



March 18, 2015

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002
Public.Comment@ussc.gov

Submitted via e-mail

RE: Request for Public Comment on Proposed 2015 Amendments to Sentencing Guidelines

Dear Chief Judge Saris:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States, we are pleased to submit the following comments and suggestions regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on January 16, 2015.¹ The Leadership Conference provides a powerful unified voice for the various constituencies of the coalition: persons of color, women, children, individuals with disabilities, gays and lesbians, older Americans, labor unions, major religious groups, civil libertarians, and human rights organizations. We are deeply invested in promoting fair and lawful policies that further the goal of equality under law. The Sentencing Commission's hearing and public notice on Proposed 2015 Amendments to Sentencing Guidelines is an important step toward meeting this goal.

We appreciate this opportunity to submit comments and recommendations relating to the importance of amending the guidelines to improve the justice system in ways that reduce the costs of federal incarceration and overcapacity of prisons. Moving forward, we urge the Sentencing Commission to support and advance a policy agenda that meaningfully addresses the primary drivers of dangerous overcrowding, unsustainable costs, and unwarranted racial disparities in the federal prison system. In brief, in order to promote lawful, fair, and effective policies, we urge the Sentencing Commission to consider the following recommendations:

- I. Proposed Amendment II: Single Sentence Rule.
 - Follow the Eighth Circuit's approach in *King v. United States* for amending the single sentence rule;
 - Amend the commentary to provide that when two or more prior sentences are counted as a single sentence, then all the criminal history points attributable to the single sentence are assigned to only one of the prior sentences and specifically, the one that was the longest;
 - When determining which of a group of multiple convictions should count as a single sentence, the Commission should count only the conviction that receives the longest period of imprisonment to ensure that prior offenses are not unnecessarily stacked on offenders or result in an exorbitantly high criminal history score.

- II. Proposed Amendment V: Mitigating Role.

- Strengthen language in the proposed amendment to replace “may receive” with “should receive;”
- Include language to clearly delineate which defendants should receive a mitigating role adjustment by explaining more fully which functional roles are considered “mitigating;”
- Expand the “Fact-Based Determination” section to highlight additional factors warranting application of a mitigating role adjustment.

III. Proposed Amendment VII: Hydrocodone.

- Although the drug Hydrocodone was recently rescheduled from schedule III to schedule II, the Commission should refrain from automatically amending the guidelines to reflect the longer statutory maximum sentence associated with schedule II drugs;
- Ameliorate inconsistencies when weighing substances by including language that considers factors other than actual weight of the drug, including size, formulation, and potency;
- Remove the emphasis on blanket statutory maximums and promulgate guidelines that focus on every drug factor, as well as the functional role of the defendant in the offense.

I. Proposed Amendment II: Single Sentence Rule.

When a defendant has multiple prior sentences, the single sentence rule provides that two or more of those sentences that meet certain statutory criteria are counted as one sentence rather than individually.ⁱⁱ Unless separated by an intervening arrest, sentences are counted as a single sentence if: 1) the sentences resulted from offenses contained in the same charging instrument; or 2) the sentences were imposed on the same day.ⁱⁱⁱ The purpose of this guideline is to reduce the cumulative impact of prior sentences on criminal history scores.

At this time, the Commission seeks to respond to the conflict between the Sixth and Eighth Circuits in interpreting the single sentence rule, and proposes amending the rule using the Sixth Circuit approach to provide an exception for counting prior convictions that do not receive criminal history points, so they will be counted as prior felony convictions for purposes of certain guideline enhancements.^{iv} This approach is potentially detrimental to offenders, as it may result in enhanced penalties for certain felony convictions that would otherwise be counted as a single sentence under the original rule. Although it is significant that the Commission is shedding light on the circuit split and seeking comment on the issue, the proposal is inconsistent with guideline objectives that seek to reduce prison sentences and the negative systemic effects of mass incarceration.

Instead, it is imperative that sentences are calculated based on the nature of the offense and relevant circumstances of the defendant. We recommend the Commission follow the Eighth Circuit’s approach in *King v. United States*, and amend the commentary to provide that when two or more prior sentences are counted as a single sentence, then all the criminal history points attributable to the single sentence are assigned to only one of the prior sentences, and specifically, the one that was the longest.^v In short, when resolving the ambiguity in determining which of a group of multiple convictions should count as a single sentence, the Commission should count only the conviction that receives the longest period of imprisonment. This will ensure that the cumulative impact of prior offenses does not result in an exorbitantly high criminal history score.

