

March 22, 2010

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

Re: Proposed Amendments to the Sentencing Guidelines

Dear United States Sentencing Commission:

The National Women's Law Center (the Center) submits the following comments on the Commission's proposed amendments to the sentencing guidelines, including expansion of courts' authority to impose alternatives to incarceration and the extent to which specific offender characteristics should be considered in sentencing.

We represent six organizations and individuals working on behalf of women in the criminal justice system and their families and advocating for a less punitive and more rehabilitative approach. For over 35 years, the Center has worked to expand the possibilities for women and girls, focusing particularly on the needs of low-income women and their families. This work includes ensuring that the needs of women are considered when "sex neutral" policies are written because without specific effort to consider policy effects on women, men tend to be the baseline from which "neutral" policy is derived.

Because research on women's pathways into crime indicates that characteristics of a typical female offender differ from those of their male counterparts in ways that materially affect the goals of sentencing, it is important to consider the effects of the guidelines on both men and women in order to craft truly gender-neutral policies. The Center recommends that the Commission consider the effects of proposals to expand the availability of alternatives to incarceration and the use of specific offender characteristics on female populations; accordingly the Center recommends the following:

I. The Commission should expand the authority of the court to impose alternatives to incarceration.

The Commission proposed expanding courts' authority to sentence eligible drug offenders to alternatives to incarceration. The Commission also requested comment on whether other categories of offender should be eligible for treatment programs as an alternative to incarceration. In contrast to past sentencing guidelines, which have distinctly disadvantaged women by dramatically decreasing the percentage of women convicted of federal felonies who were granted probation, the proposed expansion of eligibility for alternatives to incarceration would better address women's pathways into crime.

However, substance abuse is only one of three interrelated features that propel women into crime; women's pathways into crime are commonly characterized by an interrelated combination of trauma, drug dependence, and mental health issues. Because each of these interrelated issues often forms a component of why women commit crimes and because effective treatment programs require concurrent interventions, the Center suggests that the Commission expand eligibility for alternatives to incarceration to those with mental or emotional conditions, including those whose lives are characterized by sexual and physical violence.

a. The Commission should adopt Part A and Part B of its proposed amendment on alternatives to incarceration.

The Commission should adopt its proposed amendments on alternatives to incarceration, which would expand the authority of the court to impose probation with a treatment requirement for drug offenders regardless of the applicable Zone of the Sentencing Table, and which would increase Zones B and C, increasing the number of offenders eligible for intermittent confinement, community confinement, or home detention under § 5B1.1 and § 5C1.1. Largely due to mandatory sentencing for those convicted of drug offenses, the number of women incarcerated in the Federal Bureau of Prisons system increased from 1,400 to over 9,000 between 1980 and 1998.¹ As suggested by nationally recognized criminal justice experts, the criminal justice system should "recognize the low risk to public safety created by the typical offenses committed by female offenders" and "target women's pathways to criminality by providing effective interventions that address the intersecting issues of substance abuse, trauma, mental health, and economic marginality."² Expanding eligibility for alternatives to incarceration is a gender neutral policy that furthers the statutory purposes of sentencing in a way that is responsive to the realities of convicted women.

In determining the specific language of the new § 5C1.3, the Commission should endeavor to create the maximum amount of flexibility for judges to impose probation, including probation with conditions. The Commission should not require that the "controlled substance addiction [have] contributed substantially to the commission of the offense." The Commission should require that the defendant "will likely benefit from such a program," but should not require that the program "will likely address the defendant's need for substance abuse treatment." Finally, the qualifying total offense level should be set at "not greater than 16." Each of these provisions would ensure that a greater number of those who would benefit from drug treatment would be eligible for treatment as an alternative to incarceration and would allow courts to recognize the role of drug addiction in criminal activity and the role of treatment in reducing recidivism.

