners] with respect to the BOP's formal regulations, 28 C.F.R. §§ 570.20–.22, finding that the BOP's failure to use notice-and-comment provisions in promulgating those regulations violated the [Administrative Procedure Act], and enjoined the BOP from considering inmates for placement in RRCs pursuant to those regulations.").

[28] *See* Pre-Release Community Confinement, 76 Fed. Reg. 58197-01 (Sept. 20, 2011).

[29] Crime Control Act of 1990, Pub. L. No. 101–647, § 2903, 104 Stat. 4789, 4913 (codified at 18 U.S.C. § 3621(b)).

[30] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 32001, 108 Stat. 1796, 1897 (codified at 18 U.S.C. § 3621(e)).

[31] Conf. Rep. to Consolidated Appropriations Act of 2010, 155 Cong. Rec. H13631 03, at H13887 (daily ed. Dec. 8, 2009), Pub. L. 111–117, 123 Stat. 3034 (Dec. 16, 2009)

[32] U.S. Sentencing Comm'n, Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010 5 (May 2022).

[33] 18 U.S.C. § 3621(e)(1)(C).

[34] 18 U.S.C. § 3621(e)(5)(i) and (ii).

[35] 18 U.S.C. § 3621(e)(5)(A).

[36] 18 U.S.C. § 3621(e)(2).

[37] BOP Program Statement 5330.10, Drug Abuse Programs Manual, Inmate, Ch. 6 at 2 (May 25, 1995) (completion of applicable transitional services programs required for sentence reduction).

[38] Drug Abuse Treatment Programs: Early Release Consideration, 61 Fed. Reg. 25121-01 (May 17, 1996); BOP Program Statement 5330.10, Change Notice, Ch. 6 at 7.3 (May 17, 1996).

[39] Letter from Melvin Sabshin, M.D., Medical Director, American Psychiatric Association, to Kathleen Hawk, Director, Bureau of Prisons (July 18, 1995); Drug Treatment and Intensive Confinement Center Programs: Early Release Consideration, 65 Fed. Reg. 80745-01, 80746 (Dec. 22, 2000) ("The comment by the American Psychiatric Association on the adequacy of transitional services became the basis for the second interim rule.").

[40] Letter from Steven M. Mirin, M.D., Medical Director, American Psychiatric Association, to Kathleen M. Hawk Sawyer, Director, Bureau of Prisons, at 2 (June 21, 2000).

[41] BOP Program Statement 5330.11, Early Release Procedures Under 18 U.S.C. § 3621(e), § 2.5.1(b) (Mar. 16, 2009).

[42] Drug Abuse Treatment Program: Subpart Revision and Clarification and Eligibility of D.C. Code Felony Offenders for Early Release Consideration, 74 Fed. Reg. 1893 (Jan. 14, 2009). The Commission itself adopted this statistical illusion in its description of RDAP in the May 2022 report on RDAP.

[43] U.S. Sentencing Comm'n, Annual Report and Sourcebook of Federal Sentencing Statistics tbl.9 (2021); *see* Fed. Bureau of Prisons, Inmate Citizenship (Aug. 2022) (16% of the prison population are from other countries).

[44] Conf. Rep. to Consolidated Appropriations Act of 2010, *supra* note 30.

[45] 653 F.3d 970, 976 (9th Cir. 2011).

[46] 28 C.F.R. § 550.54(a)(1)(ii) (Incentives for RDAP participation).

[47] *See* 18 U.S.C. § 3632(d)(4)(A); 18 U.S.C. § 3624(g).

[48] 28 C.F.R. § 550.55(b)(5)(ii).

[49] 28 C.F.R. § 550.58 (May 1995).

[50] BOP Program Statement No. 5162.02 (July 24, 1995).

[51] The initial decisions from the Ninth Circuit held that gun possessors were statutorily eligible. Downey v. Crabtree, 100 F.3d 662, 663 (9th Cir. 1996); Davis v. Crabtree, 109 F.3d 566, 569 (9th Cir. 1997). The Circuits came to conflicting conclusions, with the majority following the Ninth Circuit's lead.

[52] Jacks v. Crabtree, 114 F.3d 983, 985 n.2 (9th Cir. 1997) ("Here, the Bureau concedes that petitioners are eligible under section 3621(e)(2)(B), but argues that they are ineligible under the Bureau's regulation creating an additional eligibility requirement."); BOP Program Statement No. 5330.10 Ch. 6 at 1 (Oct. 9, 1997); 62 Fed. Reg. 53690-01 (Oct. 15, 1997).

[53] Lopez v. Davis, 531 U.S. 230, 244 (2001)

[54] Paulsen v. Daniels, 413 F.3d 999, 1005–06 (9th Cir. 2005); Bohner v. Daniels, 243 F. Supp. 2d 1171, 1174–76 (D. Or. 2003).

[55] Arrington v. Daniels, 516 F.3d 1106, 1114 (9th Cir. 2008).

[56] Peck v. Thomas, 697 F.3d 767, 773 (9th Cir. 2012).

[57] U.S. Sentencing Comm'n, *supra* note 31.

[58] BOP Program Statement 5880.28 (July 19, 1999).

[59] 18 U.S.C. § 3585(b).

[60] Megan Shields Casturo, Comment, *Civil Immigration Detention: When Civil Detention Turns Carceral*, 122 Penn. St. L. Rev. 825, 835 (2018) ("[I]mmigration detention facilities are notorious for their carceral conditions.").

[61] BOP Program Statement 5880.28, at 1–15A (Sept. 20, 1999).

[62] Zavala v. Ives, 785 F.3d 367 (9th Cir. 2015).

[63] Henry J. Sadowski, Interaction of Federal and State Sentences When the Federal Defendant Is Under State Primary Jurisdiction 1 (Nov. 18, 2009).

[64] Stephen R. Sady, *State Sovereignty and Federal Sentencing: Why De Facto Consecutive Sentencing by the Bureau of Prisons Should Not Survive Bond v. United States*, 27 Fed. Sent'g Rep. 56, 59 (Oct. 2014).

[65] The concurrency decision "concerns a matter of discretion traditionally committed to the Judiciary," and therefore, should not "be left to employees of the same Department of Justice that conducts the prosecution." Setser v. United States, 566 U.S. 231, 236, 242 (2012) (*citing* Oregon v. Ice, 555 U.S. 160, 168–69 (2009)).

[66] U.S.S.G. §§ 5G1.3(b), (d); 5K2.23; *see also* U.S.S.G. § 5G1.3, Application Note 4(E) ("[A]void confusion with the [BOP]'s exclusive authority under" § 3585(b) by noting in the judgment that departure to achieve concurrency not be described as credit for time served).

[67] Brief of Respondent, Schleining v. Thomas, 642 F.3d 1242 (9th Cir. 2011) (No. 10-35792), 2011 WL 991513, *30; *accord* Brief of Respondent, Lopez v. Terrell, 654 F.3d 176 (2d Cir. 2011) (No.10-2079), 2011 WL 680803, *8. In *Lopez*, the court reversed the district court based on deference to the BOP; in *Schleining*, the court noted the lack of BOP rules directly addressing the question.

[68] In *Witte v. United States*, the Court noted § 5G1.3's overall purpose of avoiding disproportionate sentencing by seeking to "approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time (i.e., had all of the offenses been prosecuted in a single proceeding)." 515 U.S. 389, 404–05 (1995); *see* United States v. Wilson, 503 U.S. 329, 334 (1992) (no reason for pre-sentence detention credit "to depend on the timing of sentencing").

[69] 18 U.S.C. § 3582(c)(1)(A)(i) (1987).

[70] Comprehensive Crime Control Act of 1983, Hearing on S. 829 before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary, 98th Cong., at 491 (1983); Sen. Comm. on Judiciary, S. Rep. 98–225, 98th Cong., 1st Sess., at 121 (1983), 1984 U.S.C.C.A.N. 3182, 3304.

[71] 1984 U.S.C.C.A.N. at 3304.

[72] 28 U.S.C. § 994(t).

[73] *See generally* Hum. Rts. Watch & Fams Against Mandatory Minimums, The Answer Is No: Too Little Compassionate Release in US Federal Prisons (Nov. 2012); Mary Price, *A Case For Compassion*, 21 Fed. Sent'g Rep. 170 (2009); Stephen Sady & Lynn Deffebach, *Second Look Resentencing Under 18 U.S.C. § 3582(c) As an Example of Bureau of Prisons Policies That Result in Overincarceration*, 21 Fed. Sent'g Rep. 167 (2009).

[74] *See* Comments on Docket No. BOP 1168, 28 CFR part 571, Compassionate Release, at 4 (Feb. 3, 2014) ("[T]he structure and legislative history of the sentence reduction authority, 18

U.S.C. § 3582(c)(1)(A), leave little doubt that Congress intended that the Bureau's role be limited to identifying prisoners with extraordinary and compelling circumstances and of bringing their cases to the courts.").

75 U.S. Dep't of Justice, Evaluation & Inspection Div., I-2013-006, The Federal Bureau of Prisons' Compassionate Release Program 11 (2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered.").

76 U.S.S.G. § 1B1.13 (2016).

77 U.S.S.G. § 1B1.13, Application Note 1(D).

78 BOP Program Statement 5050.50, *Compassionate Release/Reduction in Sentences* (Jan. 17, 2019). For example, Section 7 of the current program statement requires the BOP to consider the individual's "personal history," the individual's age at the time of the offense, and "whether release would minimize the severity of the offense."

79 First Step Act of 2018, Pub. L. No. 115–391, § 603(b), 132 Stat. 5194, 5239 (2018).

80 U.S. Sentencing Comm'n, Compassionate Release Data Report, Fiscal Year 2020 to 2021 (2022).

81 18 U.S.C. § 3582(d)(2)(A). For cases of a physical or mental disability, the amended statute includes requirements of family notification and assistance, but it does not require the same swift timeline. 18 U.S.C. § 3582(d)(2)(B).

82 *Setser*, 566 U.S. at 243.

83 18 U.S.C. § 4046; 28 C.F.R. § 524.31(b); U.S.S.G. § 5F1.7.

84 18 U.S.C. § 4046(b).

85 Serrato v. Clark, 486 F.3d 560, 569–70 (9th Cir. 2007).

86 *See* Miles D. Harer & Jody Klein-Saffran, U.S. Dep't of Justice, Fed. Bureau of Prisons, Evaluation of Post-Release Success for the First 4 Classes Graduating from the Lewisburg Intensive Confinement Center 6–7 (1996) (the federal boot camp program had "demonstrated success regarding low rearrest rates" and resulted in "substantially lower" recidivism rates than similar state programs).

87 *Id.* at 2.

88 18 U.S.C. § 3632(d)(4).

89 18 U.S.C. § 3632(a).

90 H.R. Rep. No. 115–699, at 22 (2018) (recognizing that "the vast majority of federal prisoners will one day be released from BOP custody" and that it is in "the fiscal interest of the government to reduce recidivism [and] in the public safety interest as well[.]"

91 *Id.*

92 *See* Cazares v. Hendrix, 575 F. Supp. 3d 1289, 1299–1302 (D. Or. 2021) (granting partial habeas corpus relief based on the BOP's failure to implement statutory language in a timely manner).

93 U.S. Dep't of Justice, Office of Justice Programs, 2020 Review and Revalidation of the First Step Act Risk Assessment Tool 5–7 (Jan. 2021).

94 U.S. Dep't of Justice, Office of Justice Programs, 2021 Review and Revalidation of the First Step Act Risk Assessment Tool 28 (Dec. 2021).

95 *See generally* 18 U.S.C. § 3632(d)(4)(A); 18 U.S.C. § 3624(g).

96 *Id.*

97 18 U.S.C. § 3631(b)(4)(C).

98 *See* First Step Act Independent Review Comm., Report of the Independent Review Committee Pursuant to the Requirements of Title I Section 107(g) of the First Step Act (FSA) of 2018 (P.L. 115–391) 2–3 (Dec. 21, 2020) (finding insufficient program availability both during the pandemic and after an anticipated return to pre-pandemic levels).

99 Although PATTERN was validated by a small list of programs that existed before the First Step Act, the current version of PATTERN score reduction should also account for all types of rehabilitative programs now deemed eligible for earned time credit.

100 18 U.S.C. § 3624(g).

101 18 U.S.C. § 3624(g)(1)(D)(II).

102 U.S. Dep't of Justice, Office of the Att'y Gen., First Step Act Annual Report 26 (Apr. 2022).

103 *Id.*

104 Walter Palvo, *Bureau of Prisons' Interpretation of First Step Act Will Leave Thousands of Inmates Incarcerated*, Forbes (Sept. 9, 2022).

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

Natasha Sen, Chair
Patrick F. Nash, Vice Chair

Circuit Representatives
Sara E. Silva, First Circuit
Susan Walsh, Second Circuit
Susan Lin, Third Circuit
Marshall H. Ellis, Fourth Circuit
Marlo Cadeddu, Fifth Circuit
Steve Nolder, Sixth Circuit
Michelle L. Jacobs, Seventh Circuit
John R. Murphy, Eighth Circuit
Lynn E. Panagakos, Ninth Circuit
Jeremy Delicino, Tenth Circuit
Jon Sale, Eleventh Circuit
Pleasant S. Brodnax, III, D.C. Circuit
Stacey D. Neumann, At-Large
Deborah Roden, At-Large
Leigh M. Skipper, At-Large

August 1, 2023

Hon. Carlton W. Reeves
Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Comment on Possible Policy Priorities for the 2024 Amendment Cycle

Dear Judge Reeves:

In response to the Commission's request for comment on its proposed priorities for the amendment cycle ending May 1, 2024, the Practitioners Advisory Group ("PAG") supports the Commission's decision to take a different approach and review the effectiveness of current sentencing, penal and correctional practices in fulfilling the purposes of the Sentencing Reform Act, 28 U.S.C. § 991(b)(2).

Among the list of proposed priorities for review, the PAG asks the Commission to prioritize the following four areas: (1) reviewing the effectiveness of BOP practices in meeting the purposes of sentencing under 18 U.S.C. § 3553(a)(2) (proposed priority 1); (2) promoting court-sponsored diversion and alternatives-to-incarceration programs (proposed priority 2); (3) examining the treatment of youthful offenders (proposed priority 6); and (4) comparing sentences imposed in cases disposed of via trial versus plea (proposed priority (10)(C)).

In addition to the Commission's listed possible priorities, the PAG also asks the Commission to renew its consideration of how acquitted conduct is treated under the guidelines. In the term just ended, the U.S. Supreme Court declined to take up the issue of acquitted conduct, in part, because "[t]he Sentencing Commission . . . has announced that it will resolve questions around acquitted-conduct sentencing in the coming year. If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented." *McClinton v. United States*, 600 U.S. __, 143 S.Ct. 2400, 2403 (2023) (Sotomayor,

J.) (statement respecting denial of cert.); *see also id*. (noting that because "the Sentencing Commission is currently considering the issue[,] [i]t is appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant certiorari in a case involving the use of acquitted conduct.") (Kavanaugh, J., joined by Gorsuch and Barrett, JJ.) (statement respecting denial of cert.). The Supreme Court is waiting for the Commission to address this issue, and the PAG urges the Commission to do so.

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's input regarding the Commission's proposed priorities for the upcoming amendment cycle. Once the Commission settles upon its priorities, the PAG can provide substantive comments on those priorities. We look forward to further opportunities to discuss these priorities with the Commission and its staff.

Respectfully submitted,

/s/Natasha Sen
Natasha Sen, Esq., Chair
LAW OFFICE OF NATASHA SEN
P.O. BOX 871
MIDDLEBURY, VERMONT 05753
(802) 825-6385

/s/ Patrick F. Nash
Patrick F. Nash, Esq., Vice Chair
NASH ▪ MARSHALL, PLLC
129 WEST SHORT STREET
LEXINGTON, KENTUCKY 40507
(859) 254-3232

PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

Jill Bushaw, Chair, 8th Circuit
Joshua Luria, Vice Chair, 11th Circuit

Circuit Representatives
Laura M. Roffo, 1st Circuit
Tandis Farrence, 2nd Circuit
Alex Posey, 3rd Circuit
Barbara Carrigan, 4th Circuit
Andrew Fountain, 5th Circuit
David Abraham, 6th Circuit
Rebecca Fowlie, 7th Circuit
Melinda Nusbaum, 9th Circuit
Daniel Maese, 10th Circuit
Renee Moses-Gregory, DC Circuit
Amy Kord, FPPOA Ex-Officio
Carrie E. Kent, PPSO Ex-Officio

August 1, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following comment pertaining to the United States Sentencing Commission's request for comment regarding the 2023 Proposed Priorities.

(1) Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or amendments.

Chapter 1 of the Guidelines Manual in The Basic Approach (Policy Statement) section discusses that one of the basic objectives of the Sentencing Reform Act of 1984 was honesty in sentencing. Specifically, Chapter 1 reflects "It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one third of the sentence imposed by the court."

POAG believes that the sentencing computation process in relation to time credits under the First Step Act undermines, to some extent, this basic objective. As a result of sweeping changes to good time credit and the various ways in which it may be earned, courts now have less certainty as to the actual amount of time a defendant will serve. Where officers previously could readily provide the Court with estimates of good time credits available to defendants, this is no longer feasible as it is more dynamic and presently evolving, thus courts are not as informed of the actual amount of time will be served for the sentence imposed. Therefore, POAG would suggest any assessment of Bureau of Prison practices focus on the computation of time credit under the First Step Act given

that the certainty of the actual amount of time served has diminished and how that may impact the sentencing stage of the process.

The First Step Act also expanded the criteria of the Federal Location Monitoring (FLM) Program, which consequently reduced the amount of time a defendant was incarcerated and increased the amount of time a defendant was on home detention. Therefore, POAG also suggests any assessment of Bureau of Prisons practices examine the expanded Federal Location Monitoring (FLM) program and whether changes to that program comport with the purposes of sentencing, namely, whether FLM achieves the same purpose of punishment intended by the sentence of incarceration that was imposed at the time of sentencing.

(2) Promotion of court-sponsored diversion and alternatives-to-incarceration programs by expanding the availability of information and organic documents pertaining to existing programs (e.g., Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program) through the Commission's website and possible workshops and seminars sharing best practices for developing, implementing, and assessing such programs.

POAG notes that those charged in federal court who may be appropriate for formal diversion programs may be a small percentage, as the type of cases appropriate for diversion are often charged at the state level. Further, many of the diversion and alternative-to-incarceration cases are handled at the pretrial level, versus the post-conviction and sentencing level. Therefore, while several members of POAG have some familiarity with different programs offered in various districts, our overall level of familiarity is lacking as some programs are not administered by probation officers, or they occur prior to formal charges being filed or at the pretrial stage.

Nonetheless, as noted in POAG's October 17, 2022, submission regarding the 2023 proposed priorities, POAG supported the Commission's study and research of diversionary programs, particularly as it addresses the goals of sentencing, potentially reduces the incarceration rate, and better focuses limited resources to more serious offenses. POAG supports the Commission's review of the unifying principles of the existing diversion programs, as well as the providing information pertaining to the existing programs on the Commission's website and during workshops and seminars. In addition, POAG supports the Commission's study of the efficacy of such programs at reducing recidivism.

(3) Examination of the Guidelines Manual, including exploration of ways to simplify the guidelines and possible consideration of amendments that might be appropriate.

POAG continues its ongoing support to simplify the guidelines, which has been an identified factor in POAG's response to prior proposed priorities and amendments. Simplification of the guidelines will assist the Court, the parties, probation officers, defendants, their families, victims, and the community to better understand the process of federal sentencing and their perception that the process is fair and just. The guidelines have become increasingly complicated to apply, which may result in non-uniform application in similar cases. Simplification is also an investment in efficiency. Such simplification is directly related to our commitment to judicial economy and being

good stewards of government resources, which will assist the court system in maintaining its workload with less available resources.

POAG recognizes that simplification of the guidelines is not a simple process. If the Commission addresses simplification through revising specific guideline sections, POAG believes that the biggest impact includes focusing on the guidelines applied most frequently. According to the Commission, Use of Guidelines and Specific Offense Characteristics Guideline Calculation Based for the Fiscal Year 2022 report, USSG §2D1.1 (drug offenses) was applied in 29.7% of cases; USSG §2B1.1 (economic offenses) was applied in 8.1% of cases; USSG §3B1.1 (aggravating role) was applied in 4.2% of cases, and USSG §3B1.2 (minor role) was applied in 7.8% of cases.

Specifically, regarding USSG §2B1.1, the determination of loss under subsection (b)(1) is becoming a vast guideline where "loss" is becoming more complex to determine accurately. This is especially important given the consequences of misapplication of the guidelines. Moreover, there are instances (such as the $500 multiplier in USSG §2B1.1, comment. (n.3(F)(i)), see *United States v. Kirilyuk*, 29 F.4th 1136 (9th Cir. 2022)) where courts have not applied loss based on the Commentary instructions as the loss definition is not incorporated into the guideline itself. This has resulted in disparities of sentences between circuits.

Regarding role in the offense, under USSG §3B1.1, POAG has received suggestions to remove the option of a three-level increase, as the "cases falling in between (a) and (b)" is criteria that may not be applied consistently in similar cases. Further, for both aggravating and mitigating role adjustments, the timing of a defendant's conviction may impact the application of these adjustments. A defendant who is convicted earlier in a larger multi-defendant case may not receive a proper role adjustment because the role of the "average participant" has not yet been ascertained.

POAG believes the state of federal sentencing is becoming increasingly complicated, part of which is related to predicate offenses and application of the categorical approach. POAG has discussed this in greater detail in its response to Priority No. 5.

Lastly, as to the application of criminal history points, POAG received suggestions that the Commission reevaluate applying three points under USSG §§4A1.1(a) and 4A1.2(e)(1) based on the defendant "being incarcerated during any part of such fifteen-year period." POAG suggests that the guideline focus on when the sentence was imposed versus the date of release, which would be in furtherance of the goal of simplification of sentencing. However, more importantly, in some jurisdictions the state prison system assigns one correctional number to a defendant and one discharge date applies, regardless of the number of convictions. In those circumstances, the defendant receives one discharge date for several different sentences, which makes it difficult and sometimes impossible, to determine the discharge date for a specific case. As a result, convictions that would have been discharged prior to the fifteen-year time period are assessed with criminal history points, causing some defendants to qualify as a career offender based on prior convictions that would otherwise be deemed incredibly stale. See *United States v. Jones*, 662 F. App'x 486 (8th Cir. 2016) (unpublished).

Based on the foregoing, POAG favors the Commission's exploration of ways to simplify the guidelines and possible consideration of amendments that might be appropriate.

(4) Continuation of its multiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary.

POAG believes it is prudent and necessary for the Guidelines Manual to address this matter. As discussed in the introduction to the Guidelines Manual, the objective of the manual was to conceive and design fairness in sentencing through honesty, avoidance of disparity, and proportionality. However, it is recognized that the sentencing process is dynamic. As set forth in Chapter 1 of the Guidelines Manual, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court reasoned that an advisory guideline system, while lacking the mandatory features that Congress enacted, retains other features that help to further congressional objectives, including providing certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted. The Court further concluded that an advisory guideline system would "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary."

Part of the guidelines include a commentary section which serves numerous purposes. For example, the commentary provides interpretation of the guideline or direction as to its application. Commentary also can include departure considerations and background information as to what factors led to the composition of or reasoning for the guideline. Therefore, it is vital that the commentary for each offense guideline be relied upon by the court to achieve fairness in sentencing. If honesty and fairness are to be sought in sentencing, dismissal of the commentary in the Guidelines Manual will result in disparity and disproportionality for similarly situated offenders.

POAG has held an ongoing dialogue amongst its circuit and district representatives. An update to §4B1.2, Definitions of Terms Used in §4B1.1, may be a simple and short-term solution. However, moving substantive information into the guideline itself is a piecemeal solution that will prolong the disparate consideration of the Commentary. Instead, POAG believes a prompt, long-term solution addressing case law concerning the validity and enforceability of guideline commentary is prudent and recommends inclusion of a directive that the commentary of each guideline is just as binding as the guideline language itself. Otherwise, future circuit decisions are expected, which may create greater disparity as each circuit determines its own unique interpretation of guideline commentary.

(5) Continued examination of the career offender guidelines, including (A) updating the data analyses and statutory recommendations set forth in the Commission's 2016 report to Congress, titled Career Offender Sentencing Enhancements; (B) devising and conducting workshops to discuss the scope and impact of the career offender guidelines, including discussion of possible alternative approaches to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense"; and (C) possible consideration of amendments that might be appropriate.

POAG appreciates the Commission's proposal to further explore the career offender guidelines. POAG has previously written extensively on issues relating to the career offender guidelines, the categorical approach, and the sentencing disparities and circuit splits that have resulted from this issue. We strongly encourage the Commission to explore a resolution in this area because it has caused the various courts around the country significant complications when applying the career offender guidelines at sentencing.

With regard to subsection (A), POAG strongly encourages the Commission to continue its work to implement the recommendations set forth in its 2016 report to Congress titled *Career Offender Sentencing Enhancements*. This report recommends the revision of the career offender directive at 28 U.S.C. § 994 to focus on defendants who have committed at least one crime of violence and the adoption of a uniform definition of crime of violence. Our current concerns with the issue include the disparity in determining whether a predicate conviction qualifies as a "crime of violence" or a "controlled substance offense." We are in support of the Commission revisiting or redefining their focus in this report and to adopt a uniform definition of "crime of violence" and "controlled substance offense."

With regard to subsections (B) and (C), POAG believes that alternative approaches to the "categorical approach" in determining which offenses qualify as a "crime of violence" or "controlled substance" are needed and that the current approach simply does not work. There is a strong need to implement amendments based on an alternative approach to this issue. Specifically, POAG indicated in our March 2023 comment regarding the 2023 proposed amendments that the categorical approach has created ever-increasing difficulties for districts around the country. One of the primary issues POAG raised included the fact that application of the current USSG §4B1.2 definitions has created considerable consternation as practitioners work to keep up with the changes in interpretation and the pending litigation. As a result of these issues, the guideline definitions no longer function as originally designed. Application issues aside, the true impact of this issue is defendants are more or less severely punished not based upon their relative risk, but based upon the location of where they committed the offense and the structure of the underlying statute. Such unwanted sentencing disparities is the very issue that the guidelines sought to address.

Also as mentioned above in Priority #3, which focuses on the examination of simplifying the guidelines and possible consideration of amendments, POAG feels very strongly that the career offender guideline is presently the most complicated aspect of federal sentencing. Resolution of this issue will provide for ease of application and reduce the amount of resources needed to apply this guideline

(6) Examination of the treatment of youthful offenders under the Guidelines Manual, including possible consideration of amendments that might be appropriate.

POAG supports the Commission's continued examination of youthful offenders and the scoring of their criminal history under the Guidelines Manual. During February and July 2017, POAG

wrote extensively about concerns with the application of criminal history scoring as it relates to juvenile offenders. POAG still maintains a general consensus that juvenile offenders should be held accountable for past convictions. Accounting for past criminal behavior is important, especially if the offender has violent or repeat offenses. Nonetheless, the following are continued areas of concern.

POAG notes that, particularly with juvenile offenses, there are significant variations in which each state handles the prosecution and the type of sentence imposed, including even a variation in the age standard for who is a juvenile offender. In the prosecution of these cases, the offense charged for a juvenile offender may differ from what the charge would be in one state versus another, and even as an adult offender, thereby potentially not truly capturing the gravity of the actual conduct.

Another ongoing concern is the inability to obtain supporting documentation of the conviction. Probation officers across the nation, even in the age of digitized records, are still faced with unique difficulty in obtaining the necessary documents in order to properly score these types of convictions. In some instances, because it is a juvenile offender, the records may be sealed, destroyed, or require additional processes, such as a subpoena, to obtain the necessary information. The uniquely varied ability of juvenile records leads to disparity in how a juvenile offender's criminal history is captured and eventually scored.

Another recurring issue related to juvenile offenders pertains to the legal definition in each jurisdiction of the term "confinement." Pursuant to USSG §4A1.2(d)(2)(A), two points are added under USSG §4A1.1(b) for each adult or juvenile sentence of confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense. Currently, the guidelines do not provide guidance for what meets the definition of "confinement" thereby leaving the discretion up to the sentencing judge and the appellate court.

Given the Commission's goal to simplify the guidelines, POAG discussed a potential revision to USSG §4A1.2(d), providing one uniform standard point system for having a juvenile adjudication/conviction, similar to the structure under USSG §4A1.1. This simplified process would eliminate the need for a what could be an extensive search for juvenile records which could be an inefficient use of resources.

(7) Implementation of any legislation warranting Commission action.

POAG makes no comment or recommendation regarding this priority at this time.

(8) Resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. § 991(b)(1)(B) and *Braxton v. United States*, 500 U.S. 344 (1991).

POAG encourages the Commission to continue to resolve circuit conflicts whenever possible.

(9) Consideration of other miscellaneous issues coming to the Commission's attention.

POAG notes that certain sections of the Guidelines Manual need updated and amended in light of the First Step Act. For example, the First Step Act revised 18 U.S.C. § 924(c)(1)(C) by providing that the higher penalty for a "second or subsequent count of conviction" under section 924(c) is triggered only if the defendant has a prior section 924(c) conviction that has become final. As such, POAG recommends amending the illustrative example of a multiple count 18 U.S.C. § 924(c) scenario under USSG §5G1.2, comment. (n.4(B)(iii)), to comply with the statutory changes under 18 U.S.C. § 924(c).

POAG suggests that there is a disparity in application of USSG §4B1.5 (Repeat and Dangerous Sex Offender Against Minors), which was previously detailed in POAG's July 22, 2016, submission. Additionally, POAG believes further clarification is needed regarding USSG §2D1.1(b)(13), pertaining to the misrepresentation of fentanyl or fentanyl analogues. The specific offense characteristic is one of a few without further guidance in the commentary. Reports from the field indicate there is a lack of consensus on when to apply this enhancement, while fentanyl and fentanyl analogue cases have been on the rise. POAG believes clarification regarding the *mens rea* requirement and whether explicit mismarketing is required for the enhancement to apply. Finally, POAG believes further guidance on USSG §3C1.2, Reckless Endangerment During Flight, is needed, particularly as it pertains to firearms offenses and defendants who discard firearms during flight. There has been a growing body of precedent pertaining to when the enhancement should be applied; however, the application is still somewhat inconsistently interpreted.

(10) Further examination of federal sentencing practices on a variety of issues, possibly including: (A) the prevalence and nature of drug trafficking offenses involving methamphetamine; (B) drug trafficking offenses resulting in death or serious bodily injury; (C) comparison of sentences imposed in cases disposed of through trial versus plea; (D) continuation of the Commission's studies regarding recidivism; and (E) other areas of federal sentencing in need of additional research.

With regard to subsection (A), POAG recommends the Commission further examine sentencing practices relating to the prevalence and nature of drug trafficking offenses involving methamphetamine. POAG would respectfully ask the Commission to consider whether the distinction between methamphetamine mixture and methamphetamine actual is still useful, relevant, or necessary. POAG has observed an increase in challenges to the rationale behind this distinction. Purity was once considered to be an indicator of a defendant's culpability; however, POAG notes that methamphetamine is now at least 80% pure in the majority of cases in which it is tested; therefore, purity no longer appears to be an accurate measurement for culpability.

POAG has taken note of a pattern in which judges in several jurisdictions are disagreeing with the guidelines' treatment of methamphetamine mixture and methamphetamine actual and treating all methamphetamine as a mixture regardless of its purity. This pattern appears to be driven by the philosophy that methamphetamine (actual) guideline ranges are significantly above that which is

sufficiently punitive. For example, in *United States v. Harry*, 313 F. Supp. 3d 969, 973 (N.D. Iowa 2018) (unpublished), the court observed that the amount of methamphetamine (actual) resulted in a sentencing range that was more than double what would have resulted if the offense had involved the same quantity of heroin. As such, the court reached the conclusion that "there is no empirical evidence supporting the need for a drastically increased sentence based solely on the purity of the methamphetamine at issue." The Court in *Harry* cited another case in the 8th Circuit, *United States v. Nawanna*, 321 F. Supp. 3d 943 (N.D. Iowa 2018) (unpublished), which raised a policy disagreement with the 10-to-1 ratio in the treatment of actual methamphetamine as compared to methamphetamine mixture. POAG discussed the prevalence of this pattern and found that similar policy disagreements with the methamphetamine guideline have taken shape in other Circuits.

Another concern is the disparity in sentencing between cases in which the methamphetamine is tested and those cases in which it is not. Defendants in cases which have lab reports indicating the purity of the methamphetamine tend to receive longer sentences due to the harsher punishment associated with pure methamphetamine, while those with no lab reports or fewer lab reports receive the benefit of having their sentence determined by the default assessment as methamphetamine (mixture).

Additionally, as the Commission has sought feedback on the issue of simplifying the sentencing guidelines, POAG would submit to the Commission that the guidelines can be simplified by establishing a singular guideline for methamphetamine that would result in a guideline range that is sufficiently punitive and not excessive. POAG notes that methamphetamine offenses comprise 48.5% of all federal drug offenses and they have the longest average sentence of any drug type at 94 months. POAG recommends the Commission further examine the methamphetamine guidelines given both the prevalence of methamphetamine offenses and the disparity in sentencing trends across jurisdictions.

Lastly, POAG recommends that the Commission provide further guidance regarding application of USSG §2D1.1(b)(5), which provides a two-level enhancement "if the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine […]" There is a disparity in the application of this guideline in that some jurisdictions apply the enhancement in all cases involving pure methamphetamine, while other jurisdictions engage in additional fact-finding to establish a scienter requirement that the defendant have knowledge of the importation.

(11) Additional issues identified during the comment period.

As noted in a prior submission detailed on August 10, 2018, POAG recommends the Commission consider further study and refinement of USSG §2G2.2. POAG has observed an increase in binding plea agreements for child pornography offenses that establish sentences below the guideline range. In Fiscal Year 2022, there were 64,142 child pornography cases reported to the United States Sentencing Commission. Of these cases, only 34.1% were sentenced within the guideline range. While POAG recognizes that many §2G2.2 specific offense characteristics are the result of a Congressional directive, nearly all §2G2.2 specific offense characteristics apply in

every case, which leads to a one-sized approach for every defendant that fails to individualize risk. POAG suggests the Commission consider updating the guideline to reflect changing trends and emerging technologies.

POAG recommends the Commission consider an amendment to USSG §2P1.1 relating to escape offenses. Under this guideline, a defendant is eligible to receive a two-level or a four-level decrease if the defendant escaped from non-secure custody and did not commit any federal, state, or local offense punishable by a term of imprisonment of one year or more while away from the facility. A common scenario for this offense involves defendants arrested for new charges in escape status from a half-way house whose charge remains pending at the time of sentencing. POAG has observed application issues related to this guideline as there are different interpretations of what constitutes "committed." If interpreted to require a conviction or guilty finding for the new offense, defendants with pending charges would be eligible for the reduction and would be treated similarly to defendants who committed no new law violations while on escape status. Therefore, POAG recommends this reduction should not apply when defendants are arrested for a new law violation, regardless of whether the new law violation remains pending. POAG recommends the adoption of similar language used in USSG §2K2.1, comment. (n.14(C)), defining "another felony offense," "as any federal, state, or local offense…punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained." POAG believes such an amendment would appropriately account for the defendant's conduct and eliminate the need to litigate this issue at sentencing.

POAG also recommends the Commission consider creating a new category at USSG §4A1.2 for non-traditional sentences imposed by state courts which do not necessarily fall under the definitions of a "prior sentence," "custody," or a "diversionary disposition." For example, sentences of probation before judgment or conditional discharge may be considered when computing criminal history in some jurisdictions while these same sentences may not be considered when computing criminal history in other jurisdictions. Probation officers must often rely on Circuit decisions in those jurisdictions to determine whether or not sentences meet the definition(s) under §4A1.2 when scoring criminal history.

Additionally, POAG recommends the Commission consider reevaluating the loss table at USSG §2B3.1 (Robbery). Currently, the loss table at §2B3.1(b)(7) reflects a threshold of $20,000 or more before an increase in the offense level is to be applied. Many sentences under this guideline include bank and Hobbs Act robbery offenses wherein defendants receive no increase in the offense level because the loss is $20,000 or less. According to the United States Sentencing Commission's Report on Use of Guidelines and Specific Offense Characteristics Guideline Calculation Based for the Fiscal Year 2022, 90.1% of offenses sentenced under this guideline involved loss amounts of $20,000 or less. As such, POAG recommends the Commission consider reducing the minimum loss amount.

Finally, POAG recommends the Commission consider amending or deleting the criminal livelihood enhancement at USSG §4B1.3. POAG submits that the current guideline, as written, is difficult to determine and is rarely applied, causing application concerns and litigation in the cases in which it does apply. Instead, POAG recommends the Commission include a recidivism enhancement for defendants who engage in the predatory conduct of committing repeated frauds, which would account for the long-standing devastating harm these offenses can have on victims.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to provide feedback on behalf of the dedicated professionals who serve the court as United States Probation Officers.

Respectfully,

Probation Officers Advisory Group

United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

Voting Members
Manny Atwal
Jesse Laslovich
Winter Martinez
Mekko Miller
Tim Purdon
Tricia Tingle
Samuel Winder

July 26, 2023

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Proposed Priorities for Amendment Cycle

Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group (TIAG), we submit the following views, comments, and suggestions in response to the Proposed Priorities for the 2023-2024 Amendment Cycle, announced by the U.S. Sentencing Commission on June 16, 2023, and published in the Federal Register on June 20, 2023. See 88 Fed. Reg. 39907-01 (June 20, 2023); see also 28 U.S.C. § 994(o).

Priority 1: Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or Amendments.

TIAG takes no specific position on the general sufficiency of Bureau of Prisons (BOP) policies or procedures, but we are available to research and address any issue more specifically identified by the Commission for further study. Even so, TIAG notes that BOP reentry programming is a topic of ongoing and continuing concern in Indian Country, especially as it relates to women and youthful offenders.

Women released from incarceration and returning to Indian Country face conditions that are inherently more challenging than many new releasees may face elsewhere. Those within Indian Country wrestle with entrenched economic stress, multi-generational despair, chronic unemployment, addiction, and abuse among tribal members. Thus, many Indigenous women will confront homelessness, termination of their parental rights, lack of employment opportunities, a return to an environment where they have previously been the subject of abuse, an environment with significant addiction, dependency and substance abuse issues, and an environment where there is a history of physical and verbal violence and abuse. The collective experience of TIAG members suggests that many of these issues go unaddressed both while Indigenous women are

incarcerated and during their reentry planning. And, given the economic and political circumstances that present within Indian Country, local services are often limited or even unavailable. The apparent lack of appropriate reentry planning and resources places women who are reentering within Indian Country at a higher risk to be victims of poverty, abuse, violence, human trafficking, and chemical dependency relapse.

Youthful offenders pose distinct and perhaps unique problems and concerns in Indian Country. Youthful offenders fall into two separate categories, those who are minors under the age of majority and those who have attained majority but are under the age of 25. Indigenous minors face daunting problems when charged with juvenile offenses in federal court. BOP and other federal programs directed at juvenile offenders are scarce and often remote. Most juvenile offenders are jailed in BOP contract facilities that are located hundreds, even a thousand, miles from their homes. Given limited family resources, such placements essentially isolate the juvenile offenders from family and extended support, leading to an aggravation and exacerbation of underlying problems and presenting a significant hurdle in efforts to rehabilitate and reintegrate minors into the community. In addition, TIAG is aware of some cases in which final disposition of a juvenile matter was delayed until after the child would reach the age of majority so the offender could be placed in an adult facility located closer to home. This is certainly not in the best interest of the child or the community.

Youthful offenders between the ages of 18 and 25 years old are likewise often placed far from their homes and appear to be provided with inadequate support services while in custody. Many Indian Country offenders come from troubled and difficult backgrounds and suffer from substance abuse and mental health issues (i.e. PTSD, Mood and Anxiety Disorders). The lack of appropriate therapeutic cognitive behavioral therapies, including trauma-based services, both while in custody, and particularly upon release, fails to provide a sound reentry environment that maximizes the potential that these offenders will successfully reintegrate into their communities.

Priority 2: Promotion of court-sponsored diversion and alternatives-to-incarceration programs by expanding the availability of information and organic documents pertaining to existing programs (e.g. Pretrial Opportunity Program, Conviction and Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program) through the Commission's website and possible workshops and seminars sharing best practices for developing, implementing, and assessing such programs.

TIAG is in favor of making this a priority for study during the upcoming Amendment Cycle. TIAG generally favors diversion and alternative programs, especially for youthful and first-time offenders. Many areas within Indian Country encounter specific problems arising out of the unique history of the relationship between a given tribe and the United States. And, many areas located within Indian Country are beset by entrenched poverty, violence, substance abuse, PTSD, difficult educational environments, and rampant unemployment. As such, when an Indigenous person is removed from the community, reintegration becomes complicated. In the experience of TIAG members, individuals who benefit from diversion and alternative programs are able to find appropriate employment and extended support within their tribal communities and tend to fare better as compared to those who are removed and reintegrated using existing BOP

policies. Programs that keep appropriately identified offenders in the community, assist in their education and employment, provide relevant therapies for addiction, and provide therapeutic cognitive behavioral treatment best position offenders to become law-abiding and productive citizens.

The type of programming contemplated by this priority is of particular importance in Indian Country, for many of the reasons discussed above in response to Priority 1. TIAG members have observed that early intervention programs are not aggressively promoted in Indian Country because of the lack of financial support and access to resources within many tribal communities. But, diversion and alternative-to-incarceration programs would greatly improve the chances of success for low-level or first-time offenders. TIAG favors access to more aggressive diversion and alternatives-to-incarceration programs that provide earlier intervention and reduce the number of offenders sentenced to prison.

TIAG also has identified another, related area of study that may be unique to Indian Country prosecutions. Given the nature of tribal courts and justice programming, persons who have a prior history of violent offenses, sex offenses, or crimes involving victims often arrive with new charges in the federal courts without having had any meaningful intervention, treatment, or therapy. Such prior convictions are categorically disqualifying under current federal programming related to diversion and alternatives-to-incarceration, but the nature of the underlying prior conviction is not always as clear in Indian Country as it may be elsewhere. Many Indian Country offenders with such histories are the product of a deeply dysfunctional environment. In some situations, people are charged in tribal court simply to access whatever programming may exist in the community. For example, it is not unheard of for all persons involved in a domestic incident to be charged in tribal court primarily to make domestic abuse programming available to all individuals involved. TIAG believes the Commission should attempt to discern how widespread this problem is in Indian Country, and whether some alternatives to automatic disqualification might be available if it is possible to do so while keeping the risk of danger to the community at a minimum.

Priority 3: Examination of the Guidelines Manual, including exploration of ways to simplify the guidelines and possible consideration of amendments that might be appropriate.

Under this priority, TIAG asks the Commission to review the operation of §2X5.1 as it pertains to assimilated crimes and Major Crimes Act cases. TIAG has raised this issue a number of times over the years, most recently in our letter of September 7, 2022, in response to the published priorities for 2022-2023 amendment cycle. TIAG has advocated for a number of possible approaches ranging from something as radical as applying the underlying state's common law of sentencing, to specifically studying the adoption of guidelines to address the criminal offenses to which §2X5.1 is most commonly applied. We suspect that our suggestions have been unsuccessful because they might have been viewed by the Commissioners as being inconsistent with the statutory scheme of the guidelines (and the underlying purpose of the guidelines) or because they would necessarily involve trying to impose some sort of uniformity to state-law defined offenses which may not all encompass the same conduct. We acknowledge that both aspects are difficult.

We ask the Commission to undertake a study of §2X5.1 and suggest the following may be worthy of TIAG's study and recommendation to the Commission:

a. TIAG recommends an amendment of §2X5.1, or its commentary, to include a standard test to be used for determining the analogous guideline for assimilated and Major Crimes Act cases (such as the elements test currently used by a number of Courts of Appeals). If §2X5.1 is made a priority, TIAG would welcome the opportunity to work with Commission staff to propose specific amending language. The lack of a uniform test has resulted in a confused system where some district judges, for example, refuse to follow an elements-based approach, while others attempt to avoid declaring there is no analogous guideline. This results in wide disparity among guideline calculations, and the resulting sentences imposed, even within the same federal district.

b. TIAG members believe that one reason sentencing disparities exist among §2X5.1 cases is because information is not generally available to sentencing courts in a way that allows them to compare "like cases to like cases." TIAG recommends the Commission direct that data on assimilated crimes and Major Crimes Act offenses be segregated, reported, and published separately to give better sentencing information to sentencing judges. We recommend that this data be made available and searchable through the IDA and the JSIN so that all courts have access to the information.

c. TIAG suggests the Commission may consider amending the Statutory Index in Appendix A to reference maritime drug offenses and bankruptcy fraud cases to the guidelines that are almost universally applied to them and take them out of the operation of §2X5.1. Currently, maritime drug and bankruptcy fraud cases apply §2X5.1 and then almost universally apply §2D1.1 and §2B1.1, respectively. The amendment would take this data out of the operation of §2X5.1 and provide better guidance to sentencing courts on the remaining offenses.

Priority 6: Examination of the treatment of youthful offenders under the Guidelines Manual, including possible consideration of amendments that might be appropriate.

Like the Commission, TIAG defines youthful offenders to include all offenders under age 25, with juvenile offenders as a subset. TIAG recognizes that youthful offenders constitute a persistent problem in Indian Country. We have identified many concerns in our discussion of Priority 2. We also note that the lack of adequate programming, use of remote facilities, lack of adequate re-entry planning, and lack of adequate therapy and treatment to address underlying issues including substance abuse, PTSD, education, and therapeutic cognitive behavioral treatment create a difficult-to-manage situation when dealing with youthful offenders in Indian Country. And, we have raised suggestions to address these concerns during prior amendment cycles. TIAG continues to recommend:

a. That the Commission create a safety valve specifically designed to meet the needs of youthful offenders, particularly youthful offenders in Indian Country who are appearing for the first-time in federal courts, notwithstanding prior tribal court involvement.

b. That the Commission consider a downward departure in Chapter Five for first-time offenders in Indian Country to provide more discretion for sentencing courts to consider how state sentences might be applied for similar crimes when sentencing youthful offenders in Indian Country in assimilated and Major Crimes Act cases.

Recent developments in federal Constitutional law make it increasingly more likely that Indian status will drive offenders to longer sentences in federal courts than similar offenders prosecuted in state courts. An argument is often advanced that federal sentencing law is different than state sentencing law, and so many offenders in federal courts receive longer sentences than people prosecuted in state courts. But, this argument ignores one of the unique situations present in Indian Country. That is, when tribal members are prosecuted in state courts for assimilated crimes, they are being prosecuted under state law, and the crimes charged are typically ordinary street crimes. This creates a situation where a non-Indian person who commits the exact same offense (and occasionally at the exact same time and place while acting in concert with an Indian person) is prosecuted in state court and subject to state sentencing while the tribal member is prosecuted in federal court and subject to federal sentencing. Given the close nexus between Indian status and racial classification, this sentencing disparity also gives rise to a racial disparity wherein a non-Indian person is likely to face a shorter sentence. Because the underlying crimes are state-defined crimes, the presence of a departure to adjust for this sort of disparity may be useful and could go a long way towards alleviating some of the distrust that tribal members have with the federal courts.

* * *

TIAG takes no view on Priorities 4, 5, 7, 8 and 9. Regarding Priority 10, TIAG acknowledges that several of the issues identified within the priority have significant relevance throughout Indian Country and in the sentencing of tribal members, but TIAG does not provide comment on Priority 10 at this time.

Thank you for consideration of our views and for being responsive to our concerns regarding how the Commission's sentencing priorities may impact defendants who are tribal members. As always, we look forward to working with you during the remainder of this amendment cycle and to continue our collaboration in the future.

Sincerely yours,

Ralph R. Erickson

Ralph R. Erickson
Chair

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

Mary Graw Leary, Chair
Colleen Clase
Shawn M. Cox
Margaret A. Garvin
Julie Grohovsky
Francey Hakes
Christopher Quasebarth
Theresa Rassas
Katie M. Shipp

August 1, 2023

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: VAG's Comment on Proposed Priorities for Amendment Cycle ending May 1, 2024

Dear Members of the Commission:

The Victims Advisory Group (VAG) appreciates the opportunity to provide written suggestions to the Commission's proposed priorities for the 2023-2024 amendment cycle. Pursuant to its duties outlined in §1 of the VAG's Charter, the VAG offers the following to assist the Commission in determining its priorities. The VAG's membership includes experts from across the country on victim issues. Many of the members directly work with victims either as advocates, attorneys with non-profit organizations, or private attorneys representing victims of crime.

1. *Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or amendments*

Without identifying which Bureau of Prison (BOP) practice the Commission is referencing, the VAG finds this proposal so vague that it is difficult to comment upon it.

The VAG recognizes that there appear to be flaws with the BOP management of prisons as exemplified by the Commission's concern about sexual assault of prisoners and the Bureau's response to the COVID-19 epidemic discussed in the 2022-23 cycle. The VAG shares the Commission's concern about these issues and believes all victims or potential victims of crime have the right to prevention of crime and the full enforcement of criminal laws and their rights under 18 U.S.C. 3771. The VAG notes, however, that the BOP has recently engaged in a lengthy re-examination of its practices and new strategic planning to address these observed

flaws.[1] The VAG feels it may be appropriate to allow this new strategic plan to be realized. The VAG further urges the Department of Justice and Congress to intervene if necessary to ensure that the BOP fulfills its mission to "foster a humane and secure environment and ensure public safety by preparing individuals for successful reentry into our communities."[2]

However, the VAG notes that those authorities – the Department of Justice and Congress – are the proper entities to evaluate and intervene with the BOP. The VAG was greatly concerned that during the 2022-23 amendment cycle that the Commission thought it appropriate to widely expand the extraordinary and compelling release provision beyond its purpose to seemingly remedy BOP's internal flaws by allowing a significant and unstructured release of offenders from BOP custody without requiring notice to victims. The VAG agrees with the three dissenting Commissioners' concerns about the scope of the Commission's authority.[3] The VAG urges the Commission to not continue this practice of seeking methods to release convicted offenders to remedy BOP flaws. Such flaws should be addressed by the appropriate authorities but not by the Commission through expanding its authority and releasing offenders prior to the end of their lawful sentences.

Notwithstanding the vagueness of the proposed priority, the VAG assumes it could reference subparagraph (D) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." Crime victims and the community have a strong interest in the Commission reviewing BOP practices to determine which programs, if any, effectively assist incarcerated offenders in addressing and correcting their personal internal influences for committing the criminal offense(s) that harmed others (e.g., economic instability stemming from poverty, lack of education and lack of job skills; mental illness, including substance abuse). Effective BOP practices meeting the requirements of 18 U.S.C. 3553(a)(2)(D) could provide a measurable means for an incarcerated offender to accept responsibility for his/her offense and the harm caused by the offense. Effective BOP practices could produce offenders less likely to become recidivists upon release and more likely to be restored and reintegrated into the community. If such programs can accomplish these objectives, offenders, crime victims and the community at large can benefit from the improved effectiveness of such programs.

(2) *Promotion of court-sponsored diversion and alternatives-to-incarceration programs by expanding the availability of information and organic documents pertaining to existing programs (e.g., Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program) through the Commission's*

[1] https://www.bop.gov/resources/news/20230426_mission_vision_core_values.jsp

[2] https://www.bop.gov/about/agency/agency_pillars.jsp

[3] United States Sentencing Commission, Public Meeting Minutes (April 27, 2023) at 60 ("further than the Commission's legal authority extends"), 61, 72 ("a sweeping catch-all that in our view, abdicates the Commission's responsibility to articulate clear criteria by effectively delegating the Commission's authority to the courts"), 73-74 ("Under the new policy statement, once a sentence has been imposed, there is no finality and judges have virtually unfettered discretion to reduce a sentence for any reason or combination of reasons that they view as sufficiently grave. This lack of finality is also visited on crime victims.").

website and possible workshops and seminars sharing best practices for developing, implementing, and assessing such programs.

Similar to effective BOP practices meeting the requirements of 18 U.S.C. 3553(a)(2), above, crime victims and the community have a strong interest in effective programs that are rooted in the purposes of sentences outlined in the Sentencing Reform Act and the Guidelines Manual: "deterrence, incapacitation, just punishment, and rehabilitation."[4] If those programs are shown by multiple valid studies to effectively assist offenders in addressing and correcting their personal internal influences for committing the criminal offense(s) that harmed others (e.g., economic instability stemming from poverty, lack of education and lack of job skills; mental illness, including substance abuse; personal trauma) then the sharing of that information could be beneficial to all. Effective programs in this area could also provide a measurable means for an offender to accept responsibility for his/her offense and the harm caused by the offense, produce offenders less likely to become recidivists upon release and more likely to be restored and reintegrated into the community, and able to pay restitution for victims more readily. However, any diversion or alternative to incarceration program programs should not be promoted without requiring the consultation and in some cases consent of the victim survivor. Furthermore, such exploration of these programs must also comply with the crime victim's rights to protection from offenders, restitution, and to be heard. [5]

(3) Examination of the Guidelines Manual, including exploration of ways to simplify the guidelines and possible consideration of amendments that might be appropriate.

This proposal is so vague, the VAG finds it difficult on which to comment. While the VAG supports clarity in the Guideline it notes a concern raised during the 2022-23 cycle that the Commission was streamlining the Guidelines at the expense of crime victim rights. It is the guidelines that should be simplified, not hearings addressing an offender's sentence, especially when those proposed simplifications directly affect victims' rights. The VAG previously requested the Commission to require hearings for any motion for extraordinary and compelling release, as well as potential release under the criminal history amendments. The VAG also noted the suggestion that such matters could be resolved without a hearing in the Impact Analysis of the retroactivity of the criminal history amendment indicated "a repeated pattern of the Commission to a focus on streamlining processes in favor of offenders – in this case some of the most dangerous of offenders - in contravention to the law and recognized due process for victims."[6] The VAG reiterates this concern that "simplifying" the guidelines should not ever be at the cost of victim survivors of crime.

(4) Continuation of its multiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary.

The VAG has no specific comment on this proposed priority.

---

[4] Sentencing Guidelines Manual at Ch1, Part A, 1.2

[5] 18 U.S.C. 3771

[6] Letter to U.S. Sentencing Commission, from Victims Advisory Group, Inapplicability of Retroactivity of 2023 Criminal History Amendment, 1 (June 22, 2023).

(5) Continued examination of the career offender guidelines, including (A) updating the data analyses and statutory recommendations set forth in the Commission's 2016 report to Congress, titled Career Offender Sentencing Enhancements; (B) devising and conducting workshops to discuss the scope and impact of the career offender guidelines, including discussion of possible alternative approaches to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense"; and (C) possible consideration of amendments that might be appropriate.

The VAG previously commented in its February 19, 2019, public comment to the Commission's then-proposed amendment regarding Career Offenders and addressed concerns about the "categorical approach" as to a "crime of violence" or a "controlled substance offense." If this 2024 Priority is addressing the same issue, the VAG refers to those comments.

(6) Examination of the treatment of youthful offenders under the Guidelines Manual, including possible consideration of amendments that might be appropriate.

The VAG notes that any examination of youthful offenders under the Guidelines manual must still afford victims the right to be heard at sentencing and all other federal rights under 18 U.S.C. 3771.

(7) Implementation of any legislation warranting Commission action.

The VAG has no specific comment on this proposed priority.

(8) Resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991).

The VAG has no specific comment on this proposed priority.

(9) Consideration of other miscellaneous issues coming to the Commission's attention.

The VAG has no specific comment on this proposed priority.

(10) Further examination of federal sentencing practices on a variety of issues, possibly including: (A) the prevalence and nature of drug trafficking offenses involving methamphetamine; (B) drug trafficking offenses resulting in death or serious bodily injury; (C) comparison of sentences imposed in cases disposed of through trial versus plea; (D) continuation of the Commission's studies regarding recidivism; and (E) other areas of federal sentencing in need of additional research.

The VAG notes that drug trafficking offenses are never victimless, even when an "identified victim" is lacking. Drug trafficking offenses resulting in death or serious bodily injury have identifiable victims. Recidivism often has identified victims. This priority seems to be directed at further study; such studies need to include research on the continuing impact of these offenses on victims and communities and the fulfillment of victim rights during sentencing proceedings.

(11) Additional issues identified during the comment period.

In the VAG's 2022 letter to the Commission the VAG asked the Commission to allow for victim survivors to have access to the Presentence Reports (PSR) prior to sentencing. Specifically, the VAG wrote:

> One of the many benefits of the modern sentencing system is the creation of the Presentence Report. This document affords offenders the opportunity to place before the court information relevant to their life experiences, but also critically gives victims an opportunity to provide essential information to the court about the offenders, the offenses, and their impact. Offenders and the government have the opportunity to both review the report prior to the hearing and to make corrections. However, victims do not have the opportunity to review the report. The VAG has observed through its work with victims that victims must have access to these reports for several reasons.
>
> First, when a victim attends a hearing he or she does not know what the Court has been told in the report about the offense itself, the victim, or any history. The victim has a right to be meaningfully heard at sentencing. "It is hard to see how victims can meaningfully provide 'any information' that would have a bearing on the sentence without being informed of the Guidelines calculations that likely will drive the sentence and reviewing the document that underlies those calculations."[7] Furthermore, the victim's comments cannot be as meaningful if he or she has less information than all the other parties. Secondly, the victim also does not know if the author of the presentence report accurately documented the victim's statements. Members of the VAG recount situations in which this information is simply incorrect, but they do not learn of it until after sentencing. Incorrect information should not be considered by a court at sentencing, yet there is no mechanism for a victim to ensure his or her information has been accurately conveyed.
>
> The entire goal of the Presentence Report specifically and the Guidelines generally is to produce an accurate sentence based on relevant conduct and specific actions. Only one person knows certain information - the victim - and the victim should have the opportunity, just as the offender does, to ensure the information provided is accurate and to object if it is not. [8]

In light of the amendments in the 2022-2023 cycle, the request to allow victims access to the PSR has reached new urgency. As motions are filed for early release and the Commission seems to have not required hearings and notice to victim survivors (which the VAG believes is required by law), courts will be turning to the PSR with greater frequency to assess important questions such as the role of offenders in crimes, the danger to the community, the circumstances of the

[7] Paul Cassell, Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act, 2005 B.Y.U. L. Rev 835, 894-895 (2005).

[8] The PSR appears to now be a source of information a judge will turn to years later to try to assess facts about the underlying case. They have a right to review them to ensure accuracy.

offense, etc.[9] Given this significant change in the role of a PSR, the VAG renews its request for the Commission to consider requiring victim's be able to review the PSR prior to sentencing.

The VAG thanks the Commission for this opportunity to address proposed priorities for the 2023-24 cycle.

Respectfully,

Mary Graw Leary
Chair
Victims Advisory Group

cc: Advisory Group Members

[9] Letter to U.S. Sentencing Commission from Victims Advisory Group, VAG's Suggested Priorities for 2022, 5-6 (September 24, 2022).

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

August 1, 2023

Public Comments on Proposed 2023-2024 Priorities of the United States Sentencing Commission

Dear Chairman Reeves and Members of the Commission:

We are grateful for the opportunity to provide our comments on the proposed priorities for the 2023-2024 amendment cycle. We comment here on several of the priorities identified for consideration, as we wish to share our views on why these should be adopted by the Commission.

Specifically, we recommend that the Commission adopt priorities 2 (alternatives-to-incarceration programs), 3 (simplifying and amending the Guidelines), 8 (resolving circuit court conflicts), and 10 (cases disposed of by trial versus plea, and recidivism studies).

Our organizations are continually heartened by the active and effective work the Commission is doing. We applaud the Commission's efforts to shift practices in our system toward less frequent use of incarceration and lengthy prison sentences, emphasizing approaches to holding people accountable that do not unnecessarily separate and harm families and communities and that promote equity and fairness, consistent with public safety and the other goals of sentencing.

The Center for Justice and Human Dignity

The Center for Justice and Human Dignity ("CJHD")[1] is a nonprofit organization whose mission is safely reducing the use of incarceration in the United States while improving conditions for those imprisoned and correctional staff. The Center promotes human dignity and shared safety while keeping in mind the needs of survivors, system-impacted people, and society at large. Alongside diverse partners, the Center works with judges and prosecutors on ways to expand the use of alternatives to incarceration; with correctional leaders on the conditions of confinement; and with policymakers on legislative reforms to the criminal legal system. At its upcoming October

[1] https://www.cjhd.org.

2023 Rewriting the Sentence II Summit on Alternatives to Incarceration, CJHD plans to convene hundreds of key stakeholders to discuss and formulate strategies for implementing innovative sentencing practices in the criminal legal system.

CJHD is closely guided by the expertise of its steering committee, comprised of 20 current and former federal judges. CJHD's board also lends the guidance of a range of experts, including the Honorable Larry D. Thompson, former U.S. Deputy Attorney General; the Honorable Nancy Gertner, Senior Lecturer, Harvard Law School and former U.S. District Judge; and the Honorable Jeremy D. Fogel, Executive Director of the Berkeley Judicial Institute, former U.S. District Judge, and former Director of the Federal Judicial Center.

The Aleph Institute

The Aleph Institute ("Aleph")[2] served as the incubator for CJHD's formation. Aleph was founded in 1981 and has a decades-long history of direct service in prisons around the country, and has worked with judges, legislators, executive branch officials (including prosecutors and prison officials), academics, and legal practitioners on criminal legal reform. Aleph was honored to have been a part of the bipartisan effort resulting in the passage of the First Step Act of 2018, which brought about much-needed reform to our federal criminal legal system.

Aleph also has submitted alternative sentencing recommendations in dozens of criminal cases around the country. In many of them, the judge imposed a below-Guideline sentence, based at least in part on considerations set forth in Aleph's submissions. Most frequently, courts in these cases rely upon defendants' genuine expressions of remorse and acceptance of responsibility, their prior service to their community, the damage that would be caused to their family members were the defendant to be imprisoned, and their willingness to make amends. These are among the very factors that support the government's expanded use of alternatives to incarceration, especially for defendants who do not pose a risk to public safety.

In 2016, Aleph convened a high-level Alternative Sentencing Key Stakeholder (ASKS) summit at the Georgetown Law Center, featuring nearly 200 current and former leaders and senior government officials serving in the criminal legal system. And in 2019, Aleph co-hosted (with Columbia Law School) a second summit on Alternatives to Incarceration—titled Rewriting the Sentence—to examine the significant changes taking place in the alternatives to incarceration arena. This summit was attended by approximately 300 criminal legal stakeholders, including federal and state judges, prosecutors, defense counsel, probation and pretrial officers, individuals directly affected by incarceration, advocacy groups, and other key stakeholders.

---

[2] https://www.aleph-institute.org.

Comments on Priority 2

Priority 2 would advance the goals of the Commission's laudable adoption of Priority 12 during the previous amendment cycle[3] to promote "court-sponsored diversion and alternatives-to-incarceration programs by expanding the availability of information and organic documents pertaining to existing programs (*e.g.*, Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program) through the Commission's website and possible workshops and seminars sharing best practices for developing, implementing, and assessing such programs."

We fully support the adoption of this priority. Moreover, we further encourage the Commission, alongside promoting the existing federal programs, to consider providing further guidance in its pronouncements to lend assurance to judges, prosecutors, and other system actors that these alternatives are legitimate and effective methods to achieve the goals of sentencing in appropriate cases.

The benefits of alternatives to incarceration—to the individual defendants, their families, and their communities—have been demonstrated through data, case studies, and scholarly articles as well as the actual implementation of these alternatives in justice systems throughout the country. Nevertheless, alternative sentences have remained relatively rare in the federal system, at least for many decades. We note with great favor that the use of such alternatives is on a path to scaling up significantly, pursuant to actions by the President of the United States,[4] the U.S. Attorney General,[5] and (through its dedication to studying this area) the Sentencing Commission in recent years.[6]

Given the numerous economic and human costs associated with incarceration,[7] all system actors should look to limit the use of incarceration to cases in which no reasonable alternative exists. In

---

[3] Priority No. 12: Multiyear study of court-sponsored diversion and alternatives-to-incarceration programs and related amendments to the *Guidelines Manual*, *available at* https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2022-2023-priorities.

[4] *Executive Order on Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety*, May 25, 2022.

[5] *Memorandum From the Attorney General To All Federal Prosecutors*, Dec. 16, 2022, at 2.

[6] *See* note 3, *supra*.

[7] *See, e.g.,* Don Stemen, Department of Criminal Justice and Criminology, Loyola University Chicago, *The Prison Paradox: More Incarceration Will Not Make Us Safer,* July 2017 (footnotes omitted) ("It may seem intuitive that increasing incarceration would further reduce crime… In reality, however, increasing incarceration rates has a minimal impact on reducing crime and entails significant costs"); *United States v. Rivera,* 281 F. Supp. 3d 269, 271 (E.D.N.Y. 2017) ("[i]ncapacitory sentences are usually unnecessary to increase public safety, or prevent recidivism; they place a tremendous financial burden on society through excessive incarceration"); U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *Five Things About Deterrence* (last modified June 6, 2016) ("long prison sentences do little to deter people from committing future crimes"); *Gall v. United States*, 552 U.S. 38, 54 (2007) (quoting lower court order with approval) ("a sentence of imprisonment may work to promote not respect,

the words of William Fitzpatrick, the former President of the National District Attorneys Association, we should "use prison for those we are afraid of, not those whom we are mad at based upon their behavior."[8]

In addition to negatively impacting individuals, lengthy periods of incarceration devastate the families and communities left behind, breeding bitterness, anger, and ultimately recidivism. Indeed, the most recent meta-analysis concluded that, with respect to reducing recidivism, the "null effect of custodial compared with noncustodial sanctions" is now established as a "criminological fact."[9] The research concludes that "[i]ncarceration cannot be justified on the grounds it affords public safety by decreasing recidivism. Prisons are unlikely to reduce reoffending unless they can be transformed into people-changing institutions on the basis of available evidence on what works organizationally to reform [people]."[10]

Incarceration's bona fides look even less impressive when considering the outcomes for families, particularly for children with an incarcerated parent. More than five million U.S. children (approximately seven percent of the country's population of children) have experienced the incarceration of a parent.[11] Children of incarcerated parents are more likely to live in poverty and be homeless; are more likely to experience domestic violence or substance use disorder by a parent;[12] and have higher rates of learning disabilities, developmental delays, speech/language problems, attention disorders, and aggressive behaviors.[13] These children are up to six times more likely to enter the criminal legal system themselves.[14] In our view, a fair and effective criminal legal system must take these devastating collateral consequences into account.

Comments on Priority 3

---

but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing").

[8] April 26, 2016, letter to U.S. Senators Mitch McConnell and Harry Reid.

[9] Damon M. Petrich, Travis C. Pratt, Cheryl Lero Jonson, and Francis T. Cullen, *Custodial Sanctions and Reoffending: A Meta-Analytic Review, Crime and Justice*, Sept. 22, 2021.

[10] *Id*.

[11] Annie E. Casey Foundation, *Children Of Incarcerated Parents, A Shared Sentence: The Devastating Toll Of Parental Incarceration On Kids, Families And Communities*, April 19, 2016, available at https://www.aecf.org/resources/a-shared-sentence (based on 2011-2012 data).

[12] *See* Youth.gov, *Children of Incarcerated Parents*, available at https://youth.gov/youth-topics/children-of-incarcerated-parents.

[13] *See* Julie Poehlmann-Tynan and Kristin Turney, Society for Research in Child Development, *A Developmental Perspective on Children with Incarcerated Parents*, Nov. 17, 2020, available at https://srcd.onlinelibrary.wiley.com/doi/full/10.1111/cdep.12392.

[14] National Institute of Justice, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, March 1, 2017, available at https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children#note12.

Simplifying the Guidelines. Simplifying the Guidelines is a worthy and long-overdue endeavor. Several data points illustrate the need. The 1987 Guidelines Manual is 290 pages. The 2021 manual is 600 pages, with another 1,460 pages devoted to the 813 amendments that have been promulgated. 2B1.1, the principal economic offense guideline, has 20 specific offense characteristics, 14 of which have one or more subparts. 2D1.1, the principal narcotics offense guideline, has 17 specific offense characteristics, 6 of which have one or more subparts. This, of course, does not take into account all of the other components of computing an advisory Guideline range—victim adjustments, role adjustments, obstruction adjustments, multiple-count adjustments, acceptance of responsibility adjustments, and the criminal history category (with its own myriad set of intricate rules)—as well as upward departures and downward departures from that range. The considerable time and energy required to perform the task of working though the Manual to calculate the range for a specific set of charges appears even more disproportionate, given that the Guidelines (since 2005) no longer control the sentencing process as they once did, but instead provide a non-binding reference point for what a defendant's sentence should be.

The Commission ought to thoroughly review the Guidelines Manual to identify opportunities to streamline its contents, consistent with the advisory role the Guidelines now play in the sentencing process and the fact that, in some instances, they are more complicated than is necessary to fulfill that function.

Amending the Guidelines—the Loss Table. Much has been said over the years about 2B1.1's loss table. Criticism of it is plentiful—in terms of the outsize role it has in determining a defendant's Guideline range, its flaws as a proxy for culpability, and the sheer harshness of the results it produces.[15] Examples of the excesses produced by the loss table abound; for two examples of cases in which the Aleph Institute was involved at various stages, *see United States v. Gozes-Wagner*, 14-cr-637 (S.D. Tex.) (20-year sentence in health care fraud case for mid-level first-time offender/single mother of two children) and *United States v. Rubashkin*, 08-CR-1324 (N.D. Iowa) (27-year sentence in bank fraud case for first-time offender with 10 children). Indeed, it is not a coincidence that, in the most recent reporting year, sentencing courts granted downward variances in 40.5% of fraud/theft/embezzlement cases.[16]

The *Gozes-Wagner* case is addressed further below (at p.10); the *Rubashkin* case prompted a letter to the sentencing court from six former Attorneys General of the United States and many other former high-ranking federal law enforcement officials, excoriating the draconian nature of the loss guidelines. *See* Letter to Hon. Linda Reade, Apr. 26, 2010, at 2 ("We cannot fathom how

---

[15] *See, e.g.*, B. Boss and K. Kapp, *How the Economic Loss Guideline Lost its Way, and How to Save It*, Ohio State Journal of Criminal Law, Vol.18.2, 605 (2021); R. Eliason, *The New Sentencing Guideline for Fraud Cases*, May 4, 2015, *available at* https://www.sidebarsblog.com/p/the-new-sentencing-guideline-for-fraud-cases; American Bar Association Criminal Justice Section, *A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes*, Nov. 10, 2014, *available at* https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf.

[16] U.S. Sentencing Commission, *2020 Sourcebook of Federal Sentencing Statistics*, at 90.

truly sound and sensible sentencing rules could call for a life sentence—or anything close to it—for Mr. Rubashkin, a 51-year-old, first-time, nonviolent offender whose case involves many mitigating factors and whose personal history and extraordinary family circumstances suggest that a sentence of a modest number of years could and would be more than sufficient to serve any and all applicable sentencing purposes.”).

At the same time, our criminal legal system has begun to come to terms with the harms of the reflexive, and excessive, resort to incarceration as the preferred means of punishment in this country. Alternatives to incarceration are being used more often. Pretrial diversion programs have taken hold in many federal districts, with more to come by virtue of the United States Attorney General’s commendable directive, in December 2022, for every U.S. Attorney’s Office to have a pretrial diversion policy.[17] And since 2005, when the Guidelines were made advisory,[18] courts downwardly vary frequently from the Guidelines, including imposing non-incarceratory sentences in cases in which the Guidelines call for imprisonment.[19]

Moreover, data show that many individuals can be held accountable without imprisoning them, consistent with public safety. To take one recent, striking example: since the spring of 2020, 13,204 incarcerated individuals have been released early to home confinement pursuant to the CARES Act of 2020, on the grounds that they suffered from vulnerability to COVID and were low-risk individuals least likely to re-offend. Three years later, only 22 of them (a fraction of 1%) have been arrested on new charges, the vast majority of which were for nonviolent offenses.[20] This demonstrates that many individuals (including ones sentenced based on 2B1.1) who were in prison, did not need to be (or at least, did not need to be there for as long as their sentences provided)—and that prison space, personnel, and programmatic resources can be more effectively deployed.

All of these phenomena support the conclusion that the Commission should review rigorously the loss table and the overall severity of 2B1.1, and consider amending it to better conform it to current federal sentencing policies, practices, and data—including providing for alternatives to incarceration in appropriate cases.

Amending the Guidelines—Downward Departures for Personal Characteristics. The Commission should examine and, to the extent it is able to, rectify the structural disparity between the treatment of a defendant’s personal characteristics under governing federal sentencing statutes and under the Guidelines.

Under 3553(a), the primary federal sentencing statute, courts are *required* to consider seven factors in determining what sentence to impose. The first factor includes “the history and

---

[17] *Memorandum From The Attorney General To All Federal Prosecutors*, Dec. 16, 2022, at 2.

[18] *United States v. Booker*, 543 U.S. 220 (2005).

[19] U.S. Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics*, at 90 (downward variances in 32.2% of all cases).

[20] Sen. Cory A. Booker, *CARES Act Home Confinement Three Years Later*, June 2023, at 4.

characteristics of the defendant[.]"[21] That factor is not qualified in any fashion, or given any less weight than any other. It has equal status. Thus, personal characteristics, along with the other 3553(a) factors, must be taken into account by sentencing courts in determining what sentence is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing in 3553(a)(2).

The Guidelines are different. A defendant's Guideline range is essentially dictated by two factors: the offense conduct (and whether the defendant pled guilty), and the defendant's criminal history. Many personal characteristics—age; education; employment; mental and emotional conditions; physical conditions; family ties and responsibilities; military, civic, charitable and public service, and prior good works—have no role in the determination of that range. Moreover, policy statements provide that some personal characteristics (such as a disadvantaged upbringing) are never a relevant basis for departure, and that other factors must be present to an "unusual" or "extraordinary" degree to warrant departure. In this way, many of a defendant's personal characteristics—which define who a defendant is as a person; their lifelong track record; their potential amenability to rehabilitation or treatment; and the impact their sentence may have on others—are given "second-class" status, marginalized by the Guidelines, as compared to the other factors that impact a defendant's sentence.

The wisdom, efficacy, and fairness of that approach is suspect, and our sentencing scheme is imbalanced, given that the Guidelines aggravate sentences for virtually any and every prior *bad* act, but then provide that a wide variety of prior *good* acts (such as civic, charitable, or public service; employment-related contributions; and similar prior good works) are ordinarily irrelevant in sentencing departure determinations, thus relegating these acts to potentially affecting merely where within an often-narrow sentencing Guideline range a sentence should fall.

To be sure, we recognize that at least some of this structural disparity exists because Congress has provided that certain personal characteristics generally should not be considered when determining prison terms. *See* 28 U.S.C. § 994(e) ("The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."). But there are steps the Commission can take to rectify the situation. For example, the Commission can (1) recognize that certain personal characteristics (such as age, military, civic, charitable and public service, and prior good works) are not constrained by 994(e) and therefore should not require extraordinary justification before a sentencing court can depart from the Guideline range on these grounds; (2) ensure that the Guideline provisions for personal characteristics covered by 994(e) are not unduly restrictive when data or experience supports having these characteristics play a greater role in the Guideline process; and (3) recommend amendments to 994(e) so that it comports with 3553(a) and the legitimate—indeed, critical—

[21] 18 U.S.C. § 3553(a)(1).

role that personal characteristics should and do play in fashioning an appropriate sentence for a defendant in each individual case.

One example of a potential Guideline amendment worthy of focused attention would be for 5H1.6, dealing with family ties and responsibilities. As now written, such factors are generally *not* a basis for a downward departure, and may only serve that role if they are present to an unusual or extraordinary degree. Moreover, in the case of a loss of family caregiving or financial support, four additional criteria must be met—including a showing that the defendant's support is not only helpful or even important, but "irreplaceable."[22] Read literally, a defendant is deprived of any downward departure, despite being the sole means of caregiving and financial support for several children, if there were, say, a second cousin or a distant aunt who could contribute in their stead—even if the quantity or quality of that support was inferior, and even if was undisputed that the defendant was the person who could provide the *best* support for their family. Indeed, it requires no citation of authority to recognize that parents can have a crucial, if not indispensable, role in their children's upbringing. Guideline 5H1.6 ought to be amended to better reflect the critical role that primary caregivers often have in the lives and well-being of their dependents.

Comments on Priority 8

Last year's priorities included "[c]onsideration of possible amendments to the Guidelines Manual to prohibit the use of acquitted conduct in applying the guidelines." This did not come to pass. At the time, the United States Supreme Court had been asked to resolve an inter-circuit court conflict with respect to the constitutionality of using acquitted conduct in connection with a defendant's sentencing. Since then, the Supreme Court has chosen not to do so—with several Justices explicitly calling on the Sentencing Commission to address this issue. *See McClinton v. United States*, No. 21-1557 (June 30, 2023) (statement of Justices Kavanaugh, Gorsuch, and Barrett).

We agree. Much has been said, on both sides of the issue—and those matters can be discussed further in due course, if this priority is adopted. But whether and the extent to which acquitted conduct can play a role in a defendant's sentence ought to be resolved by the Commission, at least with respect to the use of such conduct to increase the applicable range under the Guidelines.

Comments on Priority 10

We enthusiastically support the Commission's consideration of Priority 10, especially the portions that would prompt the Commission's continued "examination of federal sentencing

[22] Guideline 5H1.6, Application Note 1(B)(iii).

practices on … (C) comparison of sentences imposed in cases disposed of through trial versus plea" and "(D) continuation of the Commission's studies regarding recidivism."

The Trial Penalty. Both the Aleph Institute and CJHD have experience with law and policy relating to the constellation of issues often referred to as the "trial penalty." Because the conditions that created this phenomenon are complex and systemic, we hope to see a multi-agency, multi-branch effort to ensure that we restore and protect the fundamental constitutional right to a jury trial. Accordingly, we strongly support the selection of this priority for the Commission's 2023-2024 amendment cycle.

The "trial penalty" has been described as "the substantial difference between the sentence offered in a plea offer prior to trial versus the sentence a defendant receives after trial. This penalty is now so severe and pervasive that it has virtually eliminated the constitutional right to a trial. To avoid the penalty, accused persons must surrender many other fundamental rights which are essential to a fair justice system."[23] In essence, instead of merely conferring a reasonable benefit on people who accept responsibility and plead guilty, the current system gives prosecutors nearly unfettered power to threaten vastly increased sentences to people who assert their constitutional presumption of innocence and challenge the government to meet its burden of proof at trial.

The magnitude of the effects on our current system cannot be overstated. Only 2.3 percent of federal criminal cases went to trial in fiscal year 2022,[24] by contrast with prior periods in which upwards of 15 percent of federal criminal cases went to trial.[25] Instead, "[t]he vast majority of felony convictions are now the result of plea bargains."[26] The late William J. Stuntz, a former Harvard Law School professor and criminal justice scholar, noted that "those who are punished most severely are often those who made the worst deals, not those who committed the worst crimes."[27]

Plea bargaining practices routinely induce individuals to waive not only the right to trial, but many other fundamental rights as well, such as the rights to obtain discovery, to challenge unlawfully obtained evidence, to testify and present defense witnesses, and even to appeal or collaterally

---

[23] National Association of Criminal Defense Lawyers ("NACDL"), *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It,* July 2018, available at https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth amendment- right-to-trial-on-the-verge-of-extinction-andhow-to -save-it.pdf.

[24]John Gramlich, *Fewer than 1% of defendants in federal criminal cases were acquitted in 2022*, Pew Research Center, June 14, 2023, *available at* https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022/#:~:text=30%2C%202022.,were%20found%20guilty%20(1.9%25).

[25] *See* NACDL Report, *supra* note 23, at. n. 2; *see also* Albert Alschuler, "Plea Bargaining and Its History," 79 Columbia Law Review 1, *passim* (1979).

[26] Emily Yoffe, *Innocence Is Irrelevant: This is the age of the plea bargain—and millions of Americans are suffering the consequences, The Atlantic*, Sept. 2017.

