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BEFORE THE UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON PROPOSED AMENDMENTS TO U.S.S.G. § 5H1.1 AGE (POLICY STATEMENT)
MARCH 7, 2024

Thank you for the opportunity to offer public comment on the proposed amendments to the United States Sentencing Guidelines relating to youthful individuals. I submit this statement in anticipation of my March 7, 2024 testimony. I am a Professor of Law at the University of Richmond School of Law, where I teach courses related to criminal law and procedure, including a seminar on Sentencing Law.[1] Much of my research analyzes the reliance on data-driven methods in criminal system reform, including the emerging use of recidivism predictions at sentencing.[2] My scholarship is informed by my years of experience as an appellate public defender in New York City and as the Executive Director of the Clemency Resource Center at NYU School of Law, where I oversaw the filing of more than 100 petitions for federal clemency between 2015 and 2016.

I will focus my commentary on the proposed amendment to U.S.S.G. §5H1.1 Age (Policy Statement). I am encouraged by the possibility that the Commission will expand the opportunity for more people to be eligible for downward departures based on age by removing the "unusual degree" limitation. I am concerned, however, with the proposed instruction to judges to consider research regarding the "correlation between age and rearrest rates, with younger individuals rearrested at higher rates and sooner after release than older individuals" when deciding whether to grant a downward departure based on age in §5H1.1(2). I urge the Commission to reject this part of the proposed amendment, for the reasons that follow.

In essence, proposed amendment §5H1.1(2) requires judges to consider group recidivism data, defined by historic rearrest statistics, when assessing the suitability of a downward departure based on youth in an individual case. I urge the Commission to see the limits of what recidivism data can and actually does reveal, to think critically about the purpose of recidivism considerations in sentencing decisions, and to expansively consider other goals and values that could guide sentencing law and policy towards a different future.

Recidivism has a straightforward definition: it connotes a return to criminal activity.[3] As measured and analyzed, however, recidivism becomes a malleable concept. In some contexts and for some purposes, recidivism is measured by a new conviction of any crime, and in others by a new period of

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[1] I submit this testimony in my individual capacity.
[2] Two of my articles are particularly relevant to the issues currently before the Commission. *See* Erin Collins, *Punishing Risk* 107 GEO. L. J. 57 (2018) and Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 B.Y.U. L. REV. 403 (2022).
[3] Ryan Cotter, Courtney Semisch, & David Rutter, *Recidivism of Federal Offenders Released in 2010*, U.S. SENT'G COMM'N, 6 (2021) ("Recidivism 'refers to a person's relapse into criminal behavior, often after the person receives sanctions or undergoes intervention for a previous crime.').

incarceration, the filing of a new charge, or a new arrest.[4] The period over which recidivism is measured may stretch from a few months to many years.[5]

Many federal agencies, including the Commission in proposed amendment §5H1.1(2), define recidivism as rearrest. The justification for this definitional decision is that we have more data about how frequently arrests occur than we do about how frequently people who are arrested are charged and/or ultimately convicted, and therefore arrest data provides a "more reliable measure" of recidivism. However, that we have more information about arrest rates does not render arrest more probative of an individual's behavior or more reliable in estimating recidivism than other metrics.[6] In fact, arrest is the least accurate, and most concerning, method of measuring whether someone has "relapse[d] into criminal behavior."[7]

Arrest and guilt are "factually and legally distinct" concepts.[8] An arrest reflects the determination by a law enforcement officer that there was probable cause to believe someone engaged in criminal activity.[9] As the Supreme Court reminds us in *Michaelson v. U.S.*, arrest "happens to the innocent as well as the guilty."[10] That someone was arrested does not tell us whether the arresting officer's assessment was correct, whether the government was able to substantiate the officer's determination with proof beyond a reasonable doubt, or whether the arrested person actually committed a crime.[11]

For these reasons, using rearrest as a measure of recidivism necessarily overpredicts behavior.[12] The degree of overprediction is unknown, though, because we lack comprehensive data about what happens to cases after arrest.[13] For example, the researchers who conducted one of the recidivism studies referenced in this proposed amendment could not determine the disposition in 44.1% of the

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[4] Cotter, Semisch, & Rutter, *supra* note 3, at 6. *See also* Jessica Eaglin, *Constructing Recidivism Risk*, 67 EMORY L. J. 59, 75-78 (2017) (discussing the various ways recidivism risk assessment instruments define and measure recidivism).