¹ Mark Sherman, *Women Offenders and Their Children*, Special Needs Offenders Bulletin No. 7 (Fed. Judicial Ctr., D.C.), Sept. 2001, at 6, http://www.fjc.gov/public/home.nsf/autoframe?openform&url_1=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/584.

² Nat'l Inst. of Corr., DOJ, *Gender Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders* vii (2003), available at <http://www.nicic.org/pubs/2003/018017.pdf>.

b. The Commission should expand eligibility for alternatives to incarceration to offenders with mental and emotional conditions.

The Commission should expand eligibility for treatment programs as an alternative to incarceration to defendants with mental and emotional conditions. 28 USC § 994(d)(4) requires the Commission to take into account “mental and emotional condition to the extent that such condition mitigates the defendant’s culpability or to the extent that such condition is otherwise plainly relevant” to the nature, extent, place of service, or other incidence of an appropriate sentence. Mental and emotional condition is highly relevant to placement in a non-incarceration setting because the correctional institution context, characterized by punishment and control, is not as conducive to behavioral change as a treatment based model, particularly where a compromised mental and emotional condition is caused by trauma. Integrated treatment that addresses substance abuse, trauma, and mental health issues is an evidence based approach to fulfilling the sentencing goal of reducing future crime.

The Commission’s inclusion of defendants whose lives have been characterized by intimate violence in the category of those eligible for sentencing to alternatives to incarceration based on mental and emotional condition is crucial to successful treatment outcomes for women. “One of the most important developments in health care over the past several decades is the recognition that a substantial proportion of women have a history of serious traumatic experiences that play a vital and often unrecognized role in the evolution of a woman’s physical and mental health problems.”³ The guidelines should reflect that drug dependence, trauma, and mental and emotional health issues are common interdependent components of women’s pathways to crime, and that prison sentences could exacerbate each of these related problems while non-incarceration sentences have more potential for rehabilitation.

II. The Commission should ensure that offender characteristics relevant to convicted women are available for consideration at sentencing and are interpreted in a way consistent with women’s pathways to crime.

The Center urges the Commission to consider offender characteristics as they would commonly apply to convicted women in making determinations about the relevance of each of these factors to decisions regarding prison and probation. The Sentencing Reform Act requires all Commission guidelines and policy statements to be entirely neutral as to sex. In light of this requirement, the Commission requested comment on how to ensure that none of these characteristics would be used as a proxy for sex, while still ensuring that the characteristic is considered when relevant.

The Center urges the Commission to consider the relevance of each offender characteristic using both men and women as frames of reference. Because our society is not sex neutral, men’s and women’s pathways to criminal activity and the effects of various sentences on future crime commission are likely to be different. If a policy is written without consideration of its effects on women, the policy is not sex neutral because it is derived from a male baseline that

³ Nat’l Inst. of Corr., DOJ, *Gender Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders* 80 (2003), available at <http://www.nicic.org/pubs/2003/018017.pdf>.

excludes relevant female experiences. An approach that uses convicted women as a baseline to determine which personal characteristics are relevant, and then crafts a policy that applies these considerations derived from a female baseline to both men and women who possess that characteristic is truly sex neutral in that it counteracts the tendency to use a male baseline to determine relevancy and then to apply the principles based on men only to women without considering women's different experiences in a highly sex differentiated society. A sex neutral policy may recognize that more women or more men will possess a particular characteristic, so long as male and female offenders who do in fact share identical characteristics would be treated the same under the policy. The following are outlines of how particular characteristics operate in the lives of many women within the criminal justice system so that the Commission may better consider whether each characteristic is generally relevant to sentencing.

a. Physical conditions, including both drug dependence and pregnancy, should be valid sentencing considerations.