[27] William J. Stuntz, *The Collapse of American Criminal Justice* (2011), at 58.

attack a conviction or sentence. Cases abound in which courts impose severe trial penalties on defendants, in the form of a geometrically greater sentence, simply for contesting the charges.

Not infrequently, the significant leverage given to prosecutors under the current system even causes innocent people to give up their constitutional rights, rather than risk draconian sentences by going to trial. As has been explained by U.S. District Judge Jed Rakoff of the Southern District of New York,[28] it often makes sense for people who have committed no crime whatsoever to convict themselves by accepting a plea offer subject to the explicit or implicit threat that, if they fail to do so, the charges will be vastly increased and they will be subjected to the risk of a much harsher sentence if they are convicted after a trial. As Judge Rakoff notes, the modern criminal legal system "provide[s] prosecutors with weapons to bludgeon defendants into effectively coerced plea bargains."[29] Moreover, "the typical person accused of a crime combines a troubled past with limited resources: he thus recognizes that, even if he is innocent, his chances of mounting an effective defense at trial may be modest at best. If his lawyer can obtain a plea bargain that will reduce his likely time in prison, he may find it 'rational' to take the plea… This has "caus[ed] the virtual extinction of jury trials in federal criminal cases."

One example of trial penalty injustices is that of Daniela Gozes-Wagner, a single mother of two young children, who was sentenced to 20 years in prison for her subordinate role in a health fraud scheme.[30] Meanwhile, several ringleaders (and beneficiaries) in the scheme pleaded guilty and were given sentences of 5 or 6 years. According to her trial attorney, "… Daniela was also offered the opportunity to plead guilty to a single count of conspiracy to defraud the United States (18 U.S.C . § 371), which carries a 5-year maximum. … I reasonably anticipated that the government would have recommended that Daniela receive a guidelines sentence of 48 months…" But he notes that Daniela was a devoted mother… [who] could not face the possibility of separation from her children, and she chose to go to trial."[31]

Ms. Gozes-Wagner ended up paying an intolerably severe price for that decision. Indeed, the imposition of such a long sentence on Ms. Gozes-Wagner was based, in the judge's own words, on the fact that she "exercised the constitutional rights that she has in the United States to plead not guilty."[32] Ms. Gozes-Wagner's sentence drew the condemnation of numerous interested parties, including in the form of an amicus brief (spearheaded by the Aleph Institute and co-authored by CJHD's Director of Policy and Legal Affairs, a co-author of this comment letter), signed by six former U.S. Attorneys General, two former Solicitors General, a former FBI Director, and nearly 100 former federal and state judges and U.S. Attorneys.

The trial penalty also has the unfortunate effect of shifting authority over the proper sentence from impartial judges to prosecutors. By offering plea deals that include reduced charges or

---

[28] Jed S. Rakoff, *Why Innocent People Plead Guilty,* The New York Review of Books, Nov. 20, 2014.
[29] *Id.*
[30] *United States v. Gozes-Wagner*, 14-cr-637 (S.D. Tex.).
[31] Letter from Ms. Gozes-Wagner's trial attorney T. B. Todd Dupont II to the U.S. Pardon Attorney, Nov. 11, 2020.
[32] *United States v. Gozes-Wagner*, ROA.20157:1234.

promises not to seek sentencing enhancements to those who accept them, and piling charges and sentencing enhancements on those who do not, prosecutors often persuade judges that they have no choice but to impose a sentence vastly out of proportion to the actual culpability of the defendant. These practices also give prosecutors immense leverage to extract guilty pleas in multiple-defendant cases, because the first co-defendants to accept a plea offer almost always get far better dispositions than those who plead later or insist on going to trial, a practice that often bears no relationship to either the defendant's culpability or their amenability to rehabilitation.

We urge the Commission to lend its considerable expertise to this important issue. Indeed, we are unaware of any major report on the issue since the NACDL's report in 2018, or any significant traction at the federal government level for examining it. America's criminal jury trial system needs significant attention in order to divert its path away from complete extinction.

In short, the imposition of the trial penalty is a blemish on the nation's criminal legal system. The diminution of trial rights has become an intractable systemic problem that can only be addressed with the participation of all relevant stakeholders—including the Sentencing Commission. We believe it is incumbent upon all to do what they can to restore this crucial component of our system to its rightful place in our system. For these reasons, we encourage the adoption of Priority 10(C), with the hope that the Commission's examination will contribute to broader progress on this issue.

Recidivism studies. A major goal of our criminal legal sentencing system is (and should be) to reduce the risk of recidivism. This does not mean a presumptive reliance on incapacitation of defendants; we now know better. For example, there is already a growing body of data supporting that many alternatives-to-incarceration (or pretrial diversion) programs result in relatively low rates of recidivism, including rates that are favorable to comparison groups of defendants who do not participate in such programs.[33] To the extent that these programs are proliferating—in particular, in the federal criminal legal system—their effectiveness, and the precise impacts of these programs and related measures (such as drug treatment and trauma treatment) on recidivism, would be fruitful areas for continued study by the Commission. Such study could assist system stakeholders in learning from the experiences of others and fashioning (or modifying) their respective programs to best achieve the most positive outcomes, including lowering the risk of recidivism among the programs' participants. Accordingly, we also support further study in this area, as set forth in Priority 10(D).

[33] *See, e.g.*, Laura Baber, Kevin Wolff, Jonathan Muller, Christine Dozier, and Roberto Cordeiro, *Expanding the Analysis: Alternatives to Incarceration Across 13 Federal Districts*, Dec. 2021 (individuals who successfully completed pretrial diversion programs were "significantly less likely" to be re-arrested on supervision); Amanda Garcia, Chief U.S. Pretrial Services Officer, N.D. Ill., *Comment letter to U.S. Sentencing Commission*, Oct. 6, 2022 (no re-arrests among 20 most recent graduates of district's pretrial diversion program); Hon. Ronnie Abrams and Hon. Sarah Netburn, S.D.N.Y., *Comment letter to U.S. Sentencing Commission*, Oct. 17, 2022 (recidivism rates among graduates of S.D.N.Y.'s Young Adult Opportunity Program has been "gratifyingly low," with outcomes that "are nothing short of extraordinary").

Conclusion

We commend the Commission on assembling a list of meaningful, substantive priorities for the 2023-2024 amendment cycle. We stand ready to assist the Commission as it sees fit.

Respectfully,

____
Hanna Liebman Dershowitz, Esq.
Director of Policy and Legal Affairs
Center for Justice and Human Dignity

____
Rabbi Sholom Lipskar
Founder and Chairman of the Board
Aleph Institute

AUTISM CONNECTION OF PENNSYLVANIA

TO

THE UNITED STATES SENTENCING COMMISSION

RE: PROPOSED 2023-2024 PRIORITIES

OPEN COMMENT SUBMISSION

AUGUST 1, 2023

The Autism Connection of Pennsylvania fully supports the position paper and recommendations (the latter cited at the end of this statement) issued by PARSOL on July 30, 2023. The Autism Connection of PA also believes all sexual abuse is unacceptable and that prevention-based, rehabilitative, and trauma-informed programs are significantly more effective in healing a person as opposed to permanently damaging, disability inaccessible, and life-altering, shame-centered punishment.

Many jurisdictions require people to register under SORNA ("Megan's Law") monthly and in person, at a designated location. Failure to register due to illiteracy or cognitive issues found in autism and/or intellectual disability, along with poverty and lack of transportation, results in re-incarceration. 1/34 people in the US are autistic, with a higher representation in the Justice system. Disabled former prisoners cannot retain instructions, keep paperwork in any order, and are focussed on daily survival, not complex re-entry rules. Disabled people are unjustly punished and institutionalized as a result of this mandate.

Case in point - we supported a 19 year old autistic young man who met a younger, distant cousin at a family reunion, and they had a sexual contact the following week, resulting in his two year incarceration at the Allegheny County, PA Jail. Because he failed to re-register his location at release, while on an ankle monitor, police "found" him at his home (his mom's house) and **he spent an additional 19 months in the county jail because he did not understand nor know to comply with the rules of his original release.**

<u>Autism, lack of consequence thinking, and false confessions are common</u>

Autistic and intellectually disabled people are in the justice system in large numbers often due to sex offenses "on paper." Recent cases we have worked with include:

1.) A state trooper who failed to arrest a man for a weapons crime who then proceeded to hold a hostage in a prolonged SWAT situation. The parent of **a 20 year old autistic man** filed a grievance complaint against the trooper with the state, then let the trooper know she had done so. Soon after, and without parents' knowledge, the trooper passed the autistic adult son's phone number to teen girls and had them contact him, which they did, and arranged to meet at a skating rink. The young man was quickly arrested and jailed. His naivete that the could be unde age, and his extreme loneliness, poverty, and poor decision making skills, led to him being incarcerated for seven (7) years.*
2.) **A mid-20's man** with no friends and no romantic life, downloaded adult pornography, then set his computer for auto downloading when he was at work. He is serving a federal sentence after the government first thought he was a major dealer in child pornography, only to find out he is autistic with computer skills, but not filtering skills. Child porn mixes with adult images online, and accidental possession is common with this disability.
3.) **An man in his early 20's** who "fell in love with a mirage" and believed what he was told his entire life, to "just follow your heart" and "if you work hard enough, you can achieve anything," emailed and texted a young woman for 10 years, first to show his love, then to get to know her better to understand why she didn't love him back. His final "crime" was sending her a package of gummy Lifesavers and a BlueRay cartoon disk she had on her

public Amazon wish list. After he learned she was frightened (judge explained this) he still faces stalking and harassment charges, even though he is remorseful and now wants to get into therapy to learn "how to date people - I am like a first grader when it comes to that."

4.) **A man with a 58 IQ and autism** who went online to buy adult female companionship time, and was offered to meet a 15 year old girl - a police decoy. He declined twice in texting, stating "No, I don't want to get into trouble" then "I went downtown to see if she was real. I couldn't believe it! It turned out to be a cop but she looked like a child!" He witnessed her in the lobby of a large hotel, and was arrested, shackled to the floor during questioning, and is stuck on the shackling and the fact that an adult looks like a child. He faced five felony counts for his curiosity and complete ignorance of the law.

5.) **Currently a 23 year old man is in state prison** because the girlfriend he moved in with wanted to evict him, and he had nowhere to go. She reported that he touched her child (the child was a survivor of previous sex abuse by a relative). Detectives found no evidence and did not prosecute. However, he became suicidal at the rejection, and went with his therapist to the emergency room. Before seeing a doctor, he started screaming "I want to see a cop!" He wrote and signed a confession, while stating "She says I did it, I might as well get it over with and do what she says, so I can get back with her." He is serving a 7 year sentence.

There are innumerable similar stories. None of these people are candidates for re-entry disability housing due to their convictions and the state understands this and is asking us to help find disability appropriate aftercare (nothing exists currently). None of them can survive in typical re-entry houses with multiple roommates, strict rules, and inappropriate therapy expectations. They don't have the same types of sex offenses as the current regulations intend to address (albeit there are some victims). They did not have criminal intent, usually act out of loneliness and naivete, can be "set up" by others, or have no idea how to conduct themselves in interviews. They do not "look remorseful" in court, often cannot look a judge in the eye due to disability factors, and often lose their words and are unable to communicate in court.

People with autism need to learn how to navigate in society despite crushing loneliness, detachment from the guidance of supports like parents and teachers, and extreme naivete leaving them prone to grave social errors they need to learn from differently than predatory, criminally intending others. They have even worse than the baseline 75% unemployment rate of their autistic peers, due to their conviction records. Employment at re-entry, therefore, will be elusive, at best.

Today, an autistic man, aged 32, with an IQ of 61 hits the end of his sentence and will be dropped off at a homeless shelter in Pittsburgh with no destination and no supports, despite a three page long conviction record of mainly retail thefts, with a sex offense being the last crime on his record. He has no idea how to self-advocate to find: housing, food, income, etc. Disability programs will not allow him into residences. Re-entry programs will not meet his needs and will likely introduce him to some with criminal intent that may use or abuse him. His story will likely have a bad ending.

We are supporting a 27 year old man right now who achieved parole on April 6th (the man who met girls at a skating rink) and has no place to go, so he remains incarcerated. He is frustrated and has banged his head off the floor out of despair, - "why are other guys getting out who made parole after me? What is WRONG WITH ME?" - to the point he has knocked himself unconscious. This is barbaric.

We are supporting another man, this one who is 37 years old with schizophrenia and autism, who has spent many years in a state psychiatric hospital previously and has been incarcerated for four years because he sent one piece of child pornography to his former social worker. He did this after she discontinued 20 hours a week of community based services, likely out of feeling rejected, hurt, and angry. He has dissociated inside, taking on the persona of rock musician Bryan Adams. He needs therapeutic housing, but with his new "sex offense" will not be eligible. Disability providers nearly always turn down cases due to these types of convictions. He also has nowhere to go upon release and will likely be dropped off at a shelter that cannot meet his needs.

Therefore, we support the following recommendations from PARSOL:

"**OUR RECOMMENDATIONS**

We, urge The Commission to modify the Federal Sentencing Guidelines in response to the requested topic areas from the call for public comment priorities[1] as follows:

1. **Re: (2) Alternatives to Incarceration and Court Diversion Programs, (3) Simplification/Structural Reform, and (7) Crime Legislation**
   Barring congressional action to change the mandatory minimum assigned, recommend that the Court's sentencing of individuals under 34 U.S.C. §20913(e) of "Registry Requirements for Sex Offenders" under subchapter I, par. (a) 'Failure to Register,' a Felony offense with a penalty including a penalty of imprisonment of one year, considers the individual's circumstances. Therefore, allowing for a downward discharge toward a Summary offense with a sentence commensurate with 18 U.S.C. § 402.9, Contempt of Court constituting a criminal offense, wherefore "the term of imprisonment shall not exceed six months, and the amount of any fine paid to the United States shall not exceed $1,000."

2. **Re: (3) Simplification/Structural Reform, (7) Crime Legislation, and (9) Miscellaneous Guideline Application Issues**
   Eliminate the Mandatory Minimums around Child Sexual Abuse Material (Child Pornography) cases, as suggested in the Congressional Research Service Report R42386 as follows:

---

[1] https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2023-2024-priorities

> Two-thirds of the federal trial judges responding to a U.S. Sentencing Commission survey questioned the severity of the mandatory minimum penalties required for receipt of child pornography (5 years; 15 years for repeat offenders). The Commission's report suggested that the perception may lead to inconsistent sentencing in child pornography cases.[2]

We suggest that in the USSC's review of the guidelines, examine ways to reduce all sentences in line with Executive Order 14074, which states "no individual should serve an excessive prison sentence." The President's order intends to relieve individuals from unfair and unduly harsh sentences, including those driven by mandatory minimums and those excluded from downward variances under the PROTECT Act. Implementing E.O. 14074 falls squarely on the shoulders of the USSC in re-examining the guidelines, particularly with non-production CSAM offenses.

3. **Re: (3) Simplification/Structural Reform, (9) Miscellaneous Guideline Application Issues, and (10) Research Topics**
   Amend The Commission's guidelines for *Departures and Variances* for sexual offenses committed by people with decreased mental capacity or underdeveloped cognition, including those with Autism Spectrum Disorder, Impulse Control Disorder, and other relevant paraphilic mental health disorders and diagnoses. This also applies to youth offenders.[3]

4. **Re: (7) Crime Legislation, and (9) Miscellaneous Guideline Application Issues**
   We suggest the USSC recommend to Congress to pass legislation that amends the law around the awarding of time credits towards time served under pretrial home confinement where conditions are equal to or more severe than home confinement conditions at the end of a defendant's sentence. This will provide immediate and substantial relief to the BOP and thousands of individuals whose liberties were suspended during their period of pretrial supervision. In many cases, these individuals completed rehabilitative programming to reduce their recidivism and made substantial efforts to rehabilitate themselves. These efforts should be encouraged and rewarded with credit towards a sentence under 18 U.S.C. 3553(b)(2).[4] The cost to keep an individual in federal prison is roughly $130/day compared to roughly $10/day for that same individual to be under the care of the court and the U.S. Probation office.

---

[2] https://crsreports.congress.gov/product/pdf/R/R42386/4

[3] https://caselaw.findlaw.com/court/us-8th-circuit/2077237.html

[4] https://guidelines.ussc.gov/ab/18U.S.C.%C2%A73553

5. **Re: (1) Bureau of Prisons Practices**
   Ensure that the programs and services offered by the Federal Bureau of Prisons and related administrative entities align with the desired sentencing and program goals and deliverables intended by the sentencing Court. Testimony from PARSOL members references that this is frequently not the case and, in one instance, "None of us are getting programs we need here. The programs are superficial, focusing on shame-based, demoralizing punishment instead of trauma-informed shame reduction and [dialectical and cognitive] healing. Society loses because prisons release un-reformed people back into the population."[5]

By the United States Sentencing Commission enacting these priorities in their 2023-2024 strategic work, they will advance the fair, non-discriminatory treatment of justice-involved individuals while also helping to foster safe communities across the United States."

5. Source: Personal interview with inmate Jon Frey [BOP #13317-509], 7/12/2023."

Respectfully submitted,

Luciana M. Randall, President
Autism Connection of PA
711 Bingham Street
Pittsburgh, PA 15203

www.autismofpa.org

412.781.4116

5

P.O. Box 55713 Washington, D.C. 20040
info@civilfreedoms.org | civilfreedoms.org | @civilfreedoms

July 7, 2023

The U.S. Sentencing Commission
One Columbus Circle, NE
Suite2-500 South Lobby
Washington D.C. 20002-8002

public_comment@ussc.gov

Re: Eliminating or Reforming the Terrorism Enhancement

Dear Members of the Sentencing Commission.

The Coalition for Civil Freedoms, formed in 2010, is a coalition of organizations who have come together to end the legal abuses and injustices created by the "War on Terror", and to advocated for the victims of these abuses. Hundreds of defendants, mostly Muslim, have been convicted of terrorism-related offenses in the War on Terror, and sentenced to lengthy prison sentences that often appear shockingly unjust considering the fact situations out of which the convictions arise, especially when these shockingly lengthy sentences target primarily one religious minority group - Islam. The cause of these abusive sentences in most cases is the terrorism enhancement under USSG 3A1.4 which, when applied, can effectively double or triple a normal sentence.

Although most of the people we advocate for have *no* actual criminal history, a few of them would benefit from the new criminal history provisions the Sentencing Commission is currently looking at making retroactive. But they are excluded from eligibility for the new provisions because they were subjected to the terrorism sentencing enhancement. *We are requesting that, for the reasons discussed below, that exclusion be removed from the new provisions.* We also would like to see the 3A1.4 enhancement eliminated or reformed, as set forth below.

Eliminate the Terrorism Enhancement

The terrorism enhancement applies only to a relatively small number of terror-related charges (i.e. 18 USC Section 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism), 2339D (relating to military-type training from a foreign terrorist organization).[1] All of these sections already provide for long maximum prison

[1] **The Terrorism Enhancement:**

United States Sentencing Guideline §3A1.4. Terrorism

(a) If the offense is a felony that involved, **or was intended** to promote, a federal crime of terrorism, increase by **12** levels; but if the resulting offense level is less than level **32**, increase to level **32**.

(b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Application Notes:

1. "Federal Crime of Terrorism" Defined.—For purposes of this guideline, "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5).

***

4. Upward Departure Provision.—By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.

Definition: "Federal Crime of Terrorism"

18 USC 2332b(g)(5) the **term "Federal crime of terrorism" means** an offense that—
(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and
(B) is a violation of—[1] ...2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism), 2339D (relating to military-type training from a foreign terrorist organization)

18 USC 2339B (a) **Prohibited Activities.—**

(1) **Unlawful conduct.—** Whoever knowingly provides material support[1] or resources to a foreign terrorist organization[1], or attempts or conspires to do so,

sentences. Doubling or tripling the maximum sentence with the terrorism enhancement achieves no additional benefit, and instead creates the perception of injustice, especially in situations where the crime is based on loose conversations with no actual plan; or where nobody was killed or injured or affected in any way; or where the crime was manufactured entirely by the US government; or the defendant was suffering from mental illness; or the defendant played only a minor role in a larger alleged conspiracy, or the crime was trivial compared to the punishment. Given the lengthy maximum sentences already authorized for terrorism related charges, the terrorism enhancement provides no additional deterrence, and merely creates the perception of abuse of a minority religious community. In individual cases the result is shockingly unjust. The terrorism enhancement is a relic of the hysteria following 9/11, when the government feared possible Muslim disloyalty and believed that it was necessary to apply a form of legal repression against the Muslim community. The government's fears of Muslim disloyalty have since been conclusively disproved. The terrorism enhancement is now a source of perceived hostility by the government against Islam, and in individual cases the source of shocking injustice. The terrorism enhancement should be eliminated.

The Alternative of Reform – Eliminate the Enhanced Criminal History

Even if the Commission does not eliminate the terrorism enhancement entirely, reform is still essential. The terrorism enhancement not only greatly increases the base level for an offense, but it is a double whammy because it *also* increased the criminal history category all the way up to the maximum. As a result, many people with *no* criminal history end up being treated as if they were a career criminal. No other sentencing enhancement does this. Eliminating the enhancement to the defendant's criminal history will allow a truthful assessment of the defendant's history, rather than the distorted effort at vengeance that the terrorism enhancement now represents in which terrorism defendants in effect are deemed guilty of additional fictious crimes they never committed and were never charged with. At the very least, the enhancement to the defendant's criminal history must be eliminated. For more background on this enhancement, see Said, Wadie E. "The Terrorist Informant." *Washington Law Review* 85:4 (December 14, 2010). http://digital.law.washington.edu/dspacelaw/bitstream/handle/1773.1/492/85wlr687.pdf?sequence=3

Moreover, the terrorism enhancement applies in many cases where there is no intent to support violence, and in many sting operations where the offense (including all the factors which make the enhancement apply) is manufactured by the government. Also, the enhancement sometimes applies in minor offenses (such as false statements, contempt or obstruction of justice) which generally carry short sentences less than two year. The terrorism enhancement increases those sentences over ten times to 20 or more years. At the very least, the enhancement should be reformed so that it does not apply in these three types of situations.

Cases Where There is no Finding that any Violence was Intended

In *Holder v. Humanitarian Law Project*, in 2010, the Supreme Court held that someone could be convicted of material support to terrorism even where there was *no intent to support or promote*

any violence. Terrorism enhancement applies to such material support convictions, even though in some cases the defendants were, in reality, trying to prevent violence. Application of terrorism enhancements in such cases is clearly unjust.

One example of such injustice is the case of the Holy Land Foundation (HLF) defendants, who, after a second trial (the first resulted in a mistrial) were convicted of material support to terrorism for running a charity which sent nonviolent aid to civilians, including those in Gaza. The money was given not to a designated terrorism organization, but instead to "zakat committees" which also received aid from the Red Cross and US AID. The government claimed at trial that these committees were somehow enmeshed with Hamas, a designated organization. The defendants were convicted in a very problematic trial. (See http://www.wrmea.org/2013-january-february/why-all-americans-should-care-about-the-holy-land-foundation-case.html)

In order for the terrorism enhancement to apply in the HLF case, there was no need for a finding that the defendants had any intent to support violence, only that they had been convicted of material support. The base offense level for this offense is already quite high, 26, and with no enhancements and little or no criminal history, the guidelines sentencing range is 63-78 months (around 5-6 years). But with the enhancement, the range becomes 30 years to life. Two of the HLF defendants received sentences of about 65 years each, essentially life sentences, and these draconian sentences were a result of the terrorism enhancement.

Proposed reform – An Application Note which states, *"Do not apply the terrorism enhancement unless there is a specific finding by the jury, or in a plea agreement, that the defendant had the specific intent to promote a specific plan of violence in connection with the offense of conviction. This intent requirement is not satisfied simply based on the defendant's knowledge that the designated organization engages in violence, or unspecific loose talk unconnected to a specific plan – there must be a showing that the defendant supports a specific plan of violent activity, and that the acts for which the defendant was convicted were intended to support such a plan of violent activity."*

(Alternatively, it could say, "Do not apply the terrorism enhancement unless there is a specific finding by the court that the defendants had the specific intent to promote a specific plan of violence in connection with the offense of conviction.")

Sting Operations

Because the definition of "federal crime of terrorism" – and thus the terrorism enhancement - includes attempts and conspiracies, the enhancement has very often been applied in sting operations, where the government created the plot and the defendants were brought into it after being given various degrees of convincing and help from informants. One of the most unfair sting cases is that of the Newburgh Four, where the defendants were apolitical, and had no interest in any terrorism activities until they were offered a great deal of money from an

informant. (It is not even clear if they had any intent to go through with the fake attack, or were just trying to con the informant, as he was conning them.)

Often the government targets vulnerable young men who are "slow" mentally or suffer from mental illness. In the case of Shahawar Matin Siraj, the informant befriended Siraj, who had cognitive defects, and inflamed him by showing him videos of atrocities against Muslim civilians. Even then Siraj was hesitant about supporting violence, and said he had to ask his mother's permission first. He was sentenced to 30 years in prison, largely as the result of the terrorism enhancement.

Proposed Reform – An application note which states, "*In cases where there is a showing that a confidential informant played a substantial role in the offense, or where the defendant was a "vulnerable defendant," the terrorism enhancement shall not apply. Factors to be considered as to whether the informant played a "substantial role" include not but are not limited to: whether the informant helped choose targets; whether the informant incited the target of the sting to engage in violence, and whether the informant provided resources, such as weapons or money. A defendant is considered to be a "vulnerable defendant" where the defendant suffers from a diminished intellectual capacity, or a mental illness, and where such condition had a major effect on the defendant's decision to engage in the plot.*

Minor Offenses

Sometimes the terrorism enhancement has been applied to fairly minor convictions such as making false statements to a government official, contempt or obstruction of justice (often for refusals to testify in what is essentially a perjury trap). For example, in the case of Abdelhaleem Ashqar, he was convicted of obstruction and contempt for refusing to answer questions at a grand jury, and the basic guidelines sentencing range for these offenses would have been 24-36 months (2-3 years). However, the application of the terrorism enhancement led to a guidelines range of 210-260 months (about 17-22 years) – the judge applied the enhancement but then gave him a "lesser" sentence of 135 months (over 11 years).

Proposed reform: Repeal the "upward departure" under USSG 3A1.1 Application Note 4 which allows for the terrorism enhancement to apply to convictions not falling within the (broad) definition of "federal crime of terrorism" under 18 USC 2332b(g)(5).

In the recent case of, US v. Mohamed Hammoud (US Dist. LEXIS 214184 (WDNC 2002), the Court reduced the defendants' sentence as being too harsh in part because of the terrorism enhancement. The Court said:

> *"The specter of the terrorism enhancement also loomed over Hammoud's sentencing. That provision triggers dramatically enhanced penalties at sentencing, catapulting a defendant's offense level by 12 points and ratcheting the criminal history category to the highest level, Category VI. In Hammoud's case the effect of the enhancement on his guidelines sentence was extreme. His offense level jumped from 34 to 46, and his criminal history category went from the lowest (1) to the highest (VI)...As a result, his*

Guidelines sentence called for life imprisonment, instead of 161-188 months...Although the Court ultimately employed a variance, the
Guidelines calculation – heavily weighted by the terrorism enhancement – undoubtedly influenced the sentence that Hammoud received...In sum, the Court finds that the disproportionate and disparate sentence that Hammoud received coupled with the specifics of his case, constitute 'extraordinary and compelling reasons for a sentence reduction."

It seems clear that the Sentencing Commission needs to give more specific and discriminating guidance on the use of the terrorism enhancement. CCF would like to work with the Sentencing Commission to reform or eliminate the terrorism enhancement so that it can no longer result in sentences that shock the conscience when compared to other defendants similarly situated, and the actual acts and intent of the defendant being sentenced. We can provide to the Commission numerous such cases for your examination that we believe will also shock your conscience and guide your reform of a troubled sentencing guideline. This discussion is way overdue. We hope to hear from you soon.

Sincerely,

Stephen F. Downs, Esq., Interim Executive Director

518-767-0102
26 Dinmore Rd.
Selkirk, NY 12158

Mel Underbakke, PhD, Interim Executive Director
melva@civilfreedoms.org
813-215-3403

Kathy Manley, Esq., Legal Director
Kathy@civilfreedoms.org
518-635-4005

August 1, 2023

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Priorities for the 2023-2024 Amendment Cycle

Dear Judge Reeves,

Founded in 1991, FAMM (formerly known as Families Against Mandatory Minimums) pursues a broad mission of creating a more fair and effective justice system. By mobilizing communities of incarcerated persons and their families affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM has engaged with the Commission since our founding by submitting public comments, participating in hearings, and meeting with staff and commissioners. The Guidelines touch countless lives, including those of our own members – over 75,000 people nationwide. We welcome the opportunity to share our views of the issues that the Commission has proposed to prioritize in this upcoming amendment cycle.

FAMM thanks the Commission for a productive 2022-2023 year and has enjoyed participating in two public hearings. We are particularly grateful that the Commission made a concerted effort to include in its hearings panels of formerly incarcerated people who spoke directly to the impact of the Commission's work. Your honor has said that "when you speak to the Commission, your voice will be heard" and we at FAMM, as well as our members, feel that to be true. We look forward to continuing our work together in this coming year.

I. **Proposed Priority (1)**: Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or amendments.

FAMM is thrilled that the Commission intends to analyze whether BOP is effective in meeting the purposes of sentencing and use its statutory authority to ensure that individuals are not serving more time than necessary, or under conditions that will not contribute to their success upon release.[1]

[1] *See generally* 28 U.S.C. §§ 994(o), (q).

1100 H Street NW, Suite 1000 • Washington, D.C. 20005 (202) 822-6700 www.famm.org

The problems within BOP are well documented.[2] They include understaffing,[3] overcrowding,[4] denying or neglecting individuals necessary medical care,[5] rampant sexual abuse in certain facilities,[6] and refusing to act under its authority to seek release of individuals pursuant to 18 U.S.C. § 3582(c)(1)(A). In fact, many of the amendments that the Commission made to §1B1.13 in the last cycle addressed BOP's broadscale intransigence and failures.

The Commission has a critical, yet largely unfilled, role in improving the experience of those in BOP and ensuring individuals are not serving more time than necessary. As Stephen Sady observed:

> Prisoners themselves are virtually voiceless regarding their conditions of confinement. Advocacy groups' suggestions can be administratively shrugged off. Litigation carried out by the few attorneys with the expertise to make their way through the procedural quagmire of administrative law face the limitless resources of a multi billion-dollar agency that takes advantage of every procedural obstacle. The Commission has unique power to offer insight and influence, given its institutional expertise and statutorily conferred authority.[7]

Below, we provide just two examples of ways by which the Commission can exert influence over the BOP.

---

[2] *See, e.g.*, Joe Davidson, *Senate Prison System Inquiry Reveals 'national disgrace,'* Washington Post (Feb. 10, 2023), https://www.washingtonpost.com/politics/2023/02/10/jon-ossoff-bop-prison-abuse-hearings/.

[3] Glenn Thrush, *Short on Staff, Prisons Enlist Teachers and Case Managers as Guards*, NY Times (May 1, 2023), https://www.nytimes.com/2023/05/01/us/politics/prison-guards-teachers-staff.html; *see also* U.S. Dep't of Justice, Office of Inspector General, *Capstone Review of the Federal Bureau of Prisons' Response to the Coronavirus Disease 2019 Pandemic* at 44, Tbl. 3 (March 2023) (showing a 13% vacancy rate for all BOP employees and 21% vacancy rate for Correctional Officers, which are even higher than the rates during COVID-19).

[4] *See* U.S. Dep't of Justice FY 2024 Performance Budget, Congressional Submission, Federal Prison System Buildings and Facilities, ("The BOP faces challenges in managing the existing Federal inmate population and providing for inmates' care and safety in crowded conditions at higher security levels, as well as the safety of BOP staff and surrounding communities.), https://www.justice.gov/d9/2023-03/bop_bf_fy_2024_pb_narrative_omb_cleared_3.21.2023.pdf.

[5] Devlin Barrett, *Judge Blasts Bureau of Prisons' Treatment of Dying Prisoner*, NY Times (Oct. 14, 2022), https://www.washingtonpost.com/national-security/2022/10/14/prisons-contempt-dying-inmate/.

[6] *See, e.g.*, Dep't of Justice, *Seventh and Eighth Federal Correctional Officers Charged as Part of Ongoing Federal Investigation into FCI Dublin*, https://www.justice.gov/usao-ndca/pr/two-more-dublin-federal-correctional-officers-plead-guilty-sexually-abusing-multiple.

[7] Stephen R. Sady, *Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes that Reduce Prison Time*, Federal Sentencing Reporter, Vol. 35, No. 1 at 13 (Oct. 2022).

For the first time in its history, the Commission heard from panels of system-impacted people during the 2023 amendment cycle hearings. In the panel on February 23 and the panel on July 19, Commissioner Horn Boom asked the formerly incarcerated witnesses what the Commission could do to help give hope to those who are currently incarcerated.[8] Witnesses responded unequivocally that BOP could increase access to programming. They detailed the impact that programming could have on them, but also how difficult it was to access meaningful programs.

Programming in prison helps ensure that sentences imposed "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[9] And yet, access to programming in federal prison remains a challenge.[10] As an initial matter, availability of programming, and the incentives for programming depend on an individual's PATTERN score and SPARC-13 assessment. For example, individuals with a High PATTERN score are unlikely to be able to use their programing for early release or early transfer to the community. The problems with PATTERN are now well documented.[11] PATTERN has been shown to overpredict recidivism for people of color, giving certain individuals a higher PATTERN score for reasons untethered to their likelihood to recidivate. In addition, the BOP's risk and needs assessment, known as SPARC-13, which determines the appropriate programs for an individual, was not conducted on time, limiting some individuals' access to recidivism reducing programming.[12] Even though these problems with PATTERN and SPARC-13 are documented and well known, BOP will continue to rely on these systems to determine an individual's programming needs and eligibility to return to the community early.

The Department of Justice's 2023 report on the First Step Act celebrates increased access to programming since 2022, but roughly a quarter of individuals are still not participating in First

---

[8] U.S. Sentencing Comm'n, February 2023 Public Meeting Transcript at 270 (Feb. 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/0223_Transcript.pdf.

[9] 18 U.S.C. § 3553(a)(2)(D).

[10] U.S. Dep't of Justice, *First Step Act Annual Report* 21-23 (Apr. 2023), https://www.ojp.gov/first-step-act-annual-report-april-2023.

[11] *See id.* at 8-11; *see also* Carrie Johnson, Flaws Plague a Tool Meant to Help Low-Risk Federal Prisoners Win Early Release, NPR (Jan 26., 2022), https://www.npr.org/2022/01/26/1075509175/justice-department-algorithm-first-step-act; Nat'l Inst. Of Justice, *Predicting Recidivism: Continuing to Improve the Bureau of Prisons' Risk Assessment Tool, PATTERN* (Apr. 19, 2022) (recognizing, after many iterations, that there is still work to be done because "[r]esults demonstrate evidence of differential prediction across racial/ethnic groups . . . include[ing] overprediction of Black, Hispanic, and Asian males . . .").

[12] GAO, *Report to Congressional Committees, Bureau of Prisons Should Improve Efforts to Implement its Risk and Needs Assessment System* (March 2023), https://www.gao.gov/assets/gao-23-105139.pdf ("[W]e found issues with BOP's ability to oversee whether risk and needs assessments are conducted on time. Specifically, BOP does not have readily-available, complete, and accurate data to determine if risk and needs assessments were conducted within the First Step Act required and BOP established timeframes. While BOP has plans to implement various mechanisms to monitor First Step Act requirements, BOP has not confirmed whether it will measure if assessments are conducted on time.").

Step Act activities.[13] Moreover, the GAO recently found "BOP has some data on who participates in its programs and activities, but does not have a mechanism to monitor if it offers a sufficient amount. Without such a mechanism, BOP cannot ensure it is meeting the incarcerated population's needs."[14] The Commission should consider ways in which it can help encourage increased access to programing for individuals and enhance monitoring to ensure that individual needs are being met.

In his article, Sady recommends numerous ways the Commission can live up to its responsibility to help ensure the BOP is advancing the purposes of sentencing.[15] We wanted to highlight one recommendation in particular. In a recent study, the Commission found a "significant reduction in the likelihood of recidivism" for people who completed the RDAP program.[16] And yet, a group of individuals who would otherwise benefit from this productive program are categorically excluded because the BOP has determined that a mere sentencing enhancement for possession of a weapon is a disqualifying "crime of violence."[17] This is so even though the BOP has acknowledged that gun possessors are statutorily eligible for RDAP, but nonetheless exercised its discretion to disqualify individuals with a gun enhancement.[18] The Commission should use its authority to recommend that individuals with gun enhancements who are not otherwise statutorily disqualified be eligible for RDAP. Doing so will help reduce recidivism and ensure that a sentence meets the purpose of punishment while avoiding incarceration that is overly punitive, to the detriment of the individual and the system as a whole.

FAMM communicates daily with individuals in federal prison who share with us their lived experiences of trying to survive their days in BOP. We would welcome the opportunity to be involved with the Commission's work to help make BOP more efficient and more humane for those in federal custody.

II. **Proposed Priority (2)**: Promotion of court-sponsored diversion and alternatives-to-incarceration programs by expanding the availability of information and organic documents pertaining to existing programs (e.g., Pretrial Opportunity Program, Conviction and Sentence Alternatives Program, Special Options Services Program) through the Commission's website and possible workshops and seminars sharing best practices for developing, implementing, and assessing such programs.

FAMM supports the Commission's initiative to promote court-sponsored diversion and alternatives-to-incarceration programs. We believe that overincarceration is a systemic problem and one that disproportionately impacts communities of color. Identifying and strengthening feasible alternatives to incarceration that can protect community safety while reducing the prison population and lessening racial disparity is a noble goal for the Commission to pursue. The

---

[13] *See supra* n. 10 at 21-22.
[14] *See supra* n. 12.
[15] *See supra* n. 7.
[16] U.S. Sentencing Comm'n, Recidivism & Federal Bureau of Prisons Programs, Drug Program Participants Released in 2010 at 4 (May 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220517_Recidivism-BOP-Drugs.pdf.
[17] BOP Program Statement No. 5162.02 (July 24, 1995); 18 U.S.C. § 3632(d)(4)(A); 18 U.S.C. § 3624(g).
[18] 62 Fed. Reg. 53690-01 (Oct. 15, 1997).

Commission heard from a wide variety of stakeholders who provided their views on alternatives to incarceration nearly 15 years ago.[19] FAMM would support the Commission in once again gathering stakeholders to discuss strategies for alternatives to incarceration that can appropriately address current issues in our carceral system and explore how the Guidelines can be adjusted to lessen our reliance on incarceration.

III. **Proposed Priority (3)**: Examination of the *Guidelines Manual*, including exploration of ways to simplify the guidelines and possible consideration of amendments that might be appropriate.

FAMM supports the Commission in its endeavor to simplify the Guidelines in a manner that would make them more user-friendly and accessible, particularly to incarcerated individuals and their loved ones. As we have counseled before, if it embarks on this endeavor, the Commission should not conflate simplification with increased mandatory or presumptive direction to judges.[20] Preserving a judge's ability to account for nuance in each case is key to "providing certainty and fairness . . . while maintaining sufficient flexibility."[21]

IV. **Proposed Priority (6):** Examination of the treatment of youthful offenders under the Guidelines Manual, including possible consideration of amendments that might be appropriate.

FAMM adopts the comment of the Federal Public Defenders regarding the Commission's consideration of youthful offenders and amendments that may be appropriate. As the Commission is well aware, brain science on the impact of age on impulse control and arousal has improved significantly in recent years. FAMM applauds the Commission's proposal to study and perhaps amend the guidelines to reflect this scientific advancement.

V. **Proposed Priority (9)**: Consideration of other miscellaneous issues coming to the Commission's attention.

a. *Acquitted conduct*

Last year, FAMM and many others urged the Commission to tackle the use of acquitted conduct at sentencing. The Commission commendably proposed an amendment to the acquitted conduct guideline. FAMM, while supportive of the general thrust of the proposal, pushed back on it to the extent it would have retained some use of the practice. In our view, the proposed amendment was confusing and created an unnecessary carve out for an exceedingly rare

---

[19] U.S. Sentencing Comm'n, *Proceedings from the Symposium on Alternatives to Incarceration* (July 14-15, 2008), https://www.ussc.gov/research/research-reports/proceedings-symposium-alternatives-incarceration-july-14-15-2008.
[20] Letter from Kevin A. Ring & Mary Price to Hon. William H. Pryor, Jr. 7 and n. 21 (Aug. 9, 2018), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/FAMM.pdf.
[21] 28 U.S.C. § 991(b)(1)(B).

circumstance (split verdicts).[22] We advocated that the Commission prohibit the use of acquitted conduct unequivocally.[23]

After hearing testimony on the issue and reviewing submissions from FAMM and others on the topic, the Commission announced that it would not be voting to finalize its acquitted conduct proposed amendment in 2023. The Commission explained it "needs a little more time . . . before coming to a final decision on such an important matter. We intend to resolve these questions involving acquitted conduct next year."[24]

Given the Commission's expressed intention to resolve the issue of acquitted conduct, FAMM was surprised to see that it was not included on the list of priorities. We urge the Commission to add acquitted conduct to this amendment cycle. Doing so is particularly important in light of the fact that the Supreme Court recently denied certiorari in a handful of cases raising the constitutionality of the practice. Justice Sonia Sotomayor observed that "[t]he Court's denial of certiorari today should not be misinterpreted. The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year."[25] Justice Brett M. Kavanaugh, joined by Justices Neil M. Gorsuch and Amy Coney Barrett, echoed this sentiment and added that "[i]t is appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant certiorari. . . ."[26]

The Commission should take up this issue given the Court's expectation that it would do so. FAMM urges the Commission to end the practice of augmenting an individual's sentence using acquitted conduct. Public confidence is key to the legitimacy of our courts. Justice Sotomayor echoed the opinion of numerous jurists when she observed that "acquitted-conduct sentencing raises questions about the public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system."[27] FAMM agrees.

VI. Conclusion

FAMM appreciates the Commission's consideration of our input on issues critical to federal sentencing and prison reform. We look forward to participating in the Commission's upcoming amendment cycle.

---

[22] Letter to the Hon. Carlton W. Reeves from Mary Price and Shanna Rifkin, *Proposed Amendments to the Federal Sentencing Guidelines* 28 (Mar. 14, 2023), ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=1052.
[23] *Id.* at 29-30.
[24] U.S. Sentencing Comm'n, *April 2023 Public Meeting Transcript* at 23, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230405/20230405_transcript.pdf.
[25] *McClinton v. United States*, No. 21-1557, 600 U.S. ___ (2023),
[26] *Id.*
[27] *Id.* at 4; *see also United States v. Katallah*, 41 F.4th 608, 646-47 (D.C. Cir. 2022); *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millet, J., concurring in the denial of rehearing en banc); *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008).

Sincerely,

Mary Price
General Counsel

Shanna Rifkin
Deputy General Counsel

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Middle Ground Prison Reform

Topics:

1. Bureau of Prisons Practices

Comments:

We are the only advocacy group in Arizona that has consistentsly operated since 1983 to advocate to protect the rights of jail and prison inmates, including those housed in the BOP in Arizona. Our experience with the BOP is that this gargantuan bureaucratic agency is mostly engaged in cover-up and non-compliance with basic constitutional rights, especially (in our direct experience) with the legal rights of prisons for access to legal counsel, the lack of confidential handling of legal mail, delays in scheduling legal visits, lack of access to clients with immediate-pending court deadlines when the prisoner is in a SHU, etc. Legal mail is often photocopied and a poor copy is provided to the prisoner (and who knows where the original document is filed or by whom it is read?), a poor quality -- often unreadable -- copy is provided to the prisoner, legal calls are difficult to arrange and not given the priority they deserve. In short, the BOP has many, many enormous problems to overcome and we don't see any improvement at all since the new Director has come aboard. Drastic measures are required to fix this embarrassing government agency.

Submitted on: July 25, 2023

August 1, 2023

Honorable Judge Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Comment on U.S.S.C. Proposed Priorities
for Amendment Cycle Ending May 2024

Dear Judge Reeves,

The Muslim Legal Fund of America (MLFA) is a 501(c)(3) non-profit legal organization dedicated to defending Muslims' civil rights and liberties in national security cases through federal litigation. MLFA has a federal criminal defense department that represents clients in federal courtrooms across the country in national security cases (often material support of terrorism offenses, obstruction of justice, false statements in a terrorism investigation, distribution of bomb-making instructions online and others). These cases are selected for the unique constitutional issues they present, including prosecutorial overreach and discriminatory application and enforcement of federal law and sentencing guidelines.

MLFA respectfully submits the following comments on the Commission's proposed priorities for the amendment cycle ending in May 2024. We will address the Commission's following proposed priorities:

- To study and reform the career offender guidelines (Proposed Priority #5)
- Reform the Guidelines' treatment of youthful offenders (Proposed Priority #6)
- Further study and reform of the sentencing differences due to the trial penalty (Proposed Priority #10)
- Continued study regarding recidivism (Proposed Priority #10)
- Promote court-sponsored diversion and alternatives-to-incarceration programs (Proposed Priority #2)

MLFA submits that the study and reform of the career offender guidelines is not complete without discussion of the Terrorism Enhancement. The Terrorism Enhancement (U.S.S.G. § 3A1.4)[1] is ripe for reform and further study as part of each of these proposed priorities (#'s 2, 5, 6, 10 and 11).

The Terrorism Enhancement is currently not addressed in any of the Commission's Reports or analyses[2] on the Career Offender guidelines, but § 3A1.4 automatically increases an individual's criminal history category to Category VI (career offender) and raises the offense level by 12 points. The Terrorism Enhancement, more so than the § 4B1.1 (career offender) guideline, does not distinguish between youthful, first-time, non-violent offenders and those with significant violent criminal history and often results in overly severe penalties for the largely Muslim individuals it is applied to. The Terrorism Enhancement does not have any evidentiary basis to support its draconian treatment of Muslims convicted of terrorism-related offenses, and it is discriminatorily applied to Muslims convicted of crimes "calculated to influence or affect the conduct of government." But the Enhancement is rarely sought for non-Muslim[3] and white individuals and was found inapplicable where it has been sought. Reforming the Enhancement, expanding court diversion alternatives, and studying its discriminatory application and lack of evidentiary basis fits well within the Commission's proposed priorities.

A. The impact of the Terrorism Enhancement (§ 3A1.4) – a career offender guideline

Terrorism-related offenses have been aggressively prosecuted in the United States since 9/11. The leading statute in the anti-terror push is the material support statute, 18 U.S.C. § 2339B, which punishes knowingly providing material support or resources to a designated foreign terrorist organization ("FTO") or attempting or conspiring to do so. The government frequently uses the material support statute because convictions under the law do not require that the defendant engaged in terrorism, aided or abetted terrorism, or conspired to commit terrorism. This endlessly broad statute, along with many others (false statements, and obstruction of justice)[4], has resulted in unjust convictions and unjustifiably lengthy sentences.

The statutory maximum of a § 2339B conviction is 20 years. The sentences prescribed for material support independently reflect Congress's intent to deter and punish terrorism-related crimes. If the offense results in the death of any person, the required prison sentence is any term of years or for life. The guideline for material support offenses, USSG § 2M5.3, carries a base offense level of 26. If the offense involved dangerous weapons, firearms, explosives, funds to purchase any of those items, or funds or other support believing they will be used to commit a

---

[1] Section 3A1.4 is one of five "Victim-Related Adjustments" in the Guidelines. Of the five, the EN is the most severe. It applies to non-violent offenses that do not have any victims.

[2] U.S. SENT'G COMM'N, PRIMER ON CATEGORICAL APPROACH 20 (2022).

[3] Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L. J. 1520, 1560 (2017), https://digitalcommons.law.yale.edu/ylj/vol126/iss5/5.

[4] For example, 18 U.S.C. § 2339A, 18 U.S.C. § 2339C, but the Terrorism Enhancement is also applied to false statements (1001(a)), obstruction of justice, and other conduct that does not warrant the extreme treatment of the Terrorism Enhancement.

violent act, 2 levels are added.[5] Assuming a criminal history category I and an offense level of 26, the advisory guideline range is 63 to 78 months; at offense level 28, the advisory guideline range is 78 to 97 months.

But these sentencing ranges are rarely ever the advisory guidelines ranges for individuals convicted under the material support statutes. The Terrorism Enhancement then, on top of the sentencing in § 2339B (and other statutes), increases the sentence for individuals convicted of "a federal crime of terrorism," i.e., crimes "calculated to influence or affect the conduct of government." *See* U.S.S.G § 3A1.4 (adopting the definition of "Federal Crime of Terrorism" in 18 U.S.C. § 2332b(g)(5)). This adds 12 more levels to the offense level, or increases the level to 32, whichever is higher. And regardless of the individual's actual criminal history, the enhancement assigns them to Criminal History Category VI, usually reserved for career offenders. *See United States v. Segura-Del Real*, 83 F.3d 275, 277 (9th Cir. 1996) ("Defendants are placed in category VI because they are the most intractable of all defendants."). The Terrorism Enhancement is the reason that individuals convicted of terrorism-related conduct, no matter how minor, receive abnormally long criminal sentences.

After applying the Terrorism Enhancement, the minimum possible Guidelines range for any offense is 210 to 262 months—that is, 17.5 to 21.8 years.[6] But more typically, the enhancement leads to a sentence of thirty years to life or the statutory maximum, whichever is less. The result: it can put a criminal defendant away for thirty years to life for a crime that would otherwise result in a sentence of around five years.[7]

B. The Terrorism Enhancement does not consider, and actually undermines, the objective factors required under 18 U.S.C. 3553(a).

Courts are required to consider seven factors in developing an appropriate sentence, including the nature of the offense and the characteristics of the defendant. § 3553(a)(1). The Terrorism Enhancement violates 28 U.S.C. § 991(b)(1)(A)—and undermines 18 U.S.C. § 3553(a)—as its express language and application suggests the Commission does not advise courts to follow the § 3553(a) factors for terrorism-related cases. In fact, none of the § 3553(a) factors are encompassed within or referenced by the enhancement at all. Instead, the Terrorism Enhancement automatically increases the level of the offense and the Criminal History Category, neither of which are based on an evaluation of the defendant's conduct or characteristics or the need for the sentence imposed. *See* 18 U.S.C. § 3553(a).

In the context of a material support offense under 18 U.S.C. § 2339A or 2339B, the Terrorism Enhancement would not direct a court to consider objective factors, such as the amount or kind of support given, whether the support was choate or inchoate, the defendant's actual role in the terrorist activity, or the extent of harm caused by the defendant's support. Rather, the enhancement hinges on a single question: was "the offense a felony that involved, or was intended

[5] § 2M5.3(b)
[6] U.S. SENT'G GUIDELINES MANUAL § 2X1.1(b), 406-07 tbl. (U.S. SENT'G COMM'N 2021).

[7] *Id.*

to promote, a federal crime of terrorism," with "federal crime of terrorism" defined as an offense calculated to influence or affect the conduct of government. U.S.S.G. § 3A1.4(a); 18 U.S.C. § 2332b(g)(5). If the court finds, by a preponderance of the evidence, that the defendant provided material support to a terrorist or terrorist organization, then the Guidelines oblige the sentencing court to apply the Terrorism Enhancement with no adjustment for mitigating or aggravating conduct. *See United States v. Awan*, 607 F.3d 306, 317 (2nd Cir. 2010) (citing 18 U.S.C. § 2332(b)(g)(5)(A)).

In reality, the type of criminal conduct subject to the enhancement varies significantly: from planning and participating in a terrorist attack that kills many people (i.e. what would likely be accompanied by life in prison to capital punishment) to making false statements to law enforcement officials (i.e. punishable by a maximum five-year prison sentence). *See e.g., United States v. Benkahla*, 530 F.3d 300, 304, 307 (4th Cir. 2008) (applying the Terrorism Enhancement, the defendant's sentence for perjury was increased from approximately three years to 10-12 years, or up to four times the normal length for perjury). This variance in conduct is not accounted for in the Terrorism Enhancement and the resulting Guidelines range is thus often inconsistent with the statutes criminalizing and punishing the conduct. *Id.*

Moreover, the Terrorism Enhancement directly contradicts the language of the material support statutes, which acknowledge that there are different levels of support requiring different punishments. For example, while § 2339A permits a maximum sentence of fifteen years, if death results from the support provided, the maximum sentence increases to life. Likewise, under § 2339C, if a defendant provides financial support with the intent or knowledge that the funds will be used in an act of terrorism, the maximum sentence is twenty years. But if someone only conceals, rather than provides, financial support, the maximum is just ten years. By contrast, the minimum sentence under the Terrorism Enhancement is 17.5 years, *regardless of the type of material support provided*.[8] While the material support statutes' variation in sentencing shows that Congress intended for sentences to be "proportional to the culpability of the conduct, to the injury that can be directly attributed to a defendant's actions, and to the nature of the organization's actions," the Terrorism Enhancement treats an individual who provides any type of material support as harshly as the terrorist who himself commits violent acts.[9,10]

C. The Terrorism Enhancement functions as a mandatory minimum sentence in terrorism-related cases.

Although the Guidelines were deemed advisory in *Booker*, because sentencing courts are required to consider them and must provide a sufficient justification for departing from them, they

[8] U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2021) 406-07 tbl.

[9] James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51, 100, 116 (2010).

[10] Attachment 1 is a table demonstrating the wide ranging sentences for similar types of offenders subject to the Terrorism Enhancement. The result is disparate and dissimilar sentencing for similar offenses.

largely continue to act as mandatory.[11] *See Rita v. United States*, 551 U.S. 338, 366 (2007) (Stevens, J., concurring) ("I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in Booker."). Perhaps nowhere is this more evident than with the Terrorism Enhancement. Sentencing courts start from a place of little experience with terrorism-related cases, like the district judge noted in *United States v. Said Azzam Rahim* (N.D. Tex. 2019).[12] They rely on the Terrorism Enhancement in the Guidelines based on the assumption that the Commission, with superior knowledge and data, must have created the Terrorism Enhancement for some logical and substantiated reason. *See Gall v. United States*, 552 U.S. 38, 46 (2007) (explaining that the Guidelines are the "product of careful study based on extensive empirical evidence"). While this assumption is inaccurate[13] , terrorism defendants then receive severe punishments that, when reviewed by an appellate court, are given a "presumption of reasonableness." *See Rita*, 551 U.S. at 347.

In other words, because the sentences are within the Guidelines range, appeals courts typically defer. It seems that the only time appellate courts have stepped in is to overturn sentences as too lenient when district judges vary downward from the Guidelines range created by the Terrorism Enhancement.[14] *See United States v. Ressam,* 679 F.3d 1069 (9th Cir. 2012); *id*. at 1106 (Schroeder, J., dissenting) ("The majority's implicit assumption that terrorism is different . . . flies in the face of the congressionally sanctioned structure of sentencing that applies to terrorism as well as all other kinds of federal criminal offenses."); *United States v. Jayyousi*, 657 F.3d 1085, 1117 (11th Cir. 2011) (vacating sentence which varied downward from Guidelines range and remanding with instructions to increase sentence into range of 360 months to life). Thus, to call the Terrorism Enhancement "advisory" is to ignore reality—that no matter the route taken, we end up right back at applying the Terrorism Enhancement's automatic offense level and Criminal History Category increases without regard for the defendant's conduct or characteristics.

D. The Sentencing Commission's analysis of the career offender guideline also applies to the Terrorism Enhancement and should include it in recommended reforms.

The Guidelines classify defendants by Criminal History Category based on their number of past offenses because, according to the Commission, courts should impose a sentence that will "protect the public from further crimes of the defendant" (18 U.S.C. § 3553(a)), and "repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation." 18 U.S.C. § 4A1.1, Introductory Comment. "Prior convictions . . . serve under the Guidelines to place the

---

[11] *See* United States Sentencing Commission, *Federal Sentencing: The Basics*, 3 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf ("[T]he average sentence imposed for all cases has closely tracked the average guideline range—both before and after *Booker*.").

[12] *United States v. Said Azzam Rahim*, 3:17-cr-00169 (N.D. Tex. 2019), Doc. 180, Transcript of Sentencing Hearing, 69 ("Mr. Rahim, we don't see many cases like this here. We might do maybe one case a year for the various courts . . .").

[13] *See* discussion *infra* Section VI.C.1.c.i.

[14] *See* Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 525 (2014). *See also* Said, *supra* note 8, at 525-27.

defendant in one of six 'criminal history' categories; the greater the number of prior convictions, the higher the category. . . . the Guidelines seek to punish those who exhibit a pattern of 'criminal conduct.'" *Nichols v. United States*, 511 U.S. 738, 751 (1994) (Souter, J., concurring). In other words, the Criminal History Category is intended to increase sentences for "career offenders."

The Sentencing Commission has studied the career offender guideline (§ 4B1.1) which implements a Congressional directive instructing the Commission to set the guideline range for offenders with specified instant and prior convictions at or near the statutory maximum. A defendant qualifies as a career offender if (1) the defendant was at least eighteen years old at the time he or she committed the instant offense of conviction; (2) the instant offense is a felony that is a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

In its analysis, the Sentencing Commission explored concerns that the career offender guideline does not meaningfully distinguish among career offenders. That same concern applies to the Terrorism Enhancement, and the career offender portion of the Terrorism Enhancement is significantly more problematic than section 4B1.1 because it is applied to first-time, non-violent offenders regularly. Unlike § 4B1.1 that at least required a present felony, and two prior felonies for either a crime of violence or a controlled substance offense.

Importantly, the Commission found clear differences between offenders who had drug trafficking only offenses, violent only offenses, and mixed offenses. The Commission found that "career offenders who have committed a violent instant offense or a violent prior offense generally have a more serious and extensive criminal history, recidivate at a higher rate than drug trafficking only career offenders, and are more likely to commit another violent offense in the future."[15]

Based on its findings, the Sentencing Commission concluded that the career offender directive is best focused on those offenders who have committed at least one "crime of violence." The Commission recommended that "Congress amend the directive to reflect this principle by no longer including those who currently qualify as career offenders based solely on drug trafficking offenses" and noted that such "reforms would help ensure that federal sentences better account for the severity of the offenders' prior records, protect the public, and avoid undue severity for certain less culpable offenders."[16]

The same findings apply to the Terrorism Enhancement, which *pretends* that first-time offenders are career offenders.[17] There is no evidentiary basis for the harsh impact of the enhancement. In fact the evidence in the aftermath of these prosecutions reveals what the

---

[15] U.S. SENT'G COMM'N, REPORT TO CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 26 (2016).

[16] *Id.* at 3.

[17] None of the other "Victim-Related Adjustments" result in an automatic Criminal History Category increase. *See* U.S.S.G §§ 3A1.1-3.

Commission has already learned about "career offenders"—that past crimes of violence are better indicators of recidivism, and non-violence indicates a much lower risk of recidivism.

E. The empirical evidence does not support treating and sentencing first-time terrorism offenders like career offenders.

According to the Commission, "the guidelines represent an approach that begins with, and builds upon, empirical data." U.S.S.G. Part A Introduction and Authority (2021) at 5. Indeed, the Supreme Court has repeatedly claimed that the reason courts should and do look to the Guidelines in imposing fair sentences is because the Commission develops the Guidelines by using empirical data. *See Rita*, 551 U.S. at 349 (outlining the "empirical approach" that the Sentencing Commission used to structure the Sentencing Guidelines); *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007) (The Commission "has the capacity courts lack to 'base its determinations on empirical data and national experience. . . .'"). Despite this imperative, there was little empirical data on terrorism sentences when the Commission promulgated the Terrorism Enhancement in 1994.[18] Instead, the Terrorism Enhancement was created on the unsubstantiated assumption that terrorism defendants, no matter their individual situation, were so different from other defendants that an extreme increase in Criminal History Category was necessary across the board.[19]

Moreover, the evidence since 1994 strongly discredits the logic of the Terrorism Enhancement's blanket increase in Criminal History Category, particularly where the defendant is a first-time offender. According to the Commission, individuals with no criminal record have the lowest rate of recidivism.[20] One study cited by the Commission in 2004 determined that 93.2% of first-time offenders did not reoffend.[21] Based on this evidence, for non-terrorism defendants without a criminal history, courts regularly impose sentences below the advisory Guidelines range because they recognize that a lesser prison sentence is nonetheless a significant punishment and deterrent for someone who has never experienced prison.[22] There is *no evidence* however, that terrorism-related defendants are an exception or reoffend at higher rates. To the contrary, the available data shows that individuals convicted of terrorism-related offenses do not reoffend at

---

[18] *See Brown*, *supra* note 2, at 547.

[19] At the time, neither Congress nor the Commission could have envisioned how a group like ISIS would use the internet to ensnare individuals online into making verbal statements of support, offers of financial support, or discussions about traveling abroad etc., thereby exposing first-time non-violent offenders to statutory maximum sentences.

[20] *See* Sameer Ahmed, *Is History Repeating Itself: Sentencing Young American Muslims in the War on Terror*, 126 Yale L. J. (2017), https:// digitalcommons.law.yale.edu/ylj/vol126/iss5/5.

[21] *Recidivism and the "First Offender,"* U.S. SENT'G COMM'N 26 (May 2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/20040 5_Recidivism_First_Offender.pdf [http://perma.cc/MLD8-RQU8].

[22] *See, e.g.*, *United States v. Willis*, 479 F. Supp. 2d 927, 937 (E.D. Wis. 2007) (varying downwards because the "sentence provided a substantial punishment for someone . . . who had never before been to jail and who engaged in no violence").

higher rates than those convicted of other crimes. Scott Shane, Beyond Guantánamo, a Web of Prisons for Terrorism Inmates, N.Y. TIMES (Dec. 10, 2011), https://www.nytimes.com/2011/12/11/us/beyond-guantanamo-bay-a-web-of-federal-prisons.html.

Of more than 300 prisoners who had completed terrorism sentences since 2001 (up to 2011), "Justice Department officials and outside experts could identify only a handful of cases in which released inmates had been rearrested, a rate of relapse far below that for most federal inmates . . ." *Id.* Thus, "it appears extraordinarily rare for the federal prison inmates with past terrorist ties to plot violence after their release." *Id.* Because the Terrorism Enhancement automatically increases a defendant's Criminal History Category to VI, the fact that the defendant is a first-time offender with a low likelihood of recidivism is not only ignored but actually erased.

Courts scrutinizing this issue agree that the complete lack of evidence is a weak basis for the Terrorism Enhancement. Senior Judge George O'Toole, Jr., presiding over *United States v. Mehanna*, Transcript of Disposition, No. 09-10017-GAO (D. Mass. 2012), criticized the mandatory Criminal History Category VI as "too blunt an instrument to have any genuine analytical value" and "fundamentally at odds with the design of the Guidelines" because it "imputes a fiction into the calculus." *Mehanna*, Sentencing Transcript (Doc. 480) at 8-9. Moreover, the Court in *United States v. Jumaev* refused to apply the enhancement because it "is not backed by any empirical evidence" and because "treating all 'terrorists' alike is impermissible under our sentencing paradigm." 2018 WL 3490886, *10, CR 12-0033 JLK (D. Colo. July 18, 2018). And the court explained in *United States v. Alhaggagi:*

> [T]he enhancement's treatment of criminal history-automatically assigning to all terrorism defendants a criminal history category of VI is inappropriate based on the seriousness of the crime, inappropriate based on assumptions about recidivism, and inappropriate as to this Defendant, warranting a downward departure.

2019 U.S. Dist. LEXIS 37889, 2019 WL 1102991 at *16 (N.D. Cal. March 8, 2019). *See also United States v. Khan*, No. 4:15-cr-00263, Judgment at Doc. 126 (S. D. Tex. July 2, 2018), rev'd and remanded, 938 F. 3d 713 (5th Cir. 2019), resentenced (sentencing the defendant to 18 months because he had no criminal history and terminated his plans).[23]

Courts applying the Terrorism Enhancement, on the other hand, conspicuously fail to cite any evidence to justify imposing the Guidelines' harsh sentences in terrorism-related cases.[24] They seek to justify its steep increase by arguing, with no evidence, that "terrorists[,] [even those] with no prior criminal behavior[,] are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." *Jayyousi*, 657 F.3d at 1117; see also

---

[23] *United States v. Khan* (S.D. Tex. 2019) (initial Court did not apply the Terrorism Enhancement to Khan's sentence), rev'd, 5th Cir. (2021). The government appealed a second time, the Fifth Circuit reversed and remanded again, the original judge was recused, and the new sentencing judge sentenced the defendant to 12 years.

[24] McLoughlin, *supra* note 6, at 112-15.

United States v. Meskini, 319 F.3d 88, 92 (2d Cir. 2003). This belief, "that terrorism is different, maybe even exceptional" is premised on "a type of visceral outrage at all conduct linked to terrorists that can taint the individualized and careful process that is supposed to go into a criminal sentencing" and, despite the lack of evidence, is used to "justif[y] a departure from the normal standards."[25] Not only is this belief unsupported, its resultant sentencing enhancement also causes harm to the Muslim American community.[26]

The Terrorism Enhancement should be included in the Commission's analysis and recommend reforms of career offender guidelines, and considered for additional reforms, study, and alternatives-to-incarceration for first-time, youthful, non-violent offenders.

F. Discriminatory application of the Terrorism Enhancement to Muslim individuals, and court refusal to apply the enhancement to non-Muslim, white offenders where applicable

While the Terrorism Enhancement is written for broad application, it has been largely applied only to Muslim defendants, or offenses involving Muslim organizations.[27] The Terrorism Enhancement is intended to dramatically increase the punishment of offenses that were "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." This can apply to the list of enumerated statutes in § 3A1.4, but Application Note 4 to § 3A1.4 also allows for an upward departure—equivalent to what would result if the enhancement was applied—for any other offense that "was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." The upward departure can also apply to any of the enumerated statutes where the terrorist motive was to intimidate or coerce a civilian population, rather than influence the conduct of government.

Many of the January 6th convictions, were based on a clear and established intent to "influence or affect the conduct of government by intimidation or coercion, or retaliation," and would thus qualify for application of the Terrorism Enhancement or the upward departure it provides for in Application Note 4.

On January 6, 2021, a mob of President Donald Trump's supporters went to the U.S. Capitol, attempting to interfere with the certification of electoral votes from the 2020 presidential election. The rioters assaulted the Capitol police force, and looted and invaded the complex for several

[25] Said, *supra* note 8, at 521.

[26] Ahmed, *supra* note 15, at 1556. "These [similar] negative effects include (1) increasing discrimination by reinforcing stereotypes of African Americans and Muslims as inherently dangerous, (2) furthering distrust of law enforcement among African Americans and Muslims, . . . and (3) failing to effectively rehabilitate drug and terrorism offenders and reintegrate them into society." *Id.*

[27] Trevor Aaronson & Margot Williams, *Trial and Terror*, THE INTERCEPT (last updated June 14, 2023), Trial and Terror (theintercept.com). This online database spotlights 992 terrorism-related prosecutions by the Department of Justice. Of these 992, only ~95 cases are against non-Muslim offenders/non-Muslim organizations.

hours. They destroyed property and sent members of Congress and their staff into hiding in offices and bunkers. More than 100 members of law enforcement were injured.[28]

The Justice Department however has only sought the Terrorism Enhancement in a couple of the over 900 prosecutions.[29] Courts have not applied the enhancement to any of the January 6th rioters.

The discriminatory application of the Terrorism Enhancement to mostly Muslims, or offenses involving Muslim organizations, has long been established. But in the face of the government's refusal to seek the enhancement, and courts' refusals to apply the enhancement to white, non-Muslims whose conduct clearly warrants its application, the enhancement is now on its face discriminatory on the basis of religion.

The Sentencing Commission's tracking and reported data does not show this clear discrimination however. The Commission only tracks race as commonly tracked in the U.S. Census. There is no category for Arab, Iranian, or Southwest Asian. More than 80% of individuals of Middle Eastern, Southwest Asian, or North African (Egypt, Morocco etc.) background, select themselves as "white."[30] Indeed, the Sentencing Commission indicates that the Terrorism Enhancement is applied to 50% "white" individuals. This is inaccurate and results in an erasure of the discriminatory impact of the Enhancement on those of Southwest Asian, Arab, and North African descent.

The Commission also does not track religion. As a result, there is currently no data from the Sentencing Commission that would alert a clearly discriminatory application of the Terrorism Enhancement to Muslim Americans. For the reasons discussed above, religion should be clearly tracked for this enhancement and analyzed in the context of discriminatory application.

---

[28] History.com Editors, *U.S. Capitol Riot*, HISTORY.COM (last updated Dec. 20, 2022), https://www.history.com/this-day-in-history/january-6-capitol-riot.

[29] *United States v. Reffitt*, (D.D.C. 2022) Case number: 1:21-cr-00032 (tried to storm the Capitol while armed with a gun. The judge refused to apply the terrorism enhancement and sentenced Reffitt to just over 7 years*.); United States v. McCaughe*y, III et al (D.D.C. 2023), Case number: 1:21-cr-00040
(Judd launched a lit object at a tightly packed tunnel of law enforcement and the mob in an attempt to clear a path for rioters. The judge did not apply the terrorism enhancement, sentenced to 32 months.).
See also Josh Gerstein, *Why DOJ is Avoiding Domestic Terrorism Sentences for Jan. 6 Defendants*, POLITICO (Jan. 4, 2022, 4:30 AM), https://www.politico.com/news/2022/01/04/doj-domestic-terrorism-sentences-jan-6-526407.

[30] Sarah Parvini & Ellis Simani, *Are Arabs and Iranians white? Census says yes, but many disagree*, LOS ANGELES TIMES (March 28, 2019), https://www.latimes.com/projects/la-me-census-middle-east-north-africa-race/. ; *See also* Abboud, Sarah et al. "The Contested Whiteness of Arab Identity in the United States: Implications for Health Disparities Research." *American journal of public health* vol. 109,11 (2019): 1580-1583. (Discussion on how "Arab classification as White leads to their cultural invisibility and perpetuates a cycle of undocumented health disparities.")

G. RECOMMENDATIONS

Based on the above, MLFA makes the following recommendations using a three-pronged approach:

a. Revise the Terrorism Enhancement itself (Proposed Priority #2 and #8)

1. The Commission should recommend that the Terrorism Enhancement be amended to remove the automatic criminal history category increase to career offender status, and recommend that the 12 level increase be removed as statutory elements and other enhancements already adequately account for specific types of conduct. The arbitrary 12 level increase ignores these measures, and undoes the purposes of 18 U.S.C. § 3553(a).

2. Application Note 1 to § 3A1.4, states that a "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5), which in turn defines a "federal crime of terrorism" as "an offense that (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and (B) is a violation of [the enumerated statutes]."

The Commission should recommend that this definition be amended to reduce the list of enumerated offenses to include only offenses which do not already incorporate provisions for aggravating conduct.

The Commission should also recommend that any amended Terrorism Enhancement should only apply to conduct in which there was at least one victim,[31] and that the defendant specifically intended to himself "influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." This would fall under the purview of proposed priority #8 as well, which seeks to resolve circuit splits. The specific intent requirement of the Terrorism Enhancement is the source of a circuit split among various circuits.[32] Conduct in support of a foreign terrorist organization that is indirect and unconnected to any specifically known terrorist activities should not be included (i.e. an online agreement to travel to live in the territory of an FTO, or sending donations for food, clothing, other types of aid to an FTO, providing contact information for travel to the FTO, etc.).

---

[31] Many of the attempted provision of material support convictions state there were no victims of the offense in the PSR.

[32] *See United States v. Amer Sinan Alhaggagi*, 978 F.3d 693 (9th Cir. 2020).

b. Conduct further research on terrorism-related sentencing (Proposed Priority #10)

3. Proposed priority #10 proposes further examination and comparison of sentences imposed in cases disposed of through trial versus plea. The trial penalty in terrorism-related offenses is extraordinary because of the Terrorism Enhancement. The broad applicability of the enhancement and its severe impact, mean that defendants feel enormous pressure to plead guilty with a cap on the potential sentence, rather than facing a statutory maximum recommend sentence after trial because of the enhancement. The Enhancement is also used as a "bargaining chip to strong-arm a desired result" and "prosecutors sometimes seek the Terrorism Enhancement against a formerly cooperative defendant if they default on a cooperation agreement. Rather than determining 'who is and who is not…a terrorist, the enhancement's practical utility is often reduced to that of a tool used to punish a lack of cooperation."[33]

   Given that many of these offenses are non-violent, first-time offenders, the impact of the trial penalty in these cases is particularly harmful to the defendants and their communities. The Commission should include a comparison of sentences imposed in terrorism-related cases that went to trial versus plead guilty.

4. Proposed priority #10 also proposes continued studies regarding recidivism. As discussed above, there is no empirical evidence to support the Terrorism Enhancement and the data that exists demonstrates that contrary to the idea that terrorism-related defendants are different, and intractably incapable of rehabilitation, they have some of the lowest recidivism rates. The Commission should study the recidivism rates of those convicted of terrorism-related crimes to gather empirical evidence on whether there is any evidentiary justification for the Terrorism Enhancement.

5. The Commission should also study and track the discriminatory application of the Terrorism Enhancement by accounting for the fact that those of Arab, North African, and Southwest Asian descent self-select as "white" for racial identification because of a lack of other options.

6. The Commission should study and track individuals' religion for those who receive the Terrorism Enhancement as an analysis of material support convictions and those who receive the Terrorism Enhancement indicate a distinct discriminatory application on the basis of religion.

[33] Madeline Johl, *Activism or Domestic Terrorism? How the Terrorism Enhancement Is Used to Punish Acts of Political Protest*, 50 FORDHAM URB. L.J. 465 (2023).

c. **Expand court-sponsored diversion and alternative-to incarceration programs for first-time terrorism-related offenders (Proposed Priority #2)**

The Commission should expand court-sponsored diversion and alternative-to-incarceration programs for young, non-violent terrorism-related offenders. The District of Minnesota has had great success with their program and additional study of their program and expansion of either the program, or access to the program from other districts would present a better alternative to the draconian sentences we have seen in other districts.

In the District of Minnesota, first-time non-violent offenders, convicted of terrorism-related crimes, receive sentences far less severe. As of the end of 2018, the District of Minnesota has dealt with 59 foreign terrorism related cases. *See* Kevin D. Lowery: Responding to the Challenges of Violent Extremism/Terrorism Cases for United States Probation and Pretrial Services, Journal for Deradicalization, Nr. 17 (December 28, 2018).

The District of Minnesota is home to a large Somali immigrant population. Mr. Lowery's study points out that some of these young Somali men have become disillusioned with America, and thus were especially vulnerable to ISIS propaganda. Several of these cases thus appeared after ISIS proclaimed the caliphate and the atrocities perpetrated by al-Assad in Syria.

Because many of these young men charged with attempting to join ISIS didn't have a criminal record and were facing extraordinary prison time, Senior Judge Michael J. Davis worked with the U.S. Attorney's office and the Federal Public Defender to deal with this modern phenomenon.

> It was determined through extensive research that there were no other federal agencies, state or local jurisdictions, or nongovernment organizations in the U.S. that had specialized evaluation and assessment practices or intervention programming for radicalized defendants and offenders. This imminent issue required further initiatives to provide for public safety on a number of levels. Therefore, the District conducted further research to evaluate international programs for possible solutions. The focus of this research was to identify components of other countries' extremism/terrorism intervention programs claiming success, which could be useful to the circumstances in Minnesota and the U.S.

Id. at 41.

Mr. Lowery continues:

> The scarcity of civil prevention and intervention programs in the U.S. has unfortunately resulted in criminal prosecutions being the nation's almost exclusive intervention response to extremism thus far. The District of Minnesota's justice system model team process for intervention starts at the point of arrest or criminal charges. Although the federal justice system has worked with domestic terrorism

> cases such as white supremacists for many generations, this new brand of jihadist extremist involved with foreign terrorist organizations has brought new challenges. …Included in the justice system team decision-making process is a more elaborate consideration of the underlying motivating factors and levels of radicalization, which is in addition to assessing the motivations or circumstances for other types of criminal behavior. *Id.* at 58-59.

The District of Minnesota, overwhelmed with material support to foreign terrorist organizations cases, understood that to treat this new class of defendant fairly, they needed to look beyond just the federal sentencing guidelines. The young people who have attempted to leave the United States to join ISIS resulted from a combination of the Syrian Civil war, and ISIS' unprecedented success in using the internet to lure vulnerable, young Muslims.

> The District of Minnesota and many other criminal justice professionals are committed to developing effective alternative solutions to lengthy incarceration alone to best deal with extremism/terrorism-related cases. There is no need to debate on how critical it is to incapacitate radicalized individuals involved in and committed to carrying out terrorism related offenses. However, in terrorism-related activities, there are a number of differing types of offenses and levels of involvement. Failing to develop sentencing and supervision practices at the appropriate, varying levels for these defendants and offenders could have catastrophic future consequences.
>
> Terrorism defendants generally fit no set profile. However, many terrorism defendants seen in the District of Minnesota and in other districts have been young, often first exposed to the radicalization process as teenagers, and have little or no history of criminal behavior or actual violence. Dissecting the underlying motivations and understanding the level of radicalization of terrorism-involved defendants are factors criminal justice professionals must consider when recommending an appropriate sentence. Treating this population ineffectively may result in dire, catastrophic consequences that range from freeing a dangerous offender to commit an act of terrorism in the community to unnecessarily over incarcerating very young offenders, possibly creating long-term breeding grounds for terrorists in prisons. Probation and Pretrial Services faces the challenge of determining a defendant's level of radicalization and intent to pinpoint actual, potential harm to the community through acts of violence in addition to the threat he/she could pose to national and international security. Determining if a sentence within the guideline range of imprisonment greatly increased by the Chapter 3 terrorism adjustment is greater than necessary to accomplish the statutory goals of sentencing is a complex and concerning process.

Id. at 68-69 (emphasis added).

The District of Minnesota decided that hiring an expert consultant that gets involved immediately after these types of cases are charged and who works to assist the Court with issues from bond all the way through sentencing was a good solution.

> Thus far, there have been a number of variances and departures from the enhanced sentences in the District of Minnesota, demonstrating that a one-size-fits-all approach was not justified based on U.S. Criminal Code Title 18, Section 3553 sentencing factors. District of Minnesota sentences for the first 30 jihadist-type, terrorism-related cases ranged from 3 years' probation for cooperators and those with minor involvement to 35 years' custody with life terms of supervised release to follow for the most serious offenders.
>
> Id. at 75-76 (emphasis added)

Because many of these offenders are young, first-time, non-violent offenders, lengthy sentences are unjust and cause immeasurable damage to the local communities and families. Research has shown that these types offenders can be rehabilitated and have an exceptionally low recidivism rate. MLFA recommends that the sentencing commission study and introduce alternative-to-incarceration programs and other court-sponsored diversions for these offenders. The District of Minnesota's model is one that has had great success and warrants expansion.

Conclusion

In conclusion, MLFA hopes that these issues regarding the Terrorism Enhancement and sentencing of young, Muslim, first-time offenders are studied and reformed through amendment proposals in the coming amendment cycle. We look forward to submitting additional comments on such proposals.