[5]Cotter, Semisch, & Rutter, *supra* note 3, at 7 (using an eight-year follow up period).

[6]*Cf. id.* (arguing that arrest is a "more reliable measure" of recidivism than reconviction and reincarceration "due to the incomplete nature of disposition data").

[7]*Id.* at 6 ("Recidivism 'refers to a person's relapse into criminal behavior, often after the person receives sanctions or undergoes intervention for a previous crime.').

[8] Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 988, 988 (2019).

[9] *Id.* at 991 ("[A]n arrest is at its core a governmental act, rather than the act of a suspect; its occurrence, therefore, cannot in and of itself establish that a suspect is guilty of anything")·

[10] Michelson v. US, 335 U.S. 469, 482 (1948) ("Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty.")

[11] Professor Anna Roberts distinguishes these final two concepts as "legal guilt" and "factual guilt," respectively. Roberts, *Arrests as Guilt*, *supra* note 8, at 989.

[12] *See* Cotter, Semisch, & Rutter, *supra* note 3, at 12 ("Because not all arrests result in conviction or incarceration, rearrests can overstate recidivism.").

[13] *See* Surrell Brady, *Arrests without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 36 (2000) ("Quantifying the arrest/prosecution ratio remains elusive. Despite hundreds of pages published annually by the FBI and the Bureau of Justice Statistics (BJS), those agencies do not report complete statistics for criminal case outcomes in state courts.").

32,135 cases considered in assessing rearrest rates.[14] There have been some attempts to estimate what percentage of people who are arrested are ultimately charged and convicted. A 2013 Bureau of Justice Statistics survey found that approximately one-third of felony arrests in large urban counties did not result in convictions.[15] A study by researchers at the University of South Carolina concluded that more than one quarter of the individuals in their study who were arrested were not charged, and nearly half of those who were arrested were not convicted.[16] And one legal scholar surveyed available data and concluded that "in a number of large jurisdictions, the majority of criminal cases at the state level, both misdemeanors and felonies, are dismissed without prosecution."[17]

Thus, arrest is a misleading measure of recidivism; it identifies many people as recidivists who have not, actually, "relapse[d] into criminal behavior."[18] Measuring recidivism by a prosecutor's decision to charge someone with a crime suffers many of these same flaws, as not all criminal charges result in convictions. And for reasons Professor Anna Roberts has laid bare, even the use of conviction as a stand-in for factual guilt suffers from conceptual flaws.[19] She argues that the structural and individual pressures upon criminally accused people to plead guilty, combined with the ways in which high caseloads, resource constraints, and institutional incentives subordinate defense representation, "creat[e] a significant risk that convictions will be imposed in the absence of guilt."[20]

Moreover, *even if* we assume arrest data accurately reflects criminally culpable behavior, it tells us nothing about the severity of that behavior. It does not distinguish between those who recidivate by committing a quality-of-life crime and those who commit homicide. For example, one of the studies cited in the proposed amendment, which shows recidivism rates for young people are higher than their older counterparts, defines "recidivism" as an arrest for *any* "new crime" or arrest "for alleged violations of conditions of federal probation, federal supervised release, or state parole."[21] In other words, under this definition people are recidivists if they engage in (or, more precisely, are arrested for) criminal behavior of any severity, or behavior that is not criminal but is prohibited because they are under some form of supervised release.

Regardless of whether recidivism is defined as conviction, charge, or arrest, recidivism data provides only a glimpse of who is suspected of engaging in or who does in fact engage in behavior deemed criminal. And what we see in that glimpse is shaped by the structurally unequal and racially biased context in which the criminal law is enforced.

Criminal laws are not enforced equally across the population. Just as not all people who are arrested have in fact engaged in criminal behavior, not all people who engage in criminal behavior are arrested. Quite simply, arrests occur where police officers are. As Professor Cecilia Klingele has explained,

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[14] Cotter, Semisch, & Rutter, *supra* note 3, at 6.
[15] Brian A. Reeves, U.S. DEP'T. OF JUST. *Felony Defendants in Large Urban Counties, 2009*, 24 table 21 (2013).
[16] *See* Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014) (describing the study).
[17] Brady, *supra* note 13, at 3.
[18] *See* Cotter, Semisch, & Rutter, *supra* note 3, at 6 (defining recidivism)
[19] Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L REV. 2501 (2020).
[20] *Id.* at 2504.
[21] Kim Steven Hunt & Billy Easley, *The Effects of Aging on Recidivism Among Federal Offenders*, U.S. SENT'G COMM'N, 6 (2017) (discussing the widespread focus on recidivism).

