The Honorable William Pryor, Acting Chair
United States Sentencing Commission
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Washington, DC 20002-8002
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Submitted via e-mail

RE: Request for Public Comment on Proposed 2017 Amendments to Sentencing Guidelines

Dear Judge Pryor:

On behalf of The Leadership Conference on Civil and Human Rights (Leadership Conference) and the American Civil Liberties Union (ACLU), 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 December 19, 2016.[1]

The Leadership Conference provides a powerful unified voice for the various constituencies of the coalition: persons of color, women, children, individuals with disabilities, LGBTQ individuals, older Americans, labor unions, major religious groups, civil libertarians, and human rights organizations. For almost 100 years, the ACLU has worked to defend and preserve the individual rights and liberties guaranteed by the Constitution and laws of the United States. We are deeply invested in promoting fair and lawful policies that further the goal of equality under law. The Sentencing Commission's proposed 2017 Amendments are an important step toward meeting this goal, and we urge the Sentencing Commission (the Commission) to consider the following recommendations:

Proposed Amendment 1
Part A: First Offenders

- Establish a new guideline at §4C1.1 for first offenders, but broaden the definition of "first offenders" to include any offender in Category I (one or fewer criminal history points).
- Adopt Option 2 in the proposed §4C1.1. Under this option, first offenders with an offense level under 16 (as determined under Chapters two and three) would receive a two-level reduction, and all other first offenders would receive a one-level reduction.
- Create a presumption in §5C1.1 that non-violent first offenders who have a guidelines range in Zones A or B should ordinarily receive a sentence other than imprisonment.

[1] Sentencing Guidelines for United States Courts, 81 Fed. Reg. 92003 (proposed Dec. 19, 2016).

- Adopt by cross-reference the existing definition of "crime of violence" at §4B1.2 for the purposes of this presumption (Option 1).

Part B: Zones B and C Consolidation

- Consolidate Zones B and C to allow greater sentencing flexibility for offenders whose guidelines ranges are currently in Zone C.
- Do not exempt white-collar or public corruption offenders from Zone B and C consolidation.
- Refrain from providing additional guidelines for former Zone C offenders.
- Eliminate the presumption in the Application Notes to §5F1.2 that electronic monitoring should ordinarily be used when a home detention sentence is imposed.

Apply Amendment 1 retroactively.

Proposed Amendment 3: Youthful Offenders

- Amend §4A1.2(d) to prohibit sentences committed prior to the age of 18 from being counted in the criminal history score regardless of severity of the crime or whether the sentence was classified as "adult" or "juvenile."
- Modify the Application Notes to §4A1.3 to eliminate the consideration of state law when determining whether a downward departure should be granted.
- If the Commission continues to allow consideration of offenses committed before an offender turns 18, establish a downward departure for any such convictions that overstate the seriousness of an offender's criminal history.
- Refrain from establishing an upward departure for youth sentences in any circumstance.

Apply Amendment 3 retroactively.

Proposed Amendment 4: Criminal History Issues

Part A:

- Eliminate the use of revocation sentences in determining the length of a term of imprisonment under §4A1.2.
- Make a conforming amendment to the definition of "sentence imposed" in §2L1.2.

Part B:

- Establish that a downward departure is warranted when a defendant's period of imprisonment is significantly less than the length of the sentence imposed.
- Refrain from creating an exception to this downward departure in cases where a defendant's period of imprisonment is reduced for reasons other than the defendant's good behavior.

Apply Amendment 4 retroactively.

Proposed Amendment 6: Acceptance of Responsibility

- Remove all references to relevant conduct in the standards for acceptance of responsibility in the Application Notes to §3E1.1.

Our detailed comments on these matters are set forth below. We take no position on the other amendments that the Commission has proposed (Amendments 2, 5, 7, 8, and 9).[2]

Proposed Amendment 1: First Offenders and Zone Consolidation

We support both parts of Amendment 1, which the Commission has divided into two parts: Part A would create a new guideline, §4C1.1, which would provide "first offenders" with a small reduction in offense level. Part A would also modify §5C1.1 by establishing a presumption that non-violent first offenders in Zones A and B of the Sentencing Table receive sentences other than imprisonment. Part B provides more flexibility by consolidating Zones B and C in the Sentencing Table and by eliminating a presumption that individuals sentenced to home detention be subject to electronic monitoring. Together, the amendments provide significantly more judicial discretion in sentencing decisions for offenders who the Commission's own studies show are least likely to commit another offense.

Part A: First Offenders

We support the Commission's efforts to advance its goals of reducing costs, reducing overcrowding, and promoting the effectiveness of reentry programs by proposing amendments that account for the substantially lower threat of recidivism that first offenders pose.[3] Expanding the availability of alternatives to incarceration for low-level, non-violent first offenders appropriately balances the Commission's responsibility to guide courts to sentences that are "sufficient, but not greater than necessary" and that "afford adequate deterrence to criminal conduct."[4]

The Commission has proposed that the definition of first offenders include all individuals who either have no prior offenses or no criminal history points assessed for their convictions. [5] We support this change, but contend that this definition is under-inclusive of the people least likely to offend again. We recognize that offenders with zero criminal history points have the lowest recidivism rates, but individuals with one criminal history point are similarly low.[6] The Commission's study, *Recidivism Among Offenders: A Comprehensive Overview* (Recidivism Study), showed people with zero or one criminal history points were far less likely to offend again; 33.8% of people with zero or one criminal history points were rearrested within eight years of release – compared to 56% of people with two criminal history points.[7] And these are *rearrests*, which reflect the possibility that an individual has reoffended, not a determination of guilt—a far more relevant measure of recidivism. The reconviction rate for offenders with one or fewer criminal history points is even lower; only 19.9% of those offenders are reconvicted in eight years. By contrast, offenders with two or three criminal history points are reconvicted at a