<u>/s/ Sufia M. Khalid</u>
Lead Counsel
Federal Criminal Defense Department
Muslim Legal Fund of America (MLFA)
100 N. Central Expy.
Suite 1010
Richardson, TX 75080

Charles D. Swift
Director, Federal Criminal Defense Department
Muslim Legal Fund of America (MLFA)

Arshia Ali-Khan
Chief Executive Officer
Muslim Legal Fund of America (MLFA)

Table 1: Illustrating Sentencing Disparities within Material Support Offenses

NAME & CASE #	LOCATION	CHARGE	SENTENCE
ADAM DANDACH	C.D. California	Attempt to provide material support to ISIS, false statement on passport application 1542	**15 years**
ARMIN HARCEVIC	E.D. Missouri	Conspiracy and providing material support to ISIS 2339A	**5.5 years**
ASHER ABID KHAN	S.D. Texas	Material support to ISIS 23339A and 2339B	**12 years**
DONALD MORGAN	M.D. North Carolina	Attempt to provide material support to ISIS; possession of firearm (assault rifle) by convicted felon	**20.25 years**
GEORGIANNA GIAMPIETRO	M.D. Tennessee	Concealment of material support and resources to ISIS 2339C	**5.5 years**
JASMINKA RAMIC	E.D. Missouri	Conspiracy to commit offenses against the U.S. (371)	**3 years**
JOSEPH HASSAN FARROKH	E.D. Virginia	Attempting to provide material support to ISIS 2339B	**8.5 years**
LEON DAVIS	S.D. Georgia	Attempt to provide material support to ISIS 2339B	**15 years**
MEHIDA MEDY SALKICEVIC	E.D. Missouri	Conspiracy to provide material support to ISIS 2339A	**6.5 years**
MICHAEL TODD WOLFE	W.D. Texas	Attempt to provide material support ISIS 2339B	**6.75 years**
MOHAMMED HAMZAH KHAN	N.D. Illinois	Attempt to provide material support to ISIS 2339B	**3.3 years**
MUHAMMAD DAKHLALLA & JAELYN YOUNG	N.D. Mississippi	Conspiracy to provide material support to ISIS 2339B	**8 years** and **12 years**
NICHOLAS MICHAEL TEAUSANT	E.D. California	Attempting to provide material support to ISIS 2339B	**12 years**
SAID RAHIM	N.D. Texas	Conspiracy and attempt to provide material support to ISIS 2339B, false statement 1001	**30 years**
SAMANTHA ELHASSANI	N.D. Indiana	Concealment of financing terrorism 2339C(c)	**6.5 years**
SAYFULLO SAIPOV	S.D. New York	8 counts 18 USC 1959(a)(1), 7 counts 18 USC 1959(A)(3), 9 counts 18 USC 1959(a)(5), 1 count 2339B, 1 count 33(a), 34	**Life imprisonment**

Table 1: Illustrating Sentencing Disparities within Material Support Offenses			
NAME & CASE #	**LOCATION**	**CHARGE**	**SENTENCE**
SEDINA UNKIC HODZIC [redacted]	E.D. Missouri	Conspiracy to provide material support to ISIS 2339A	**4 years**
SHANNON CONLEY [redacted]	D. Colorado	Conspiracy to provide material support to ISIS 2339B	**5 years**
SHELTON BELL [redacted]	M.D. Florida	Conspiracy and attempt to provide material support to ISIS 2339A	**20 years**
SULTANE SALIM [redacted]	N.D. Ohio	Concealment of financing terrorism 2339C(c)	**5 years**
RAHATUL ASHIKIM KHAN [redacted]	W.D. Texas	Conspiracy to provide material support to ISIS 2339A	**10 years**
RAMIZ HODZIC [redacted]	E.D. Missouri	Conspiracy and material support to ISIS 2339A	**8 years**

TABLE 1[34]

[34] This table is representative of the wide variance and disparities of material offense sentences subject to the Terrorism Enhancement. The Terrorism Enhancement applies to other offenses as well; this table selects specifically for material offense sentences where the Terrorism Enhancement was applied for the sake of comparison.

August 1, 2023

Honorable Judge Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Priorities for the 2023-2024 Amendment Cycle

Dear Judge Reeves:

The National Association of Defense Lawyers (NACDL) respectfully submits the following comments on the Commission's possible policy priorities for the amendment cycle ending May 1, 2024.

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal legal system.

I. 2023-24 Proposed Priority No. 2: Alternatives to Incarceration and Diversion Programs

NACDL welcomes the Commission's focus on court-sponsored diversion and alternatives to incarceration (ATI) in the federal system. These programs, long a feature of state criminal legal systems, have been instituted in many federal districts at a grassroots level in recent years with considerable success. The Commission's support of these programs by publicizing them on its website, disseminating foundational documents, and facilitating the exchange of information and ideas through workshops and seminars would be an important step in furthering and enhancing these initiatives. The Commission will thereby be giving ATI its official imprimatur, as well as

setting the stage for a more fulsome engagement by the Commission in instituting, promoting and critically evaluating ATI in the federal system.

The overriding feature of the federal sentencing system since the Sentencing Reform Act has been its punitiveness. Incarceration rates have not only sky-rocketed – sentences have become considerably longer.[1] Contrary to the vision of the SRA drafters,[2] probation is the exception rather than the rule, with only 6.2% of federal defendants receiving a probation-only sentence in FY2021.[3] In response, several districts started diversion and ATI programs, often with no funding and utilizing volunteer hours.[4] Today, at least 52 districts have such programs, and the results are encouraging.[5] As a group of researchers studying these federal programs recently concluded:

Successful completion of an ATI program is associated with more favorable case dispositions and less severe sentences. Participants are more likely to avoid new arrests for criminal behavior, remain employed, and refrain from illegal drug use while their cases are pending in court. Such positive outcomes help defendants place their best foot forward while awaiting sentencing, demonstrating to the judge that they are on the path to rehabilitation, and thus deserving of a more favorable disposition that imposes "a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)" of that provision. 18 U.S.C. § 3553(a).[6]

These results parallel the extensive scholarship conducted at the state level and internationally establishing that ATI and diversionary programs reduce recidivism;[7] decrease racial and

---

[1] *See* Federal Bureau of Prisons, Sentences Imposed (March 14, 2023) (indicating that 53.7% of BOP prisoners are serving sentences over ten years), https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp.

[2] *See* Comments of Federal Defenders on Commission's Proposed Priorities for the 2022–2023 Amendment Cycle (December 1, 2022) at n. 126-28.

[3] FY 2021 Sourcebook, at fig. 6 & tbl. 14.

[4] *See* Laura Baber et al., *A Viable Alternative? Alternatives to Incarceration Across Several Federal Districts*, 83 Fed. Prob. J . 8 (June 2019); *see also* Julian Adler, *"There's Something Happening Here:" On the Tentative Emergence of Federal Alternatives to Incarceration*, 35 Fed. Sent. Rep. 29 (October 2022) (describing the "considerable profess" of "scrappy and ambitious district courts in the federal space" in the context of ATI programs) ("*Something Happening*").

[5] *See* Laura Baber et al., *Expanding the Analysis: Alternatives to Incarceration across 13 Federal Districts,* 85 Fed. Prob. 3 (December 2021) ("*Expanding the Analysis*").

[6] *Id.* at 12.

[7] *See*, *e.g.*, James Austin et. al., *A Guidelines Proposal: How Many Americans are Unnecessarily Incarcerated*, 29 Fed. Sent. R. 140, 143 (Dec. 2016 - Feb. 2017) ("Research shows that prison does little to rehabilitate and can increase recidivism in such cases. Treatment, community service, or probation are more effective. For example, of the nearly 66,000 prisoners whose most severe crime is drug possession, the average sentence is over one year; these offenders would be better sentenced to treatment or other alternatives.").

economic disparities;[8] ensure the young and those with mental and physical disabilities get the therapeutic care they need;[9] and keep families together.[10] Thus, it is appropriate for the Commission to show leadership on the issue of encouraging and promoting ATI and diversionary programs.

The Commission proposes that it will promote ATI and diversionary programs "by expanding the availability of information and organic documents pertaining to existing programs . . . through the Commission's website and possible workshops and seminars sharing best practices for developing, implementing, and assessing such programs." Notice at 4. This proposal is consistent with the Commission's educational role and would be an important step to encouraging implementation of ATI programs in districts that do not have them, as well as promoting the informational exchange necessary to identifying best practices.

NACDL urges the Commission to go further: express its wholehearted support for such programs and advocate for widespread implementation across districts. Importantly, such an endorsement from the Commission will encourage extensive mitigation advocacy early on in a case, potentially leading to expeditious, more equitable and more cost-effective outcomes.

In addition, NACDL urges the Commission, as it proposed in the last amendment cycle, to support a new policy statement permitting a downward departure if the defendant industriously participated in the necessary requirements of a court-sponsored or approved ATI program. NACDL supports making this downward departure option as broad as possible, encompassing not only ATI programs run by the district court but also ATI programs run by nonprofit organizations that have been vetted and approved by the district court. In addition, as the Commission suggested last year, the departure should also apply to those defendants who productively participated in any such program even if they did not fulfill all requirements for completion. There are many reasons why a motivated and responsible person cannot fulfill the rigorous requirements of a rehabilitation program, including childcare and elderly care responsibilities, illness, conflicts with work schedules, etc. District courts should have discretion

---

[8] For a discussion of the racial disparities in imprisonment, *see generally* Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (Sentencing Project 2016), https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/.

[9] For a discussion on the appalling treatment of individuals with mental illnesses in prison, *see generally* KiDuek Kim, *The Processing & Treatment of Mentally Ill Persons in the Criminal Justice System* (Urban Institute 2015), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf; for a discussion on the criminogenic impact of prison on young offenders, s*ee generally*, Patrick McCarthy et al., *The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model* (National Institute of Justice 2016) at 13, n.56 (("Mounting evidence from the best statistical analyses suggests that incarceration of youth may actually increase the likelihood of recidivism.").

[10] *See* MODEL PENAL CODE: SENT'G § S1.02(2), reporters' note b(3) (Am. Law Institute 2021) (citing sampling of literature on adverse effects of incarceration on families).

to consider partial completion accompanied by committed engagement in granting this downward departure. Importantly, the Commission has the expertise and resources to set forth some evidence-based threshold criteria for approval of these ATI programs. Such requirements would include that the ATI programs (1) do not result in a "net widening" of those subject to federal charges or onerous probationary conditions;[11] (2) focus on those of highest need rather than cherry-picking those most likely to succeed;[12] and (3) are subject to careful monitoring to ensure they do not replicate the racial and economic disparities they are designed, in part, to address.[13]

Finally, we urge the Commission to consider more systemic changes to the guidelines to facilitate and encourage non-custodial sentences, including a presumption of probation for first-time, non-violent offenders,[14] offense-level reductions for first-time offenders; elimination of the zones in the Sentencing Table or at least a large expansion of Zones A and B, where probation-only sentences are authorized.

II. 2023-24 Proposed Priority No. 10(A): Drug Trafficking Offenses Involving Methamphetamine (Actual v. Mixture)

The Commission proposes as a priority the "examination of federal sentencing practices" on issues such as "the prevalence and nature of drug trafficking offenses involving methamphetamine." NACDL welcomes the Commission's focus on methamphetamine cases, which at 48.5% represent the largest percentage by far of sentenced drug cases.[15]

In particular, NACDL urges the Commission to consider eliminating the distinction between "actual" methamphetamine and "mixture" guidelines and, instead, apply the "mixture" guidelines across the board to all methamphetamine cases. This is in accord with a growing number of federal courts, who have taken such action in an effort to reduce the sentencing

---

[11] *Something Happening* at 30 (noting that "treating lower-risk individuals can 'do harm,' the treatment itself disrupting people's existing routines (e.g., work or school), bringing them into contact with influences from higher-risk peers, and creating recidivism risks that did not previously exist").

[12] *Id.* (noting that in the optimal ATI program, "the level or intensity of intervention offered someone (e.g., treatment, social services, supervision) should correspond to their risk" of recidivism).

[13] *Expanding the Analysis* at 5 (noting state court initiatives and resolutions to identify and eliminate racial disparities).

[14] Such presumption would be consistent with the Congressional directive at 28 U.S.C. §994(j) to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."

[15] *See* U.S. Sentencing Comm'n, *Distribution of Primary Drug Type in Federal Drug Cases, Fiscal Year 2022 (Figure D-1), found at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/FigureD1.pdf

disparities resulting from the excessive purity enhancement that is without foundation in either empirical research or fact.

Drug Quantity Table: Tied to Statutory Mandatory Minimums, not Empirical Research

In formulating the United States Sentencing Guidelines, the United States Sentencing Commission developed and used data on past practices and recidivism, conducting statistical analyses on pre-Guidelines sentencing practices and utilizing an empirical approach to establish the base offense levels for each crime. *See* USSG § 1A1.1, intro. comment, pt. A, p. 3; *see also* United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing*, Nov. 2004.

However, that was not the case with the current drug trafficking Guidelines provisions. Following the passage of the 1988 Anti-Drug Abuse Act, later codified at 21 U.S.C. § 841(b)(1), the Commission revised the Drug Quantity Table found in USSG § 2D1.1 and, departing from past practices of using an empirical approach, increased the base offense levels to better equate to the statutory mandatory minimum sentences. *See Gall v. United States,* 552 U.S. 38, 46 n.2 (2007) (following passage of the 1986 Act, the resulting Guidelines ranges for drug trafficking offenses are driven by the quantity of drugs, and keyed to statutory mandatory minimum sentences based on weight).

For methamphetamine, because the statutory mandatory minimum penalties had a 10:1 ratio based on purity, the Commission revised the Drug Quantity Table to distinguish actual/pure methamphetamine from methamphetamine mixtures at the same 10:1 ratio. *See, e.g., United States v. Ferguson,* 2018 U.S. Dist. LEXIS 129802 at *1 (D. Minn. Aug. 2, 2018) (citing *Anti-Drug Abuse Act of 1988,* Pub. L. No. 100-690, § 6470(g)-(h), 102 Stat. 4181, 4378); *see also United States v. Pereda,* 2019 U.S. Dist. LEXIS 19183 at *4 (D. Colo. Feb. 6, 2019).

In 1998 Congress amended the statutory penalties for methamphetamine offenses, cutting in half the amount that triggered the mandatory minimum sentences. *Ferguson* at *4 (citing *Methamphetamine Trafficking Penalty Enhancement Act of 1998, Div. E, § 2, Pub. L. No. 105-277, 112 Stat. 2681, 2681-759*). And, again, the Commission increased the base offense levels for methamphetamine offenses to better align with the mandatory minimum sentences. *Id; see also Pereda* at **4-5.

Historical Premise for Actual-to-Mixture Ratio for Methamphetamine Offenses is No Longer Valid

The Commission sought to justify the 10:1 actual-to-mixture methamphetamine ratio by stating, "[s]ince controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure

narcotics may indicate a prominent role in the criminal enterprise and proximity to the drugs." *See* U.S.S.G. § 2D1.1, note 27(c). Historically, that may have been so; however, as evidenced by the Drug Enforcement Agency's *2020 National Drug Threat Analysis,* the average purity of methamphetamine between 2014 and 2019 was over 95%.[16]

Acknowledging this increase in purity of the methamphetamine being marketed in this country, a growing number of federal courts, from Nebraska to Idaho to Louisiana and more, have recognized that the distinction between actual methamphetamine and methamphetamine mixture is no longer appropriate as it is not based on empirical data, does not serve as an accurate proxy for culpability, and creates unwarranted sentencing disparities between methamphetamine and other drugs. *See, e.g., United States v. Bean,* 371 F. Supp.3d 46, 52-56 (Dist. of N.H. 2019); *United States v. Castillo,* 440 F. Supp.3d 1148, 1154-56 (E.D. Cal. 2020); *United States v. Hartle,* 2017 U.S. Dist. LEXIS 93367 at *7-8 (D. Idaho 2017) (finding that the purity enhancement resulted in arbitrary and irrational distinctions between sentences imposed upon similarly situated defendants); *see also United States v. Celestin,* 2023 U.S. Dist. LEXIS 25406 at **7-14 (E.D. La. Feb. 15, 2023) (noting that at least eleven district courts across the country have deviated from the Guidelines and applied the methamphetamine mixture guidelines to all methamphetamine violations (*see* fn. 47 for survey of courts)).

As recognized by these courts, the high purity of methamphetamine available today at all levels of the distribution chain means that virtually all defendants face enhanced punishment for threshold purity levels, not enhanced punishment based on individualized determinations (e.g., for leadership or "kingpin" roles), making the Guidelines purity enhancement excessive.

Enhanced purity enhancement results in severe sentencing disparities

The enhanced punishment is by no means nominal. Take, for example, a defendant charged with distribution involving 28 grams of methamphetamine. If the court used *actual* methamphetamine, based on the Drug Quantity Table this would result in a Base Offense Level of 26. If, however, the court used the methamphetamine *mixture,* based on the Drug Quantity Table, this would result in a Base Offense Level of 18. This leads to a difference of years – *years*

[16] *See* DEA, *2020 National Drug Threat Assessment,* at 20, https://www.dea.gov/sites/default/files/2021-f02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf.

– between the advisory ranges across Criminal History Categories. For sentencing purposes, the impact of this distinction is severe.

Accordingly, NACDL urges the Commission to revisit the methamphetamine purity enhancement. Put simply, it does not accurately reflect the culpability of most federally prosecuted drug offenders.

Further, NACDL joins the Federal Defenders in their suggestion to delink the Drug Quantity Table altogether for the reasons set forth in their letter addressing the proposed priorities for the 2023-24 amendment cycle.[17]

III. 2023-2024 Proposed Priority (10)(C): Comparison of Sentences Imposed in Cases Disposed of Through Trial Versus Plea

We strongly urge the Sentencing Commission to compare sentences imposed in cases disposed of through trial versus plea. NACDL's own extensive research on this very question, which used Sentencing Commission data, has shown that for most primary offense categories, the average trial sentence in the federal system is three times higher than a plea sentence for the same crime.[18] For some crimes, the prison sentence for a person convicted at trial is as much as eight times greater than for those convicted after a plea. NACDL and many other individuals and organizations refer to this systemic, often massive, and inherently coercive differential as the trial penalty.

Over the last 40 years, the trial penalty has converted the Framers' vision of a system of public jury trials into an assembly line of guilty pleas coerced principally by mandatory minimum sentencing and overuse of pretrial detention. Walk in a courthouse today and you will see guilty plea after guilty plea and virtually no public trials in which the government is put to its proof and prosecutorial power is scrutinized (and limited) by citizens.

The trial penalty not only undermines the Sixth Amendment right to trial; it also undermines every right in the Bill of Rights because plea agreements typically require waivers of rights including bail, discovery, and all the liberties enumerated in the Fourth and Fifth Amendments including the right to be free from unreasonable searches and seizures. For these reasons, a

---

[17] *See* Defender Annual Letter, dated May 24, 2023, at pp. 3-8 (found at https://src.fd.org/sites/src/files/blog/2023-05/20230524%20Defender%20Annual%20Letter.pdf).

[18] NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct.

diverse consensus – across the political, ideological, and professional spectrum – has joined NACDL in attempting to eliminate the trial penalty.

This differential is significant and has major impacts on the criminal legal system. As suggested above, the trial penalty has virtually eliminated trials from the federal system. In 2022, over 97% of convictions in the federal system were the result of pleas with less than 3% occurring after trials.[19] In 2021, less than 2% of convictions were the result of trial and there were fewer than one thousand criminal trials in the entire federal system.[20] This is far from what our Constitution's framers, who revered and repeatedly emphasized the importance of the right to trial, would have imagined.[21]

The trial penalty has a major coercive effect, with defendants understandably influenced to accept pleas because of the real threat of a geometrically higher sentence if convicted at trial, even if a defendant has a strong defense. The trial penalty also allows for other coercive tactics including piling on charges, charge bargaining, threats of superseding indictments and sentencing enhancements, and threats to withdraw plea offers if the defendant seeks to assert other constitutional rights under the Fourth or Fifth Amendments. Perhaps most concerningly, the trial penalty in our system is often so severe that it coerces even innocent people into pleading guilty.[22]

Advocacy groups, individuals, and academics from across the political spectrum have recognized the pervasiveness and harm of the trial penalty and have formed a broad cross-ideological

---

[19] U.S. Sentencing Comm'n, *2022 Annual Report and Sourcebook of Federal Sentencing Statistics*, at 56 table 11, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf (showing that 97.5% of federal criminal convictions in fiscal year 2022 were the result of guilty pleas).

[20] U.S. Sentencing Comm'n, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics*, at 56 table 11, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf (showing that 98.3% of federal criminal convictions in fiscal year 2021 were the result of guilty pleas).

[21] *See, e.g.*, John Adams, *The Revolutionary Writings of John Adams* 55 (C. Bradley Thompson ed., 2000) (calling representative government and trials the "heart and lungs of liberty"); Thomas Jefferson, Letter to Thomas Paine (July 11, 1789), in *The Life and Selected Writings of Thomas Jefferson* (Adrienne Koch & William Peden, eds., 1998) (calling trials "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution"). Note, also, that the right to trial is the only individual right guaranteed in both the Original Text of the Constitution and in the Bill of Rights. U.S. Const. art. III, §2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

[22] Data from the National Registry of Exonerations shows that 18% of exonerees—people who have been found innocent and completely cleared of the crime they were once convicted of—pleaded guilty. See The National Registry of Exonerations, Browse Cases, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-

coalition to fight against it. Coalition members include NACDL, Right on Crime, ACLU, leaders at the Cato Institute, The Innocence Project, and Stand Together. Additionally, the Plea Bargain Task Force, a task force of the Criminal Justice Section of the American Bar Association, recently released a report urging major changes to plea bargaining including a reduction in the use of trial penalties to coerce pleas.[23]

We are pleased to see the Sentencing Commission raise this issue as a possible priority for this amendments cycle and strongly urge the Commission to examine this differential and the resultant harmful effects it has on our system.

We recognize that many of the major policy contributors to the trial penalty, such as mandatory minimum sentencing and prosecutorial control of the charging function, are beyond the Sentencing Commission's control and purview. However, there are many smaller, but still important, actions the Commission could take to reduce the trial penalty and its coercive effects.

First, Acceptance of Responsibility: U.S.S.G. § 3E1.1(b) should be amended to authorize courts to award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial.

Second, Obstruction of Justice: U.S.S.G. § 3C1.1 should be amended to clarify that this adjustment should not be assessed solely for the act of an accused testifying in her or his defense. Like the right to trial, the right to testify in one's own defense is also constitutionally protected.[24] While Application Note 2 states that the "provision is not intended to punish a defendant for the exercise of a constitutional right," clarification that this includes the right to testify in one's own defense would be welcome.

Third, Acquitted Conduct: U.S.S.G. § 1B1.3 should be amended to prohibit the use of acquitted conduct as relevant conduct. This important issue, discussed in greater detail below, is well known to the Commission and was carefully considered during the Commission's last amendment cycle, although no action was ultimately taken. We urge the Commission to

---

2C61F5BF9EA7%7D&FilterField1=Group&FilterValue1=P. For individual stories of innocent defendants who were coerced to plead guilty, *see* https://guiltypleaproblem.org.

[23] American Bar Association, *2023 Plea Bargain Task Force Report*, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf.

[24] *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987).

reconsider acquitted conduct sentencing which is unjust on its own but is also a contributor to the trial penalty.

IV. Additional Proposed Priority: The Use of Acquitted Conduct in Sentencing

NACDL urges the Commission to again consider an amendment to the Guidelines that would eliminate the unjust practice of sentencing defendants based on acquitted conduct. The Commission considered amendments on this important issue during the previous amendment cycle, but ultimately took no action. We urge the Commission to consider it again and to amend the Guidelines as described below to end the unjust practice of sentencing people for conduct they have been acquitted of at trial.

The Fifth and Sixth Amendment guarantees of due process and the right to trial by jury for those accused of a crime are fundamental to our criminal justice system. However, as the Commission noted in its proposed priorities for the previous amendments cycle, current federal law allows judges to override a jury's not-guilty verdict by sentencing a defendant for the very conduct he or she was acquitted of by the jury.[25] This is because, while a jury must find a defendant's guilt based on the standard of "beyond a reasonable doubt", a judge may apply the relevant conduct factors in the Sentencing Guidelines using the less demanding standard of preponderance of the evidence. Permitting sentencing based on acquitted conduct undermines due process and subverts the critical function of, and constitutional right to, trial by jury. This practice has been roundly criticized by practitioners, judges—including Supreme Court justices[26]—and scholars.

In our experience, lay people and even lawyers who practice in civil rather than criminal cases are shocked when they learn that people may be sentenced to prison time based on conduct they were acquitted of at trial by a jury. Acquitted conduct sentencing harms the public's perception of the legitimacy of our legal system. Furthermore, studies show that these types of decisions – subjective decision-making of this nature – are entry points for racial implicit bias in sentencing. Juries, of course, are intended to be diverse, and replacing a jury's judgment with that of a judge,

---

[25] *United States v. Watts*, 519 U.S. 148, 157 (1997) ("[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.")

[26] *See, e.g., id.* at 170 (Kennedy, J., dissenting) (allowing district judges "to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal."); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of the r'hrg en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.").

especially given the racial, socioeconomic, and professional composition of our judiciary, deepens the impact of bias on well-established racial disparities in sentencing.

It is important to note that, since the Commission's last amendments cycle, multiple Supreme Court justices have indicated in published opinions that "the use of acquitted conduct to alter a defendant's [sentence] raises important questions" while adding explicitly that the Supreme Court is awaiting the Sentencing Commission's action on the issue.[27] The time is ripe for Sentencing Commission action. We respectfully urge the Commission to act this cycle to eliminate acquitted conduct sentencing by amending U.S.S.G. § 1B1.3 to prohibit the use of acquitted conduct as relevant conduct.

Respectfully Submitted,

JaneAnne Murray
Co-Chair, NACDL Sentencing Committee

Darlene Comstedt
Member, NACDL Sentencing Committee

Nathan Pysno
Director, NACDL Economic Crime & Procedural Justice

Elizabeth Blackwood
Director, NACDL First Step Act Resource Center

[27] *See McClinton v. United States*, 600 U.S. __ (2023), No. 21-1557 (statement of Kavanaugh, J., joined by Gorsuch & Barrett, JJ., respecting the denial of certiorari) ("The use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions. But the Sentencing Commission is currently considering the issue. It is appropriate for this Court to wait for the Sentencing Commission's determination . . ."); *id.* (statement of Sotomayor, J., respecting the denial of certiorari) ("The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year.").

MEMORANDUM OF PUBLIC INTEREST

BY THE PENNSYLVANIA ASSOCIATION FOR RATIONAL SEXUAL OFFENSE LAWS (PARSOL)[1]

TO

THE UNITED STATES SENTENCING COMMISSION

RE: PROPOSED 2023-2024 PRIORITIES

OPEN COMMENT SUBMISSION

JULY 30, 2023

Lead Author
John W. Dawe, MNA, CNP, RCP, Dallas, PA

Contributors
Michael Cooperman, M.Ed., Philadelphia, PA
Amy Frey, Philadelphia, PA
Jon Frey, FCI Fort Dix, NJ
Randall A. Hayes, Harrisburg, PA
Josiah Krammes, Pottsville, PA
Theresa Robertson, Ph.D., York, PA

---

[1] The Pennsylvania Association for Rational Sexual Offense Laws (PARSOL) believes all sexual abuse is unacceptable and that prevention, treatment, and healing are possible. We take a person-first approach to criminal justice reform that cultivates a fair and just society, honors inherent dignity, and promotes respect and fairness. People can and do change. As such, PARSOL advocates for sexual offense public safety measures and resources that work for all through prevention-based, treatment-informed, and healing-focused legislative and public policy initiatives that respect our Constitution and all people's dignity. [PARSOL.org]

PARSOL is the Pennsylvania affiliate of the National Association for Rational Sexual Offense Laws (NARSOL.org).

INTRODUCTION

During her confirmation hearings, now Supreme Court Justice Ketanji Brown Jackson and former vice-chair of the USSC commission said, reflecting the Commission's stance on sexual offenses and sentencing:

> *"The statute doesn't say, "Look only at the guidelines and stop."*
> *The statute doesn't say, "Impose the highest possible penalty for this sickening and egregious crime."*
> *The statute says, "Calculate the guidelines, but also look at various aspects of this offense and impose a sentence that is sufficient but not greater than necessary to promote the purposes of punishment."*
> *[The Statute] is not doing the work of differentiating who is a more serious offender in the way that it used to. The commission has taken that into account, and more importantly, courts are adjusting their sentences to the changed circumstances but say[s] nothing about the judge's view of the seriousness of these offenses."*

Justice Brown Jackson referenced that current sentencing guidelines, specifically around possession and distribution of child sexual abuse materials, were developed when receiving 1,000 images of child pornography was done via postal mail for extreme fees. The manufacture involved significant physical media, not the click and download of one zip file within seconds.

Like Justice Brown Jackson, the **Pennsylvania Association for Rational Sexual Offense Laws** (PARSOL) believes all sexual abuse is unacceptable and that physical, mental, and emotional healing is possible by focusing on prevention-based, rehabilitative, and trauma-informed programs rooted in healing rather than lifetime, shame-centered punishment.

In addition, we know many federal laws and sentencing recommendations unfairly discriminate against people with sexual offenses.

To that end, we present the following background information and recommendations for the United States Sentencing Commission to consider during its 2023-2024 session.

BACKGROUND INFORMATION

SORNA REGISTRATION PUNISHES HOMELESS/TRANSIENT INDIVIDUALS BECAUSE OF THEIR ECONOMIC STATUS

Many jurisdictions require that homeless and transient individuals required to register under SORNA ("Megan's Law") do so monthly and in person at a designated location. If they fail to register due to indigency, incarceration results. 10.5% of adults in America walk in poverty, and registration facilities, especially in rural areas, are difficult or impossible to reach solely by public transit. These individuals are further punished because of their economic status. [2]

***PA SUPREME COURT CHIEF JUSTICE:* MAKE [SORNA] FAILURE TO REGISTER A CONTEMPT OF COURT CHARGE**

In the *Commonwealth of Pennsylvania v. Williams*, 574 Pa. 487, 527 (Pa. 2003), then-Chief Justice of the Supreme Court of Pennsylvania, Thomas G. Saylor, stated that "As noted, the [Megan's Law II] penalty provisions provide an enforcement mechanism for the registration and verification mandates. They do so by erecting an enormous disincentive for failing to comply. ... Moreover, even absent the penalty provisions, enforcement is possible. Because registration and verification are statutorily required, the district attorney could implicate the judicial process through an enforcement proceeding in which failure to comply with the resulting order would be punishable by the court's contempt powers."[3]

LEGISLATION AIMED AT REDUCING INCARCERATION AND HARM REDUCTION EXCLUDES INDIVIDUALS WITH SEXUAL OFFENSES

The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003[4] excluded persons with sexual offenses from obtaining downward variances, declaring their crimes "aberrant behavior and diminished capacity."[5]

The First Step Act (FSA) of 2018**,** formerly known as the "Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person [FIRST STEP] Act," discriminates against persons with sexual offenses. Under FSA, an inmate is "ineligible to receive time credits if they are serving a sentence for a conviction under certain provisions of law," including sexual offenses. This prohibits them

[2] https://federalsafetynet.com/poverty-statistics/

[3] Com. v. Williams, 574Pa.487,527 (Pa03), https://casetext.com/case/com-v-williams-224

[4] https://www.congress.gov/bill/108th-congress/senate-bill/151/text

[5] https://www.justice.gov/archive/opa/pr/2003/April/03_ag_266.htm

from receiving good time credits for completing rehabilitative programming, even though they have the lowest rate of recidivism and the lowest incidence of disciplinary infractions in prison[6]. This statutory discrimination discourages sex offenders from engaging in treatment programs, which have shown to be highly effective in preventing re-offense and recidivism. In contrast, drug offenders with much higher recidivism rates are provided with this benefit. They are more likely to have discipline problems in prison (i.e., contraband, cell phones, substance abuse, fighting, etc.)[7]

***UMASS LAW REVIEW*: PRE-TRIAL DIVERSION FOR NON-PRODUCTION CHILD PORNOGRAPHY OFFENSES INCREASES TREATMENT SUCCESS AND HARM-REDUCTION**

The Case for Extending Pretrial Diversion to Include Possession of Child Pornography, an article published in the January 2014 University of Massachusetts Law Review, proposed including child pornography offenders in pretrial diversion programs. Given the statistics on these specific offenders, doing so would decrease the prison population/incarceration cost burdens. The article proposes that implementing such a program and offering early release to qualifying offenders would achieve such goals and increase the likelihood of treatment program success.[8]

***PENNSYLVANIA DEPT. OF CORRECTIONS:* RECIDIVISM RATES FOR SEXUAL OFFENSES ARE THE LOWEST OF ANY CRIME CLASSIFICATION, WITH TWO-THIRDS RECIDIVATING DUE TO TECHNICAL VIOLATIONS**

A 2022 report from the Pennsylvania Department of Corrections, PA DOC: Recidivism, found that recidivism rates for property crime (59.9%), Public Order (52.1%), and Drug Offenses (50.1%) were significantly higher than those with sexual offenses (28.9%). Note: All rates reflected a combination of reoffense and technical violations, with two-thirds of individuals reincarcerated within three years of release being returned for technical violations.[9]

INDIVIDUALS WITH AUTISM SPECTRUM DISORDER REQUIRE SPECIAL TREATMENT PROGRAMS AND CONSIDERATIONS

Both a 2017 study, *A Psycho-Legal Perspective on Sexual Offending in Individuals with Autism Spectrum Disorder***,** published in the International Journal

---

[6] https://parsol.org/wp-content/uploads/2020/05/Fact-Sheet-Ineffectiveness-Recidivism-v2.pdf

[7] https://www.bop.gov/inmates/fsa/overview.jsp

[8] https://scholarship.law.umassd.edu/cgi/viewcontent.cgi?article=1041&context=umlr

[9] https://www.cor.pa.gov/About%20Us/Statistics/Pages/Reports.aspx

of Law and Psychiatry, and *Autism, Sexual Offending, and the Criminal Justice System***,** published by The Journal of Intellectual Disabilities and Offending Behavior (2016), state that there are innate vulnerabilities that increases the risk of an individual with an autistic spectrum disorder (ASD), predominantly those defendants diagnosed with Asperger's Syndrome, being charged and convicted of a sexual offense. Judicial officers must consider the fact that Autism-related social impairments, including an individual's difficulty with the capacity to develop appropriate and consenting sexual relationships because of impaired social cognition, is a factor in ASD sexual offending.[10]

ARIZONA LAW REVIEW: **FEDERAL SENTENCING GUIDELINES AROUND NON-PRODUCTION CHILD PORNOGRAPHY OFFENSES ARE LESS EFFECTIVE IN FUTURE HARM-REDUCTION, MAY DO MORE DAMAGE**

The Arizona Law Review provides a deep-dive into the USSC's work around sentencing guidelines for child pornography offenses in its 2021 article, *The Condemnation of Scopophilia: How the Federal Sentencing Guidelines Perpetuate Rather Than Discourage Child Pornography Offenses*, stating that in 1987, the U.S. Sentencing Commission created its first federal sentencing guideline for child pornography offenses. As Congress grappled with dynamic technological advances that changed the child pornography landscape, the Commission continually revised and amended these guidelines, creating the last significant amendment in 2009. Since then, federal judges have utilized these guidelines when tasked with sentencing child pornography offenders, yet little has been done to determine whether these guidelines diminish the number of children victimized by child pornography. While acknowledging that child pornography victimizes and harms children in countless ways and must be criminalized to account for these egregious harms, this article argues that the sentencing guidelines fail to deter the production, distribution, and consumption of child pornography and do not fulfill congressional goals of protecting children from victimization. Rather, the guidelines have resulted in the mass incarceration of child pornography offenders and a system that punishes viewers of child pornography more severely than it does child rapists. If the government truly wants to protect children from being victimized through child pornography, then the sentencing guidelines, as written, cannot stand. They must be replaced by a system that allows child pornography offenders to access rehabilitative resources

10 https://www.sciencedirect.com/science/article/abs/pii/S0160252716302461?via%3Dihub

both inside and outside of the federal prison system.[11]

USSC: NON-PRODUCTION CHILD PORNOGRAPHY REPORT SUPPORTS AN OVERHAUL OF RELATED SENTENCING

The 2021 report Federal Sentencing of Child Pornography Non-Production Offenses[12], by the USSC under the chairmanship of Charles R. Breyer, reported:

- Facilitated by advancements in digital and mobile technology, non-production child pornography offenses increasingly involve voluminous quantities of videos and images that are graphic, often involving the youngest victims.
- Constrained by statutory mandatory minimum penalties, congressional directives, and direct guideline amendments by the PROTECT Act of 2003, Section G2.2 contains a series of enhancements that have not kept pace with technological advancements. Four of the six enhancements – accounting for a combined 13 offense levels - cover conduct that has become so ubiquitous that they now apply in most cases sentenced.
- Because enhancements initially intended to target more severe and more culpable offenders apply in most cases, the average guideline minimum and average sentence imposed for non-production offenses have increased by more than 38%. (Average sentences increased by 13%)
- When tracking 1,093 non-production child pornography offenders released from incarceration or placed on probation in 2015, 27.6% were rearrested within three years, but only 4.3% were arrested for a sex offense. 8.1% were rearrested for failure to register under SORNA.

---

[11] https://arizonalawreview.org/the-condemnation-of-scopophilia

[12] https://www.ussc.gov/research/research-reports/federal-sentencing-child-pornography-non-production-offenses

OUR RECOMMENDATIONS

We, therefore, urge The Commission to seek the following modifications to the Federal Sentencing Guidelines in response to the requested topic areas from the call for public comment priorities[13] as follows:

1. **Re: (2) Alternatives to Incarceration and Court Diversion Programs, (3) Simplification/Structural Reform, and (7) Crime Legislation**
   Barring congressional action to change the mandatory minimum assigned, we recommend that the Court's sentencing of individuals under 34 U.S.C. §20913(e) of "Registry Requirements for Sex Offenders" under subchapter I, par. (a) 'Failure to Register,' a Felony offense with a penalty including a penalty of imprisonment of one year, considers the individual's circumstances. We recommend allowing for a downward discharge toward a Summary offense with a sentence commensurate with 18 U.S.C. § 402.9, Contempt of Court constituting a criminal offense, wherefore "the term of imprisonment shall not exceed six months, and the amount of any fine paid to the United States shall not exceed $1,000."

2. **Re: (3) Simplification/Structural Reform, (7) Crime Legislation, and (9) Miscellaneous Guideline Application Issues**
   Eliminate the Mandatory Minimums around Child Sexual Abuse Material (Child Pornography) cases, as suggested in the Congressional Research Service Report R42386 as follows:

   > Two-thirds of the federal trial judges responding to a U.S. Sentencing Commission survey questioned the severity of the mandatory minimum penalties required for receipt of child pornography (5 years; 15 years for repeat offenders). The Commission's report suggested that the perception may lead to inconsistent sentencing in child pornography cases.[14]

   We suggest that in the USSC's review of the guidelines, examine ways to reduce all sentences in line with Executive Order 14074, which states "no individual should serve an excessive prison sentence." The President's order intends to relieve individuals from unfair and unduly harsh

[13] https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2023-2024-priorities

[14] https://crsreports.congress.gov/product/pdf/R/R42386/4

sentences, including those driven by mandatory minimums and those excluded from downward variances under the PROTECT Act. Implementing E.O. 14074 falls squarely on the shoulders of the USSC in re-examining the guidelines, particularly with non-production CSAM (Child Sexual Abuse Material) offenses.

3. **Re: (3) Simplification/Structural Reform, (9) Miscellaneous Guideline Application Issues, and (10) Research Topics**
   Amend the Commission's guidelines for *Departures and Variances* for sexual offenses committed by people with decreased mental capacity or underdeveloped cognition, including those with Autism Spectrum Disorder, Impulse Control Disorder, and other relevant paraphilic mental health disorders and diagnoses. This should also apply to youth offenders.[15]

4. **Re: (7) Crime Legislation and (9) Miscellaneous Guideline Application Issues**
   We suggest the USSC recommend to Congress to pass legislation that amends the law awarding time credits towards time served under pretrial home confinement where conditions are equal to or more severe than home confinement conditions at the end of a defendant's sentence. This will provide immediate and substantial relief to the BOP and thousands of individuals whose liberties were suspended during their period of pretrial supervision. In many cases, these individuals completed rehabilitative programming to reduce their recidivism and made substantial efforts to rehabilitate themselves. These efforts should be encouraged and rewarded with credit towards a sentence under 18 U.S.C. 3553(b)(2).[16] The cost to keep an individual in federal prison is roughly $130/day compared to roughly $10/day for that same individual to be under the care of the court and the U.S. Probation Office.

5. **Re: (1) Bureau of Prisons Practices**
   Ensure that the programs and services offered by the Federal Bureau of Prisons and related administrative entities align with the desired sentencing and program goals and deliverables intended by the sentencing Court. Testimony from PARSOL members references that this is frequently not the case and, in one instance, "None of us are getting programs we need here. The programs are superficial, focusing on shame-based, demoralizing punishment instead of trauma-informed shame

[15] https://caselaw.findlaw.com/court/us-8th-circuit/2077237.html

[16] https://guidelines.ussc.gov/ab/18U.S.C.%C2%A73553

> reduction and [dialectical and cognitive behavioral] therapeutic healing. Society loses because prisons release un-reformed people back into the population." [17]
>
> Members also report that inmates with sexual offenses, especially contact offenses, are frequently denied access to, or restricted from participating in educational, recreational, and harm reduction/treatment programs available to individuals with non-sexual offenses. The USSC's and Bureau of Prison's existing Sex Offender Treatment Programs (SOTP-R) policies confirm these reports.[18]

Were the United States Sentencing Commission (USSC) to enact these recommendations during their 2023-2024 strategic work, they would advance the fair, non-discriminatory treatment of justice-involved individuals while also helping to foster safe communities across the United States.

---

[17] Personal interview with inmate Jon Frey [BOP #13317-509], conducted 7/12/2023.

[18] https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2015/BOP_slides.pdf

About PARSOL

The Pennsylvania Association for Rational Sexual Offense Laws (PARSOL) believes all sexual abuse is unacceptable and that prevention, treatment, and healing are possible. We take a person-first approach to criminal justice reform that cultivates a fair and just society, honors inherent dignity, and promotes respect and fairness. People can and do change. As such, PARSOL advocates for sexual offense public safety measures and resources that work for all through prevention-based, treatment-informed, and healing-focused legislative and public policy initiatives that respect our Constitution and all people's dignity.

PARSOL is also the Pennsylvania affiliate of the National Association for Rational Sexual Offense Laws (NARSOL).

Pennsylvania Association for Rational Sexual Offense Laws
P.O. Box 399 - New Freedom, PA 17349
www.PARSOL.org
General: 717-820-2237 – contact@parsol.org
Legislative Affairs: 717-526-9733 – legis@parsol.org
Public Policy & Communication – 570-706-6794 – commdesk@parsol.org

Special thanks to the PARSOL Members and Donors for Supporting our Public Policy Efforts.

Justices: we represent a group of concerned individuals who would like to propose an idea of Restorative Justice Pretrial Diversion for those who have been accused of a sexual offense.

Everyone is worthy of a second chance if they WANT to get help. Most first time non-violent sexual offenders realize they have a problem when they are brought into custody, but they are told they are unredeemable. However, if they were a first time drug offender, domestic abuse offender, or suffered from mental illness they are offered different forms of pretrial diversion.

Pretrial diversion (PTD) is an alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service. In the majority of cases, offenders are diverted at the pre-charge stage. Participants who successfully complete the program will not be charged or, if charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution.

The major objectives of pretrial diversion are:

To prevent future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services.

To save prosecutive and judicial resources for concentration on major cases. To provide, where appropriate, a vehicle for restitution to communities and victims of crime.

Why can this not be done for those individuals who have been accused of a sexual offense? Past studies have found childhood sexual abuse and deprivation in the histories of sex offenders. As such, first time non-violent sex offenders should be offered a mental health pretrial diversion, but currently being a sex offender unqualifies an individual from pretrial diversion and they are not able to get the therapy they need until after they are charged and imprisoned (SOMP) or after charged and on probation. If they were granted mental health pretrial diversion/therapy before incarceration it would save taxpayers money from housing non-violent offenders and get these individuals back to being productive members of society where they can continue to maintain employment to pay restitution to their victims and legal fees.

When the court grants an offender mental health pretrial diversion, the charges are put "on hold" to give the offender up to two years to rehabilitate through the appropriate treatment. A treatment plan may be inpatient or outpatient but must be **specialized** to address the mental disorder that played a role in the commission of the offense. The purpose of the treatment is to prevent the offender from committing further crimes due to the mental disorder. The offender must be willing to enter the program voluntarily (after a guilty plea) and satisfy the court that he or she will cooperate with treatment.

This is not a "get out of jail free" card. The diversion period can be revoked by the court at any time if the offender is charged with another crime or is engaged in criminal activity or is

reported to be responding unsatisfactorily to treatment. In such a case, the court must hold a hearing to determine whether the criminal proceedings should be reinstated, if indicated, the treatment should be adjusted to better address the offender's mental health disorder. During the treatment period, the court must receive regular reports from the program regarding the offender's progress.

We implore you to consider alternatives to incarceration for a carved out, marginalized group, of individuals. Our team is working on a program to accomplish this goal. Please feel free to contact us directly to discuss this further, including details on how this could work for the safety and security of our community and our children.

Signed: Project Crimson Flower

Represented by:

Tammy Henke, BSLS
Matthew Lister, BT,LT
Kasey Cockrell, BBA

Submitted Electronically

July 31, 2023

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: The Sentencing Project Comment on the Commission's Proposed Policy Priorities

Dear Judge Reeves:

The Sentencing Project appreciates the opportunity to comment on the Commission's proposed priorities for the amendment cycle ending May 1, 2024. The Sentencing Project advocates for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice. We are eager to be a resource as you work to create just and equitable sentencing policies. We write to comment on several of the Commission's proposed priorities and to suggest an additional priority.

Across all of these topics we urge the Commission to consider that fifty years ago, the United States embarked on the path to mass incarceration.[1] To ensure that our country does not experience another fifty years of mass incarceration's harms, we urge you to take bold, evidence-based steps to decrease incarceration.

In 1980, federal prisons held 25,000 people, now they hold almost 160,000.[2] The toll of that increase on individuals and communities has been profound. Mass incarceration tears apart families, creates lasting trauma, harms the health of individuals and communities, and deepens poverty.[3] And those harms are disproportionately borne by Black, Latinx, and Native American communities. We are approaching the third annual increase in the federal prison population, following seven years of decline.[4] The need for change is urgent. We applaud the Commission's work thus far to decrease excess incarceration and we urge you to continue to build on that progress.

---

[1] Ghandnoosh, N. (2023). *Ending 50 years of mass incarceration: urgent reform needed to protect future generations*. The Sentencing Project.

[2] Federal Bureau of Prisons (2023). *Statistics*.

[3] Travis, J., Western, B., & Redburn, S. (2014). *The growth of incarceration in the United States*. National Academy of Sciences.

[4] Federal Bureau of Prisons (2023), see note 2.

Topic 1: Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2).

Congress has instructed courts to impose a sentence sufficient, but not greater than necessary to meet four purposes: (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. Persistent inhumane conditions and insufficient services in federal prisons interfere with these purposes.

Federal prisons are plagued by inadequate medical care, overcrowding, staff shortages, unsanitary conditions, violence, and abuse, which are well-documented in Office of Inspector General[5] and Bureau reports,[6] media coverage,[7] and congressional testimony.[8] Education and vocational training is often lacking and falls far short of the requirements of the First Step Act and rehabilitative needs. Inadequate medical care may turn a brief sentence for a medically vulnerable individual into a death sentence. Pervasive sexual violence at institutions like FCI Dublin subjects the individuals incarcerated there to sexual abuse that can have lifelong traumatic effects.

Under 28 U.S.C. § 994(g), the Commission is charged with making "recommendations concerning any change or expansion in the nature or capacity of [correctional] facilities and services that might become necessary as a result of the guidelines promulgated." We urge you to use this power to make recommendations that will assist the Bureau in reducing over-incarceration and crowding, improving access to rehabilitative services, and bettering conditions. For example, the Bureau has historically made next to no use of its ability to grant compassionate release – the Commission could recommend otherwise. Chief Deputy Federal Public Defender for the District of Oregon Stephen Sady has also advanced several other recommendations the Commission could adopt to encourage the Bureau to make better use of programs and statutes which could lessen incarceration.[9] The Commission should consider these potential recommendations and others and embrace its statutorily mandated role in providing guidance to the Bureau.

---

[5] *See, e.g.*, Office of the Inspector General (2023). *The Federal Bureau of Prisons' efforts to maintain and construct institutions*; Office of the Inspector General (2021). *Management advisory memorandum: Impact of the failure to conduct formal policy negotiations on the Federal Bureau of Prisons' implementation of the First Step Act and closure of Office of the Inspector General recommendations*.

[6] *See, e.g.,* Federal Bureau of Prisons (2019). *After action report: partial electrical and reported heating outage civil disturbance*.

[7] *See, e.g.,* Willson, C. (2022). *Inmates at Oregon's only federal prison report dire medical care*. OPD; Lacey, A. (2022). *Federal prison officials knew of misconduct, corruption, and abuse, senate investigation finds*. The Intercept; Thompson, C. (2022). *How the newest federal prison became one of the deadliest*. NPR.

[8] *See, e.g.,* Homeland Security and Governmental Affairs Permanent Subcommittee On Investigations (July 26, 2022), *Witness Opening Statements in PSI Hearing Investigating Corruption, Abuse, & Misconduct at U.S. Penitentiary Atlanta*.

[9] Sady, S. (2022). *Advice to new commissioners: The U.S. Sentencing Commission should address the failure of the Bureau of Prisons to adequately implement statutes that reduce prison time*. Federal Sentencing Reporter.

Topic 2: Promotion of court-sponsored diversion and alternatives-to-incarceration programs, including possible workshops and seminars sharing best practices for developing, implementing, and assessing such programs.

The Sentencing Project encourages the robust use of diversion and restorative justice programs as an alternative to incarceration (ATI). Some federal districts have strong diversion and ATI programs while others have few opportunities. We encourage the Commission to use this topic as a means to lift up the work of successful programs, as well as to advise on how to remedy limited access to diversion and ATI programs in some districts, including potentially by permitting sentencing judges greater latitude to consider evidence of post-conviction rehabilitation.

We also urge the Commission to expand this topic to include the consideration of potential amendments to the guidelines concerning alternatives to incarceration. Currently, the guidelines recommend non-custodial sentences for individuals convicted of low-level offenses with no criminal history. A far broader swath of individuals could benefit from ATI programs. A growing body of research indicates that categorical exclusions from ATI programs based on offense type, criminal history, or the need for drug or substance use treatment run the risk of excluding those who may most benefit from such programs and disproportionately exclude people of color.[10]

We encourage the Commission to consider amending the guidelines to both encourage the broader use of diversion and ATI programs and to incentivize their successful completion by adopting guidelines that grant appropriate adjustments in §3E1.1 (Acceptance of Responsibility), or departures in Chapter 5F (Sentencing Options) or Chapter 5H (Specific Offender Characteristics) for successful completion of an ATI program.

Topic 5: Categorical approach and other "career offender" guideline issues.

During the 2022-2023 Commission amendment cycle, The Sentencing Project joined several other criminal justice reform and civil rights organizations in commenting on potential changes to the "career offender" guidelines.[11] We incorporate those comments by reference and reiterate our concerns that the current "career offender" guidelines already drive over-incarceration and racial inequity in federal sentencing without any evidence that they enhance public safety. Modifications should be carefully considered to avoid subjecting more individuals to extreme sentences and deepening racial disparities.

Topic 6: Examination of the treatment of "youthful offenders" under the guidelines Manual, including possible consideration of amendments that might be appropriate.

As the Commission found in its 2017 report on "youthful offenders" in the federal system, between 2010 and 2015, youth and emerging adults 25 years and younger accounted for about

---

[10] Adler, J. & Barrett, J. (2023). *Plenty of science, just not enough passion: Accelerating the pace of felony decarceration*. Center for Justice Innovation.

[11] FAMM et al (2023). *Comment: Proposed amendments to the career offender and criminal history guidelines*.

18% of the federal prison population.[12] The majority were Latinx, and overwhelmingly, they were convicted of non-violent offenses. Their offenses were similar to their mature adult counterparts, but they were significantly more likely to recidivate.[13] This higher recidivism rate illustrates the failure of the current approach in the guidelines, which offer judges little leeway to consider the unique characteristics, needs, and experiences of youth and emerging adults.

That approach is inconsistent with the growing body of research and jurisprudence recognizing that youth and young adults are different and deserving of distinct sentencing treatment. The development from adolescence to "late adolescence" or emerging adulthood is marked by lower levels of emotional control and higher levels of impulsive actions.[14] The Supreme Court has recognized these qualities in minors and thus the need to sentence them differently in a way that reflects their diminished culpability and great potential for growth.[15] Emerging adults share many of the same qualities as teenagers below 18, and the same sentencing principles should apply.[16]

In 2016, the Tribal Issues Advisory Group recognized the guidelines' failure to reflect this body of evidence and recommended that the Commission amend USSG §5H1.1 regarding the "age" policy statement, add a departure concerning youth and emerging adults as USSG §5K2.25, and the expansion of opportunities for diversion.[17]

Similarly, we urge the Commission to amend the guidelines to permit greater consideration of the needs and characteristics of emerging adults, including cognitive development, the mental health impact of incarceration, the availability of appropriate services and educational opportunities, and the importance of maintaining and developing pro-social community-based ties and behaviors.

Additional suggested topic: Life sentences for Base Level 43 offenses, especially for individuals with limited criminal history.

Finally, we urge the Commission to consider an additional priority: potential amendments to the guidelines regarding the imposition of life sentences for Base Level 43 offenses, especially for those with little or no criminal history. As Jason Hernandez, a clemency recipient who was sentenced at 21 to life without parole plus 320 years for drug-related offenses that were committed mostly in his teens, articulated in his 2018 comment to the Commission, the guidelines depart from international and domestic sentencing norms by mandating a life sentence in some circumstances even for non-violent offenses where an individual has no prior criminal history.[18]

---

[12] U.S. Sentencing Commission (2017). *Youthful offenders in the federal system*.
[13] U.S. Sentencing Commission (2017), see note 12.
[14] Nellis, A. & Monazzam, N. (2023). *Left to die in prison: Emerging adults 25 and younger sentenced to life without parole*. The Sentencing Project.
[15] *Miller v. Alabama*, 567 U.S. 460 (2012).
[16] Nellis, A. & Monazzam, N. (2023), see note 14.
[17] U.S. Sentencing Commission (2016). *Report of the Tribal Issues Advisory Group*.
[18] Hernandez, J. (2018). *Comment to the U.S. Sentencing Commission that a policy statement be implemented advising that offense level 43's recommendation of life without parole be reduced to 360 months - life without parole for offenders with a criminal history category I and II who are convicted of a nonviolent crime*.

Under the Commission's sentencing table an individual's recommended sentence is determined – in most circumstances – by calculating the offense's "base offense level" based on its severity and the individual's criminal history category.[19] With one exception, for each base offense level the recommended sentencing range rises with an individual's criminal history category. For offenses with a base level of 43, however, a life sentence is mandated regardless of whether an individual has a criminal history. [20]

Base level 43 offenses can include a wide array of conduct. §2A1.1 (First Degree Murder), §2D1.1(a)(1) (Unlawful Manufacturing, Importing, Exporting or Trafficking), and §2M1.1(a)(1) (Treason) all specifically establish a base offense level of 43.[21] Other offenses, including non-violent drug offenses, may be aggravated to a base level of 43 based on an individual's role in the offense and other factors.

Such a sentencing structure, however, is inconsistent with a wealth of evidence that makes clear that extreme sentences – including sentences to life and death – are not necessary to protect public safety.[22] The vast majority of individuals age out of crime.[23] Individuals with little or no criminal history are also less likely to recidivate.[24]

As such, we recommend that the Commission amend the guidelines to remove the recommendation that all offenses with a base level of 43 should result in life sentences and institute sentencing ranges for such offenses, especially for those with little to no criminal history.

Thank you for this opportunity to comment. We look forward to working with the Commission to advance justice in federal sentencing.

Sincerely,

Kara Gotsch

Kara Gotsch
Acting Executive Director
The Sentencing Project

---

[19] U.S. Sentencing Commission (2022). *Life sentences in the federal system*.
[20] U.S. Sentencing Commission (2022), see note 19.
[21] U.S. Sentencing Commission (2022), see note 19.
[22] Nellis, A. (2021). *No end in sight: America's enduring reliance on life sentences*. The Sentencing Project.
[23] Farrington, D. (1986). "Age and crime." In Michael Tonry and Norval Morris (eds.), *Crime and Justice: An Annual Review of Research*. Vol. 7. Chicago, Ill.: University of Chicago Press; Piquero, A., Jennings, W., and Barnes, J. (2012). Violence in criminal careers: A review of the literature from a developmental lifecourse perspective. *Aggression and Violent Behavior*. Vol 17 (3): 171-179.
[24] U.S. Sentencing Commission (2016). *Recidivism among federal offenders: A comprehensive overview*.

Public Comment to the U.S. Sentencing Commission's Request for Comment on Proposed Priorities for Amendment Cycle 2023-2024

Prepared by Tzedek Association

Author: Rabbi Mordechai Biser, Esq.

Advisors: Douglas Berman & Norman Reimer

August 1, 2023

About Tzedek Association:

Tzedek Association is a nonprofit humanitarian organization that focuses on criminal justice reform, religious liberty and humanitarian cases around the globe. Tzedek was instrumental in the drafting and passing of the First Step Act, among other criminal justice reform legislation, such as a provision in the CARES Act that allowed for home-confinement for incarcerated individuals vulnerable to COVID-19 based on CDC-approved high-risk criteria. Tzedek continues to work to ensure that the FSA is correctly implemented in accordance with statute, the intent of Congress, and spirit of the legislation, as well as many other important criminal justice reform efforts.

About Rabbi Mordechai Biser, Esquire:

Rabbi Mordechai Biser, OBM, a graduate of Yale Law School, served for over 20 years as General Counsel at Agudath Israel of America. In 2019, Mordechai joined the Tzedek team to help develop meaningful criminal justice reform ideas that would truly impact our justice system for the better, especially our sentencing system. His tireless efforts made up the basis of this document. Sadly, Mordechai recently passed away before he could see the fruition of his work. We pray that his contribution of ideas laid out in this document will indeed bear fruit with concrete reforms that will improve our justice system as he envisioned and so desired.

About Professor Douglas A. Berman:

Douglas A. Berman serves as a Professor at Moritz College of Law and is Executive Director of the Drug Enforcement and Policy Center. Professor Berman's principal teaching and research focus is in the area of criminal law and criminal sentencing. Professor Berman attended Princeton University and Harvard Law School. He served as a law clerk for Judge Jon O. Newman and then for Judge Guido Calabresi, both on the United States Court of Appeals for the Second Circuit. Professor Berman has authored books on sentencing, served as an editor of the Federal Sentencing Reporter for more than twenty five years, serves as co-managing editor of the Ohio State Journal of Criminal Law and today is the sole creator and author of the widely-read and widely-cited blog, Sentencing Law and Policy.

About Norman L. Reimer:

Norman L. Reimer currently serves as Of Counsel at Vladeck, Raskin & Clark, P.C. Norman has devoted his career to the defense of the criminally accused at the trial, appellate and post-conviction levels and to criminal justice reform advocacy. Most recently, Norman was Global CEO of Fair Trials. Norman is renowned for his tenure as Executive Director to the National Association of Criminal Defense Lawyers (NACDL), a position he valiantly served for fifteen years. He co-founded the John Adams Project with the ACLU to provide attorneys qualified in

capital defense to represent individuals at Guantanamo Bay, and led a collaboration among several groups to establish Clemency Project 2014, one of the largest national pro bono projects ever undertaken by the legal profession and which secured the commutation of long federal prison sentences for 894 individuals, including more than 300 who were serving life sentences.

Introduction:

Congress, in the Sentencing Reform Act of 1984, provided that the U.S. Sentencing Commission is to "establish sentencing policies and practices for the Federal criminal justice system that … reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C). Decades of mass incarceration and massively long prison sentences have advanced our knowledge about the limits of an excessively punitive system in providing meaningful public safety and achieving true justice and spiritual healing for offenders and victims. The Commission should seize the opportunity to lead the federal criminal justice system away from the harmful and counter-productive carceral commitments that have unduly dominated modern federal sentencing policies and practices.

The United States has less than five percent of the world's population but close to one-quarter of its prisoners—an incarceration rate five to ten times that of other Western democracies. Indeed, the U.S. incarcerates more people (both in absolute numbers and per capita) than any nation on Earth, including the far more populous China, which rates second, and authoritarian Russia, which rates third. These are disconcerting realities in a nation that, when its citizens pledge allegiance to our flag, promises to be a republic with "liberty and justice for all." 4 U.S.C. § 4.

Over the past 40 years, the number of people held in prisons and jails in the United States per capita has more than quadrupled, with the total number of incarcerated persons now around 2 million. And since 1970, the federal prison population has grown nearly 1000 percent, a rate that far outpaces that of the general U.S. population and crime rates. Nearly half of all those incarcerated throughout the United States are serving time for non-violent drug, property, or public order crimes, and more than two-thirds of the federal prison population are imprisoned for these sorts of non-violent offenses. Despite recent declines, every state and the federal government have seen a massive increase in inmate populations in recent decades, and the modest prison population decline resulting partially from pandemic developments are reversing within many justice systems. *See* Jacob Kang-Brown, Stephen Jones, Joyce Tagal & Jessica Zhang, The VERA Institute, *People in Jail and Prison in 2022* (June 2023).

This epidemic of incarceration has arguably done little to reduce crime and has, along the way, helped to destroy innumerable lives, especially the lives of children and spouses of incarcerated individuals. Reform and clarity of what our justice system is truly about are desperately needed, including a sober assessment of whether and when prison terms, especially long prison terms, serve legitimate purposes. We need to provide alternatives to incarceration, reduce excessively long sentences, especially for non-violent first-time offenders, give incarcerated individuals the education and training they need to successfully reintegrate and find employment after leaving prison, lift barriers to reentry and, yes, show compassion. Everyone would benefit from a criminal justice system that takes seriously its obligation to rehabilitate as well as to hold people accountable for their misdeeds.

The United States Sentencing Commission (USSC) plays a pivotal role in enlightening our justice system, particularly through the Sentencing Guidelines. This Commission has taken a

number of important and valuable steps toward an improved federal sentencing system through its Guideline amendments in the last amendment cycle. But there is much more work to do, and significant and ambitious reforms are needed to more fully address the substantial and systemic problems of the current federal sentencing system.

The comments and priorities we propose here are intended to address some of what we believe are key shortcomings in our criminal justice system that we hope can be clarified and corrected via instruction to judges throughout the country through amendments to the Sentencing Guidelines. While these proposals all deal with the federal criminal justice system, the hope is that enacting these reforms would also inspire state legislators and state sentencing commissioners—who often look to the federal system for guidance—to enact similar reforms.

Table of Contents

The First Step Act – 18 U.S.C. § 3582(c)(1)(A) 7

Alternatives to Incarceration 9

Maximum Sentences for First-time Non-violent Offenders 16

Family Hardship and Other Sentencing Considerations 18

Revise the Fraud Sentencing Guidelines & Other Guideline Provisions 21

Mens Rea Reform 26

Acquitted Conduct 28

Recommendation for Judges and DOJ Officials and Others to Visit Prisons 30

The First Step Act – 18 U.S.C. § 3582(c)(1)(A)

The First Step Act (FSA) is the most monumental criminal justice reform legislation passed in decades. In Title 1, it sets out to meaningfully assist incarcerated individuals to rehabilitate themselves and provide them with the necessary tools that will help them to successfully reenter society as contributive members of society. It also incentivizes men and women in our federal prison system to better utilize their time in prison by participating in recidivism reduction programs, job training, educational courses and faith-based activity. These productive activities have all proven not only to reduce the risk of reoffending, but also to create a more productive experience while incarcerated.

The subsequent provisions in the FSA are important, and truly critical compassionate pieces, as well as sentencing reforms, that are significant improvements to our justice system. This includes 18 U.S.C. § 3582(c)(1)(A) (implementing the right to court review of a compassionate release denial). This comment addresses this important provision in particular.

Comments Regarding Amendment to 18 U.S.C. § 3582(c)(1)(A).

The Commission's amendments to 18 U.S.C. § 3582(c)(1)(A) are astute and praiseworthy, and effectively address issues regarding sentence reductions that have been of great concern and attention since the FSA was passed into law in December of 2018. We thank the Commission for its attention to this important issue.

Importantly, in the months and years ahead, it will be critical for the Commission to monitor and assess how its sentence reduction guidelines are applied by judges in the exercise of their broad discretion in considering these requests.

While the Commission can and likely will seek to monitor and assess whether sentence reductions are being granted *consistently* around the country, we think it especially important for this Commission to monitor and assess whether sentence reductions are being granted *sufficiently*. Our view is that many federal sentences, especially those imposed due to severe mandatory minimums or guidelines, often prove over time to be "greater than necessary to comply with the purposes set forth" by Congress. 18 U.S.C. § 3553(a). We believe it will be essential for this Commission to continue to encourage sentencing courts to recognize and act upon their obligations to reduce prison terms to ensure persons are not serving unnecessary and wasteful prison time.

Alternatives to Incarceration

The length of incarceration for released federal prisoners doubled between 1988 and 2012, from an average of 17.9 months to 37.5 months. But increasingly, lengthy prison terms for federal offenses have become counterproductive for promoting public safety. Long-term sentences produce diminishing returns for public safety as individuals "age out" of the high-crime years; such sentences are particularly ineffective for drug crimes as drug sellers are easily replaced in the community; long-term sentences have deleterious consequences on families and communities, which undermines public safety; increasingly punitive sentences add little to the deterrent effect of the criminal justice system; and mass incarceration diverts resources from program and policy initiatives that hold the potential for greater impact on public safety.

Further, there is evidence that prison sentences—especially lengthy ones—are "criminogenic," *i.e.*, actually increase crime and criminal attitudes by exposing first-time offenders to more hardened offenders and reducing post-incarceration opportunities for jobs, housing, and social connections.[1]

The comments below promote alternative sentencing (such as home confinement, electronic monitoring, weekend jail stays, and other forms of supervision) for first-time, non-violent offenders.

These comments also address how a "crime of violence" should be defined, which is responsive to comments being sought by the USSC at this time in the Career Offender section.

We would also strongly recommend that the Commission plan a national convening in the form of a Commission-sponsored symposium, and/or conduct a series of regional hearings, in order to give much needed attention to alternatives to prison. Federal judges, U.S Probation, Congress, federal prosecutors, states and localities nationwide—as well as many other stakeholders and interested parties—could and would draw considerable guidance from a Commission-sponsored event that brought together leading researchers and scholars to discuss what we continue to learn about alternatives to incarceration and public safety. In addition to informing this Commission's work, one (or a series of major events) on this topic would help advance our collective knowledge of whether and when incarceration is needed and appropriate as a response to a range of wrongdoing.

[1] See, e.g., Marc Mauer, "Long-Term Sentences: Time to Reconsider the Scale of Punishment." The Sentencing Project. November 5, 2018, https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/; Marta Nelson, Samuel Feineh and Maris Mapolski, The VERA Institute, *A New Paradigm for Sentencing in the United States* (Feb. 2023), https://www.vera.org/downloads/publications/Vera-Sentencing-Report-2023.pdf

Favoring Alternatives to Prison Incarceration for a Certain Class of Non-violent Offenders in Keeping with Congressional Statutory Direction.

We propose that the USSC place a strong emphasis on alternatives to incarceration and on exploring how such alternatives can be better and more broadly utilized in our sentencing system. Alternatives to incarceration, including home confinement, were much more commonly utilized by judges prior to the Sentencing Guidelines. Indeed, we believe this is one of the unfortunate unintended negative consequences of the Guidelines and one that has not received nearly as much attention in the modern federal sentencing era as it merits, given the low-risk nature of many of those subject to federal prosecution. Congress, in the Sentencing Reform Act of 1984, stated clearly that the Commission "shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense," and also provided that the Guidelines should direct that imprisonment is generally appropriate only when persons are "convicted of a crime of violence that results in serious bodily injury." 28 U.S.C. § 994(j).

Many federal defendants fit the profile that Congress has ordained should qualify for "a sentence other than imprisonment." Nevertheless, Commission data regularly document that over 90% of all federal defendants are sentenced to imprisonment terms every year. (Notably, state criminal courts process many more violent offenses and sentence many more repeat offenders and yet data generally shows that about 30% of felony offenders sentenced in state courts receive alternatives to incarceration.) Commission data also highlight that a large percentage of federal defendants do not have any significant criminal history: the Commission's Fiscal Year 2022 reports show that over 40% of sentenced persons scored in the lowest possible criminal history category (CHC I). And yet the mean sentence for that group, many of whom would fit the category Congress indicated should generally receive a "sentence other than imprisonment," was imprisonment for 40 months (nearly 3.5 years).

The USSC should, therefore, aggressively pursue and find more ways to encourage judges to utilize the important option of prison alternatives when sentencing offenders deserving of such consideration. Work by this Commission to highlight alternatives ranging from home confinement to electronic monitoring to traditional community supervision can and should not only advance congressional directives as judges make initial sentencing determinations but also help better inform judges when they are considering motions for sentence reductions brought pursuant to 18 U.S.C. § 3582(c)(1)(A) and also when considering options in response to supervised release violations. As detailed below, we have set forth some specific suggestions for various ways to amend the Sentencing Guidelines to encourage judges to give more and greater consideration to prison alternatives. In addition to those particular recommendations, we urge the Commission to give sustained attention to alternatives to incarceration.

There are numerous reasons why our justice system needs alternatives to incarceration now more than ever:

- Our federal prisons are overcrowded, understaffed and place an increasingly heavy burden on taxpayers to pay for them.
- Health care is completely inadequate in our federal prison system due to limited resources. Because of that, inmates—especially the elderly—get sick unnecessarily since their medical issues were not addressed at all or adequately, or worse, result in their untimely deaths. These tragic examples of illness and death would have been avoidable had the individual been in the community receiving regular health care.
- Family units are broken up due to incarceration.
- Children are separated from their fathers and mothers due to incarceration. Many of these children tragically later turn to crime without a father figure at home to educate them, among many other negative consequences. (See below section titled "Family Hardship and Other Sentencing Considerations" for more details and data on this issue.)
- Spouses are left without the breadwinner or other critical resources to support their children and other family members due to incarceration.

We propose that the USSC should immediately begin a comprehensive review of the federal sentencing system that culminates in a report to Congress and the public on:

- The effectiveness of the current system.
- Its conformity to the purposes set forth under Section 3553(a) of Title 18 of the United States Code and other key provisions of the Sentencing Reform Act of 1984, as well as the more recent First Step Act of 2018 and
- Whether the current list of factors to be considered when imposing a sentence under Section 3553(a) of Title 18 of the United States Code are producing appropriate results that serve the public's interest.

This report should include recommendations for needed actions and appropriate reforms directed to every federal institution that plays a central role in the imposition and administration of sentences, including Congress, the U.S. Department of Justice, federal defender offices, U.S. Probation and the Federal Bureau of Prisons.

We propose that this sort of comprehensive review focused on alternatives to incarceration be conducted at least every ten years and that the Commission's annual reports and priorities consistently examine and assess the use of, and potential for expanding, alternatives to incarceration for various classes of cases.

We offer further specific comments on this important subject:

1. We propose that the USSC advise Congress to amend 18 U.S.C. § 3553(b) to delete subsections (1) and (2)[2]—which became largely unconstitutional and inapplicable due

[2] Directing consideration of "(1) the nature and circumstances of the offense and the history and characteristics of the defendant; [and] (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

to the Supreme Court's ruling in *U.S. v. Booker*—and insert a subsection that would address alternatives to prison sentences. The new subsection should establish that, at least for defendants with no prior felony convictions for federal or state criminal offenses, and no act of violence was involved in the offense for which they were convicted, it shall be presumed, absent a jury finding of aggravating circumstances, that alternatives to prison shall be sufficient to satisfy justice and the other purposes set forth under Section 3553(a) of Title 18.

Alternatives shall include, but not limited to:

- Home confinement
- Supervised probation
- Confinement in "Residential Confinement Centers"
- Intermittent confinement
- Electronic monitoring
- Community service
- Fines
- Restitution to victims
- Participation in rehabilitation, faith-based or other programs.

Definitions:

"Act of violence" should be defined as causing actual physical harm to another person, intentionally putting another person in reasonable fear of imminent violence, attempting to sexually assault another person or actually sexually assaulting another person.

"Residential Confinement Centers" should be defined as centers based in communities for the purpose of confinement, similar to Residential Reentry Centers currently contracted by the Federal Bureau of Prisons.

"Intermittent confinement" may include alternatives such as being home on weekends and in prison on weekdays or vice versa.

2. For defendants to whom this section applies who are currently serving a prison term, on the motion of the prisoner, a court that imposed a prison sentence prior to the enactment of this guidance should generally impose an alternative to prison for the remainder of the defendant's sentence as if this guidance was in effect at the time the offense was committed. Notably, in last year's amendments, this Commission soundly recognized the need to reduce recommended guideline ranges for certain offenders with zero criminal history points under the Guidelines ("zero-point offenders"). The logical next step is to create a statutory presumption against incarceration for first-time non-violent offenders.

3. Importantly, we propose that the USSC amend its Sentencing Guidelines, Section 5B1.1, by adding a new subsection (c) that reads as follows:

   > "For defendants with no prior felony convictions for federal or state criminal offenses, and who committed no act of violence in the offense for which they were convicted, alternatives to prison shall be considered sufficient to comply with the purposes set forth in 18 U.S.C. Section 3553(a)(2), absent a jury finding of aggravating circumstances that would warrant a sentence of incarceration.
   >
   > Supervised probation, community service, home confinement, intermittent confinement, fines, restitution payments to victims, electronic monitoring, participation in rehabilitation programs, participation in faith-based programs, placement in Residential Confinement Centers, and other authorized alternatives to prison shall all be presumed to be sufficient for first-time offenders convicted of crimes that did not involve acts of violence. Intermittent confinement may include alternatives such as being home on weekends and in prison on weekdays or vice versa. Prisoners may be sentenced by judges directly to Residential Confinement Centers or may be placed in such Residential Confinement Centers by the Federal Bureau of Prisons, as long as their sentence is less than five years long. Probation officers shall include a discussion of viable alternatives to prison in the pre-sentencing report."

4. We further propose that the USSC create an advisory list of aggravating factors that may provide the basis for a court to be authorized to sentence an individual to an alternative to prison.

5. We further propose another category of individuals for a presumption in favor of alternatives to incarceration even if they have a modest criminal history: people who demonstrate pretrial and/or presentence rehabilitation, such as through exemplary performance on pretrial release, should also presumptively receive an alternatives-to-prison sanction. This alternative basis captures deserving individuals who might otherwise be excluded, and it properly adds a focus on rehabilitation to the Guidelines.

6. Given the success (low recidivism rates[3]) of the Home Confinement provision of the CARES Act, we believe that its provision should be permanently adapted with its emergency provision replaced by the requirement of consideration of the overall health of the incarcerated individual. We propose the following language or similar:

---

[3] Of the 13,204 individuals placed on CARES Act home confinement since March 2020, only 22 people—less than 1%—have been charged with a new criminal offense. CARES Act Home Confinement Three Years Later, Senator Cory A . Booker, June 2023 at page 8, https://www.booker.senate.gov/imo/media/doc/cares_act_home_confinement_policy_brief1.pdf.

"A prisoner who has served at least 50% of his or her sentence may be transferred to home confinement if: 1) The prisoner is at elevated risk for of a serious or debilitating illness, 2) has no history of violence, 3) has no detainers, and 4) is assessed as Low or Minimum risk to recidivate in their PATTERN score."

7. Additionally, we propose that the USSC amend its Sentencing Guidelines, Section 5C1.2(a) by adding a new subsection (6) that reads as follows:

   "(6) the defendant does not qualify for alternative sentencing under section 5B1.1(c)."

8. We propose that the USSC advise Congress to amend Title 18 U.S.C. 3552(a) to add the following sentence:

   "The report shall include a discussion of viable alternatives to prison."

9. We propose that the USSC amend its Sentencing Guidelines, Section 6A1.1 by adding a new subsection (c) that reads as follows:

   "The pre-sentencing report shall include a discussion of viable alternatives to prison."

10. We propose that the USSC advise Congress to provide a sense of Congress that Rule 32 of the Federal Rules of Criminal Procedure should be revised by adding to section (d)(1) a new subsection (F) to read as follows:

    "F. Include a discussion of viable alternatives to prison."

11. We propose that the USSC advise Congress to amend 28 U.S.C. § 997 to add a sentence that shall read as follows:

    "As part of its annual report, the Commission shall address its effort to develop and expand alternatives to prison for as many federal defendants as possible."

12. We propose that the USSC advise Congress to amend 28 U.S.C. § 994(j) to read as follows:

    "The Commission shall ensure that the Guidelines recommend imposing a sentence other than imprisonment in cases in which the defendant is a first-time offender of a federal or state felony offense, whose conviction was not for a crime that involved an act of violence, absent a jury finding of aggravating circumstances that would warrant a prison sentence. The Commission shall create an advisory list of aggravating factors that may provide the basis for a court to be authorized to sentence an individual to an alternative to prison."

13. We propose that the USSC advise Congress to amend 28 U.S.C. § 994 by adding a new subsection (z) to read as follows:

    "The Commission shall further evaluate, develop, and promote alternatives to prison as a strategy to divert appropriate convicted individuals from prison and shall promote the availability of evidence-based sentencing alternatives to incarceration across the system."

14. Finally, at a time when we as a nation have become addicted to excessive sentences, erroneously thinking that prison is the answer to all our criminological problems, it is critical that the United States Sentencing Commission —the preeminent entity we all look toward for sentencing guidance—send a message that is loud and clear that we must expand the utilization of alternatives to incarceration. What better way to send that message than by the Commission proposing that the Commission itself be reorganized to focus more on alternatives? Accordingly, we propose that the USSC advise Congress to amend 28 U.S.C. § 991 by revising subsection (a) to read as follows:

    "(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of nine voting members and three nonvoting members. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. <u>One of the vice-chairs shall be dedicated to researching, developing and proposing alternatives to prison incarceration to be included in the United States Sentencing Guidelines and associated materials.</u> At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than five of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an *ex officio*, nonvoting member of the Commission. The Chair of the United States Parole Commission, or the Chair's designee, shall be an *ex officio*, nonvoting member of the Commission. A federal public defender shall be an *ex officio*, non-voting member of the Commission, to be appointed by the President. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown."

Maximum Sentences for First-time Non-violent Offenders

When alternatives to prison are not appropriate, the argument against lengthy prison stays for first-time, non-violent offenders is still no less compelling. The bold proposal below would cap maximum sentences for first-time, non-violent federal offenders at ten years, absent a jury finding of aggravating circumstances that would warrant a prison sentence. As previously mentioned, in last year's amendments this Commission soundly recognized the need to reduce recommended guideline ranges for certain offenders with zero criminal history points under the Guidelines ("zero-point offenders"). We believe that one important and sensible next step is to create a cap against lengthy incarceration terms for first-time non-violent offenders.

Establishing Maximum Sentences for First-time Non-Violent Offenders Convicted of Federal Crimes.

1. We propose that the USSC advise Congress to amend 18 U.S.C. §3553(b) by inserting a new subsection (2) which should read as follows:

> "(2). Maximum sentences for certain offenders.
>
> Notwithstanding any other law, statute, regulation, or guideline to the contrary, a court may not impose on a defendant with no prior felony convictions for federal or state criminal offenses and was not convicted of a crime that involved an actual act of violence, a sentence of more than ten years, absent a jury finding of aggravating factors would justify a longer sentence."

Definitions:

> "Act of violence" should be defined as causing actual physical harm to another person, intentionally putting another person in reasonable fear of imminent violence, attempting to sexually assault another person or actually sexually assaulting another person.

2. We propose the USSC amend Chapter Five of the United States Sentencing Guidelines by adding, in the introductory commentary to that chapter, the following or similar language to the same effect:

> "For those with no prior felony convictions for federal or state criminal offenses, and no actual act of violence in the offense for which they were convicted, a court may not impose on a defendant a sentence of more than ten years, absent a jury finding of aggravating factors that would justify a longer sentence."

3. We further propose that the USSC create an advisory list of aggravating factors that may provide the basis for a court to be authorized to impose a sentence longer than ten years.

