



October 10, 2017

Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Amendments

Dear Judge Pryor:

We are always pleased to bring you the views of the board, staff and members of FAMM on proposed amendments to the federal Sentencing Guidelines. The guidelines have touched many lives, including those of our own members – 35,000 prisoners and 40,000 individuals outside prison. We appreciate the Commission’s work to amend and improve the guidelines and, as always, welcome this opportunity to share our views on one of the proposals: First Offenders/Alternatives to Incarceration.

a. First Offenders Adjustment

FAMM generally supports the Commission’s proposal to acknowledge first offenders and provide them a measure of sentencing relief by way of a reduced guideline range. We support the most generous reduction (two levels) notwithstanding the final offense level. We also encourage the Commission to adopt Option 1. Doing so would define first offenders as those Criminal History Category I defendants with no criminal history whatsoever as well as those with no criminal history points because their prior convictions are not countable, for example under §4A1.2(c)(1) and (2).

We are pleased the Commission has proposed an adjustment for first offenders. Among its benefits, adding a first offender adjustment would help the Commission better comply with two congressional directives. In one, Congress directed the Commission to ensure that the guidelines provide for punishment other than prison for first offenders.¹ The statute defined first offenders as defendants who had not been convicted of a crime of violence or otherwise serious offense.² The guidelines missed the mark to the extent that Criminal History Category I was drawn too broadly, equating defendants with no countable criminal history with those who receive one criminal history point. The other rather neglected directive is found at 28 U.S.C. §

¹ 28 U.S.C. § 994(j).

² *Id.*

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994(g). Congress requires the Commission to craft guidelines that “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons as determined by the Commission.”

In line with Congress’s interest in keeping first offenders out of prison, the former administration’s Smart on Crime initiative aimed, among other things, to dampen reliance on incarceration for less dangerous offenders. The Department encouraged prosecutors to consider alternatives to incarceration for non-violent offenders in appropriate cases. Unfortunately, it appears the program was marked by wide disparity; some districts used diversion programs robustly while others used them not at all.³

Earlier this year, the Department of Justice has announced an about face on charging policy. Attorney General Jeff Sessions has directed prosecutors to seek once again the most serious, readily provable offense, defining severity by means of measuring sentence length.⁴ This is sure to once again sweep up more first offenders and other people with minimal criminal history and ensure lengthy sentences and bulging prisons.

The sheer size of the federal prison population remains a significant concern, despite reductions due in part to actions the Commission has taken to lower sentences and make those changes retroactive. At the end of FY 2016, BOP facilities remained overcrowded. Overall, institutions were 16 percent over rated capacity and high security institutions stood at 31 percent over rated capacity.⁵ The BOP still consumes more than 25 percent of the DOJ’s discretionary budget and the administration has requested approximately \$7.2 billion for the Bureau in the FY 2018 budget.⁶ The request includes \$10 million for “expected population growth.”⁷

While disappointing, this news is not especially surprising. It underscores the continued relevance of the Commission’s ongoing effort to comply with directives that aim to reduce population pressure on the BOP. The proposals as drafted can do that as they make a modest start on scaling back sentencing for first offenders. We think they can be expanded in several ways.

Defining first offenders as individuals with no criminal history points would be consistent with the Commission’s treatment of these defendants. The guidelines view these defendants’ criminal history as so remote or insignificant -- or marked by convictions that may have been secured in ways that did not afford them due process protections – as history that should not

³ *Id.* at III-14.

⁴ Dep’t of Justice, Office of the Attorney General, Memorandum for All Federal Prosecutors, *Department Charging and Sentencing Policy* (May 10, 2017), available at <https://www.justice.gov/opa/press-release/file/965896/download>.

⁵ Dep’t of Justice, Office of the Inspector General, *Top Management and Performance Challenges Facing the Department of Justice* III-13 (Nov. 10, 2016), available at <https://www.justice.gov/doj/page/file/910486/download#page149>.

⁶ Dep’t of Justice, *Federal Prison System (BOP) FY 2018 Budget Request at a Glance 1*, available at <https://www.justice.gov/jmd/page/file/968276/download>.

⁷ Dep’t of Justice, *FY 2018 Budget Request at a Glance, Discretionary Budget Authority 4*, available at <https://www.justice.gov/jmd/page/file/968216/download>.

affect their sentence in any way. We can think of no principled reason to treat them differently for first offender purposes.

