August 2, 2017

The Honorable Judge William H. Pryor, Jr.
Chair
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-8002
Attention: Public Affairs – Priorities Comment
pubaffairs@ussc.gov

Submitted via e-mail

Re: Proposed Priorities for Amendment Cycle (Document Citation: 82 FR 28381)

Dear Judge Pryor:

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 rights of all persons in the United States, and the American Civil Liberties Union (ACLU), we write to provide comments on the Sentencing Commission's Proposed 2017-2018 Priorities for Amendment Cycle published in the Federal Register on June 21, 2017.[1]

These comments focus on the specific areas where we believe the Sentencing Commission ("the Commission") can improve the fairness and proportionality of the Guidelines; promote individualized review of specific offense conduct; and mitigate excessively punitive provisions that have not only promoted racial disparities in sentencing, but have also sustained a costly explosion in the number of individuals in the federal penal system.

Our comments that follow will address Priority #3, Priority #4, Priority #5, Priority #8, and Priority #9 in detail.[2]

I. Priority #3: "Career Offender" Sentencing Enhancements and Defining "Crime of Violence"

Recommendations Regarding "Career Offenders"

The Leadership Conference and the ACLU support the Commission's recommendation to Congress to revise the career offender directive at 28 U.S.C. § 994(h) to focus on offenders who have committed at least one "crime of violence." As expressed in the Commission's 2016 report, "clear and notable differences between career offenders who have committed a violent offense and those who are deemed career offenders based solely on drug trafficking offense," including lower recidivism rates for drug

offenders without a history of violence.[3] Furthermore, by including violations of the Controlled Substances Act, the career offender directive at 28 U.S.C. § 994(h) has a disproportionately harmful impact on people of color. For these reasons, we recommend that the Commission continue to urge Congress to narrow 28 U.S.C. § 994(h) to focus on offenders who have committed at least one "crime of violence."

Recommendations Regarding Defining "Crime of Violence"

We recommend that the Commission adopt a uniform definition of "crime of violence" applicable to the guidelines and other recidivist statutory provisions. Having separate definitions for "crime of violence" could lead to confusion among defendants who are trying to understand the basis for criminal history calculations and eligibility for any first offender adjustments.

In particular, we recommend adopting by cross-reference the existing definition of "crime of violence" at §4B1.2 that applies to a presumption in §5C1.1 that non-violent first offenders who have a guideline range in Zones A or B should ordinarily receive a sentence other than imprisonment. "Crime of violence" is defined in §4B1.2 of the Guidelines as 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)."[4] We believe this definition is appropriate and the Guidelines should be amended wherever inconsistent with this definition.

II. Priority #4: Mandatory Minimum Penalties in the Federal Criminal Justice System

As documented by a 2013 report by the Congressional Research Service (CRS), one of the single most important elements in explaining the record incarceration numbers at the federal level could be "mandatory minimum" sentencing requirements, under which certain prison sentences for certain crimes, particularly for drug offenses,[5] are automatically required by federal and state law. In fact, the number of federal mandatory sentences has doubled in the last 20 years,[6] and between 1980 and 2013, the federal imprisonment rate increased 518 percent.[7] Thankfully, over the last three years, the Bureau of Prisons (BOP) population has dropped by more than 30,000,[8] primarily due to administrative reforms like the Attorney General's Smart on Crime Initiative. However, Attorney General Sessions has decided to discontinue such programs and the BOP is currently operating at 16 percent over its intended capacity.[9]

Mandatory minimum sentencing schemes eliminate judicial discretion and prevent courts from considering all relevant factors, such as culpability and role in the offense, and tailoring the punishment to the crime and offender. Further, studies have shown that mandatory minimum sentences not only exacerbate racial disparities in the criminal justice system, but are also ineffective as public safety mechanisms, as they increase the likelihood of recidivism.[10] One of the few ways to address this unsustainable growth in the BOP prison population and disparities in sentencing is to address the length of time offenders are serving sentences in the federal system and increase a sentencing judge's ability to engage in individualized sentencing.[11]

While we categorically oppose mandatory minimum sentencing schemes, we agree with the Commission that "if Congress decides to exercise its power to direct sentencing policy by enacting mandatory

minimum penalties . . . such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently."[12] We therefore support the following specific recommendations regarding mandatory minimums:

- Expanding the safety valve at 18 U.S.C. § 3553(f) to include offenders who receive two, or perhaps three, criminal history points under the guidelines.[13] (See additional discussion of this recommendation below).
- Mitigating the cumulative impact of criminal history by reassessing both the scope and severity of the recidivist provisions at 21 U.S.C. §§ 841 and 960, including more finely tailoring the current definition of "felony drug offenses" that triggers the heightened mandatory minimum penalties.[14]
- Amending the mandatory minimum penalties established at 18 U.S.C. § 924(c) for firearm offenses, particularly the penalties for "second or subsequent" violations of the statute, to lesser terms.[15]
- Amending 18 U.S.C. § 924(c) so that the increased mandatory minimum penalties for a "second or subsequent" offense apply only to prior convictions to reduce the potential for overly severe sentences for offenders who have not previously been convicted of an offense under section 924(c).[16]
- Amending 18 U.S.C. § 924(c) to give the sentencing court limited discretion to impose sentences for multiple violations of section 924(c) concurrently to provide the flexibility to impose sentences that appropriately reflect the gravity of the offense and reduce the risk that an offender will receive an excessively severe punishment.[17]
- Finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act's mandatory minimum penalty.[18]

The Leadership Conference and the ACLU were especially pleased by the Commission's 2011 recommendation that "Congress should consider marginally expanding the safety valve at 18 U.S.C. § 3553(f) to include certain non-violent offenders who receive two, or perhaps three, criminal history points under the federal sentencing guidelines."[19] We urge the Commission to reiterate its recommendation to Congress and to support an expansion of safety valve eligibility for non-violent offenders with even more than three criminal history points. Although not as effective as comprehensive reform to mandatory minimums, this eligibility expansion would permit judges to sentence more defendants with studied and thoughtful care given to the 18 U.S.C. § 3553(a) factors and to avoid unjust sentences caused by Congress's mistaken conflation of drug quantity with culpability in the Anti-Drug Abuse Act of 1986.

As the Commission reported to Congress in fiscal year 2010, "[m]ore than 75 percent . . . of Black people convicted of a drug offense carrying a mandatory minimum penalty have a criminal history score of more than one point under the sentencing Guidelines, which disqualifies them from application of the safety valve."[20] By contrast, 53.6 percent of Hispanic offenders, 60.5 percent of White offenders, and 51.6 percent of other offenders had more than one criminal history point disqualifying them from safety valve relief. Thus, in addition to subjecting non-serious traffickers to harsh mandatory minimums, the safety valve's criminal history eligibility requirement magnifies racially disproportionate enforcement dynamics that occur at both the state and federal levels. No reasonable justification exists for maintaining a safety valve that applies too narrowly. The Commission should support significantly expanding the safety valve eligibility for nonviolent offenders with more than one criminal history point. Such an expansion would permit judges – in appropriate situations – to avoid imposing lengthy sentences on offenders who do not need and whose conduct does not justify serving long sentences in federal prison.

III. Priority #5: Recidivism, "First Offenders," and Alternatives to Incarceration

Recommendations for Reducing Recidivism

We support the Commission's continuation of its comprehensive multi-year study of recidivism. Over-incarceration has not only led to the burgeoning of our prison populations and spending, but has also led to an explosion in the number of people returning to the community each year. Although this phenomenon has resulted in an increased focus on barriers to reentry, to date, efforts to reduce reoffending have not been as robust as necessary.

Within three years of being released, 67 percent of ex-prisoners re-offend, and 52 percent are re-incarcerated. Americans are paying dearly for this trend. According to the Pew Center on the States, state and federal spending on corrections has grown 400 percent over the past 20 years, from about $12 billion to about $60 billion. To stem the tide of increasing budgets, much has been done over the last decade to study interventions that prevent further crime and result in substantial cost savings for local governments. For example, the Urban Institute evaluated a family therapy intervention for juveniles incarcerated in DC jails, concluding that on average, the program reduces arrests by 22.6 percent for program participants within one year.[21] The analysis found that each prevented arrest saves local agencies $26,100 and federal agencies $6,100 and that, on average, each averted arrest prevents $51,600 in associated victim harms, which accounts for more than 60 percent of all savings from averted crimes.[22] This is but one example of programming that has been proven to have a significant impact on both spending and reoffending.