"while the criminal justice system purports to measure recidivism, what recidivism data usually measure are rates of re-capture – outcomes that turn as much on luck and policing patterns as they do on deviant behavior."[22] For this reason, policing can be understood as a "data creation practice."[23] And certain communities in certain locations – specifically, low-income, urban communities of color – are policed more heavily than others.[24] The racial biases embedded in the data emerging from these disparate policing practices are then replicated in the data that forms the basis of recidivism predictions.[25]

I urge the Commission to consider the rearrest data in the proposed amendment with these concerns in mind.

I also encourage the Commission to scrutinize the relevance of group recidivism data to sentencing decisions. Using an individual's criminal history records to predict that person's future behavior is an established sentencing practice.[26] A judge may be justified in imposing a longer sentence on people who have a criminal record, it has been argued, on the theory that their past interactions with the criminal system provide a basis for inferring that they require a sentence that serves as a greater deterrent or that they should be incapacitated in order to prevent future criminal behavior.[27] Of course, an individual's criminal history record is shaped by the same structural and historic biases that shape group recidivism data, and I hope the Commission will consider these dynamics as it develops future amendments. I also hope the Commission will revisit the presumption that recidivism predictions based on criminal history records should play a prominent role at sentencing.[28]

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[22] Cecelia M. Klingele, *Measuring Change: From Rates of Recidivism to Markers of Desistance*, 109 J. CRIM. L. & CRIMINOLOGY 769, 785 (2019).

[23] Rashida Richardson, Jason Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. ONLINE 192, 194 (2019).

[24] *See generally* Elizabeth Hinton, LeShae Henderson, & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUSTICE, 7 (May 2018) (discussing studies); Nazgol Ghandnoosh & Celeste Barry, *One in Five: Disparities in Crime and Policing*, THE SENTENCING PROJECT, 8-11 (Nov. 2, 2023)(same); *see also* Cotter, Semisch, & Rutter, *supra* note 3, at 31 (finding that Black and Hispanic people were rearrested at higher rates than their white counterparts and that rearrest rates for white people are lower than any other racial category).

[25] Klingele, *supra* note 22, at 785 n.72.

[26] *See* U.S. SENT'G COMM'N, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, 41 (June 18, 1987) ("[A] criminal history component is especially important because it is predictive of recidivism").

[27] *See id.* ("Enhancing a defendant's sentence on the basis of a criminal history further crime control goals of general and special deterrence, and incapacitation."); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention As Criminal Justice*, 114 HARV. L. REV. 1429, 1431 n.7 (2001) ("The rationale for heavy reliance upon criminal history in sentencing guidelines is its effectiveness in incapacitating dangerous offenders.")

[28] *Cf.* Tracey Kyckelhahn & Trishia Cooper, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders*, U.S. SENT'G COMM'N (2017). Using criminal history as a basis for recidivism predictions has not always been a central feature of sentencing law and policy. Rather, it is a practice that rose to prominence in the 1980s. *See* Paul H. Robinson, *supra* note 27, at 1429 (noting, in 2001, that "the justice system's focus has shifted from punishing past crimes to preventing future violations through the incarceration and control of dangerous offenders" in "the past several decades"); *see also*

For purposes of the Commission's consideration of this proposed amendment, however, I would like to emphasize one difference between criminal history information and group recidivism data. Criminal history information consists of documented convictions and punishments of the particular person being punished. When the Commission originally adopted the Sentencing Guidelines, it reasoned that "[p]rimary reliance on criminal history to predict recidivism limits the tension between a just punishment and a crime-control philosophy."[29] Historic group recidivism data lacks this direct connection to the behavior of the person being sentenced and therefore does not provide the same inferential basis for making predictions about future behavior. For example, the data referenced in this proposed amendment indicates that law enforcement arrests young people more frequently than they do older people. The past behavior of people who were arrested – *even if* criminally culpable – does not dictate that the particular young person who is being sentenced will behave similarly in the future, simply because they all share a single characteristic.[30] And, yet, that is the very inference that is required to render this group data relevant to an individual sentencing decision.

Notably, the Guidelines prohibit judges from considering an individual's arrest record, without more, as a basis for an upward departure.[31] It would be logically inconsistent, therefore, to allow a judge to deny a downward departure because of the possibility one may be arrested in the future – an inference based on how people other than the individual being sentenced may have behaved in the past.