The Commission has struggled with recognizing first offenders for some years. A very early staff working group proposed a two-level reduction for defendants with no criminal history points who had not used violence or weapons during the offense.⁸ According to the Commission, “[t]he significance of this proposal was that it both responded to the intent of 28 U.S.C. § 994(j) and finessed the need to create a new ‘first offender’ CHC.”⁹

The proposal did not advance. The Commission said in 2005 that the fact that the early commissions lacked recidivism data had a role in preventing any first offender guideline.¹⁰

Today, of course, we have ample evidence, thanks to the Commission’s robust collection and analysis of sentencing data. For example, now we know that offenders with zero criminal history points have the lowest recidivism rates of any sentenced in the federal system.¹¹ They enjoy the lowest re-arrest rates (30.2 percent), beating out offenders with one criminal history point who had re-arrest rates of 46.9 percent.¹² Moreover, they comprise over 40 percent of all defendants in Criminal History Category I.¹³

We point out that the Commission has chosen to err on the side of over-inclusiveness by using rearrest rates, rather than reconviction or reincarceration as the measure of recidivism. The Commission explains its choice is based on data quality problems.¹⁴ Given the extensive publicity and study of poor policing choices, and new information on the unreliability of everything from bite mark to eyewitness identification, we think that rearrest is a poor measure of recidivism. As the Commission’s most recent report on recidivism points out “[m]any rearrests do not ultimately result in reconviction or reincarceration. . . .”¹⁵ Among the reasons for not convicting those who are rearrested is that there was insufficient evidence supporting the arrest.¹⁶ The report nonetheless goes on to assume, uncritically, that rearrest is an accurate measure of recidivism, without supporting the assumption. “To the extent that the rearrest event is an accurate indicator of relapse into criminal behavior, excluding events due to non-conviction or non-incarceration will result in underestimation of recidivism.”¹⁷ Of course, one does not know if rearrest events are accurate indicators. They are certainly not used in the criminal history

⁸ U. S. Sentencing Comm’n, *Recidivism and the “First Offender”* 3 (May 2004) (“*Recidivism and the First Offender*”) (citing U.S. Sentencing Comm’n, *Criminal History Working Group Report: Category 0, Category VII, Career Offender* (1991)).

⁹ *Recidivism and the First Offender* at 3.

¹⁰ *Id.* at 4.

¹¹ U.S. Sentencing Comm’n, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* 9 (March 2017) (“*The Past Predicts the Future*”).

¹² *Id.* at 8.

¹³ U.S. Sentencing Comm’n, *Recidivism Among Federal Offenders: A Comprehensive Overview* 10 and Fig. 2 (March 2016)(*Recidivism Among Federal Offenders*).

¹⁴ *Id.* at 2.

¹⁵ *The Past Predicts the Future* at 3.

¹⁶ *Id.*

¹⁷ *Id.*

calculations that the Commission otherwise relies on to assess criminal history scores and predict recidivism, unless of course they result in conviction.

In defining first offenders, the Commission should include those without countable criminal history points, regardless of prior convictions. While the Commission did not include a breakdown in its most recent recidivism report, an earlier report found that 29.8 percent of citizen offenders with zero criminal history points had no arrests, 8.4 percent had no convictions and only 1.5 percent had § 4A1.2(c)(2) non-countable convictions.¹⁸ The Commission considered such “never count” minor offenses as not altering one’s first offender status as their presence did not alter predictions.¹⁹

While first offenders with non-countable priors had higher rearrest rates, their most serious charges were public order offenses, which they shared with the no-prior-contact first offenders.²⁰ The two groups of first offenders also had similar median times to rearrest.²¹

One incarcerated FAMM member with non-countable priors was convicted of wire fraud and identity theft for filing tax returns using the names of others. He had two prior non-countable convictions: one for driving with a suspended license and the other for driving under the influence of alcohol. One was a non-countable offense under §4A1.2(c) and the other was not counted because it was time barred, being nearly 25 years old at the time of sentencing. His instant offenses, while serious, were unconnected to these insignificant priors. It is difficult to distinguish him as less deserving of relief than other first offenders. He was the loving father of eight children who had worked 18 years in the trades. When he found himself out of work options after relocating his family, he filed for bankruptcy. After falling into further debt, he and a friend hit upon a scheme to falsify tax returns using others’ social security numbers. When caught, he admitted to his conduct and pled promptly. He was subject to a variety of cumulative enhancements under the fraud guideline that ensured he received a significant prison term, even taking into account adjustments and reductions. His conduct was serious but we can see nothing to distinguish him from other first offenders with no prior conduct whatsoever and we can see no reason why his extremely old and relatively minor priors should bar him from first offender status.