Recent studies such as these have sparked a movement toward reform, primarily at the state level. State leaders have recognized the benefits of sentencing reforms and begun to transform sentencing and correction policies across much of the country through justice reinvestment initiatives. Early reports in those states that have implemented reforms suggest that these initiatives have been largely successful in reducing prison spending and improving public safety, by redirecting resources to less expensive community-based efforts and making adjustments to sentencing for low level non-violent drug offenders.

Justice reinvestment has typically been accomplished in three phases: (1) an analysis of criminal justice data to identify drivers of corrections spending and the development of policy options to reform such spending to more efficiently and effectively improve public safety; (2) the adoption of new policies to implement reinvestment strategies, usually by redirecting a portion of corrections savings to community-based interventions; and (3) performance measurement. Using this model, 21 states have implemented initiatives – including Arizona, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Kansas, Kentucky, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas and Vermont – and six others are pursuing legislation. For those states that have implemented initiatives, great improvements have been made, resulting in almost immediate reductions in costs and prison populations. For example, the 2007 reinvestment initiative in Texas stabilized and ultimately reduced its prison pollution between 2007 and 2010.[23] The initiative also produced a 25 percent decrease in parole revocations between September 2006 and August 2008.[24]

Taking its cue from state leaders, it is imperative for the federal government to do all it can to reform sentencing policy in order to reduce reoffending, improve supervision programming, and increase overall

public safety. The continuation of the Commission's multi-year study is a right step in this direction and the availability of current data will assist in analyzing how best to implement reforms.

Recommendations Regarding First Offenders

The Leadership Conference and the ACLU would like to submit the following recommendations regarding "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).
- Amend §4C1.1 to recommend that first offenders with an offense level under 16 (as determined under Chapters two and three) receive a two-level reduction, and all other first offenders 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.

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.[25] 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."[26]

First, we recommend broadening the definition of "first offenders" to include any offender in Category I (one or fewer criminal history points). While offenders with zero criminal history points have the lowest recidivism rates, the recidivism rate for individuals with one criminal history point are similarly low.[27] 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 percent of people with zero or one criminal history points were rearrested within eight years of release – compared to 56 percent of people with two criminal history points.[28] 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 percent of those offenders are reconvicted in eight years. By contrast, offenders with two or three criminal history points are reconvicted at a rate of 33.0 percent.[29] 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.[30] 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.

Second, we urge The Commission to amend §4C1.1 in order to recommend that first offenders with an offense level under 16 (as determined under Chapters two and three) receive a two-level reduction, and all other first offenders receive a one-level reduction. 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. 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,[31] and federal prisons are currently operating at 16 percent over-capacity.[32] Furthermore, a two-level reduction will not risk a decrease in the deterring effect of the law,[33] because the length of a sentence has no effect on the likelihood of recidivism, as evidenced by the Recidivism Study.[34]

Third, we recommend creating 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. This presumption would substantially advance the Commission's goals to "provide the defendant…correctional treatment in the most effective manner"[35] and to reduce costs, reduce overcrowding, and promote effectiveness of reentry programs. [36] As the Commission determined in the Recidivism Study, Category I offenders are only rearrested at a rate of 33.8 percent 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)).[37] 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.[38]

IV. Priority #8: Criminal History Scores and Youthful Offenders

Recommendations Regarding Criminal History Issues

We would like to submit the following recommendations regarding various criminal history issues:

- Eliminate the use of revocation sentences in determining the length of a term of imprisonment under §4A1.2.
- 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.

First, we recommend amending §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. We are concerned about the use of revocation sentences in calculating criminal history points for several reasons, namely that 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.[39] 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.[40] Examples of technical violations include a violation of general conditions, use of drugs, absconding, and the willful nonpayment of a court imposed obligation.[41] 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."[42] Section 7B1.4 of the Guidelines provides that if your Grade C violation goes before a judge, a defendant's sentencing range is anywhere between three and 14 months.[43]

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.[44] California has 20 basic conditions of parole including that a defendant cannot be around guns or a "thing that looks like a real gun."[45] 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.[46] 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."[47]

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

Second, we recommend amending 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.