Thus, the authorization in the proposed amendment for judges to consider historic group arrest data as a basis for predicting future behavior of an individual represents a step away from sentencing decisions based on an individual's history and personal characteristics. And the negative burden of this predictive inference would fall disproportionately on people who are not white. Nearly two-thirds (62.3%) of all youthful individuals who were sentenced in fiscal years 2018 through 2022 were described as Hispanic, and nearly a quarter (23.5%) were Black.[32]

Group recidivism data, like that featured in proposed amendment § 5H1.1(2), has become a primary focal point of many criminal system reform efforts.[33] Indeed, under the prevailing evidence-based paradigm for criminal system reform, which looks to quantitative empirical data to guide change, recidivism data is often invoked both to identify areas in need of attention and to assess the efficacy

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Eaglin, *supra* note 4, at 67 ("By the 1980s, states and the federal system began to introduce the "science of probabilities" into sentencing law through a variety of methods" including the consideration of criminal history as a "measure of recidivism risk").

[29] *See* U.S. SENT'G COMM'N, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, 42 (June 18, 1987).

[30] This proposition is true even for recidivism risk predictions generated by more complicated, technical risk assessment instruments. *See* Stephen Hart, *Evidence-Based Assessment of Risk for Sexual Violence,* 1 CHAPMAN J. CRIM. JUST. 143, 164 (2009) ("It is impossible to directly measure (using some technology) or calculate (using some natural law) the specific probability or absolute likelihood that a particular offender will commit…violence, and even impossible to estimate this risk with any reasonable degree of scientific or professional certainty.").

[31] *See* U.S.S.G. § 4A1.3(a)(3) ("A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.").

[32] U.S. SENT'G COMM'N, *Public Data Presentation: Proposed Amendment on Youthful Individuals*, 36 (Jan. 2024).

[33] *See* Hunt & Easley, *supra* note 21, at 6 (discussing the widespread focus on recidivism).

of reform. One of my primary critiques of this approach is that assessing and justifying system reforms primarily in terms of data obscures the role of subjective decision-makers throughout the research process.[34] Data, including recidivism data, does not simply exist in the world; it is defined, gathered, and analyzed by human actors. Researchers, guided by their own worldview and the policies, priorities, and values of the institutions in which they operate, choose what to measure, how to measure it, and how to interpret the resultant data.[35]

The development of the Sentencing Guidelines provide another example that illustrate this point. In setting the original Guidelines' Base Offense Level sentencing ranges, the Commission aimed to approximate "typical past practice" in federal sentencing.[36] It therefore centered its sentencing ranges on a study of "current practices"[37] in federal sentencing, as extrapolated from estimates of time served by approximately 10,000 people convicted in fiscal year 1985.[38] Yet, in compiling this data, researchers omitted cases in which people were sentenced to non-incarcerative sentences.[39] Thus, the data that resulted from this study – the data that played a formative role in setting the original sentencing ranges within the Guidelines – does not depict an objective empirical truth about the sentencing practices that preceded the Guidelines.[40] Instead, it provides a snapshot of some sentencing practices in a single fiscal year, a view that is limited by the decisions of the researchers who collected and analyzed the data.[41] And the researchers' choice to omit non-incarcerative sentences had tangible impacts. As

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[34] *Id.*

[35] *See generally* Eaglin, *supra* note 4 (describing the series of normative choices made by those who design actuarial recidivism risk assessment instruments).

[36] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 7 (1988) ("[I]n creating categories and determining sentence lengths, the Commission, by and large, followed typical past practice, determined by an analysis of 10,000 actual cases.")

[37] U.S. SENT'G COMM'N, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, 22 n62 (June 18, 1987) (defining "current practices").

[38] *Id.* at 21.

[39] *See id.* at 27-34, table 1(a); *Dissenting View of Commissioner Paul H. Robinson on the Promulgation of the Sentencing Guidelines by the United States Sentencing Commission*, 5 n11 (May 1, 1987) ("[T]he time-served data reflects only the sentences for those [people] sent to prison, presumably the worst cases"). *See also* Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 FED. R. DEC. 459, 467–68 (1988) ("In assessing current sentencing practices, however, the Commission used as its baseline only cases in which offenders had been sentenced to imprisonment."); Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 DRAKE L. REV. 575, 578 (2009) ("[I]n determining preguideline sentencing practice, the Commission arbitrarily excluded sentences of probation"). Some scholars have estimated that nearly 50% of the sample cases fell into this category. *See* Mark Osler & Judge Mark W. Bennett, *A 'Holocaust in Slow Motion?' America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. FOR SOC. JUST. 117, 141 (2014).