[2] *Id.*
[3] Final Priorities for Amendment Cycle, 81 Fed. Reg. 58004 (5)(B) (Aug. 24, 2016).
[4] *See* 28 U.S.C § 991 (2008) (referencing the purposes of sentencing established in 18 U.S.C. § 3553(a)).
[5] Sentencing Guidelines for United States Courts, 81 Fed. Reg. 92003 at 92015 (proposed Dec. 19, 2016).
[6] KIM STEVEN HUNT, U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW, 19 (2016) [hereinafter *Recidivism Study*].
[7] *Id.* The study also reveals a clear distinction between offenders with one criminal history point, 46.9 percent of whom are rearrested within eight years of release, as compared with 56.0 percent of those with two criminal history points.

rate of 33.0%.[8] The drastically lower recidivism and conviction rates of offenders with one or fewer criminal history points shows that they are deserving of the "first offender" relief that the Commission is proposing.

Furthermore, the Commission already groups offenders with one and zero criminal history points together in "Category I" in the Sentencing Table for a reason: Chapter 4 makes clear that the differences between those with one or zero criminal history points is minimal. Under §4A1.1, an offender will receive more than one criminal history point if he has failed to satisfy past commitments to the state, has been convicted of a violent crime, has more than one unexcluded conviction within the past ten years, or has a prior conviction that resulted in a 60 day (or more) term of imprisonment.[9] Nor should the label "first offender" stand in the way of making these offenders eligible for relief under proposed §4C1.1, because the same could be said of an offender who has zero criminal history points because of convictions that do not yield points under Chapter 4. For these reasons, making offenders with one criminal history point eligible for the same "first offender" relief as those with zero criminal history points is consistent with the Commission's practice of treating these two cohorts as part of one criminal history category.

The Commission also requests comment on two options it proposes for the size of the downward adjustment for first offenders.[10] The Leadership Conference supports Option 2, which provides, "a decrease of [2] levels if the final offense level determined under Chapters Two and Three is less than level [16], or a decrease of [1] level if the offense level determined under Chapters Two and Three is level [16] or greater."[11]

A two-level reduction in offense level is better than a one-level reduction because it better serves the Commission's stated goals of reducing costs and overcrowding and will not risk a decrease in the deterring effect of the law.[12] Option 2 is supported by the Recidivism Study, which conclusively determined that the length of a sentence has no effect on the likelihood of recidivism.[13] Providing sentencing length flexibility will reduce the overcrowded federal prison population. The U.S. imprisons more people than any other industrialized nation in the world,[14] and federal prisons are currently operating at 16% over-capacity.[15]

We also support the Commission's proposal to establish a presumption in §5C1.1 that first offenders who are low-level (*i.e.*, those in Zones A or B) and who have not committed a crime of violence receive a sentence other than imprisonment.[16] This presumption would substantially advance the Commission's goals to "provide the defendant…correctional treatment in the most

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[8] *Id. at* A-2 (2016). Note that there is also a substantial difference between the reconviction rates of offenders with one criminal history point (28.8%) and those with two criminal history points (34.5%). *Id.*
[9] *See* U.S. SENTENCING GUIDELINES MANUAL §4A1.1 (U.S. SENTENCING COMM'N 2016).
[10] Sentencing Guidelines for United States Courts, 81 Fed. Reg. at 92012.
[11] *Id.*
[12] Final Priorities for Amendment Cycle, 81 Fed. Reg. 58004 (5)(B) (Aug. 24, 2016).
[13] *Recidivism Study*, *supra* note 5, at 22.
[14] *The World Prison Brief*. Accessed Feb. 21, 2017. http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All.
[15] "Federal Inmate Population Declines." *Federal Bureau of Prisons*. Sept. 30, 2016. https://www.bop.gov/resources/news/20161004_pop_decline.jsp.
[16] Sentencing Guidelines for United States Courts, 81 Fed. Reg. at 92012.

effective manner"[17] and to reduce costs, reduce overcrowding, and promote effectiveness of reentry programs. [18] As the Commission determined in the Recidivism Study, Category I offenders are only rearrested at a rate of 33.8% in the eight years after their release (although this statistic covers individuals that are in Zone D not just current Zones A, B and C (or Zones A and B, post consolidation)).[19] Keeping these first offenders out of prison will allow them to keep their employment and maintain their relationships with their family and community, both of which have been shown to decrease the likelihood of recidivism.[20]

The Commission requested comment on how to define "crime of violence" for the purpose of determining whether a first offender is eligible for this presumption. We recommend that the Commission adopt proposed Option 1, which would employ by cross-reference the definition in §4B1.2: any offense "punishable by imprisonment for a term exceeding one year" that either "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is a murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive materials defined in 18 U.S.C. § 841(c)."[21] The Commission's alternative definition would exclude offenders who "did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense."[22]

Defining "crime of violence" by cross reference to §4B1.2 is preferable to the alternative, because it is easier to apply and would ensure that the term "crime of violence" has consistent application throughout this section of the Guidelines.[23] Having two separate definitions of crime of violence could lead to confusion among defendants who are trying to understand the basis for criminal history calculations and eligibility for the proposed first offender adjustment. Furthermore, the alternative definition's references to "credible threats of violence" and possession of a "dangerous weapon" are subjective and vague and could result in the disqualification of more offenders than the Commission intends.[24] Therefore, we support the definition of crime of violence as described in Option 1 of the proposed amendment.