In light of the addition of § 5C1.3, the Commission should revise § 5H1.4 to encourage consideration of physical condition, namely drug dependence, in making decisions regarding whether a non-incarceration sentence should be imposed, whether some of the sentence should be served in an alternative setting, and the length and conditions of probation. This change would reflect a consistent position that community-based substance abuse treatment is a way to prevent people from continuing criminal involvement that in many cases will be more effective than incarceration. Women's pathways to criminal activity commonly involve substance abuse; allowing treatment programs to take the place of incarceration sentences, in whole or in part, recognizes the reality that treatment for the issues that lead to the commission of crime is a strong way to prevent future crime in the convicted woman herself, her children, and in her community, which would benefit from healthier, more stable role models.

In addition, we urge the Commission to explicitly recognize pregnancy and attendant conditions, including post-partum and nursing, as physical conditions that weigh in favor of a decision not to incarcerate or to limit the period of incarceration. "About 5 percent of women enter prison while pregnant Most of these pregnancies are considered high risk due to a history of inadequate medical care, abuse, and substance abuse."⁴ Health care for women in federal prisons, including pregnant women, is "unacceptable."⁵ Pregnant and newly parenting women should not be placed in programs that are not equipped to handle pregnancy, childbirth, post-partum recovery, early childhood bonding, and basic parenting skills, and the guidelines should reflect this. However, pregnancy and related conditions should never be used as a factor to impose additional restrictions on pregnant women because this would violate the Commission's statutory duty under 28 U.S.C. § 994(k) to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of ... providing the defendant with needed ... medical care, or other correctional treatment." Allowing pregnancy and related conditions to be a factor in consideration of alternatives to incarceration where incarceration might otherwise be imposed allows courts leeway to determine whether the

⁴ Nat'l Inst. of Corr., DOJ, *Gender Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders* 6 (2003), available at <http://www.nicic.org/pubs/2003/018017.pdf>.

⁵ Nat'l Ass'n of Women Judges, *Priorities for Dealing with Incarcerated Women* (2009) (on file with the National Women's Law Center).

goals of sentencing can be carried out in a way that would not harm the woman's health or that of her fetus or child. In contrast, using pregnancy as a factor to impose additional restrictions would entail punishing the woman not for her crime, but for the physical condition itself.

b. Mental and emotional condition and lack of guidance as a youth should be valid sentencing considerations, and should be interpreted to include physical, sexual, and emotional abuse.

The Commission should amend § 5H1.3 to provide that mental and emotional conditions are relevant to the in/out decision, to the length of sentence, and to conditions of probation. Where a given offender does not constitute a danger to others, such as where the crime of conviction is non-violent, the salient goal of sentencing should be reducing future criminal activity through treatment and provision of services that would stabilize the convicted person's life. When considering relevance based on a typical female pathway to crime, the Commission should note that mental and emotional condition is particularly relevant to the in/out decision because educational, vocational, and treatment programs "are typically less available to female prisoners than to male prisoners."⁶ In addition, the prison environment is not as effective as community based options are in treating the trauma and inter-relational abuse that commonly undergirds women's mental and emotional conditions.

In particular, the guidelines should recognize physical, sexual, or emotional abuse experienced either as a child or as an adult as mental or emotional conditions, though mental and emotional condition should not be limited to these. Additionally, the Commission should revise § 5H1.12 to reflect the relevance of "lack of guidance as a youth" to the in/out decision, length of sentence, and conditions of probation, particularly recognizing the impact of emotional, physical and sexual abuse as a child on future criminal activity. Trauma during both childhood and adulthood is a major component of many women's entry into crime. Intimate trauma is more likely to be effectively resolved and produce reduced recidivism in non-incarceration settings, both because treatment settings are less available to women within the prison setting and because treatment within the prison setting, which is inherently punitive and controlling, works against the treatment modalities employed with trauma survivors, which include increasing self-sufficiency and independence, empowerment, and relationship and community building as part of the treatment program.