Second, in addition to following the Eighth Circuit approach, the Commission should adopt straightforward, uniform language for applying the single sentence rule, which will help achieve the

Commission's objective to simplify the guidelines. The Commission requested comment on whether there are certain situations in which the application of the *King* rule will be presented by other provisions when calculating the criminal history score, highlighting the longstanding and complicated history courts have endured in applying the rule.^{vi} The Commission should amend the guideline to be consistent with the Eighth Circuit in *King*, as well as the upward/downward departure provision noted in the commentary.^{vii} Again, it is imperative that relevant characteristics of the defendant and circumstances of the crime are recognized when applying additional points to an offender's criminal history score. In doing so, the Commission should recognize mitigating and/or aggravating circumstances of the crime and advocate for a simpler, common sense policy that results in a criminal history score that is appropriate to the crime and subsequent punishment.

In addition, it is noteworthy that the *King* approach limits application of minor offenses to enhance penalties and avoids classifying an exorbitant number of individuals as career offenders. Because violent offenders are rarely given a lesser sentence as they are also sentenced with a lesser crime, the single sentence rule will continue to count violent crimes as a prior felony conviction. We believe that concerns that application of the proposed amendment to the rule will mask the seriousness of a crime are unfounded.

Moreover, the *King* approach will allow more discretion for sentencing judges to assess the entirety of an individual's criminal history and allocate an appropriate sentence accordingly. Indeed, the Sixth Circuit's approach in *United States v. Williams* lacks this important aspect by motivating courts to treat each of the multiple prior sentences as if it had received criminal history points for the purposes of determining predicate offenses, regardless of whether this actually occurred.^{viii} Additionally, limiting the stigma associated with categorizing more inmates as "career offenders" is valuable when these defendants re-enter society after being released from prison. Indeed, individuals who are released from incarceration without the status of "career offender" will be more likely to access employment and other resources, and become beneficial participants in society.

Moving forward, these recommendations will help minimize the current system's excessive reliance on imprisonment and mass incarceration. Doing so will also reduce imprisonment costs and the prison population, increase safety for prison employees and promote public safety, and place greater emphasis on rehabilitation as opposed to incarceration as a form of punishment. Indeed, these recommendations and policy changes are more aligned with the objective that an offender's sentence accurately reflect the seriousness of an offense and ensure public safety by preventing further crimes.

II. Proposed Amendment V: Mitigating Role.

Similar to the single sentence rule, the Sentencing Commission has proposed an amendment to the "mitigating role" guideline.^{ix} The purpose of the mitigating role adjustment is to ensure that a sentence appropriately reflects a defendant's culpability and severity of the individual offense.^x Specifically, if a defendant is a minor or minimal participant in the criminal activity, the guidelines allow a multiple point-decrease in the defendant's base offense level, and consequently results in a lesser sentence. As described by the Commission, a minimal participant is a defendant who is "plainly among the least culpable," whereas a minor participant is merely "less culpable" than other participants but whose role could not be described as minimal.^{xi} Whether a defendant is entitled to a mitigating-role adjustment is "heavily dependent upon the facts of a particular case."^{xii} As such, amending the mitigating role amendment would make minor changes to the guideline that calls for a reduction in sentencing if the defendant was a minor

or minimal participant in the crime. While this is a step in the right direction, much of the proposed language must be improved in order to be effective.

First, it is significant that the proposed amendment will more generously apply the mitigating role adjustment. Specifically, the proposed language is an improvement because it simplifies prior language and explicitly indicates the availability of a mitigating adjustment through the inclusion of the phrase “may receive” rather than the current language “not precluded from consideration.”^{xiii} Although this is an important change to emphasize the availability of applying a mitigating role adjustment to certain sentences, we recommend the Commission strengthen the language even more to replace “may receive” with “should receive.” This will ensure that reviewing judges are aware that the mitigating role adjustment must be considered in a variety of cases.