Part B: Zones B and C Consolidation

We also support Part B of proposed Amendment 1, which would consolidate Zones B and C of the Sentencing Table to create a new, expanded Zone B and would change the Commentary to §5F1.2 of the Guidelines to eliminate the presumption that electronic monitoring is appropriate

[17] *See* 18 U.S.C. 3553(a)(2)(D).
[18] Final Priorities for Amendment Cycle, 81 Fed. Reg. 58004 (5)(B) (Aug. 24, 2016).
[19] *Recidivism Study*, *supra* note 5, at 19.
[20] M. T. Berg & B. M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUSTICE QUARTERLY 383 (2011).
[21] U.S. SENTENCING GUIDELINES MANUAL §4B1.2 (U.S. SENTENCING COMM'N 2016).
[22] Sentencing Guidelines for United States Courts, 81 Fed. Reg at 92019.
[23] *Compare*, U.S. SENTENCING GUIDELINES MANUAL §4B1.2 (U.S. SENTENCING COMM'N 2016), *with*, Sentencing Guidelines for United States Courts, 81 Fed. Reg. at 92019.
[24] *See*, *United States v. Johnson*, 324 F.2d 264, 266 (4th Cir. 1963) (stating many objects that have been considered dangerous, including shoes, a rake, a plastic chair, and more).

for all home detention sentences.[25] Consolidating the two zones would create more flexibility in judicial discretion by increasing the number of offenders eligible for non-incarceration sentences. This flexibility would help reduce the federal prison population, curtail sentencing disparities, and rehabilitate lower-level offenders. Additionally, expanding judicial discretion in electronic monitoring would empower judges to fashion sentences that are more practical and feasible to administer.[26]

We believe that the consolidation of Zones B and C is appropriate because it would achieve several objectives. First, sentencing flexibility would reduce the overcrowded federal prison population.[27] Second, providing Zone C offenders with alternative sentencing options would help reduce racial and economic disparities in sentencing. Currently, a disproportionate number of inmates are African American, Hispanic, low-income, and non-violent.[28] Finally, Zone C offenders would have rehabilitative opportunities, which could reduce the likelihood of recidivism.

Providing alternatives to imprisonment enables offenders to remain productive in society while serving out their sentences. For example, probation and supervised release may enable a defendant to continue working and to receive better medical or psychiatric monitoring, if needed.[29] In the Recidivism Study, the Commission notes that longer prison sentences neither reduce crime nor increase public safety.[30] Creating flexibility within the new Zone B would ensure that prison capacity is reduced, that sentencing disparities are curtailed, and that offenders are rehabilitated to become productive members of society.

The Commission requested comment on whether it should exempt from consolidation current Zone C offenders convicted of white-collar and other public corruption offenses. We oppose the creation of such an exemption. The Commission notes that the exemption could reflect "a view that it would not be appropriate to increase the number of public corruption, tax, and other white-collar offenders who are eligible to receive a non-incarceration sentence."[31] However, racial and ethnic disparities exist even within white-collar sentencing. One study found that African American and Hispanic white-collar defendants receive longer prison sentences than whites because white offenders are more often able to pay the fine to reduce their time in prison,

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[25] Additionally, Zone B would encompass all guideline ranges that have a minimum of at least one month imprisonment but not more than twelve months. Zone C would disappear, and Zone D would remain labeled as such. Sentencing Guidelines for United States Courts, 81 Fed. Reg. at 92006.

[26] *See* Emma Anderson, *The Evolution of Electronic Monitoring Devices*, NPR (May 24, 2014) available at http://www.npr.org/2014/05/22/314874232/the-history-of-electronic-monitoring-devices (stating that some EM technology can send false alerts).

[27] As mentioned under Part A, the U.S. imprisons more people than any industrialized nation, and federal prisons are currently operating at 23% over capacity.

[28] *Civil and Human Rights Coalition Commends Bipartisan Action on Sentencing Reform*, THE LEADERSHIP CONFERENCE (Jan. 30, 2014), http://www.civilrights.org/press/2014/smarter-sentencing-act-committee.html.

[29] United States Courts, *Chapter 3: Intermittent Confinement (Probation and Supervised Release Conditions)*, http://www.uscourts.gov/services-forms/intermitten-confinement-probation-supervised-release-conditions (also noting that offenders are able to continue serving as provider and caretaker for family members).

[30] *Recidivism Study*, *supra* note 5.

[31] Sentencing Guidelines for United States Courts, 81 Fed. Reg. at 92006.

whereas Hispanic and African American defendants are usually incapable of doing so.[32] Moreover, individuals who did not graduate high school or who are not U.S. citizens receive longer prison sentences,[33] an outcome that reinforces the racial disparity. Overall, the study found that black and Hispanic defendants, on average, receive 10% longer sentences than white defendants.[34] Through consolidation, racial and ethnic minorities who commit white-collar and public corruption crimes would have sentencing alternatives otherwise not available to them in Zone C.

We also oppose any additional guidance to courts about new Zone B offenders (*i.e.*, those who are currently in Zone C) for a simple reason: establishing such guidance would run counter to the Commission's proposal to consolidate Zones B and C. Accordingly, the same reasons that counsel in favor of zone consolidation counsel against the creation of such guidance.

The Commission Should Give Amendment 1 Retroactive Effect

The Commission requested comment on retroactivity, and we believe that Amendment 1 is a strong candidate for such treatment. The Policy Statement on retroactivity in §1B1.10 explains that the Commission assesses three criteria in determining whether an amendment should be retroactive: (1) the purpose of the amendment, (2) the magnitude of the amendment's impact on the guidelines range (the Commission does not apply retroactivity when the maximum guidelines range reduction is less than six months), and (3) the ease of application.[35] We believe that retroactive application of Amendment 1 satisfies these criteria, particularly when the changes proposed in Parts A and B are considered in aggregate.