Family Hardship and Other Sentencing Considerations

The incarceration of a parent can have devastating effects on children. Astonishingly, the number of minors with a parent in prison increased 500% (!) between 1980 and 2000.[4] In 2007, there were 1.7 million children in America with a parent in prison, more than 70% of whom were children of color.[5] A study based on U.S. Department of Justice statistics found that between 1980 and 2019, the number of incarcerated women increased by more than 700%—and about 60% of these incarcerated women have children under age 18.[6]

Incarceration of a parent, and especially of a mother, is associated with a host of poor outcomes for children, including a substantially increased likelihood of being incarcerated themselves as adults. One study found that the majority of children with an incarcerated parent are subject to four or more risk factors.[7] Obviously, almost immediately, family income (already low among this group) drops sharply when a parent is incarcerated. About one-third of children with an incarcerated parent live in poverty.[8]

Children's behaviors also diverge dramatically from their peers who do not have an incarcerated parent. One study found that children with an incarcerated parent "had higher levels of problem behaviors between the 5th and 10th grades," with the differences being significant and increasing over the course of this time period. Moreover, "serious" delinquency—essentially, conduct that was otherwise a felony crime—was significantly higher for this group than for children without incarcerated parents.[9]

Overall, and not surprisingly, having an incarcerated parent was strongly correlated in children with increased rates of substance abuse, mental health disorders, violence, anti-social behaviors, learning disabilities, homelessness, and mental and physical health issues (including migraines, asthma, high cholesterol, depression, anxiety, and post-traumatic stress disorder).[10]

Incarceration of a mother especially seems to have an outsized impact on children. Dallaire found that the adult children of incarcerated mothers were 2.5 times more likely to be incarcerated than the adult children of fathers. The risk of incarceration for the adult children of

---

[4] Leila Morsy & Richard Rothstein, *Mass incarceration and children's outcomes*, Economic Policy Institute (Dec. 15, 2016), available at https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/.
[5] D.H. Dallaire, *Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families*, 56 Family Relations 440 (2007).
[6] The Sentencing Project, *Incarcerated Women and Girls* (Nov. 20, 2020), available at https://www.sentencingproject.org/publications/incarcerated-women-and-girls/.
[7] J. Poehlmann, *Children's family environments and intellectual outcomes during maternal incarceration*, 67 J. Marriage & Family 1275 (2005).
[8] Jean M. Kjellstrand & J. Mark Eddy, Parental Incarceration During Childhood, Family Context, and Youth Problem Behavior Across Adolescence, 50 J. Offender Rehab. 18 (Jan. 1, 2011).
[9] Kjellstrand & Eddy, *supra*.
[10] Morsy & Rothstein, *supra*.

women who used drugs regularly was particularly high.[11] And nearly half of all children with an incarcerated mother live in poverty, as opposed to slightly less than one-third who have an incarcerated father.[12]

Given these relationships, it seems clear that reducing the number of parents and caretakers who are incarcerated is not just good criminal justice policy, it is a pro-family policy that can serve society's interests in many ways.

The proposals below fill an overdue void: to incorporate family hardship in the Sentencing Guidelines.

The Commission long ago promulgated a policy statement that mere "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted." (USSC Section 5H1.6). Since nearly every person has some family ties and responsibilities, this old policy statement is understandable. But, before and since the *Booker* ruling, federal judges have recognized there are many situations in which family ***hardships*** are directly relevant to the sentencing purposes and considerations Congress set forth in 18 U.S.C. § 3553(a). Indeed, Commission data show that family considerations are consistently one of the most commonly cited factors for traditional departures and for variances from the Guidelines. The recommendations below seek to ensure the Guidelines more effectively guide federal judges toward appropriately considering family hardships at sentencing.

[11] Dallaire, *supra*.
[12] Kjellstrand, et al., *supra*.

Additional Factors to be Considered at Sentencing.

1. We propose that the USSC amend the Sentencing Guidelines, Section 5H1.6, commentary Application Note (B)(ii) to read as follows, or similar language to the same effect:

   > "The loss of caretaking or financial support to third parties that could prove detrimental to their well-being. The fact that the defendant's family might incur significant financial hardship or suffer in other ways from the absence of the defendant as a result of incarceration, including but not limited to emotional and psychological harm to children, a special needs child in the defendant's family, a family member with medical or mental health issues, a spouse, or elderly parents, may be a sufficient basis for departure from the Sentencing Guidelines.
   >
   > In order to qualify for a departure on this basis, a defendant must demonstrate to the court's satisfaction that he or she has reasonably assumed his or her responsibilities to the third parties in question. For example, in the event a defendant has a child or children with a person or persons to whom the defendant is not married, and the child or children do not reside with the defendant, the defendant must demonstrate that he or she regularly visits said child or children, makes regular and sufficient child support payments to the best of their ability and did so regularly before their arrest for the current offense."

2. We further propose that the USSC amend the Sentencing Guidelines, Section 5H1.6, commentary Application Note (1)(B)(iii) to read as follows or similar language to the same effect:

   > "The loss of caretaking or financial support is one for which effective remedial or ameliorative programs are not readily available."

3. We further propose that the USSC amend the Sentencing Guidelines, Section 5H, by adding a new subsection, 5H1.13, which shall read as follows or similar language to the same effect:

   > "Consideration of Collateral Consequences and Extraordinary Acceptance of Responsibility.
   >
   > Punitive collateral consequences resulting from the defendant's prosecution (*e.g.*, loss of employment and income, or other formal and informal societal sanctions, coupled with the defendant's demonstration of genuine remorse and sincere effort to make amends to any victims or the broader community) may provide a reason to depart downward."

Revise the Fraud Sentencing Guidelines & Other Guideline Provisions

The portions of the Sentencing Guidelines on federal fraud crimes—embezzlement, securities fraud, insider trading, and related crimes—have long been the subject of extensive and bipartisan criticisms. Due to the Guideline's instructions to use the *higher* of "intended" or "actual" loss, its numerous overlapping sentencing enhancements, and its tendency to treat both intentional conduct (think Bernie Madoff) and less culpable conduct similarly, there is a broad consensus that the fraud Guidelines often recommend excessive punishment for many types of economic offenses. They also may now result in widely disparate sentences for like conduct, especially as federal judges register their disapproval of these Sentencing Guidelines by departing or varying from them in a wide range of cases.[13] Though structured with various elements, this proposal fundamentally seeks to alleviate at least some of the excessive harshness of these fraud Guidelines by focusing more closely on defendants' actual intent and directing judges to consider mitigating as well as inculpatory factors. Reforms that better align the fraud Guidelines with culpability and other sound sentencing factors will help reduce disparity as judges will be even more inclined to follow Guideline recommendations.

We also propose that *mens rea* be further incorporated into the Guidelines. Criminal intent is fundamental to our justice system. That ideal is not sufficiently expressed in the current Guidelines, which too often allow for unintended results to greatly enhance sentencing ranges. This proposal would correct that.

To begin, we urge the Commission to fundamentally rethink and restructure the entire fraud Guideline. The fraud Guideline's Loss Table drives fraud sentences, and it consistently produces intolerably unjust sentencing recommendations. The Commission should explore amendments that could allow the Guidelines to function without a Loss Table in order to put particular focus on a defendant's *mens rea*, motive, culpability and the extent to which they deliberately inflicted economic hardship on discrete individuals. If the Commission does not fundamentally rethink this guideline, then we propose below that the Commission at least significantly reform and simplify the Loss Table in Section 2B1.1. With financial crimes, it is the government's (sometimes fanciful) construction of loss amounts that (too greatly) drives the sentence. All too often, loss calculations are built on supposition about intent or resulting harm and they push a Guideline sentence to an amount of time that the average person would consider outrageously long and a punishment that does not sensibly meet the crime given the defendant's actual culpability. Indeed, the current Loss Table is outdated, creates a false sense of precision, and is excessively complicated. A million dollars today is not what it was when the Table was created, and frauds involving $975,000 and $1,005,000 are not meaningfully different because of "loss" amount. The Loss Table currently functions in an arbitrary manner and results in human beings often losing their freedom for an overly-excessive amount of time. That is wrong, unjust and

[13] David DeBold & Matthew Benjamin. "Losing Ground'—In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft," 160 U. Penn. L. Rev. 141 (2011).

must be fixed. Taking away a citizen's freedom is the government's greatest power, and thus must be done with fairness and with the utmost care.

See below as well for additional recommendations to improve the Guidelines, including streamlining the U.S. Code and placing a greater focus on collateral consequences.

Revision of Section 2B1.1 of the United States Sentencing Guidelines Regarding Fraud & Other Revisions to the Guidelines.

1. The Loss Table in Section 2B1.1 is outdated, excessive and exceedingly unfair in creating a false sense of precision and in being excessively complicated. Moreover, loss is only a sound aggravating factor in a Guideline calculation if a defendant both intended ***and*** actually caused a significant loss. Importantly, the current Guideline already rightly recommends a departure if and when the Guideline "substantially understates" or "substantially overstates" the seriousness of the offense, and so sentencing judges can and do have authority to look beyond the crude metric of loss. Assessment of loss should be just one component of determining a fair and effective sentence for an economic offense, and hence, we propose that the USSC revise Section 2B1.1 of the United States Sentencing Guidelines by amending and revising the Table in Section (b) to read as follows or similar:

   "b) Specific Offense Characteristics

   If the intended and actual loss roughly exceeded $100,000, increase the offense level as follows:

Loss (apply the greatest)	**Increase in level**
Loss intended and actual loss is less than roughly $100,000	no loss-specific increase
Loss intended and actual loss is more than roughly $100,000 and less than roughly $1,000,000	add 3
Loss intended and actual loss is more than roughly $1,000,000 and less than roughly $50,000,000	add 6
Loss intended and actual loss is more than roughly $50,000,000 and less than roughly $250,000,000	add 9
Loss intended and actual loss is more than roughly $250,000,000 and less than roughly $1,000,000,000	add 12
Loss intended and actual loss is more than roughly $1,000,000,000	add 15.

2. Respectfully, if the Commission is disinclined to rework the structure of the Loss Table as recommended above, we would recommend the Commission revise the loss amounts in Section 2B1.1 that is fairer in consideration of current economic conditions and factors:

   "b) Specific Offense Characteristics

If the loss exceeded $100,000, increase the offense level as follows:

Loss (apply the greatest)	**Increase in level**
$100,000 or less	no increase
More than $100,000	add 2
More than $250,000	add 3
More than $500,000	add 4
More than $1,000,000	add 5
More than $10,000,000	add 6
More than $50,000,000	add 8
More than $100,000,000	add 10
More than $150,000,000	add 12
More than $200,000,000	add 14
More than $250,000,000	add 16
More than $375,000,000	add 18
More than $500,000,000	add 20
More than $750,000,000	add 25
More than $1,000,000,000	add 30.

3. We propose that the USSC advise in the Sentencing Guidelines that for defendants previously sentenced, in cases where the prior Loss Table resulted in an enhanced sentence, a court shall, on motion of the defendant, impose a reduced sentence as if this revised Loss Table were in effect at the time the offense was committed.

4. We also propose that the USSC revise the Sentencing Guidelines, Section 2B1.1, commentary application note 3 by amending it to read as follows or similar:

   "Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1). (A) General Rule.—Subject to the exclusions in subdivision (D), loss shall only be defined as the *lesser* of actual loss and intended loss so that for any loss enhancement to be imposed the defendant must have actually ***and*** intentionally caused that level of loss. (i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that directly resulted from the offense. (ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that the defendant purposely sought to inflict but that may not have directly resulted from the offense. (iii) Pecuniary Harm.—"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation or other non-economic harm."

5. We propose that the USSC revise the Sentencing Guidelines by amending Section 5K2.12 by striking the last sentence.

6. We propose that the USSC revise the Sentencing Guidelines by adding a new Section 5K2.25 that should read as follows or similar:

   "If the defendant committed the offense because of personal financial difficulties or economic pressure or duress due to a trade or business, the court may depart downward when and only if the defendant's criminal response to his financial difficulties or economic was a sincere but misguided effort to reduce harms to other individuals or society. Actions based in avarice should not be the basis of a departure, but actions based on largess could be."

7. We propose that the USSC revise the Sentencing Guidelines by adding a new Section 5K2.26 that should read as follows or similar:

   "If the defendant who committed the offense did not do so for personal financial gain and did not receive any personal financial benefit from the offense, the court is encouraged to depart downward."

8. Consistent with its statutory power to "establish a research and development program within the Commission for the purpose of ... assisting ... in the development, maintenance, and coordination of sound sentencing practices,' 28 U.S.C. § 995(a)(12), we propose that the USSC should undertake a comprehensive review of the U.S. Criminal Code to identify unnecessary and duplicative federal criminal laws, those that lack appropriate and consistent *mens rea* elements and proportionate statutory sentencing ranges and to recommend to Congress how to best gather all federal criminal laws and all regulatory crimes into a single title of the U.S. Code organized in a way that is both useful to practitioners and understandable by the general public. If the USSC determines that a crime would be more appropriate to be a state crime, it should recommend that Congress remove that crime from the U.S. Code. This review should be completed within four years and should be reported to Congress with specific recommendations as to legislation that Congress should consider revising and streamlining the U.S. Criminal Code. We propose that subsequent reviews and reports to Congress should occur not less than every five years.

9. Consistent with its statutory power to "establish a research and development program within the Commission for the purpose of ... assisting ... in the development, maintenance, and coordination of sound sentencing practices," (28 U.S.C. § 995(a)(12)), we further propose that the USSC should also review "collateral consequences" and make recommendations to Congress and the Department of Justice as to how to mitigate them.

Mens Rea Reform

The Honorable Judge Jack Weinstein & Fred Bernstein wrote[14]:

> "In the guidelines era, *mens rea* has been all but eliminated from the sentencing of drug offenders. This development is a disastrous departure from the great traditions of Anglo-American law…It contorts the meaning of *mens rea* to say that state of mind is irrelevant to sentencing. It is at sentencing that *mens rea* is most crucial…Punishing a defendant for facts she 'reasonably should have foreseen' is tantamount to punishing negligent conduct. This is a substantial departure from 2b1 traditional principles of *mens rea*. The Model Penal Code, for example, permits criminal liability only in cases of extreme negligence, and then only rarely. Moreover, punishments are 'proportional' to mental states."

The Honorable Judge Gerard E. Lynch similarly wrote[15]:

> "The guidelines significantly muddle questions of *mens rea* as applied to factors that can have a dramatic effect on culpability…The lack of attention to *mens rea* issues [means] the guidelines totally ignore the question of the level of culpability required with respect to the quantities of narcotics that determine the severity of sentencing in drug cases."

The need for the reform of *mens rea* is long overdue. Below we recommend the Commission address this foundational issue, as well as collateral consequences.

[14] Judge Jack Weinstein & Fred Bernstein, The Denigration of Mens Rea in Drug Sentencing, 7 FEDERAL SENTENCING REPORTER 121 (1994).
[15] Judge Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 FEDERAL SENTENCING REPORTER 112 (1994).

USSC Mens Rea Review.

1. Consistent with its statutory power to "establish a research and development program within the USSC for the purpose of ... assisting ... in the development, maintenance, and coordination of sound sentencing practices," (28 U.S.C. § 995(a)(12)), we propose that the USSC should establish a program to conduct a comprehensive review of the U.S. Criminal Code to identify overlapping, unnecessary and duplicative federal criminal laws, as well as those that lack appropriate and consistent *mens rea* elements and proportionate statutory sentencing ranges, and to assess the feasibility of gathering all federal criminal laws and all regulatory crimes into a single title of the U.S. Code organized in a way that is both useful to practitioners and understandable by the general public. The USSC's review should be informed by data concerning the most widely applied and most commonly sentenced federal offenses, and the USSC should consider making recommendations to Congress about whether certain offenses could and should be more appropriately addressed by state criminal justice systems. The review should culminate with a report to Congress with recommendations as to legislation that Congress should consider revising the U.S. Criminal Code to advance sounder sentencing practices.

2. We propose that the USSC should review and revise the Sentencing Guidelines to ensure the Guidelines properly incorporate and ensure courts properly consider *mens rea*, motive, purpose and personal culpability issues at sentencing. This review and revision of the Guidelines should ensure: (a) that aggravating sentencing enhancements are imposed only in instances in which the defendant exhibited sufficient *mens rea* with respect to a sentencing factor to justify the corresponding sentencing enhancement, and (b) that the sufficient *mens rea* is adequately proven at the appropriate burden of proof. The government should generally be required to prove a culpable state of mind with respect to any key offense facts that impact guideline ranges, such as the quantity of drugs or the amount of loss involved in the offense, and greater proof of a more culpable state of mind should generally be required for greater sentencing enhancements. This review and revision of the Guidelines should also ensure that courts are fully and clearly instructed to consider any and all mitigating aspects of a defendant's *mens rea* motive, purpose, and personal culpability as a basis for a departure under the Guidelines.

3. We further propose that the USSC should review collateral sanctions imposed by federal and state laws to ensure courts properly consider the nature and impact of collateral consequences likely to be endured by federal defendants. The USSC should conduct research and issue a report within three years concerning the array of collateral consequences faced by federal defendants. This report should give special attention to whether and how collateral consequences may undermine or impede the effectiveness of the recidivism reduction provisions in Title I of the FIRST STEP Act of 2018 and should include specific recommendations to Congress as to how to mitigate the harmful impacts of collateral consequences, as well as recommendations for courts as to how they should adjust sentencing practices in light of the punitive nature of collateral consequences.

Acquitted Conduct

In the last amendment cycle, the Commission's stated priorities included "[c]onsideration of possible amendments to the Guidelines Manual to prohibit the use of acquitted conduct in applying the guidelines."[16] Many observers were justifiably eager for this issue to receive Commission attention. Though full criminal trials are relatively rare in the federal system, and cases involving acquitted conduct guideline enhancements are even rarer, the doctrines surrounding the use of acquitted conduct at sentencing still impacts every indictment and plea negotiation in the federal criminal justice system. Federal prosecutors who know that any acquittal at trial will not preclude (and may even aid) securing a contested guideline enhancement will always have more incentives to bring and stack additional indictment charges against defendants; federal defense attorneys who know that any acquittal at trial will not ensure (and may even hinder) defeating a contested guideline enhancement will always have to advise their clients that they may likely face a longer prison sentence after a partial trial acquittal than if they just plead guilty to all charges. In other words, just the possibility of acquitted conduct sentencing enhancements has a profound impact on all aspects of federal criminal case processing, not just on the few hundred cases in which such an enhancement could become prominent at an actual sentencing.

With a very full agenda, particularly with respect to urgent matters dealing with implementation of key First Step Act issues, this Commission decided to defer action on acquitted conduct sentencing last amendment cycle. This choice may have been particularly sensible during that cycle given that the U.S. Supreme Court had been reviewing a number of high-profile federal cases raising issues relating to the constitutionality, under the Fifth and Sixth Amendments, of using acquitted conduct in connection with a defendant's sentencing.

In addition, in Spring of 2022, the U.S. House of Representatives in the 117th Congress passed, by an overwhelming bipartisan vote of 405-12, the "Prohibiting Punishment of Acquitted Conduct Act of 2021." This bill also had bipartisan Senate support; Senate Judiciary Committee Chair, Senator Dick Durbin (D-IL), explained why he sponsored this bill this way: "[F]ederal law inexplicably allows judges to override a jury verdict of 'not guilty' by sentencing defendants for acquitted conduct. This practice is inconsistent with the Constitution's guarantees of due process and the right to a jury trial…If any American was acquitted of past charges by a jury of their peers, then some sentencing judge down the line shouldn't be able to find them guilty anyway and add to their punishment. A bedrock principle of our criminal justice system is that defendants are innocent until proven guilty. The use of acquitted conduct in sentencing punishes people for what they haven't been convicted of. That's not acceptable and it's not American."[17]

---

[16] See Tzedek's comment on "Acquitted Conduct" in our previous submission to the Commission, "Public Comment to the U.S. Sentencing Commission's Proposed Amendments to the Sentencing Guidelines", March 2023.

[17] United States Senate Committee on the Judiciary, Press release, *Durbin, Grassley, Cohen, Armstrong Introduce Bipartisan, Bicameral Prohibiting Punishment of Acquitted Conduct Act* (March 4, 2021), *available at* https://www.judiciary.senate.gov/press/dem/releases/durbin-grassley-cohen-armstrong-introduce-bipartisan-bicameral-prohibiting-punishment-of-acquitted-conduct-act

Thus, in the last amendment cycle it reasonably appeared that the U.S. Supreme Court and that the U.S. Congress might directly address acquitted conduct sentencing in the federal system.

But it is now summer 2023 and neither the Supreme Court nor Congress has addressed this issue on the merits. The 118th Congress has many other pressing matters to address, and there's no guarantee this bill will pass into law if taken up again. Congress may also reasonably believe, now that the U.S. Sentencing Commission is fully staffed for the first time in nearly a decade, that the Commission is the expert body best positioned to address this matter in the first instance.

Similarly, and critically, the Supreme Court decided earlier this month to not yet take up the range of constitutional issues related to acquitted conduct sentencing; in doing so, a number of Justices explicitly stated that they expected the Sentencing Commission to "resolve questions around acquitted-conduct sentencing in the coming year." *McClinton v. United States*, No. 21-1557 (June 30, 2023) (statement of Justice Sotomayor); *see also id.* (statement of Justice Kavanaugh, joined by Justices Gorsuch and Barrett) ("The use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions. But the Sentencing Commission is currently considering the issue. It is appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant certiorari in a case involving the use of acquitted conduct.")

We recognize, of course, that this Commission can only make amendments to the Guidelines and cannot resolve all the constitutional and statutory issues that the Supreme Court and Congress might address regarding acquitted conduct. But it is indisputable that Congress and the Supreme Court, as well as federal practitioners and the general public, could and would benefit in myriad ways from having this Commission actively consider again, in this coming amendment cycle, whether and to what extent acquitted conduct should play a role in at a defendant's sentencing. Ultimately, we believe the use of acquitted conduct at sentencing to increase either the Guidelines range or the final sentence amounts to an affront to the Fifth and Sixth Amendments which guarantee due process and the right to trial by jury. These rights are fundamental to our criminal justice system, and so it is no surprise that acquitted conduct sentencing has been roundly criticized by practitioners, judges, and scholars (and that nearly a decade ago Justice Scalia, joined by Justice Ginsburg and Justice Thomas, lamented that the practice of sentencing based on acquitted conduct "has gone on long enough").[18]

Last amendment cycle, the Commission put forward for comment a proposed amendment to §1B1.3 to add a new subsection (c) providing that acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless the conduct was admitted by the defendant during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt. As the Commission returns to this issue, we advocate that the Commission not only put forward a similar proposed amendment but also issue a policy statement to recommend to judges that acquitted conduct shall not be considered for any purposes that would aggravate a sentence (in keeping with the provisions of the "Prohibiting Punishment of Acquitted Conduct Act of 2021" that received near unanimous support in the House).

[18] *See Jones v. United States*. 574 U.S. 948 (2014).

Recommendation for Judges and DOJ Officials and Others to Visit Prisons

The impetus of this proposal is simple: Those involved in sentencing persons to prisons should be aware of the conditions of those institutions and have some first-hand knowledge of what life in prison is like. The U.S. Sentencing Commission conducts a number of training sessions for judges and other court personnel throughout the year, and USSC staff speak at a number of circuit conferences and other like events. In line with such sessions, this comment proposes that the USSC should make a concerted effort to make visits to prison an integral part of this training and other programming.

Judges and DOJ Officials and Others Should Visit Prisons.

1. We propose that the USSC recommend Congress to amend 28 U.S.C. §134, as follows or similar:

   > "Within one year of their initial appointment, and every five years thereafter, all United States District Judges, United States Magistrate Judges, United States Circuit Judges, United States Supreme Court Justices, all U.S. Attorneys, Assistant U.S. Attorneys, the U.S. Attorney General, the Deputy Attorney General, and all attorneys of the Criminal Division of the U.S. Justice Department, shall be required to visit at least one federal prison. The Federal Bureau of Prisons shall help coordinate these visits and help ensure that these visitors shall have access to all areas within the prison and be permitted to speak with any prison staff and prisoners. The Federal Bureau of Prisons shall report yearly to Congress the number of persons who visited its prisons and which prisons were visited under this section."

2. We further propose that the USSC should recommend to Congress to amend 18 U.S.C. § 4042(a) by adding a new paragraph 8, to read as follows or similar:

   > "The Federal Bureau of Prisons shall coordinate visits of judges and attorneys to federal prisons, as mandated by 28 U.S.C. § 134. The Bureau of Prisons shall ensure that these visitors shall have access to all areas within the prison and be permitted to speak with any prison staff and prisoner. The Bureau of Prisons shall report yearly to Congress the number of judges and attorneys who visited its prisons and which prisons were visited under 28 U.S.C. § 134."

3. Even without the above proposed legislation, the USSC should make this recommendation to all federal judges (United States District Judges, United States Magistrate Judges, United States Circuit Judges and United States Supreme Court Justices) to visit at least one federal prison at least once every five years. These judges should personally see where they are sending people to for years and even decades at a time.

***

VIA PUBLIC COMMENT SUBMISSION PORTAL

July 14, 2023

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: United States Sentencing Guidelines Applicable to the Rodchenkov Anti-Doping Act

Dear Honorable Commissioners:

I write on behalf of the United States Anti-Doping Agency ("USADA") to discuss the United States Sentencing Guidelines (the "Guidelines") treatment of violations of the Rodchenkov Anti-Doping Act ("RADA"), 21 U.S.C. § 2401-04. Because RADA was enacted in December 2020, when the United States Sentencing Commission (the "Commission") was without a quorum, the Guidelines do not yet address RADA offenses. USADA has an important stake in the promulgation of guidelines applicable to RADA that fairly and effectively punish and deter doping crimes. Thus, in this letter, I set forth USADA's position on RADA guidelines. Before addressing specific recommendations, I will provide a brief background on USADA and RADA.

About USADA

USADA is a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code. Public Law 109-469, signed into law on December 29, 2006, officially recognizes USADA as the anti-doping agency for Olympic, Pan American, and Paralympic sports in the United States, and charges USADA with the responsibility for implementing education, research, testing, and adjudication programs.

Although USADA is not a government agency, USADA performs functions that are important to the government. USADA currently receives a significant portion of its funding from Congressional appropriations administered by the White House Office of National Drug Control Policy. In its capacity as the Congressionally-recognized, exclusive anti-doping agency for the Olympic Movement in the United States, USADA administers the anti-doping program applicable to the United States Olympic & Paralympic Committee (the "USOPC") and its National Governing Bodies, which govern Olympic and Paralympic sport in the United States pursuant to the authority granted to them by the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501, *et seq.* (1978).

Before USADA, the USOPC and the National Governing Bodies conducted their own anti-doping programs. The international perception of this arrangement was that the "fox was guarding the henhouse" because the same organizations that were charged with catching dopers also had a stake in those athletes' competitive success. As a result, it was widely believed that more athletes were doping in the United States than in any other country. To overcome that international perception and restore the reputation of American athletes, the USOPC, the White House Office of National Drug Control Policy, and the Senate Committee on Commerce, Science and Transportation, during October

U.S. ANTI-DOPING AGENCY
5555 Tech Center Drive, Suite 200, Colorado Springs, CO 80919 • Tel: 719.785.2000 • Fax: 719.785.2028
USADA@USADA.org • www.USADA.org

1999 hearings on the use of performance-enhancing drugs in Olympic sport, all recognized that a new independent agency (USADA) must be created to administer the anti-doping program for the Olympic Movement in the United States. Because of its independence from sport and its transparency, USADA has been able to rebuild the credibility of American Olympic sport.

USADA has succeeded in its mission in large part due to collaborative relationships with law enforcement. USADA has a history of collaborating with federal investigators and United States Attorneys' Offices in doping-related cases that involve violations of both sport rules and criminal laws. This collaboration has been based on the common interests that the federal government and USADA share in stopping illegal doping. Because of USADA's unique technical expertise, knowledge of sport, and experience in the anti-doping area, it has been routine practice for the Department of Justice and federal agents to seek USADA's cooperation in the analysis of potential cases. This has included disclosure to USADA of documents (not protected by Federal Rule of Criminal Procedure 6(e)) to elicit information and facilitate cooperation. After reviewing these documents, USADA has shared technical insights with investigators that might otherwise have been missed.

Outside of RADA cases, the government's authority to share with USADA information not covered by the secrecy requirements of Rule 6(e) was formalized by the United States' ratification of the International Convention Against Doping in Sport. The Convention requires State Parties ratifying the Convention to adopt appropriate measures and commit themselves to the principles of the Code. The Code clearly provides for the exchange of non-Rule-6(e) investigatory information between federal prosecutors and USADA:

> "Article 22: Involvement of Governments. Each government's commitment to the Code will be evidenced by its signing the Copenhagen Declaration on Anti-Doping in Sport of March 3, 2003 [signed by the United States in March 2003], and by ratifying, accepting, approving or acceding to the UNESCO Convention [the International Convention Against Doping in Sport]. . . .
>
> [T]he following Articles set forth the expectations of the Signatories to support them in the implementation of the Code. . . .
>
> 22.5 Each government should encourage cooperation between all of its public services or agencies and Anti-Doping Organizations to timely share information with Anti-Doping Organizations [USADA has been recognized by Congress as the Anti-Doping Organization for the Olympic Movement in the United States] which would be useful in the fight against doping and where to do so would not otherwise be legally prohibited."

Over its sixteen-year existence, USADA has worked collaboratively with many federal law enforcement bodies, U.S. Attorneys' Offices, and international law enforcement authorities. By way of example:

- USADA served as an important technical resource for the government in the BALCO cases involving MLB, NFL, and professional track athletes.

- In 2015, USADA was a key resource in Operation Cyber Juice, an international investigation into steroid producers. The DEA noted that law enforcement efforts "comprised of over 30 different U.S. investigations in 20 states and resulted in the arrest of over 90 individuals, the seizure of 16 underground steroid labs" and a large quantity of steroids and money.

- In 2017, USADA assisted with Operation Total Package, which led to the indictment of five individuals and the recovery of steroids and proceeds from an underground steroid laboratory in Florida.

- In 2018, USADA assisted in an investigation that resulted in federal criminal charges against multiple defendants in the Eastern District of Louisiana, United States v. Natalie Barton, et al. USADA's Chief Science Officer, Dr. Matthew Fedoruk, served as an expert for the prosecution. As part of the investigation, USADA received customer lists from law enforcement that led to the identification of athletes who had made purchases of prohibited performance enhancing drugs.

- In 2021, USADA provided the tip and investigatory resources that led to the first indictment under RADA against Eric Lira.

About RADA

In the years since the 2014 Sochi Winter Olympic Games, evidence revealed a massive Russian state-sponsored doping scheme across multiple sports and lasting multiple years. The scheme included switching Russian athletes' dirty urine samples for clean ones within the onsite laboratory in Sochi. One of the whistleblowers was Russian laboratory director, Dr. Grigory Rodchenkov, after whom RADA is named.

In response to the Russian doping scandal, Congress enacted RADA to criminalize international doping conspiracies to hold orchestrators and benefactors of doping criminally responsible no matter where they were in the world. Importantly, RADA exempts athletes from criminal liability, because sport anti-doping rules are already in place to hold athletes responsible.[1]

RADA contains cooperation obligations that identify USADA by name. The statute requires that "the Department of Justice, the Department of Homeland Security, and the Food and Drug Administration shall coordinate with USADA with regard to any investigation related to a potential violation of Section 2402 of this title, to include sharing with USADA all information in the possession of the Department of Justice, the Department of Homeland Security, or the Food and Drug Administration which may be relevant to any such potential violation." 21 U.S.C. § 2404. The only exceptions to this

[1] The typical sanction for a serious anti-doping rule violation, like use of steroids, EPO, or human growth hormone, is four years ineligibility from sport. A second serious violation can result in an eight-year ban. These periods can be increased by two years if aggravating circumstances are established. Reductions to the period of ineligibility are also possible and may result in as little as a reprimand depending on the degree of fault of the athlete and the type of substance involved. A reduction is also possible for providing substantial assistance to an anti-doping organization, criminal authority, or professional disciplinary body.

sharing requirement are if it is "prohibited by law" or if sharing would affect "the integrity of the criminal investigation." *Id.*

Congress has relied on USADA in pursuit of its on-going interest in anti-doping, as evidenced by the numerous Congressional hearings devoted to the topic at which USADA has been asked to testify, including:

- The Joint Hearing of the House Subcommittee on Commerce Trade and Consumer Practice and the Subcommittee on Health;
- The House Subcommittee on Commerce, Trade, and Consumer Protection;
- The Senate Committee on Commerce, Science and Transportation;
- The House Hearing conducted by the House Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection;
- The Senate Committee on Foreign Relations;
- The House Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection;
- The Senate Committee on the Judiciary, Subcommittee on Crime and Drugs; and
- The U.S. Helsinki Commission.

As USADA's testimony at these hearings confirm, doping involves fraud on clean athletes, sponsors, competition organizers, and consumers, all of whom pay to be associated with or watch clean sport. Doping also involves the illegal manufacture, distribution, and use of controlled drugs and other misbranded substances.

RADA Sentencing Guidelines Analysis and Recommendation

RADA provides for a maximum sentence of ten years' incarceration and a $250,000 fine for individuals ($1 million fine for entities). 21 U.S.C. § 2403(a)(1). But RADA has not yet been given a formal classification under the U.S. Sentencing Guidelines.

Although RADA offenses bear superficial similarities to other drug offenses, USADA believes that classifying RADA offenses under Section 2D of the Guidelines (Offenses Involving Drugs and Narco-Terrorism) would create difficulties from both a practical application and a policy standpoint. Section 2D of the Guidelines places great emphasis on the weight of the substances involved. But RADA violations identify hundreds of prohibited substances and methods, pursuant to the Prohibited List promulgated by the World Anti-Doping Agency ("WADA"), which is updated annually. *See* World Anti-Doping Code, *International Standard Prohibited List* (2022) (the "Prohibited List"). The substances on the Prohibited List can—in miniscule amounts—undermine the fairness of a competition. Indeed, any amount of the substance in an athlete's sample, which can currently be detected down to the trillionths of a gram, is considered a violation of anti-doping rules that can result in an athlete receiving a four-year ban.

The vast majority of substances on the Prohibited List ("Prohibited Substances") are not classified in the Guidelines' Drug Quantity Table or the Drug Conversion Table. The Prohibited List covers a diverse array of substances of differing physical attributes, uses, and effects. Categorizing these substances on the Drug Conversion Table would be a monumental undertaking. Furthermore, anti-

doping organizations like USADA are in a continuing cat-and-mouse game with scientists involved in doping, as the latter work to formulate novel substances and methods to evade detection. Because the Prohibited List necessarily undergoes annual updates to stay ahead of those working to evade detection, so too would the Drug Conversion tables require continuous amendments.

An additional complicating factor is the small dosages of many Prohibited Substances that have an out-sized impact on the fairness of a competition. Some substances are administered in doses in the tens of milligrams, and multiple agents are often "stacked" as part of a doping program. The effective dose of a given substance can also vary widely depending on the weight and other physiological characteristics of the athlete and the nature of the athletic competition. For these reasons, assessing penalties based on the weight of a particular Prohibited Substance is not aligned with how Prohibited Substances are used by athletes to cheat.

Categorizing RADA within the existing rubric of Offenses Involving Drugs and Narco-Terrorism may also create difficulties in ensuring that offenses involving WADA Prohibited *Methods*—which do not necessarily involve Prohibited Substances—receive an adequate Guideline Offense Level. RADA violations may stem from Prohibited Methods, such as blood doping, gene and cell doping, sample swapping, and use of otherwise-acceptable intravenous infusions in quantities that suggest the purpose is to mask blood doping. While such methods do not require the use of Prohibited Substances, their provision is equally punishable as a felony under RADA, and sanctions for athletes are every bit as severe as if they had used Prohibited Substances. Thus, if the Sentencing Guidelines were revised to incorporate Prohibited Substances, the Guidelines should also account for varying degrees of severity for violations involving Prohibited Methods.

USADA's concerns about the use of substance weight as a factor in determining the offense level go beyond difficulties of practical application. Placing emphasis on substance weight runs the risk of amplifying the importance of a characteristic that is not directly indicative of the degree of severity of any particular RADA offense. Similarly, although doping perpetuates fraud on clean athletes, sponsors, organizers, and spectators, categorizing RADA offenses under Section 2B1 of the Guidelines (Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit) would be misplaced because there is limited ability to gauge the financial benefit from doping, and the primary harm is to the integrity of sport, which has a global impact. As discussed below, USADA proposes several alternative factors that are more relevant, and should be included as adjustments to RADA offense-level calculations.

While USADA contends that the use of the Drug Quantity Table is not an appropriate methodology for RADA crimes, USADA nevertheless believes that base-offense levels for drug offenses are instructive in determining an appropriate RADA base-offense level. Federal sentencing policy for narcotics offenses is largely grounded in protecting public health and safety. Similarly, a guiding principle underlying RADA and other anti-doping initiatives is to ensure that every athlete has a chance to compete without compromising his or her health with unsafe substances and methods. USADA suggests that a base-offense level of at least **12** be implemented for any RADA violation. This is equivalent to the lowest offense level for a drug offense under Guidelines Section 2D1.1.

Within the Prohibited List, WADA categorizes Prohibited Substances and Methods as either "Specified" or "non-Specified." Pursuant to World Anti-Doping Code Art. 4.2.2, at n.26, while

"Specified" Substances and Methods should not be considered less important or less dangerous, they ". . . are more likely to have been consumed or used by an Athlete for a purpose other than the enhancement of sport performance." USADA recommends that, for RADA violations involving non-Specified Prohibited Substances or Methods, the offense level should be increased by **2** levels.

USADA further proposes that offenders receive a base-offense level adjustment for the number of athletes who received a Prohibited Substance or Method related to the RADA offense. Large-scale doping operations that provide Prohibited Substances and Methods to numerous athletes deserve a higher offense level than doping activities related to relatively fewer athletes. USADA recommends an adjustment of **1** level for each individual recipient of a Prohibited Substance or Method.

Additionally, USADA proposes that the offense level be increased by **10** levels for any offense in which a Prohibited Substance or Method was administered to a person under eighteen years of age. While not common, USADA has been involved in cases in which Prohibited Substances and Methods have been administered to a minor athlete—with or without the minor's knowledge. USADA regards these cases as especially egregious and deserving of a greater Guidelines offense level.

USADA also recommends adjustments based on the number of clean competitors who were disadvantaged in a RADA-protected competition by the Prohibited Substance or Method. For this adjustment, USADA recommends implementing adjustments in lock-step to the "Number of Victims" adjustment in Guidelines Section 2B1.1(b)(2). That is, USADA proposes that the Guideline section related to RADA offenses include the following adjustment:

(Apply the greatest) If the offense—

(A) involved five or more competitor-victims, increase by **2** levels;

(B) involved 10 or more competitor-victims, increase by **4** levels; or

(C) involved 25 or more competitor-victims, increase by **6** levels

USADA proposes that for this section, "competitor victim" should be defined to mean an athlete directly competing against an athlete determined to have used a Prohibited Substance or Method in connection with that competition or, in the case of a team-sport-based competition, "competitor victim" should mean a team directly competing against a team on which one or more athletes has been determined to have used a Prohibited Substance or Method in connection with that competition.

USADA further contends that RADA violations affecting Olympic and Paralympic Games and World Championships are especially serious, as they have a greater potential to impair the integrity of organized sport on the world stage. For this reason, USADA recommends that for any RADA offense related to the use of a Prohibited Substance or Method in Olympic Games, Paralympic Games, or World Championships, the offense level should be increased by **10** levels.

Finally, in recognition of the detrimental impact state-sponsored doping schemes have had on international sport and American athletes, USADA recommends that for any RADA offense involving a state official the offense level should be increased by **10** levels.

I hope the information provided here has been informative and helpful as the Commission continues its important work. I also hope this will be the beginning of a continuing dialogue between the Commission and USADA on crafting fair and effective treatment of RADA offenses in the Guidelines. We would be pleased to provide additional commentary or information, and to make our experts available for further questions. We look forward to continuing working with you.

Sincerely,

Jeff T. Cook
General Counsel, USADA

526 W. 14th Street, Suite 287
Traverse City, MI 49684
www.uv4sor.org

Dear Chairman Reeves and United States Sentencing Commission Members,

As Executive Director of United Voices for Sex Offense Reform (UV4SR), a criminal justice reform non-profit, and as a justice-impacted family member of an adult in federal custody, thank you for the opportunity to provide input to the Commission on May 2024 proposed priority ***(2) Promotion of court-sponsored diversion and alternatives-to-incarceration programs by expanding the availability of information and organic documents pertaining to existing programs (e.g., Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program) through the Commission's website and possible workshops and seminars sharing best practices for developing, implementing, and assessing such programs.***

Today's victims are tomorrow's monsters, just as yesterday's victims are the monsters incarcerated today. Promotion of court-sponsored diversion and alternatives-to-incarceration programs, expanding availability, and encouraging federal judges and Assistant United States Attorneys (AUSAs), to utilize these programs for juveniles and first-time offenders with zero criminal history points will help break this generational cycle. Diversion and alternatives-to-incarceration programs are needed as interventions because of the lack of available, effective mental health resources in not only the BOP, but state Department of Corrections as well.

UV4SOR members were encouraged when we became aware that Commissioner Reeves and Director Peters will be attending and speaking at the upcoming "Rewriting the Sentencing II Summit on Alternatives to Incarceration" and that these alternatives to incarceration are being seriously considered. We agree wholeheartedly with the Commission that all the programs mentioned in the proposed priority should be promoted heavily, with easily obtainable information and documents. This information should be readily available to all federal judges and AUSAs, and both groups should be encouraged to utilize these programs to the fullest extent possible to guarantee true justice outcomes and reduce mass incarceration and its associated problems. Our organization would also like to see Restorative Justice programs added, not only as alternatives to incarceration but as an opportunity for currently incarcerated first time offenders with zero criminal history points who successfully complete a Restorative Justice program to have their sentence reduced to allow early release to probation.

The Commission's idea of promoting these programs through its website and conducting workshops and seminars sharing best practices for developing, implementing, and assessing such programs is forward-thinking. Implementation will require a lot of effort, but the results will improve and reduce mass incarceration. Has the Commission determined a rating system to determine the effectiveness and success of these programs, so that judges and AUSAs will have knowledge of which programs have the highest success rates?

The Commission should consider consulting with the National Institute of Justice (NIJ). Its CrimeSolutions program is both a web-based clearinghouse of programs and practices and also has a process in place to identify and rate those programs. (https://crimesolutions.ojp.gov/about) Collaborating with NIJ to learn its best practices may save the Commission time in the long run. Best practices and successful outcomes will ease mass incarceration and free up resources which can be utilized to improve

and fund education, vocational, and other rehabilitation, medical and mental health care as well as improve the deteriorating infrastructure at all 123 BOP facilities.

Referring first time offenders with certain sex offense convictions 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.

As Commissioner Reeves stated in his opening remarks at the recent public hearing on retroactivity held on 19 July, which is perhaps the best reason for implementing and promoting these programs:

> "We consider the time judges and their staffs will have to expend dealing with filings for reduced sentences. We consider the additional resources expended on re-entry and supervision. But we also consider the financial costs of continuing to incarcerate someone, which stands at roughly $44,000 per person per year with the BOP – which is $40,000 more than the annual cost of supervision, and which increases year after year after year. ***And we consider a cost that has little to do with docket sizes or dollars and cents: the moral price of incarcerating someone for longer than is necessary.***"

A recent example of a successful justice outcome is from the State of Florida. Jalen Kitna, (former) Quarterback for the University of Florida, a celebrity in his own right and also the son of former NFL player, Jon Kitna, recently received a plea deal from the Gainesville, Florida State's Attorney where his CSAM possession and distribution felony charges were changed to two second-degree misdemeanor counts of disorderly conduct; he received no prison time, only 6 months' probation for each count, and will not be required to register as a sex offender.(https://www.wuft.org/news/2023/03/09/former-uf-quarterback-faces-years-in-prison-sex-offender-status-if-convicted/).
(https://nypost.com/2023/07/05/jalen-kitna-cuts-deal-with-prosecutors-in-child-porn-case/)

- Mr. Kitna had zero criminal history and no prior convictions or arrest.
- He is a young, emerging adult with a low risk of re-offending.
- His family will ensure he receives court-ordered therapy and rehabilitation.

While some may argue that Mr. Kitna received probation because of his and his family's wealth and celebrity statuses, the outcome was fair and should be a model for other first time internet offenders who possessed and distributed CSAM with zero criminal history points and no prior arrests. The sexual recidivism rate may have been considered in making this plea agreement, and should continue to be used for making policies based on research and empirical evidence. In a recent Florida Action Committee (FAC) commentary, (http://Floridaactioncommittee.org) FAC commented that "The United States Sentencing Commission's report, **Federal Sentencing of Child Pornography Offenses, June 29, 2021,** found that 'recidivism events by non-production CP offenders released or placed on probation in 2015, after a three-years follow-up period was 4.3%...the lowest recidivism rate for all criminal offenses.'"

Utilizing Pretrial Diversion for first time offenders with zero 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 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."

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."

The Commission's idea of promoting these programs through its website and conducting workshops and seminars sharing best practices for developing, implementing, and assessing such programs is a platform which will improve countless lives, not only the lives of those facing charges but for the family members who love and support them. It will provide fair justice outcomes and reduce the challenges and costs associated with mass incarceration.

Thank you, Commissioners, for asking for public commentary and considering UV4SOR's input.

Sincerely,

Shawn Barrera-Leaf / Executive Director
United Voices for Sex Offense Reform
UV4SOR

526 W. 14th Street, Suite 287
Traverse City, MI 49684
www.uv4sor.org

Dear Chairman Reeves and United States Sentencing Commission Members:

Thank you for the opportunity to offer commentary on the United States Sentencing Commission's (the Commission) possible policy priorities for the amendment cycle ending May 1, 2024.

I am the Executive Director of United Voices for Sex Offense Reform (UV4SOR) and an impacted family member of an adult currently in federal custody for a sexual offense conviction. I am focused on the sections 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 all sexual offenses. It is important to clarify that UV4SOR does not condone sexual abuse of any kind.

In response to priority "(1), Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or amendments".

18 U.S. Code § 3553

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.

The feedback we receive from our members is that although federal judges impose the sentences, there are practices by the Bureau of Prisons (BOP) which are not effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2).

- Slow roll out of methods for calculating programming under First Step Act (FSA), understaffing at BOP institutions, and poorly trained unit employees frequently cause incarcerated individuals to serve "*greater than necessary*" sentences.
- Incarcerated individuals are frequently held longer than their release date because of miscalculations of FSA credits.
- The lack of suitable Halfway Houses in some areas, and the BOP's hesitation to grant tethered Home Confinement, cause adults in custody to stay incarcerated longer than necessary.

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed-
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

- Current guidelines and legislation deny individuals with certain convictions access to programming even though Department of Justice (DOJ) research shows that these individuals have the lowest recidivism rates.
- BOP employees re-enforce this discrimination

(B) to afford adequate deterrence to criminal conduct;

- BOP Unit Managers and Wardens frequently deny adults in custody with certain convictions, such as sex offenses, access to the Trust Fund Limited Inmate Computer System (TRULINCS) which enable them to keep in touch with their family members. This discriminatory practice is strictly punitive and serves no purpose other than to punish
    - TRULINCS mail program has no connections to the internet
    - If a facility's phones are inoperable, or the facility is going into lockdown, TRULINCs allows the family to be notified concerning the situation
    - Lack of access to TRULINCS punishes these same family members who experience fear, and suffer collateral consequences of not hearing from their loved one
    - The exclusion of people with certain convictions by the BOP from participating in vocational programs is not a deterrence to criminal conduct, but has the opposite effect
    - One example is the exclusion of people with certain convictions from participating in the dog training programs offered at multiple BOP facilities

(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

- Research has shown that the three main factors which lower recidivism are family support, economic opportunity, and being a productive, contributing member of a community.
    - BOP facilities' failure to re-institute vocational and other programs now that the COVID-19 emergency is over does not prepare people for successful reentry and makes attaining economic opportunity more difficult. It also hinders returning citizens to become productive, contributing members of their communities
    - Unemployment for formerly incarcerated citizens with felony convictions is 27.3% (https://www.prisonpolicy.org/reports/outofwork.html).
        - The BOPs exclusion of certain convictions from participation in multiple vocational programs is not rehabilitative, deprives people of training and economic opportunity upon re-entry, and does nothing to decrease recidivism
        - Although unemployment rates are not listed by conviction, feedback received from our members indicates that those formerly incarcerated with sex offense convictions is ***significantly*** higher.
    - There is a lack of opportunity for higher education in many BOP facilities, including access to Master's programs across the BOP.
        - There are numerous online degree programs (undergraduate and graduate), as well as professional and certification programs available to the public
        - Despite the availability of inexpensive monitoring software, persons who are incarcerated are denied access to online programs and are forced to take antiquated correspondence courses.
            - There are BOP facilities that do not offer any higher education courses
            - With the slowness of mail delivery to so many BOP facilities, it is extremely difficult to complete correspondence courses in a timely manner
    - Punitive practices, such as denying access to TRULINCs for individuals with certain convictions, difficulties in delivering mail to incarcerated individuals (often taking 2-3 months for individual letters to be delivered), and limiting the in-person visitation days and hours make communications with, and support from, family more difficult, and may increase recidivism.

- The most critical concerns our members frequently discuss are the health and safety of their incarcerated loved ones, particularly the lack of medical, mental health, and dental care across the BOP
    - Lack of Medical treatment
        - Members frequently discuss medical treatment being routinely denied to their family members, with BOP staff denying or holding up Administrative Remedy paperwork to frustrate the process. This makes it impossible for the individual to get needed treatment, or have any recourse for their lack of care
        - Individuals who are incarcerated with a high Care Level may be placed at a facility which has a lower Care Level designation and cannot accommodate their needs; this is termed "management variable" for justification
        - There are individuals in BOP facilities who not only cannot get adequate treatment for debilitating medical conditions noted on their PSRs, but are denied any form of treatment, despite their probable negative outcome due to lack of intervention
        - Individuals in these facilities also wait months for routine medical tests, such as an X-ray, and the wait is even longer to get diagnostic tests
        - Incidents abound where the individual is critical before receiving treatment, despite pleas for help; some of these incidents have resulted in death
    - Lack of Mental Health treatment
        - Individuals in some BOP facilities who request mental health treatment are confined in the Special Housing Unit (SHU) for an indefinite period of time; justification is for observation, but instead they experience humiliation and deprivation, and are denied counseling
        - Members tell us their loved ones cannot obtain needed mental health medications that are not on the BOP formulary, even if the individual cannot take a substitute medication safely, and even when the family has offered to pay for the medication themselves
        - Members have recounted horrendous incidents of BOP Correctional Officers (COs) ignoring reports of an individual in the family member's unit showing signs of mental illness and extreme behavior
        - The most recent "share" was earlier this month from multiple members who have a family member at the same facility
            - A disturbed individual was acting strangely, and repeatedly quoting Matthew 5:29
            - Several people in his unit reported the individual's behavior to the COs, who did nothing
            - The individual took a razor blade and cut off his testicles, flushing them down the toilet
            - Due to the amount of blood loss, there were pools and spatters of it everywhere, and also bloody footprints tracked through the halls; it was disregarded for several days, deeply distressing the others living in the unit
    - Lack of Dental care
        - "Providing access to dental care can arguably *improve health outcomes, reduce healthcare utilization costs*, and improve several societal outcomes." https://bmchealthservres.biomedcentral.com/articles/10.1186/s12913-022-08951-x
            - Individuals in the BOP have difficulty obtaining any dental care, and often dental problems must be critical before an individual can be seen

- Routine dental care, such as teeth cleaning is not provided by many facilities in the BOP system, even when the Dentist comes for annual visits
- Despite numerous requests, including administrative remedies, routine oral hygiene such as teeth cleaning is not practiced; there are BOP facilities that will not contract a dentist, nor take patients to a local dentist, for teeth cleaning.

While the BOP is not without fault and needs to remedy these critical situations, a significant number of these issues are problems created by mass incarceration and a Congressional desire to appear "Tough on Crime." Expanding the availability of educational and vocational programs within the BOP, and allowing participation by low-risk individuals, would alleviate many of the problems associated with mass incarceration. It would also begin to fill the millions of vacant positons in our economy. Expanding the convictions available for re-sentencing and retroactivity for those with the lowest recidivism rates, and allowing participation in programs by these documented low-risk citizens, will give them credit for early release, which would ease over-crowding in the BOP. This would allow facilities the bandwidth and resources necessary to provide quality and effective medical, dental, and mental health care to our family members. We need to make these changes so our great nation is still one that other nations look up to and attempt to model.

Sincerely,

Shawn Barrera-Leaf / Executive Director
United Voices for Sex Offense Reform

526 W. 14th Street, Suite 287
Traverse City, MI 49684
www.uv4sor.org

Dear Chairman Reeves and Commission Members:

On behalf of the members of United Voices for Sex Offense Reform (UV4SOR), a criminal justice reform non-profit, thank you for the opportunity to respond to the Commission's May 2024 proposed priority ***(11) Additional issues identified during the comment period.*** As Executive Director, I am responding on behalf of my membership.

(11) Additional issues identified during the comment period.

Additional issues have been identified by our members during the comment period.

Despite the best efforts of the Commission to enact fair and realistic sentencing guidelines, Congress will not accept those findings, and they continue to adjust reforms to exclude people with sex offense convictions from nearly all criminal justice reform. These reforms from which they are excluded include participation in programs resulting from legislation such as the First Step Act, and the ability to petition for sentence reductions, even though the Commission's own data shows the vast majority of persons convicted of sex offenses are CHC-1 with zero criminal history points, and many having never been arrested. Our members noticed changes to the May 2023 priorities, with an effective date of 1 November 2023, from what was suggested would be adopted by the Commission to what was ultimately adopted in its final priorities. The addition of exclusions such as "if the instant offense is a sex offense" were not missed by UV4SOR members, who appreciated the efforts of the Commission to enact comprehensive, practical reforms designed to ease the burden of mass incarceration.

Other issues, identified by and worrisome to our members, include the continuous marginalization, economic barriers, and social discriminations, intensifying collateral consequences our loved ones and families who support them suffer. These occur throughout our society despite research that shows low recidivism and rearrests for people convicted of sexual offenses.

The Commission has the ear of Congress, so we, the members of UV4SOR, request the Commission provide this information with elected officials in Congress. Our population, which includes individuals convicted of sex offenses currently in custody, returning citizens who have served their time and are now persons forced to register (PFRs), justice-impacted family members and friends, are all persons who suffer collateral consequences for supporting our loved ones. We are all at a precipice; the tipping point has been reached. Our members are disgusted with the targeted violence, vigilante justice, harassment, social and economic discriminations, and lack of privacy for us and our families. We can no longer be silent while we remain marginalized in our own communities. We fear for our children being ostracized and bullied because they have a parent on the registry. The registry was designed to protect all children, but it harms ours. We are tired of being discriminated against socially and economically at much higher levels than not only the general population, but other incarcerated returning citizens and their families. Most of all, we tire of hiding in shame and fear, facing the never-ending punitive punishment of the sex offense registry.

The Prison Policy Initiative has documented the unemployment rate for formerly incarcerated people at 27.3%. It has been our members' experience that the unemployment rate for returning citizens convicted of a sex offense is significantly higher. Not only is the PFR affected, but family members frequently suffer job losses and denial of equal employment opportunity when employers and potential employers find a connection to someone on a sex offense registry.

For those reasons, a coalition is forming with like-minded organizations, including victims advocacy groups who advocate for restorative justice, meaningful criminal justice reform, including rational sex offense laws and the abolishment of the registry, laws based on facts and empirical evidence, instead of the fear, hysteria, and misinformation the general public has been fed by the media and politicians. For decades, political campaigns have capitalized on the myth of "frightening and high" to prove they're tough on crime, and endorse public safety through this low-hanging fruit. The organizations in our coalition advocate for people convicted of sex offenses, those who are incarcerated in federal and state prisons, and those who have served their time, have returned to the community, and are forced to endure the Draconian restrictions of bloated sex offense registries. These registries do not keep children safe, and actually take law enforcement away from prevention because of the heavy administrative burden trying to manage the almost 1 million people who are on a sex offense registry nationally. No other conviction, including murder, drug distribution resulting in death, or terrorism requires registration upon re-entry. People on the registry for sex offenses such as public urination, streaking, and Romeo and Juliet consensual relationships are required to register and are viewed and treated the same as a person who is convicted for the rape of a child.

The organizations forming the new coalition do not condone sexual abuse of any kind. We are organizing for our survival to advocate for much needed changes to laws and unconstitutional mandates that affect us. The coalition is non-partisan with members who support and are registered members of both major political parties. We are issue voters who will be evaluating individual candidates without regard to their party affiliation, but instead will focus on their voting records and their commitment to meaningful effective criminal justice reforms. We endorse reforms that will truly keep the public and all children safe, while ending mass incarceration, reforms without exclusions or carve-outs.

28 organizations have expressed an interest in joining the coalition. These organizations represent a large voting block of over 10 million people who are impacted by collateral consequences including formerly incarcerated people, family and friends who support them, and victim advocates. Our membership and voting block is large enough to vote in change, and we will. Although we may not be able to change the outcome of every election in every state, we are large enough to be the differentiator in many races, including the Presidential race. Our members are aware that both political parties have authored, sponsored, and supported legislation that has harmed our loved ones and our families.

- There are nearly 1 million people on the United States sex offense registry (SOR),
- There were approximately 200,000 more individuals incarcerated in federal and state prisons for sex offenses in 2020. (https://felonvoting.procon.org/incarcerated-felon-population-by-type-of-crime-committed/)
- While some states prohibit our population from voting, those individuals have family and friends who support them and who will vote for issues that impact these disenfranchised citizens and their families. There is still a large number of citizens convicted of sex offenses and family members who can and vote enthusiastically for change.
- Victim advocacy groups support the use of Restorative Justice instead of incarceration to provide healing to all parties.

One analogy, presented by our members, compares our population's status and our new coalition to the LGBTQ+ movement of the 1990s when Gay individuals "came out of the closet." They organized to fight for their Constitutional rights, against marginalization of their population, social and economic discrimination, vigilante justice against them, and inequitable treatment. For well over 100 years, gay people had been arrested, sentenced, and incarcerated for their sexual preference and hid in shame. The LGBGT+ community had finally had enough and organized to make change. The LGBTQ+ community has made great strides in the past 30 years. They are still advocating and their movement has grown exponentially as people have emerged from the shadows and made the public aware of the injustices and collateral consequences they and their loved ones have suffered because of sexual preference.

Now the movement for rational sex offense laws and criminal justice *is* at a precipice. During the "War on Drugs", drug users, the "low hanging fruit" with drug addictions in need of treatment (instead of incarceration), and individuals who sold small quantities of drugs such as marijuana to pay for their to addiction, were arrested, prosecuted, and received sentences similar to major drug dealers and cartel members. There are too many similarities to ignore.

As Sidhu and Robinson stated so eloquently in their compelling article in the Cardozo Law Review, (https://cardozolawreview.com/wp-content/uploads/2023/01/SIDHU.pdf)

> *"Drug offenses lie at the heart of the movement for criminal justice reform, and for good reason. Drug policy is defined by severe and disproportionate penalties owing to a retributive, factually flawed, and hurried congressional process. These central characteristics apply to the child pornography context as well. Though drug sentencing is problematic enough, child pornography sentencing is arguably worse. The U.S. Sentencing Commission has disavowed the child pornography sentencing guidelines and invited judges to vary from them. Judges have done just that, varying in sixty-three percent of all cases, more than any other offense type."*

The authors point out *"Whereas retributive attitudes toward drug offenses have softened, the same cannot be said for child pornography offenses. As the Second Circuit recently noted, child pornography sentencing has become "barbaric without being all that unusual."* Sidhu and Robinson also suggest *"how improvement to the uniquely distressed area of child pornography policy can inform criminal justice reform more generally, especially as to substantive reasonableness review under Gall v. United States, mandatory minimum sentences, and sunset provisions for penalty levels."* This fascinating law review article lays out a compelling and persuasive case for criminal justice reform and puts the blame for lack of reform for people convicted of non-contact internet offenses squarely where it belongs: on Congress.

UV4SOR agrees with Sidhu and Robinson's research. Every member of Congress should read this informative article to better understand some of the reasons why our organization is participating in the coalition. The article recognizes the Commission in a positive light. Look for us in the next election cycle. Please let Congress know we'll be in touch.

Thank you again, Commissioners, for the opportunity to provide commentary on proposed priority 11 as well as the other 10 proposed priorities. UV4SOR members know the Commission takes the time to listen, and that you hear us, and we value your representation of truth and justice.

Sincerely,

Shawn Barrera-Leaf / Executive Director
United Voices for Sex Offense Reform
UV4SOR.org

526 W. 14th Street, Suite 287
Traverse City, MI 49684
www.uv4sor.org

Dear Chairman Reeves and Commission Members.

Thank you for the opportunity to offer commentary on the United States Sentencing Commission's (the Commission) proposed priorities for the amendment cycle ending May 1, 2024. I am responding as both an Executive Director for a non-profit criminal justice reform organization, United Voices for Sex Offense Reform (UV4SOR), and as an impacted family member of an adult in federal custody. I am submitting UV4SOR's response to USSC Proposed Priority ***(10) C, D, and E; "Further examination of federal sentencing practices on a variety of issues, possibly including…(C) comparison of sentences imposed in cases disposed of through trial versus plea; (D) continuation of the Commission's studies regarding recidivism; and (E) other areas of federal sentencing in need of additional research."***

(C) Comparison of sentences imposed in cases disposed of through trial versus plea;

As Americans, reading that 95% of Federal cases are adjudicated through plea agreements and a sentencing hearing in lieu of going to trial reinforces many of our members' loss of faith in the American judicial system. We are taught in school to revere the U.S. Constitution in Civics and U.S. History classes and how we have the greatest judicial system in the world. Our justice-impacted family members have witnessed AUSAs stack the charges as high as they possibly can, so defendants have no option but to take a plea deal, regardless of guilt or innocence. It is why, according to the Pew Research Center 2019 empirical data, the DOJ has a 99.6% conviction rate. Numerous family members in multiple advocacy organizations have recounted AUSAs being disinterested in true justice outcomes due to compensation based on their "win" rate. We certainly hope this is untrue, but if the cases of our members' loved ones are any indication, it would not be a revelation to any of us who have lived through this nightmare.

I subscribe to the Department of Justice press releases, as do many UV4SOR members. We are shocked at the sentencing disparities in conviction types and discuss them frequently in organizational meetings. One of the DOJ press releases detailed a man who received a 10 year sentence, negotiated by plea deal and agreed to by the presiding federal judge, for providing material support to a terrorist organization. Another recent press release detailed a plea deal for a Bureau of Prison's Chaplin who abused a position of trust. He received 6 years in prison for raping 6 women (one year for each woman). A July 23, 2023 CBS news article reported that "Kristy Lynn Felkins, 38, of Fallon, Nevada, pleaded guilty in March to a charge of murder-for-hire as part of a deal with federal prosecutors that avoided trial, court records show." Ms. Felkins received a 5 year prison sentence. UV4SOR has members with loved ones who received sentences through plea-agreements for non-production Child Sexual Abuse Material (CSAM)

that are significantly longer than all 3 of these sentences. While our members do not condone sexual abuse of any kind, including viewing, possessing, or distributing CSAM, is looking at illegal images really worse than terrorism, rape of a vulnerable population, or murder for hire?

I cannot comment on the comparison of sentences imposed in cases disposed of through pleas vs. cases that have gone to trial because nearly all the cases of our members' loved ones' were adjudicated through a plea deal. The prior statement speaks volumes on Federal sentencing practices. It is a violation of constitutional rights to a trial by a jury of peers, but the trial is vanishing in the wake of prosperous plea deals that line the pockets of lawyers and create easy "wins" for the prosecution. There is no longer an incentive to encourage a fair trial. Stacked charges and taking a plea deal are the only reasonable choices open to most defendants. The August 2022 Cardozo Law Review article, ***Child Pornography and Criminal Justice Reform*** by Dawinder S. Sidhu & Kelsey Robinson illustrates in great detail the sentencing inequities for individuals with child pornography convictions, summarizes the penalty structure that applies to these offenses, and traces the development of that structure over time. (https://cardozolawreview.com/wp-content/uploads/2023/01/SIDHU.pdf)

(D) Continuation of the Commission's studies regarding recidivism;

The continuation of the Commission's studies regarding recidivism is extremely important. Unlike the Bureau of Justice Statistics (BJS), who uses **"twistictics"** to sensationalize and present recidivism statistics in the worst light possible and gives new meaning to the phrase "lies, damn lies, and statistics" to push a narrative, the Commission's recidivism reports are comprehensive, straightforward, and present the ***actual*** data and facts in an ***unbiased*** manner in a format that is easy to read, has no political spin, and allows the reader to interpret the actual data and form sound conclusions. The public already has a distorted view of which convictions actually have the lowest recidivism rates based on discredited studies, and the Commission's research studies are the only DOJ agency studies our members have found to present accurate and unbiased information.

It is unfortunate Congress ignores and/or disavows the Commission's recidivism data. As citizens, we cannot allow Congress to perpetuate the myth of public safety to intimidate and discourage the Commission in its work, or stop the insightful, accurate data collection from research studies conducted by the Commission to ascertain accurate recidivism rates.

If Congress read the Commission's studies and followed its guidance, exclusions and "carve-outs" would cease for the convictions with the lowest recidivism rates, allowing participation in legislation and programming. Also of concern is the addition of "instant offense' convictions within the population of those persons with the lowest documented recidivism rates, as shown in the Commission's own research. The majority of people with sexual offense convictions not only have zero criminal history points, but zero arrests, yet Congress continuously and consistently has added these convictions into the Commission's proposed priorities for exclusion. The First Step Act is an excellent recent example of legislation where Congress ignores the data and carves-out certain offenses from participation, yet allows convictions with much higher recidivism rates to program and qualify for early release. There appears a lack of common sense in Congress's justification of the criteria. By its failure to include, at the very least, non-contact

sex offense convictions, the convictions with the lowest documented recidivism rates of all convictions, it appears that Congress does not want the First Step Act to succeed.

Thank you, U.S. Sentencing Commission for being honest-brokers.

(E) Other areas of federal sentencing in need of additional research.

UV4SOR's members have identified 3 areas of federal sentencing that need additional research, revision, and expansion:

1) Court-sponsored diversion, alternatives-to-incarceration programs, and restorative justice programs for first time offenders with zero criminal history points and for incarcerated individuals determined to be low risk and have a low risk of recidivism.
2) Revising the current sentencing guidelines for sex offenses based on empirical evidence and research instead of fear and hysteria.
3) Creating new sentencing guidelines for receipt, possession, distribution (aka trafficking), and production of Child Sexual Abuse Material (CSAM) which distinguish between individuals and entities motivated by financial incentives and individuals who offended for personal use. Social media and big tech companies are included in the former category of entities motivated by profit.

(1) *Court-sponsored diversion, alternatives-to-incarceration programs, and restorative justice programs for first time offenders with zero criminal history points and for incarcerated individuals determined to be low risk and have a low risk of recidivism.*

The United States has 4% of the global population, yet 25% of the global incarcerated population. (https://www.prisonpolicy.org/global/2021.html). According to the Prison Policy Initiative, in the referenced report, not only does the U.S. have the highest incarceration rate in the world, many U.S. states incarcerate more people per capita than virtually any independent democracy on earth. The United States houses a staggering 25% of the world's prisoners; the prison system is considered one of the largest mental institution, with 1 out of 5 persons needing intervention; and many prisoners are aged 55 and older (Hart, 2021), due to lengthy prison sentences.

The Merriam-Webster definition of prison industrial complex is "The profit-driven relationship between the government, the private companies that build, manage, supply, and service prisons, and related groups (such as prison industry unions and lobbyists) regarded as the cause of increased incarceration rates especially of poor people and minorities and often for nonviolent crimes" (www.merriam-webster.com). The complex business of incarceration in America takes various forms, with differences for juvenile offenders or adults in custody. For adults who are incarcerated, there is a vast assortment of jails, prisons, mental health, and civil commitment facilities. Past research studies indicate that each state has their own penal system, with jails and prisons that are state-funded, and house 90% of persons incarcerated in America; 37 states having a higher incarceration rate than any other country in the world. Many states also have

federal prisons which are federally funded, and private prisons contracted by outside business enterprises with extended surveillance and control beyond sentences.

- Mass incarceration has caused numerous problems at Bureau of Prison facilities including lack of space for new arrivals and all 123 facilities in dire need of repair and maintenance, while woefully underfunded, according to the 3 May 2023 Inspector General Report (https://oig.justice.gov/news/doj-oig-releases-report-federal-bureau-prisons-efforts-maintain-and-construct-institutions)
- The United States national debt is currently $32.9 Trillion and growing daily.
    - In addition to the costs of incarceration Commissioner Reeves referred to in his opening remarks at a recent public hearing, which are a tax burden on American tax payers, there are huge economic costs in lost productivity. The rate of unemployment for formerly incarcerated individuals is 27% because of the stigma attached to incarceration, with employers reluctant to hire people with felony convictions in their backgrounds. (https://www.prisonpolicy.org/reports/outofwork.html)
    - As of March 2023 the inmate population of the BOP was 158,259, with a cost to incarcerate those individuals at approximately $6.97 Billion based upon Commissioner Reeves' cost of incarceration of $44,000 per year.
    - The costs quoted do not include the loss of productivity from employable people being out of the work force, creating increased costs to and strains on social services. Nor do these estimates address the costs of having an incarcerated or formerly-incarcerated family member who is unable to contribute to financially supporting the family.
        - Not only does incarceration impoverish families, causing economic harm, but it harms families emotionally and socially as they suffer the collateral consequences of loving and supporting their family members.
        - These economic and social impacts also harm fragile communities, through voter sanctions and loss of economic stability within the residence families.
- Court-sponsored diversion and alternatives-to-incarceration programs will not only reduce the costs of mass incarceration and over capacity significantly, but have been shown to lower recidivism.
- UV4SOR will address this topic in more detail in Proposed Priority #2, "Promotion of court-sponsored diversion and alternatives-to-incarceration programs…"

(2) ***Revising the current sentencing guidelines for sex offenses based on empirical evidence and research instead of fear and hysteria.***

- All forms of sexual abuse are unacceptable. Prevention-based, rehabilitative, and trauma-informed programs rooted in healing are more effective than lifetime, shame-centered punishment.

  On a recent **Open to Debate** podcast recorded on February 3, 2023 social justice reform advocate, Emily Horowitz, PhD of St. Francis University stated "*Those convicted of sex offenses are not a distinct breed of person unresponsive to punishment and treatment, ... subjecting them to lifelong banishment and humiliation is counterproductive and vengeful.*" (https://podcasts.apple.com/us/podcast/does-the-sex-offender-registry-do-more-harm-than-good/id216713308?i=1000597846857)
- The fear and hysteria ("frightening and high") which has impeded the equitable treatment of people convicted of even the lowest level sex offense in sentencing and post-conviction is based on a pop-psychology article in a lay magazine, not even a research study, by an un-credentialed counselor with one uncited reference, which was actually just an assertion. The article/faux study has been discredited because the individual had his own treatment program and was trying to show that anyone who completed his prison treatment program would have a lower recidivism rate (also an assertion). (https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1429&context=concomm)
  - The Commission's own research shows that people convicted of sex offenses have extremely low recidivism rates. The sexual crime recidivism rates for non-production CSAM (CP) are the lowest of all convictions.
  - As stated in its June 2021 report, ***Federal Sentencing Child Pornography Non-Production Offenses***
    - Most non-production child pornography offenders released or placed on probation in 2015 had little or no criminal history. Over 86 percent were in Criminal History Category I (the lowest category).
    - The sexual recidivism rate for non-production child pornography offenders released was just 4.3 % after 3 years , 7.3% for registry violations
    - 72.4% of non-production child pornography offenders released had no recidivism and the overall recidivism rate for all recidivism combined was 27.6% significantly lower than those with other convictions.
  - As stated in the Commission's January 2019 Report, ***Recidivism Among Federal Violent Offenders***
    - Violent offenders (N=10,004) recidivated for more serious crimes than non-violent offenders (N=15,427)
    - Over one-fourth (28.4%) of the violent offenders who recidivated had assault as their most serious new charge, followed by public order crimes (15.6%) and drug trafficking (11.1%).

- Even the most serious violent sex offense (Rape) is not a top category for recidivism for violent criminals.
  - Throughout the report, recidivism and re-arrest for Rape was extremely low, whether for violent, violent instant offender, or violent prior offender: 2.2%, 3.6%. and 1.8% respectively
  - Even making an assumption that the "Other Violent" and "Other" categories were 100% sexual offenses like sexual assault, other sexual contact offenses, and CP, the recidivism rates would still be listed as 3.7%, 4.9%, and 3.4% respectively.
  - Sexual assault was broken out separately from assault
  - Non-violent criminals released had similar percentages of re-arrest/recidivism for Rape (1.5%), Other violent (1.4%), and Other (0.4%)
  - The recidivism numbers for sexual assault, receipt, possession, distribution and production of CP were not large enough to warrant their own recidivism categories

- In 2022, despite push back from multiple State Attorney Generals and the Department of Justice, the American Law Institute (ALI) made and adopted major revisions to sex offenses and the registry in its Model Penal Code based on decades of empirical evidence and study. (https://www.ali.org/publications/show/model-penal-code/)
  - Why are Congress and the Department of Justice ignoring the recommendations of the ALI, an organization well-respected around the globe?
  - The ALI's recommendations are based on decades of research and should be utilized by the Commission to make common sense revisions to the sentencing guidelines, including Draconian mandatory minimum sentences currently in place for those individuals with the lowest recidivism rates and determined to be of low risk to the community upon reentry.
    - According to the Rape, Abuse, and Incest National Network (RAINN), over 93.3% of child sexual assault victims knew the perpetrator.
    - Current sentencing guidelines with lengthy sentences for sex offense convictions and bloated sex offense registries do not keep children safe.
      - Stranger danger - Children are taught to fear strangers instead of learning to be wary of "trusted" individuals

- who commit 9 out of 10 sexual assault crimes against children
- Trusted individuals who commit the majority of these crimes include coaches, teachers, clergy, parents, step-parents, other relatives, friends, and neighbors
- A large percentage of the perpetrators of sex offenses against children were victims of child sexual abuse themselves

3) Creating new sentencing guidelines for receipt, possession, distribution (aka trafficking), and production of Child Sexual Abuse Material (CSAM) which distinguish between entities motivated by financial incentives and individuals who offended for personal use. Social media and big tech companies are included in the former category of entities motivated by profit.

- For profit individuals and entities make money by preying on and profiting from individuals who receive, view, or possess CSAM on their telephone or computer, or who may take photos of themselves or their teenage love interest and email or "sext" to each other for personal use.
  - Most of the offenders who view this disturbing material are first time offenders with no criminal history and have untreated childhood sexual trauma in their own pasts.
  - These individuals need therapy and treatment and are at low risk to the community and have the lowest rates of recidivism.
- Prosecution of CSAM is similar to the War on Drugs in the 1980s, where overzealous law enforcement tactics led to the arrest, prosecution, and incarceration of people with drug addictions and those who sold small quantities of drugs to pay for their addictions. There was limited to no pursuit of drug cartels or major drug dealers and distributors who fueled and profited from those with addictions. Today, law enforcement entities are arresting, prosecuting, and incarcerating people with histories of unresolved childhood sexual trauma, porn addictions, and collecting and other internet-driven addictions, fueled by PTSD, OCD, and other mental health issues. These people, the end-product users, are prosecuted similarly to or more harshly than the actual creators of CSAM, who traffic and abuse children, produce, host, and distribute this material.
  - Our current, broken justice system incarcerates these "low hanging fruit" instead of offering them trauma-based therapy and alternatives to incarceration. Upon release back into the community, these individuals are forced to register, are stigmatized, marginalized, and continue to suffer social, residential, economic, and other collateral consequences along with their family members, who love and support them. These collateral consequences include their children, the population we claim we are protecting. Family members are frequently victims of vigilante

justice due to having all their information publicly available to people who think they warrant more punishment because they are a registered citizen.

  - A much more effective use of law enforcement and Department of Justice resources would be pursuing and prosecuting those individuals and entities who are the real criminals, those who profit handsomely from this abuse.
  - Congress must stop sensationalizing "Stranger Danger" and people convicted of sex offenses as a vehicle to re-election by appearing "tough on crime" when research shows the opposite.

- Big tech and social media companies are also complicit, since CSAM is highly profitable for them.
  - The June 7th front page of the Wall Street Journal featured an article entitled Instagram Connects Vast Pedophile Network (https://www.wsj.com/articles/instagram-vast-pedophile-network-4ab7189)
  - In the article, Meta states that in the past 2 years it "has taken down 27 pedophile networks and is planning more removals" indicating it knows more are there and have not taken any action yet.
  - Meta is hosting numerous CSAM sites, yet no one is being held accountable because they are a "public utility" under Section 230 of Title 47 of the United States Code.
  - META CEO, Mark Zuckerburg, is a huge political donor, who donated over $400 Million through his PAC during the 2020 election cycle.
  - Meta and other large social media companies are hosting and distributing CSAM without reprecussions or prosecution because of Section 230 protections.

- In the New York Times 2019 article, ***The Internet Is Overrun with Images of Child Sexual Abuse. What Went Wrong?*** CSAM was found to be not doubling or tripling, but growing exponentially, where "tech companies reported over 45 million online photos and videos of children being sexually abused – more than double what they found the previous year. Twenty years ago, the online images were a problem; 10 years ago, an epidemic. Now, the crisis is at a breaking point."

As a civilized nation and society, our attempts to eliminate CSAM, and our response to this exponentially-growing crisis, are ineffective. The guidelines must be amended to distinguish between prosecution levels for the product end-users versus for-profit entities responsible for production, hosting, and distribution of CSAM. These guidelines must include holding Big Tech and Social Media companies accountable, since they are the largest for-profit hosts and distributors of CSAM. If this is not resolved now, we will have yet another mass incarceration crisis spanning decades, similar to the War on Drugs. We will be showing, once again, we are not leaders of the free world, but judges of other countries' human rights violations and freedom issues when we are the worst offenders, due to our dehumanizing disregard of our own beloved citizens. Justifications for violating and denying our citizenry due process, the impact of life-altering sentences, and public registry requirements that make this population a perpetual

vigilante target, coalesce to ruin families, and destroy the lives of the very population we are hypothetically protecting with all these antiquated guidelines: our own children.

Thank you for accepting UV4SOR's feedback.

Sincerely,

Shawn Barrera-Leaf/ Executive Director
United Voices for Sex Offense Reform
UV4SOR

526 W. 14th Street, Suite 287
Traverse City, MI 49684
www.uv4sor.org

Dear Chairman Reeves and United States Sentencing Commission Members:

Thank you for the opportunity to provide commentary and suggestions to May 2024 proposed priority (3) **Examination of the *Guidelines Manual*, including exploration of ways to simplify the guidelines and possible consideration of amendments that might be appropriate.** I am responding in my position as Executive Director of the criminal justice reform nonprofit, United Voices for Sex Offense Reform (UV4SOR) on behalf of our members.

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 due to our nation's mass incarceration, requires reexamination and revision of our sentencing guidelines for all convictions. 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=11288c1b67be,https://www.washingtonpost.com/opinions/2022/09/29/prison-release-covid-pandemic-incarceration/

The Commission should consider amendments to existing sentencing guidelines, which exclude persons convicted of certain sexual offenses and persons convicted of other non-sexual offenses with low recidivism rates, from participation in BOP programming, criminal justice reforms, and legislation passed by Congress. The guidelines should be amended to make these individuals eligible for sentencing reductions and alternatives to incarceration if they have zero criminal history points and it is their first offense.

The guidelines should also be amended to reclassify certain sexual offenses from violent to non-violent, such as internet-based offenses.

People with minimum PATTERN scores, having convictions with low recidivism rates, and are deemed to be low risk to the community, should be housed in BOP camps, regardless of their offense, with no exclusions or carve-outs.