Moreover, we suggest that the Commission also include language to clearly delineate who should receive a mitigating role adjustment by explaining more fully which functional roles should be considered “mitigating.” Specifically, the Commission should consider adding language to indicate that a defendant who performs a peripheral or non-leadership role, such as merely packaging controlled substances, is eligible for a mitigating role adjustment, as opposed to a defendant who performed an essential, indispensable part in the activity. As noted, the purpose of the adjustment is to look at a particular case to see if mitigating circumstances, characteristics of the defendant, or specific details of the crime warrant adjusting a sentence. Because this involves a determination “that is heavily dependent upon the facts of the particular case,” the guidelines’ language is crucial to preserving application of the adjustment for all situations that warrant its application. Indeed, Sentencing Commission FY 2012-2013 data show that 5.6 percent of all individuals sentenced under the guidelines received a 2-level reduction, 1.4 percent received a 4-level reduction, and .5 percent received a 3-level reduction.^{xiv} With greater clarity and more factors upon which the court can rely for guidance, allowing more individuals to receive these higher level reduction is a significant policy improvement.

We also recommend the Commission expand the “Fact-Based Determination” section. Specifically, although the current language appropriately states that the list of factors is “non-exhaustive,” the list should be expanded to include factors that distinguish a “minimal” role from a “minor” role. The Commission should consider adding the following criteria: the degree to which the defendant had a role in expanding the criminal activity; the degree to which the defendant’s participation affected the inevitable outcome of the criminal activity; and consideration of any monetary gain or personal benefit the defendant received from direct participation in the criminal activity as compared with mitigating factors such as the defendant’s minor or minimal role in the overall criminal enterprise. These additions will give courts additional guidance for when to appropriately apply the mitigating-role adjustment.

Although amending the mitigating-role adjustment to reduce sentences based on individual participation in a crime is a step in the right direction to lowering the prison population and associated costs related to overcriminalization, there are more language changes that must be made to curb these systemic issues. As noted above, these include greater application of the mitigating role adjustment, as well as reforming penalties associated with drug offenses, which often are one of the major drivers to mass incarceration and disproportionate allocation of justice system resources.

III. Proposed Amendment VII: Hydrocodone.

Current available research confirms that the U.S. Department of Justice (“DOJ” or “Department”) continues to face unsustainable growth in the federal prison population and costs that consume an ever greater share of the Department’s budget. The federal prison population has increased from approximately 25,000 in FY1980 to nearly 210,000 today.^{xv} The Bureau of Prisons’ (BOP) budget has also doubled over the past decade, reaching its current level of \$7.2 billion in the President’s FY16 budget request, approximately 25 percent of the Department of Justice’s overall budget. In 2014, the BOP’s budget grew at almost twice the rate of the rest of the Department of Justice.^{xvi} Despite this growing budget, current BOP Director Charles Samuels has acknowledged that, under current conditions, the system is over-capacity and jeopardizing the safety of staff and prisoners.^{xvii}

Several recent studies have concluded that mandatory minimum sentences, particularly for drug offenses, are the leading contributor to our burgeoning federal prison population. Both the human and economic costs of mandatory minimum sentencing are great. In its 2011 report to Congress, the Commission found that mandatory minimum sentences disproportionately impact communities of color^{xviii} and that African Americans received relief from mandatory minimum sentences *least* often, compared with Whites and Hispanics.^{xix}

Sentencing guidelines involving drug-related crimes, including hydrocodone, are of particular importance and must be addressed in order to curb overcriminalization and harsh sentencing policies. Recently, the drug hydrocodone was “rescheduled” from schedule III to schedule II by the Drug Enforcement Agency. In response, the Commission proposes to amend the drug guideline to reflect the reality of the longer sentences that schedule II drugs carry.^{xx}

Rather than resorting to an automatic increase in maximum penalties, we recommend the Commission amend the sentencing guidelines to account for the proportionality of hydrocodone that leads to the least excessive punishment. Indeed, the rescheduling of a drug should not independently warrant an automatic increase or decrease in sentence length. As applied here, the Food and Drug Administration’s recent rescheduling of hydrocodone seeks to raise the statutory maximum penalty (absent aggravating factors such as bodily injury or death) from ten years to twenty years.^{xxi} Although rescheduling technically calls for an increase in statutory maximum penalty, the Commission should consider other factors related to the offense before resorting to automatic changes in the guidelines for penalties associated with hydrocodone offenses.

Specifically, when amending penalties, the Commission should consider implementing an upward/downward reduction if the offense involved a drug that resulted in less potential for abuse versus heightened addictive properties. It is important for the Commission to consider the totality of the circumstances of the controlled substance in order to curb excessive reliance on blanket factors, such as actual weight, without consideration of other responsible factors such as addictive properties and potency.