Retroactive application would advance the purposes of the amendment—to alleviate prison over-capacity and recidivism by reducing sentences for first offenders and Zone C offenders. Low-level offenders should benefit from the change even if they were sentenced in the year or two prior to adoption of this amendment. Their recidivism risks are just as low as similar offenders who would be sentenced one year after this amendment takes effect.

Taken together, the magnitude of the changes in Parts A and B would have a large impact on the guidelines range for certain offenders. For example, a non-violent first offender whose offense level is 15 (in Zone D) and would be subject to a maximum guideline sentence of 24 months could see his offense level reduced by two, thereby placing him in offense level 13, which carries an 18-months maximum guidelines sentence. In addition, the sentence would now be in Zone B (if the commission proceeds with Zone C and B consolidation) rather than Zone D, which would make the offender eligible for alternative sentences such as several months of imprisonment with supervised release subject to conditions of confinement. For this reason, our hypothetical offender's term of imprisonment could be reduced even further. This example makes clear that retroactive application of Amendment 1 could result in changes of a significant magnitude.

[32] Schanzenbach & Yaeger, *Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity*, 96 J. CRIM. L. & CRIMINOLOGY 757, 764 (2006).
[33] *Id.* at 781.
[34] *Id.*
[35] *See* U.S. SENTENCING GUIDELINES MANUAL §1B1.10 cmt. background (U.S. SENTENCING COMM'N 2016).

Finally, Amendment 1 would be easy for courts to apply retroactively. Determining whether an individual is a first offender and whether he was given a sentence in an expanded Zone B would in most cases be a simple matter of consulting the sentencing record.[36] In a smaller subset of cases, the court would have to consider whether the underlying offense was a crime of violence; however, courts are well practiced at making such determinations under §4B1.2. Accordingly, we recommend applying this amendment retroactively.

Proposed Amendment 3: Youthful Offenders

The Leadership Conference and the ACLU support the objectives behind Amendment 3, which would modify §4A1.2(d) to exclude juvenile sentences from being considered in the calculation of a defendant's criminal history score; however, we believe that whether the conduct was committed before the offender turned 18 (*i.e.,* whether or not it was a "youth" offense) [37] should be the dispositive question rather than whether or not the offender received a juvenile or adult sentence. Nevertheless, should the Commission decide to move forward with its proposal, we support creating a downward departure for cases in which the defendant had an adult conviction for an offense committed prior to age 18 counted in the criminal history score that would have been classified as a juvenile adjudication if the laws of the jurisdiction did not consider offenders below the age of 18 as "adults." Finally, we also oppose creating an upward departure in §4A1.3 for criminal conduct committed before the age of 18 under any circumstances.

The Commission asked for comment on whether it should provide that sentences for offenses committed prior to age 18 not be counted in the criminal history score, regardless of whether the sentence was classified as a "juvenile" or an "adult" sentence as an alternative to the proposed amendment. The Leadership Conference and the ACLU support these changes and believe that all youth sentences should be excluded from the calculation of the criminal history score for two reasons: (1) youth offenses are not indicative of future criminal activity due to youth brain development and (2) the inclusion of youth sentences in the criminal history score has a disparate impact on people of color since youth of color are more likely to be sentenced as adults.

First, youth offenses should not be considered in the calculation of a defendant's criminal history score because youth convictions are not indicative of an offender's culpability or propensity to recidivate. According to the Sentencing Guidelines, one goal of considering the past criminal conduct of the defendant is "to protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior…."[38] While this strategy may be effective when using prior adult sentences, the predictive value of youth convictions is much lower.

[36] In 2014, only about 10% of the federal prison population was Zone C offenders. *See* COURTNEY R. SEMISCH, U.S. SENTENCING COMM'N, ALTERNATIVES TO SENTENCING IN THE CRIMINAL JUSTICE SYSTEm 7 (2015).
[37] We use the term "youth sentences" to refer to sentences for offenses committed prior to the age of 18 regardless of whether the sentence was classified as "juvenile" or "adult." We use the term "youth offenses" to refer all offenses committed prior to the age of 18.
[38] U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (U.S. SENTENCING COMM'N 2016).

Research has shown that the prevalence of offending increases from late childhood, peaks in the teenage years (from 15 to 19), and then declines in the early 20s.[39] Between 40% and 60% of youth stop offending by early adulthood, which demonstrates that a youth sentence is not predictive of future criminal behavior.[40] The decline is linked to a decrease in impulsive behavior. Adolescents struggle to control their impulses and are prone to participate in risky behavior because their brains do not develop into an adult brain until the individual reaches their early 20s.[41] Emotionally charged situations make it difficult for youth to make correct decisions and many become involved in the criminal justice system due to mitigating circumstances stemming from systemic racism or entrenched poverty.

The Supreme Court's recent Eighth Amendment jurisprudence counsels in favor of considering this research in deciding how we should adjudicate youth offenders. In *Miller v. Alabama*, the Supreme Court highlighted three significant gaps between youth and adults to explain why youth have diminished culpability and deserve less severe punishments.[42] First, children have a lack of maturity and an underdeveloped sense of responsibility that leads to recklessness, impulsivity, and risk-taking. Second, children are more vulnerable to outside influences and pressure from family and peers, and are often unable to extricate themselves from a negative environment. Lastly, a child is still growing and his or her actions are less likely to be "evidence of irretrievable depravity."[43] All youth should have diminished culpability for offenses committed prior to the age of 18 regardless of whether the sentence was classified as "juvenile" or "adult" according to the logic put forth by the Supreme Court. We encourage the Commission to adopt this rationale.