The sentencing guidelines should be amended to create new, distinct sentencing guidelines for receipt, possession, distribution (aka trafficking), and production of Child Sexual Abuse Material (CSAM) to distinguish between entities motivated by financial incentives and the pursuit of profit, and those individuals who only offended due to personal use. Social media and big tech companies must be included in the former category of entities motivated by profit and personal gain.

The sentencing guidelines should be amended to remove the technology enhancements for the use of a computer or mobile phone in the commission of internet-based offenses because 99% of these offenses are committed through one of these devices. At the time these statutes were written, these technologies did not exist. Similarly, the ability of the prosecution to stack charges based on transport across state lines had the original intent of physically driving a vehicle across state lines, not the three seconds it takes for the internet to send files across the internet. Therefore, we respectfully ask for consideration of amendment of these guidelines.

Thank you for the opportunity for UV4SOR to provide input to the Commission.

Sincerely,

Shawn Barrera-Leaf / Executive Director
United Voices for Sex Offense Reform
UV4SOR

.

DR. DOUGLAS A'HERN
LAW GROUP P.L.L.C.

Houston /Galveston –(Principal office) **832.767.3603**
Rio Grande Valley (By Appointment) **281.904.3797**
Facsimile **281-213-0628**
Cellular

22 JUNE 2023

United States Sentencing Commission
Attention: Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

RE: Public Comments on Commission Application of Guidelines Review 2023-2024

Greetings,

My name is Dr. Douglas A'Hern. I am an active federal criminal defense attorney. I am also retired as the National Director of Trend Analysis for US Customs and Border Protection. I hold a Bachelor of Science in Criminal Justice from the University of Houston-Downtown, a Juris Doctorate from South Texas College of Law, a Master of Law in International Law, a Master of Law in Intellectual Property and Information Law, both from the University of Houston Law Center, a Master of National Security Studies from Angelo State University, and a Doctor of Forensic Psychology from Walden University. I teach undergraduate and graduate courses for Southern New Hampshire University and Purdue University Global in psychology.

In my practice, I have provided counsel to a number of defendants charged with trafficking methamphetamine. Based on my personal experiences, I have been involved in the interception of methamphetamine smuggling cases since the 1990's. I have seen it transform from a novel replication of pacific and Asian driven "ice" to "crank" pushed and controlled by motorcycle gangs. I witnessed the affiliation of those same biker gangs with Mexican drug trafficking organizations such as the original Amezcua brothers. There is a reason drug traffickers push methamphetamine in pounds and other drugs are kiols – because of the history and origin of the drug. Mexico brought in MC cooks to reach their people how to make methamphetamine and often traded for American guns. I have made those arrests personally and now defend them. The cases were cases of methamphetamine that was not refined nor powerful. The purity ranges went from 30% to 90%. The amounts intercepted with half pound (500 grams) to three pounds (1500 grams).

Today, the amounts of seizures are 100 pounds to 2000 pounds. They are almost all made in super labs that rival what Moderna and other pharmaceutical companies have. The precursors arrive in pacific ports of Mexico – primarily from China – every single day. The purity levels are 95% to 100% pure in every load.

However, with the new developments and current state of things – especially along the border area – the sentencing for methamphetamine at the federal level has not changed.

First, the federal threshold is only 500 grams. I have not seen a case cross my desk in over 5 years that was less than three pounds. That case was rare. Most of my cases range right now from 100 pounds to 2000 pounds. No one is shocked to see 700-pound methamphetamine seizures. Those amounts are reflected on the streets of this country as methamphetamine is exceedingly cheap. I had a call from a potential client charged with selling 112 grams to an undercover officer for $1200 in Houston. That is $10 a gram. Cases of smuggling are coming in at 40-pound loads and drivers are being paid $100 because the prioces are so low. Yet we are spending billions on incarcerating people federally for 500 grams?

Next, there are enhancements if methamphetamine is imported under USSG §2D1.1(b)(5).. This section of the Guidelines is routinely abused by the Government for sentencing as the assertion is that ALL methamphetamine originates outside the United States. The additional level increase is virtually automatic at this stage. When was the last time the Courts saw a methamphetamine related sentence where the two levels were NOT applied? Had the USSC wished to make the base offense level with two additional levels, it could have done so. Much like the Government final recognized that the errors for enhancements in crack cocaine sentencing disproportionally impacted African Americans, it will not be long before the Government or the USSC recognizes that this provision disproportionally impacts Americans and persons of Hispanic ethnicity.

Next, the calculations related to mixed loads in the drug tables under USSG §2D1.1(c)(1).. First, there are differences between methamphetamine and methamphetamine actual, with the actual enhanced because of the higher purities. Today, they are all actual because of the superlabs.

Finally, the drug conversion tables "The Drug Equivalency Tables" for mixed loads where all the drugs are converted to marijuana. Say a Defendant was apprehended with what the laboratory has said was 96% pure. That is only a 4% difference between non-actual and actual. Yet the table show the equivalency of 1 gram of methamphetamine non-actual to 2 kilos of marijuana, but 1 gram of actual methamphetamine is equivalent to 20 kilos of marijuana? A 4% difference in the case at bar compared to a 1000% increase in equivalency. It is difficult to see how this was ever the actual intended result of the USSG.

This glaring discrepancy of the equivalency tables because probation then calculates the total equivalency of drugs that the defendant is responsible for should be 151,997 kilos of marijuana for a 7.5 pound methamphetamine arrest. I am former narcotics agent who worked for 20 years on the U.S. Mexico border. Based on this table conversion, if taken as true, the defendant is being held accountable for some 76 smuggling ventures via 18-wheel trucks at the Port of Entry. It is equivalent to some 303 loads of marijuana being crossed along the Rio Grande River. That is the equivalent to roughly 1,519 average loads of marijuana via car crossing at a port of entry. 151,997 is equivalent to 30,399 average seizures of marijuana at the international airports or cruise liners or 300,000 average marijuana seizures at international mail facilities. We have transformed a 24- year-old kid into a major narcotics kingpin and kingpins don't even receive sentences as high as probation is suggesting.

Respectfully,

Dr. Douglas A. A'Hern

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Victoria Blanco, IT COULD HAPPEN TO YOU

Topics:

1. Bureau of Prisons Practices
2. Alternatives to Incarceration and Court Diversion Programs
3. Simplification/Structural Reform
4. Case Law Relating to Guideline Commentary
5. Career Offender Guideline/Categorical Approach
6. Youthful Offenders
7. Crime Legislation
8. Circuit Conflicts
9. Miscellaneous Guideline Application Issues
10. Research Topics

Comments:

There are far too many wrongfully convicted persons inside prisons. Communities are suffering and America is the land of the un-free. Why does the federal government consistently oppressed it communities?

Submitted on: July 25, 2023

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Gary Devine, Presbyterian

Topics:

1. Bureau of Prisons Practices
2. Alternatives to Incarceration and Court Diversion Programs
3. Simplification/Structural Reform
4. Case Law Relating to Guideline Commentary
5. Career Offender Guideline/Categorical Approach
6. Youthful Offenders
7. Crime Legislation

Comments:

I am especially concerned that the sentencing commission identify effective policies that will replace simplistic incarceration with alternative forms of sentencing, such as home confinement and public service.
I'm also concerned that as much as is practical, family and community engagement is increased with those who commit crimes.

Submitted on: July 14, 2023

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Frank Inserni-Milam, Frank D. Inserni Law Office

Topics:

4. Case Law Relating to Guideline Commentary

7. Crime Legislation

Comments:

The Commission and Congress should definitely amend the acquitted conduct statute and guideline to eliminate the totally discriminatory and subjective power federal judges have in using facts from a 12-0 state or federal acquittal to jack up sentences. It is a total disrespect to the institution of the Jury who decides to acquit or convict. Also, relief for inmates who have been in prison for more than10-15 years with a low recidivism quotient should be able to exit prison and be allowed to be gainfully employed and be ordinary tax-paying individuals. Being in prison that long without any serious incidents of violence and having a good educational and work record should be the parameters for allowing release. The BOP does not have the ability to house so many prisoners and provide true rehabilitation to many inmates.

Submitted on: July 25, 2023

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Susan Lea, Attorney at Law

Topics:

2. Alternatives to Incarceration and Court Diversion Programs

6. Youthful Offenders

10. Research Topics

11. Other Suggested Priorities

Comments:

Assuming the incarcerated person was actually guilty and not innocent, many cases need to be assessed on an individual basis to assure that the sentence constitutes adequate protection of the public, punishment, restorative justice, opportunities for recovering a stake in life, education and skills training. Because I know that 99% of youthful offenders will mature, opportunities for a more productive future life should be available to young people who are incarcerated. The dog training programs have been very successful. Farming is a very productive and growth experience. 2nd chances because Rewards work.

Submitted on: July 25, 2023

The Pennsylvania Association for Rational Sexual Offense Laws (PARSOL) suggested I contact the USSC regarding your upcoming session priorities.

My comments are intended to address serious disparities and discrepancies in sentencing, and where existing sentencing laws, guidelines, and/or precedents are ignored (which has become a heated national issue as a result of the so-called "Hunter Biden Sweetheart Deal").

In my own case (in Dauphin County, PA), lies were told (perjury committed), numerous state/case laws violated by the prosecution and the judge, the plea was unknowing, and most relevant to this topic, THE SENTENCE WAS BOTH ILLEGAL, and IT WAS EXCESSIVE as a result of the judge ignoring sentencing law and established case precedent for a first-time offender. The governing guidelines and laws were overlooked, ignored, or willfully and negligently violated in numerous ways, and sufficient proof exists for confirmation. Mine was a "drumhead trial" at best, and all *pro se* appeals were either denied on technicalities or ignored; at no time was any effort to defend unlawful sentencing actions undertaken.

My interest in this issue addresses not only the need for sentencing reform to prevent what I experienced happening to anyone else, but also establishment of sentencing rules which hold legally accountable ANY judge who ignores sentencing guidelines and/or law, imposes illegal or wildly disproportionate sentences, or grants special deals to authority figures (a Comparative Proportionality Review will follow under separate cover), which is highly relevant in my personal case, as a part thereto.

While judges must be granted some latitude in sentencing, steps ought to be taken to insure against special deals and abuse of discretion. Mandatory minimums should be abolished for first-time offenders, and even though an individual assessment of the alleged offender is mandated, assessments are often not performed (just as my own was not, despite a court order for it). Recent data from *The Innocence Project* showed that approximately 34% of offenders never receive the Constitutionally-mandated individual assessment.

Regarding laws and sentencing for sexual offenders, the myth that such offenders are at a high risk for re-offense has been repeatedly debunked by both private groups like NARSOL and similar state-based groups, as well as government task forces, most notably a recent PA Legislative Task Force which again proved that myth is indeed a myth. Additionally, the PA DOC 2022 Recidivism Report found that sex offenders consistently have - by far - the lowest rate of recidivism of all criminal classes.

There is voluminous data showing that longer, tougher sentences NEVER provide “correction.” Quite the opposite is true: the longer the sentence, the more hardened an individual becomes, and the less likely that person is to be able to return to society as a productive member thereof. While sentencing and prison management and disparate subjects, they are nevertheless inextricably linked. Prisons ought not to be “human warehouses,” but more of what their name says: “corrective.” A five-year sentence would be enormously more successful at returning a person to a normal life when the prison works to improve that person instead of denying them proper nutrition, adequate sleep, and humane conditions, offering educational and/or vocational training, than a 20-year sentence in a brick oven with nothing to do but suffer under state-sanctioned abuse and learn how to be a better criminal.

Summary:

1. We must eliminate the use of extreme sentences, including mandatory minimums;

2. Ensure prosecutors' offices have ethical charging policies and hold legally accountable those who violate;

3. Give judges more discretion to “look back” in order to adjust excessive sentences;

4. Remove language used in plea agreements that requires people to waive certain legal rights;

5. Eliminate "charge stacking," a practice in which police and prosecutors level as many charges at a person as possible, heightening an accused’s anxiety and the pressure to settle;

6. Eliminate “take-it-or-leave-it” offers where people have virtually no time to make a decision, and

7. Recognize how selective moral outrage can lead to a reduction of logic and rationality, resulting in excessive punishment, and take steps to prevent it. One person’s fear does not void another person’s rights.

Opinion: The road from legitimate suspicion to rampant paranoia is a lot shorter than most people think. As a Christian pastor, I must add that the Bible is abundantly clear regarding the tremendous harm that is caused by excessive punishment, and why God has expressly forbidden it. We see the results in our society of what happens when we choose to apply excessive punishment – it doesn’t age well, does it?

Respectfully Submitted,

Rev. Ronald S. Martin, A.CM, BCMMHC

COMPARATIVE PROPORTIONALITY REVIEW

The purpose of this review is to establish violations of the US Constitution, Amendment VIII, Cruel & Unusual Punishment, and Amendment XIV, Equal Protection Under the Law.

Review is intended to demonstrate that Judge John Cherry imposed excessive sentencing 1) compared to other individuals charged similarly, 2) compared to those charged with more serious physical assault crimes, 3) compared to Legislative intent and sentencing precedent with regard to excessive CVCF fee without reason, and constitutionally intolerable excessive non-mandatory fine.

In addition to the chart that follows, witness these examples:

1. From The Bedford Gazette (Bedford, PA), 3rd August 2017: Lee Shomo, 52, was convicted of giving his 16-year-old babysitter alcohol and illegal moonshine (*providing alcohol to minors*), making sexual advances on the girl (*corruption of minors*), eventually paying her $100 for sex (*engaging minor in prostitution; statutory rape*). When told to stop, Shomo held the girl down when she tried to get away in order to complete the sex act (*unlawful restraint, rape*). Even with two similar priors, one a 15-year-old girl in 1998, and another, a 7-year-old girl in 1984, this predator received a mere 2½-5 years in prison. We must consider how a man with this record receives less prison time (no fine is mentioned in record) than a first-time offender (the defendant/appellant) who never touched anyone.
2. William Cosby, convicted of drugging a raping a woman, received a 3-year minimum in prison, same minimum as defendant/appellant. **Case overturned for illegal prosecution.**
3. Jeffery Toman, 34, Scranton attorney, was lightly punished after manipulating attorney/ client privilege to gain access to a 14-year-old girl. He sexted with her, sending her penis and masturbation videos, requested bra and panty photos, and asked her to be his girlfriend. He was arrested on a mere M-1 corruption charge, pleading guilty. The PA Supreme Court suspended his law license for 3 years on 9th May 2018 when he went to prison, but he was already free from prison by November, 2018.
4. Brian Meehan, Philadelphia attorney, had a sexual relationship with a 14-year-old girl in 2014, arrested on a sexual assault charge. He received 2-4 years in prison with no fine.
5. Rebecca Willis, Poconos region, slaughtered her 6-year-old daughter while DUI, and received only 1½-3 years in state prison.
6. Jeffrey Hand, 37, was maintaining a sexual relationship with a teenage girl. Hand was a school employee, thus having authority over the girl. He received 1-5 years in prison.
7. Michael Folmer, 64, Pennsylvania Senator from Lebanon County, plead guilty in February 2020 to four felonies, 3 for possession of child porn, 1 for criminal use of a communication facility, trading in child porn. Sentenced to one year less one day to two years less one day in *county* prison – a sentence fashioned to avoid incarceration in a state prison. Sentence included probation. Example calls Equal Protection into question on severity of defendant/appellant sentence versus leniency for a politician; individual also received *one*

sentence for *four* felonies. Folmer was sentenced very lightly to a county prison, whose operators benefitted from his political position.

The following chart shows a number of individuals interviewed by the defendant/appellant. Each was interviewed personally by the defendant/appellant, and each shared their paperwork with him. All data contained herein is attested true and correct; all cases occurred and sentenced in Commonwealth of Pennsylvania. Names are on file, but withheld by request for confidentiality.

INITIALS	MONTH SENTENCED	NATURE OF CHARGES	PRISON TIME	FINE	CVCF FEE
* J.K.	07/2014	6312(d), Possession Child Porn, <100 images Third Offense, 1 Count	1-3 yr (maxed out)	500	60
C.K.	04/2016	6312(d), <50 images; illegal use communication device; Parole violation. 1 count, inclusive	1-7 yr Re-paroled 02/2019	NONE	60
R.C.	08/2016	6312(d), 100-500 images; disseminating; illegal use comm. Device Three sentences: Resentenced, appealed on illegal enhancement of sentence:	1-5 yr 1-5 yr consec+ 2-7 yr concur. 1-5 yr	NONE NONE	60 60 60 ---
R.C. Age 68	08/2016	6312(d), <100 images	3-84 mo Parole 01/2020	NONE	60
F.P. Age 59	10/2016	Indecent. Aslt, 16-y-o girl; Agg Ind Aslt, 14-y-o girl Two sentences, concurrent:	1-9 mo 2-5 yr	200	60
G.L.	10/2016	6312(d) (number images not shown); 1 ct. Bestiality (horse); online sexual contact with minors	3-6 yr	3,500	60
* L.G.	01/2017	6312(d) (number images not shown); online sexual contact with minors; sexting minors/illegal use comm device	2-4 yr	500	60
R.L.	01/2017	Corruption of minors, having sexual contact, <13 y.o.	2-4 yr	NONE	60
J.G.	01/2017	Online solicitation of minors for sexual activity; sexting minors	1½ -3 yr	NONE	60
C.L. Age 46	02/2017	Ind Aslt <13 y.o. (Laid on, restrained 11-y-o girl, fondled vagina skin-on-skin several minutes, stated desire for "power and control" over girl)	1-3 yr (maxed out)	2,000	60
S.D. Age 62	02/2017	6312(d), >10,000 images & videos, file sharing, 11 cts. Fined $300/ct	1½-10 yr Parole 08/2019	3,300	60
N.W. Age 42	03/2017	Indecent Aslt: Maintained sexual relationship, 15-y-o girl; sex contact 17-y-o girl; sexting minors	2-4 yr + Probation Parole 01/2020	2,000	60
R.T.	03/2017	6312(d), 100-500 images having 1 ct.; illegal use comm dvc/ disseminating images, 1 ct Two sentences, concurrent:	2-4 yr	1,000	60 60
E.M.	04/2017	6312(d), 11 cts., disseminating images, illegal use comm dvc	20-60 mo. Parole 03/2020	200	60

R.F.	04/2017	6312(d), 100-500 images, 1 ct.; illegal use comm device, 1 ct. Two sentences, concurrent:	2½-5 yr Parole 01/2020	1,000	60 60
* D.W. Age 71	09/2017	6312(d), 11 images, 1 ct.	1½-3 yr	NONE	60
A.W.	10/2017	6312(d), >500,000 images and videos, 1 ct.	1½-3 yrs Parole 11/2019	NONE	60
Ronald S. Martin, Defendant/ appellant	**02/2017**	**6312(d), 14 images, 14 cts. Four sentences:** **Fined $1,000 per count:**	**1½-3 yr** **1½-3 yr** **1½-3 yr** **Concurrent** **+ 1½ yr** **Consecutive** **TOTAL OF** **3-6 yr**	**14,000**	**100**

* Refused to participate in mandatory sex offender groups.

Defendant/appellant contends that the chart above, coupled with textual information, clearly: 1) demonstrates disproportionate sentencing imposed upon Mr. Martin, and, 2) demonstrates a violation of his 14th Amendment Equal Protection Under Law rights, and, 3) demonstrates a violation of his 8th Amendment Cruel & Unusual Punishment prohibition rights because of an A) excessive fine, and, B) excessive/enhanced sentence, and, 4) demonstrates abuse of power and discretion in violation of enhanced sentencing law/standards/doctrine by the trial judge.

The defendant/appellant's charges do **not** involve any 1) direct physical contact with, or, 2) electronic contact with any person, minor or adult, or, 3) buying, selling, creating, trading, or disseminating electronic images. Defendant/appellant contends that the data presented in this Exhibit should be viewed with those facts in consideration.

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Deborah Newman, Baptist Minister

Topics:

1. Bureau of Prisons Practices

Comments:

We as Americans need to look at our sentencing strategies. My son is serving a 75 year sentence he was given when he was 24 years old by a jury that was presented with a narrative and not facts in an emotional setting at the the time.
We need laws that will
*provide just punishment.
*afford adequate deterrence to criminal conduct--he did not intend to commit his crime and has a much longer sentence to many others who did intend to commit a crime. Dallas Cowboy Players have received probation for the same crime.
*The public protection from further crime from the person should be the focus.
*The prison system must be able to provide the proper guards, medical and educational care to those in custody

Please adopt the policies set forth in 18 USC 3553 (a). Although my son in in a Texas State Prison, Prison reform in our nation will eventually have a much needed impact.

Submitted on: July 25, 2023

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Dianne Post, Attorney

Topics:

2. Alternatives to Incarceration and Court Diversion Programs

Comments:

I have my BA in correctional administration, during my Masters I did research in CA prisons, and as a lawyer I have worked on criminal justice the world over. People in other countries are shocked at how long our sentences are. We know such long sentences are counterproductive and in fact increase crime not to mention destroy families and communities. Since 1980, we have gone the wrong way on punishment. We need to adopt humane and proven policies that work not punish those we don't like or who are poor.90376

Submitted on: July 25, 2023

Public Comment - Proposed 2023-2024 Priorities

Submitter:

William Swor, Private Practitioner

Topics:

1. Bureau of Prisons Practices
2. Alternatives to Incarceration and Court Diversion Programs
3. Simplification/Structural Reform

Comments:

The Bureau of Prisons is currently incapable of adequately addressing the sentencing goal of providing education and vocational training or treatment in any meaningful fashion. Neither RDAP nor the sex offender programs are administered in a way that they can be effective.

2B1.1 must be restructured. "Loss" should not be the linchpin of the guideline. The dollar amount does not consistently demonstrate the harm caused by the offense. The loss tables are too easily manipulated to to prevent unwarranted disparate sentencing.

Sentences in general are too long. Insufficient attention is paid to alternatives to incarceration and diversion.

Submitted on: July 25, 2023

Date: July 1, 2023
To: U.S. Sentencing Commission
From: G. D'Anne Weise, Ph.D.
RE: **Drug Induced Homicides-*Proposed 2023-2024 Priorities. Item #10***

My son, Scott, is an advanced opioid addict who was arrested in February 2019for sharing fentanyl (his drug of choice) with a friend who overdosed and died.

Scott was not guilty of being a dealer, but the deceased family believed he was because of some text messages on the deceased phone. To force him into a plea deal, the prosecutor charged Scott with two random felonies (each requiring a 20-year sentence). Once he pled guilty to the original charge, the other two charges magically disappeared.

According to *Pew Research Foundation*, only 2% of federal defendants go to trial and most who do are found guilty.[1] That means 98% have a plea deal, which is considered a *golden* win by the prosecutor. Golden because it avoids the cost of a trial. Of the 2% that go to trial, only 1% (or 0.0002) win their case. This means prosecutors win in federal drug cases **99.98%** of the time. Worse than Russia. Clearly, Scott is not alone in being assumed guilty and forced to take a plea deal. Scott was assumed guilty until he could be proved guiltier. There was never an assumption of innocence. There was no right to a trial, fair or otherwise, as the prosecutor skillfully put Scott is a lose-lose more, situation to force a guilty plea. There was no right to due process because strict liability applies to DIH convictions. Motive and state of mind do not matter.

Drug-induced homicide (DIH) laws were introduced in 1986 as part of the *Controlled Substances Act* and were designed to punish drug traffickers and high-level dealers. However, since 2011, prosecutors have been convicting friends, family, lovers, or low-level dealers and imprisoning them for 20 years. These people are sitting in prisons, mourning the loss of their loved one or friend and dealing with the pain of having their lives destroyed because of misdirected anger.

A HUGE consideration in DIH cases that is simply ignored is the *complicity of the deceased*. The deceased, in Scott's case, laid the table for her death with the combined decisions to buy a deadly drug, ingest the drug, determine the ingestion method[2], govern the quantity of drugs ingested and regulate any other drugs in her system. Despite her multiple confinements in rehabilitation centers for opioid abuse, neither she nor her family had any naloxone available, and she died at her aunt's house. All addicts are victims of their drug use and when addicted to a drug as deadly as fentanyl, that often means death will soon follow. Scott was close to death himself when he was arrested by the DEA. Ironically, the arrest saved his life.

Recommendation

Rather than succeeding in ruining 2 lives, we need a justice system that singles out addicts to send to long-term TREATMENT facilities. **We need treatment facilities not more prisons**. When Scott has served his 20-year sentence, he will *still* be an untreated addict with no skills on how to cope with life. That is why the U.S. not only has the highest incarceration rate in the world but also the highest recidivism rates.

---

[1]Gramlich, John (2019, June 11). Only 2% of federal criminal defendants go to trial, and most who do are found guilty. *Pew Research Center*. https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

[2] Fentanyl can be ingested 4 ways: 1. Injection (riskiest), 2. Smoking (very risky), 3. Nose ingestion (snorting, risky), 4. Orally take a pill (least risky). There is no method of intake that eliminates the risk of death.

Our so-called justice system is a global embarrassment. Thank you for your sincere dedication to this enormous job in front of you.

To Whom it May Concern,

I write to submit a public comment on possible policy priorities for the US Sentencing Commission amendment cycle ending May 1, 2024. My name is Melissa Whatley and I hold a Ph.D. from the McBee Institute of Higher Education at the University of Georgia. I am currently an Assistant Professor of International and Global Education at the School for International Training's Graduate Institute, where I teach courses in applied statistics and social theory. Although I write to you today as an individual, my professional role as a researcher in the social sciences provides important background for my thinking regarding criminal justice reform in the United States. Most notably, my research often focuses on students enrolled at community colleges, which are institutions that provide a much-needed second chance for many individuals who have encountered the criminal justice system.

My comments in this letter focus on priorities 2, 3, and 10.D listed for this amendment cycle and relate to the exceptionally high incarceration rate in the United States, which sits at 664 per 100,000 people and is the highest in the world. Indeed, the country with the second highest incarceration rate is El Salvador, at 562 per 100,000. Incarceration is a significant expense for US taxpayers, but this expense is small when compared to the human costs of incarceration, which include separation of families, trauma to the children of incarcerated individuals, and human rights violations of those currently incarcerated in jails and prisons across the United States. Sentence reductions and consideration of alternatives to incarceration would significantly decrease these costs.

Regarding the second priority, the promotion of court-sponsored diversion programs, such as the Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, and Special Options Services (SOS), would represent a significant step in addressing the United States' high incarceration rate. These programs offer a cost-effective deterrent to recidivism that would reduce or avoid prison time for the arrestees that are most likely to benefit.

In reference to the third priority, I urge the Commission to consider guideline amendments that consider technological advances in recent decades. For example, the "use of a computer" enhancement is outdated for offenses such as sex crimes that, by definition, make use of technology. Enhancements that result in additional points added to a defendant's recommended sentence can result in significant increases in prison time, thus adding to the United States' already high incarceration rate.

Finally, regarding priority 10.D, I encourage the Commission to continue studies of recidivism to assist in determining which offenders should be eligible for First Step Act Time Credits (FTCs). My understanding is that under current eligibility guidelines, some qualifying offenders, such as those convicted of drug crimes, are more likely to reoffend compared to other groups of individuals, such as sex offenders, who do not currently qualify. While I certainly respect the desire to protect innocent Americans from the potential consequences of reoffence, and I do not at all endorse drug or sex crimes, I do support the use of data to make informed decisions regarding public policy. The First Step Act will not be as effective as it could be in reducing the United States' incarceration rate if it does not apply to the groups of individuals who are most likely to benefit.

I am grateful to the Commission for considering this comment and am hopeful for
future sentencing reform that both ensures justice for victims of crimes and affords opportunity for reform and rehabilitation for those who commit them.

Sincerely,

Melissa Whatley, Ph.D.
Athens, GA

What follows is a suggestion for a possible policy priority for the amendment cycle ending May 1, 2024. My comment regards the sentencing of those convicted of crimes involving methamphetamine. The federal government has been using the purity of methamphetamine as a proxy for an individual's position within a drug distribution hierarchy. Multiple studies have shown that for years now the purity of methamphetamine is exceedingly high across all distribution levels. Numerous federal judges have commented on this problemmatic issue. In particular, Judge Lewis Brack wrote: "The point, then, of increasing a defendant's sentence based on drug purity is to punish defendants who have prominent roles in drug distribution." Because lower purity is a thing of the past, however, Judge Brack added, "The Commissions assumption regarding the connection between methamphetamine purity and criminal role is divorced from reality." The problem he wrote, is "that the sentencing guidelines would treat the average individual as a kingpin or leader, even though that is simply not true." This fallacious notion has resulted and continues to result in defendants being sentenced to longer prison sentences than they otherwise would. The Sentencing Commission should reflect in its guidelines recommendations the widely acknowleded reality regarding universal methamphetamine purity and eliminate these enhanced sentences. The changes - in the interest of fairness - should be made retroactive and give relief to those languishing in prison unnecessarily.

Sincerely,

James R. Helms Jr.

[illegible]

[illegible]

Mike [illegible]

[illegible]

Mark Ramsey

Andrew Williams

[illegible]

James [illegible]

[illegible]

Macon Fragale

Sammy Fragale

SEVON THOMAS

From: ~^! ABRAMIAN, ~^!ARNO
Subject: [External] ***Request to Staff*** ABRAMIAN, ARNO, [redacted], VVM-B-L
Date: Wednesday, June 28, 2023 2:34:51 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:
Inmate Work Assignment: NA

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

the sentencing guidelines are designed for severe harsh commitments with no room for alternative sentence. its designed ONLY for a direct trip to federal prison. bop policy has major defects within itself. anyone with a immigration detainer (civil) cannot earn any time of their sentence to parole/release early. no RDAP, no crucial programs to better themselves. also, some immigration detainers are unwarranted. meaning, a person may have been deported or deportable, but not removable because the country of origin has NO diplomatic relationship with united states of America. such countries as Cuba, Iran, Vietnam, North Korea etc. the BOP can engage in these area and allow inmates to participate with crucial programs and allow the inmates to benefit with the time of their sentence, specially the inmates who will be released back into the U.S. just like a U.S. citizen would. Not all immigration detainers are the same. Regardless of the division between a person who just has no papers is not a reason to deprive with earning time off. its not a crime for not being legal. in addition, BOP has created the PATTERN score to see who is HIGH recividsm MEDIUM, LOW or MINIMUM. HIGH and Medium do not earn credits towards their release date. it only banks it for the future "if" it happens to move lower. the sysytem is designed for it not move or even move att all. there is not a method pr anything an inmates can do to foucus only on that. Every inmates should be able to earn time of thier sentence as an incentive to better themselves for their release regardless. This all starts from the courts and needs to be addressed.

From: ~^! AGUIAR, ~^!STEPHEN <[REDACTED]
Sent: Wednesday, June 28, 2023 2:08 PM
Subject: [External] ***Request to Staff*** AGUIAR, STEPHEN, [REDACTED], DEV-J-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: Sentencing Commission
Inmate Work Assignment: Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear United States Sentencing Commission:

I am a prisoner serving a 360 month sentence under U.S.S.G. Section 4B1.1 for a non-violent drug conspiracy offense having been convicted in 2011. I wish to propose to this Sentencing Commission the possibility of two amendments to be considered for the 2024 year for Career Offenders. It is my view that such an amendment is overdue and pray that this Commission will consider it with a provision that implies the amendment to be applicable on a case by case basis:

***** IMPLEMENT A RETROACTIVELY-APPLICABLE AMENDMENT TO THE UNITED STATES SENTENCING GUIDELINES ALLOWING A TWO OFFENSE LEVEL DECREASE FOR ALL NON-VIOLENT CAREER OFFENDERS UNDER U.S.S.G. SECTION 4B1.1; OR

***** IMPLEMENT A RETROACTIVELY-APPLICABLE AMENDMENT TO THE UNITED STATES SENTENCING GUIDELINES ALLOWING A TWO OFFENSE LEVEL DECREASE FOR CAREER OFFENDERS CONVICTED OF AND SENTENCED FOR NON-VIOLENT CONTROLLED SUBSTANCE OFFENSES UNDER U.S.S.G. 4B1.1 LIMITED TO ONLY THOSE PRISONERS CONVICTED OF NON-VIOLENT CONTROLLED SUBSTANCE OFFENES WHO WERE PREVIOUSLY PRECLUDED OF RECEIVING THE BENEFIT OF AMENDMENT 782 BECAUSE OF HIS OR HER CAREER OFFENDER STATUS.

Thank you for your time and consideration concerning this matter.

Respectfully submitted,

/s/ Stephen Aguiar
Stephen Aguiar
[REDACTED]
FMC Devens

From: ~^! ARCHULETA, ~^!NATHAN
Subject: [External] ***Request to Staff*** ARCHULETA, NATHAN, [REDACTED], SHE-B-R
Date: Wednesday, July 26, 2023 1:19:48 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: whom it may concern
Inmate Work Assignment: rec

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing this in regards to the constant lockdowns due to staff shortages at FCI sheridan. It not only keeps us in our cells for un-nessesssayr reasons but out educationalprograms and our First Step Act (FSA) classes are being affected.There are hardly any FSA programs being provided to us due to lack of staff. The inmates taing G.E.D or E.S.L classes are not being given a constant school schedules and are not getting enough teaching hours to pass these tests. All vocational training is obsolete.This is not fair to us trying to further our education or reduce our recidivism levels so we can return to society with skills to succeed. They refuse to return back to normal procedures and Recreation hours are being denied to us so our right to stay healthy and get sunshine is reduced they have done away with our weekend recreation cuz of staff shortages yet we still are locked down during the week. Our visits are still on covid protocols so we only get one day every two weeks to see our families even if they travel long distances to see us , bathroom and food is denied by guards forcing families with small children to have to leave early cuz they are hungry or need the rest room. There excuse for doing so now is staff shortages or because they cant get a handle on drugs in the facility which has more to do with them being horrible at there jobs and punishing everyone and there families for there incompentence. First FCI sheridans excuse for violating our rights was thru covid procedures now the new excuse is staff shortages yet they make no moves to teach the classes that would help reduce prison population and thats because they dont care about rebilitation only incarceration. The medical medical department is so understaffed there has been deaths due to lack of staff and incompetence with there medical department. It took them 7 months to get someone to take blood samples from people and this slows down the process for programs like the much needed M.A.T program thats helping people with there drug addictions. IT also makes it impossible for people with cancer or blood deseases like HepC or other conditions that need monitoring. We are tired of not being given to access to the programs congress has put forth for us to us to come home sooner and with the skills to stay ffree.The administration process for dealing with our complaints or staff wrong doings is a joke. The facility doesnt even bother to respond to our complaints and is only in place to take so much time to process people give up and thats what its designed to do with the BP8's and BP9's being dealt with by the same people ur writing up. Region is no better they dont awnser our BP10's they dont follow there own procedures and time limits and dont respond back half the time either or follow up on wrong doing by there officers. Our families call and make complaints and there calls are ignored or go un awnsered. When we address the problem to the warden hear or the captain we are retaliated against with our cells being trashed or personal property being destroyed

From: ~^! AVALOS, ~^!JOSE [redacted]
Sent: Friday, June 30, 2023 6:10 PM
Subject: [External] ***Request to Staff*** AVALOS, JOSE, [redacted], LEE-E-A

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: Comment RE:2024 Amendment

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am currently serving a 360 month sentence for a possession with intent to distribute 1.3 kilograms of methamphetamine (Actual) charge. I had one co-defendant, my brother, whom tried to take full responsibility for the drugs found in an apartment in my name. I did not live there and no witness testified against me. My brother took a plea and was sentenced to 168 months for the exact same conduct and in fact was also found guilty for felon in possession under 922(g). I on the other hand proceeded to trial that is guaranteed to me by the constitution but was sentenced to a term of imprisonment more than twice my brothers. I was deemed a career offender under a crime that is not qualifying under the current amendment that was passed in 2016 (Amendment 798). Although, the guidelines are changing for others and I'm happy for that it does people like me no good because they are not retroactive.
One thing sticks with me today, was how my judge stated that she is a guideline judge and will not deviate from them. My guidelines were 360-life. So unless in her eyes they are changed retroactively then I will not be released any time soon. Please make some of the past amendments retroactive, failing to do so is creating a disparity in sentencing that is no longer warranted. Thank you.

From: ~^! AYELOTAN, ~^!OLADIMEJI SEUN
Subject: [External] ***Request to Staff*** AYELOTAN, OLADIMEJI, [redacted], THP-C-B
Date: Friday, June 30, 2023 2:49:40 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: Sentencing Commission
Inmate Work Assignment: Inmate Companion

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Good Day,

As an individual serving a 95 years sentence for a non-violence offense (Financial Fraud) and a first time offender, I'll suggest an application note at the very least recommending downward departure from normal guidelines similar to the safety valve in situation similar to mine.

I will also recommend eliminating the enhancement from intended loss amount in fraud cases as its not based on fact, but rather off of subjective interpretation or "guess work." This could theoretically violate due process, because it implicate a liberty interest, i.e.. Additional prison time from enhancements, for a non existent loss which never occurred. The supreme court has held multiple times that it's not the court's job to litigate theoretical harm which "could have" or "hypothetically" could have occurred. In my case, I received a 22 level enhancement because of this issue.

Thank you for any consideration and assistance with this matter.

From: ~^! BAKER, ~^!HOWARD [redacted]>
Sent: Wednesday, June 28, 2023 5:21 PM
Subject: [External] ***Request to Staff*** BAKER, HOWARD, [redacted], MEN-A-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: carlton w.reeves
Inmate Work Assignment: n/a

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

ill like to send my comment and suggestion for the 2024 cycle proposed amendment dealing with the career offenders..

my comment: I been in the federal system for 14 years and every year the commission talk about looking into the career offender guideline but nothing never happen so i really hope this will be the year that change may come dealing with the career offender guidelines..

my suggestion: is that the sentence commission look into changing the way the career offender guideline is use and worded this is what i mean..

Its states if a person has been convicted of a crime that is punishable with a minimum of 1 year max of 10 years of more in jail that case may be use to career a person. But many people have received probation and haven't been sentence to any jail time or serve under a year in the county jail, yet that conviction is able to be use due to the wording of the career offender guideline-.so maybe you can implement causes that a person received probation can not be use to career a person..i think this would solve a really big problem with people being sentence as a career offender.. I am sure the commission know this issue and may have looked into this but nothing has been done to better the career offender guideline dealing with this matter. If the commission hasn't not ill like to bring it your attention and if these changes are made can you make them retroactive..

Thank you for taking time to read my message: HOWARD BAKER

From: ~^! BALL, ~^!WILLIAM BRINSON
Subject: [External] ***Request to Staff*** BALL, WILLIAM, [redacted], COL-A-A
Date: Wednesday, June 28, 2023 1:34:54 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: Sentencing Commission
Inmate Work Assignment: A-1 Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To the United States Sentencing Commission,

Please consider revising the current guidelines for U.S.S.G. 2G2.2. As evidenced in the 2012 report for non-production child pornography offenders, 2G2.2 has shown to be outmoded. The computer enhancement, for example, applies to almost 100% of today's offenders. And due to the advent of increased storage, almost all offenders will cap out at over 600 images. As such, the guidelines as amended (largely by Congress) have been rendered largely irrelevant.

To further this argument, and as highlighted in confirmation hearings for Justice Ketanji Brown Jackson, a preponderance of sentencing judges vary downward for first-time, non-contact child pornography offenders. Defense attorneys object to these enhancements at countless sentencing hearings, and published opinions on the matter go back as far as United States v. Dorvee, Second Circuit, in 2010 (comparing 2G2.2 to Kimbrough and crack-to-cocaine disparities). Thus, I respectfully request the Sentencing Commission, to the extent not constricted by Congress, to consider judges' decisions to downwardly depart as additional evidence for the need to revise the 2G2.2 Guidelines.

Last, I respectfully request the Sentencing Commission to consider fewer restrictions on the types and classes of offenders that will, prospectively, be considered ineligible to apply USSG amendments. Despite the fact that the November 2023 amendments have yet to be published (and apart from the retroactivity issue), most prisoners understand it is a foregone conclusion that large swaths of offenders will be ineligible for this year's and future amendments.

I believe such a wholesale restriction on eligibility goes against the core tenet of criminal justice reform. There are many offenders who do things repugnant to society, and who violate the trust of those they love. Yet society has said there should be no second chances for these people. But what if you were to suddenly find your loved one accused of possession of child pornography? Does everything before their arrest become a lie? Does everything after their incarceration worthless? That is the effect of the term"certain offences." It creates a system that some are more redeemable than others.

Thank you for considering my requests.

W. Ball

From: ~^! BALLARD, ~^!JOHN MARVIN
Subject: [External] ***Request to Staff*** BALLARD, JOHN, [redacted], BUT-M-A
Date: Thursday, June 29, 2023 1:19:48 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: Carlton W. Reeves, Chair
Inmate Work Assignment: ChapOffW and OrdMDAW

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Chairman Reeves,

Thank you for giving us the opportunity to make comments about the Sentencing Guidelines. I hereby submit my comments and suggestions for the commission to consider.

First off, since their inception, the guidelines have become much more severe -- progressively increasing in punishment over the years without justification. I suggest that the guidelines turn back the clock to the levels in place when they were devised. There is no reason that they should have become more punitive. All this has done was fill the prisons with people languishing unnecessarily. Believe me, a sentence of one year is no different to me than 20 years. It is still a deterrent (at least to me).

I also believe that the guidelines should be simplified. All the enhancements should be unnecessary. Make it simple by saying if you commit this crime, then this is what you possibly will get. Two levels here and one level there, etc., really are irrelevant. Make it based on the crime -- period.

I also suggest that in the cases of pedophilic related offenses, that there should be court-sponsored diversion and alternatives-to-incarceration (especially in photo related offenses) available which focus on TREATMENT. Treatment WORKS! It should be an alternative to incarceration (especially considering that many are kept in a county jail pretrial for years). Prison doesn't help. This should also take into consideration that the guidelines OVERSTATE the recidivism rate for sex offenders. Please consider the latest evidence (I believe it is an 80-year study on sex offense recidivism done in Canada) which shows that recidivism rates for sex offenses is EXTREMELY low.

I hope that the future for this country is much more humane and better for society. Believe me, I am for punishment, but the punishment should fit the crime. We, as a nation, incarcerate people for far too long compared to other nations. Please consider my suggestions and make the decisions which make things more in line with the world.

Thank you for allowing me the time.

John Ballard

From: ~^! BAUM, ~^!TIMOTHY ADAM
Subject: [External] ***Request to Staff*** BAUM, TIMOTHY, [REDACTED], SEA-A-A
Date: Thursday, June 29, 2023 6:05:27 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: Sentencing Comm. Chairman
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Sir,

Greetings! These comments are really directed generally to all that the Sentencing Commission Does. It was quite a disappointment as I followed the Sentencing Commissions decisions to finally do something about " Acquitted/Uncharged Conduct" as it relates to sentencing enhancements. From the outside looking in it appeared to be a game of "hot potatoes between the Sentencing Commission and the Supreme Court. Honestly, how hard is it to recognize that adding points and the corresponding time in prison to someone's sentence based upon something that person has been acquitted of, or never charged for, is a Constitutional violation. Are you familiar with "due process" and what that entails. When a sanctioning body uses a relatively non existent standard of proof, that violates a persons right to be sanctioned only for what they have been lawfully convicted of. In this case, this minimum standard of proof takes away the very right to liberty that is supposed to be sacred and protected by the U.S. Constitution. The bottom line is this. Those members of the Sentencing Commission are charged with keeping the playing field as fair as possible. Allowing this practice to continue completely negates the purposes of your organization. Then, after convincing the Supreme Court to hold off taking up the pending cases that address this matter, the Sentencing Commission tables it for the year. Here is how it appears. The Sentencing Commission knows that this practice is wrong and Constitutionally unviable. The Sentencing Commission knows that this practice has affected a great many cases, and therefore they do not want to invite an avalanche of paperwork that will surely flood the District/Appellate Court System. The bottom line is this. We have a Supreme Court that is very much interested in righting many of these policies that have been birthed into a system of overzealous and politically motivated politicians. My whole comment today revolves around one request: SENTENCING COMMISSION, STOP BEING POLITICALLY MOTIVATED. DO WHAT IS RIGHT AND JUST FOR A CHANGE!!

Sincerely,
Timothy A. Baum
[REDACTED]

From: ~^! BERGER, ~^!JOSEPH PAUL
Subject: [External] ***Request to Staff*** BERGER, JOSEPH, [redacted], PHL-D-S
Date: Friday, June 30, 2023 2:05:42 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:
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Current guidelines do not allow for a downward variance or departure for a history of community service or philanthropy. I believe this is contrary to title 18 U.S.C. subsection 3553(a) which stipulates that the "history and characteristics of the defendant" should be taken into account during sentencing. The sentencing guidelines should be updated to allow for a downward departure or variance for a history of community service.

From: ~^! BEST, ~^!MICHELLE RENEE
Subject: [External] ***Request to Staff*** BEST, MICHELLE, [redacted], HAF-K-A
Date: Wednesday, July 26, 2023 1:05:51 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: USSC
Inmate Work Assignment: Medical

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am currently serving a 30 year sentence for something i should not have been held liable for. I was allegedly involved in a drug conspiracy and was charged with a distribution that caused an overdose death. The supply chain went like this A(My supplier) B (me in SC at time) - C(codefendant) - D (perpetrator who served victim) E(victim). So out of this supply chain the only one who was indicted on the bodily injury was me person B. I had nothing to do with it nor did they find anything linking me. The prosecutor said at sentencing because i was 3rd in supply chain i was most culpable, but wouldn't that make person A more liable then me if that was the reasoning. All 3 others in supply chain did 2-4 years i am still in prion with a outdate of 2044. My criminal history was a 2 when i got this charge lower than the others involved. Prison serves no purpose but to recycle govt money so it is legal. There is no work programs here, the classes are a joke. I could thrive being on home confinement and save the tax payers over a million dollars,by doing so. If the others involved are not a threat to society there is no possible way i am. But yet i am here still. The BOP refuses to send me to a camp even though my recidivism is a minimum as well as my security level but because of my time they keep me here and do not follow BOP policy. I think the commission should focus on more of home confinement for people with lower criminal history and lower recidivism. I am 48 years old and have no plans involving myself in any criminal activity when i get released. Being here does nothing for anybody. I know my actions were wrong but they were no more worse than others involved, actually was less involved or not involved at all. I think the commission should also not be able to give enhancements for dismissed charges, or able to give them if not found by a grand jury. I also think that ghost dope should not be allowed. I have been at SFF Hazelton for over 4 years and have no incident reports worked continuously and programmed. The BOP is actually bigger drug dealers then i ever was. I don't know the exact statistics but pry 90% of inmates receive medication from medical and sell it once they get it monthly.

From: ~^! BIGELOW, ~^!GORDON
Subject: [External] ***Request to Staff*** BIGELOW, GORDON, [redacted], JES-A-B
Date: Friday, July 14, 2023 9:19:57 AM

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: U.S. Sentencing Commission
Inmate Work Assignment: Safety

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

BAC2210-40
Hello,
Referencing Priority #3, please consider removing the "use of a computer" enhancement that is attached to most Sex Offense cases. This would help bring the guidelines more in line with the current practice of Federal District Court Judges
Also, removing the enhancement for the number of pictures. One download could easily have more than 600 pictures, especially if one video = X number of pictures.

Referencing Priority #10, please research recidivism and then compare it to the 67 offenses excluded from receiving First Step Act Time Credits (FTCs). Most of the excluded offenses have a significantly lower recidivism rate than those approved for FTCs. Also, in it's current state, it violates the Due Process Clause of the 5th Amendment to categorically exclude those offenders from equal treatment by the justice system.
Presenting a report to Congress and the Public on rehabilitation and recidivism of those incarcerated for offenses under the 67 sections relative to those incarcerated for FTC eligible offenses would provide useful data-driven information to lawmakers, actors in the state and federal legal systems and the public to know

Thank you for your time.

From: ~^! BOLTON, ~^!BENJAMIN
Subject: [External] ***Request to Staff*** BOLTON, BENJAMIN, [redacted], MCK-D-A
Date: Thursday, June 29, 2023 10:05:19 AM

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: Carlton Reeves
Inmate Work Assignment: Compound

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Pursuant to the recent posting about United States Sentencing Commission amendments for this cycle, this email includes ideations regarding policy changes that need to occur. The scope and purpose of such amendments is based on the judicial philosophies pertaining to our criminal justice system's goals; which are deterrence, rehabilitation, incapacitation and retribution. The difficult to accept truth by Congress et al. is that the Sentencing Reform Act of 1984 is atrocious when it comes to distributions of justice. Case in point, the Sentencing Reform Act of 1984 is way too punitive and outdated. Legal recourse, especially in our courts and correctional services, is based on the evolution of law. Apparently, Congress and many entities in the private sector have mistaken this or forgotten about it altogether.

The following suggested amendments are general and specific:

Amend the definition of violent crimes. Violent crimes ought to be behavior that results is physical harm or death. Threatening language is not inherently violent and excited utterances without actions are simply words that may hurt people's feelings.

Amend the United States Sentencing Guidelines' Chapter 4 and Chapter 5. The career offender and armed career offender system is way too broad and punitive. The fact is that most offenders and lay people can be considered to be career offenders given the structure of society. Also, the use of the prior criminal history is outrageous when it comes to acquiring justice. Using a lousy mathematical scheme to place a person in a category suggests that an individual's past can be calculated to understand who they are at the time they were sentenced for a current offense. Additionally, it says terrible things about our justice system when people finish sentences and still have them used against them in a court of law and while in prison. The criminal history points and categories in Chapter 4 needs to be eliminated entirely from the Guidelines.

Amend the Chapter 5 sentencing chart. Whoever thought that a chart could be better than Presidentially appointed and Senate confirmed judge's discretion is out of place when it comes to their understanding of justice. The chart needs to be eliminated in its entirety and the discretion of judges needs to be the main utility when sentencing occurs.

Supervised release is something else that needs to be restructured. Double sentencing an offender is double jeopardy is some sense. The lengths of sentences are too long and the probation officers are mostly incompetent people who strive to be law enforcers rather than social workers who want to help offenders transition into society. Case in point, the supervised release system is an enormous waste of money and needs to be taken out of the federal system altogether as well.

Mandatory minimums are extremely punitive and need to be removed from the Guidelines.

The Bureau of Prisons currently offers little to no programming that is effective. Most of the programs have little incentive to participate in and the ones that do exist and appear to be made for elementary children or some disabled person who has cognitive issues. Moreover, the people who work in federal prisons tend to be inept to the laws that they are upholding and purpose of their position. Many prisons these days simply serve as places of employment because the automobile and other manufacturing jobs barely exist. Thus, causing a unnecessary reliance on punitive outputs of justice in the United States.

Residential Reentry Centers need to give out more time for offenders, a minimum of six months, that is, and actually employ social workers who can achieve reentry goals. Again, these places appear to serve as only places of employment for the public at large.

Thank you,

Benjamin J. Bolton, M.S.

June 18, 2023

Gregory Bonnie

S.C.P. Williamsburg
P.O. Box 380
Salters, SC 29590

United States Sentencing Commission
Public Affairs Priorities Comment
One Columbus Ave, NE Suite 2-500
Washingtion, DC 20002-8002

I request the U.S.S.C. examine the Federal Bureau of Prisons application of 18 U.S.C. § 3584(c). This statue continues to be used to negate the First Step Act, over incarcerate and shows complete disregard for 18 U.S.C. § 3583(e), U.S.S.G. 7B1.3(F) and 18 U.S.C. § 3553(a).

I have enclosed a six page document that explains the negative effects 18 U.S.C. § 3584(c) has on rehabilitation and the length of incarceration.

Please take a moment of your time to review the document provided. I thank you in advance for your time and cosideration.

Respectfully,

Gregory Bonnie

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Gregory Allen Bonnie, [redacted]
Petitioner,

vs.

Warden Dunbar,
Respondent.

PETITION FOR WRIT OF HABEAS COURPUS
PURSUANT TO 28 U.S.C. § 2241

The petitioner Gregory Allen Bonnie moves Pro-se under 28 U.S.C. § 2241 to challenge the Federal Bureau of Prisons interpretation of 18 U.S.C. § 3584(c) and the denial of First Step Act (FSA) "time credits".

Petitioner has exhausted the FBOP Administrative Remedy Process on two seperate occasions, Exhibit's (A & B). Because petitioner is acting pro-se, he prays this court will liberally construe his petition.

A petition seeking habeas relief under 28 U.S.C. § 2241 is appropriate if the petitioner is challenging the fact or duration of his confinement. Here, the subject of petitioner's request for habeas relief falls squarely within the ambit of 2241 because he is not attacking his underlying conviction, but only the length of his 24 month Supervised Release Violation (SRV) sentence as calculated by the FBOP and the fact that the FBOP will not allow him to earn FSA time credits and possible earlier release from his 120 month Post - FSA "eligible" sentence.

Background

October 2005, Petitioner was convicted of a Federal Narcotics Offense and a 924(c) Firearms offense, Docket No. 2:04-CR-546(1). Petitioner was sentenced to a 120 month term of imprisonment and 8 years of supervised release for the narcotics

offense. Petitioner was also sentenced to a 60 month term of imprisonment for the 924(c) firearms offense with 5 years of supervised release to follow. The terms of imprisonment were mandated by statue consecutive to one another. Petitioner's terms of supervised release were ran concurrent for a total supervised release term of 8 years. Petitioner remained incarcerated in the Federal Bureau of Prisons (FBOP) for approximately 13 years and was released via good conduct time (GCT) June 6, 2017. These are petitioner's PRIOR convictions and will be referenced as the (old case).

October 2018, Petitioner violated the terms of his supervised release, (old case). Petitioner was subsequently indicted on new federal narcotic offenses, ie the (new case) Docket No. 2:19-cr-00060-DCN-3.

April 2021, Petitioner was sentenced to a 120 month term of imprisonment and 5 years of supervised release for the (new case). Petitioner was also sentenced to a 24 month term of imprisonment for petitioner's supervised release violation, ie (old case). These sentences were ordered consecutive to one another. Each of these sentences are assigned to seperate judgment and commitment orders. Exhibits (C & D).

Discussion

Petitioner was committed to the FBOP July 7, 2021. Petitioner has a 120 month First Step Act (FSA) "Eligible" sentence.

Petitioner also has a 24 month Supervised Release Violation (SRV) "Ineligible" sentence.

Because the FBOP incorrectly interprets 18 U.S.C. § 3584(C), petitioner is being denied FSA "Time Credits". Time credits that will reduce the petitioner's sentence by 12 months. The FBOP has "aggregated" petitioner's 120 month FSA "Eligible" sentence with his 24 month FSA "Ineligible" sentence, to render petitioner FSA "Ineligible" for the entire 144 month aggregated term of imprisonment.

Petitioner agrees with the fact that the FBOP does have the authority to aggregate two sentences for administrative purposes. However, the petitioner can not serve a term of imprisonment that exceeds the statutory maximum of five years for his SRV. There must be a starting point and stopping point for petitioners 24 month SRV, or the FBOP will incarcerate the petitioner beyond the statutory maximum sentence permitted by law.

ISSUE ONE

December 2018 Congress enacted the FSA. The FSA allows "eligible" inmates to earn time credits for participation in Evidence Based Recidivism Reduction Programs (EBRR's) and Productive Activities. Pursuant to the FSA, petitioner is "eligible" to earn time credits for his 120 month sentence. Petitioner is "ineligible" to earn time credits for his 24 month supervised release violation. According to the FBOP's determination, petitioner is "ineligible" to earn time credits at all. The FBOP has used 18 U.S.C. § 3584(c) which pre-dates the FSA by approximately 36 years to make this determination. FBOP's interpretation of 18 U.S.C. § 3584(c) is incorrect and rest on a predicate legal error an erroneous construction of § 3584(c) and is therefore "invalid".

Nothing in the language of the statue supports the FBOP's position that § 3584(c) requires it to treat the aggregate term of incarceration as fully applicable to each count of conviction that is, to treat the petitioner as if he is serving, in effect, concurrent sentences on each conviction that are each equal to the total term of imprisonment. Such reading makes no sense, because it would regularly attribute to an individual offense of conviction a total sentence that would exceed the statutory maximum for that offense. Under the BOP's view, the petitioner is serving a 24 month supervised release violation from 2018 until 2029 even though the statutory maximum term of imprisonment for a Class A supervised release violation is five (5) years (18 U.S.C. § 3583(e)(3). A reading of § 3584(c) that would produce such a legally flawed result cannot be correct.

Indeed, nothing in the language of FSA suggests that the statue says anything about the relationship between an aggregated term of imprisonment and each constituent individual charge that produced it. On the contrary, the clear import of the FSA is that an individual may earn FSA time credits if his sentence is "Eligible". Assigning portions of a total term of incarceration to specified offenses is not an "administrative purpose," it is a judicial function performed at sentencing.

The FSA nor Section 3584(c) speak to the charge - allocation issue and it does not replace the court's allocation, as reflected in the sentencing orders, with concurrent, identical aggregate sentences on each and every charge.

Petitioner was sentenced to two seperate terms of imprisonment ordered in two seperate judgments. At no time did the Court order petitioner's sentences "together". In fact, in both judgments the court ordered petitioner's sentences consecutive to one another. This was ordered by the court to comport with U.S.S.G. 7B1.3(f), 18 U.S.C. § 3553(a) and 3583(e). Sentencing Transcript (Exhibit E).

Petitioner would like to provide the court with two scenarios for consideration:

1. If petitioner committed a drug offense and a 924(c) offense and was sentenced at the same time (with one judgment), it would be acceptable for the FBOP to aggregate these sentence because the statutory maximum term or imprisonment for neither offense would ever be exceeded.

2. If petitioner was sentenced to his new 120 month sentence and also sentenced to "one" day for his supervised release violation. Would petitioner <u>serve</u> that "one" day for 120 months?

ISSUE TWO

The FBOP stands on it's position that multiple sentences are aggregated in accordance with 18 U.S.C. § 3584(c). Although, the

FBOP has chosen which class of people it chooses to enforce it's aggregation practice upon. This is unconstitutional and discrimatory to the petitioner. FBOP's Program Statement: 5140 42 Cn-1 Date: 4/19/19 Transfer of offenders to or from Foreign Countries reads :(d) "The inmate is a Mexican citizen or national who is "currently" serving a sentence for committing an immigration offense, unless he/she is serving a sentence for multiple offenses and the immigration portion of the sentence has already been served".

For clarity, in order to be "eligible" for a treaty transfer a non - US citizen must serve a portion of his/her multiple (supposedly aggregated sentences). But the petitioner whom is a US citizen is told he cannot earn FSA time credits for the 120 month "eligible" portion of his multiple sentences Why is this?

CONCLUSION

Due to the FBOP's erroneous interpretation of § 3584(c) the petitioner is losing approximately 15 days a month of "time credits" that can be applied to petitioner's release from custody. If § 3584(c) were set aside and his two sentences were tracked separately. Petitioner would earn "time credits" for his 120 month FSA "eligible" sentence, in accordance with the Congressional intent of the FSA. It is clear that once the FBOP's legal error concerning § 3584(c) is corrected, petitioner will begin to earn time credits for his FSA "eligible" sentence

Petitioner asks this court to not allow him to serve a term of imprisonment that is greater than the statutory maximum sentence for a Class A supervised release violation. The only way to avoid this, is for the FBOP to dedicate a starting date and stopping date for petitioner's SRV When this function is administered the petitioner will not serve a term of imprisonment that exceeds 18 U S C. § 3583(e)(3).

Petitioner also requests appointment of counsel to better articulate the procedural aspects of this petition and any responses that may follow Petitioner is an indigent pro-se litigant with no knowledge of the legal rules governing Habeas Petitions

Respectfully submitted this 23rd Day of March 2023.

I declare, certify, verify, and state under the penalty of perjury that the foregoing is true and correct

By:____________

Gregory Allen Bonnie
[redacted]
SCP Williamsbug
P.O Box 380
Salters SC 29590

From: ~^! BRADDY, ~^!JOSEPH [redacted]
Sent: Sunday, July 16, 2023 5:44 PM
Subject: [External] ***Request to Staff*** BRADDY, JOSEPH, [redacted], FTD-W-C

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

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am very pleased to be able to provide public comment on the upcoming policy priorities for the amendment cycle ending May 1, 2024. Like last year, I feel you have a very good list of priorities and are focusing in the areas that have opportunities for positive change.

The priority that I want to focus on and provide public comment is on priority number 5. Priority #5 is the continued examination of the career offender guidelines. I believe this is an area that seems to be a moving target and has wide ranges in sentences with people that have the same crime. Furthermore, whenever there is a case that has a potential positive impact on inmates with career offender status, they make sure the case is not retroactive. All of this creates a very large opportunity for the sentencing commission to real in these guidelines and create consistency throughout this country. As you do this, I do have a request. Please make sure you make sure that "non-violent" criminals gets the breaks on the guidelines. If someone is a career offender with violent crimes, I understand the need of protecting the public. However there are far too many non-violent "career offenders" that are suffering. This includes me. Thank you for listening and I look forward to see how this progresses.

From: ~^! BRADSHAW, ~^!JOSEPH
Subject: [External] ***Request to Staff*** BRADSHAW, JOSEPH, [redacted] SST-F-A
Date: Thursday, June 29, 2023 8:49:50 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:
Inmate Work Assignment: warehouse

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To whom it may concern.
Can you address "Aquitted conduct" next year. It's unconstitutional and has been going on too long. Please and thank you.

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Betty Brady

Topics:

3. Simplification/Structural Reform

Comments:

It has come to my citizen attention that "state guidelines for incarcerated individuals" received credit to their sentencing due to covid restrictions while in prison "yet" federal guidelines for federal incarcerated "did not receive" credit to their sentencing due to covid restrictions "which were just as harsh", federal and state prisoners should have equal footing in reduction of their sentencing across both prison guideline systems. Please look into this unfair covid situation and correct the situation. You are the Sentencing Guideline Commission and should be aware that all inhumane covid conditions were present in both prison atmospheres.

Submitted on: July 19, 2023

From: ~^! BURNS, ~^!JACOB RICHARD [redacted]
Sent: Wednesday, June 28, 2023 4:07 PM
Subject: [External] ***Request to Staff*** BURNS, JACOB, [redacted], GRE-A-A

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: Whom It May Concern
Inmate Work Assignment: HVAC 1

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I was sentenced under the "Career Offender Guidelines" in 2018. I was a low level meth dealer that was caught with 169.7 grams and the Judge even commented in my "Statement of Reasons" that I was not a big player and was only involved for a short period of time. I was "Careered" because of two very low level priors, which one of them should never have been able to be used to catagorize me into the Career catagory which was suppose to be used to get big time cartel bosses or drug lords. There are so many of people incarcerated for obscene amounts of time for small amounts of meth that cost literally close to nothing on the streets. 50 Grams of meth triggers a 10 year mandatory minimum sentence and at a street level the price of that is literally $300 to $500. Over the past 15 years something that will automatically get you 10 years isn't much more than a user amount. I feel like simple drug addicts that use meth have been unjustly sentenced. How is it that I would have to get caught with 16,970 grams of cocaine to be in the same amount of trouble? If I was a multi-million dollar coke dealer I'm in the same amount of trouble as if I get caught with a couple hundred dollars worth of meth? Please look at the lives that these guidelines have destroyed due to someone saying "This drug is worse than this anything else" Heroin I would have to get caught with 5,000 grams to trigger the same minimum as the little bit of meth that I got hit with. Please look at how full the system is of meth offenders that aren't a danger to society. I just want another shot at life and to have a family before it's too late. Thank you for your time and I hope that you understand how horribley broken the system is when it comes to meth. The "Crack Law" was the same as meth is and the Sentencing Commission found the error in that why not this? Thank you for your time.

From:	~^! BURTON, ~^!JOHN MOSES IV
Subject:	[External] ***Request to Staff*** BURTON, JOHN, [redacted], ELK-G-A
Date:	Thursday, June 29, 2023 7:34:39 AM

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: Jennifer Dukes, Senior Public Affairs Specialist
Inmate Work Assignment: .

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Attn: Public Affairs... Priority Comments

For the forthcoming 2024 guideline priorities for consideration, I respectfully draw your attention to the outdated section 2G2.2. In December 2012, the Commission proposed changes to the guidelines because of the sentence disparities. With these long pass overdue changes, I hope the Commission may reintroduce some of these proposals and/or update it further.. including the report you offered previously (https://bit.ly/3B7XPzX) (https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/).

In 2021, the Commission re-examined the above mentioned report and issued a new report entitled "Federal Sentencing of Child Pornography: non-production offenses" (2021) that reintegrated similar findings from those of nearly a decade prior. (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210629_Non-Production-P.pdf] {https://bit.ly/3m9O8gh}.

External research examined these guideline also and made their own recommendations which includes Brent E. Newon conclusions published as "A Partial Fix of a Broken Guideline: a Proposed Amendment to Section 2G2.2 of the United States Sentencing Guidelines" 70 Case W. Rsrv L Rev 53 (2019). This paper establishes a pathway that the Commission could be effective in making certain changes to the guidelines to be more equitable and reduce sentence disparities across the nation.

With this being a difficult subject but with a lot of accreditated research including this commission, I hope it is high time to impliment changes to these guidelines... and specifically, removing the Use of a Computer enhancement, and convert the number of images enhancement into a more reasonable storage range, such as gigabyte of material...

Thank you in advance for your considerations.

Respectfully

John Moses Burton
[redacted]
F.S.L. Elkton
P.O. Box 10
Lisbon, OHIO 44432-0010

From: ~^! CLARK, ~^!DARRELL
Subject: [External] ***Request to Staff*** CLARK, DARRELL, [redacted], BEN-A-B
Date: Wednesday, June 28, 2023 1:20:26 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: any
Inmate Work Assignment: compound

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

im writting to comment on the sentencing guideline for fraud where the intended loss is calculated with the actual loss i think that the sentencing should only be calculated with what was actually taken in the crime because to intend to do something is like almost doing sometheing there is no way you can intend to take something if it was not taken , i think the system is designed unequal in this matter becasue the intended loss is and will always be higher then the actual loss and that is what will give the person the most time i was given 192 months for a fraud scheme where 300,000 was my intended loss

From: ~^! CLARK, ~^!MICHAEL DENNIS
Subject: [External] ***Request to Staff*** CLARK, MICHAEL, [redacted], ENG-E-L
Date: Monday, July 17, 2023 7:50:11 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: USSC Comments
Inmate Work Assignment: Compound

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

The exclusion of all non-terrorism and national security convictions from receiving FSA credits runs counter to the general purpose of the law. Namely, to encourage inmates to participate in evidence-based recidivism reduction programs and activities, with a focus on giving convicts a stronger chance at avoiding subsequent prison sentences. The hodgepodge of enumerated offenses (gun cases, arson cases, sex offenses, etc) lacks any coherent rationale. Rather, it seems to be purely based on "politics of the moment," instead of verifiable statistical analysis. For example, individuals convicted of federal arson crimes or sex-related offenses, have some of the (if not, THE) lowest recidivism rates when compared to the first 3 years after release from prison with the numerous various drug- and gun-related offenses. The USSC can rectify this politically motivated bias that is driven primarily, as mentioned, by the "politics of the moment," by adjusting all the the non-terrorism and national security convictions that do not receive FSA credits downwards to reflect the true scope of these convictions.

From: ~^! CONGRESS, ~^!CURTIS
Subject: [External] ***Request to Staff*** CONGRESS, CURTIS, [redacted], CAA-B-B
Date: Wednesday, June 28, 2023 1:20:20 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: Sentencing Commission
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

A big issue with the sentencing guidelines is being that we are being punished for crimes that we have already been convicted for (Our Criminal history)There should be some type of correction to that. The sentencing point system doesn't help with rehabilitation. Yet, it help to give us more time than the actual offense might carry. So, my request would be to re-consider the way we are sentenced as far as the guideline/point system. Thank You

From: ~^! COOK, ~^!SANDRA
Subject: [External] ***Request to Staff*** COOK, SANDRA, [redacted], CRW-I-S
Date: Monday, July 17, 2023 3:50:01 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: Public Comment
Inmate Work Assignment: Suicide Watch

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear USSC,
I would like to suggest making the public comment forum available to inmates via a survey on TRULINCS. Most inmates do not understand the importance of their voice and the impact on their sentence. Also, most inmates do not believe that their voice will be heard. A survey would alleviate the difficult reading of the announcement. References to legal authority and code also make the reading confusing. A survey could drill down and narrow in on applicable comments as well as target the intended population demographic.

In response to the USSC request for comment, the commission enumerated eleven issues (numbered 1-11). I will number my comments to correspond with the commission's numbers.

#1. 3553 (a)(2) has four subparagraphs, numbered "A", "B", "C", and "D". I believe that subparagraphs "B" & "C" are accomplished when the detainment of the accused takes place and therefore can be included in solving paragraph A. When a person is detained so long that their entire livelihood, no matter how it was maintained, is annihilated, B & C naturally occur. Therefore I am going to comment on subparagraph "D". As you know, inmates are being warehoused and the staff to inmate ration is at a critical low that educational and recreational programs is almost non existent. An alternative to this could be more correspondence studies for higher education, a college release program and a work release program. Inmates are held decades without paying into social security, are disqualified from all types of social federal funded programs, housing, etc.. because of their crime. Once they have lived in a violent, bullying, oppressive environment, it is unrealistic for them to be placed in a halfway house and "bounce" right back into society. Prison is an unhealthy environment that is conducive to making someone worse coming out then they went in. PRISON as it is NOW, is not the answer. Especially for women. Taking away childbearing years is cruel and unusual punishment, anyway you look at it. Perhaps release programs from a different section of the prison, like honor units would be better. Halfway houses are setup for failure. It's too much of a change going from one environment to another. The digital divide alone can be overwhelming. Most inmates are drugged to maintain their sanity. Unknown to the public is how many suicides are attempted and how many inmates are drugged, just to maintain some type of sanity while living in this environment. Do not let the authorities tell you otherwise. Prison is not conducive to a normal life afterwards.

#2 See #1

#3 A sentencing table and guideline range listed per enumerated offense of group of enumerated offenses

#4 Clarify the meaning of "otherwise extensive" in the aggravating role of manager leader three point enhancement

#5 N/A

#6 N/A

#7 Making the elderly early release program available with good time and FSA credits

#8 This would be especially helpful

#9 Relevant Conduct that was known before trial should not be used at the sentencing guidelines when the government had the chance to prove or disprove such conduct. This is a work around of the guidelines

From: ~^! COOK, ~^!ZACHARY [redacted]
Sent: Thursday, July 13, 2023 8:16 AM
Subject: [External] ***Request to Staff*** COOK, ZACHARY, [redacted], OKL-C-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: Charmain
Inmate Work Assignment: N/a

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I was sentenced to 168 months for possession of 23 grams of Meth. A Career Offender Enhancement was placed on me for a possession of Marijuana (1.5 ounces) in 2015 and a Battery 2nd in 2011. I feel that Marijuana offenses should not be considered a serious drug charges being that its legal in some states and used for medical in most. without this enhancement my guidelines would have been much less. That is my opinion. Honestly the entire career offender should be done away with its horrible. Thank you.

From: ~^! COON, ~^!FRANK W
Subject: [External] ***Request to Staff*** COON, FRANK, [redacted], TRM-B-A
Date: Friday, June 30, 2023 11:19:50 AM

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: Carlton W. Reeves
Inmate Work Assignment: SLAVE

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Bureau of of prison continues to evade questions about abuse and sheer disregard for human dignity . Striped of right , failure of BOP to respond to medical need, confinement and treatment regarding the seriousness of condition. BOP administrative misconduct will not take disciplinary action against BOP employees. Prison guard Sevilla acted unethical and unprofessional, want other prisoner to beat me up when I would not fight him. Guards collaborating with gangs , harassing, threatening use of physical force to cause bodily injury , threat to physical safety. Misconduct and wrongful action of correctional officers has condemn me to life of chronic pain and deteriorating mental health.

From: ~^! COURTNEY, ~^!ROBERT RAY
Subject: [External] ***Request to Staff*** COURTNEY, ROBERT, [redacted], ENG-E-U
Date: Wednesday, June 28, 2023 5:49:31 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: Mr. Carlton Reeves, Chair
Inmate Work Assignment: Unicor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Mr. Reeves:

In the Commission's effort to "simply the Guidelines" I suggest that the Commission's new effort to "reduce by 2 levels
the guideline level for first time offenders" be made simpler by using the same criteria as what The First Step Act dictates in its determination of Eligibility for the accumulation and redemption of FSA "Time Credits."

Congress thoroughly studied the eligibility requirements for "Time Credits" before implementing the "ACT." The eligibility does not permit violent offenders, sex offenders, etc...to receive FSA Time Credits. Now that the USSC is making its determination for 2-level reductions for first-time offenders, and since the USSC's goal is to make the Guidelines simpler to use and understand, I urge the Commission to adopt the same eligibility criteria for both programs, the FSA and the 2-Point Reduction for First Time Offenders.

Please consider the confusion our families encounter when confronted with two-standards being used for their Inmate
loved ones to receive FSA Time Credits or to receive a 2-level guideline reduction for being a first-time offender.

It has taken the Bureau many months to implement FSA rehabilitation programs, to implement the FSA "Calculator", and
to use their FSA-directed PATTERN SCORING program.

With the USSC developing and implementing a new 2-level reduction for first-time offenders, it makes much since for the USSC to use the same guidelines for the 2-level reduction for first-time offeners, as what Congress (Implemented)
and passed for usage in the FSA. Not only does this suggestion make it easier for families to understand, it also makes
it easier for defense counsel and the Government to use and implement when calculating a defendant's time that will be spent in the Bureau.

Thank You Very Much for considering my idea.

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Johnny Crabtree, Parent

Topics:

11. Other Suggested Priorities

Comments:

A majority of the drug trafficking offenses involve prosecutors who charge low level drug addicts who are mostly just users with offenses designed to punish "King Pins". Many of these people are struggling, addicts who are most often homeless and selling small amounts of drugs to support their own habits. How could a homeless and struggling addict receive a sentence similar to those given to drug "King Pins" selling millions of dollars of contraband? Most of these defendants are people who had no assets or property of their own and yet they are deemed to be "King Pins" and punished with harsh sentences of 20, 30, 40, 50 years and even life sentences. Is this fair?

My son, Jeremy Lee Crabtree, is such a person. Despite the fact that he is a first time non-violent offender and the fact that his pre-sentence report stated that he was only known to buy "user amounts", he was charged as a "King Pin" and given a sentence of twenty years. We are asking the sentence commission to correct this injustice for my son and those like him by implementing changes to lower the sentences of low-level, non-violent, first-time drug offenders. Further request that the Commission, consider home confinement for non-violent, first-time drug offenders.

Jeremy Lee Crabtree is and American Veteran who loves his country. I would like to see a fair and impartial judicial system that is not rigged and that preserves the rights of defendants and victims while providing justice. I humbly request that the Commission consider promulgating reforms to eliminate this systemic corruption.

I would like to thank you for your time and consideration.

Submitted on: July 17, 2023

From: ~^! DANNON, ~^!MAHDE
Subject: [External] ***Request to Staff*** DANNON, MAHDE, [redacted], THA-J-A
Date: Friday, June 30, 2023 1:34:52 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:
Inmate Work Assignment: REC YARD

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I ask that the U.S sentencing commission takes a careful and progressive look at chapter 3 of the U.S sentencing guideline manual, specifically the chapter 3A1.4 enhancement (Also known as the "Terrorism enhancement"), the section of the enhancement calls that if the offense was calculated or intended to promote a crime of Terrorism, 12 points should be added to the original offense level and also that the criminal history category goes to VI regardless of the offenders criminal history.
I see that the enhancement is overly broad and cruel, offenders with possibly no criminal history automatically graduate to what is looked as "Career offenders" regardless of their criminal history, also the 12 points added to the offense level has been referred to as "Draconian" by multiple U.S District judges across the country.
Also to note the "Intended" language of the enhancement is overly broad and vague in some ways where the Prongs of the enhancement call for a sentencing judge to establish a factual background on applying the enhancement to include what is referred to as the "mens rea" of the offense to see if the crime was in fact committed to influence or change government conduct by intimidation or coercion.
The enhancement has affected a multitude of individuals across the country including myself and the matter is simply being overlooked where harsh sentences are being imposed, mostly reaching the statutory maximum of the offense.
I ask that the commission take a deeper approach into the enhancement and uses their discretion to fix the miscarriage of justice afflicted by the "3A1.4" enhancement.
Thank you,
If further questions needed feel free to contact me,
Mahde Dannon [redacted]
FCI Terre Haute, IN.

From: ~^! DAVIS, ~^!JOSEPH HOWARD
Subject: [External] ***Request to Staff*** DAVIS, JOSEPH, [redacted], MCK-C-A
Date: Wednesday, June 28, 2023 2:06:02 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:
Inmate Work Assignment: plumbing

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

ive been waiting for years on this acqitted conduct and you all along with the courts keep making it impossoble for people such as myself to get any help. im in here on 53grms of meth and was given 22 years this isnt justice when i was found not guilty and given this much time. thank you for the help and stuff you all are doing i know your jobs are not easy but theirs people who really need a lot of help

From: ~^! DELGADO, ~^!JONATHAN
Subject: [External] ***Request to Staff*** DELGADO, JONATHAN, [redacted], THP-C-B
Date: Friday, June 30, 2023 10:34:29 AM

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: U.S. Sentencing Commision
Inmate Work Assignment: suicide watch companion

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

They say you can tell a lot about society by how you they treat their youth/kids. In this country , our history shows us that we have failed when it comes to the issues of our youth. We put restrictions on them and tell them their to young to make decisions to smoke cigarettes, to consent to sex, to buy and drink liquor or to even own a credit card under their own name but when they commit a crime whether in an emotional state, through peer pressure or even due to past trauma and the history of their upbringing and family circumstances that they should know better. That if they could make those decisions then they should be treated like everyone else, like adults.

I've been incarcerated since the age of 23. After a trial for Rico crimes, Drug conspiracy and firearm charges I was convicted and sentenced to life in prison without the possibility of parole. The crimes which I was convicted of were crimes I committed as a juvenile. In 2020 after an appeal , my sentence was overturned due to Miller v. Alabama and Montgomery v. Louisiana and I was resentenced to the excessive sentence of 50 years with 5 years super release. That means by the time I walk out of prison I would be in my late sixties and wont be off of supervised release until I am 70. That will also mean that I have spent two times more years incarcerated then I was free.

I have shown through my rehabilitation and the attempt to better myself that I am not the same person I was when I was a juvenile. I have shown that my past immaturity and poor decisions does not define the man I am today. Since being incarcerated I have jumped at opportunities to make sure I am better then I was when I first came in. On my journey I have obtained my G.E.D. , completed the Life Connections program(faith based program), Challenge program(cognitive behavioral therapy program), Non residential D.A.P.(drug and substance abuse program), Completed over 50 + ace courses form plumbing to victims impact to money management. I have been a member of the sucice watch companion cadre program for 5 years. I created an youth outreach program which I pray I can implement one day with the hope that another youth doesnt repeat the same mistakes Ive made. Im also currently in enrolled in the Blackstone paralegel course. I have demonstrated that I am more than my past mistakes and that if given a chance(one that is more releastic) I can truly make a difference in the world.

Currently in the federal system there is no provisions for juvenile offenders. After 15 + years of cases like Miller V Alabama, Montgomery v. Louisiana, Roper v. Simmons and Graham v. Florida and contless states with protections in place for the reentry of juvenile offenders through a demenstration of rehabilitation, the ferderal system has yet to implement any such provisions that can hel aid the juvenile offender reenter society. I beleive it has been long enough and the federal system should create such a provision whether its through the parole system ir through an amendment in the Guidelines. I hope one day that the federal sytem can be more than a sytem of punishment but also a system of redemption and second chances. Please takt this into consideration. Thank you for your time and hearing my story.