[40] It is possible that the researchers lowered the average sentence for offense for which non-incarcerative sentences were frequently imposed. *See Dissenting View of Commissioner Paul H. Robinson, supra* note 39, at 5 n11. However, this is not the same as counting those sentences as zero days of incarceration for average sentence calculation purposes.

[41] *Dissenting View of Commissioner Paul H. Robinson*, *supra* note 39, at 5 ("By eliminating all past non-incarcerative sentences from the "averages" calculations, the guidelines seriously distort their claimed replication of past practice."); Adelman & Deitrich, *supra* note 39, at 578 (arguing that the decision to omit probation sentences when determining the Guidelines ranges "significantly skewed the data

Professor Albert Alschuler argued, because of this choice some people were likely to be sentenced more severely under the Guidelines "not because the Commission or anyone else considered the facts of their cases and decided they deserved it, but only because the Commission and its statisticians decided to count one thing and not another in assessing prior practice."[42]

I do not contend that data and empirical methods are irrelevant to the thorny questions that arise as we think about the future of federal sentencing law and policy. Rather, I encourage the Commission to proceed with an awareness of the limits of the data it has and to supplement its existing research with new perspectives and methodologies.

Recidivism is simply one way to define and measure public safety and criminal system impacts, and this metric provides a limited and limiting view of what safety means and how it can be achieved. I do not purport to have a definitive list of alternative metrics or methodologies that should guide future reforms. Rather, I agree with legal scholars who insist that we cannot answer the inevitable question of what should come next without including more perspectives and more methodologies in the decision-making process.[43] I am therefore heartened that the Commission has recently taken the important step of proactively soliciting input from people who have been incarcerated on proposed amendments to the Guidelines.

There are established research methodologies that can provide additional insight into alternative answers to the challenging normative questions that motivate sentencing law and policy. Community-based participatory research, for example, engages people impacted by the research as co-equal partners in the research process. A recent study used this method to explore two questions: how to define safety and how to achieve it.[44] The data gathered through this process revealed answers that depart significantly from the presumptions that motivate many popular reforms. For example, research participants defined safety not in terms of crime rates but rather "as freedom from harm and enjoyment of close, supportive relationships" and "identified poverty and racism as key barriers to creating safety."[45]

We find ourselves at a crucial inflection point: there is widespread agreement that our system of mass incarceration inflects humanitarian and fiscal costs that we cannot afford. Meanwhile, the use of recidivism data to guide reforms aimed at addressing these costs is so pervasive as to seem inevitable.

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relating to past practice because approximately 50% of defendants in the preguideline era received sentences of probation"). Judge Mark Bennett has argued that this history renders the claim that the Guidelines are empirically based a "myth." Mark W. Bennett, *Addicted to Incarceration: A Federal Judge Reveals Shocking Truths About Federal Sentencing and Fleeting Hopes for Reform*, 87 UMKC L. REV. 3, 17-19 (2018).

[42] Alschuler, *supra* note 39, at 467–68. Whereas nearly 50% of all federal sentences before the Guidelines consisted of straight probation, that percentage dropped to about 15% under the initial guidelines. Marc L. Miller, *Domination & Dissatisfaction: Prosecutors As Sentencers*, 56 STAN. L. REV. 1211, 1222 (2004)

[43] *See*, *e.g.*, Ngozi Okidegbe, *To Democratize Algorithms*, 69 U.C.L.A. L. REV. 1688 (2023); Jocelyn Simonson, *Police Reform through a Power Lens*, 130 YALE L. J. 778 (2021).

[44] *See* Lauren Johnson, Cinnamon Pelly, Ebony L. Ruhland, Simone Bess, Jacinda K. Dariotis & Janet Moore, *Reclaiming Safety: Participatory Research, Community Perspectives, and Possibilities for Transformation,* 18 STAN. J. C. R. & C. L. 191 (2022).

[45] *Id.* at 191-192.

The decision to center reforms on recidivism data has been a choice by those empowered to set criminal law and policy. And those same actors – including this Commission – can also choose to include different data and frameworks going forward.

For all of the above reasons, I hope the Commission will reject the proposed amendment that would require sentencing judges to consider historic group rearrest data when deciding whether to grant a downward departure based on youth. Thank you for your consideration.