Second, youth sentences should not be used in calculating a defendant's criminal history points because doing so perpetuates racial disparities in the treatment of young offenders. People of color face disparate treatment at all stages in the criminal justice process, from enforcement decisions to intake to adjudication.[44] State laws and judicial discretion also negatively impact youth of color. Some states have laws that automatically transfer youth over a certain age to adult courts, while other states allow the juvenile court judge or prosecutor to make a decision to waive or transfer a case to the adult court. Thirty-four states have provisions known as "once an adult always an adult" that require youth who were previously tried and/or convicted in adult court to automatically face adult charges for any future conduct, regardless of whether it is related to the prior offense.[45]

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[39] Rolf Loeber, David P. Farrington, David Petechuk, *Series: Study Group on the Transitions between Juvenile Delinquency and Adult Crime*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE (2013).

[40] *From Juvenile Delinquency to Young Adult Offending*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE (Mar. 11, 2014), https://www.nij.gov/topics/crime/Pages/delinquency-to-adult-offending.aspx#reports.

[41] *The Teen Brain: Still Under Construction*, NATIONAL INSTITUTE OF MENTAL HEALTH (2011), http://www.nimh.nih.gov/health/publications/the-teen-brain-still-under-construction/index.shtml.

[42] *Miller v. Alabama*, 132 S. Ct. 2455, 2464–65 (2012).

[43] *Id*. at 2464–65.

[44] Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is It Sound Policy?*, 10 VA. J. SOC. POL'Y & L. 231, 252–53 (2002).

[45] *Key Facts*: Youth in the Justice System, THE CAMPAIGN FOR YOUTH JUSTICE (Jun. 2016), https://campaignforyouthjustice.org/images/factsheets/KeyYouthCrimeFactsJune72016final.pdf.

These laws and procedural flaws in the juvenile justice system have startling consequences. In the United States, an estimated 200,000 youth are tried, sentenced, or incarcerated as adults even though most of the youth prosecuted are charged with non-violent offenses.[46] African American youth overwhelmingly receive harsher treatment than white youth and make up 32% of those arrested even though they represent only 16% of the overall youth population.[47] African American youth are more than eight times as likely as white youth to receive an adult prison sentence.[48] Latino youth are 43% more likely than white youth to be waived judicially to the adult system and 40% more likely to be admitted to adult prison.[49] Since youth of color are more likely than white youth to be sentenced as adults, continuing to allow the use of adult sentences would have a disparate impact on people of color and perpetuate racial inequalities already present in the criminal justice system.

Nevertheless, if the Commission does proceed with Amendment 3 as proposed, The Leadership Conference and the ACLU support that option over the status quo because of systemic flaws in the juvenile justice system. The procedural requirements in the juvenile court are frequently relaxed to account for the unique circumstances of individual cases and to achieve the best rehabilitation for the juvenile. For instance, evidentiary rules and procedural rules are followed less rigorously, there are frequent procedural errors, the proceedings are less adversarial than in the criminal court, youth are unrepresented by counsel or the quality of representation is poor, and juvenile offenders are not offered a jury trial.[50] Juvenile offenders do not have the right to a trial by jury, which may lead many offenders to plead guilty rather than proceeding to trial.[51] Youth offenders rarely receive notice that their juvenile adjudication could be used for sentence enhancement, and they are generally unaware that juvenile adjudications factor into their criminal history score. Youth and their parents often fail to understand their legal rights due to inadequate legal representation and falsely believe that juvenile adjudications are confidential and will be expunged.[52] In addition, youth offenders are psychosocially and emotionally immature in ways that significantly affect their decision-making process in a legal context.[53] Given the systemic flaws in the juvenile justice system that impede due process and the developmental differences in youth that can impact their substantive and procedural rights, it would be unjust to use juvenile sentences in the calculation of a criminal history score.

The Commission requested comment on whether a downward departure may be warranted in cases in which the defendant had an adult conviction for an offense committed prior to age 18 counted in the criminal history score that would have been classified as a juvenile adjudication (and therefore not counted) if the laws of the jurisdiction in which the defendant was convicted

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[46] Liz Ryan, *Youth in the Adult Criminal Justice System*, 35 CORDOZO L.REV. 1167, 1169 (2016); Carmen Daugherty, *State Trends: Legislative Victories from 2011-2013: Removing Youth from the Adult Criminal Justice System*, CAMPAIGN FOR YOUTH JUSTICE 12 (2013), http://www.campaignforyouthjustice.org/documents/ST2013.pdf.

[47] *Key Facts*, *supra* note 42.

[48] *Id.*

[49] *Id.*

[50] Melissa Hamilton, *Back to the Future: The Influence of Criminal History on Risk Assessments*, 20 BERKELEY J. CRIM. L. 75, 110–11 (2015).

[51] The Supreme Court has held that trial by jury in the court's adjudicative stage is not a constitutional requirement. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

[52] *See* Redding, *supra* note 41 at 242–43.

[53] *Id.* at 247–48.

did not categorically consider offenders below the age of 18 years as "adults." The Leadership Conference supports a downward departure for all defendants with an adult conviction for an offense committed prior to the age of 18 regardless of whether the jurisdiction categorically considers offenders below the age of 18 as "adults." The text of the proposed change to the commentary of §4A1.3 captioned "Application Notes: Downward Departures A(ii)" should be modified to state, "The defendant had an adult conviction for an offense committed prior to age eighteen counted in the criminal history score." This change would prevent the Commission's approach to juvenile sentences from being contingent on state law and would address the overarching concerns we have raised about using youth offenses to calculate criminal history points.