<u>Recommendations Regarding Youthful Offenders</u>

We would like to submit the following recommendations regarding 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.

We 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…."[48] While this strategy may be effective when using prior adult sentences, the predictive value of youth convictions is much lower.

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.[49] Between 40 percent and 60 percent of youth stop offending by early adulthood, which demonstrates that a youth sentence is not predictive of future criminal behavior.[50] 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.[51] 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.[52] 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."[53] 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.[54] 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.[55]

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.[56] African-American youth overwhelmingly receive harsher treatment than White youth and make up 32 percent of those arrested even though they represent only 16 percent of the overall youth population.[57] African-American youth are more than eight times as likely as White youth to receive an adult prison sentence.[58] Latino youth are 43 percent more likely than White youth to be waived judicially to the adult system and 40 percent more likely to be admitted to adult prison.[59] 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.

In the alternative, if the Commission continues to allow consideration of offenses committed before a person turns 18, we support creating a downward departure for all people with an adult conviction for an offense committed prior to the age of 18 regardless of whether the jurisdiction categorically considers those below the age of 18 as "adults." We recommend modifying the commentary of §4A1.3 captioned "Application Notes: Downward Departures" to state that, "A downward departure from the defendant's criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period *or 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.

Finally, we also oppose creating an upward departure in §4A1.3 for criminal conduct committed before the age of 18 under any circumstances. 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.

V. Priority #9: Alternatives to Incarceration

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.[60] In the Recidivism Study, the Commission notes that longer prison sentences neither reduce crime nor increase public safety.[61]

In particular, 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. To allow greater sentencing flexibility for offenders whose guidelines ranges are currently in Zone C, we encourage the Commission to consolidate Zones B and C without exempting white-collar or public corruption offenders and refrain from providing additional guidelines for former Zone C offenders.

We support consolidating Zones B and C of the Sentencing Table to create a new, expanded Zone B.[62] 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.

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.[63] 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.[64] Finally, Zone C offenders would have rehabilitative opportunities, which could reduce the likelihood of recidivism.

In addition, the Commission should not exempt from consolidation current Zone C offenders convicted of white-collar and other public corruption offenses. 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, whereas Hispanic and African-American defendants are usually incapable of doing so.[65] Moreover, individuals who did not graduate high school or who are not U.S. citizens receive longer prison sentences,[66] an outcome that reinforces the racial disparity. Overall, the study found that black and Hispanics, on average, receive 10 percent longer sentences than white defendants.[67] 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.

Finally, we urge the Commission to refrain from providing additional guidelines for any new Zone B offenders (*i.e.*, those who are currently in Zone C). 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.

VI. 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 priorities 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, Senior Counsel, at cook@civilrights.org or Jesselyn McCurdy, Deputy Director, at jmccurdy@aclu.org.

The Leadership Conference on Civil and Human Rights

American Civil Liberties Union

---

[1] Proposed Priorities for Amendment Cycle, 82 Fed. Reg. 28381 (proposed June 21, 2017). https://www.federalregister.gov/documents/2017/06/21/2017-12868/proposed-priorities-for-amendment-cycle

[2] *Id.*

[3] "Report to the Congress: Career Offender Sentencing Enhancements." (U.S. SENTENCING COMM'N 2016) https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

[4] U.S. SENTENCING GUIDELINES MANUAL §4B1.2 (U.S. SENTENCING COMM'N 2016).

[5] Congressional Research Service, The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options (Jan. 22, 2013), available at http://www.fas.org/sgp/crs/misc/R42937.pdf.

[6] *See* "Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System." *United States Sentencing Commission*. Oct. 2011. http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