From: ~^! DONNELLY, ~^!CORY S
Subject: [External] ***Request to Staff*** DONNELLY, CORY, [redacted], POL-A-A
Date: Thursday, June 29, 2023 8:50:08 AM

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: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

i believe that the criminal history should be revised. We have already served our time in state prison for our crime and some have even completed their parole for whatever they have done. why should we be judged twice for it and keep us in prison again and waste tax dollars further? The sentance we would recieve without criminal history is already stiff for us. please take into account there are people stealing millions of dollars from countless tax payers like yourself and recieve the same amount of time if not less time then someone like me who sold drugs. neither one is a victimless crime but the difference in them is the drug dealer never ment to take or hurt anyone. they were consumed in their addiction and unaware of their affect on the community. The other targeted you and your family and elderly to take what wasnt theirs. this is just one example of the unfair treatment of a drug crime compared to other types. please help us to recieve some slack somewhere in our sentancing because we desperatly need relief from extensive sentances. thank you

From: ~^! DREW, ~^!ANDRE
Subject: [External] ***Request to Staff*** DREW, ANDRE, [redacted], MAR-D-A
Date: Thursday, June 29, 2023 7:50:04 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: "Chairperson
Inmate Work Assignment: P.M. Rec.

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Two things about your latest notice cought my attention in particular: 1] reviewing sentencing as compared between sentencing issues as a result of a plea, and that as a result of trial. Even you should know that there is a significant difference in the two processes: The Courts penalize individuals who dare to go to trial by giving a defendant the maximum sentence for doing so as was done in my case. Better that this, you should consider how prosecution tips the scale in its favor by depriving a defendant of the ability to establish a defense and how they coach witnesses to insure convictions, again, as was done in my case; and the court aiding prosecutors in this effort. 2] If the Commission is serious about capping the prison population, it should consider promoting alternative programs to prison for sex offenders, as well as the amount of time sex offenders are given. Sex offenders, today, are by far the largest population in federal prisons, and the only population who get no benefit from anything the Commission or First Step Act has thus heretofore proffered; yet they are forced to participate in programs with no significant incentives as are given to others of the inmate population. A 'Blanket Excuse' for this discriminatory provision is 'Social Safety' as a mean to deny sex offenders 'Equal Treatment of the Laws'. Prison officials benefit from FSA sponsored programs more than the inmate do in that they get extra pay through the funding of each program offered to the inmates, programs that consist of inmates getting a tablet with questions to fill and that being the limit of official assistance in a program that would ordinarily last a number of weeks. It makes no sense to have programs just for the inmates to sign up for in order to get FSA benefits, if the programs aren't really going to benefit the inmates upon their release. This is not helping to institute healthy society or the inmates affected. We need REAL PROGRAMS THAT ARE DESIGN FOR SUCCESS AND NOT FOR FAILURE as are the current FSA programs. Inmates are being place of program list so as to allow funding for a particular program. What you should add to your agenda is looking into this.

From:	~^! EDGER, ~^!JOE
Subject:	[External] ***Request to Staff*** EDGER, JOE, [redacted], THP-C-B
Date:	Monday, July 10, 2023 6:49:43 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: U.S. Sentencing Commission
Inmate Work Assignment: C2 Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I would like for this commission to resolve a conflict with the definition of the phrase "offense of conviction" as there is a conflict of that definition between the United States Probation Office and the 8th Circuit Court of Appeals. The U.S.P.O. relies on the definition supplied by this agency in Section 1B1.2(a) U.S.S.G. which states that offense of conviction means i.e. (that is) "the offense conduct charged in the count of the indictment or information of which the defendant was convicted". That is in my PSR. The 8th Circuit erroneously concluded that offense of conviction "encompasses more broadly the offense conduct giving rise to the conviction, and the court may refer to the entire record of the case to determine whether a firearm is cited in the offense. The 8th Circuit did not end with "offense of conviction" on that sentence, only "offense." United States v. Edger, 2019 U.S. App. LEXIS 40388, at 4 (8th Cir. 2019) or 924 F.3d 1011, 1014 (8th Cir. 2019). I believe that the U. S. Sentencing Commission should resolve this conflict as it will impact others in the future and changed my sentencing guideline range from 41-51 months to 360 months-Life. I ended up with 360 months because the court could not give me a longer sentence. this all resolves around the phrase "cited in the offense of conviction" in Section 2K2.1(c)(1)(B) U.S.S.G. I believe if it was not cited in the indictment or information, of which I was convicted, then it does not apply. this requires the intervention of the United States Sentencing Commission. Thank you.

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Abraham Escobar

Topics:

2. Alternatives to Incarceration and Court Diversion Programs
3. Simplification/Structural Reform
5. Career Offender Guideline/Categorical Approach
7. Crime Legislation

Comments:

To the United States Sentencing Commission,

I, Abraham Escobar, am writing to express my deep concern regarding the unfair sentencing practices and the subsequent impact on families, specifically related to prison placement by the Bureau of Prisons. I believe it is crucial to address both the issue of unjust sentencing and the challenges posed by significant distances between incarcerated individuals and their families.

My father, Eduardo Castelan Prado, was recently subjected to a sentencing decision that many, including myself, perceive as unfair. The severity of the sentence imposed does not seem to adequately reflect the circumstances surrounding his case, his character, and his potential for rehabilitation. While I understand that sentencing decisions are multifaceted and complex, it is disheartening to witness the devastating consequences of what appears to be an overly punitive approach.

Moreover, the situation has been exacerbated by the Bureau of Prisons' decision to place my father in a facility that is located three hours away from our family. The significant distance has made it incredibly challenging for us to maintain regular contact and provide the support he needs during his time in prison. The long travel times and associated financial and logistical burdens have placed a tremendous strain on our family.

Studies consistently highlight the vital role of strong family connections in an individual's successful reentry into society. Regular contact with loved ones and the provision of support significantly contribute to reduced recidivism rates and positive behavior changes. Unfortunately, when incarcerated individuals are placed far away from their families, these

essential connections are severely hindered.

I, therefore, urge the United States Sentencing Commission to address the issue of unfair sentencing practices and prioritize family proximity in the Bureau of Prisons' placement decisions. While I recognize the importance of maintaining security and utilizing available resources efficiently, it is crucial to consider the impact on families when determining prison placement. Placing incarcerated individuals closer to their families would enable more frequent visitation, enhance family support, and facilitate successful rehabilitation and reintegration into society.

In light of these concerns, I recommend that the Bureau of Prisons establish policies and procedures that take into account the proximity of families during prison placement decisions. By doing so, the Bureau can help alleviate the negative consequences of long-distance placements and ensure that families can play an active role in their loved ones' rehabilitation journey. This approach aligns with the principles of fairness, justice, and the goal of fostering successful reentry into society.

Thank you for your attention to this matter. I trust that the United States Sentencing Commission will thoroughly evaluate the impact of unfair sentencing practices and prioritize family proximity in Bureau of Prisons' placement decisions. It is my hope that these efforts will contribute to a more equitable and compassionate criminal justice system.

Sincerely,

Abraham Escobar

Submitted on: July 12, 2023

From: ~^! FABRICANT, ~^!DANNY JOSEPH [redacted]
Sent: Wednesday, June 28, 2023 6:02 PM
Subject: [External] ***Request to Staff*** FABRICANT, DANNY, [redacted], VVM-D-L

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: Public Comments
Inmate Work Assignment: Med Unass

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Re: Your request for public Comments about your current and future Priorities:

As to Item 5(B) and (C), Career Offender definitions.
The current definition of "serious drug offence" should be changed from the current "punishable by more than one year" to the new definition in 21 U.S.C. section 841(b)(1)(a) and (b) enacted by the First Step Act of 2018;
" .. punishable by ten years or more .. "
" .. must have served more than one year .. " and
" .. must have occurred within 15 years .. "

If you're serious about reducing prison populations, this change should be made fully RETROACTIVE.

Another WAY OVERDUE change/amendment would be another RETROACTIVE two-level drop in the Drug Weight Chart, like the fully retroactive Amendment 782.

Another suggestion that the Commission should make to Congress would be to RETROACTIVELY change the current weights of methamphetamine triggering mandatory minimum sentences from the current 5 and 50 grams to what crack was changed to in 2010 (and finally made retroactive by the First Step Act of 2018): 28 and 280 grams.

From: ~^! FAHS, ~^!ULYSSA MARIE
Subject: [External] ***Request to Staff*** FAHS, ULYSSA, [redacted], ALI-A-B
Date: Thursday, July 13, 2023 6:19:29 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:
Inmate Work Assignment: UNICOR

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Hello. I'm writing you today on behalf of the public addressing the Proposed priorities for Amendment Cycle. First the public comment period needs to be open for 2 months not just one, due to time for public awareness and weather/mail processing time.
Our answer is :YES to all proposed priorities#1,#2,#3,#4,#5(A)(B)(C),#6,#7,#8,#9<310(A)(B)(C)(D)(E),#11; and the Public petitions for the following Amendments:
1. Home Confinement, Ankle Monitor, or alternatives-to-incarceration programs for first time offenders, low recedivism level inmates, and minimum recidivism level inmates.
2.All mandatory minimums cut ih half.
3.Youthful offenders serve no more than 3 years. Capped at 3 year sentence of incarceration, also recieve programs with therapy treatment and help recieve housing in society away from abuse.
4.All amendments retroactivity, effective immediatly for both inmates already incarcerated in the prison system and new inmates to be sentenced.
Reasons:
The public sees an extreme need to reduce costs of incarceration and the mass incarceration causing overcapacity of prisons.
On proposed priorities #2 and #3:
We petition for home conefinement, ankle monitor, or alternatives-to-incarceration programs for first time offenders, low recedivism level inmates, and minimum recedivism level inmates. This will drastically reduce costs of incarceration and overcapacity of prisons. Thus solving many National issues. As of May 27,2023 B.O.P. has placed 13,204 people into Home conefinement under CARES act. As of May 1,2023 only 22 people of the 13,204 re-offended. That's a very clear answer, it is an effective tool that has proven to have worked over the past 2 years since the enactment of the CARES act.
The average housing cost of a single inmate per year is $50,000. That is far too much, especially with the nations failing economy verses the average home confinement cost of a single inmate per year is only $5,000 per year. Switching to home confinement for first time offenders, low recedivism level inmates, and minimum recedivism level inmates will save the nation millions possible bollions of dollars. The home confinement inmates will be able to work jobs to support themselves and pay taxes. They will be contributing to helping our nation and being productive members of society.
Too much money is poured into the prison system causing mass incarceration because the officials see more prisoners as more money in their pockets (Greed). How do we fix it? By placing more inmates on home confinement, anabling them to make amends by paying taxes, community service, working a job, and recieving the much needed therapy/reform proggrams through re-entry services offered for recently released convicted felons helping them further lower their risk of recidivating.
Many prisons are falling apart. The answer is not fixing them all but putting the money towards hame confinement. That will fix the problem foever, prisons will always have to be repaired. Cut our losses now, just put first time

offenders, low and minimum recidivism inamtes on home confinement. Then condense the prisons and fix those. Also, allowing high and medium recedivism levels available space to programming. A more effective plan for cost and national crisis.
We petition for all mandatory minimums be cut in half for already convicted inmates and future inmates. Do to judes/officials often seeing more prisoners serving more time as more money in their pockets(bonuses,job security,pay offs by wardens/officials with stock in prisons, and their own stock in prisons). Judges often give the maximum and over the guidelines to imates when not needed. This is not acceptable. To the public it points to the end times, whre there will be buying and selling lives.
On proposed priority#6. We petition for youthful offenders to be realeased on home confinement or ankle monitor, and their sentences reduced to no more than 3 years.
We need to change before it's too late

From: ~^! FELICIANO, ~^!RUBEN
Subject: [External] ***Request to Staff*** FELICIANO, RUBEN, [redacted], COM-A-A
Date: Sunday, July 9, 2023 3:05:59 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: ATTN:TO ALL THE POWERS OF THE COURTS!!!!!!
Inmate Work Assignment: COMMISSARY STOCK CLERK

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I have been in the custody of the FEDERAL BUREAU OF PRISONS,SINCE 1999 and has maintained i clear record as to my conduct,education,no violence,mentoring others within the prison system and more importantly leading many inmates to become more productive within their lives within these facilities so when they get a second chance or in fact finish their sentence they will be role models within their communities. I have a life sentence and i have done nothing but greatness within my time.I have seeked in the will towards my rehabilitation and stand on the rule of law.I have changed my life within all the areas where i was week in.I love my Country and America has not failed me but i have in fact failed it.I stand on reality and made all of the proper choice within my life in prison and seeked all of the treatment that i needed within my dysfunctional state of mind.I plead to you that men can change no matter what the circumstances could ever be and i was told that i was a drug abuser,a murderer,a menace to society,a monster a violent person who is a risk towards human life! well time only tells what a person is because they have only known me within that time and its was for a few weeks but here i stand over 25 years latter and i have a better record while in prison that i had within society because i had no help,no programs to seek,my mental state from a youth who was in the streets since 16 years old all by myself.I don't agree that's the case of my down fall in life and i had made some very wrong choices when it comes to friends and the direction my life will face.I understand the word ownership and accountabilities and i took them and started looking in the reflection of myself as to where i start (CHANGE)i plead to this U.S. SENTENCEING COMMISSION that i know what i will do if given that second chance to be a proud AMERICAN and a respected member of society who wishes to help our falling youth within the hands of gangs and guns.I am a MENTOR here at FEDERAL CORRECTIONAL COMPLEX,COLEMAN MEDIUM IN FLORIDA! in the A1-SKILLS PROGRAM UNIT! its a modified therapeutic community where low functioning inmates who are mentaly retarted and other illnesses.I help them rise within the tools learned here and this programs base is in WASHINGTON DC,i am a man who has been healed from all the traumas of my childhood years!!! i stand for my flag! the red,the white and the blue!!! i also am a proud member of the mental health companion program here as well,doing trainings and suicide watches in helping others by saving lives.I have been a peace maker within the system to the point of keeping from staff and inmates from being hurt within gang wars in our prison systems!!!!! i am no monster!!! time will only tell and let the records reflect as to all my accomplishments.I see men given these chances and come back to prison because they do not see the beauty within it.I am not a (RISK-FACTOR) i am a changed man.I ask that you all see that we have many men in these prisons with (LIFE) based on he said and she said,cases.I pray that the powers that be will remember men like me!!!! i will do nothing more but greatness nor will i ever do any harm to no one from my past life no matter the circumstances that got me here in the first place,i thank you and my the grace of this U.S. SENTENCING COMMISSION i plead for lifers!!!!!!! thank you and (GOD-BLESS-REHABILITATED-AMERICANS) AMEN!

From: ~^! FOSTER, ~^!JASON RAY
Subject: [External] ***Request to Staff*** FOSTER, JASON, [redacted], BIG-S-C
Date: Saturday, July 1, 2023 10:19:32 AM

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: To whom it may concern,
Inmate Work Assignment: GM5/Carpentry

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing in regards to the reduction of my sentence & possible early release.
As of June 21, 2023 I have been incarcerated (7) seven of my (10) ten year sentence (with (4) four here at FCI BIG SPRING- as of Sept. 2019) I have been incarcerated during the COVID epidemic, and the great freeze of 2021 here in Northwest Texas, in that year we lost our Chapel and lower-rec due to a busted water pipe and it was condemned due to black mold. Then in 2022 the Dinning Hall was condemned due to a water leak that caused a sink hole to formed under it.
I am still being charged a 30% mark-up on my commissary purchases that have also gone up due to inflation even though we have no lower rec and no longer have a movie program or late-night tv time.
All this on top of being in a facility that is over-crowded and in major disrepair. The RO water doesn't work most of the time, bathroom has mold & urinals overflow, AC doesn't work, fire extinguishers are locked & inaccessible and due to the dinning hall being closed we are having to stand to eat or sit on the floor, or eat on our bed (I am 50 yrs old & have a top bunk).
It would be nice if this place were closed and I was transferred to a facility that I had more opportunity to take VT classes or work in UNICOR but this place cant keep staff because it is managed by the incompetent or ignorant or visa versa.
I would be better off if I could obtain early release so I can find a real job and be better able to return to society.
Something needs to happen to fix this place & also the system in general.

From: Jon Frey
To: Public Affairs
Subject: [External] U.S. Sentencing Commission (USSC) Comments
Date: Friday, July 28, 2023 12:39:01 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.

I respectfully submit the following comments to the U.S. Sentencing Commission (USSC) on the proposed priorities for the May 1, 2024 amendment cycle.

1. The following aspects of the BOP are not effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2) and need to be addressed by Congress:

- The prevalence of racial discrimination and segregation in BOP facilities
- The prevalence of criminal enterprises within BOP facilities
- The proliferation of contraband and substance abuse
- The inadequacies of medical and lack of dental care
- The lack of resources and direction for inmates' re-entry preparation
- Housing units are run down

I request the USSC to recommend the following remedies to Congress:

- Re-brand FCI Low facilities as rehabilitation institutes
- Replace the word "inmate" with "resident" in BOP literature and material pertaining to defendants in custody
- Rebalance prison staff with more psychologists, educators, case workers, and life counselors in place of traditional "corrections officers"
- Expand offerings of 12-step programs
- Provide means for residents to have access to distance learning academic programs including graduate and post-graduate programs.
- Provide mandatory classes on the American system of law
- Host job fairs twice a year at all BOP camp and low facilities
- Require participation in programs focused on racism, segregation and discrimination
- Develop new policies that forbid racism, segregation and discrimination in BOP facilities
- Employ motivational speakers such as crime victims and ex-felons to speak about the impact of crime
- Adopt a program structure modeled on a college-prepatory system with rigid structure for all residents to promote education, rehabilitation, fitness and teambuilding activities

2. I request the USSC to recommend the expansion of court-sponsored diversion and alternative to prison programs
to include non-production child pornography offenses. This recommendation is supported by a 2014 study from the University of Massachusetts Law Review entitled "The case for extending pretrial diversion to include possession of child pornography".
There are compelling reasons to rehabilitate these offenders outside of prison. According to a 2022 study by the Pennsylvania Department of Corrections, these offenders have a high rate of success and the lowest rate of recidivism.

3. I recommend to the USSC to fully implement Executive Order 14074 which states that "no individual should serve an excessive prison sentence". Many prison sentences are excessive and

provide no benefit to the community. According to 2012 statistics, it cost $79.16/day to house a defendant compared to $9.17/day for that same person to be supervised by U.S. Probation. Tremendous cost savings can be achieved through rational sentencing standards and a greater use of community supervision for non-violent/non-contact offenders.

4. I recommend the following items for integration into the Commission's discussions for the May 1, 2024 amendment cycle:
a. End the practice of incarceration for technical violations of supervised release. Amend statutes such as 34 USC 20913(e) and 18 USC 2422 for registry requirements and replace mandatory prison terms with summary offenses similar to 18 USC 402.9 Contempt of Court constituting a prison term of not more than 6 months and a fine paid to the U.S. government.

b. Amend the sentencing guidelines to allow downward variances for sex offense defendants with diminished capacity and qualify as an aberrant behavior under USSG 5K2.13 and 5K2.20 which were removed for sex offenders under the PROTECT Act. Many judges are already varying downward to get around the PROTECT Act prohibitions. Removing the statutory prohibition restores a judge's ability to sentence a defendant accordingly.

c. Amend 18 USC 3585(b)(2) to award credit for time served under pretrial home confinement where conditions are equal to the terms of home confinement during an inmate's last 6 months of sentence under the Second Chance Act.

Respectfully submitted,

From: ~^! GAFFNEY, ~^!MAXWELL JOSEPH
Subject: [External] ***Request to Staff*** GAFFNEY, MAXWELL, [redacted], BIG-R-B
Date: Thursday, July 6, 2023 9:06:15 AM

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

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear U.S.S.C,
I helped one of my best friends buy $20 worth of heroin and unfortunately he overdosed and died. My judge was unable to sentence me under 20 years due to it being my mandatory minimum sentence. I have never been a violent person or hurt anyone but my crime is classified as violent and I am not eligible for FSA or Residential Drug Program incentives. My severity in the BOP classification system is Greatest which means I am unable to reach minimum custody. I made a huge mistake over 6 years ago and not only I, but my family is suffering every single day because of it. It baffles me that drug kingpins convicted of selling hundreds of kilos of heroin get half the sentence length that I received. Our current system stipulates that even though I was at the very bottom of the drug totem pole, that I should receive the maximum sentence length because I was the last person to distribute the drugs to the deceased. But mid and high level drug dealers that distributed the drugs to me go unpunished to say the very least.

In my opinion it would make more sense when sentencing an individual under a resulting in death enhancement to include the amount of drugs sold into the sentencing guidelines. It is a mitigating factor in my opinion but currently it doesn't matter if you sold 1 gram or 1000 kilos. The sentencing guidelines are the same which is a mandatory minimum of 20 years in prison. I'm no expert but it seems the current sentencing guidelines are a bit tedious. Lets fix this before it's too late.

Thank you for your time. It means a lot to myself and my family.

Sincerely,
Maxwell Gaffney

From: ~^! GARCIA, ~^!BREANNA
Subject: [External] ***Request to Staff*** GARCIA, BREANNA, [redacted], ALI-B-D
Date: Sunday, July 16, 2023 8:05:23 AM

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: U.S. sentencing Commission
Inmate Work Assignment: Commissary

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing in regards to the upcoming amendment cycle. I am in the penal system so I am able to tell you from experience what it is like on the daily for an inmate.

Rehabilitation/Class availability/Staffing:
From the very first day we walk into the gate, rehabilitation is supposed to have started for reentry back into the community. From my experience many classes are offered on the FSA guide and it may even say the class is offered in the prison I am at, however the classes hardly appear. They are so under staffed where I am at that there is a tremendously long wait list to even get into a very much needed class like drug education or NRDAP. Sure, I am now getting programming credit while waiting to get into the class but I need to be learning the tools to actually rehabilitate and cope with everyday life while making better choices and rebuilding a better Me for my family, daughter, and a better Me for society. I have experienced that when staff doesn't show up to work we are locked down or confined to our units because they don't have enough people available to work the job. How about bringing in the national guard to fill these positions so people are able to program and rehabilitate and by bringing the national guard I could have more classes offered to me to rehabilitate so I do not reoffend.

DrugTreatment:
Rdap is offered 48 months to the door. This means for the first 2/3rds of my sentence i am receiving no daily or even weekly drug treatment. This makes absolutely no sense. I need help and even though I am off the street, I still have a lot of access to drugs here, if i were to choose to make those bad decisions. I need the tools right now to prepare myself for the world inside and out to learn how to cope with out drugs. Drug sentences tend to be longer sentences than others in federal prison and therefore there are people struggling 10, 15, 20, years before they can even get into a detailed drug program to teach them to be better people. I need to be able to start drug treatment right away .

MAT Program
They are offering synthetic Herion now in the prison systems. This is given to someone that comes out of county jail, that has been clean from herion and just because they have an opiate addiction on the streets they now are given it in prison to cope or from becoming sick without it even though they have been with out it for months and months . But yet again, I would like to be be able to take a treatment class for meth and i have to wait 8years to the door?

Past charges
Our past charges are put into a category called custody points. The higher the custody points the longer my prison stay is. If I have already served the time in state as it was a state charge, why am I having to pay for it again in my federal bid?

District VS. District in sentencing

One district may say one thing is allowed where the very next district says something different, then that has to be disputed in court or taken to a higher level in the supreme courts. That is like saying one person can drive through a redlight with no reprocautions and another person gets the death penalty for the offense. This shouldn't be! it should be the same penalty straight across, thus saving time and money in the courts .

From: ~^! GARDNER, ~^!ADAM FRANCIS
Subject: [External] ***Request to Staff*** GARDNER, ADAM, [REDACTED], FLP-D-A
Date: Monday, July 3, 2023 11:49:59 AM

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: cp pm

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

please consider the following:
1, the meth guidelines are absurd. it doesnt reflect the reality of a narco-state on our southern border. the guidelines should be more in line with marijuana due to the extremely cheap cost of the drug on the streets. i was given 89 months for $250 worth of meth. before i was indicted, the state of california offered me 6-months for the same arrest. street prices were $10 a gram for 90%+ pure meth when i was last out 5 years ago. ounces were $100. you should never be looking at a 10yr mandatory minimum for $200 worth of dope, no matter how pure it is.

2, the career offender guidelines are all wrong, specifically prior controlled substance offenses should not count, only violent crimes. there should NEVER be a scenario where non-violent drug offenders are facing life sentences (or even 15-20 yrs). addiction is hard enough on the family of the addict, unless your EL CHAPO, no drug crime should ever result in a sentence longer then 5-10yrs. a decade is an awful long time for a mistake committed by a drug addled brain, especially where there is no violence at all. most of the so-called dealers i see in the feds were just addicts playing the role of middle man to feed their habit. were talking grams and ounces, not pounds and kilos- yet time after time i see these same people with 10-20+ year sentences and its destroying poor families

most of us do drugs to make us feel better, to escape the misery of poverty and crime. this needs to be treated as the public health crises it is, not as a criminal issue. accross the board, all drugs should be de-criminalized in amounts of 1 oz or less. also there should be a mechanism that allows judges to suspend a sentence and let career offenders go to rehab instead of prison. despite my addiction i was working full-time and going to college when i was arrested for meth. IF the judge could have suspended my sentence and allowed me to complete an intensive 1-2yr drug rehab, in all likelyhood i would be out in the community right now as a college graduate, employed and with my family. instead ive now missed my sons entire childhood and despite my attempts i havent been able to take a single college class towards finishing my degree, i cant affoed the cost of the correspondance courses and thats all thats available to me at this time.

so in reality, im going to hit the streets in worse shape than when i left. so much for rehabilitation

From:	~^! GONZALEZ, ~^!MICHAEL
Subject:	[External] ***Request to Staff*** GONZALEZ, MICHAEL, [redacted], ALM-C-B
Date:	Wednesday, July 26, 2023 6:19:56 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: United States Sentencing Commission
Inmate Work Assignment: UNICOR/FS

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear USSC:

I thank you for your time, and patience in reviewing this brief email. Changes to retroactivity will provide fairer sentences that are currently being given by the Courts. In fact, most mandatory minimums and lenghtier sentences for certain crimes opens the door for sentence manipulation (shaded in forms of entrapment) that the prosecutors are often employing to give trigger more time. The problem in the FBOP is that they are NOT complying with anything.

The FBOP institutions, as this one (Allenwood FCI) has many flaws-- starting with the Medical Department who tells inmates that they are ok, just buy it from commissary or sleep it off. Many times inmates with medical complications go to sick call and staff just sends inmates back to the unit (sleep/rest and buy from commissary). Medical Department refuses often to continue with medications that certain inmates were on for many years-- this happen to me. Another example is that they often refuse to refer an inmate to specialist and psychiatrist and P.A's act as Doctors prescribe and analyze a patients issues via google or a FBOP clinical site for them (this I know for a fact because this happen to me, my P.A saids I have to check the site for this or for that-- I cant help you). if anyone reports any symptoms of COVID-19 they say its just a cold right, you dont want to be lock down? Inmates have reported certain issues and they said "they are just faking it, he will be ok".

Dental delays are irrational, in this institution they are doing routine care for 2017 patients, they are not treating caries -- only pulling teeth, since they lack staff.

Education is not running all the programs that should be running because they lack staff, and dont have training from Central. Many of the FSA programs and/or others are not running. Units A/C's are often down, sink water is often brown, water fountains dont work, toilet paper is scarce.

Laundry, issues a small bottle of body wash that only lasts 1-2 days, SHU razors (small) are the only thing they gave you.

Food Service, is always without the menu supplies because of shortages in warehouse. Portions are very small because they dont have enough food being cook for the entire population.

Commissary prices are so high it beats Target/Walmart.

Psychology programs have a long list and they dont see patients as often as they supposed to. Infact, when I asked for my records I seen staff wrote that I didnt request to be seen and this was not true, in another facility I was on weekly treatment here it all changed. They often tell you "what you want? we cant do nothing for you!"--

prettymuch they are often discouraging inmates from talking to them.

Lock downs are always in effect for no reason.

Unit teams, tell you that they dont know anything and that Central havent trained them on FSA. Also, that you cant transfer to lower custody facilities because of management variables. In addition, to not bother them and they often send you in a ping pong game for most of the things and dont file administrative remedies because you will become a target or simply they will recommend less RRC/half way house and/or request management variables to keep you in this facility. Counselors dont provide any information of value, same with case managers whom are more interested on other things that their work.

Staff are always using force on inmates and creating false incidents to justify their use of force. Majority of the bathrooms have low or no toilet papers, and/or soap. There are barely jobs for inmates, see staff labels inmates to certain jobs; However, none of those inmates actually work for those areas e.g. it can be 300 workers for food service but only about 100 work there.

The conditions in this intitution makes it hard to do time. There are no efforts to assist inmates rehabilitate and do positive activities. Thank you for your time.

From: ~^! GRIFFITH, ~^!VIRGIL
Subject: [External] ***Request to Staff*** GRIFFITH, VIRGIL, [redacted], ALF-B-B
Date: Sunday, July 16, 2023 5:05:21 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: USSC
Inmate Work Assignment: USSC

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear USSC,

In Residential Reentry Center / Halfway House (HH) hearings at our facility, LSCI Allenwood Low, it is difficult to get more than scraps of HH time. For example, when an inmate qualifies for up to 12 months of half way house, it is common, even *typical*, for the inmate to receive ~3 months. When asked about the discrepancy, the standard reply is, "The USSC has not issued a recommendation on Halfway House time, so we are being conservative."

I request that the USSC issue a formal recommendation on Halfway House time. And if that means inmates get more HH time, more Halfway Houses get built, or that some HH times are put into Home Confinement to make space for new arrivals, so be it.

Thank you for your time,
Virgil Griffith

From: ~^! GUNDERSEN, ~^!JEFFERY SCOTT
Subject: [External] ***Request to Staff*** GUNDERSEN, JEFFERY, [redacted], OXF-D-A
Date: Thursday, June 29, 2023 10:20:35 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: U.S. Sentencimg Comm.
Inmate Work Assignment: Labor a.m.

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

There is no oversight on the FBOP when it comes to FSA Credit assessment, nor will FCI Oxford Reassess FSA Credit points when disagreements occur within FSA Scoring and Calculation Assessments are incorrect or changed when inmate completes his FSA Classes and doesn't receive credit for classes he completed. Often goes unchecked and unsupervised to where inmates don't receive proper and fair consideration in a timely manner for time off because of lack of any authority or oversight in making sure Unit Team actively updating FSA Assesment Scoring. Inmates are just told that there is a shortage on FCI Oxford Staff members and no fault of their own, which probably correct but unacceptable. There needs to be more staff and more oversight on how inmates FSA Assessment Scoring and update inmate's programming. Lastly, FCI Oxford is not implying 15 to 10 month of inmate's sentences either. Inmate's often have to file 28 USC 2241 to make the Warden Keyes comply with FSA Credits towards inmate sentences.

From: ~^! HAAS, ~^!DALTON
Subject: [External] ***Request to Staff*** HAAS, DALTON, [redacted], GIL-Q-A
Date: Wednesday, June 28, 2023 1:35:11 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: U.S. Sentencing Commission
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To whom it may concern,

I have a few changes that should be made to the sentencing guidelines.

1. Because of the amount of money that was fraudulently taken in my case, I was ineligible for another 3 point deduction in the federal sentencing guidelines and because of the amount of money, that was 20,000 instead of 16,000 I was 1 point above only receiving 0-4 months of prison time. The amounts "lost" are extremely long ranged, and need to be updated. Basically, if you take more money, you are rewarded with a another 3 point deduction for "taking responsibility."

2. In the sentencing guidelines, the point structure needs to be updated tremendously for prior convictions, whether its local, state, or federal. If a plea agreement is met at the state level for a 1,000 dollar fraudulant scheme, and I receive 1 year probation, I am automatically in a totally different zone on the guidelines for 1,000 dollars. This makes zero sense.

3. If restitution is paid in full before sentencing or within so many days of being sentenced, there should be a major point reduction especially if there was no real harm to the victims life, or if the victim was the government. (covid relief)

4. A judge should not be able to sentence a defendant on pending cases outside of the federal court, or cases that have nothing to do with the current one the defendant is being sentenced on. I was sentenced on the long range of the guidelines because I was on a diverson plea where if I fixed the problems, paid restitution, and didn`t break the law, then the case was dropped. However, I was sentenced to 10 months because of other "pending" cases (that were on diversion) and not because of the federal crime itself.

5. If a defendant has no history of drug activity, no history of violence, and especially if this is the defendants first federal crime, the defendant should be first be given the opportunity of home confinement or house arrest if the defendant has a stable home and address. I have 10 months and was shipped all over the country before arriving to my camp. It not only is a waste of time and resource but does not help the defendant get back on his or her feet. From home confinement, work release, or community confinement can be looked at .

6. If the amount of a non violent crime is at a certain amount, and even if it is paid back, there should be no prison time at all and just allow the defendant to be on probation. If the person is a bad person, they will break the law again, and then you can put them away in prison or jail.

7. The court should not be allowed to bring in people that have nothing to do with the case, is not a government witness, and is not a victim, to come and speak against the defendant just because they don`t like him or her, or don`t agree with them.

Just a few thoughts, thank you for taking the time to read them.

Sincerely,
Dalton Haas

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Jessica Hagar

Topics:

1. Bureau of Prisons Practices

5. Career Offender Guideline/Categorical Approach

10. Research Topics

Comments:

1. BOP meeting the purpose of sentencing: After the court hands down a sentence, it is the responsibility of the BOP to have practices, policies, and procedures in place to meet the purpose of the sentence. 18 U.S.C. 3553(a)(2) states the sentence needs to "...to promote respect for the law, and to provide just punishment for the offense..." There need to be more policies in place for those who are incarcerated to be treated respectfully by correctional officers. Current conditions only create a divisive, distrustful environment for both parties. It is clear the purpose of incarceration in this country is punishment only, not rehabilitation, as it is so plainly stated in the guidelines (and above). The BOP should also have, in addition to the "educational or vocational training, medical care, or other correctional treatment" offered, actual drug treatment/therapy programs NOT prioritized for individuals closest to their out date. That very much sends the message that the BOP doesn't care drugs are being done in prison, and they don't care about the people suffering from addiction themselves (likely why they are in prison to begin with). It sends the message that drugs are okay in prison, but God forbid inmates be strung out when they leave- can't have that statistic- how bad would that look on the BOP. Get them real mandatory drug treatment/therapy/detox/psychology at the beginning of their sentence, and save everyone stress down the road. Not a pamplet of info, real help. Mental health treatment absolutely needs to be core and essential as well. Mandatory therapy - one hour a week at least - with a qualified psychologist or psychiatrist who can prescribe medications, really needs to be a must.
5. Three drug charges makes someone a career offender? That's it? Doesn't that seem like not very much? 50% of people incarcerated are there on drug charges, and now I'm wondering if it is because they have been designated as career criminals when they aren't. That's not what any modern lay person would consider a career criminal. That seems out of touch with society. Getting non-violent drug offenders out of prison (and reducing the costs of prisons in doing so) should be a priority.
10. VERY interested in the disparity of sentences handed down through trial versus pleas. Reading a plea deal actually makes me physically ill. Americans should NOT be forced to sign

away their rights to receive a lesser (more humane) sentence. Going to trial, which is absolutely their right, should not be something that is punished by excessive and higher sentences, which is exactly what happens.

Thank you for reading. I try to keep my comments short and to the point.

Submitted on: July 4, 2023

From:	Pat Clarey
To:	Public Affairs
Subject:	[External] comments and facts for consideration in the Commission"s Review of Sentencing Guidelines for the Federal Courts (amendment cycle ending 05/01/24)
Date:	Tuesday, August 1, 2023 5:50:20 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.

My purpose in addressing the Commission relates to the incredible disparity in methods used by the courts as it relates to the 1:167 ratio that is used to determine the THC to marijuana ratio in determining sentences that are imposed by the courts. There appears to be no reason behind the ratio.

In reviewing individual cases, the experts all seem unable to provide a reason for this ratio, which has major implications in the determination of the Base Level Offense. The 1:167 ratio appears to have been included in the first set of Guidelines in 1987, with no published explanation. While a sentence mst reflect the seriousness of the offense to provide just punishment, a sentence based on a range that has no cognizable basis is most certainly not just.

It is extremely important for the courts to understand that THC vaping cartridges contain the same psycotrophic element that gets a user "high" when consuming marijuana:THC. In other words, the drug inside a THC vape pen is made out of marijuana. The difference in effects between the two drugs are linked to how much THC is consumed, in either marijuana or THC concentrates. To make the vaping pens, the manufacturer extracts THC from marijuana. This foundation helps explain what exactly the district court's task is - determining a ratio of THC to marijuana from which it is made. Whether guidelines should be followed at sentencing is a significant issue. I argue that the 1:167 ratio should not be followed and that the court should have a policy disagreement with the guidelines in accordance with Kimbrough v. United States, 552 U.S.85, 101 (2007). The evidence presented at the sentencing hearing indicated that there is no basis for the Guidelines treating 1 gm of tetrahydrocannabinol (THC) to 167 gm of marijuana. It is inaccurate from a chemical perspective, from how it is produced by a manufacturer, and by how it is used by the consumer. There has been considerable testimony by "expert" witnesses that one puff on a vape pen of THC is like smoking a puff of a marijuana joint, and that the only difference in the user using a vape pen versus a joint is convenience.

Rather than write page after page citing specific case after case that document huge disparities in sentences that have been imposed, I'd like to bring this to a more personal level and demonstrate the terrible consequences that result from sentences being imposed by some of the courts that are using the 1:167 conversion ratio for which there is no credible basis.

My son is serving a 192 month sentence due to the court having used the totally absurd 1:167 conversion ratio that puts him at a total offense level of 35. His expert witness at trial, testified that depending on which scientific approach you use to some up with a conversion ratio , you could use a 1:4 ratio, a 1:5 ratio, a 1:8 ratio or at most a 1:10 ratio. In another case that he reviewed in the prison law library, the sentencing judge said his research found a 1.7 ratio to be appropriate.

I am humbly pleading for the Commission to take every bit of information they have available and to use every possible resource that is available to them to find the appropriate and common sense conversion ratio. The inaccurate, totally absurd 1:167 ratio must be amended. Using that ratio is totally unfounded and is total destroying a countless number of lives. And all for something that is already legal in at least 23 states in the United States of America.

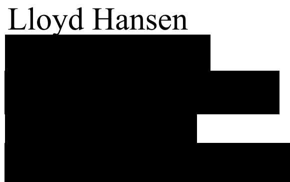
I am a 77 year old man who is nearing total deafness and will, at some point, be legally blind due to the macular degeneration for which I am currently being treating. I have five surviving siblings, ranging from 79 to 92 years of age. This unjustified conversion ratio is having a devastating affect on all of us. When my son, Sam, was sentenced, most of us likely received a "life sentence".
Most of all, my son, Sam, has a son Kade who turned 11 years old today. Yes, Kade has a tremendous amount of extended family support but he needs his dad. I do my best to be the most supportive and loving grandpa possible, but it's his dad that should be out there tossing the baseball to him and helping with his training for all his sports and watching him grow up on a daily basis. He is a very intelligent boy and an honor student. But, how in the world does anyone explain to him that his dad won't be home until well after he has graduated. The last few years have been difficult and he has only been able to visit his dad once. For some unknown reason, Sam was sent to prison in Mississippi, 1,000 miles from home. Visits from anyone will be few and far between.

Yes, Sam needed to accept responsibility for and pay for his crime. He has done that. What can possibly be gained from keeping him imprisoned until he will likely be too old to pursue a good, productive career? He has a college degree and, given the opportunity, he could still succeed in being a solid, productive citizen. Many more years of imprisonment could likely destroy that opportunity. And all because of an erroneous, unjust conversion ratio having been used in calculating the term of his sentence.

How many, many more individuals and their families are suffering untold hardships because of this issue. I cannot imagine, but it has to be a huge number.

I apologize for my very lengthy plea and ask that the Commission please act as expeditiously as possible to amend the Federal Sentencing Guidelines to establish a reasonable, common sense and fair THC to marijuana ratio to be used in determining offense levels.

Lloyd Hansen



From: ~^! HANSMEIER, ~^!PAUL R
Subject: [External] ***Request to Staff*** HANSMEIER, PAUL, [redacted], SST-F-A
Date: Saturday, July 1, 2023 11:49:11 AM

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: U.S. Sentencing Commission
Inmate Work Assignment: Indus. Warehouse

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

As for sentencing guideline priorities, please revise guidelines for white collar offenders. The existing guidelines do not clarify whether intended loss or actual loss should be used in calculating the base offense level. There are significant disparities across sentencing courts about whether actual loss or intended loss should be used, resulting in signficant sentencing disparities among white collar offenders. See the Third Circuit's recent decision in Banks for more information. The better result is that actual loss be used versus "intended" loss. "Intended" loss is a subjective standard that lacks obvious definition. Actual loss better reflects harm to society and is eminently more measurable.

JULY 3rd

To: U.S. Sentencing Commission
Office of Public Affairs
1 Columbus Cir. NE
Suite 21500
South Lobby
Washington, DC 20002-8002

Subj: Methamphetamine Drug Purity Enhancement

Dear Sentencing Commission,

I respectfully ask the Sentencing Commission to address the issue of the sentencing enhancement for "Drug Purity" in cases involving methamphetamine.

The case of U.S. v. Nawanna, 321 F. Supp.3d 943 (8th Cir. 2018) probably best explains the issues with this enhancement. It explains it well enough that Chairman Judge Reeves quoted it himself in the recent case of U.S. v. Robinson, No.: 3:21-CR-14-CWR-FKB-2 (S. District of Mississippi 12-23-22).

One argument is that "because enhanced punishment is based on drug purity as a proxy for a person's role in an offense, the enhancements for methamphetamine purity and aggravated role in the offense punish a defendant twice for the same reason." Nawanna at 948.

The Commission's own data shows a significant disparity across judicial districts in the treatment of methamphetamine as pure or as a mixture. Nobody has stepped forward to dispute that the only express basis for the 10:1 ratio between actual (pure) methamphetamine and methamphetamine mixture in the guidelines is that drug purity is a proxy for a defendant's role in the offense. Judge Robert C. Brack, of the District of New Mexico, agrees and refers to it as "divorced from reality." Ibarra-Sandoval, 265 F. Supp.3d 1255.

I've little doubt that the Commission will agree with Chairman Reeves and that this issue will be addressed and corrected. My purpose here is to respectfully request that any changes made to the guidelines include language that they be made retroactive.

The enhancement is wrong and thousands of inmates have suffered overly long sentences because of it. Please help correct this mistake. Thank you for your time and consideration in this matter.

Respectfully,

[signature]

* Can you also look at the 4pt leadership role enhancement? The bar that has been set (conspiracy involving 5 people) is way too low for such a devastating enhancement.

*

I was a drug dealer who sold small amounts of drugs to 4 other people. That makes me an average drug dealer, not a "Kingpin" who should get a 4 pt enhancement since my "Conspiracy" involved 5 people.

Being given a "leadership role" makes me inelligable for FSA credits and other programs. The bar for such a devastating enhancment is way too low.

"El Chapo" is a Kingpin. I was simply a drug dealer.

Respectfully

[signature]

From:	~^! HARVEY, ~^!DANNY MICHAEL
Subject:	[External] ***Request to Staff*** HARVEY, DANNY, [redacted] BIG-S-E
Date:	Thursday, June 29, 2023 6:34:53 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: U.S. Sentencing Commission
Inmate Work Assignment: SS Unasign

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Shalom!

I am writing in regard to the request for public comments on the upcoming sentencing review. I have a couple of comments:

First, if you are truly interested in "reducing costs of incarceration and overcapacity of prisons," serious consideration should be given to shutting down (or giving over to INS) of all low- and minimum-security BOP facilities and allowing the inmates to be placed on home confinement. This would save the DOJ a lot of money! And, there is an apparent need for more INS facilities, as is evident in the fact that the majority of the inmates here at FCI Big Spring, TX, are illegal immigrants. Home-confinement for lower risk inmates is an excellent alternative to incarceration!

Second, in considering whether a crime should be considered a "crime of violence," two specific items should be considered: 1) if the crime is a "victimless" crime, it should not be considered a "crime of violence"; 2) if the crime is an "attempt" crime, it should not be considered a "crime of violence." Both of these criteria have affected my case, and because my "crime" is considered a "crime of violence," though my conviction was for an "attempt" to commit a crime and it was a "victimless" crime, as I was entrapped by an ICE Special Agent, I have been banned from using the TRULINCS e-mail service available to most inmates in the BOP. This alone seems unfair to me, as e-mail can be monitored for security as easily, or more easily, as postal mail or phone calls.

Thank you for your time and consideration in these matters. May Yah bless us all!

Respectfully,

Dan Harvey

From: ~^! HELDSTAB, ~^!GARY L
Subject: [External] ***Request to Staff*** HELDSTAB, GARY, [redacted], SST-F-A
Date: Thursday, June 29, 2023 5:49:12 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:
Inmate Work Assignment: construction 5

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To whom it may concern, would you please address the acquitted conduct next year. It is unconstitutional...thank you

From: ~^! HENDERSON, ~^!JEFFREY PAUL
Subject: [External] ***Request to Staff*** HENDERSON, JEFFREY, [redacted], LOM-C-A
Date: Wednesday, June 28, 2023 1:20:15 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:
Inmate Work Assignment: Gym PM

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I would like to see three issues addressed:

The failure of the BOP to properly implement the First Step Act, specifically, the denial of application of FSA ETC towards additional RRC/HC placement. The BOP considers it entirely up to it's discretion if an inmate gets ANY time in RRC/HC and does not consider itself obligated to apply these credits. This leads to inmates spending many additional months to years in a prison environment that Congress has clearly determined is not necessary. This exposes them to additional mental anguish, time away from family, and more time where they have to adapt to "prison culture" to survive instead of working to put that behind them while they reintegrate into society.

The second issue is the use of purity as a factor in methamphetamine cases. Multiple studies have determined that while this may have been relevant in the past it is clearly not a factor in how high a person is in the drug distribution network and now just leads to significantly longer sentences for anyone involved in meth cases.

The third issue is the amounts of drugs to trigger higher sentencing ranges. These should be dramatically higher so that federal resources can force on actual high level drug distributors and leave the street level crime where it should be, local state courts.

Thank you.

From: ~^! HENRY, ~^!DREW JOSEPH
Subject: [External] ***Request to Staff*** HENRY, DREW, [redacted], LOS-G-N
Date: Wednesday, June 28, 2023 9:20:24 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:
Inmate Work Assignment: Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Priority 1 (BOP Practices): Pretrial detention centers appear to be designed as short-term facilities when in reality it is not uncommon for people to spend years detained pending trial. As such, pretrial facilities should be required to offer FSA programs. I have been detained for four years and people in situations like mine will have longer effective sentences (contributing to overcrowding and creating perverse incentives for prosecutors to oppose bail and for defendants to shirk their due process rights) and miss out on programs that could have been beneficial to us. In effect, I am being punished for choosing to take the necessary time to go through all the steps that are needed to ensure that my case concludes with a just outcome instead of signing a plea agreement quickly. If I must be detained pending trial then let me at least use this time somewhat productively.

Priority 10(B) (Sentences for Distribution Resulting in Death): Base level 38 goes against the SRA objectives of providing certainty and fairness, and of avoiding unwarranted disparities, in sentencing. Level 38 is a HUGE disparity from homicide sentences generally in which the act did not involve malice, intent, recklessness, foreseeability, or proximate causation. Moreover, distribution cases which consider the death in a 5K2.1 departure from a drug quantity table base level generally result in sentences much lower than those which start from base level 38. Mikkel McKinnie, 21 F.4th 283 (4th cir. 2021), was sentenced to only 10 years despite numerous aggravating factors. Michael Watley, 46 F.4th 707 (8th cir. 2022), received only a 7-level upward departure per 5K2.1. Because the base level was set in accordance with the 20-year mandatory minimum sentence for the distribution resulting in death statute which conflicts with sensible notions of culpability and traditional legal conceptions of homicide, distribution resulting in death sentences depend substantially on the sentencing judge and the mechanism chosen to incorporate the death (base level 38 or a drug quantity table base level with a 5K2.1 departure). The appropriate resolution would be to drastically lower the distribution resulting in death base level, or to defer to the drug quantity base level, and allow sentencing judges the freedom to depart when warranted by the facts of the case. It should also be noted that the same sentence is mandated/prescribed (both statutorily and per the guidelines) for cases in which an overdose occurred but did NOT result in death.

Subject: Alternatives to Incarceration and Court Diversion Programs

To whom it may concern,

I hope this letter finds you well. I am writing to express my deep interest and support for the implementation and expansion of alternatives to incarceration and court diversion programs within our criminal justice system. As a concerned citizen, I strongly believe that such programs can significantly contribute to a more equitable and rehabilitative approach to dealing with offenders.

In recent years, there has been growing recognition of the limitations and drawbacks of traditional incarceration as a means of addressing crime and promoting public safety. While incarceration may be necessary for individuals who pose an immediate threat to society, it often fails to address the root causes of criminal behavior and can perpetuate a cycle of reoffending. Moreover, our prisons are becoming overcrowded, and the financial burden of maintaining these facilities is substantial.

Alternatives to incarceration provide a more holistic and restorative approach to justice. These programs encompass a range of initiatives, including diversion programs, community-based supervision, restorative justice practices, and substance abuse treatment. By diverting individuals away from the traditional court system and into these alternative programs, we have an opportunity to address the underlying factors that contribute to criminal behavior and foster positive change.

Court diversion programs, in particular, offer an effective means of reducing recidivism and promoting rehabilitation. Through diversion, eligible individuals can be redirected from the criminal justice system to community-based interventions tailored to their specific needs. These interventions may include counseling, educational programs, vocational training, or community service. By providing offenders with the necessary support and resources to address the root causes of their behavior, court diversion programs can help break the cycle of crime and promote successful reintegration into society.

Furthermore, alternatives to incarceration have proven to be more cost-effective than traditional imprisonment. The financial burden of maintaining prisons and correctional facilities is substantial, and the funds saved through the implementation of alternative programs can be reinvested in education, healthcare, and other vital social services. By redirecting resources toward prevention, intervention, and support, we can address the underlying issues that contribute to crime and foster safer and more resilient communities.

I urge you to consider the significant benefits and potential of alternatives to incarceration and court diversion programs. By embracing these approaches, we can move toward a justice system that values rehabilitation, reduces recidivism, and promotes fairness and equity. I encourage you to explore the successful models implemented in other jurisdictions and collaborate with experts and community stakeholders to design and implement effective programs tailored to our local context.

Thank you for your attention to this critical issue. I believe that together, we can work toward a more just and compassionate criminal justice system that not only holds individuals accountable but also supports their transformation and reintegration into society.

Yours sincerely,

Daniela Hernandez

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Mirtha Hernandez

Topics:

2. Alternatives to Incarceration and Court Diversion Programs

Comments:

To whom this may concern,

I would like to take this time to comment on alternatives to incarceration. I believe that there are more holistic ways of handling crimes of those who do not pose a threat to society. Those who do not pose a threat to society should be allowed to have a less harsh punishment as prisons cause many individuals mental health issues and a difficult time reintegrating back into society. Additionally, 2020 proved that the cost per prison was incredibly high. I see it is fit to have prisoners who are not a threat to society complete their sentence through some type of educational program that cost far less than what prisons cost now. Lastly, those prisoners who are not a threat to society can benefit from being enrolled in an educational program to not commit such crimes and therefore can do this alongside the support of their family and further continue to pass the lessons to their kids/ family members.

All in all, I appreciate you taking the time to reach my comment and hope this helps the future of those prisoners who are not a threat to our society.

Submitted on: July 13, 2023

From:	~^! HERRERA, ~^!JOAQUIN
Subject:	[External] ***Request to Staff*** HERRERA, JOAQUIN, [redacted], TCP-A-B
Date:	Monday, July 17, 2023 9:05:58 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:
Inmate Work Assignment: maint 3

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

-First, I would like urge the sentencing commission to Actually visit, on a regular basis, the Bureau of Prison Institution - especially the Penitentiaries and FCI's that house inmates serving 30+ years. Such visits would allow the commission to see the delays in programming opportunities for prisoners.
-Second, with such knowledge, the commission should re-examine the policy that grants Judges the discretion to ignore characteristics that could be indicative of the likelihood that a particular inmate will engage in future criminal behavior. In other words, Recidivism should be a main policy concern taken into consideration when judges impose lengthy, defacto life sentences of 30+ years.
-There are, and have been, alternatives available when imposing a sentence besides always employing incarceration. Particularly in sex offense cases, it should be appropriate for the sentencing Judge to consider the defendant's age, sex, and family situation, especially when deciding whether to depart from sentencing guideline range.
-First time sex offenders automatically face a life sentence of incarceration under the current guideline scheme. this should not be so. Even deductions for acceptance of responsibility and cooperation rarely alter such an extremely brutal sentencing calculation that often includes enhancement for computer, age of victim, distribution and a pattern of conduct.
-Section 3553 seems to supersede any regard for alternatives to sentencing and if that remains the case, then making comments about the current and future changes that the Sentencing Commission plans to implement are futile.
-In sum, a humanistic approach should carry more weight than a mechanical and robotic assessment of how much imprisonment a human being deserves. Minimizing the idea of excessive punishment should be the goal of the Sentencing Commission, as well as offering realistic alternatives.
Thank you and I hope this be take in consideration.

From:	~^! HILL, ~^!WILLIAM JOSEPH
Subject:	[External] ***Request to Staff*** HILL, WILLIAM, [redacted], OKL-C-C
Date:	Friday, July 28, 2023 12:19:58 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: U.S. SENTENCING COMMISSION
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I would like to say that the time a lot of men and women are getting for these Methamphetamine conspiracy's is very harsh. The AUSA'S can make a very simple drug case seem very extreme by using ghost dope and Pseudoephedrine logs to make a person seem like they were doing a lot more than they really were. I think you should consider making some sort of change where ephedrine logs cannot be used. I also feel like there should be something done to exclude ghost dope in calculating drug weight. I was sentenced to 175 months for a little less than 1000 grams When there was never any actual methamphetamine caught on my person. My brother was sentenced to 480 months for double that when he was only ever caught with one thirtieth of what he was accountable for at sentencing. I would like for you to understand that people will say anything a lot of the times and say whatever certain agents want them to say or the us attorney want them to say. Just so they do not have to go to prison or do not have to stay in prison. I have been incarcerated since 2012 and during this time I have seen numerous people that have committed or participated in murders and executions and actually committed them, receive less time than my brother, and in a few cases myself. My brother was 23 when he received 40 years for basically something that should of been simple possession. What I am really trying to say to the men and women of the commission is these laws and sentencing calculations used for methamphetamine cases are overly harsh. People commiting violent murder's are getting less time. I wish you would consider this when considering any amendments to the guidelines. Thank you for your time.
WIlliam Joseph Hill

Elmer Curtis Jones

Public comment addressing proposed amendment (11)

Dear Sentencing Commission:

I would like to suggest that the sentencing commission propose a modest amendment to the FIRST STEP Act so that those with 924(c) convictions qualify for the FIRST STEP Act Credits upon the completion of their sentence for the crime.

I am currently serving 210 months for being in possession of a plethora of drugs with the intent to distribute them following a traffic stop on February 4, 2020. I was also convicted of being in possession of a firearm in furtherance of a drug crime 924(c) and was sentenced to first serve a consecutive 60 months. I have a total of 270 months to serve for my first felony conviction.

In approximately 10 months, I will have served the required 60 months for my 924(c) conviction and will begin to serve the 210 months for my drug conviction. Despite the fact, I will no longer be serving the time for my 924(c), I am unable to accumulate the FIRST STEP Act credits (FTCs) for my drug conviction because my 924(c) conviction disqualify me from ever receiving the credits. I believe this is wrong and should be changed by the sentencing commission.

If I were to be eligible for the FTC's for the remaining 210 months, then I would acquire up to 3150 days of credits (210 months x 15 days earned per month). That is 8 years and 4 months of FTCs that I am unable to receive because I constructively possessed a firearm. Does this not seem like double punishment considering the fact I have already served a consecutive 60 months for the same offense?

I understand that I am considered a danger to society and that I need to pay my debt by a lengthy sentence. But like an onion, if you peel the layers back, you will see that I am more than a drug dealer with a gun. I have taken programs such as R.D.A.P and B.R.A.V.E to ensure my commitment to recovery. Don't I deserve a chance to reunite with my children before they become adults?

In today's criminal justice system, there are many who qualify for FTC's such as those who are on conspiracies to commit murder and child pornography offenders. My crime was non-violent. I never aimed or pointed the firearm at anyone at any time. However, I am barred from receiving any of the criminal justice legislation that has recently passed by Congress or the Sentencing Commission.

As a 924(c) offender, I do not qualify for the Bureau of Prisons' RDAP's year off incentive, the FIRST STEP Credits, or the Sentencing Commissions' "Zero Point" amendment which could have reduced my criminal history level by 2 points. I am already being punished with an additional 5 years for my crime, so why am I withheld from receiving any reduction of my sentence?

The FIRST STEP Act stands for Formerly Incarcerated Re-entry Society Transformed Safely Transitioning **Every** Person Act (FIRST STEP Act). That is every person. In my opinion the FIRST STEP Act takes the opposite approach by being intensely selective in "who" qualifies, despite the acronym stating it's for "Every" person. Therefore, I ask that you please include a meek amendment that broadens who qualify for the FTCs. Thank you for the time.

Sincerely,

Elmer Jones
7/7/23

From: ~^! KOWALEWSKI, ~^!STANLEY J
Subject: [External] ***Request to Staff*** KOWALEWSKI, STANLEY, [redacted], FTD-C-C
Date: Wednesday, June 28, 2023 8:49:46 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: Comment
Inmate Work Assignment: GM E4

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

One area that the Commission highlighted for amendment/change that I think is crucial is the disparity between sentences of those who chose to plea bargain and those who chose to go to trial.

Personally, I have experienced this firsthand as I was offered a plea in 2014 that would entail pleading to one count of wire fraud and receiving a sentence of one year and one day. I chose to go to trial, as I have always maintained my innocence and have demonstrated innocence in court filings/appeals that have gone ignored. I lost at trial and was sentenced to 17 years and 5 months. Quite a disparity!

This needs to be corrected and people who are charged with crimes should not be intimidated in order to have their day in court, especially when they know and truly believe that they are innocent. Also, regarding my own case, there was a co-defendant who plead guilty to conspiracy and was sentenced to 2 years probation and no jail time versus what I received for going to trial on the same charges.

This needs to be addressed and by correcting it, you will discourage US attorneys from fabricating evidence, witnesses, making false statements to the media, using "jailhouse snitches" and many of their other well-known tactics that they have engaged to encourage plea bargains rather than trials.

Your first round of amendments were well done and are a nice first step to rectifying the criminal justice system which has so many disparities, they are too numerous to address.

Sincerely,

Stan Kowalewski
[redacted]

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Charles Lander, Retired Local Criminal Court - Town Justice

Topics:

1. Bureau of Prisons Practices

Comments:

Charles W. Lander

July 31, 2023

United States Sentencing Commission
One Columbus Circle NE
Suite 2-500 South Lobby
Washington, DC 20002-8002

Re. United States vs. Ryan C. Lander 13-CR-00151

Distinguished Members,

My Name is Charles Lander and I am the father of Ryan C. Lander who is currently serving a 22 year sentence handed down by Western District of New York Judge Richard J. Arcara. Ryan was sentenced on August 8, 2019, for one count of 18 U.S.C. Sec. 2251(a) and (e) and has been serving his sentence, with time served for the six years it took to adjudicate him, at FCI Allenwood Low Pennsylvania in an exemplary manner!

For the sake of background; Ryan was arrested March 15, 2013 by Homeland Security agents who arrived at night in sheep's clothing. They scanned and seized items without a warrant stating that if Ryan objected they would "take him to jail". They then took him into the custody of their car and continued to question him while on route to the jail. After 30mins of the 60min trip, the supervising officer said "leave him alone now". At that point, they read Ryan his Miranda rights. When the US Attorney was questioned about the unconstitutional behavior of these officers he said, here is a plea agreement, sign it, because if you go to trial you will get 60 years! After six years of court appearances and being shuffled from one jail to another, my son was finally broken and signed the US Attorney's Plea Agreement for 15 years of incarceration. Then at sentencing, that same attorney asserted that the six year long adjudication was due to my

son "dragging his feet and not accepting responsibility", and he urged the judge to sentence Ryan to 22 years instead of the 15years which had been agreed upon. As a result, the judge sentenced Ryan to 22 years. In a nut shell, the "ends justify the means" malfeasance of United States vs. Ryan C. Lander is appalling. I understand that the Commission cannot express opinion over the actions of arresting agencies, or the manner of federal prosecutors, and certainly not the federal courts themselves; I simply wanted to give you a look at where I am coming from. On a related topic, I also appreciate, along with countless others, that the prison system needs repair. I recently read that the Sentencing Commission is requesting ideas to cut the costs of incarceration and relieve overcrowding. Respectfully, here are a couple ideas that I have had for the past ten years that my son has been serving; roughly 50% of his sentence completed thus far. Incidentally, ten years is the average sentence for convictions of this type when prosecuted by most of the 50 states. Wondering why that is causes me to have such an antagonistic manner in this letter; please forgive me.

Most successful individuals on the outside agree that incarceration should accomplish more than simply protecting society from wrongdoers. Incarceration should also provide training to reduce recidivism. The question is where the higher cost lies; the cost of the training up front or

the costs associated with re-arresting, re-prosecuting and re-housing those who re-offend. Obviously there is more cost in the revolving door of recidivism. Therefore, it stands to reason the BOP, as well as the inmates themselves, would benefit from any strategies conducive with cutting costs and reducing over-crowding. One such strategy is to begin differentiating inmates according to the level of education they received prior to conviction. I would venture a guess that a college-degreed inmate would be less likely to re-offend than a high school dropout. Inmates with prior college education should be allowed to serve their sentences in institutions that leverage their skills towards the day-to-day needs of the whole. Then following a reasonable, uniform sentencing protocol, utilized nationwide, these individuals would be given credit, for their cooperation, which they can use towards early release. Furthermore, those individuals, having been formally trained and having spent their sentences honing their skills rather than becoming obstinate, fat and lazy, be recognized for yet another form of reward that, incidentally, benefits both the inmate and the BOP. That reward would be the opportunity to pay a fine that shortens their sentence. I'd like to point out here that inmates with degrees are not only more disciplined and responsible but also far better equipped to earn money and consequently pay that fine. Now I'm not so naïve to think that there aren't risks here. I'm simply offering suggestions that have a lot going for them and thus merit some trial runs.

In conclusion I will recap and offer my final pitch. I'll use my son Ryan as an example. Here is a college-educated individual who has never been in trouble with the law before his mistake ten years ago. Despite the grossly unconstitutional nature of his adjudication Ryan was given a great opportunity at FCI Allenwood Low because someone at that institution recognized that he was not only gifted but also willing to give back un-begrudgingly to benefit the group. And Ryan is not the only one there that shares this characteristic. I am aware of this because of the two phone calls we've shared each week. So to be brief and to the point; I advocate a two-pronged approach which firstly provides training for those who lack higher education, and who are

motivated to take advantage of such training. If they successfully complete the training it becomes coupled with a reward of earned credits towards shortening their sentences. Secondly, recognize those individuals already college educated, who are also willing to use their education to benefit the group. These individuals should certainly receive earned credits too and in addition these more diligent, disicplined individuals should also be offered an opportunity to pay a fine in lieu of portions of their sentences. These two approaches directly address the BOP's desire to relieve over-crowding and at the same time reduce incarceration costs by actually generating funds in the process. Simply put… money coming in while jail cells empty.

Sincerely and apologetically for my candor,

Charles W. Lander

Submitted on: July 31, 2023

From: ~^! LANIER, ~^!SAMUEL THOMAS
Subject: [External] ***Request to Staff*** LANIER, SAMUEL, [redacted], LOM-A-A
Date: Wednesday, June 28, 2023 3:06:09 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 Sentencing Commision Public Comment team
Inmate Work Assignment: Grounds

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Hello USC Public Comment Team,

I am responding to the request for Public Comment as it relates to amendments to the USC's priorities for the May 2024 Priority Amendment Cycle.

Areas of primary concern for those incarcerated at Lompoc Federals Corrections Facility revolve around the unequal application of sentencing guidelines as it relates to release, rehabilitation, and anti recidivism programming. The Lompoc Prison Camp for example has not had any Anti Recidivism programming courses scheduled since the new education staff took over in March of 2023.

The largest problem when it relates to recidivism from the ACLU Prison Project revolves around the lack of rehabilitative efforts and programming to reduce recidivism. In California, there are state funded programs available to any person who has been previously incarcerated or system impacted that helps them attend higher education. The program, Project Rebound, has been around since 1969 and has seen a 0% recidivism rate since 2018. The program has tried to gain access into the federal prisons, but the mindset of the Prison Staff is not to help people prepare for re-entry.

The US Sentencing Commission should focus attention on limiting the number of people who go to a Minimum Security Prison camp by increasing the opportunities for people in the minimum risk category to work in community based programs through home confinement. Project Rebound is a great program that would enable every person in BOP custody in California to attend Public University. The Solitary Project has shown that people who have opportunities available to themselves post release reduce return to prison by nearly eight times.

The US Sentencing Commission has a mission to reform sentencing and to increase the use of Home Confinement and Diversion programs. As a first time offender, zero opportunities were extended to me. And the US Attorney's office has done their best to assure I never return to viable employment. However, I have taken it upon myself to combat the US Attorney's office's attempts at smearing me from public image and continue to push for higher education by obtaining my Bachelor's degree, and am currently enrolled in a MBA Program as a Graduate Student.

These opportunities were not made possible by the BOP or the US DOJ. They were at my own finding. Which should have been something I was made aware of by the courts and through anti diversion programs. When the judge sentenced me, she departed substantially from the USC and the Prosecutors suggestion because she saw a person that was not a criminal but who had made a mistake. And she even commented that she was not happy to sentence me to prison as she didn't see it being beneficial. But that she was required by the USC and Constitution.

These types of situations should not force a judge to sentence someone to a term of imprisonment, just because. But the judge should have the ability to place first time offenders in a position that they can succeed.

I was on my way back to my prior employment as a Firefighter/Fire Captain for the State of California. But the job offer was redacted because the State required a "Certificate of Rehabilitation". After spending 7 months in prison, I am frankly disgusted by the complete lack of rehabilitative efforts any person within the BOP puts for to help people. The current system does not allow people to receive a "Certificate of Rehabilitation" and thus removes people from several opportunities to re-enter society and succeed.

The Federal Prison System is very broken. And needs revamp to more closely align with rehabilitation first. One specific incident I will report, I am dyslexic. And I know it. I took the Dyslexia screening. And answered truthfully in the survey. Like in questions, do you often mix up numbers and have trouble with simple addition, yes!

When I was screened by the current Education staff, a group of us were called to his office. He explained to us that we had all scored low on the Dyslexia Screening survey. And explained to us that, "You don't want to take a stupid person class, so re-do the survey, and check no to almost everything, or else you will have to take class for stupid people!" As a person with mental health disabilities, and am part of the Disabled Student Services program at CalPoly Humboldt (Undergrad), and Chico State University (MBA), I was blown away at this person's disregard for educational needs.

And if furthers my statements, the BOP needs to be revamped, retrained, and educated on why people recidivate. Educational opportunities around rehabilitation, and advancing knowledge only better help people re-enter society and be prepared to succeed. Having Directors of Education who call out an entire group as "Stupid People" is a violation of the ADA and HIPPA for that matter. And we were encouraged by a Federal Official to falsify a Federal Document so he didn't have to help us, or put on a class and make him do work.

The US BOP is not an organization that is focused on reducing recidivism. It is a system that is focused on further inflicting damage, and returning people to prison. The statistics from the DOJ show, the US BOP has one of the highest levels of recidivism. And is that because of the people who are incarcerated, or is it because the people who are hired to reduce recidivism feel it is more important to discipline and reticule than it is to follow models like California where they have continued to reduce prison population, offer Certificate's of Rehabilitation, and encourage public education for every previously incarcerated individual.

The USC needs to put focus into policies that divert people from Prison on first time offense. Never enters them into custody, and requires them to receive higher education through programs funded at the US Dept. of Education. The programs should focus on allowing people to receive programing that qualifies them for Certificates of Rehabilitation. The Prison System should be a "Technical College" of sorts where the staff become educators, rather than captors. But that is a positive world. Where we reduce recidivism, and re-enter people better than they got here. But isn't that what the BOP is supposed to do?

I know my comments will likely not be read. And will likely be disregarded. Because that is what the BOP has shown as a standard. But for once, it would be good if the voice of those who do want to improve their lives is heard. As it stands now, all my job opportunities I had have been removed. I screwed up. But at the same time, I also dedicated 23 years of my life as a public servant. And I created a company that built technology for the Federal and State Government to assist with Wildfire Response. Now, that is all a moot point because the Federal BOP and DOJ feel I can never be a pillar of society ever again.

I am not going to let this 5 year experience define my future. A mistake is to be forgiven. I served my time. I am paying my debt. But the BOP and DOJ don't believe that is enough. Time for you to make that change to help us not ever return to this god for shaken place!

From: ~^! LOFTIN, ~^!COREY JAMES
Subject: [External] ***Request to Staff*** LOFTIN, COREY, [redacted], TCP-E-B
Date: Saturday, July 8, 2023 5:49:22 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:
Inmate Work Assignment: n/a

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Hello! I am an inmate at the federal penitentiary in Tucson, Arizona. Thank you for accepting comments from convicted persons; I sincerely hope our words can help you with moving towards common sense, progressive sentencing reform.

I would like to suggest that the U.S. Sentencing Commission examine possibilities in reduced sentences for first-time offenders. A large number of inmates, including myself, committed their first, and in many cases only, crime in their early twenties, when studies show that the brain has not yet fully developed. I can tell you with some confidence (and experience) that twenty-something year-old men are far from the wise, good decision makers they will some day become. This is not to excuse them from breaking the law, of course - but I think that it does warrant consideration when sentencing is concerned if it is their very first time breaking the law. It is stunning to me how many inmates I meet on a regular basis who received life sentences or effective life sentences in their twenties - I find myself wondering where the government plans on housing them all as they age and new, like inmates come in!

I wish I had the resources to research and prepare a more thorough statement, but I hope this paragraph is at least helpful to you. Thank you for your time, and for working towards sentencing reform both for convicted persons and for those who will be convicted.

From:	~^! MATTES, ~^!BRIAN
Subject:	[External] ***Request to Staff*** MATTES, BRIAN, [redacted], SEA-A-A
Date:	Friday, July 14, 2023 10:05:26 AM

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: NA

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

....I've seen staff escorted off the premises for smuggling (tobacco, cell hones, drugs, etc.), for allowing an inmate full and unrestricted access to her Bureau computer so he could conduct illegal activities, and for stealing food and equipment from Food Service, to run their own restaurants. FCI Seagoville has been the worst while, even now, Food Service inventory is short food and two brand new ovens ("air fryers").
....The biggest problem in the BOP is what's called "prison politics", and the apathetic staff who now only allow it to continue, but who encourage it. Their claim is that "politics are just going to exist in prison, and there's nothing we can do about it", but that sounds like staff surrendering their power and control to inmates, which is far from acceptable. It's known that FCI Seagoville is a protection yard, where sex offenders go for safety, and to get treatment. This is also a yard for gang drop-outs but, even though they may have dropped out someplace else, they get here and realize that there are no wolves. So they all want to step up and be a wolf, and form up into active gangs again. Tango Blast is the worst, extorting other inmates, and I cannot fathom why they are here at al. Instead of being safe, these Low-custody facilities are rife with gang activity, and many of the inmates are only concerned with staying safe by staying out of the way, and letting the gangs get rich. Staff needs to take control of the prisons back from the gangs because, only then, can they call any of them safe.
....Cells are not owned or controlled by the BOP staff, but by gang "shot callers", who can buy and sell them at will. If an inmate lives in a room that the gang wants, they just force that inmate out. Gang members can pay to have a two-man room to themselves (having a "ghost cellie" who doesn't really live there), or a cell with their "significant other". All room moves are controlled by inmates who staff never questions. The Main TV Room and the Small TV Room are the only areas in the housing unit inmates have access to that have AC, and they are owned by gangs. The cleaning chemicals are owned and sold by gangs. Free haircuts are not free. There is a price list, with different prices for different gangs. It has become so bad here that even the sex offenders had to form a gang, as protection against the abuses of the other gangs. This to me, is ridiculous, but sex offenders have decided that they need to show the other gangs that they are not weak. Other sex offenders are punished for not wanting to be a part of this gang.
....Promotion of this gang mentality has become a tool used by lazy and apathetic staff, so that they only have to deal with one inmate "shot caller" for each group, instead of treating each inmate as an individual. This dangerously empowers the shot callers and the gangs, while inhibiting inmates' chances of a successful reintegration into society. This inmate shot caller is provided personal and sensitive information about other inmates, which causes conflicts and physical altercations. Worse ye is when staff tells the shot caller to "handle it", knowing full well what it means , that the inmate being "handled" will be assaulted by several gang members. Staff-sanctioned assaults like this will sometimes become knife fights, but always result in significant injury.
....Allowing gangs to operate with impunity this way facilitates the introduction and distribution of contraband, utilizing gang networks to easily hide and/or transport said contraband without detection. These gangs cleverly obtain certain positions for their members, ones that are advantageous to their enterprise, like the construction crew that hollows out hiding places. One member of Tango Blast boasts an income of $30,000 per month from all of his illicit activities. Another has the maximum amount of $10,000 on his Trust Fund account. A black gang member, a

Gangster's Disciple, claims that, every years that he is incarcerated, he makes enough to purchase another house, owning several already off the proceeds from his drug sales in prison.
....This gang activity adversely impacts the safety, security and orderly running of the institution, putting staff and inmates in harm's way. Methamphetamines are prevalent, and so is "meth rage", where an addict will get disproportionately angry for no apparent reason. When this same addict is unable to secure another dose of this very expensive drug, he is violently ill for three days. Staff claims that they are unable to hit the brakes on gang activity, but iit's actually quite simple. The solution is two-fold, with staff having to first accept a closer scrutiny (or body cameras) to weed out the bad apples that spoil the bushel. Then, for any gang that is "active" or "online", round up the shot callers and transfer them. Make it known that the BOP does not

United States Sentencing Commission
ATTN: Public Affairs | Public Comments
1 Columbia Circle NE
Suite 2-500
Washington, DC 20002-8002

July 7, 2023

Randy McKinley [redacted]
FCI Loretto
P.O. Box 1000
Cresson, PA 16630

Re: Priorities of USSC in 2023-2024

To whom it may concern.

As the potential for long-overdue criminal justice reform and opportunities to remedy outdated and outmoded federal sentencing guidelines brings hope to the lucky few nonviolent offenders who qualify for recent and proposed amendments' retroactive sentence reductions, I and thousands of inmates like me continue to question whether "equal protection under law" still truly exists.

Since I pled guilty to one count of possession of child pornography, I have been labeled a sex offender. While I acknowledge the unspeakable pain and trauma which results from the exploitation of children for monetary gain and sexual gratification, I believe that classifying individuals who struggle with mental illness which has led them to such dark places as on equal footing with violent predators who have manufactured child pornography or otherwise abused a child is reactionary and unjust, in the same manner that addicts should not be classified as drug traffickers.

Since coming to the Bureau of Prisons, I have found that the lion's share of inmates in similar circumstances were otherwise law-abiding, model citizens, teachers, engineers, small business owners, and military veterans who served honorably and with distinction. Many of us faced abuse early in life, and all of us struggled with the stigmatization and complete dearth of available resources to right our course in life before it became too late. Inside, we

are hard-working, honest individuals who follow the rules and regulations of prison, despite serving a term of incarceration in which ridicule, ostracism, and the threat of random violence is a daily reality. We take advantage of the staggeringly little programming available to benefit us, make the best use of our time, do not engage in antisocial behaviors, and pay our debt to society with as much dignity as we can muster.

Those of us convicted of possession of child pornography struggle to understand why rules continue to be introduced which benefit those convicted of nonviolent drug, weapon, and financial crimes, but do not apply to us. I firmly believe that with proper treatment and therapy, as a class our risk of recidivism is effectively nil. We are far less prone to violent and antisocial behavior, are highly educated, and have strong support systems available to us. We also face years if not decades or even lifetimes of post-release supervision once we are released. As such, we are exceptional candidates for evidence-based recidivism reduction incentives and reëntry programs, and are of infinitely more value to our families, communities, and the country when placed on home confinement, in Residential Reëntry Centers, and on post-release supervision, as opposed to needlessly consuming taxpayer resources in prison for the additional years we would otherwise not have to serve if not excluded from these reforms.

I humbly request that we be included in new USSG amendments going forward, such as the reduction for zero-point offenders, as well as future reforms. We also ask that the Commission examine the wisdom in excluding us from First Step Act, Second Chance Act, Residential Drug Abuse Program, elderly offender program, and Conviction and Sentence Alternatives (CASA) programs. Such incentives would allow us to return to society to provide for our families.

In short, we are seeking equal protection under the law, a principle enshrined in the Fourteenth Amendment to the United States Constitution and held as fundamental by all Americans.

Thank you for your time and careful consideration. I believe that the Commission is a force for good in the federal system, and earnestly believe the volume of appeals to expand criminal justice reform to all nonviolent offenders (not just certain, politically convenient castes) will be heard, and that future reforms will benefit us all.

Sincerely,

Randy McKinley

Randy McKinley [redacted]

01 July 2023

UNITED STATES SENTENCING COMMISSION
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002
ATTN: Public Affaris - Priorities Comment

Re: Methamphetamines Guidelines

I am writing the commission in disagreement with the Methamphetamine guidelines. I would suggest that Methamphetamine guidelines be given less deference than guidelines that were properly crafted with empirical data and institutional expertise.
The Methamphetamine guidelines fail to promote the goals of sentencing in 18USC3553(a) because they have a strong potential to overstate the seriousness of a defendant's record and risk of reoffending, resulting in unwarranted sentencing disparities. I would also suggest affording less defference to the methamphetamine guideline's range also since it was "promulgated pursuant to Congressional directive rather than by application of the Sentencing Commission's unique area of expertise." Recognizing "the guidelines of methamphetamine crimes were anchored to mandatory minimum sentences, not based on empirical study", no other drug is punished more severely based on purity. While it may seem logical to punish a pure substance more than a mixed substance, there is no support in the legislative history to explain the formula underlying greater methamphetamine purity to greater months of imprisonment. There is no empirical data or study to suggest that actual purity should be punished more severely by an arbitrary increase of higher level; it seems to be 'black box science'. It creates unwarranted disparity. In light of research revealing the assumptions behind the crack/powder disparity it is just as important to examine the underlying assumptions of the methamphetamine guidelines. The methamphetamine guideline range is overinclusive. The majority of defendants in the methamphetamine offenses are neither managers or leaders. However, the guideline ranges for methamphetamineare triggered by quantity, so all offenders, whether they are managers or not, receive an elevated penalty as long as the offense meets the threshold quantity of methamphetamine. Methamphetamine - actual and mix - are not different forms of the substance, but rather are alternative methods of measuring the severity of the offense both under the mandatory minimum statues and the guidelines. The guidelines make a distinction between "methamphetamine mixture" and "actual methamphetamine" in the drug quantity table. "Methamphetamine" refers to methamphetamine mixtures whereas "actual methamphetamine" or "ice" refers to

the purer forms of methamphetamine. This distinction is made because the guidelines use drug purity as a proxy for a defendant's culpability, which is no longer an accurate indicator of a defendant's role in a drug trafficking conspiracy. Actual methamphetamine and methamphetamine mixture should be treated alike using the latter for guideline purposes whereas no empirical data or study suggests otherwise. It creates false uniformity among individuals charged in methamphetamine offenses.

Respectfully,

Name: [signature]

Registration Number: [redacted]

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Patricia Mckeehan

Topics:

2. Alternatives to Incarceration and Court Diversion Programs

Comments:

Dear Sir:
Sentencing of Non Violent Offenders should be considered from the time of sentencing even if they can not be put in their Jail location or immediately.
Sentences need to also run concurrently if there's more than one sentence.