The Commission also requested comment on whether juvenile sentences may be considered for the purposes of an upward departure under §4A1.3. The Leadership Conference and the ACLU oppose an upward departure for offenses committed prior to the age of 18. If the exclusion of juvenile sentences from the calculation of criminal history points results in a criminal history category that inadequately captures the seriousness of an individual's record, a court can impose a non-guidelines sentence. Nonetheless, if the Commission does decide to consider youth sentences for an upward departure, guidance should be provided that youth sentences should only be considered where the offense was a crime of violence as defined by §4B1.2 of the Guidelines.

The Commission Should Give Amendment 3 Retroactive Effect

We also propose that the Commission give Amendment 3 retroactive effect. As we discussed in conjunction with Amendment 1, the Commission must take into consideration the purpose of the amendment, the magnitude of the change, and difficulty of applying the amendment when determining whether to use retroactivity.

Making Amendment 3 retroactive advances the purpose of the proposed amendment. We presume that many individuals are serving sentences that were based on criminal history calculations that included youth offenses. Those sentences are flawed for the reasons we outlined above.

The magnitude of the proposed amendment would be large for many offenders. The changes proposed could easily cause a defendant to move down a Criminal History category or two. For instance, an offender with an offense level of 15 and who was assessed ten criminal history points (Criminal History Category V) would have a maximum guidelines sentence of 46 months; however, if two juvenile convictions made up four of his criminal history, the proposed amendment would shift him down to Criminal History Category III and a resulting maximum of 30 months imprisonment.[54]

Finally, Amendment 3 would not be difficult for the courts to apply retroactively because recalculation of an individual's criminal history points would only require the court to determine what juvenile offenses were included in an offender's criminal history calculations ***(or, if The***

[54] In our example, both juvenile sentences resulted in confinement of at least 60 days and occurred within five years of his commencement of the instant offense.

Leadership Conference and ACLU's preferred alternative were adopted) when the offender turned 18 and what conduct occurred before that date. Neither inquiry would be particularly complex.

Proposed Amendment 4: Criminal History Issues

The Leadership Conference and the ACLU support the adoption of Amendment 4. Part A of Amendment 4 amends §4A1.2 to provide that revocations of probation, parole, supervised release, special parole, or mandatory release are no longer counted for purposes of calculating criminal history points in Chapter 4. Part B amends the Commentary to §4A1.3 to provide a downward departure from the defendant's criminal history when the period of imprisonment actually served by the defendant is significantly less than the length of the sentence imposed.

Part A

The Leadership Conference and the ACLU support Part A of Amendment 4 for the following reasons: revocation sentences are not related to the severity of the underlying offense, revocation offenses are in many cases not serious violations, and considering revocation offenses that are also prosecuted as separate offenses could lead to systematic overstatement of offender criminal history.

Revocation sentences are not related to the severity of the underlying offense, which is what criminal history calculations are meant to reflect.[55] An offender's criminal history points are supposed to represent the seriousness of the defendant's prior convictions; however, adding points because of conduct that occurred *after* the underlying offense does not accomplish that end, particularly when the points are based on an aggregate term of imprisonment. There is a possibility that even if the revocation sentence were counted separately, a defendant could end up in a higher criminal history category than would be warranted for the cumulative number of days the defendant spent in jail.

In many instances, revocation offenses are far less serious than the underlying offense. More than two-thirds of all federal offenders who receive a revocation sentence commit a technical violation.[56] Examples of technical violations include a violation of general conditions, use of drugs, absconding, and the willful nonpayment of a court imposed obligation.[57] Under the Guidelines, a technical violation would likely be a Grade C violation of parole, which includes "(A) federal, state or local offense punishable by a term of imprisonment of one year or less; and (B) a violation of any other condition of supervision."[58] Section 7B1.4 of the Guidelines provides

[55] U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d) (U.S. SENTENCING COMM'N 2016).
[56] *See, e.g.*, Administrative Office of the U.S. Courts, Judicial Business in the United States 2015, Table E-7A, http://www.uscourts.gov/statistics-reports/judicial-business-2015-tables); *Number of Offenders on Federal Supervised Release Hits All Time High: Average inmate faces nearly four years of community monitoring after incarceration*, PEW RESEARCH (Jan. 24, 2017), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/01/number-of-offenders-on-federal-supervised-release-hits-all-time-high.
[57] U.S. District Courts – Post-Conviction Supervision Cases Closed With and Without Revocation, by Type, During the 12-Month Period Ending September 30, 2015, http://www.uscourts.gov/sites/default/files/data_tables/E7ASep15.pdf.
[58] U.S. SENTENCING GUIDELINES MANUAL §7B1.1 (U.S. SENTENCING COMM'N 2016).

that if your Grade C violation goes before a judge, a defendant's sentencing range is anywhere between three and 14 months.[59]

Parole conditions also vary widely depending on what state a particular defendant is in. In Kansas, Kentucky, and Hawaii, parolees are prevented from drinking alcohol and going into bars.[60] California has 20 basic conditions of parole including that a defendant cannot be around guns or a "thing that looks like a real gun."[61] Many of the state statutes are vague and broad and therefore open to interpretation; whether or not a defendant is judged to have violated the terms of his parole (or supervised release) can be highly subjective.