Moreover, the Commission should enhance the proposed amendments to avoid unwarranted disparities in sentences and fix inconsistencies in weighing the substance. Simply counting the actual weight of the controlled substance fails to consider other significant and relevant factors of the substance and offense. For example, combination drugs with similar actual weight often do not produce the same addictive effect as a single substance might in every individual. In response, the Commission should reassess the treatment of prescription drugs and opioids generally, and create a uniform method for determining drug equivalencies that includes not only an emphasis on actual weight but also such factors as potency, purity,

addictive properties, and abuse liabilities. Creating a standardized system will ease disparities in sentencing and will detract from excessive reliance on imposing harsh sentences that are draining our justice system's resources.

Finally, when considering hydrocodone offenses and hydrocodone offenders as compared to other drug offenses and offenders, we recommend the Commission consider the totality of the circumstances of the crime outside of the relevant characteristics of the drug involved. Specifically, the Commission should include language in the proposed amendment that allows a judge to consider the functional role of the defendant in handling the drugs, as opposed to merely the quantity of the drugs distributed. Reliance on longer incarceration rates has done nothing to curb the rate of drug-related crimes, and thus is not an effective deterrent to curbing abuse and trafficking of prescription drugs.^{xxii} Instead, the Commission should remove the current emphasis on blanket statutory maximum sentences, and promote judicial discretion in rendering sentences that are proportional to the circumstances of the crime. Ultimately, these amendments and recommendations will work together to improve allocation of resources, implement fairer sentencing policies, reduce prison overcrowding, and promote public safety.

IV. Conclusion.

We remain committed to working with the Commission to create more comprehensive and effective sentencing guidelines that operate to curb harsh sentencing policies, ensure public safety, reduce prison costs, and promote rehabilitation.

We believe that the important protections described above represent a step toward establishing fair and effective law enforcement policies and oversight mechanisms, which are vital to ensuring the effective administration of our country's justice system. We stand ready to work with you to ensure that the voices of the civil and human rights community are heard in this important, ongoing national conversation. If you have any questions about these comments, please contact Sakira Cook, Counsel, at cook@civilrights.org or 202-466-3311.

Sincerely,



Wade Henderson
President & CEO



Nancy Zirkin
Executive Vice President

ⁱ U.S. Sentencing Comm'n, *Proposed Amendments to the Sentencing Guidelines*, 80 Fed. Reg. 2570 (Jan. 16, 2015).

ⁱⁱ *Id.*

ⁱⁱⁱ *Id.*

^{iv} *Id.*

^v *King v. United States*, 595 F.3d 844, 852 (8th Cir. 2010).

^{vi} Sentencing Comm'n, *supra* note 1.

^{vii} *Id.*

^{viii} *Id.*

^{ix} *Id.*

^x U.S. Sentencing Comm'n, *Aggravating and Mitigating Role Adjustments Primer*, available at http://www.ussc.gov/sites/default/files/pdf/training/primers/2014_Primer_Role.pdf.

^{xi} *Id.*

^{xii} *Id.*

^{xiii} *Id.*

^{xiv} U.S. Sentencing Comm'n, *FY 2012-2013 Monitoring Dataset*, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/2013_Annual_Report_Year_in_Review.pdf.

^{xv} Fed. Bureau of Prisons, *Statistics: Total Federal Inmates*, (2015), available at http://www.bop.gov/about/statistics/population_statistics.jsp.

^{xvi} Michael E. Horowitz (Inspector General, Federal Bureau of Prisons), TOP MANAGEMENT AND PERFORMANCE CHALLENGES FACING THE DEPARTMENT OF JUSTICE 2014. (2014).

^{xvii} Charles E. Samuels, Jr. (Director, Federal Bureau of Prisons). TESTIMONY ON OVERSIGHT OF THE FEDERAL PRISON SYSTEM BEFORE THE JUDICIARY COMMITTEE OF THE U.S. HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON CRIME. (2013).

^{xviii} USSC. Report to Congress, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, (2011) , available at

http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Executive_Summary.pdf.

^{xix} *Id.*

^{xx} Sentencing Comm'n, *supra* note 1.

^{xxi} 21 U.S.C. § 841(b) (2014).

^{xxii} Sentencing Comm'n, *supra* note 1.