Submitted on: July 17, 2023

From: ~^! MILLER, ~^!JUSTIN WILLIAM
Subject: [External] ***Request to Staff*** MILLER, JUSTIN, [redacted], GRE-B-B
Date: Wednesday, June 28, 2023 9:50:30 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:
Inmate Work Assignment: REC2

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Prioritys, dealing with sentencing should be the issues reguarding career offender desigination... and criminal history scoring... the career offender desigination is often misplaced, its used to enhance sentences on federal levels using state level offences for "crimes" that often dont even exist on federal levels... the career offender desigination should only apply to past federal crimes... it shouldnt be involved with state level offences....

criminal history yet again when using state level offences and " record keeping practices" of county clerks which are to say less a bit of a cluster.... and yet again people dealing with state level offences often taking pleas to get out of jail reguardless of actual guilt... but it gets a person out to resume normal life sooner than a trial would.... but as with me i have 17 criminal history points... ive been to prison 1x for less than 1 year in total before this... i was scored as category 6 and labled a career offender... for crimes that included me getting beat up in a county jail. ... total injustice

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Renae Miller

Topics:

7. Crime Legislation

Comments:

using acquitted conduct is wrong and that it violates the due process and legal principles of going to trial.

Submitted on: July 11, 2023

From: ~^! MOIS, ~^!EMANUEL
Subject: [External] ***Request to Staff*** MOIS, EMANUEL, [redacted], SHE-B-L
Date: Monday, July 17, 2023 3:50:00 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:
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing to comment on some point regarding the sentencing commissions notice for commendation.

My first comment is on :

3.) Guidelines Manuel - that should be thrown out because "one-size-fits-all" is not justice that is blind or impartial, it's not based on facts and circumstances, but rather inconsiderate of them, therefore making correct judgement void. Recently many district judges have noticed the flaws in fitting the sentence of a crime on a case-by-case basis, so if amendments were to be made it should review the judgements of district court's and make adjustments based off the average time that others were sentenced to for specific cases. That would be more fair and just.

5.) Career Offender Sentencing Enhancements - in my opinion are redundant, it's serving more time for a past crime that could have been many years ago, and in my case i am serving twelve times more time in years for a past charge in my state of California, which i think is not right or fair.
The definition of a "career offender" should also be changed if it is not the same crime committed, such as a person who was arrested for a firearm but had a past felony for burglary, yet was counted as a "career offender", because they are bot the same thing, yet they would still be categorized as a "career offender" and be sentenced to extra time.

6.) Not all "Youthful Offenders" are the same, as i am/was a "youthful" offender, but i was never a member of any gang or group, or violent, or had a bad family up-bringing, i just made poor choices in my young age and now want to better my life and i have been doing so even while in custody, yet i wont be able to prove that betterment for many years because i was over-sentenced, in part due to my youthful age, which is not fair or considerate of my circumstances or life history.

Thank you for reading my comments and i hope that they will be helpful to make positive changes in the future and to restore fair justice in the court system.

From: ~^! MUCSARNEY, ~^!JAQUON H
Subject: [External] ***Request to Staff*** MUCSARNEY, JAQUON, [redacted], FLF-P-B
Date: Wednesday, June 28, 2023 1:20:23 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: Commission
Inmate Work Assignment: Education

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Consider doing away with 'The Intended Amount" Offense level enhancement, & only calculate the offense level for the amount 'Actually stolen" stolen for theft; fraud, electronics device, including sophisticated means.

Cesar Navarro
[redacted]
F.C.I Victorville Medium #2
Federal Correctional Institution
P.O. Box 3850
Adelanto, CA 92301

U.S. Sentencing Commission

Dear Ma'dam Or Sir:

I Would Like To Suggest, Propose And Shed Some Light On What I Am Currently Living, Experiencing And Witnessing.

The Root Of The Problem, I Believe, Is Gross Despairity In Sentencing — Equal And Unequal Justice. Especially When It Comes To First Time Offenders "Like Myself" With Non-Violent Drug Crimes. The Majority Of Inmates In The Bureau Of Prisons With Large Or Long Prison Sentences Are People Of Color Like Myself. With That Being

SAID, THE PROPENSITY OF THE COURT TOWARDS PEOPLE OF COLOR IS TO PUNISH THEM HARSHLY WITH LARGE AND LONGER SENTENCES FOR NON-VIOLENT DRUG OFFENSES. IT IS SO OVERWHLEMING WHEN COMPARED TO OTHER CRIMINAL OFFENSES SUCH AS BANK ROBBERIES, VIOLENT ASSAULT, REPEATED SEXUAL PREDATORS AND EVEN MURDER REFLECTS HOW UNBALANCED THE SENTENCING SYSTEM IN AMERICA IS. IN 2023 HOW IS THIS POSSIBLE FOR FIRST TIME NON-VIOLENT OFFENDER. A FIRST TIME NON-VIOLENT OFFENDER, TODAY, CAN RECIEVE MORE TIME OR A LARGER SENTENCE THAN SOMEONE WHO HAS BEEN CONVICTED OF MANSLAUGHTER OR MURDER — WE ARE TALKING ABOUT SOMEONE TAKING ANOTHER PERSON LIFE. MY LETTER IS NOT FOR PITY OR TO CRITICIZE. IT IS AN ATTEMPT TO INFORM, INLIGHTEN, SHED LIGHT AND SHARE MY PERSONAL LIFE EXPERIENCES. MY GOALS ARE TO OPEN A DISCUSSION WITH THE SENTENCING COMMISSION AND TO GET IT THINKING ABOUT SECOND CHANCE OPPORTUNITIES FOR PEOPLE OF

COLOR THROUGH FAIR AND REASONBLE, SENTENCE REFORM. FAIR SENTENCES AND REASONABLE SENTENCES GIVES INDIVIDUALS HOPE, VALUE AND MEANINGFUL CHANGE TOWARDS REUNITING WITH FAMILY AND FRIENDS AND BECOMING A PRODUCTIVE MEMBER OF SOCIETY. LARGE SENTENCES CREATES A SENCE OF LOSS AND DESPAIR. NOT JUST A LOSS OF FREEDOM, BUT A LOSS OF LIFE OPPORTUNITY AND OPTIMISM. REFORMING THE SENTENCING GUIDELINES IS A FIRST STEP AND AN IMPORTANT FACTOR TOWARD MEANINGFUL PRISON REFORM AND CLOSING THE DESPAIRITY GAP ON PEOPLE OF COLOR. MARIJUANA, COCAINE AND METH ARE NOT EVEN CLOSE TO THE DAMAGE THAT FENYTAL AND HERION CAN CAUSE TO RECIEVE A LIFE SENTENCE. WITH THIS CLOSING THOUGHT, I EMPLOY THE SENTENCING COMMISSION TO PLEASE SERIOUSLY CONSIDER THE HOPE THAT YOU WILL GIVE THOSE INDIVIDUALS WHO STRIDE TO REUNITE WITH THEIR FAMILY AND WHO VALUE BECOMING A PRODUCTIVE MEMBER OF SOCIETY FOR THEMSELVES AND THEIR FAMILY SAKES.

YOU HAVE A UNIQUE OPPORTUNITY TO CORRECT A DECADES LONG PROBLEM BY CREATING REASONABLE, FAIR AND MEANINGFUL SENTENCING REFORM.

THANK YOU FOR TAKING TIME TO READ CONSIDER MY THOUGHTS AND EXPERIENCES TOWARDS CORRECTING AND CREATING MEANINGFUL SENTENCING REFORM.

From: Cesar Navarro

[signature]

Attn: Public Affairs - Priorities Comment
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Carlton W. Reeves

Bogdan Nicolescu, [redacted]
Federal Correctional Institution
PO BOX 33
Terre Haute, IN 47808

July 20, 2023

United States Sentencing Commission
Attn: Public Affairs
1 Columbus Cir. NE, Suite 2-500
Washington DC 20002-8002

Re: Public Comment on the
Proposed Priorities for Amendment Cycle

To Whom It May Concern:

I am commenting on two issues:

(1) There is a Circuit Conflict regarding the §2B1.1(b)(11)(B)(i) enhancement, and I have proven beyond doubt that the Sixth Circuit, who initiated this split, was wrong.

(2) I am also submitting a thorough comment regarding the greater than necessary punishment the Guidelines impose on economic crimes.

Please note that I have already mailed you the circuit split issue on July 18, 2023. But I have attached it here too, for your convenience.

Sincerely

Bogdan Nicolescu
[redacted]

UNITED STATES SENTENCING COMMISSION

PUBLIC COMMENT

In Re Proposed Priorities
for Amendment Cycle

CIRCUIT CONFLICT REGARDING THE
APPLICABILITY OF
U.S.S.G. § 2B1.1(b)(11)(B)(i)

The Sixth Circuit's Interpretation
of Subsection (b)(11)(B)(i)
Renders it Partly Inoperative

BOGDAN NICOLESCU
Inmate# [redacted]
Federal Correctional Institution
PO BOX 33
Terre Haute, IN 47808

CIRCUIT CONFLICT REGARDING THE
APPLICABILITY OF U.S.S.G. § 2B1.1(b)(11)(B)(i)

The circuits are split on whether a 2-level enhancement for "trafficking of any unauthorized access device" under U.S.S.G. § 2B1.1(b)(11)(B)(i) is applicable in conjunction with an "aggravated identity theft" conviction under 18 U.S.C. § 1028A that is predicated by the same conduct.

Acknowledging that it "chart[ed] a new course among [its] sister circuits", United States v. Nicolescu, 17 F.4th 785, 2021 U.S. App. LEXIS 33237 (6th Cir. 2021), at LEXIS *42,[1] a divided panel of the Sixth Circuit has recently held that such enhancement can be applied in conjunction with § 1028A.

But every other circuit to have addressed this issue has held that a defendant convicted of aggravated identity theft cannot receive a 2-level enhancement under § 2B1.1(b)(11)(B)(i) for trafficking access devices because trafficking necessarily involves transfer. See United States v. Jones, 551 F.3d 19, 25 (1st Cir. 2008); United States v. Doss, 741 F.3d 763, 767-68 (7th Cir. 2013); United States v. Lyons, 556 F.3d 703, 708 (8th Cir. 2009); United States v. Charles, 757 F.3d 1222, 1226-27 (11th Cir. 2014); United States v. Taylor, 818 F.3d 671, 675 (11th Cir. 2014); United States v. Giannone, 360 F. App'x 473, 477-78 (4th Cir. 2010)(unpublished). Two other circuits have cited these cases with approval: United States v. Dumitru, 991 F.3d 427, 435 n.28 (2d Cir. 2021); United States v. A.M., 927 F.3d 718, 721-22 (3d Cir. 2019).[2]

Importantly, the Seventh and Eighth Circuits have relied on the fact that under 18 U.S.C. § 1029(e)(5) "the term 'traffic' means transfer," which thus renders a trafficking-based § 2B1.1(b)(11)(B)(i) enhancement inapplicable in conjunction with § 1028A, as the § 1028A conviction already accounts for the transfer of such means of identification. See Lyons and Doss, supra.

---

1. LEXIS page numbers are used because the F.4th page numbers are not yet available in the prison's electronic law library.

This is precisely where the Sixth Circuit went astray, as it was too quick to decide that because "neither § 2B1.1(b)(11), § 2B1.6, nor the relevant commentary defines 'traffic' or 'transfer'", Nicolescu at *39, it could simply rely on the term's "ordinary meaning". Because the "ordinary meaning of 'traffic' carries a commercial aspect[] which the word 'transfer' does not, Id. at *39, the court reasoned that such conduct was sufficiently distinct from the 'transfer' already punished under the mandatorily consecutive § 1028A so as to avoid double counting. However, the court failed to consider the "structure, history and purpose", United States v. Abramski, 573 U.S. 168, 179 (2014), of the U.S.S.G. § 2B1.1(b)(11)(B)(i) guideline.

SIXTH CIRCUIT'S INTERPRETATION
RENDERS PART OF THE GUIDELINE INOPERATIVE

The Guidelines must be "consistent with all pertinent provisions of any Federal statute". 28 U.S.C. § 994(a). But the Sixth Circuit failed to observe that the only statute to define offenses involving the trafficking of unauthorized or counterfeit access devices is 18 U.S.C. § 1029, i.e., §§ 1029(a)(1) and (2). The guideline, it follows, needs to be consistent with § 1029(e)(5), one such "pertinent provision" that defines "traffic" to mean, inter alia, simply "transfer"—without need of any "commercial aspect".

Moreover, if § 2B1.1(b)(11)(B)(i) were to be read using the ordinary meaning of "traffic", as the Sixth Circuit held, then the guideline would be rendered partly inoperative, as it would fail to capture any transfer-based §§ 1029(a)(1) and (2) violations, which the guideline is obviously designed to punish. That, a court cannot do,[3] and neither can the Sentencing Commission.[4]

3. "'A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." Nicolescu at *41(citing Hibbs v. Winn, 542 U.S. 88, 101 (2004)). But the court applied this rule to § 1028, a statute it was not interpreting (and that in any event had its own definition of 'traffic'), but neglected to apply it to § 2B1.1(b)(11)(B)(i)—the very statute it was interpreting, and the only question before the court.

4. 18 U.S.C. § 994(a).

Because "as used in this section ... the term 'traffic' means transfer," 18 U.S.C. §§ 1029(e) and (e)(5), one can, for instance, violate § 1029(a)(1) by "knowingly and with intent to defraud" transferring—and not trafficking—"one or more counterfeit access devices." But according to the Sixth Circuit's interpretation, § 2B1.1(b)(11)(B)(i) would not apply. Such holding can only be incorrect.

To avoid rendering the guideline partly inoperative, it must therefore be read **in pari materia** with 18 U.S.C. § 1029. Because § 2B1.1(b)(11)(B)(i) and § 1029 "address[] the same subject matter" they "should be read as if they were one law." Wachovia Bank v. Schmidt, 546 U.S. 303, 315-16 (2006).[5]

CONCLUSION

Please amend the U.S.S.G. § 2B1.1 guideline so as to define the term 'traffic', for the purposes of subsection (b)(11)(B)(i), as having the same meaning given that term in 18 U.S.C. § 1029(e)(5).[6]

Dated: Terre Haute, Indiana
July 18, 2023

Respectfully submitted,

Bogdan Nicolescu, [redacted]
Federal Correctional Institution
PO BOX 33
Terre Haute, IN 47808

5. **Noscitur a sociis** yields the same result. The term "traffic" is "known by the company it keeps," McDonnell v. United States, 136 S. Ct. 2355, 2368 (2016)(citations omitted), which points to § 1029(e)(5) when such traffic is in "unauthorized access devices", § 1029(e)(3). "This canon is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." McDonnell, 136 S. Ct. at 2368.

6. On the other hand, subsection (B)(ii) must be read **in pari materia** with 18 U.S.C. § 1028, as the term "authentication feature" and the offense of "traffic[king] in false or actual authentication features" are defined solely in that statute, i.e. §§ 1028(a)(8) and (d)(1).

   Note that § 1028 does not criminalize trafficking in access devices or even in means of identification (which would otherwise include access devices), therefore creating no conflict with § 1029.

UNITED STATES SENTENCING COMMISSION

PUBLIC COMMENT

In Re Proposed Priorities for Amendment Cycle

THE GUIDELINES PRESCRIBE GREATER THAN NECESSARY PUNISHMENT FOR ECONOMIC CRIMES

BOGDAN NICOLESCU
Inmate# [redacted]
Federal Correctional Institution
PO BOX 33
Terre Haute, IN 47808

TABLE OF CONTENTS

The Guidelines Prescribe Greater than Necessary Punishment for Economic Crime 1

I. The Tail Wagging the Dog 1

A. Exponential Sentence Increase . . 2

B. Proposed Solution 2

C. Application Example . . . 3

II. Leadership Adjustment too Lightly Triggered . . 3

A. Leadership Adjustment Gone Completely Wrong . 4

i. Is Collaboration the Same as Leadership? . 4

ii. The Share of Proceeds Made Things No Clearer 4

iii. Hierarchical Structure . . 5

B. Proposed Solution 5

C. Further Relief for First-time Offenders . . 6

III. Intended Loss Sweeps too Broadly . . . 7

A. One-size-fits-all Intended Loss May Violate Due Process 7

B. Amendment 792. 8

C. Manatau. 8

D. Proposed Solution 9

IV. Disproportionate Punishment Under § 2B1.1(b)(19)(ii) . 11

A. Superfluity 11

B. Damage, as Defined under § 1030(e)(8) is a Meager Threshold. 11

C. Disproportionate Punishment . . . 12

D. Proposed Solution 12

V. Grouping Issues 13

A. USSG § 3D1.2(d) Sweeps too Broadly. . . 13

i. Tampering with regular, internet-connected home computers punished more harshly than murder. (hypothetical example). . . 13

ii. The Problem. 13

B. Per-Scheme Severability. . . . 14

C. Uncharged Conduct. 15

THE GUIDELINES PRESCRIBE GREATER THAN NECESSARY PUNISHMENT FOR ECONOMIC CRIME

"Many courts and commentators state the Guidelines related to fraud convictions do not present a reasonable starting point for sentencing." United States v. Fry, 792 F.3d 884, 893 (8th Cir. 2014)(Bright, J., dissenting) (collecting cases). But despite noting the "patently absurd" situation, Id., these courts and commentators often stop short of identifying with precision the Guideline mechanics leading to such results. Having been litigating the sentencing of my case (United States v. Nicolescu, 17 F.4th 706 (6th Cir. 2021),[1] which I will use to exemplify some of these issues) for almost four years now, I have identified some, but surely not all, of the likely culprits.

I. THE TAIL WAGGING THE DOG

"The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes." USSG § 2B1.1 cmt. (backg'd).

In my case, the base offense level (7) plus the $4.5 million loss amount (level 18; still in dispute), add up to level 25, which, by itself, calls for a 57 to 71 months sentence. But after all the enhancements are added (bar the six levels reversed on appeal), the total offense level jumps to 37, which calls for a 210 to 265 months sentence.

Therefore, the enhancements alone quadruple my sentence. Then, the "magnitude of loss" is not the primary factor in my sentence.

True, "other relevant factors", Id. cmt. (backg'd), also contribute to my sentence, but when these other factors nearly quadruple it, it makes for

---

1. Note that some facts may seem to contradict the appellate opinion. This is because the first appeal was poorly briefed. But I obviously believe those facts are supported by the record (which does not imply that any prospective amendment will necessarily benefit me).

a prime example of the tail wagging the dog.

Had the offense level of 37 been predicated solely on loss, then it would reflect a loss of more than $250 million. Is my $4.5-million offense really equivalent to a $250-million one, that Congress has characterized as one inflicting "catastrophic losses of magnitude previously unforeseen[?]" USSG § App. C., Amend. 647 (Nov 1, 2002).[2]

What is more, the Government posits that only 25% of the proceeds were attributable to me personally. But that would be 25% out of the 65% the money launderers (a completely different scheme organized by people other than the defendants) were paying to the defendants. Thus only 16.25% of the $4.5 million is even said to have went into my pocket (from 2007 until 2013), which equates to $731,250 (still in dispute).

A. Exponential Sentence Increase

On its face, level 37 looks only moderately higher than the 25-level called for by the loss amount alone. Indeed, 37 is only 48% greater than 25. A 48% <u>linear</u> sentence increase would be reasonable.

But, by design, "[a] change of six levels roughly doubles the sentence irrespective of the level at which one starts." USSG ch. 1, pt. A, P 4(h). Then, the sentence increase these "other relevant factors" induce—a jump from 57 to 210 months—is <u>exponential</u> (3.68 times greater; almost twice doubled), and not linear, which may no longer be reasonable.

Put it another way, the Guidelines were simply not designed to accomodate the degree of enhancement piling up § 2B1.1 otherwise generates.

B. Proposed Solution

Because the piling up of enhancements for economic crimes is well recognized, see <u>Fry</u>, <u>supra</u>, and because the "magnitude of loss" should

2. In fact, Congress asked for a 30-level increase when the losses exceed $400 million. USSG Amend. 647. Adding that to a base offense level of 7 adds up exactly to 37, same as my current offesnse level.

reasonably be the driving factor of a sentence, a quick and effective fix would be the application of any enhancements or adjustments other than the base offense level and loss amount linearly relative to the loss-only range to groups of counts involving the § 2B1.1 guideline.

C. Application Example

In my case, for instance, a court would first apply §§ 2B1.1(a)(2) and (b)(1)(J) for an offense level of 25, and a sentencing range of 57-71 months.

Then, the court would apply the remaining guideline provisions (both Chapters Two and Three), resulting in a total offense level of 37. Dividing 37 by 25 yields a linear multiplier of 1.48. Multiplying the above-obtained 57-71 range by 1.48 results in a sentencing range of 84-105 months.

Finally, on top of that, my 18 USC § 1028A conviction calls for an additional 24 months consecutive, for a final sentencing range of 108-129 months, which is quite reasonable for a mid-single-digit million loss offense. See United States v. Parris, 573 F. Supp. 2d 744, 753-54 (E.D.N.Y. Aug 14 2008) (correlating loss amounts with sentence length), attached as Appendix B.

II. LEADERSHIP ADJUSTMENT TOO LIGHTLY TRIGGERED

The Sixth Circuit recognized "the Guidelines' primary concern with addressing 'relative responsibility'", United States v. Vandeberg, 201 F.3d 805, 812 (6th Cir. 2000)(citing § 3B1.1 cmt. (backg'd)), in the application of the Aggravating Role Adjustment. One could reasonably understand this to mean that a leader is one with above-average responsibility and participation.

But the Sixth Circuit ultimately construed this adjustment as "[a]n increase ... appropriate for those defendants whose 'relative responsibility' for the offense is found to have been greater than that of its other participants."United States v. Quintela Munoz, 233 F.3d 410, 416 (6th Cir. 2000). It does not require this responsibility to be greater than that of either all,

or most, or even the average of the other participants. Afterall, § 3B1.1 cmt. n.2 only requires that the "defendant must have been the organizer, leader, manager or supervisor of one or more other participants." (emphasis added).

As long as the defendant asked one of his co-conspirators, one single time—throughout however many months the conspiracy may have lasted—to do something for him, then a 4-level adjustment may apply.[3]

A. Leadership Adjustment Gone Completely Wrong

My case presents one such situation. All co-defendants received the 4-level adjustment, and at least 5 out of 6 who testified would have received it too. Same goes for most of the remaining known and unknown co-conspirators.[4]

i. Is Collaboration the Same as Leadership?

As currently formulated, this adjustment will technically apply to defendants who merely collaborate by dividing various tasks amongst each other, without any well-defined hierarchical structure. But such collaboration is inherent to any conspiracy. Does anybody engaged in jointly undertaken criminal activity deserve a Leadership Adjustment?

ii. The Share of Proceeds Made Things No Clearer.

While I may ostensibly have received 25% out of 65% (thus 16.25%; the money launderers kept 35%), two other co-conspirators received the same share as I: Defendant Tiberiu Danet and co-conspirator Catalin Dima.[5]

What is more, defendant Miclaus, who received only 10% (thus 6.5% out of the total) also received the leadership enhancement. Valentin Danet,

---

3. A 4-level enhancement will increase the sentencing range by roughly 55%.

4. Some names were given by the witnesses. Others were only known by online monikers, but relevant evidence associated to them exists.

5. Catalin Dima testified that he quit because this was too much work for too little money. He received the same share as your commentator.

another co-conspirator, who was not charged, testified receiving 15% (or 9.75% of the total) and having had control over virtually all aspects of the scheme.

Testimonies do not elaborate why some members had bigger shares than others, so it is not safe to assume that this implied a leadership role. It may just as well reflect that some members were more "indispensable" than others. Yet, "'playing important or essential role' in crime is insufficient to show that a defendant deserves § 3B1.1 enhancement." Vandeberg, 201 F.3d at 812.

iii. Hierarchical Structure

My case also provides one such example: CW Antonovici's money laundering network. He testified that he was cashing out his own eBay fraud, and cashing out for the Bayrob Group (my alleged wire fraud co-conspirators), and for several other similar Romanian eBay fraud groups,[6] retaining 10% of all such proceeds.

CW Antonovici further testified that the remaining 25% were retained by "the guy in Germany", who was cashing out for Antonovici, and for other similarly situated managers of groups like Antonovici.

Naturally, none of these people were prosecuted by the Government. But had they been prosecuted, their network provided precisely the type of structure for which the Aggravating Role Adjustment had been designed.

B. Proposed Solution

When all but a few participants qualify as leaders, it is more reasonable to conclude that no leaders existed, and that a few participants, however, had minor roles.

(a) Please amend the § 3B1.1 guideline so as to punish only those who have substantially more responsibility than the average participant.

6. Valentin Danet testified that Bayrob Group had acquired the eBay scheme from Antonovici, who had been doing it since 2003, and continued to up until the arrests in 2016, 3 years after Bayrob Group had quit the eBay scheme.

I am only held personally responsible for 16.25% of the proceeds. But I am being punished for the whole $4.5 million, not just the $731,250 attributable to me. This results in a 4-level increase from §§ 2B1.1(b)(1)(H) to (b)(1)(J) in addition to the 4-level leadership adjustment. As the Guidelines currently are, I do not believe I can receive a leadership role and a minimal role for my relatively small 16.25% share of the proceeds at the same time.

(b) Please include an exception whereby a defendant who receives a relatively small share of the proceeds may be exempted from a leadership adjustment (for instance when such difference results in an at least 2-level increase under "Loss").

C. Further Relief for First-time Offenders

I believe the Commission will amend the Guidelines so as to provide a 2-level reduction for first time, non-violent, offenders, which, however, will be inapplicable to defendants receiving leadership adjustment.

Please consider allowing the 2-level reduction for first time, economic crime, defendants regardless of whether leadership applies.

As my case illustrates—and I;m sure this is true for many other defendants—in economic crime cases this adjustment is too easily triggered. I believe this happens because economic crime is inherently more complex than, say, drug dealing. But dividing and coordinating tasks between economic crime co-defendants will often be construed as leadership under the current Guidelines even when, absurdly, it results in the application of this adjustment to all co-defendants.

III. INTENDED LOSS SWEEPS TOO BROADLY.

A. One-size-fits-all Intended Loss May Violate Due Process.

In my case, evidence showed that in 2013 5,798 unique e-mails were targeted. However, only 38 persons were victimized. Thus, in 2013 the success rate of the eBay scheme was below 1% (0.65%).

But the singular method of "intended loss" calculation of the § 2B1.1 guideline prescribed for a wide range of frauds renders the "intended loss" provision arbitrary and thus irrational, therefore offending due process. Chapman v. United States, 500 U.S. 453, 464-65 (1991). Punishment based on intended loss rather than actual loss is analogous to the punishment of "street weight of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component," Id. at 465.

But this is where the similarities end. Unlike with drugs, the fraud guideline does not differentiate between the various fraud types. It was rational to include "blotter paper" weight in the LSD guideline because that was the chosen "tool of the trade for those who traffic in the drug," based on the Commission's particularized findings, and therefore this did not create arbitrary disparities between defendants, while at the same time avoiding the costs of lab tests that would have otherwise been required to determine the actual LSD weight, Id. at 466.

But applying to eBay fraud the same intended loss table that would perhaps be reasonable for investment fraud cases is analogous to applying the LSD weight table to a marijuana case. The unrestricted application of "intended loss" has the effect of punishing low success rates in fraudulent schemes, and this is irrational, as it creates arbitrary—in addition to inversely proportional to thje success rate and contrary to common sense—disparities between defendants who otherwise inflict exactly the same level

of harm upon their victims. The Commission does not appear to have foreseen this situation as it has done nothing to address it.

B. Amendment 792.

Under "Intended Loss", USSG Amend. 792 (Nov 1, 2015) solves a circuit conflict where "courts have expressed some disagreement as to whether a subjective or an objective inquiry is required." Id. "The amendment adopts the approach taken by the Tenth Circuit ... provid[ing] that intended loss means the pecuniary harm that the defendant purposely sought to inflict", noting that in United States v. Manatau, 647 F.3d 1048 (10th Cir 2011)(Gorsuch, J.), the case the amendment adopts, the court held "that a subjective inquiry is required." Id.

However, Manatau is a complex, 10-page, opinion that cannot be fully summarized in just a few lines. When the Commission "adopts" one circuit's decision, it does not automatically make it binding on the other circuits. Only what the Commission adds to the Guidelines themselves and to the commentary is binding upon the courts.

The way intended loss is currently formulated in the Guidelines, the Government could just as well argue that in my case every unique e-mail shows an intent of causing $9,000 in losses, therefore the "intended loss" might just as well be $9000 times 5798 e-mails times 6 years for a total of $313,092,000. To be effective, the Guidelines must clearly define "intended loss" in accordance with Manatau, reflecting all the relevant facts.

C. Manatau.

Manatau did define "intended loss" as "a loss the defendant purposely sought to inflict." Id. at 1050. But this definition must be read within the context of the Manatau decision as a whole, lest it give rise to unintended, overly broad, interpretations. The Commission must therefore construe Manatau in a way that avoids the disparities set forth in Section A, supra.

Put it another way, "intended loss" must be measured at a point common to all types of fraud § 2B1.1 punishes.

To begin with, "'[i]ntended loss' does not mean a loss that the defendant merely knew would result form his scheme or a loss he might have possibly and potentially contemplated." Manatau, 647 F.3d at 1050. The Manatau decision therefore restricts the reach of the term "intended loss" to those cases whre the mental state of criminal intent—as opposed to mere knowledge and willfulness—can be found, Id. at 1051, while in no way seeking to expand the reach of the term "loss." This is because "American criminal law often restricts liability to (or imposes heightened liability in) cases where an intentional choice to do a wrong is present." Id. (citing Morissette v. United States, 342 U.S. 246, 250 (1952), and Tison v. Arizona, 481 U.S. 137, 150 (1987)). "The guidelines' definition of 'intended loss' makes no mention of knowledge or some lesser mens rea standard." Id. Manatau requires criminal intent towards loss causation, and not any lesser forms of "intent"the ordinary meaning of the word may otherwise encompass.

"[O]ne intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts." Tison v. Arizona, 481 U.S. at 150 (citing W. LaFave & A. Scott, Criminal Law § 28, p. 196)(1972); Lockett v. Ohio, 438 U.S. 586, 625-626 (1978)(opinion of White, J.)(equating intent with purposeful conduct); and Perkins, A Rationale of Mens Rea, 52 Harv L Rev 905, 911 (1939)).

C. Proposed Solution.

For the purposes of the "loss" enhancement, the only consequence of interest is the causation of "loss." Thus, only those acts that a defendant subjectively believes can cause "loss" may count toward "intended loss" (irrespective, however, of whether such belief is correct).

This is one such point all types of fraud have in common. A defendant would know at which stages his scheme could actually cause loss. He cannot subjectively believe that any other stages are loss inflicting.

Intended loss must therefore be calculated based only on those acts a defendant believes could cause loss, however, regardless of whether such losses are actually possible, and regardless of whether the scheme actually succeeds—hence intended, as opposed to actual, loss.

The Manatau court made it clear that "intended loss" does not mean merely "possible and potentially contemplated" losses, as the government would have liked to read this provision. Id. at 1053. Such acts must then be excluded.

Manatau also adopted the First Circuit's view where "the court held that 'intended loss' can be shown by looking to what loss was 'expected' because under its circuit precedent a person is presumed to have 'intended the natural and probable consequences of his or her actions.'" Id. (citing United States v. McCoy, 508 F.3d 74, 79 & n.6 (1st Cir. 2007).

The Commission also endorsed the Third Circuit's view that to determine intended loss, "we look to the defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims.'" USSG Amend. 792 (citing United States v. Diallo, 710 F.3d 147, 151 (3d Cir. 2013)). This is because "[t]he fraud guideline thus far never endorsed sentencing based on the worst-case scenario potential loss (here, the face value of the loan)." United States v. Kopp, 951 F.2d 521, 529 (3d Cir. 1991)(citing USSG § 1B1.3 cmt. n.4 [now n.6])". "[T]he risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as equivalent of the harm that occurred." USSG § 1B1.3 cmt. n. 6.

IV. DISPROPORTIONATE PUNISHMENT UNDER § 2B1.1(b)(19)(ii)

A. Superfluity.

Subsection (b)(19)(ii) punishes a conviction under 18 USC § 1030(a)(5)(A), which in turn reads:

> Whoever knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct intentionally causes damage without authorization, to a protected computer;

Id. This can very easily be triggered because one definition of "protected computer", § 1030(e)(2), its residual clause, effectively resolves to any computer, as it reads: "the term 'protected computer' means a computer ... which is used in or affecting interstate or foreign commerce or communication ..." Id. But this is even broader than the Commerce Clause. The Supreme Court recognized that the phrase "affecting interstate or foreign commerce" is a term used by Congress to signal that it is exercising its full power under the Commerce Clause. See Russell v. United States, 471 U.S. 858, 859 (1985).

Then Subsections (e)(2)(A) and (C) are rendered superfluous, as any of the computers described therein are clearly computers used in or affecting interstate or foreign commerce.[7]

B. Damage, as Defined under § 1030(e)(8) is a Meager Threshold.

"The term 'damage' means any impairment to the integrity or availability of data, a program, a system or information." § 1030(e)(8).

---

7. See also United States v. Yucel, 97 F. SUpp. 3d 413, 418-19 (S.D.N.Y. 2015)(collecting cases and noting "widespread agreement in the case law" that "protected computer" includes any internet-connected computer).

By equating "protected computer" with "computer" this definition also renders § 1030(a)(2)(C) superfluous.

Finally, § 1030(e)(2)(B) may be superfluous in of itself because a computer "used in or affecting interstate or foreign ... communication" necessarily affects "commerce".

In my case, partly imparing the access to "www.ebay.com" on regular, home, computers was deemed sufficient. But one could just as well transmit a delete "command" to a home computer connected to the internet (thus a "protected computer")to delete its screensaver (which is a "program"), thereby impairing the integrity or availability of this program, and violating § 1030(a)(5)(A), resulting in a 4-level enhancement under § 2B1.1(b)(19)(ii).

This provision, therefore, punishes even pranks. "The government assures us that, whatever the scope of CFAA [§ 1030], it won't prosecute minor violations. But we shouldn't have to live at the mercy of our local prosecutor," United States v. Nosal, 676 F.3d 854, 862 (9th Cir. 2012)(en banc), lest we can risk earning "a handsome orange jumpsuit." Id.

C. Disproportionate Punishment.

The prank, supra, cannot be any more serious than a § 1030 violation

> involv[ing] a computer or system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security,

USSG § 2B1.1(b)(19)(i), which calls for a 2-level enhancement.

D. Proposed Solution.

"The graduated levels [of Subsection (b)(19)] ensure incremental punishment for increasingly serious conduct[,]" USSG Amend. 653 (Nov 1, 2003). Then, a § 1030(a)(5)(A) should call for a lesser punishment than the conduct described in Section C, supra.

Please amend the Guidelines so that § 2B1.1(b)(19)(ii) prescribe a 1-level enhancement for a § 1030(a)(5)(A) conviction.

V. GROUPING ISSUES

A. USSG § 3D1.2(d) Sweeps too Broadly.

i. Tampering with regular, internet-connected home computers punished more harshly than murder. (hypothetical example).

Let's assume defendants A and B, who are first time offenders, take part in the same wire fraud scheme, and both their offense levels are thus far 37.[8]

Defendant A learns about the ongoing investigation and unfortunately disposes of a potential witness through second degree murder.[9]

Meanwhile, Defendant B continues his criminal activities by compromising 10 regular, home, computers with malware, resulting in $10,000 in losses, which is sufficient to predicate an 18 USC § 1030(a)(5)(A) conviction (See Part IV, supra), resulting in an additional 4-level enhancement under USSG § 2B1.1(b)(19)(ii) for a total offense level of 41.

Defendant A, however, benefits from having two groups of counts: level 37 for the wire fraud, and 38 for the murder under § 2A1.2(a), resulting under §§ 3D1.4 and 3D1.4(a) in a combined offense level of 40.

Both defendants receive the low end of the guideline range, that being 292 months for the murderer, and 324 months for the computer hacker.[10]

This cannot possibly be a reasonable outcome!

ii. The Problem.

In Amendment 617 the Commission stated its intent to consolidate the economic crime guidelines in order to simplify the calculation process where an aggregated measure of harm can be quantified. But "consolidated" need not

8. As my case and the case cited in Fry, supra, show, economic crime triggers, unfortunately too often, offense levels in excess of 37 or even 43.

9. Murder and fraud can run concurrently. Ellis v. United States, 2000 U.S. Dist. LEXIS 5132 (E.D.N.Y. Mar 1 2000), at *1. Murder in connection to fraud can lead to federal prosecution. Id. (citing 18 USC § 1512(a)). No dangerous weapon is necessary either: One can be pushed out of a balcony or off a cliff.

10. The counts must run consecutively for defendant B. USSG § 5G1.2(d).

be consecutive and exponential, which is precisely what the § 2B1.1 guideline effectively prescribes.

The offense level of 37 of the wire fraud presumably resulted from a multi-million loss. But the § 1030(a)(5)(A) only involved $ 10,000. The Commission has identified no reason why the § 2B1.1(b)(19)(ii) enhancement must be applied to the multi-million loss amount. Yet, it has required it under §3D1.2(d).

What is more, the predicating wire fraud may have included enhancements otherwise irrelevant to the § 1030 offense. An Aggravating Role adjustment may also be applicable to the wire fraud but inapplicable to the very narrow § 1030 violation. But § 3D1.2(d) requires it nevertheless.

Such results are incongruous with the overall design of the Guidelines because separate offenses will generally run concurrently.

Had the § 1030 count been severable from the group, it would have started at a base offense level of 8. Add 4 levels under § 2B1.1(b)(19)(ii), and even 6 more levels on various other enhancements, for a total of 18. But due to the above-9 offense-level difference between the § 1030 count and the wire fraud, the § 1030 would have ultimately been discared uner § 3D1.4(c) resulting in a combined level of 37 for a sentence of 210 months.

That's 114 months less than when grouped under § 3D1.2(d), which thus effectively prescribes a consecutive sentence for the § 1030 count at nearly its statutory maximum of ten years, § 1030(c)(4)(B)(i). Separately, this count, at level 18, would have yielded a range of 27-33 months.

B. Per-Scheme Severability.

In my case—an excellent example for this issue—the Government charged under the same wire fraud conspiracy count two clearly distinguishable schemes: (a) the eBay auction fraud (2007-2013); and (b) the botnet scheme (2013-2016; consisting in trafficking credit cards and cryptomining on infected

computers). These schemes in no way overlap and the loss amounts are vastly different: $ 4.5 million for the eBay scheme, and somewhere between 100 and $ 200,000 for the botnet.

At the initial sentencing hearing, enhancements under §§ 2B1.1(b)(4), (b)(19)(ii) and (b)(11)(B)(i) were applied. However, those enhancements only pertained to the latter, botnet, scheme, and thus should have been severable from the $ 4.5 million eBay losses. But because they were not charged separately from the eBay scheme, they could not be grouped under § 3D1.2 even absent the § 3D1.2(d) issue set forth supra.

C. Uncharged Conduct.

It is understood that the Guidelines can punish uncharged conduct, but prosecutors should not benefit from electing not to charge it.[11] Even though subsections (b)(4), (b)(11)(B)(i) and (b)(19)(ii) do apply to the same scheme, and thus to the same loss amount, they still punish distinct offenses—codified in different statutes, and thus chargeable as separate counts.[12]

It is then not at all clear that these enhancements can be properly added on top of each other, when, had they been charged as different counts, they would have ran concurrently.

Dated: July 20, 2023

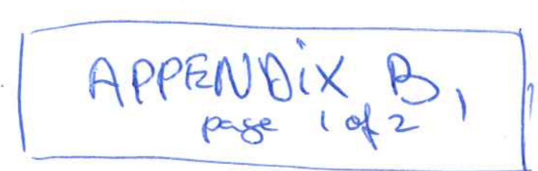
Respectfully submitted,

Bogdan Nicolescu, #64505-060

---

11. The Sixth Circuit "questioned the reliance of a definition outside of §1028a," Nicolescu, 17 F.4th 706, n.7 (6th Cir. 2021). The court's willingness to rely on § 1028A definitions, as I was convicted of that offense, suggests that it may have also relied on the § 1029(e)(5) definition, had I technically been convicted of § 1029, and therefore reversed the § 2B1.1(b)(11)(B)(i) enhcancement. The Government may have thus already benefitted from not charging me with § 1029, the only statute that criminalized the conduct punished in subsection (b)(11)(B)(i).

12. Incidentally, this no longer concerns me, as the appellate court already reversed §§ 2B1.1(b)(4) and (b)(19)(ii).



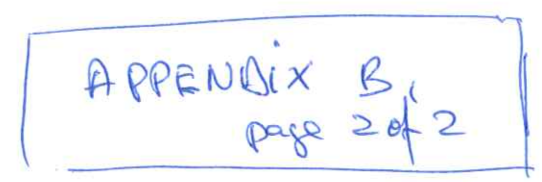
The Government and I were in agreement, therefore, that even if there were dissimilarities in the array of national securities-fraud sentences precluding the applicability of § 3553(a)(6) under *Wills*, they nonetheless bore upon the relative seriousness of the nature of the defendants' crimes under § 3553(a)(1). Thus, although the sentences in the Government's compendium obviously were impacted by many variables, such as whether they were imposed before or after the passage of the Sarbanes-Oxley Act, 7 or whether the defendant pleaded guilty or was a cooperator, it was perfectly clear that there was a **{2008 U.S. Dist. LEXIS 25}**correlation between the losses in those cases and the periods of incarceration: Those who were not cooperators and were responsible for enormous losses were sentenced to double-digit terms of imprisonment (in years); those whose losses were less than $ 100 million **were generally sentenced to single**-digit terms.

Thus, on the double-digit side, amongst the non-cooperators, there are, as representative, the following:

Name	Amount of Loss	Sentence
Bennett	**$ 100 million**	**14 years**
Ebbers	**over $ 100 million 8**	**25 years**
Rigas (John)	**over $ 200 million**	**15 years**
Rigas (Timothy) over	**$ 200 million**	**20 years**
Skilling	**over $ 1 billion**	**24 years**
Forbes	**approx. $ 14 billion**	**10 years**
Kumar	**$ 2.2 billion**	**12 years**
Ferrarini	**$ 25 million**	**145 months**

© 2023 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

64505060



And on the single-digit, non-cooperator side of the Government's compendium, there are:

Name	Amount of Loss	Sentence
Hotte	$ 67 million	108 months
Formisano	$ 9.8 million	78 months
Smirlock	$ 12.6 million	48 months
Adelson	$ 50-$ 100 million (intended)	42 months
Betts	$ 1.3 million	366 days
Chavrat	$ 1.1 million	6 months
Tursi	$ 1.1 million	41 months
Scuteri	$ 2.5 million	21 months
Kearney	$ 1.3 million	51 months
Rutkoske	$ 12 million	108 months
Cushing	$ 24 million	97 months

{573 F. Supp. 2d 754}

See App. A.

To be sure, there were undoubtedly a host of factors that entered into these sentences, and there were others that seem on the surface to defy this pattern -- for example, *Surgent* 9 -- but I simply could not dismiss, in assessing the nature and seriousness of the Parrises' crimes under § 3553(a)(1), the overall relationship of the amount of losses in those cases to the sentences imposed;

© 2023 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

From: ~^! OWENS, ~^!GREGORY
Subject: [External] ***Request to Staff*** OWENS, GREGORY, [redacted], CAA-C-B
Date: Saturday, July 1, 2023 8:34:52 AM

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: Tutor/EDU

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To the Chair of the U.S. Sentencing Commission

Sir or Ma'am

What concerns me is the disparity between sentences for the same crime when you accept a plea deal or choose to exercise your constitutional right under the Constitution of the United States to a trial. If you believe you are innocent of the charges and choose to go trial you will automatically receive an "Upward Departure" from the sentencing guidelines, if you testify in your own defense and the Federal jury finds you guilty (Fed Juries convict 99% of the time, I did not know that then.) If you are found innocent by a Fed jury the Prosecution will continue to charge you over and over under different statutes until a jury convicts you. You will also receive an enhancement for perjury (upward departure from the sentencing guidelines,) as the judge explained to me you "Testified" the jury found you guilty so you "Had to have LIED under oath."

So an individual, with no criminal record received a life sentence for a crime which involved no deaths because I exercised my right to a trial. I felt as if I was being punished for exercising my right to a trial and for making the system do it's damn job. If I had known then what I know now I would have accepted the 7-10 year plea deal I was offered. If I had I would be free right now.

Sincerely,

Gregg Owens
Sergeant Major (Retired)
U.S. Army

From: ~^! PAGE, ~^!SHAQUAN
Subject: [External] ***Request to Staff*** PAGE, SHAQUAN, [redacted], SCH-B-A
Date: Friday, June 30, 2023 8:20:18 AM

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: unicore

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

im writing in reference to the sentencing reform specifically in regards of the youthful offenders section. A crime committed as a child and recognized as a prematurely bad decision in life by the youthful offender adjudication should not be something that is used against someone who has gotten into trouble as an adult. The part of the brain that humans use to make decisions (Frontal lobe) isnt completely developed until the age of twenty one, and to use the poor decision making that took place as a child against an adult is equivalent to using a handicap against them because theres a reprensentation of temporary mental incapability because of the age. Also A youth offender adjudication is something that is supposed to be sealed so its not used against a person that has been a youthful offender in life yet the federal system has been comfortable with using it to add time which is completely unjust. this needs to stop and the people who have been wronged by the system with these mishandlings of the law should be treated. Thank you for your time.

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Kelly Perkins, ?

Topics:

5. Career Offender Guideline/Categorical Approach

Comments:

How far back can you go when sentencing someone? And How is drug crimes considered violent crimes for certain people?

Submitted on: July 10, 2023

From: ~^! PETERSON, ~^!CARIN ANN
Subject: [External] ***Request to Staff*** PETERSON, CARIN, [REDACTED], PEK-F-A
Date: Wednesday, June 28, 2023 1:34:52 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: ANYONE
Inmate Work Assignment: EDU PM

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I believe someone should look into the fact that first time drug offenders are not being offerd a drug treatment program or drug court before being sentenced to mandatory minimums. I myself am a case in point I believe if I had been offered that in my situation it would have helped me better than being sentenced to a federal prison camp in which there is no help. I had been on pretrial for almost 2 yrs and the whole time I had been working on my drug problem extensivly and it was not even takin into consideration at the time of my sentencing and instead of being able to continue working on my drug problems I was sentenced to a prison camp that has a problem with drugs getting in and no help. I was on pretrial for almost 2yrs doiong good workin hard on my drug addiction and my life was better than it had ever been and I believe I could have done great out there on my ankle monitor continuing my drug education. There for I believe something needs to be done for first time drug offenses and the stuff they do during pretrial takin into consideration instead of putting so many people in prison camps with access to drugs with no help. These prison camps need to be shut down and people with such a low custody classefecation should be home on monitors working to better their lives.

From: ~^! PHILLIPS, ~^!JOE ERNEST
Subject: [External] ***Request to Staff*** PHILLIPS, JOE, [redacted], FOR-W-B
Date: Tuesday, July 4, 2023 7:20:17 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: U.S. Sentencing Commission
Inmate Work Assignment: GM2

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I'm not sure if the U.S. Sentencing Commission has anything to do with the First Step Act's Earned Time Credits or not, but I thought I would let the Commission know what's going on in the BOP. I have been down for almost 16 years. I am First Step Act eligible for Earned Time Credits. The BOP has taken a year off of my Supervised Release for time credits that I have earned, but they are refusing to apply any of the extra 400+ Earned Time Credits that I have earned towards Residential Reentry Center or Home Confinement. I am being told by FCC Forrest City administration that it's "too late" to apply these time credits to place me in an RRC because I have MORE First Step Act credits than I have time left on my sentence. What sense does that make? What is the point of programming and working for all of these First Step Act credits only for me to not be able to use them? This is infuriating. I have been in prison for 16 years and I am being withheld First Step Act time credits that I have earned. The BOP is violating my rights under the First Step Act to these time credits. The BOP is violating the law.

If there is anything that you can do to help me get these First Step Act time credits applied to get me to RRC/HC I would be very grateful. Thank you.

7-5-23

To U.S. Sentencing Commission:

I am commenting on the policy priorities for the amendment cycle ending May 1, 2024. I feel these issues I address also need considered beyond this cycle.

① The <u>Career Offender Sentencing Enhancements</u> are an overreach by the USSC. In particular, the 5-point Career Sexual Offender Enhancement should NEVER be able to be applied to an offender with Zero-Criminal History or who is charged with a particular crime for the first time (including a plea deal for only one crime). Prosecutors add this enhancement now at an alarming rate as if it's a badge they earn. This enhancement is NOT being used for its intended purpose for career criminals and in NO way should it be a 5-point enhancement. In most cases it shouldn't be applied even if it were only a 2-point enhancement.

The scope is too broad for the current application. The impact is that it's destroying families, careers, and lives with sentence lengths that were never intended for first-time offenders. Harshly, it allows for sentencing enhancements for conduct

never convicted of.

(2) The Zero-Level Category on the guidelines should be implemented and made retroactive for ALL crimes. The term "certain offenders" should NOT be used. Offenders have already been punished by the courts for their offense(s). So why are any crimes / offenders targeted in a discriminatory way and punished a second time by the USSC? If new offenders come into the court system in the same circumstances as previous offenders, why shouldn't it be equal application to all? There should be NO exclusions and should apply equally to all - past, present, and future. Those who have zero criminal history at sentencing should have now, and always should have had, a beginning category on the guideline ranges.

(3) The sentence lengths of sex crimes - especially production, distribution, and possession of child pornography - need to be aligned with sentences at the state levels. How can production at the state level get 10-15 years or less and at the federal level with enhancements for a first-time offender get up to 30 years? The

sentence lengths are getting out of hand versus the severity of the actual crime committed. The vast majority of sex cases involve first-time offenders, are non-violent offenders, and involve computer crimes only with no contact with any victim. The offenders are categorized as violent and many times now as a "repeat and dangerous" sex offender through enhancements even for a first-time offense. Why and how is a computer/phone-only crime with no contact with a victim considered violent?

The sex offense sentencing lengths are not based on any empirical data and are far more harsh at the federal level compared to state sentences and other first-world countries. Why is there unequal application of sentence lengths based on state vs. federal charges? Many less serious offenses are being sentenced to the same or more months compared to categorically worse offenses.

(4) Technology updates to enhancements for sex crimes need to be made. Today, a large majority of these offenses involve the use of a computer (phone included as a computer). In actuality, this raises the base sentence for almost all sex

offenses. Shouldn't the enhancement now be for in-person contact? A production charge done through a social media account – with NO physical contact, NO in-person communication between offender and victim – can be routinely given a longer sentence than an offender who has physical contact with their victim, entices that victim to meet in person, AND takes the production charge pictures in person.

The enhancements and laws are outdated with modern technology. There are wide discrepencies in the cases for the same offenses / charges and all are grouped together. The guideline system is broken for sex offenses. The 15-30 years for NOT-in-person production offenders is too much. 10-20 years for distribution using only technology is too much. These need to be similar to nationwide state sentences.

(5) More the focus to rehabilitation and social justice, not just incarceration with long-term sentences. The system, for first-time offenders, especially if they have been solid citizens in the past, should allow a second chance; it currently does not. Our country needs to rethink the concept of justice.

Instead of measuring justice by the number of calendar years a person serves in prison, justice should be measured by the efforts an offender makes to redeem his crimes and reconcile with society. Reforms should encourage offenders to work toward earning freedom through merit and redemptive acts. NO sub-group or category should ever be excluded from any of that (as sex offenders currently are). We can come up with a system that serves society better than locking a human being in a cage for decades.

The system needs to allow to look at someone beyond their charges only. Positives should be incentivized into the sentencing and enhancements as well. To fully understand someone you have to see them at their best and at their worst. You have to see everything. The current system only sees the worst. Even good people make mistakes - this has to be taken into account - currently it's not. Prisoners are sent to prison as a punishment for their crimes. Why is there a further duty felt by the USSC and BOP to further punish inmates?

(6) Other issues for the USSC to address with Congress:

A) First Step Act - time credits should be given to ALL inmates. This is discriminatory and punishing "certain offenders" a second time and not allowing them equal access to rehabilitation programming.

B) Add Federal Parole - just as it exists at the state levels, it should also at federal.

C) Lower Federal Good Time - this will incentivize programming further for inmates and help with overpopulation and costs. Lower the amount to 65% from 85% to be aligned with most state charges.

In conclusion, the system needs fixed. Until it's you, a friend, or a family member directly involved, you have no idea how broken it really is and how harsh the minimum mandatories and enhancement system are. The process displays a total disregard to families being destroyed and torn apart by unfair, long sentences. These are real people with families and many of these cases are being over-prosecuted by zealous attorneys with support of judges who feel they must stay within guidelines instead of using common sense

when handing out sentences. If prosecutors and judges are not allowed to truly get to know the offender and take into account their actual life - then there needs to be a better system for all involved that is fair and equal. Under the current system there is no equal justice under the law and no equal application of the law.

Please remember, just because someone stumbles and loses their way, does not mean they are lost forever.

Thank you for considering on and acting on these suggestions.

Regards,

Jeffrey D. Pierce

Jeffrey D. Pierce

From: ~^! PINEDA, ~^!JAIME M
Subject: [External] ***Request to Staff*** PINEDA, JAIME, [redacted], ALD-A-A
Date: Wednesday, June 28, 2023 5:34:18 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.

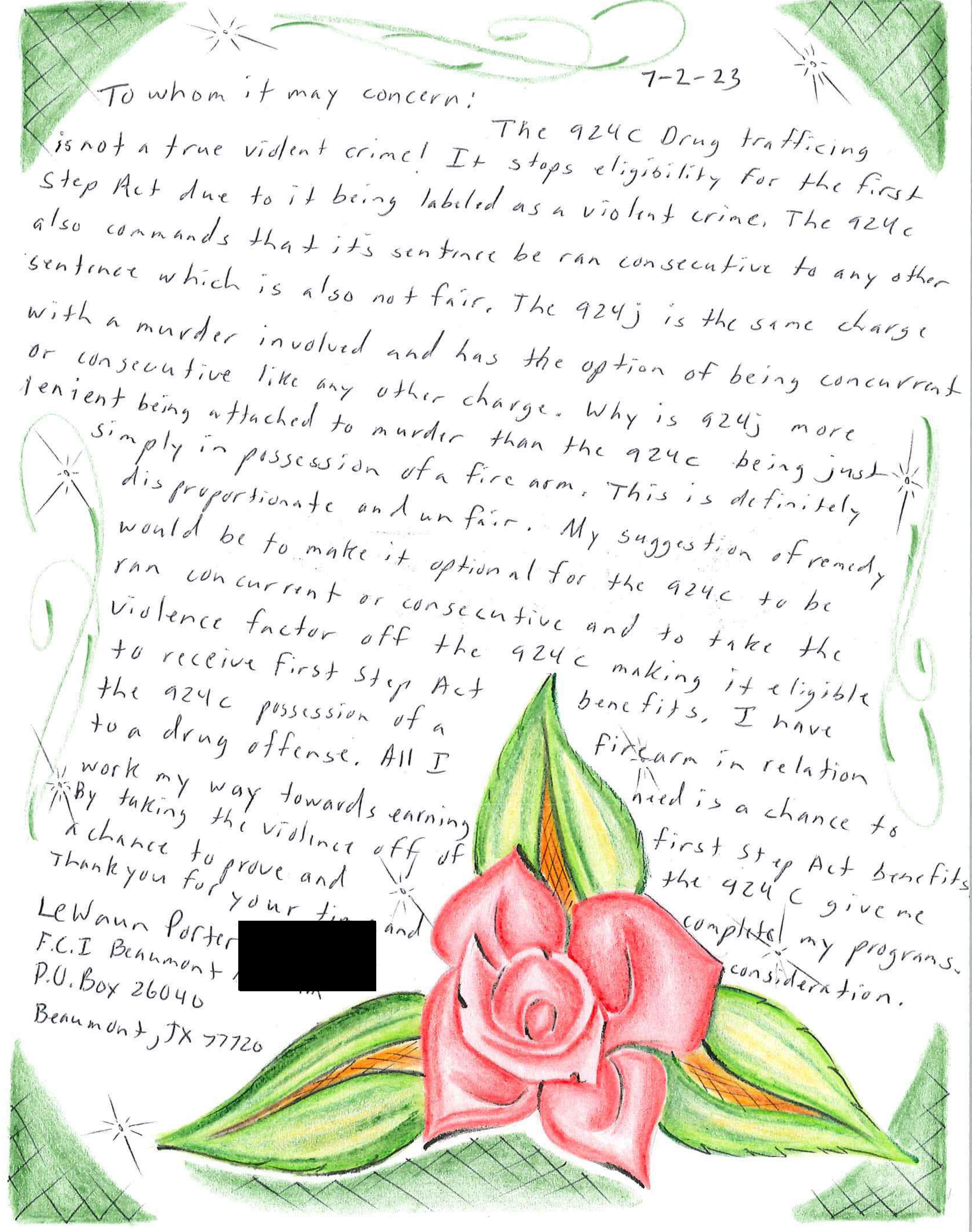
To:
Inmate Work Assignment: Administration

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Changes should be made to Career Offenders either needing a a crime of violence as well as a serious drug offense or add drug quantity to the offense to be considered. drug users that are low level "drug dealers" i.e. 2 grams or under are considered career offenders instead of rehabilitation or federal drug court...lengthy sentences take away a lot from inmates and really is not a good way to solve the problem...



7-2-23

To whom it may concern:

The 924c Drug trafficing is not a true violent crime! It stops eligibility for the first Step Act due to it being labeled as a violent crime. The 924c also commands that it's sentence be ran consecutive to any other sentence which is also not fair. The 924j is the same charge with a murder involved and has the option of being concurrent or consecutive like any other charge. Why is 924j more lenient being attached to murder than the 924c being just simply in possession of a firearm. This is definitely disproportionate and unfair. My suggestion of remedy would be to make it optional for the 924c to be ran concurrent or consecutive and to take the violence factor off the 924c making it eligible to receive First Step Act benefits. I have the 924c possession of a firearm in relation to a drug offense. All I need is a chance to work my way towards earning first Step Act benefits. By taking the violence off of the 924C give me a chance to prove and complete my programs. Thank you for your ti[illegible] and consideration.

LeWaun Porter [redacted]
F.C.I Beaumont [redacted]
P.O. Box 26040
Beaumont, TX 77720

From: ~^! PRIDE, ~^!ANDRAE
Subject: [External] ***Request to Staff*** PRIDE, ANDRAE, [redacted], OXF-A-A
Date: Wednesday, June 28, 2023 12:19:58 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: U.S. Sentencing Commission
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Im not sure after reading the memo what specifically i should write if, it was my oppinion as to addressing my take on sentencing... but in 2023 i was sentenced to 12 years and a big part of my sentencing was my criminal history. One of my prior offenses was PWID marijuana, an offense that I've submitted to my govenors office to have removed from record due to the decriminalization in my state...despite my pending determination of relief i was still sentenced to career offender status. More importantly with my case comming from the 3rd circuit two districts in my circuit(the Middle District and the Eastern District) ruled that during federal sentencing, determining a sentence relying upon a prior state conviction,the governing law at the time of the federal sentencing is to looked upon,not the law upon the time of the state conviction. The Western District of Pennsylvania made the decision that due to the fact that no cases came out of the district establishing how the district should rule my judge decided to career me despite the fact the entire circuit could decide to rule differently. I feel as though inmates in this perdictament should not be time barred from filing for relief...i feel as if inmates in this perdictament should have their sentencing dates placed on hold until a decision is made within the entire circuit not be sentenced within the district's decision and then be left to simply figure out a way back into the courts.

From:	~^! RIOS, ~^!FRANKLIN ANTONIO
Subject:	[External] ***Request to Staff*** RIOS, FRANKLIN, [redacted], EDG-C-B
Date:	Thursday, July 6, 2023 12:06:01 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: 2024 Sentencing Guidelines
Inmate Work Assignment: C2 Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Sir/Madam

My name is Franklin Rios and I am currently incarcerated at FCI Edgefield, in South Carolina.

The inmates here were recently informed of the Sentencing Commission's 2024 focus for any possible amendments, and I wanted to write with a couple of comments.

First, I would like to thank the Commission for the work they are doing. I believe that what you are doing is the only way inmates can be given the proper education, rehabilitation and drug treatments that they desperately need to return to the Community, realizing Congress' efforts. Inmates are people and not just words or statistics.

Second, you may not be aware, but the Supreme Court recently announced that it was NOT going to look at "acquitted conduct" and passed this back to the Sentencing Commission. I think this is a number one priority for most inmates, and it affects literally every single inmate I know. Inmates are confused (as I think most people are) between "acquitted conduct" and "relevant conduct". I believe anything you have never been found guilty of is acquitted conduct, and as such you should not be doing time for something you've never been found guilty of. I believe the constitution says "innocent until proven guilty" not "guilty regardless of whether you're convicted or not".

I'd also like to say that a lot of the changes don't affect me personally, but they do affect, and help, a lot of people and seeing them have hope for the first time in a long time is refreshing and, well, hopeful.

The BOP needs to be taken to task and removed from the equation as far as possible, when it comes to inmates. On a daily basis, their goal seems to be "keep as many inmates as possible in prison for as long as possible". At every turn, they show contempt, for Congress, the Courts - many's the time that inmates have brought something to their attention, say that the Commission has amended, or the Courts have ruled, or Congress has made law, or the Courts have ordered - and every time, words to the effect of "well they aren't here are they?" are used to justify they indifference and incompetence of the custody staff. Inmates have nowhere to turn and nowhere to go.

The COVID-19 Pandemic was a horrific experience for the world - but none more so than Federal Inmates. We were basically forgotten about, with little hand-outs like "Why am I locked in this cell?". We were locked up for 24 hours a day - with no access to showers, phones, email, family, education - nothing. For months and months and months. A day spent in prison can feel like a week, especially locked in your cell fearing for your life,. Yes, I know some people feel "well it's prison, what do you expect"? I expect to be punished, to be cut-off from my family somewhat and to learn the error of my ways. I don't expect to be treated like something other than human, with no

rights whatsoever and screamed at on a daily basis. The treatment of inmates is barbaric and inhumane, especially during something like COVID. That rests on the arrogance and indifference of the BOP - who I believe have taken the 13th Amendment to the Constitution to it's extreme, ensuring that prisoners are treated as "slaves" with phrases like "I run this place" and ""You will do as your told".

Prison is not the military either, and should not be run like one. Inmates are routinely punished for other inmates infractions, locked down as group and, in effect, told to take care of our own if we don't want to be locked down again. How is this legal? How can punishing an entire unit, up to 128 inmates, for one person's infractions be valid? This is NOT what Congress or, I believe, the Sentencing Commission intends.

I also believe that the zero criminal history points and alternative's to prison should be fully investigated and expanded. Regardless of the crime committed, if it's someone's first Federal offense, they should not be put in prison. What happens is people are turned into the very thing you are trying to avoid - criminals.

Thank you for you work so far and for your work to come.

Sincerely

Franklin Rios

From:	~^! RITCHOTT, ~^!JOSHUA J
Subject:	[External] ***Request to Staff*** RITCHOTT, JOSHUA, [redacted], LEW-K-A
Date:	Wednesday, June 28, 2023 2:34:49 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: Sentencing comission
Inmate Work Assignment: Gar 1

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am requesting that the comission look at FSA sentencing credits for consecutive ineligible offenses. An inmate should be able to still earn FSA credits for the eligible portion of their sentence where an ineligible offense is consecutive to an eligible offense. For example an inmate who is sentenced to consipracy to distribute Methamphetamine (841 & 846) (an eligible offense to earn time credits) and sentenced to 120 months in federal prison, and also convicted of Possession of a firearm in furtherance of a drug trafficing crime 18 USC 924(c)(1)(a) and sentenced to 60 months consecutive, An ineligible offense. The inmate would be excluded from earning any FSA credits towards their release becasue they have a conviction for the 924(c) offense. When in reality the inmate is actually serving two seperate offenses that can be distinguished from being able to earn FSA credits. An inmate should be allowed to earn FSA earn time credits towards the 120 months sentence for the drug trafficing crime, but the Bureau of Prisons, "for administrative purposes" runs the sentences together.

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Brian Robinson

Topics:

1. Bureau of Prisons Practices

10. Research Topics

11. Other Suggested Priorities

Comments:

As someone who has a federally incarcerated family member, it pains me to see the degree to which the BOP is so dysfunctional on an institution by institution basis. There are obviously some hard working and compassionate BOP employees, but there are also people going through the motions and not providing any dignity whatsoever for incarcerated individuals. With that said, some incarcerated individuals probably do not deserve any because they do nothing to try to earn it back. However, there are individuals in the Federal system who are inherently good people who did something bad that put them there. My family member deserves to be in prison for what he did. What I do not agree with is that some non-violent first-time offenders are precluded from participating in First Step Act programs with a chance to earn fractional reductions in their sentences. If we want the best chance to effectively re-integrate offenders back into society at some point, then they need to feel like they have something to work towards. Design and apply programs that can empower inmates to strive toward making themselves better. Allow them, on a equal basis, to at least have that opportunity. The worst of the worst are going to fail regardless of what opportunities are afforded to them. Those that have a low risk of recidivism and are motivated to working toward something positive will mostly succeed. In turn, this will make the lives of BOP rank and file easier as well. With the input of institutional level case managers, it "should be" pretty easy to identify individuals who accept responsibility for what they did and work every day to try and make themselves better. Individuals like this should have the opportunity through programming to work towards a better future.

Submitted on: June 20, 2023

From: ~^! ROSAS, ~^!BRENDA JEANNET
Subject: [External] ***Request to Staff*** ROSAS, BRENDA, [redacted], WAS-B-A
Date: Wednesday, June 28, 2023 3:49:49 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: Proposed Priorities
Inmate Work Assignment: cc

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Please review the FSA eligibility criteria for sentences that are running concurrent. I have a 135 mo. sentence that IS eligible and a 15 mo. sentence that isn't. Because of the 15 mo. non-eligible sentence I am not able to earn FSA credits for any of the total 150 mo. since the sentences are being run concurrent. This shouldn't be the case as I was sentenced to the 135 mo. prior to FSA and therefore when FSA began,my situation should have been re-evaluated to be sure I was able to participate.

Thank you for allowing me to comment. I'm looking forward to your coming changes.

Kindest Regards,
Brenda Rosas

USSC Chair Honorable Judge Reeves: 3.23.23

My apologies for missing the March 14 deadline for comments regarding proposed amendments made by the commisson. I'm hoping this letter can still act as a motivator to continue your important work.

BOP Director Peters, in September of 2022, shared this statement with the Senate Judicary Committee: "Our mission is ensure safe prisons, humane correctional practices, and rehabitation opportunites so that people re-enter society as good nieghbors."

I'd like to share my thoughts and experiences has how the BOP is doing in its mission.

Safe Prisons:

A. Low staff morale prohibits safe function of day to day programming and implementation of rules and routines.
B. Lack of security resources in heavy populated pison areas, ie: mess hall, classrooms, dorms, chapel, etc.
C. Treatment of inmates with "unpopular" convictions by both staff and inmates.
D. Deteoriating physical environments.ie: leaky roof, mold, outdated systems of air and water quality.

Honorable Judge Reeves: 3-23-23

Humane Correctional Practices:

A. Lack of programming for inmates with severe psychological needs.
B. Failure to utilize community corrections. Re-entry centers lack of funding and capacity.
C. Revive the boot camp program for non-violent offenders.
D. Eliminate computation rules that create longer sentences, especially those with computer related sex crimes.

Rehabilitation Practices:

A. Implement broader statutory and guideline standards.
B. Fully implement FSA.
C. Make successful completion of Sex Offender treatment eligible for reduced sentence or increased half-way house time, much like the successful RDAP.

To implement any of these reforms, no new legislation would be needed. It is a pragmatic approach to use the law and guidelines all ready in place to do what the BOP should already be doing. The BOP's poor implementation of critical legislation to improve conditions of people in prison has caused unnecessary court cases. We just want the law and policies followed fairly.

Honorable Judge Reeves: 3-23-23

I'm enclosing three articles cut from various news sources. These articles show the gross differences in treatment, sentencing in sexual offenses. My own incarceration resulted in my possession, recieving, and distribution of child pornography. While I fully cooperated and accepted my sentencing, I feel it is too severe for my case.

I was 17-year teacher with aspirations to be a school adminstor. I was sexually abused from the age of 4 to 9. I committed my crime in the privacy of my home. My crime didnt involve any in-person or direct communication with a minor. I had no previous criminal history. My public defender stated "You would have gotten less time if you would have interacted directly with a minor." Imagine that!

I believe that my case and sentencing was unjust. Please help prevent any further over-incarceration of computer based, non-touch, child pornography cases.

Thank you for your time and consideration of my opinions.

Respectfully Yours,

Michael Ross

From: ~^! RUBINSTEIN, ~^!JACOB MATHIAS
Subject: [External] ***Request to Staff*** RUBINSTEIN, JACOB, [redacted], MIL-H-A
Date: Friday, July 7, 2023 6:05:30 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:
Inmate Work Assignment: U QA 1234

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

In response to the United States Sentencing Commission's Request for Comments, in the interest of reducing the cost of incarceration and overcapacity of prisons, I respectfully submit the following:

Regarding Priority 1 and the BOP's effectiveness in meeting 18 USC 3553(a)(2), specifically 3553(a)(2)(A) regarding providing "just punishment for the offense," the BOP should be directed to grant sentence credit for pretrial restrictions on individual liberty, including home confinement, home detention, house arrest, or otherwise as directed by the court. BOP CPD 5880.28 should be updated accordingly. Such restrictions, being put in place to protect public safety, especially in cases where they are mandatory, are by definition punitive in nature. As such, subjecting a citizen to punishment beyond the sentence duly ordered by the court violates the 8th amendment. The sentence handed down by the court is considered just punishment. The BOP is responsible for administering that sentence. By not granting credit for pretrial liberty restrictions other than full incarceration, the sentence they are administering is greater than what the court ordered and is, therefore, unjust.

Regarding Priority 2 and alternatives to incarceration, implement programs like the Pretrial Opportunity Program or Conviction and Sentence Alternative Program for first-time, non-violent sex offenders. By seeking treatment for sexual behavior problems, followed by a prescribed time period of supervision to remain free from problematic behaviors, defendants have the opportunity to show sentencing judges their capacity for rehabilitation and that they do not pose a danger to the community, similar to those with substance abuse disorders.

Regarding Priority 7 and legislation changes, I propose the following:

1. Amend 18 USC 3585(b) by adding "or under significant liberty restrictions as condition of release" after "official detention."
2. Amend 18 USC 3142(c)(1)(B) by removing the mandatory conditions imposed by the Adam Walsh Child Protection Safety act of 2006, as they are unconstitutional. See United States v Smedley, 611 F. Supp. 2d 971 (2009).
3. Amend 18 USC 3632(d)(4)(D) by eliminating all non-violent exclusions, increasing the number of defendants eligible for time credits to reduce their sentence.
4. Reinstitute parole and provide greater consideration for defendant behavior and programming activities as a means to reduce their sentence or period of incarceration.
5. Abolish all mandatory minimum sentences. As each criminal case is unique, so their sentence should be, as well. Two acts that meet the same letter of the law may still be very difference in circumstance and context, thus any standard, minimum punishment is inappropriate.
6. Legalize the possession and licensed manufacture/distribution of all Schedule II through Schedule V narcotics under similar provisions as alcohol and tobacco. Not only would legalization do away with all of those direct crimes, and the enormous prison population associated with them, but also the secondary crimes associated with

them such as robbery, assault, and gang violence would be drastically reduced. We have lost the war on drugs, as evidenced by the ever increasing violence, addiction rates, and militarization of law enforcement. Read "Chasing the Scream" by Johann Hari.

Regarding Priority 9, I recommend changes to the US Sentencing Guidelines as follows:
1. Update Chapter 5 part H to allow for a greater downward departure for first time offenders after 1) consideration of rehabilitative effort on the part of defendants conducted pre-trial and/or pre-arrest; 2) consideration of the time that has elapsed since the instant offense and defendants' behavior over that time, and 3) consideration of the impact of incarceration on defendants' families and communities. Apply these also in consideration of alternatives to incarceration.
2. Do away with the 2-level increase for use of a computer, e.g. 2A3.1(b)(1). Everything is done with a computer, and in fact to commit the offenses without using a computer would be more difficult, and more heinous. This is an antiquated guideline.

With deepest thanks for your time and consideration,

Jacob Rubinstein

Criminal Justice Reform

By: Abraham Schwartz

LIBERTY, FREEDOM, AND INCARCERATION

All Americans agree, liberty and freedom are the very essence of our nation. Liberty and freedom gave us the moral right to secede from the British Empire. They are ingrained in our culture, and they control every aspect of our daily life. Each stanza of our national anthem ends with the phrase "the land of the free". This is the reason, that since our nation's founding, immigrants from across the globe, have teemed our shores. One of the most cherished landmarks is named the Statue of Liberty. On its pedestal, is mounted the new colossus. Therein, is the phrase "Give me your tired, your poor, your huddled masses yearning to breathe free."

Liberty and freedom are inherent rights to every American; including those convicted of various crimes. Since society has a compelling interest to incarcerate criminals for either retributive or utilitarian reasons and/or goals, individual freedom can be revoked, if deemed necessary for any sentencing goals. But! It must be viewed as two competing interests, a right to freedom, and a government interest. That right can be impinged only if the government has a compelling interest in incarceration and no other way or means of accomplishing that.

The free exercise clause in the first amendment of the Constitution, may be used as an example. The strict scrutiny test is applied when free exercise of religion and a government interest come into conflict with each other. The government must have a compelling interest in order to impinge upon that exercise of religion and is obligated to use the least restrictive means to achieve that interest. (See Sherbert v. Verner). If there is no compelling interest for a longer sentence than necessary, then individual freedom prevails. Or, if the government can achieve that interest in ways other than incarceration, then those avenues take precedence over incarceration. As in religious freedom, the rational basis test is not enough to revoke individual freedom.

In 1990, in the case of Employment Division v. Smith, it was established that in a neutral law of general applicability, the rational basis test must be employed. In the case of sentencing, it is not a neutral law, because it targets individual freedom directly, therefore, the strict scrutiny test should apply. It can be argued that even according to the rational basis test, at present, the sentencing guidelines defy any rational thinking.

A BRIEF HISTORY OF SENTENCING GUIDELINES

The enlightenment era gave rise to the utilitarian model of punishment which resulted in replacing corporal punishment with imprisonment. In 1910, the federal government recognized rehabilitation as a main factor by creating parole and the U.S. Parole Commission. Any prisoner sentenced to terms of one year or more, was made eligible for parole upon expiration of 1/3 of his sentence. This form continued to gain momentum until the 1930's, when rehabilitation became the primary factor when sentencing in the U.S. By the 1960's rehabilitation had become the dominant theory of criminal punishment for the entire nation. Then, the primacy of the rehabilitative goal of sentencing was diminished and many states and the federal government established guidelines which limited judicial discretion. In 1984, the federal government established the Comprehensive Crime Control Act of 1984, which created the U.S. Sentencing Commission, which established determinate sentencing and provided for the abolition of parole. Congress wanted to achieve three main objectives. See the policy statement below:

Policy Statement: *To understand these guidelines and the rationale that underlies them, one must begin with the three objectives that Congress, in enacting the new sentencing law, sought to achieve. Its basic objective was to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system. To achieve this objective, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by "good time" credits. In addition, the Parole Commission is permitted to determine how much of the remainder of any prison sentence an offender will serve. This usually results in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence handed down by the court. Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severities.*

The Commission grouped comparable crimes into classes of offenses, reasoning that this would result in a system in which defendants who committed similar crimes would receive comparable sentences. They analyzed data from over 10,000 sentencing reports and 100,00 federal convictions and calculated the average time served for each class of crime. This information was used to set the offense level for each class. All the offenses are listed in chapter 2 of the guidelines and each offense has a corresponding Base Offense Level, for example, for Homicide, first degree murder, the Base Offense Level is 43 which is the highest level on the sentencing grid, for fraud the Base Offense Level is 6 or 7.

Chapter 2 of the the guidelines also introduce Specific Offense Characteristics (S.O.C.'s) to reflect the severity of the crime itself. It identifies certain characteristics in each offense that can either increase or decrease the defendant's offense level. It reflects the sentence to the overall criminality and relevant conduct of the defendant. The initial guidelines for economic crimes had only two SOC's. The guidelines also offer adjustments in relation to the victim and the defendant's role the offense. These are listed in chapter 3 of the guideline's manual. In chapter 4, they introduced the defendant's criminal history into the sentencing calculation. This resulted in the Sentencing Table Grid which contains 43 offense levels along its vertical line and 6 classes of the criminal history, along its horizontal line. The horizontal line measures according to the past criminal record of the defendant. The vertical line measures according to the severity of the crime committed.

The Guidelines require a judge to tailor a sentence upon the totality of the defendant's conduct, not just the offense with which the defendant was charged. At sentencing, a judge is supposed to make findings of facts upon everything the defendant did. It should be based on the preponderance of evidence. The Court can apply conduct that was not proven by a jury or a defendants' own admission. Hearsay and evidence excluded at trial by the exclusionary rule is permitted as a factor in establishing the guideline level. The judge shall then calculate a sentence which includes the Base offense level and all the enhancements. He will produce the Guideline range, which reflects overall criminality. Chapter 5 outlines all departures from the total calculated guidelines range upward or downward. The judge then considers the statutory factors listed in 3553 (a) to determine if the sentence is sufficient, or not more than necessary to achieve the sentencing goals listed therein. He can than issue a variance if he deems the sentence not sufficient or greater than necessary for the sentencing goals.

SENTENCING GUIDELINES FLAWS

Although, well intentioned from the outset, the Sentencing Guidelines are not flawless. Following are a few flaws in the Guidelines:

The Mens Rea Factor:

- Since Specific Offense Characteristics (S.O.C.'s) were introduced, maintaining that the sentence should represent the nature of the offense, it would have been appropriate for economic and financial fraud to have various ranges based on the level of mens rea, the same way it is established in murder. If punishment is to be proportionate, then it should be based on the levels of mens rea, as in Homicide, see Sentencing Guidelines:

§2A1.1. Homicide 1st Degree: Base Offense Level: 43

§2A1.2. 2nd Degree murder Base Offense Level: 38

§2A1.3. Voluntary Manslaughter: Base Offense Level: 29

§2A1.4. Involuntary Manslaughter

(a) Base Offense Level:

(1) 12, if the offense involved criminally negligent conduct; or

(2) (Apply the greater)

(A) 18, if the offense involved reckless conduct; or

(B) 22, if the offense involved the reckless operation of a means of transportation

Recklessness is to act with the knowledge that there is a risk that is sufficiently large and serious. It is not just an extreme lack of caring; it is the conscience disregard of a serious risk. Negligence is less culpable than recklessness. It is the failure to be aware of something. Some criminologists believe that negligence shall never be enough to justify imprisonment. Some jurisdictions do not allow negligence to be criminal, only in the case of murder.
.

In financial fraud cases, there are many levels of mens rea. For example: when one lies on a bank loan application with the intention of stealing money, it is a representation of the highest degree of mens rea in a bank fraud case. Another person might attain a loan by misrepresenting his company's financials, because of financial hardship, though he intends to pay back the money. However, the bank is at a risk. This is a form of recklessness, which is a lesser degree than purposely stealing from the bank. Lastly, there may be one who is running his business and

he offers a misrepresentation on his financials. In his mind there is no chance of a loss for the bank. This is a form of negligence. Another example: in securities fraud, a corporate officer misrepresents a public company's solvency for it to appear more solvent than it is. When the truth is established, stock prices may decline, resulting in loss to investors. In a public company this loss may be a few hundred million dollars, which according to the current loss table could result in life in prison. However, the loss to the victims was unintentional. Therefore, the intent level should be recklessness, or even negligence.