[7] *See* "Fact Sheet: Growth in Federal Prison System Exceeds States." *Pew Charitable Trusts*. Jan. 22, 2015, http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/01/growth-in-federal-prison-system-exceeds-states.
[8] *See* "Federal Inmate Population Declines." *Federal Bureau of Prisons*. Oct. 4, 2016. https://www.bop.gov/resources/news/20161004_pop_decline.jsp.
[9] *See* "Federal Inmate Population Declines." *Federal Bureau of Prisons*. Oct. 4, 2016. https://www.bop.gov/resources/news/20161004_pop_decline.jsp.
[10] Barbara S. Vincent and Paul J. Hofer, "The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings," (Federal Judicial Center, 1994), available at http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf
[11] See generally Federal Public Defender, Southern District of Texas, Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012.
[12] U.S.S.C. Report to Congress, Mandatory Minimum Penalties in the Federal Criminal Justice System, October 2011, at 345.
[13] *Id*. at 355-56.
[14] *Id.* at 356.
[15] *Id.* at 364.
[16] *Id.*
[17] *Id.*
[18] *Id*. at 365.
[19] Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, October 2011 at xxxi.
[20] Mandatory Minimum Penalties, October 2011 at 159-160.
[21] Samuel Taxy, et al., The Costs and Benefits of Functional Family Therapy for Washington, D.C., at 3, District of Columbia Crime Policy Institute (September 2012) available at http://www.urban.org/UploadedPDF/412685-The-Costs-and-Benefits-of-Functional-Family-Therapy-for- Washington-DC.pdf.
[22] *Id.*
[23] See generally, Marshall Clement, Matthew Schwarz Feld, and Michael Thompson, Council of State Govt's Justice Ctr., The National Summit on Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending (2011); National Alliance for Model State Drug Laws, Justice Reinvestment Initiatives (2012).
[24] Tony Fabelo, Texas Justice Reinvestment: Be More Like Texas? Justice Research and Policy 11 (2010).
[25] Final Priorities for Amendment Cycle, 81 Fed. Reg. 58004 (5)(B) (Aug. 24, 2016).
[26] *See* 28 U.S.C § 991 (2008) (referencing the purposes of sentencing established in 18 U.S.C. § 3553(a)).
[27] KIM STEVEN HUNT, U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW, 19 (2016) [hereinafter *Recidivism Study*].
[28] *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.
[29] *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.*
[30] *See* U.S. SENTENCING GUIDELINES MANUAL §4A1.1 (U.S. SENTENCING COMM'N 2016).
[31] *The World Prison Brief*. Accessed Feb. 21, 2017. http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All.
[32] "Federal Inmate Population Declines." *Federal Bureau of Prisons*. Sept. 30, 2016. https://www.bop.gov/resources/news/20161004_pop_decline.jsp.
[33] Final Priorities for Amendment Cycle, 81 Fed. Reg. 58004 (5)(B) (Aug. 24, 2016).
[34] *Recidivism Study*, *supra* note 5, at 22.
[35] *See* 18 U.S.C. 3553(a)(2)(D).
[36] Final Priorities for Amendment Cycle, 81 Fed. Reg. 58004 (5)(B) (Aug. 24, 2016).
[37] *Recidivism Study*, *supra* note 5, at 19.
[38] 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).
[39] U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d) (U.S. SENTENCING COMM'N 2016).
[40] *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.
[41] 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.
[42] U.S. SENTENCING GUIDELINES MANUAL §7B1.1 (U.S. SENTENCING COMM'N 2016).
[43] *See id.*
[44] *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.

[45] State of California Department of Corrections and Rehabilitation, *Parolee Information Handbook*, http://www.cdcr.ca.gov/Parole/docs/PAROLEE_INFORMATION_HANDBOOK_2016.pdf.
[46] *See, e.g.* U.S. SENTENCING GUIDELINES MANUAL §4A1.1(d) (U.S. SENTENCING COMM'N 2016).
[47] *See id.*
[48] U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (U.S. SENTENCING COMM'N 2016).
[49] 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).
[50] *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.
[51] *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.
[52] *Miller v. Alabama*, 132 S. Ct. 2455, 2464–65 (2012).
[53] *Id.* at 2464–65.
[54] 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).
[55] *Key Facts*: Youth in the Justice System, THE CAMPAIGN FOR YOUTH JUSTICE (Jun. 2016), https://campaignforyouthjustice.org/images/factsheets/KeyYouthCrimeFactsJune72016final.pdf.
[56] 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.
[57] *Key Facts*, *supra* note 42.
[58] *Id.*
[59] *Id.*
[60] 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).
[61] *Recidivism Study*, *supra* note 5.
[62] 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.
[63] 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.
[64] *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.
[65] Schanzenbach & Yaeger, *Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity*, 96 J. CRIM. L. & CRIMINOLOGY 757, 764 (2006).
[66] *Id.* at 781.
[67] *Id.*