Where revocation offenses are serious, the conduct leading to the revocation may be the foundation for a new, separate charge and conviction as well as the imposition of a revocation sentence. This raises the possibility that application of Chapter 4 will systematically *overstate* the seriousness of offenders who receive *both* revocation offenses *and* new convictions. Indeed, it is extremely likely that the sentence imposed for the new violation will be enhanced because the offense was committed while a defendant was on probation or supervised release.[62] For instance, § 4A1.1(d) proscribes adding two additional points to an offense if an offender commits an offense under "probation, parole, supervised release, imprisonment, work release or escape status."[63]

The Commission requested comment on how the revocation sentence should be counted for the purpose of criminal history points. For the reasons stated above, we believe a revocation sentence should not be counted. If the revocation conduct is serious, charged, and proven (or admitted), the conduct will result in criminal history points as would any other conviction.

The Commission also requested comment on whether it should amend §4A1.3 to allow for upward departures for revocation sentences. The Leadership Conference and the ACLU do not believe criminal history points should be considered for a departure. Criminal history points already take into account if a new crime is committed while a defendant is on probation, and for the reasons stated above, considering revocation offenses could lead the court to overstate the seriousness of an offender's criminal history.[64]

Nonetheless, if the Commission does decide to consider revocation sentences for an upward departure, guidance should be provided that revocation sentences should only be considered when a defendant has committed a crime of violence as defined by §4B1.2 of the Guidelines or when the parole violation is substantially related to the previous crime.

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[59] *See id.*
[60] *Parole Decision Making in Hawaii: Setting Minimum Terms, Approving Release, Deciding on Revocation and Predicting Success and Failure on Parole*, *RESEARCH AND STATISTICS BRANCH CRIME PREVENTION AND JUSTICE ASSISTANCE DIVISION DEPARTMENT OF THE ATTORNEY GENERAL* (Aug. 2001), http://ag.hawaii.gov/cpja/files/2013/01/Parole-Decision-Making.pdf.
[61] State of California Department of Corrections and Rehabilitation, *Parolee Information Handbook*, http://www.cdcr.ca.gov/Parole/docs/PAROLEE_INFORMATION_HANDBOOK_2016.pdf.
[62] *See, e.g.* U.S. SENTENCING GUIDELINES MANUAL §4A1.1(d) (U.S. SENTENCING COMM'N 2016).
[63] *See id.*
[64] *See id.*

Finally, the Commission requested comment on whether a conforming amendment should be made to the definition of "sentence imposed" in §2L1.2. The Leadership Conference and the ACLU support conforming changes to §2L1.2 for substantially the same reasons that we articulated above; the assessment of criminal history in this guideline operates in a similar manner to Chapter 4.

Part B

The Leadership Conference and the ACLU also support the adoption of Part B of Amendment 4, which amends the Commentary to §4A1.3 to provide that a downward departure may be warranted when the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score. A defendant's criminal history points should reflect early release in making that assessment.

The Commission requested comment on whether an exception should be made if the reason a defendant was released early was not based on the defendant's own conduct. We do not believe there should be an exception. It is not always clear why a defendant is released from prison. If a state was forced to release prisoners because of overcrowding, it would presumably start with the low-risk defendants who have been on their best behavior. This appears to be what California did when it recently released more than 30,000 prisoners as part of an effort to reduce overcrowding.[65] A study found that of 1,600 prisoners released early only 1.3% of them ended up back in prison, compared with more than 30% of other prisoners.[66]

In addition, determining why an individual was released may not be as straightforward as it seems and could be extremely burdensome on state authorities. State authorities facing budget pressures or court orders to reduce overcrowding might choose to release certain individuals early precisely because they have been on good behavior. In such cases, it is unclear how federal courts would determine the exact reason a defendant was released. Moreover, litigating this issue at sentencing would create an issue of fact that would require defense counsel and assistant U.S. attorneys to obtain documents or testimony from state parole or prison authorities.

The Commission Should Give Amendment 4 Retroactive Effect

Section 1B.10 of the Sentencing Guidelines discusses the relevant factors to determine if an amendment should be enacted retroactively. As discussed in connection with Amendment 1, the Commission must take into consideration the purpose of the amendment, the magnitude of the change, and difficulty of applying the amendment.

We believe that Amendment 4 satisfies these criteria, particularly when the changes proposed in Parts A and B are considered in the aggregate. Retroactively applying Amendment 4 advances its

[65] *Brown v. Plata*, 563 U.S. 493 (2011).
[66] *Proposition 36 Progress Report: Over 1,500 Prisoners Released Historically Low Recidivism Rate,* STANFORD LAW SCHOOL THREE STRIKES PROJECT (Apr. 2014), http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/595365/doc/slspublic/ThreeStrikesReport.pdf.

purpose because many defendants who are currently incarcerated were assessed criminal history points that overstated the seriousness of their prior offenses.

Amendment 4 would also have a large impact on the guidelines range of some offenders. Through the aggregation of revocation and original sentences and not allowing a downward departure for a substantially early release, there are many defendants whose criminal history point total is higher than it should be. Now a revocation sentence would not be counted and a downward departure would be warranted if a defendant was released substantially early. For example, consider a defendant in Criminal History Category II and offense level 15 who was sentenced to 25 months in prison and then released. While on supervised release, he committed a technical violation and had his probation revoked. Since a violation was committed while he was on supervised release, two offense levels would be added to his offense level score. If the revocation and original sentence were no longer aggregated, the defendant would be subject to a maximum guidelines sentence of 6 months instead of 33 months.

Finally, it would not be difficult to apply this amendment retroactively. These calculations would be simple because it is easy to look at the sentencing record to determine the number of criminal history points assessed and see whether a revocation sentence was aggregated with the original sentence. In addition, it would be relatively simple to determine which defendants spent substantially less time in prison than the terms to which they were sentenced and depart from the guidelines where warranted.