Where an offense is violent, there is an argument that the goals of providing just punishment and protecting the public from future crimes of the defendant may preclude alternatives to incarceration. However, where a crime is non-violent, courts should be encouraged to consider community based alternatives to incarceration and probation with treatment because the goals of fostering respect for the law and reducing recidivism are served by treatment, and such considerations are not outweighed by the need to protect the public from the defendant during the course of treatment. The distinction between non-violent and violent offenses in determining whether a non-incarceration sentence is appropriate is supported by the requirement in 28 U.S.C. § 994(j) that the guidelines should reflect the general inappropriateness of a prison sentence for non-violent first time offenders and "the general appropriateness of

⁶ Nat'l Inst. of Corr., DOJ, *Gender Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders* 16 (2003), available at <http://www.nicic.org/pubs/2003/018017.pdf>.

imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.”

III. The Commission should promote both community programs and programs within federal prisons that address women’s pathways into crime.

Among the Commission’s statutory duties is the directive in 28 U.S.C. § 994(g) to “take into account the nature and capacity of the penal, correctional, and other facilities and services available” and to “make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines” Women’s treatment needs should be explicitly considered and the Commission should recommend expansion of programs both within prisons and in the community to address factors that would help to reduce female recidivism. Specifically, the Commission should include in its standards for effective treatment programs a requirement that such programs be “gender-responsive.” Experts note that men and women enter criminal activity for distinct reasons, resulting in different needs within the criminal justice system.

Significant numbers of women offenders have histories that demonstrate severe physical and sexual abuse, substance abuse, and more mental illness than male offenders; these are also factors that should be considered in determining differences in policies and programs for the two genders. Indeed, physiological differences are emerging in addiction and sexual trauma research that also suggest the need for men and women to be given distinct programming. Similarly, women’s pathways to crime and their biological and cultural parenting ties to their children should be considered when attempting to determine how to create programming that will best enable women to succeed when they are released from custody.⁷

In all contexts the Commission should ensure the consideration of the differing treatment needs of women and encourage the proliferation of programs that address these needs.

The guidelines should ensure that among the available alternatives to incarceration are family based treatment programs. Family based treatment, which allows primary-caregiver parents and their children to stay together in a therapeutic environment, has consistently demonstrated positive outcomes including improved family stability, developmental progress of children, improved parental sobriety, and lowered maternal recidivism rates.⁸ In contrast, separation of a child from his or her primary-caregiver parent often triggers attachment disorders and a child’s increased vulnerability to being sexually abused, to substance abuse, and to involvement in the criminal justice system.⁹ Family based treatment offers a way to address the

⁷ Myrna Raeder, *Legal Considerations With Regard to Women Offenders*, in *Gender Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders* 107, 113 (Nat’l Inst. of Corr., DOJ ed., 2003), available at <http://www.nicic.org/pubs/2003/018017.pdf>.

⁸ Anthony C. Thompson, *Releasing Prisoners, Redeeming Communities: Reentry, Race, and Politics* 64-65 (NYU Press 2008).

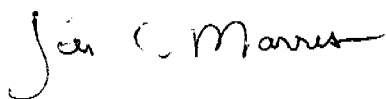
⁹ Joycelyn M. Pollock, *A National Survey of Parenting Programs in Women’s Prisons in the U.S.*, in *Women and Girls in the Criminal Justice System: Policy Issues and Practice Strategies* 19-1, 19-4 (Russ Immargieon ed., Civic Research Institute 2006).

trauma, substance abuse, and mental and emotional health issues that often lead women to criminal acts while also breaking the cycle of criminal justice system involvement for the children of convicted primary-caregivers. Because it is relevant to reducing recidivism of the defendant and to reducing crime generally, placement in family based treatment should be encouraged under the new drug offender guidelines (§ 5C1.3), as well as the existing probation guidelines (§ 5B1.1) and the substitute punishment guidelines (§ 5C1.1(e)).

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Thank you for the opportunity to comment on the proposed amendments to the Sentencing Guidelines. We would be happy to discuss our comments further or answer any questions you may have. For additional information, please contact Jill Morrison, Senior Counsel for Health and Reproductive Rights, at 202-588-5180.

Sincerely,



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