The Duress Factor:

- Duress and necessity are an affirmative defense. It exculpates criminal conduct. In the Guidelines §5K2.12. it states, *if the defendant commits the offense because of serious coercion, blackmail or duress under circumstances not amounting to a complete defense, the court may depart downward, etc.* ***Notwithstanding, this policy statement, personal financial difficulties and economic pressure upon a trade or business do not warrant a downward departure****.* Case in point: A person may be in a position of responsibility for payroll and/or accounts payable, for a large company. As happens in the business world daily, a main customer may have trouble paying and keeps delaying payment. Or, even more so, the customer refutes the amount to be paid because of unsatisfaction, or files for bankruptcy leaving a huge hole. The consequences are huge. One is faced with a dilemma to close the business or to file for Chapter 11. This will result in further loss because of the stigma. The best and most viable option in the mind of the offender is to obtain funds to keep the business afloat, until circumstances improve. In such a case of duress, even though not exculpatory, mandates a downward departure. There is a difference between a criminal enterprise that was established for criminal purposes and a business venture or any corporation that was incepted with a proper intent and purpose, but due to circumstances under duress the officers violated criminal offenses.

The Loss Factor:

- All agree that loss is a factor in a sentence. Two reasons:

  - the impact it has/had on others.
  - because of the greed of the offender.

  There is no mitigating factor in the Guidelines for one who has committed an offense but has not used the monies for personal gain i.e., a private school that has no access to government funding. The administrator commits an offense to pay its teachers. Even in a business or trade, it can be argued, that to pay debtors, cannot be considered greed. Rather it is a serious need.

- There is no mechanism implemented to assure that loss corresponds to inflation. If the Commission in the original draft deemed a 5-million-dollar loss, a trigger for an eleven-point enhancement, for the greed for whatever 5 million dollars could buy, they determined that this is the proper level. Corresponding to inflation years later 5 million dollars can buy much less. Therefore, there is less loss and less greed.

§2B1.1. covers sentences for economic crimes, including theft, embezzlement, fraud, and forgery. One of the changes the USSG made, was to raise economic crime sentences above pre guidelines levels so

that an increased number of defendants would serve time in prison instead of probation. The USSC held that the short definite sentences for this type of offenders would accomplish guideline goals of proportionate punishment and deterrence. Originally, the fraud guidelines were at USSG §2F1.1. The theft guidelines were at USSG §2B1.1. The Base Offense Level for fraud was 6. The highest range at the Loss Table gained an increase of 11 levels. Combined with the Base Offense Level it totaled 17. The Loss Table was capped at a mere 5 million dollars. The fraud guideline had only 2 S.O.C.'s. The Commission even took steps to make sure that fraud sentences were less punitive than other offenses that were considered more serious. E.g., bribery, serious drug trafficking, and violent offenses.

In 1990, in response to the Savings and Loan scandals, the Loss Table was amended. The highest range reached 17 levels for losses of 40-80 million dollars. The combined total with the base offense level was 23 levels.

In the economic crime package in 2001, another increase was enacted. It merged three guidelines 2F1.1, 2B1.1 and 2B3.1. It added more ranges to the Loss Table. The highest range in the Loss Table was 24 levels, combined with the Base Offense Level it reached 30 levels for losses of 50-150 million dollars. It also added a new S.O.C. of four levels for more than 50 victims.

Another increase in the severity of financial fraud occurred a year later. In response to several high-profile financial scandals i.e., Enron, Tyco International, WorldCom, the Sarbanes-Oxley act was enacted by Congress. Among other increases it raised the statutory maximum for wire fraud and mail fraud from 5 years to 20 years. Additionally, the Commission, by direction of Congress, stiffened financial fraud penalties, by increasing the Base Offense Level from level 6 to level 7 for any fraud offense which carries a statutory maximum of 20 years or more. Then, the Loss Table was again extended. The highest loss amount grew from 100 million dollars to 400 million dollars, which results in a 30 level enhancement, combined with the Base Offense Level it reaches 37 levels. The Commission then added another number of S.O.C.'s to the fraud Guidelines. In 2003, a 6-level enhancement was added for any fraud offense that involved more than 250 victims.

Each amendment that expanded the Loss Table to higher levels, also increased the offense level for the existing ones. i.e., in the original draft, an enhancement of 11 applied to a loss of over 5 million dollars. According to the current Loss Table it almost doubles. An enhancement of 20 levels is applied for losses between 3-9.5 million dollars. In actual prison time, it triples. Because of the accelerating nature of the guidelines, it rapidly moves upward. In the original draft a 5-million-dollar fraud case, triggered a 24–30-month sentence. See table at level 17. Currently, at level 27 the sentence is for 70-78 months.

These sentence increases over the years, for financial fraud, escalated many times beyond any rationale. There was not a decline in crime, and it did not reduce fraud. Any corporate offense with a loss of over 5 million dollars, and a few S.O.C.'s, which in 1987 would have resulted in a 24–30-month sentence, now can carry a sentence for life imprisonment! It may also result in an offense level of 50-60 points, which is basically superfluous, because the highest range in the guidelines is 43, the same offense level for one convicted of first-degree murder.

Over the years the Commission continuously added new S.O.C.'s. Many of these S.O.C.'s overlap and duplicate factors which cause a cumulative affect that does not truly represent the seriousness of the offense. i.e., the number of victims enhancement. This may be a viable tool to measure culpability. However, once the Loss Table enhancement is applied, it does not add any culpability. It can be argued that it might even serve as a mitigating factor i.e., if the amount of loss is a million dollars and is related

to only one victim, it can have a devastating effect on the victim. As opposed to, if 250 victims are affected, that amount is distributed amongst many individuals and each victim only incurs a loss of approximately four thousand dollars.

When the Sentencing Commission adopted the original Guidelines, its objective was to deter crime and to ensure that financial fraud offenders would face **short** but definite periods of confinement. The original draft of the Guidelines well reflects that. Over the years, the Sentencing Commission has let go of its original goal of ensuring short but definite sentencing. It has regularly increased the prison sentences for fraud. No other civilized country in the world recognizes that economic offenses for over a couple of million dollars should have stiffer penalties than the most vicious murders. And, by not differentiating between the levels of mens rea, an unbelievable paradox has been attained. One who commits murder in the most heinous fashion, with the highest level of mens rea, has a lower range of Guideline levels, than an individual who commits an economic offense for over 100 million dollars with a few S.O.C. enhancements. Though, his mens rea level was the lowest, for recklessness or even negligence. I would dare say, this is barbaric and violates the 8th amendment.

The most egregious part of the crime is the actual committing of the offense. Quantity, as in a drug case, or amount of money will certainly exacerbate the crime and mandate a harsher sentence. Yet, in no way can it turn a low-level felony into a high crime. If a judge deems by a preponderance of evidence, that actual loss or intended loss is for a few million dollars, and with some enhancements i.e., using sophisticated means and/or multiple victims, it can result in a sentence of 25 years to life. This is inherently wrong!

Criminologists list among various types of offenses, crimes against the person, and crimes against property. There are two levels of property crime:

1. Crime against habitat i.e., burglary. This is considered profoundly serious, because the victim's domain is violated. Additionally, there is the possibility of psychological scars, trauma, bodily injury, and even death.
2. Larceny, which is less serious than burglary.

Crimes against a person are more severe than both levels of crimes against property. Though, of course, high level crime against property can result in a stiffer sentence than a lower-level crime against a person. But it is definite, that even a high-level crime against property cannot be up to par and even exceed the most heinous crime against a person.

That is the reason that when one commits multiple low-level felonies (i.e., class E felonies), that person is not sentenced for each crime separately, resulting in consecutive sentences, which is known as the cumulative approach. If this approach is followed, then punishment is more severe than one who is convicted of a much more serious crime, i.e., murder. The principle of proportionality mandates that the severity of the sentence corresponds with the seriousness of the offense. The USSG does not accept the cumulative approach. That is why many offenses are grouped together when exacting a sentence, even though each offense is a different crime.

When one analyzes the contrast between one who commits multiple offenses, which are not punished separately, as opposed to one who commits one or two offenses where loss is established for a few million dollars, it can be deduced that it takes a more morally depraved mindset to commit multiple

offenses, though there is a lower loss, than to commit one offense with a high loss. In the former case one must violate every law separately. Whereas, in the case of the greater money loss, the violated offense is not greater. It is only the amount of money, which is a consequence of the offense, that is a greater loss. If the cumulative approach is not recognized in sentencing, then how can an offense that the base offense level does not mandate prison for, be punishable up to a to life sentence in prison?!

See the initial draft of the guidelines: *e) Multi-Count Convictions. The Commission, like other sentencing commissions, has found it particularly difficult to develop rules for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The reason it is difficult is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to life sentences of imprisonment— sentences that neither "just deserts" nor "crime control" theories of punishment would find justified.*

If this approach is accepted, then money loss, though aggravating the crime, should not be the determining factor between a sentence of life in prison or no prison at all.

PURPOSES & GOALS OF SENTENCING:
What they are, and what they were intended to be:

The Sentencing Guidelines recognize retributive justice (just deserts) and utilitarian justice, which is comprised of 3 goals in Sentencing:

1. Incapacitation
2. Rehabilitation
3. Deterrence

See policy statement of the Sentencing Guideline 18, US Code §3553 (A):

(a)Factors To Be Considered in Imposing a SENTENCE. —*The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—*

(1) *the nature and circumstances of the offense and the history and characteristics of the defendant.*

(2) *the need for the sentence imposed—*

> ***(A)****to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.*
>
> ***(B)****to afford adequate deterrence to criminal conduct.*
>
> ***(C)****to protect the public from further crimes of the defendant; and*

*(D)*to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.*

These long sentencing ranges for economic crimes do not satisfy any goals of sentencing. If retribution is a goal of sentencing, then proportionality must be a main factor in punishing. Because punishment is established by the moral turpitude it takes to commit an offense, economic crimes should not be up to par with the most heinous crimes like first degree murder, even when a huge amount of money is involved.

According to the utilitarian model, proportionality should also guide the length of a sentence. Society has an interest in sentences to be proportionate to the gravity of the crime. The leader of modern utilitarianism, Jeremy Bentham, wrote in Principles in Penal Code Rule III: *when two offenses come in competition, the punishment for the greater offense must induce a man to go for the lesser offense*. If financial fraud is penalized more gravely than the most vicious murders a potential offender will choose to commit the offense with the lesser consequences. Economic offenders must be punished less than homicide offenders of the first degree. The way it now stands, the ranges for economic offenders in multimillion dollar fraud cases are much higher than the 43 ranges for first degree murder!

Proportionality is ingrained in the core values of the U.S. As in the ruling of Whims v. U.S., and much later Solem v. Helm, both emphasized that even in non-capital cases, disproportionate sentencing is in violation of the eighth amendment, that cruel and unusual punishment should not be imposed. In the Solem v. Helm case, the court pointed out three factors to determine whether the sentence is proportionate to the crime:

- The seriousness of the crime to the severity of the penalty.
- The sentence imposed for similarly grave offenses in the same jurisdiction.
- Sentences imposed for crimes in other jurisdictions.

In Harmelin v. Michigan, the Supreme Court ruled in a 5-4 decision that *proportionality is not guaranteed by the eighth amendment, only in capital cases. The reason, as Justice Scalia points out, is, that there is relief from the other branches of government. The Legislative branch may retroactively change the amount of time for offenses. Or there is the availability of Executive clemency.*
Therefore, it is incumbent on the legislative branch, to ensure that proportionality is upheld in sentencing. Additionally, the Court agreed in a 7-2 decision, that a grossly disproportionate sentence, even in a non-capital case is unconstitutional. It can be argued that when following the calculations of the Guidelines in financial fraud, they are grossly disproportionate.

In other jurisdictions, like Canada, the maximum sentence for fraud is 14 years. There is the availability of parole after 1/3 of the sentence or after 7 years, whichever is less. The protection of society is the overriding consideration in any release decision. For example, R v. Slobagian, who orchestrated one of the biggest frauds in the history of British Columbia, the fraud amount was 182 million dollars. He was sentenced to 6 years in prison, and he was able to face a parole board for early release after two years. Canada does not have a bigger fraud problem than the U.S. In the U.S., after all enhancements were enacted, there was no decline in any of the §2B1.1. crimes. This is empirical evidence that these enhancements did not accomplish any of the utilitarian goals. Parole should be reinstated in the U.S. See policy statement of the Parole Board of Canada: *Research over many years has shown that offenders are*

more likely to become productive law-abiding citizens when they have been returned to the community through conditional release (parole) than when they stayed in prison until the end of their sentence.

If these sentences are justified for incapacitation purposes, the Sentencing Guidelines Commission has conducted a study that first-time fraud offenders are unlikely to recidivate. Furthermore, as opposed to street crimes, where the public cannot protect itself if someone is released from prison. In financial fraud, a lifelong ban on that activity will accomplish incapacitation to the fullest. We clearly see this in the following cases of the 1980's:

- Ivan Boesky, who was released from prison after two years, but was issued a lifelong ban for trading.
- Martin Siegel pled guilty, and he also received a lifelong ban on trading.
- Dennis Levine received a two-year sentence and a lifelong ban on trading.
- Michael Milken was sentenced to two years in prison and received a lifelong ban from the securities industry.

These were multi million dollars offenses and incapacitation was achieved by banning activity.

In the sentencing documents for Michael Milken, it is stated that only three out of the nearly one hundred securities law violators sentenced in this district who pled guilty, received sentences greater than one year and a day.

With the rehabilitative goal in mind, it takes a lesser criminal mindset to perpetrate financial fraud than murder. If done with the lowest level of mens rea, it is even less than that. Therefore, minimal time in prison should suffice to cure the offender.

For both deterrence purposes, general and specific, it has been established that economic crime offenders do not calculate the levels of risk and gain. It simply does not dawn on them that there will be consequences to suffer for that activity. The fact is, that any sentence will suffice for an economic crime. Even a perp walk is a consequence to reckon with. This is the reason why the Guidelines, in its initial draft sought to ensure that financial fraud offenders face short but definite periods of confinement. It was understood, and rightfully so, that any prison time would accomplish deterrence goals.

The most significant position of the model penal code is §7.01 which provides that punishment other than prison should be used unless prison is necessary for the protection of the public.

The enhanced sentences have wreaked havoc and caused irreparable harm to American families without any mercy or compassion. It has left devastating effects on children of the defendants. In U.S. v. Johnson, the District Court issued a downward departure of ten levels for extraordinary family responsibilities. The government appealed. The 2nd circuit court sustained the departure. Chief Judge Oakes wrote in that decision: *The USSG do not require a judge to leave compassion and common sense at the door to the courtroom. The government asks us, on this appeal, to reverse a sentencing judges exercise of downward flexibility on behalf of an infant and three young children who depend entirely upon the defendant for their upbringing.*

The Sentencing Guideline Commission's Base Offense Level for robbery, burglary and fraud is accorded in proportion to the severity of the crime. The base offense level for robbery, which is a crime against a person, is 20. Burglary, which is a crime against habitat:

1. 17, a residence, or,
2. 12, if a structure other than a residence.

Fraud, which is a crime against property is 6 or 7.

Contrarily, the Loss Table is just the opposite. For robbery, the loss table offers only 8 levels with the highest level of 7, for more than 9.5 mil dollars. For burglary, which is a lesser crime, there are 9 levels. The top level is 8 for over 9.5 million dollars. Fraud is 30 levels for more than 550 million dollars.

Additionally, the fraud table adds many more levels than the other tables for a loss amount up to 9.5 million dollars, which is covered by all three tables. For example, in the case of loss of more than 9.5 million dollars, the burglary table adds 8 levels, and the fraud table adds 20 levels.

The fact that other tables were not so drastically enhanced, proves that these enhancements are unnecessary for any sentencing goals or purposes. Why should a fraud of 5 million dollars yield an 18-level increase and a 5-million-dollar burglary yield only a 7-level increase?!

Loss itself does not necessarily represent moral depravity or culpability. It might be determined by sheer luck. There may be two similarly situated defendants. They both gave misrepresentations on their financials. One company is doing well so there is no actual loss. Intended loss is not relevant, because it is estimated by the pecuniary harm that the defendant purposely sought to inflict. The offense level is 6-7 which is in Zone A with no prison time. The other company lost money or stock value in the amount of a few million dollars, therefore that defendant receives a virtual life sentence. So, luck is the deciding factor between no prison time or serving the rest of his life in prison. It truly boggles the mind!

The draconian enhancements by the Commission coupled with above mentioned flaws in the Guidelines resulted in out of proportion sentencing, which in turn resulted in disparate sentencing, nationwide. The main reason why the Guidelines were enacted had the opposite effect. In 1996, in Koon v. U.S., the Supreme Court widened judicial discretion. It ruled that a District Court's decision to depart from the Guidelines were entitled to deference on appeal by adopting an abuse of discretion standard of review rather than the *de novo* standard. It also ruled that although the SRA of 1984 requires that a district judge impose a sentence within the applicable Guidelines range in an ordinary case, it does not eliminate all the district courts traditional sentencing discretion. Rather, it allows a departure from the range if the court finds there exists an aggravating or mitigating circumstance of a kind, or a degree, not adequately taken into consideration by the sentencing commission in formulating the Guidelines. However, in 2003 Congress enacted the Protect Act, which includes burdensome reporting requirements on judges who depart from the Guidelines and requires *de novo* appellate review of departures. It also directed the Sentencing Commission, within 180 days, to amend the Guidelines and Policy Statements to ensure that the incidence of downward departures is substantially reduced. However, this did not hold out for too long.

The disparity widened in U.S. v. Booker, where the Supreme Court applied the rulings of Apprendi v. NJ, and Blakely v. Washington to the federal guidelines. It ruled in a split decision that the mandatory

nature of the Guidelines violated the 6th amendment, trial by jury. It held that all the facts relevant to a sentence must be found by a jury, not by a judge. They also ruled that the mandatory nature of the Guidelines can be severed under the Statutory Severance Doctrine to render the Guidelines merely advisory. As such, a sentencing court would still be required to consider the Guidelines but would now have the freedom to tailor a sentence considering other statutory concerns. They severed and excised 18 US §3553, (b) (1) which made the Guideline sentences mandatory, and 18 USC §3742, which established standards of appellate review of sentences and reinstated reasonableness as the standard of appellate review. The Court then directed District Courts to continue to calculate proper USSG guidelines with other sentencing goals including §3553 (A). This directive to use 18 USC §3553 (A) which sets purposes to be considered when issuing sentences and states that the court shall impose a sentence, sufficient, but not greater than necessary to comply with the purposes set forth in 18 USC §3553 (a) (2) has resulted in district judges to consider purposes in sentencing when issuing sentences. It also factors in, a large variety of fact and conduct in sentencing, that was not factored in before the Booker case.

In 2007, the U.S. Supreme Court again expanded its decision in U.S. v. Booker, when it ruled in Gall v. U.S. The District Court issued a sentence of 36 months' probation for one who pled guilty to conspiracy to distribute ecstasy, instead of the recommended sentence of 30-37 months in prison. The government appealed and the circuit court vacated and remanded the sentence, because it was a 100% downward departure, it had to be justified by extraordinary circumstances. The Supreme Court reinstated the probation sentence, and it ruled that the appellate court may not apply a presumption of unreasonableness. It may consider the extent of the deviation but must give due deference to the district court decision, that the 18 USC §3553(A) factors, overall, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence is appropriate is insufficient to justify reversal of the district court. And in, U.S. v. Kimbrough, in 2007, the Supreme Court ruled that when the Sentencing Commission fails to fulfill its characteristic institutional role of developing a particular guideline, or its later amendment, based upon empirical data, national experience or some rational policy basis, the district court has the discretion to conclude that the resulting advisory range, yields a sentence greater than necessary to achieve §3553 (A) purposes. Since this ruling, judicial departure on sentences is permissible if there is a policy disagreement with the Sentencing Commission. This resulted in even greater disparity in the country. Just to mention a few notable cases:

- US v. Olis; this case attracted a lot of publicity because of the draconian sentence that was imposed on a corporate officer for participating in a fraudulent scheme called Project Alpha. A representative a of a large institution testified that the fund lost 105 million dollars when Dynegy's share price declined in the period after revelation of the fraud. This mandated a 26-level increase in the Guidelines level. Then, a two-level enhancement was added for employing sophisticated means, and another two-level enhancement for a special skill to carry out the fraud. Additionally, the court found that there were more than 50 victims, requiring a four-level enhancement. None of these findings were proven by the jury beyond a reasonable doubt. The courts calculation of Olis' total offense level was 40, almost the same range as first-degree murder. A sentence for 292 months was imposed. Olis' boss, Gene Foster, a partner in the crime, pled guilty and cooperated. He received a sentence of eight months. Another codefendant Helen Sharky was sentenced to 30 days! While an appeal was pending, the Supreme Court ruled in U.S. v. Booker. Olis's case was remanded for sentencing and the calculated Guidelines level was established at 151-188 months 12-16 years. The recalculated Guidelines that was less severe than the original was in relation to the determination that the

amount of loss attributable to the defendant was 79 million, not 105 million that was attributed to him in the original sentences. If not for the case of U.S. v. Booker, Olis would have received the sentence of 12-16 years. But, since U.S. v. Booker had already been decided by Olis' second sentencing, the judge sentenced Olis to a non-Guidelines sentence of 72 months in prison. The judge took several factors into consideration:

- 1-Defendant did not have the authority to approve Project Alpha
- 2-Defendant did not defraud Dynegy and was not enriched in a significant way by the scheme.
- 3-Dynegy was not forced to file for bankruptcy.
- 4-Defendant was born in Korea and raised by a single mother in the U.S. He had no criminal history.

The judge did not include the factor that the defendant committed the offense with the lowest level of mens rea.

- U.S. v. Sholom Rubashkin; he was convicted of bank wire and mail fraud and false statements to a bank. Additionally, he was convicted for money laundering and in violation of an order of the Secretary of Agriculture, by making late payment to the cattle suppliers. District Court judge Linda R. Reade, of the Northern District of Iowa, sentenced Sholom Rubashkin to 324 months, 27 years in prison. This was the low end of the Guidelines range. The money laundering charges were for only 3 million dollars. Rubashkin's financial charges were based on Agri Processors fraudulent inflation of collateral, and immigration violations, which gave rise to fraud charges. Agri told the bank that it was not in violation of any law statute or regulation, which would in any respect materially and adversely affect the collateral of Agri's property, business, etc. The Court found that Rubashkin's fraudulent activity resulted in a loss to the bank of 27 million dollars. This increased his offense level by 22 levels. Another 2 levels were supplemented for sophisticated means. Another 2 levels were added for money laundering, if convicted under Title 18 U.S.C. §1956. Another 2 levels were added for sophisticated laundering. The judge than added the following chapter 3 adjustments, A 4 level upward adjustment for organizer or leader. 2 levels for abuse of position of trust. Another 2 levels upward adjustment for obstruction of justice. Furthermore, the government noted that the court had authority to depart upward on the guideline's provisions, for:

1. Extraordinary obstruction of justice.
2. Criminal conduct that did not enter the above guideline analysis.

The judge reserved the right to use other enhancements in case she would lose a few levels on appeal. She would keep the range at 41 by taking into consideration upward departures, that she did not consider at the sentencing!

The above two cases strongly illustrate, how out of touch, sentencing for financial crimes has become. In both cases the defendant did not intend to steal any money. Sholom Rubashkin was paying his monthly bank payments for many years. His intent was to pay back every penny, with the interest incurred. His level of mens rea was not more than negligence. He received a sentence up to par with one convicted of first-degree murder, which reflects the highest level of mens rea. Secondly, the judge herself admitted that Agri was always strapped for cash. Rubashkin was under tremendous pressure to cover payroll and suppliers. No mitigation of the offense level was offered because of duress, even not exculpatory, but as a mitigating factor. Thirdly, the money was used to run his business. It was not done out of greed. This

too, was not a mitigating factor in sentencing. After adjusting his offense level to 29 points because of the loss, a four-level enhancement was added on top of that, for money laundering. Since the sentencing table works in an accelerating fashion; It grows exponentially. In the upper levels, every level increase, results in additional years in prison. The money laundering enhancement was put on top of the loss enhancement, even though the money laundering was for only 3 million dollars. If a sentence should reflect overall criminality, then it is unfair that fraud for 27 million dollars and money laundering for only 3 million dollars should carry the same penalty as one who launders the whole 27 million dollars. The four levels that were added on top of the money loss enhancements added another 10 years to Rubashkin's sentence.

It is unfair, even in a case where money laundering represents the complete loss. Since the Sentencing Table works in an accelerating fashion it ends up adding the years from the Loss Table plus the years from the money laundering range. The money laundering is in the highest range, where sentencing ranges are much wider. This results in ridiculous sentences.

However, there are judges who are fair-minded as illustrated below:

- US v. Gupta (2012). Rajat Gupta was convicted for insider trading. His Guidelines range was between 97-121 months. Judge Jed Rakoff sentenced Gupta to 24 months in prison. Judge Rakoff called the current Sentencing Guidelines for fraud, a draconian approach to white collar crime unsupported by any empirical evidence.
- US v. Adelson. Adelson, president of Impath, Inc., a public company specializing in cancer diagnosis testing, joined a conspiracy initially concocted by others to materially overstate Impath's financials, thereby artificially inflating the price of its stock. His Guidelines range was life in prison, blocked by an 85-year statutory maximum. Loss was calculated between 50-100 million dollars. There were another 5 defendants who were as guilty in accounting and fraud as Adelson. The others who originated the conspiracy struck deals and received no prison time. Mr. Adelson exercised his right to trial. He was faced with a 360 year to life sentence. Judge Rakoff sentenced Adelson to 42 months in prison.

The fact that prosecutors offer such huge deductions in prison time to offenders who cooperate, sustains the point that the stiff sentences are not rational with any of the sentencing goals to begin with. In murder cases there is not such a large contrast when a defendant pleads guilty or makes the decision to execute his right to trial by jury.

In 2015, the Committee proposed amendments to the Guidelines. It was a minor step in the right direction. The definition of intended loss was amended to mean, the pecuniary harm that the defendant purposely sought to inflict. Only purposeful intent should be included. The table for victims was also amended. and included an enhancement for even one victim if one suffered substantial financial hardship. It lessened the enhancement for multiple victims. It altered the sophisticated means S.O.C. It issued an amendment to add an inflationary adjustment for all tables contained in the guidelines. True, it is a step in the right direction, but it is a drop in the bucket. The Sentencing Guidelines requires a major overhaul.

In conclusion, these two factors (the stiff enhancements over the years by the Commission and the Supreme Court rulings, mentioned above) resulted in the greatest disparity. Many judges impose sentences that comply with the purposes in §3553A which results in a drastically lower sentence than when following the Guidelines calculations. However, there are still some judges who just follow the

Guidelines computation. This results in sentences that do not meet any of the sentencing purposes. This scenario creates the greatest disparity. By increasing the sentences out of proportion and out of line with the sentencing purposes, the purpose of the Sentencing Guidelines *§3553 (B) a primary goal of sentencing reform is the elimination of unwarranted sentencing disparity*, has been defeated.

Considering the above, I offer the following amendments:

1. The Commission shall amend the Loss Table at §2B1.1. (b) (1) and insert the original Loss Table at §2F1.1 (b) (1).
2.

    The Commission shall amend existing Guidelines for all §2B1.1. offenses. Computed offense level should apply only when fraud, theft, or deceit, is committed purposefully. If committed knowingly, offense level should be reduced by 25%. If committed recklessly, the offense level should be reduced by 50%. If committed negligently, the offense level should be reduced by 75%.

3. The Commission shall promulgate Guidelines to include a downward departure for any fraud case where personal greed was not the objective of the defendant.
4. The Commission shall amend §5K2.12. and establish a downward departure for an offense that was committed under duress. Personal financial difficulties and economic pressure upon a trade or business warrants a downward departure, in a case where the initial operation for the enterprise was not incepted for criminal activities.
5. The Commission shall promulgate guidelines to enact a maximum cap, if there are two or more S.O.C.'s that overlap or interact.
6. The Committee shall promulgate Guidelines, that when an enhancement does not relate to the complete loss amount i.e., a fraud case where money laundering was committed but not for the entire amount, a judge may depart downward.
7. The Commission shall promulgate Guidelines, that in a case where no violence was involved, and protection of the public can be achieved by a lifelong ban on that activity, then a variance for a sentence from 1 to 2 years should apply, regardless of loss amount.
8. The Commission shall amend §5H1.6. of the Guidelines. To insert, in the case of a defendant who is responsible for a special needs child, or responsible for an infirm spouse or parent. A downward departure may ordinarily be warranted in a non-violence offense.

From: ~^! SCHWARTZBERG, ~^!SAGI
Subject: [External] ***Request to Staff*** SCHWARTZBERG, SAGI, [redacted], TRM-A-A
Date: Monday, July 17, 2023 8:34:42 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: Chair Reeves
Inmate Work Assignment: Safety

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Chair Reeves and the Commission:

For this year's amendment cycle, I implore on the Commission to prioritize amendments to Guideline 5D1.2(b). There needs to be a reconciliation, as this amendment and policy statement was adopted when the maximum term of supervision was 5 years. There are many "sex offenses" that the recidivism rate is one, if not the, lowest for all federal offenders. While supervision of high risk offenders is appropriate, the routine imposition of lifetime supervised release (or even 10-20 years) for low-risk offenders is unecessary. The resources of the US Probation Department can be better spent, as all of these offenders are, or will be subject to the registry anyway. It is double work, double cost, and provides no benefit.

Also, I believe that you should amend 4C1.1 to include all first-time zero criminal history offenders to get the benefit of the 2-point reduction. This can, and will, save the BOP millions of dollars, especially for the low level, low-risk of recidivism offenders--such as those sentenced under 2g2.1 and 2g2.2. While the PROTECT ACT prevents you from calibrating these guidelines as you deem appropriate, this will be one way to do so. Either delete all exclusions, or eliminate the "sex offender" exclusion and perhaps only include violent or hands-on offenses in the exclusion.

While I doubt this will go anywhere, I hope the commission pays attention to these issues. Thank you for you time.

From: ~^! SEGREST, ~^!ROBERT
Subject: [External] ***Request to Staff*** SEGREST, ROBERT, [redacted], PET-D-A
Date: Wednesday, June 28, 2023 12:49:42 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: Comments for policy
Inmate Work Assignment: NA

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I wanted to make note in this forum, that there is a first Step Act issue. The issue is, that Petersburg VA FCI LOW, has no education Building available to facilitate its requirements to provide students with the abilities to obtain there programing. They are stagnate in the water by only having a rotting down, Black Mold, Falling apart and dilapidated building and compound for that matter. Furthermore, by not allowing the students, residents, inmates at this facility to obtain Vocational, educational, hobby craft, or any other FSA allotted Recreational programing, they are not providing the American People the rights given to them by these same policies we are here for today to correct. We need not tell the inmates,, "your on a waiting list, you'll get credit" It's not just about the credit. It's the recidivism, the return of these men to the system, including myself, by not being afforded the right to program. The lies about the programs they say they provide and the ones that are not Recreational, or self taught, just are not enough. We get to teach ourselves a lot of things, but what we need is HELP. Help from competent staff that knows what they are teaching. Dedicated instructors that care about life, and the return of these men, self included, to society and to their families, better off than before they came in, Not worse. In short, We need staff, educators, a place to go for these programs and the ability to obtain these things in a manner which lines up with the policies already in place in a timely manner, as for so these men that are there now can obtain what is put forth in the verbiage and language of the First Step Act. Get the education they need, that's already been voted on and approved by the legislature. This is by a inmate currently being housed at the LOW in Petersburg, VA. FCC. LOW Robert Segrest [redacted]

From:	Abdull posso
To:	Public Affairs
Subject:	[External] Lowering actual meth sentencing
Date:	Monday, July 31, 2023 9:08:57 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.

Please lower the sentencing guidelines of (actual) methamphetamine to match that of methamphetamine mixture. There is no data that merits the guidelines disparity for (actual) methamphetamine. The overdose for methamphetamine are so few that the CDC bunches methamphetamine with all psychostimulants and even prescription medication overdoses. There is also no data that merit's methamphetamine being punished more severely than cocaine, fentanyl, and heroin. Please make all changes retroactive to get rid of past sentencing disparity.

Scott Rodriguez Serrano
[redacted]
Federal Corectional Institute
Ashland KY 41105

Sent from the best. iPhone

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Amy Smith

Topics:

5. Career Offender Guideline/Categorical Approach

Comments:

Thank you for taking the time and reading my comments regarding career offender. As you are aware the career offender law needs to be looked at and redesigned with offenders already in custody given the opportunity to benefit. How can one determine a serious drug crime when in reality it's not a serious drug offense. Serving 15 years plus for having a drug addiction is ludicrous and we as the United States of America have to do better. It's less expensive to rehabilitate then to incarcerate for that long. It's a disservice to the citizens as these offenders will be released one day and in our community as our neighbors. With attaching career offender to everyone is like trying to compare apples to apples, they are all different sizes and different cases. I have faith in the USSC and pray daily that the ones in federal prison and effected by this will see some sort of relief. I understand and am very thankful for your willingness to look into this important issue. Thank you for your time. Have a blessed day.

Submitted on: July 12, 2023

From: ~^! SMITH, ~^!EDWARD LEE
Subject: [External] ***Request to Staff*** SMITH, EDWARD, [redacted], SST-C-A
Date: Wednesday, June 28, 2023 1:20:21 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:
Inmate Work Assignment: orderly C-unit

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I ask the commission to apply retroactivity to 4B1.2 for those who have been sentenced as career offenders under the commentary that has now been removed. The commission is well aware of the many circuits that have ruled that the commentary cannot add crimes to the text that weren't in it, see 3rd, 4th, 6th, 9th, 11th, DC, and 5th circuit pending at this time. Persons in those circuits prior to November 1st 2023 do not get enhanced sentences under 4B1.2 for inchoate crimes. Others in circuits outside of those listed are enhanced and stuck with sentences that far exceed others similarly situated as them. It's "luck" of the draw depending totally on the circuit you were convicted in. To apply retroactivity to those sentenced prior to November 1st causes no hardship but levels the the playing field. One of the top priorities of the commission should be uniformity in sentencing.

From: ~^! SMITH, ~^!MARTI J
Subject: [External] ***Request to Staff*** SMITH, MARTI, [redacted], MNA-Y-A
Date: Friday, July 21, 2023 8:05:52 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: Judge Reeves
Inmate Work Assignment: food service

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I'm writing in support of any reform toward correcting the pure meth vs meth mixture disparity in sentencing. The U.S. has conceded on numerous cases that there is currently no empirical basis for the 10-1 disparity. In fact the DEA data shows that "average" meth purity was above 96.2% in 2014 and has continuously increased to around 98% in 2020. Sentencing guidelines should be adjusted because meth purity is not indicative of culpability or hierarchy in the distribution chain. These days a homeless man on the street and a drug kingpin can both have the same disparity in meth and therefore, this disparity is very unfair. Common addicts who just need help for their disease are being sentenced to decades in prison. I hope that you can look further into the data and this is a priority topic for the 2024 amendments.

From: ~^! STEIN, ~^!CHRISTINA LOUISE
Subject: [External] ***Request to Staff*** STEIN, CHRISTINA, [redacted], DAN-P-A
Date: Friday, July 7, 2023 1:19:52 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: COMMISSION
Inmate Work Assignment: UNIT ORDERLY

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Suggestion for next cycle would be to make 922(g) 1 offenses elgible for the year off for RDAP. This is by LAW a non-violent crime and we qualify for FSA time off but not time off for RDAP. This would be a positive change and is rehabilitative.

From: ~^! SULLIVAN, ~^!TIMOTHY F
Subject: [External] ***Request to Staff*** SULLIVAN, TIMOTHY, [redacted], ELK-B-B
Date: Saturday, July 1, 2023 1:34:51 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: Sentencing Commission
Inmate Work Assignment: Temp Unit

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

If you want to start with the problem of prison overcrowding, make the FBOP follow the First Step Act (FSA) Law as well as the Second Chance Act (SCA). They are making a mockery of these both. They are forced to give every time credit eligible inmate the one year off their sentence for the first 365 Federal Time Credits (FTC's) but where they are to give you ADDITIONAL halfway house time, well that simply doesn't happen. I am an inmate at Elkton FCI and our Case Manager is following neither of these laws causing many inmates to be here costing exhobinant amounts of money when they should be released to the RRC, sometimes costing inmates up to 18 months here instead of reintegrating back into society. They do it because there is no oversight and they interoperate the law to whatever suits them best.

The Second Chance Act has a formula giving the inmate up to 10% of their sentence for halfway house HOWEVER they are encouraged to give EVERY inmate 12 months. That simply does not happen. Most inmates are lucky to get 3-6 months. Again, they are holding inmates much longer than necessary and against Congress' intent.

But the biggest problem is that they are ignoring inmate's FTC's (above the inmates year off) and not giving the additional halfway house/home confinement that the law as earned by eligible inmates and is costing tens of thousands of dollars each year and causes the overcrowding. Even entitled to the additional halfway house time earned by the inmate, the unit staff is simply denying the inmates what they earned. They have had almost 5 years to secure more halfway house facilities but they lie and tell us that we don't get our (earned) additional halfway house placement because they are full. This simply is not true. I should be leaving for the halfway house in August 2024 having my initial 12 months per the SCA and have an additional 16 months per the FTC's I earned (my statutory out date is Dec. 2026). This would be a great savings to this country and we would be getting nothing more than what we EARNED. The DOJ needs to intervene because the BOP is a holy mess. There is NO rehabilitation and the "programs" are a running joke here (in the event that they are even available).

Following the FSA FTC's would be the easiest solution immediately to save money and ease overcrowding. Why is the BOP allowed to ignore this law and its benefits? You are the first group to see the damage that mandatory minimums and long sentences do. They help no one and place an unnecessary monetary burden on this country when a simply diversion program for first time offenders (as is done in State Courts) would suffice instead of a 10 year mandatory sentence. It is sad that the state courts (most of them, anyway) have outdone the federal government in finding fair and just laws. We as federal inmates could be out working, providing for and caring for our families but still be under scrutiny but instead, we languish EVRY DAY either reading, watching TV or sleeping. Period!!! IF a program every even is offered to you it is usually sped through by staff and if there is a 'final', the answers are usually given to the inmates by staff.

The BOP is broken and beyond repair. It only gets worse and the fact that it is 432 (worst place to work) out of 432

agencies tells how the inmates are punished in ways the Court never intended. Let us get our lives back and actually be ABLE to reintegrate into society and not be marked and burdened by a one time mistake.

Thank you for taking on these issues. Please help so that we can all as inmates benefit from the FSA FTC's as was intended. Address the BOP and enforce the law. Giving us what was earned should not be optional.

From: ~^! SWISSI, ~^!AHMED
Subject: [External] ***Request to Staff*** SWISSI, AHMED, [redacted], SCH-D-A
Date: Wednesday, June 28, 2023 3:06:10 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:
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Reader,
I am currently a federal inmate serving a 14 year sentence for Distribution of Fentanyl Resulting in Death (21 U.S.C. 841(B)(1)(C)) in the 9th Circuit out of the Los Angeles Courthouse. I accepted a plea deal that removed the death from the language of the charge but still left me at the base offense level of 38 thus allowing me to be sentenced to a maximum of 20 years instead of the mandatory minimum of 20 years I was facing. The charge I was convicted of was 21 U.S.C. 841 a1,(B)(1)(C).
After reading a memo with your proposed priorities I found that Priority #10 deals directly with my case. Specifically it says, (10) Further examination of federal sentencing practices on a variety of issues, possibly including (B) drug trafficking offenses resulting in death or serious bodily injury. In my letter to the U.S. Sentencing Commission I will give a background on how I came to be convicted of this offense and my opinion of possible changes to the base offense level.
As you may know our country is going through a fentanyl epidemic that is wrecking havoc on our population. In 2021 alone about 107,000 people died from drug overdoses a majority from fentanyl. As the years pass, the epidemic is only getting worse and with that, unfortunately death's are increasing. In late 2018 I became a fentanyl addict by being sold counterfeit OxyContin Pills. For months I was using these pills not knowing I was infact using fentanyl. Once I realized I was using fentanyl, I started using powder fentanyl which was in March 2019. My funds depleted from spending all my money on fentanyl and to get high I helped a dealer sell there product just to get high. The grip the addiction had on me distorted my thought process and I did not know right from wrong. On April 3rd, 2019 I sold a .5 gram to a 25 year old man who lost his life that night.
At the time I had no clue what I was doing and was not part of a major drug dealing orginization. I was just a scatterbrained drug addict. To be subject to 38 is very harsh and is more than what major players in this industry are subject too. I think based on the amount sold there should be a lower offense level. We really need to go after the suppliers not the addicts. Right now I need to be in rehab but I'm in jail and my drug problem is only getting worse. I need help, I need drug counsling. I am not getting this at all and I've constantly asking for it.
I hope this letter gives you insight on how this charge affected my life. I have remorse for my actions but 14 years in prison is not going to help rid fentanyl from society. Before prison I was 18 months clean and never went back to fentanyl or any sort of criminal activity.

Thank You For Your Time,

Ahmed Galal Abdelkader Swissi

From: ~^! TILLMAN, ~^!DEANTHONY
Subject: [External] ***Request to Staff*** TILLMAN, DEANTHONY, [redacted], FOR-H-C
Date: Thursday, July 6, 2023 1:34:42 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: BOP
Inmate Work Assignment: oderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

i have been incarcerated since 2018 of march i have to federal sentencing i got sentenced to 84 months feburary of 2019 i was indicted while still incarcerated housed at fci greenville. there i left on a writ to get sentenced to 144 months in the western district of arkansas in which my both terms of inprisonment was ran concurrently january 2022 now the BOP is telling me i have a overlap concurrent sentence which was not stated in court. i was credit for all my time incarcerated january 2022 at sentencing not a overlap this issue need to be fixed Asap its very stressful. my 144 month sentence monthsis more than my 84 months if i get credit for the entire time i have been incarcerated i should only be facing a 144 months which is 12 yeqars not 14 years 11 and 15 days ... again this issue is stressful and i should not have to work with the courts to fix this minor issue all my jail time credits was giving to me and my computation and time should be fixed to 12 years only thank you ...if this is a court issue please let me know

To: Public Affairs- Priorities Comment
United States Sentencing Commission
One Columbus Circle, N.E, Suite 2-500
Washington, D.C., 20002-8002

RE: Review of Federal Sentencing Guidelines

From: Christopher A. Torwirt, Inmate
FCI Engelwood
9595 W. Quincy Ave
Littleton, CO 80123

Date: July 4, 2023

Dear Public Affairs Representative,

Thank you for taking a few minutes to review my comments regarding current sentencing guidelines. I pray that you will consider what I have to say despite my incarcerated status. In the BOP, inmates are nolonger people.

I have more to say after sharing my recommendations for revising the guidelines, but wanted to address that issue first.

GUIDELINES

1. Any revisions that are made (assuming they will make things better) should include those who are already in prison serving sentences established under the current guidelines.

2. First time offenders of non-violent crimes should be offered probation with required mental health and substance use treatment. This also applies to sex offenses. If it is a low-level offense, wave lengthy probation or supervised release for non-violent offenders.

3. First time offenders of non-violent, low-level offenses, if sentenced to incarceration, should be at the sentencing judge's discretion for the length of time to be served. Let the minimum/maximum guidelines be a tool for more serious offenses or for repeat offenders.

4. Judges should not be allowed to sentence based on their morally outraged emotions to convict and sentence a defendant. If the guidelines are being used, they should be a consistently applied framework and <u>not</u> a trap.

5. Stop the non-sensical assumption that all sex offenders are child molestors/rapists. And that they are worse than violent drug dealers, gangsters, bank robbers or terrorists. That is prison politics and has no place in a fair and just legal system. The fact is that the majority of those convicted of a sex offense were in their homes on their computer and never met a victim. Those who did pose a higher level of risk.

6. Make all non-violent offenders eligible for non-prison alternatives (home confinement, etc). Come to a realistic consensus on a definition of 'non-violent.'

7. Make all non-violent offenders eligible for a reinstated system of parole in the federal system commensurate with state parole and probation. State sentences are more realistic and don't appear to be designed to completely destroy the life of a non-violent offender as opposed to the absurdly lengthy sentences on the federal side.

8. Make ALL non-violent offenders eligible for First Step Act (FSA) time-off credits. This includes those convicted of a sex offense. Prejudicially, almost no sex offender is eligible for FSA credits of any kind. Once again implying that drug dealers are better for society than computer users who might benefit from treatment rather than years behind bars.

Please note: I am in no way trying to minimize the seriousness of sex offenses. The higher risk level offenders must be sentenced appropriately, but those are not the majority of sex offenders in prison. I have been in for one year and I get out December 2024.

I am a <u>first time offender</u> for possession of images considered to be child pornography. I have never been convicted of a crime, nor do I anticipate ever being convicted again. I am 62 years old. I retired from the U.S. Air Force with 24.5 years of service. I served in combat in the middle east and in Central America. I have four college degrees and had a successful career as a therapist and clinical director. I made a difference. Up until an extremely poor decision I made in 2016 (due to severe depression) I was a law abiding, productive member of society.

My BOP risk points are low enough to place me in a camp if it were not for my status as a sex offender. Can you guess how drugs and other contraband makes it into FCI Englewood? Answer: Through the upstanding camp-eligible drug dealing inmates sentenced to the camp.

My judge in Alaska (Judge Gleason) sentenced me below the guideline, and for that I am very grateful. I have also met many other first-time offenders (some as young as twenty years old) who will be in their forties when they leave. Their lives are essentially over and many are still too young to fully grasp that...
<u>UNLESS</u> changes are made to the guidelines that will reverse at least a portion of the damage that has been done. I am taking ownership and responsibility for my crime... my actions.

I am fortunate that Judge Gleason didn't feel that I deserved to die in prison.

Please know that by reforming the sentencing guidelines for all offenses, you are giving people a second chance to do the right thing without completely destroying them; something the Bureau of Prisons seems to sadistically embrace.

When people's lives get taken away, society does not benefit. Though the sentence has been served and the debt to society is paid, it is never over for the offender. There are no ways to safely and productively re-enter society as a free person: the laws and registrations currently see to that. This seems so apparent to me, so illogical, unless prisons really are for profit.

Our government needs to take a more responsible and reasonable approach to sentencing. Prisons are over crowded because of current guidelines. I wrote this by hand because we have five (5) electric typewriters and 800 men.

Please stop sending people to prison for first time offenses. Offer help not harm. Or add a voluntary death sentence because that's what it is anyway. Not everyone belongs in prison... including me.

Thank you so very much. I am grateful.

Respectfully,

[signature]

July 28, 2023

VIA EMAIL to PubAffairs@ussc.gov

UNITED STATES SENTENCING COMMISSION
Attn: Public Affairs-Priorities Comment One
Columbus Circle, N.E. Suite 2-500
Washington, D.C. 20002-8002

RE: Policy Priorities for Amendment Cycle 2024

Dear Chair & Sentencing Commission :

I am writing to you regarding the United States Sentencing Commission's request for comments on possible policy priorities for the amendment cycle ending May 1, 2024. I support and urge the commission to prioritize these Guideline issues:

1. Guideline § 5D1.2(b)

The Policy Statement in this Guideline should be deleted, or severely modified to limit those offenders who should be subject to a lifetime of supervised release. The Policy Statement provides that the maximum term of supervision is recommended for individuals convicted of sex offenses. This Policy Statement, however, was added by the Sentencing Commission when the statutory maximum term of supervised release was five years, not life.(compare U .S.S.G. App . C, Amend. 615 (2001)with 18 U .S.C. § 3582(k)(b)(2000); see also, United States v. Apodaca, 641 F. 3d 1077 (9th Cir. 2011)(concurring opinion by Judge fletcher criticizing the draconian, outdated, and unsupported Policy statement and life-time supervision for no-contact offenders). This is, partly, because the "Sentencing Commission has not amended the [Policy] following the enactment of the [PROTECT Act.]" (United States v. Brown, 411 F. Supp. 3d at 449, n.1).

In 2012, the Commission published a report about Child Pornography and the draconian Guidelines, guidelines that were not the result of the Commission's role but were caused by direct mandates from Congress. While the Commission called for a change in the Guidelines dealing with Child Pornography, nothing was done. Nearly 10 years later, the Commission again issued another report on Child Pornography. In its June 2021 report, the Commission cited statistics relating to the recidivism rate for no-contact sex offenders as being as high as 4.3%, and stating that one - half of those recidivating were arrested with 12 months of release from prison. (See Federal Sentencing of Child Pornography : Non-Production Offenses, United States Commission, June 2021).

Prior to its latest report about Child Pornography in 2016, a study concluded that "[w]hile it remains a widely accepted belief that people who commit sex crimes will inevitably repeat . . . , the academic literature, for the most part, does not support this claim. Overwhelmingly, recidivism studies conducted over the last sixty-five years find that a large majority of individuals convicted of sex crimes will not repeat." (Bad Data: How Government

Agencies Distort Statistics on Sex-Crime Recidivism, A. Ackerman and M. Burns, Justice Policy Journal, Spring 2016, at pg. 6). In fact, sex offenders have some of the lowest recidivism rates of any class of criminal." (Sexual Violence, Victim Advocacy, and Republican Criminology: Washington State's Community Protection Act, Stuart A. Scheingold, et al., 28 IAW & SOC'Y REV. 729, 743 (1994) .

The empirical data and evidence is clear: sex offenders are the least likely group of offenders to recidivate; especially those convicted of no-contact, internet offenses.

1. Relationship of This Statement with Cost of Incarceration

As the Commission considers the issue of reducing the cost of incarceration under 28 U.S.C. § 994(g), the elimination and/or limitation of this Policy Statement will have a significant impact on costs of incarceration—specifically, the United States Probation Department's costs and resources.

According to the Administration Office of the United States Courts, August 27, 2021, report, the cost of supervision is $,454.00 per year, per offender. 'While the number of people that may be affected by this is still unknown, amendment to this Policy Statement of deletion or modification can limit only the most dangerous sex offenders (such as repeat offenders, or sexually violent persons) to life-time supervision and allow other low-risk offenders, who are the least likely group of offenders to recidivate, to spend the mandatory 5 years of supervision instead of life. This can, and will save the United States Probation Department millions of dollars. This, in turn, will ensure that the U .S. Probation Department's limited resources in supervised release is spent in the areas that are most needed.

2. Proposed Amendments

I support and urge the Commission to consider and adopt one of the following amendments to Guideline § 5D1.2(b)'s Policy Statement:

i. Proposed Amendment No. 1:
Guideline § SD1.2(b)and the Policy Statement be deleted.

ii. Proposed Amendment No. 2:
(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory minimum or 5 years, whichever is less, is recommended, unless the offender is a repeat sex offender or has been previously deemed a sexually violent person.

iii. Proposed Amendment No . 3:
(b)Notwithstanding subdivisions (a)(1)through (a)(3) . . . (b)a covered sex offense.
(Policy Statement) If the instant offense of conviction is a covered sex offense, however, the statutory maximum of supervised release is recommended unless the offender can prove that he or she is not likely to reoffend”

1. Definitions:

"Covered Sex Offense" means (A)an offense, perpetrated against a minor, under (i)109A of Title 18, United States Code, (ii)Chapter 110 of such title, not including trafficking in, receipt of, or possession of child pornography, or a record keeping offense; (iii)Chapter 117 of such title, not including transmitting information about a minor, or an offense under 18 U .S.C § 2421A; or (iv)18 U.S.C. § 1591; or, (B) an attempt or conspiracy to commit any offense described in subdivision A(i) through (iv) of this note.

Amending this Guideline (5Dl.2(b))and its corresponding Policy Statement will harmonize the Policy Statement that was issued under an old regime/law with the new, and empirically-based one.

2. Guideline § 4C1.1

Although the Commission recently promulgated this Guideline, the version promulgated should be amended to delete subsection (5)(sex offense) or modified to "covered sex offense" (as defined previously).

As the Commission would be aware, "[t]he current status of the child pornography Guidelines dates to Congress' enactment of the PROTECT Act of 2003, Pub. L. 108-21, 117 Stat. 650. It was the culmination of the Sentencing Corrnnission's multiple amendments to these Guidelines-at Congress' direction-since their introduction in 1987, each time calling for harsher penalties. And it was the first instance since the inception of the Guidelines where Congress directly amended the Guidelines Manual ...[T]here congressionally mandated Guidelines were fundamentally different from £?Ost. ·.'.' (May v. Shinn, 37 F.4th 552 (9th Cir. 2022)(Block, F. concurring) .(quoting United States v. Dorvee, 616 F.ed 174 (2nd Cir. 2010)(internal quotations and citations omitted)).

The Commission, in its reports to Congress in 2012 and 2021, noted that nearly every defendant's Guideline range includes all Specific Offense Characteristics and effectively "maxes out" each Defendant. Nevertheless, Congress has repeatedly ignored, and continues to ignore, the Sentencing Commission reports and empirical- based studies.

While the Commission 's hands are "tied" with respect to calibrating the Child Pornography Guidelines (2G2.1 and 2G2.2)due to the PROTECT Act, the Commission ·can do so indirectly, through Guideline 4Cl.1, by amending it to either delete subsection (5) for all sex offenses, or modify so that those convicted of child pornography offenses are eligible for the reduction.

The above-described amendment will be consistent with the Commission 's goal of reducing the cost of incarceration and prison over-population. The child pornography guidelines have increased from an average of 36 months in 1994 to an average

of 109.6 months in 2007, due to changes that were "largely the consequence of numerous morality earmarks, slipped into larger bills over the last fifteen years, often without notice, debate, or study of any kind." (See T. Stabenow, Deconstructing the Myth of Careful Study: a Primer on the Flawed Progression of the Child Pornography Guidelines, (https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/report_stabenow.pdf)

With the use of the internet, the Child Pornography offender population in Federal Prison has increased exponentially. By making this amendment, the Commission can reduce the cost of incarceration by millions of dollars.

The average annual cost to house an individual in the Bureau of Prison is $44,258.00 according to the Administration Office of United States Court, August 27, 2021 report. A 2-point reduction will result in about a 20% reduction of offenders' sentences. *As* the average sentence for first-time Child Pornography offender is 109 months, a reduction of 2 years (approximately) will save more than $88,000 per offender. On average, for the last approximately 5 years, approximately 1,200 individuals were sentenced under the Child Pornography Guidelines per year; this minor adjustment can save more than $88,000,000 per year (See Sentencing Commission "Quick Facts"- Child Pornography Offenders, Fiscal Year 2021)

By making the amendment to Guideline 4Cl.1 a priority and making Child Pornography offenders eligible for the 2-point reduction, the Commission can fulfill its role and duties under 28 U.S.C. § 991, et seq. After all, as a society we "cannot keep power in the hands of Congress if it is not wise and timely meeting its problems." (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952)(Jackson, J. Concurring)).

Congress seem to have ignored the Commission 's reports regarding the empirical studies concerning Child Pornography and its ongoing recommendations to amend these Guidelines. Prioritizing this amendment will ensure that offenders convicted of no contact, internet only, offenses that pose little to no risk to society end up with a fair, empirically based, and just sentence, while at the same time save society millions of dollars per year on the cost of incarceration; costs and resources that can be put towards other much-needed programs.

I urge the Commission, and support it in its mission, to make Guidelines 4Cl.1 and 5Dl.2(b)a priority for its May 1, 2024 cycle .

Thank you.

Terrel Transtrum, Idaho Falls ID, TEL [redacted]5

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Christopher Velissaris

Topics:

3. Simplification/Structural Reform
4. Case Law Relating to Guideline Commentary

Comments:

Dear Honorable Members of the Sentencing Commission,

This letter respectfully seeks your consideration in restructuring the Economic Theft loss table as defined under U.S.S.G. 2B1.1(b)(1). We have serious concerns about the current approach, most notably the sentencing disparities created by the current loss table and the subjective nature in which the loss table is applied. The current table has historically fostered sentencing disparities that fundamentally challenge the notions of justice in our country.

These concerns were compounded by the revisions to the Guidelines in 2005, which transformed the loss table into an even more punitive tool by amplifying the maximum level enhancement from 20 points to a staggering 30 points. This shift appears to contradict the fundamental purpose of the Sentencing Guidelines, raising the question of whether it accurately reflects the severity of economic theft offenses.

In its current form, the Guidelines result in significant disparities in sentencing outcomes between Theft, as specified under U.S.S.G. 2B1(b)(1), Burglary under U.S.S.G. 2B2.1(b)(2) and Robbery under U.S.S.G. 2B3.1(b)(7). At first glance, it would be expected that the loss tables for these crimes would be extremely closely correlated, but the current Guidelines exhibit a substantial deviation. These discrepancies are particularly inequitable considering the subjective nature of the calculation of loss for Theft under U.S.S.G. 2B1.1(b)(1). Notably, U.S. vs. Borrasi, 639 F. 3d 774 (7th Circuit (2011)), highlights that the Sentencing Guidelines aim to eradicate sentencing disparities and foster uniformity. This mission appears to be undermined by the current Economic Theft loss table, which engenders significant sentencing discrepancies.

Under the present Guidelines, a defendant charged with Burglary and Robbery under U.S.S.G. 2B2.1(b)(2) and Robbery under U.S.S.G. 2B3.1(b)(7), face a maximum of 8 level enhancement for losses exceeding $9.5 million. Conversely, the Economic Theft loss table encapsulated in U.

S.S.G. 2B1.1(b)(1), posits a significantly more punitive response to economic crime with a maximum enhancement of 28 levels. When aggregated with the base level offense of 6 or 7 levels and any supplementary enhancements, this provision could compel a defendant to confront sentencing ranging from 30 years to life in prison, largely dictated by the loss table.

To emphasize the unreasonable consequences of the current system, consider the following scenario. An individual contemplating the commission of securities fraud analyzes the Economic offense loss tables, and instead decides to physically steal from a company resulting in a $70 million loss. Under the Burglary Guidelines, this individual would accumulate a total of 20 points, which would result in a sentence of approximately 3 years. However, if the same person were to commit securities fraud for the equivalent dollar amount, their total points would sky rocket to 31 points which would result in a sentence of approximately 10 years. The same exact crime with the same dollar amount creating substantially different outcomes. Such disparities not only contradict the fundamental purpose of the Sentencing Guidelines, but also lead to incongruous outcomes that undermine the integrity of the judicial system.

This punitive disparity defies the spirit of the Supreme Court's ruling in U.S. vs. Gall, 552 U.S. 38 (2007), which advocated for a sentencing approach that is "sufficient, but not greater than necessary." This disparity seems to deviate from the Sentencing Guidelines' purpose of harmonizing sentencing outcomes as highlighted in U.S. vs. Booker, 543 U.S. 220 (2005).

Furthermore, the calculation of the loss under U.S.S.G. 2B1.1(b)(1) is often subjective and frequently leads to unjust outcomes, which is incompatible with our criminal justice system. The Sentencing Guidelines define loss as "the reasonably foreseeable pecuniary harm" that is "readily measurable in money." These losses should be a reasonable estimate of the monetary value which includes: "the fair market value of the property taken, or the cost of the property." These definitions directly contradict the subjective manner in which federal courts are interpreting loss and imposing sentences utilizing the Theft loss table. A clear instance of this subjectivity was shown in the securities valuation case U.S. vs. Velissaris (2nd Circuit (2022)), where the court stated that it was "largely immaterial" whether the defendant's calculations were "objectively correct or not," and that the prosecution "will not even attempt to provide a fair market value."

This approach directly contradicts the Supreme Court's assertion in U.S. vs. Williams (2017), where the court emphasized the need for clear and objective Guidelines to avoid arbitrary sentencing outcomes.

Therefore, we call upon the Sentencing Commission to implement a more objective and more just Economic Theft loss table with a more reasonable maximum sentence enhancement to accurately reflect the severity of Economic Theft offenses.

Thank you!

Submitted on: July 31, 2023

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Vicki Vest

Topics:

11. Other Suggested Priorities

Comments:

Subject: Request for Review and Consideration of Sentencing Guidelines for Long-Term or Life Incarceration Cases

Dear United States Sentencing Commission,

I write to express my concern regarding the current state of sentencing guidelines for individuals who have been incarcerated for extended periods, specifically those serving life sentences without the possibility of parole.

While I understand the importance of accountability and public safety, there arises a need to reevaluate the system to ensure fairness and justice in such cases.

It is with great empathy that I bring to your attention the case of individuals who have spent substantial portions of their lives behind bars.

These individuals, having already served decades in prison, often exhibit remarkable personal growth, rehabilitation, and positive contributions to their communities from within the correctional system.
This raises questions about the continued necessity and proportionality of their continued incarceration.

While recognizing that public safety remains a paramount concern, it is essential to strike a balance between accountability and providing avenues for redemption and reintegration into society. This delicate balance should account for factors such as exemplary behavior, participation in rehabilitative programs, demonstrated remorse, and significant contributions toward the betterment of others, both inside and outside of the correctional facility.

By revisiting and reassessing the sentencing guidelines for long-term incarceration cases, the

United States Sentencing Commission has the opportunity to ensure that the justice system recognizes and rewards genuine efforts at rehabilitation and positive transformation. A thoughtful examination of these cases, taking into account the specific circumstances and the demonstrated commitment to personal growth, can result in fairer outcomes and a more rehabilitative approach to justice.

I respectfully urge the Commission to undertake a comprehensive review of the sentencing guidelines for long-term incarceration, seeking input from legal experts, practitioners, and stakeholders, as well as considering the evolving societal understanding of rehabilitation and punishment. Through this process, we can work towards a system that not only safeguards public safety but also acknowledges the potential for redemption and reintegration into society, even for those sentenced to lengthy terms.

Thank you for your dedication to maintaining a just and equitable sentencing system. Your thoughtful consideration of this matter and potential revision of guidelines will have a profound impact on the lives of those serving extended sentences and contribute to the continued improvement of our justice system.

Thank you for taking the time and your consideration.

Submitted on: July 6, 2023

Hello,

I'm writing you today on behalf of the public addressing the Proposed priorities for Amendment Cycle.

First the public comment period needs to be open for 2 months not just one, due to enough time for public awareness and weather/mail processing time.

Our Answer is:
YES to all proposed priorities #1, #2, #3, #4, #5 (A) (B) (C), #6, #7, #8, #9, #10 (A) (B) (C) (D) (E), #11; and the Public petitions for the following Amendments:

1. Home Confinement, Ankle Monitor, or Alternatives-to-Incarceration Programs for First-time offenders, Low Recidivism Level inmates, and Minimum Recidivism Level inmates.

2. All Mandatory Minimums cut in Half.

3. Youthful offenders serve no more than 3 years. Capped at 3 year sentence of incarceration, also receive programs with therapy treatment, and help receive housing in society away from abuse.

4. All Amendments Retroactivity, Effective Immediately for Both inmates already incarcerated in the prison system and new inmates to be sentenced.

Reasons:

The Public sees an Extreme Need to reduce costs of incarceration and the Mass incarceration causing overcapacity of prisons.

On proposed Priorities #2 and #3:
We petition for home confinement, ankle monitor, or alternatives-to-incarceration programs for First-time offenders, Low Recidivism level inmates, and Minimum Recidivism level inmates. This will drastically reduce costs of incarceration and overcapacity of prisons. Thus solving many National issues. As of May 27,2023 B.O.P. has placed 13,204 people into Home Confinement under CARES ACT . As of May 1, 2023 only 22 people of the 13,204 re-offended. That's a very clear answer, it is an effective tool that has proven to have worked over the past two years since the enactment of the CARES ACT.

The average housing cost of a single inmate per year is $50,000. That is far too much, especially with the nations failing economy verses the average home confinement cost of a single inmate per year is only $5,000. Dramatic differences. Switching to home confinement for First-time offenders, Low Recidivism level inmates, and Minimum Recidivism Level inmates will save the Nation Millions possible Billions of dollars. The home confinement inmates will be able to work jobs to support themselves and pay taxes. They will be contributing to helping our Nation and being productive members of society.

Too much money is poured into the prison system causing Mass Incarceration because the officials see more prisoners as more money in their pockets (Greed). How do we fix it? By placing more inmates on Home Confinement, enabling them to make amends by paying taxes, community service, working a job, and receiving the much needed therapy/reform programs through re-entry services offered for recently released convicted felons helping them further lower their risk of recidivating.

Many prisons are falling apart. The answer is not fixing them all but putting the money towards Home Confinement. That will fix the problem forever, prisons will always have to be repaired. Cut our losses now, just put First-time offenders, Low and Minimum recidivism levels inmates on Home Confinement. Then condense the prisons and just fix those. Also, allowing High and Medium recidivism levels available space to programming. A more effective plan for costs and the National crisis.

We petition for All Mandatory Minimums be Cut in Half for already convicted inmates and future inmates. Due to Judges/Officials often seeing more prisoners serving more time as More Money in their pockets (Bonuses, Job security, pay offs by Wardens/Officials with stock in prisons, and their own stock in prisons). Judges often give the Maximum or over the

guidelines to inmates when not needed. This is not acceptable. To the Public it points to the End times, where there will be buying and selling of Human lives.

On proposed priority #(6):
We petition for Youthful offenders to be released on Home Confinement or Ankle Monitor, and their sentence reduced to no more than 3 years. According to the damaging effects imprisonment causes on the youth. The youth must attend programs according to theirs Needs with therapy treatment.

The current treatment of Youthful offenders is despicable. We are utterly appalled by how they are handled by the Government.

The Future of our Nation are locked away to be abused and sexual abused. When the youth needed help from the older Generation. To receive treatment of therapy, rehabilitation, and safety to grow into healthy functioning adults. Instead they are locked up, receiving No help to become well. Most of the youth wish they were dead. Why is that? Because they had no chance, no mercy, no compassion, and no help to live in peace (the pursuit of happiness). Instead just more abuse, removed from outside abusers to inside the walls of prison abusers.

We the people, petition for programs with therapy treatment to get them to safety and live in society so they can grow into healthy functioning adults.

No youth should serve more than 3 years behind bars. What are we doing to the future of our Nation? There is no nation if there is no people.

The Covid-19 Pandemic has given society a taste of what its like to be locked up. It is fact that the Mental Health of people dramatically spiraled down, especially in the Youth of the Nation. Most likely will last a lifetime. The Scars that you get when locked down never go away. How many youthful offenders are being mentally damaged? The answer is All of Them, and that's our future we are currently building. How do we go on?

It needs to change and there is no better a time as Now.

1/3 of the U.S. population has been or is incarcerated.
2/3 of the public is left trying to support everyone? A set up for failure.
The U.S.A. has the highest number of incarcerated people in the world and its not even the highest populated Nation.

We need to Change before its too late.

How to accomplish this?
Hire more probation officers and start sending people on home confinement. Programs can be done either online portal or in person depending on available and mental/medical state of inmate. Either home Confinement, Ankle Monitor, work release, or alternatives-to-incarceration depending on criminal history and Needs.

This is substantial public comment. The guideline-writing process is evolutionary. We are expecting change through modification and revisions to the guidelines through submission of Amendments to Congress. Combating crime though effective and fair sentencing. The ultimate aim is the control of crime by stopping the breeding grounds for crime (prisons and abuse) and reform the existing inmates to be productive members of society (programs/learning to live right in society).

The public believes Home Confinement and alternatives-to-incarceration programs are the Key to Saving our crumbling Nation.

We the People, petition for these remedies to be retroactivity for current inmates and future inmates.
These We find the best course of action for our Nation.
Thank you.

Respectfully Submitted,

Frances Westmoreland

From: ~^! WHISMAN, ~^!WILLIAM CRAIG
Subject: [External] ***Request to Staff*** WHISMAN, WILLIAM, [redacted], OAK-A-B
Date: Thursday, June 29, 2023 8:20:11 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: U.S Sentencing Commission
Inmate Work Assignment: UNICOR

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Please consider ammending the significant differences in sentencing between plea deals and trials. Defendants are given an impossible choice of "take the deal and we'll give you 10 years or go to trial and we'll give you 30". Why are defendants punished for exercising their constitutional right to trial. The rules are written to benefit the government. If a person is offered a 10 year sentence, the DOJ is acknowloging that 10 years is sufficient to meet the punishment requirement. But if you make them actually work for the conviction, they push for every enhancement they can. And for what? They thought 10 years was enough in the plea deal. So how does pushing for the maximum at trial do anything more than punish the defendant for actually going to trial? The last statistics I remember reading, about 95% of all cases end in a plea deal. And of the remaining 5%, over 95% of those end in a conviction. State conviction rates are significantly lower than that. Are the governments lawyers that much better? Or are the rules stacked in their favor?

July 17, 2023

VIA U.S. MAIL AND/OR EMAIL

UNITED STATES SENTENCING COMMISSION
Attn: Public Affairs-Priorities Comment
One Columbus Circle, N.E. Suite 2-500
Washington, D.C. 20002-8002

RE: Policy Priorities for Amendment Cycle 2024

Dear Chair Reeves and Sentencing Commission:

I am writing to you in regards to the United States Sentencing Commission's request for comments on possible policy priorities for the amendment cycle ending May 1, 2024. For the reasons set forth, I hereby support and urge the commission to priorities the following Guideline issues:

1. Guideline § 5D1.2(b)

The Policy Statement in this Guideline should be deleted, or severely modified to limit those offenders who should be subject to a lifetime of supervised release. The Policy Statement provides that the maximum term of supervision is recommended for individuals convicted of sex offenses. This Policy Statement, however, **was added by the Sentencing Commission when the statutory maximum term of supervised release was five years, not life.** (compare U.S.S.G. App. C, Amend. 615 (2001) with 18 U.S.C. § 3582(k)(b)(2000); see also, United States v. Apodaca, 641 F. 3d 1077 (9th Cir. 2011)(concurring opinion by Judge fletcher critisizing the draconian, outdated, and unsupported Policy statement and life-time supervision for no-contact offenders). This is, partly, because the "Sentencing Commission has not amended the [Policy] following the enactment of the [PROTECT Act.]" (United States v. Brown, 411 F. Supp. 3d at 449, n.1).

In 2012, the Commission published a report about Child Pornography and the draconian Guidelines; Guidelines that were not the result of the Commission's role but were caused by direct mandates from Congress. While the Commission called for a change in the Guidelines dealing with Child Pornography, nothing was done. Nearly 10 years later, the Commission again issued another report on Child Pornography. In its June 2021 report, the Commission cited statistics relating to the recidivism rate for no-contact sex offenders as being as high as 4.3%, and stating that one-half of those recidivating were arrested with 12 months of release from prison. (See Federal Sentencing of Child Pornography: Non-Production Offenses, United States Commission, June 2021)).

Prior to its latest report about Child Pornography, in 2016, a study concluded that "[w]hile it remains widely accepted belief that people who commit sex crimes will inevitably repeat..., the academic literature, for the most part, does not support this claim. Overwhelmingly, recidivism studies conducted over the last sixty-five years find that the vast majority of individuals convicted of sex crimes will not repeat." (Bad Data: How Government Agencies Distort Statistics on Sex-Crime Recidivism, A. Ackerman and M. Burns, Justice Policy Journal, Spring 2016, at pg. 6). In fact, "[s]ex offenders have some of the lowest recidivism rates of any class of criminal." (Sexual Violence, Victim Advocacy, and Republican Criminology: Washington State's Community Protection Act, Stuart A. Scheingold, et al., 28 LAW & SOC'Y REV. 729, 743 (1994)).

The empirical data and evidence is clear: sex offenders are the least likely group of offenders to recidivate; especially those convicted of no-contact, internet

offenses.

1. Relationship of This Statement with Cost of Incarceration

As the Commission considers the issue of reducing the cost of incarceration under 28 U.S.C. § 994(g), the eliminiation and/or limitation of this Policy Statement will have a significant impact on costs of incarceration; specifically, the United States Probation Department's costs and resources.

According to the Administration Office of the United States Courts, August 27, 2021, report, the cost of supervision is $4,454.00 per year, per offender. While the number of people that may be affected by this is still unknown, amendment to this Policy Statement of deletion or modification can limit only the most dangerous sex offenders (such as repeat offenders, or sexually violent persons) to life-time supervision and allow other low-risk offenders, who are the least likely group of offenders to recidivate, to spend the mandatory 5 years of supervision instead of life. This can, and will save the United States Probation Department millions of dollars. This, in turn, will ensure that the U.S. Probation Department's limited resources in supervised release is spent in the areas that are most needed.

2. Proposed Amendments

I support and urge the Commission to consider, and adopt one, of the following amendments to Guideline § 5D1.2(b)'s Policy Statement:

i. Proposed. Amendment No. 1:
Guideline § 5D1.2(b) and the Policy Statement shall be deleted.

ii. Proposed Amendment No. 2:
(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory minimum or 5 years, which ever is less, is recommended; unless the offender is a repeat sex offender or has been previously deemed a sexually violent person.

iii. Proposed Amendment No. 3:
(b) Notwithstanding subdivisions (a)(1) through (a)(3)...
(b) a **covered** sex offense.
(Policy Statement) If the instant offense of conviction is a **covered** sex offense, however, the statutory maximum of supervised release is recommended **unless the offender can prove that he or she is not likely to reoffend"**

1. Definitions...
"**Covered** Sex Offense" means (A) an offense, perpetrated against a minor, under (i) 109A of Title 18, United States Code, (ii) Chapter 110 of such title, **not including trafficking in, receipt of, or possession of child pornography,** or a record keeping offense; (iii) Chapter 117 of such title, not including transmitting information about a minor, or an offense under 18 U.S.C. § 2421A; or (iv) 18 U.S.C. § 1591; or, (B)an attempt or conspiracy to commit any offense described in subdivision A(i) through (iv) of this note.

Amending this Guideline (5D1.2(b)) and its corresponding Policy Statement will harmonize the Policy Statement that was issued under an old regime/law with the new, and empirically-based one.

2. Guideline § 4C1.1

Although the Commission recently promulgated this Guideline, the version promulgated should be amended to delete subsection (5) (sex offense) or modified to "**covered** sex offense" (as defined previously).

As the Commission knows, "[t]he current status of the child pornography Guidelines dates to Congress' enactment of the PROTECT Act of 2003, Pub. L. 108-21, 117 Stat. 650. It was the culmination of the Sentencing Commission's multiple amendments to these Guideliens-at Congress' direction-since their introduction in 1987, each time calling for harsher penlaties. And it was the first instance since the inception of the Guidelines where Congress directly amended the Guidelines Manual...[T]here congressionally mandated Guidelines were fundamentally different from most..." (May v. Shinn, 37 F.4th 552 (9th Cir. 2022)(Block, F. concurring) (quoting United States v. Dorvee, 616 F.ed 174 (2nd Cir. 2010)(internal quotations and citations omitted)).

The Commission, in its reports to Congress in 2012 and 2021, noted that nearly every defendant's Guideline range includes all Specific Offense Characteristics and effectively "maxes out" each Defendant. Nevertheless, Congress has repeatedly ignored, and continues to ignore, the Sentencing Commission reports and empirical-based studies.

While the Commission's hands are "tied" with respect to calibrating the Child Pornography Guidelines (2G2.1 and 2G2.2) due to the PROTECT Act, the Commission can do so indirectly, through Guideline 4C1.1, by amending it to either delete subsection (5) for all sex offenses, or modify so that those convicted of child pornography offenses are eligible for the reduction.

The above-described amendment will be consistent with the Commission's goal of reducing the cost of incarceration and prison over-population. The child pornography guidelines have increased from an average of 36 months in 1994 to an average of 109.6 months in 2007, due to changes that were "largely the consequence of numerous morality earmarks, slipped into larger bills over the last fiftten years, often without notice, debate, or study of any kind." (See T. Stabenow, Deconstructing the Myth of Careful Study: a Primer on the Flawed Progression of the Child Pornography Guidelines, pg. 2, available at: www.fd.org/pdf_lib/Deconstrucing%20the%20Child%20Pornography%20Guidelines%20206.1.08.pdf)). With the use of the internet, the Child Pornography offender population in Federal Prison has increased exponantially. By making this amendment, the Commission can reduce the cost of incarceration by millions of dollars.

The average cost to house an individual in the Bureau of Prison is $44,258.00 according to the Administration Office of United States Court, August 27, 2021 report. A 2-point reduction will result in about a 20% reduction of offenders' sentences. As the average sentence for first-time Child Pornography offender is 109 months, a reduction of 2 years (approximately) will save more than $88,000 per offender. On average, for the last approximately 5 years, approximately 1,200 individuals were sentenced under the Child Pornography Guidelines per year; this minor adjustment can save more than $88,000,000 per year (See Sentencing Commission "Quick Facts"-Child Pornography Offenders, Fiscal Year 2021)

By making the amendment to Guideline 4C1.1 a priority and making Child Pornography offenders eligible for the 2-point reduction, the Commission can fullfil its role and duties under 28 U.S.C. § 991, et seq. After all, we as a society, "cannot keep power in the hands of Congress if it is not wise and timely meeting its problems." (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S.

579, 654 (1952)(Jackson, J. Concurring)). Congress has ignored the Commission's reports regarding the empirical studies concerning Child Pornography and its ongoing recommendations to amend these Guidelines. Prioritizing this amendment will ensure that offenders convicted of no contact, internet only, offenses that pose little to no risk to society end up with a fair, empirically based, and just sentence, while at the same time save society millions of dollars per year on the cost of incarceration; costs and resources that can be put towards other much-needed programs.

I therefore fully urge the Commission, and support it in its mission, to make Guidelines 4C1.1 and 5D1.2(b) a priority for its May 1, 2024 cycle.

Thank you for your time and consideration.

Lori Williams

From:	~^! WINSTON, ~^!KWAN ANDRE
Subject:	[External] ***Request to Staff*** WINSTON, KWAN, [redacted], THP-D-B
Date:	Tuesday, July 4, 2023 12:35:50 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: Mr. Carlton Reeves
Inmate Work Assignment: Unicor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Greetings:

My name is Kwan Winston, and I have been incarcerated for a quarter of a century, for crimes I committed between the young ages of 16-21, that I went to trial on and am serving a life sentence for (I was enhanced to the maximum level of 43 under the Guidelines). I have been incarcerated since age 23, and am now a graying (grandfather) of 48, with three children (one recently deceased), and six grandchildren. I am a first time offender, and have grown and matured while incarcerated, and have a loving and supportive family.

All of my co-defendants (with the exception of one, who refused a plea deal and elected to go to trial with me) are home, and have been home for years, but of course they were smart enough to take a plea. I add this to point out that the ignorance of my youth was a huge factor in the decisions I made with regards to crimes committed, as well as the decision to go to trial, which all resulted in my life's forfeiture.

I am writing to ask that the Sentencing Commission implement changes within the Guidelines for "Youthful Offenders" which would require sentencing courts to take into account an offenders age at the time of the offense, and provide a safety valve for those meeting this criteria. And, I believe it is important that there be adjustments for those who elect to go to trial, as the sentence disparity between myself and my co-defendants (who engaged in the same, or similar conduct) is without compare. Also, it is important that any such changes be implemented retroactively, as my situation is not all that unique in the federal system, and could positively impact hundreds of family's.

Thank you for your time and consideration

Public Comment - Proposed 2023-2024 Priorities

Submitter:

Ken Zipf

Topics:

11. Other Suggested Priorities

Comments:

I would like to comment on what should be the real priorities for the 2023-2024 Amendment cycle should be. To solve all most all problems in the federal prison system the large number of prisons needs to be reduced. Federal prisons over incarcerate people with long sentences and no parole system. Most states have a parole system and give out far less sentencing length. If you bring back parole, you solve the problem of overcrowding and the cost of incarceration. A simple solution and not political is to increase the amount of time off for good behavior from 15% of your sentence to 30%. An inmate serving a 10-year sentence would serve 7 years instead of 8 ½, and with FSA (First Step Act) credit of one year and the early release for halfway house for at least a year, the inmate would serve 5 years of incarceration. Make all solutions retroactive. 30% of the Federal Offenders are in prison because of immigration crimes. There needs to be an alternate solution instead of putting these offenders into a Federal correctional institution. Immigrants take away scarce resources from American inmates. Priorities could be, bring back parole, give 30% off for good behavior instead of 15%, reduce federal sentences across the board, decrease the number of immigration federal offenders in prison. Any changes should be made retroactive.

Thank you,

Ken Zipf

Submitted on: July 10, 2023

UNITED STATES SENTENCING COMMISSION
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
www.ussc.gov