Proposed Amendment 6: Acceptance of Responsibility

The Leadership Conference and the ACLU are encouraged by the Commission's proposed amendment to limit references to relevant conduct in §3E1.1 of the Guidelines; however, as we explain below, we think the Commission should go one step further than the changes it has proposed by removing mention of relevant conduct from §3E1.1 altogether.

The Commission should remove all references to relevant conduct from §3E1.1 because its inclusion requires judges to make decisions as to guilt in the sentencing phase, which uses a lower burden of proof and standard of evidence. Relevant conduct is "uncharged, dismissed, and sometimes even acquitted conduct undertaken as part of the same transaction or common scheme or plan as the offense of conviction."[67] Although this proposed amendment is a step towards limiting the impact of non-convicted, relevant conduct in the sentencing phase, the amendment should eliminate the impact of this conduct from the accepting responsibility reduction entirely.

The Application Notes to §3E1.1 recognize that incentivizing the acceptance of responsibility serves "legitimate societal interests."[68] Although the Notes do not explicitly explain what these interests are, they acknowledge that the acceptance of responsibility offense level reduction encourages defendants to plead guilty, thereby reducing the amount of resources the Government must spend on preparing for and conducting a trial.[69] Avoiding trial costs and time is one of the

[67] Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1325 (2005).
[68] U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. background (U.S. SENTENCING COMM'N 2016).
[69] U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 n.6 (U.S. SENTENCING COMM'N 2016).

principal purposes of this guideline, and accordingly, §3E1.1 should only require consideration of factors germane to this purpose.

The Leadership Conference and the ACLU believe that the reduction for acceptance of responsibility should focus on whether the defendant has admitted charged conduct rather than relevant conduct. Issues at sentencing involve many different determinations under a lower burden of proof where rules of evidence do not apply.[70] The court may also consider all relevant information, even if it would not be admissible under the rules of evidence, as long as the information "has sufficient indicia of reliability to support its probable accuracy."[71] For example, uncorroborated hearsay is inadmissible at trial, but hearsay that meets the standards of §6A1.3 is admissible during the sentencing phase.[72] In this context, determining what challenges to relevant conduct constitute "false denials" or "frivolous" arguments is hardly a simple task.

With these concerns in mind, we believe that even if Amendment 6 were adopted as proposed, §3E1.1 would still contain two problematic references to relevant conduct: one sentence that encourages a defendant to "truthfully admit" to relevant conduct; and another sentence that discourages arguments that may be considered frivolous.

First, the Guidelines should not encourage judges to consider as a factor whether defendants "truthfully admit" to relevant conduct because it is coercive and a violation of the defendant's Fifth Amendment rights. Application Note 1(A) to §3E1.1 first requires that a defendant truthfully admit to the conduct of the offense of conviction, and truthfully admit or not falsely deny relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct).[73] Although a defendant is not obligated to truthfully admit to relevant conduct, the fact that this is still a factor for consideration is concerning. Suggesting a defendant admit to conduct for which he was not charged in order to receive a possible sentence reduction is unduly coercive and interferes with a defendant's Fifth Amendment right against self-incrimination – regardless of whether it is mandatory or just a factor for consideration. Moreover, this does nothing to further the primary aim of §3E1.1, which is to limit resource expenditure at trial.

Second, the proposed amendment to Application Note 1(A) to §3E1.1, which adds that "a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction," [74] imprudently encourages the consideration of frivolity in determining whether to grant the acceptance of responsibility reduction and may have the undesirable impact of chilling valid, factual legal arguments. The Commission's proposed amendment would replace the current last provision, which says if a defendant falsely denies or frivolously contests relevant conduct, he cannot receive the acceptance of responsibility reduction.[75] Although Amendment 6 alters the way in which a judge considers frivolous arguments, the proposed amendment's reference to frivolity still suppresses a defendant's ability to defend himself. The Guidelines should not dissuade defendants from raising valid, factual, and

[70] U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 (U.S. SENTENCING COMM'N 2016).
[71] *Id.*
[72] *See* Ricardo J. Bascuas, *The American Inquisition: Sentencing after the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 33 n.207 (2010).
[73] U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2016).
[74] Sentencing Guidelines for United States Courts, 81 Fed. Reg. at 92015.
[75] *Id.*

legal arguments to be eligible for acceptance of responsibility because the proper application of the Guidelines depends on both sides being able to litigate their interpretation and application. Language in the Guidelines intended merely to dissuade frivolous challenges at sentencing may in fact prevent defendants from raising valid challenges to the application of the Guidelines.[76]

For these reasons, although the Commission proposes a welcome softening of the language in §3E1.1, it does not go far enough. The Sentencing Guidelines should be designed to allow judges the discretion to appropriately sentence defendants who have pled guilty and reduce the Government's burden of preparing for trial. The Leadership Conference and the ACLU recommend that the Commission remove all references to relevant conduct from factors for consideration under §3E1.1.

Conclusion

We remain committed to working with the Commission to create more comprehensive and effective sentencing guidelines that operate to shift the Commission's treatment of defendants and promote rehabilitation. We believe that the proposed Amendments discussed above represent a step toward establishing fair and effective policies, 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 202-263-2894 or Jesselyn McCurdy, Deputy Director, at jmccurdy@aclu.org or (202)675-2307.

Sincerely,

The Leadership Conference on Civil and Human Rights

The American Civil Liberties Union (ACLU)

[76] In the Seventh Circuit, for instance, a defendant's challenge to relevant conduct may be deemed frivolous if the defendant fails to present evidence on his behalf. *United States v. Lister*, 432 F.3d 754, 760 (7th Cir. 2005).