Another concern we have with a proposal that would provide relief only to first offenders with no convictions whatsoever is that it might give rise to demographic disparities in awarding the adjustment. Take, for example, the issue of non-countable petty and misdemeanor offenses. A number of studies have focused on the disparate impact on racial minorities of policing and prosecution choices. In one 2014 report by the Vera Institute of Justice, race was found to play a significant role at every stage of the criminal prosecutions.²² The study examined 222,542

¹⁸ *Recidivism and the First Offender* at 5.

¹⁹ *Id.* at 5, n. 14.

²⁰ *The Past Predicts the Future* at 9.

²¹ *Id.*

²² Besiki Luka Kutateladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County*, Vera Institute of Justice (Jan. 31, 2014) (*Prosecution and Racial Justice*), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf>.

prosecutions in New York City, including all misdemeanor prosecutions.²³ The study examined the demographic picture with respect to charging for a number of felony and misdemeanor offenses. Relevant to non-countable convictions for guideline purposes, blacks and Latinos made up fully 84.3 percent of persons charged with gambling misdemeanors; 53.2 percent of those charged with prostitution; and 77.9 percent of those charged with offenses against public order.²⁴

The study found that blacks and Latinos were more likely than whites to be incarcerated post-arraignment for misdemeanors or unable to make bail.²⁵ Defendants with prior misdemeanors that are not counted under § 4A1.2(c)(1) might very well have been affected by pre-trial detention. Jail detention statistics reveal racial disparity. “Nationally, African Americans are jailed at almost four times the rate of white Americans.”²⁶ Once jailed, those charged with crimes, plead guilty in 97 percent of cases. “[M]uch of the decision making powers in disposition remains with prosecutor, who can leverage the initial charge decision and the amount of money bail requested to bring a case more quickly to a close with a plea deal. Particularly for defendants on low-level charges – who have been detained pretrial due to an inability to pay bail, a lack of pretrial diversion options, or an inability to qualify for those options that are available – a guilty plea may, paradoxically, be the fastest way to get out of jail.”²⁷

One researcher found, also in New York, that while blacks and Hispanics comprised 51 percent of the population, they made up fully 82.4 percent of all misdemeanor arrestees.²⁸ The high percentages of “quality of life” misdemeanor arrests . . . that occur in heavily minority or poor neighborhoods are . . . cause for great concern. . . .”²⁹

We suspect, in light of these and other studies, that racial differences and disparity might be evident with respect to non-countable prior convictions under § 4A1.2(c). The Commission should be able to determine from its own first offender research whether defendants of color would be adversely affected by the proposed exclusion. Before adopting the proposed exclusion, the Commission should examine the matter.

We also urge that defendants with convictions from foreign, military and tribal courts should not be excluded from first offender consideration. There are inherent concerns about these convictions that led the Commission to exclude them from criminal history consideration entirely. For example, the Indian Civil Rights Act, 25 U.S.C. § 1301(2), which provides for certain procedures in tribal courts, nonetheless does not require that defendants in those courts be

²³ *Id.* at v.

²⁴ *Prosecution and Racial Justice* at 50. (Those listed offenses were the only ones tracked that resembled non-countable offenses in § 4A1.2(c)).

²⁵ *Prosecution and Racial Justice* at 94-96.

²⁶ Ram Subramanian, Ruth Delaney et al., *Incarceration’s Front Door: the Misuse of Jails in America* 11, Vera Institute of Justice (Feb. 2015) available at <http://archive.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf>.

²⁷ *Id.* at 38.

²⁸ Jamie Fellner, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* 48, HUMAN RIGHTS WATCH (Dec. 2010).

²⁹ *Id.* at 47-48.

afforded certain constitutional protections.³⁰ Above all, it does not provide tribal court defendants the right to appointed counsel. Uncounseled convictions are suspect, not just from a due process perspective, but substantively as well. According to the Commission's Tribal Issues Advisory Group, many tribal courts have court officers who lack a law degree or formal training and/or are politically appointed, raising concerns about impartiality.³¹ These features led the TIAG to recommend the Commission continue its ban on counting tribal court convictions under USSG § 4A1.2.³²

The same concerns that led the Commission to exclude such convictions from counting toward criminal history should inform the first offender decision. In any event, if a conviction from one of the currently uncounted courts does trigger a first offender reduction, an upward variance or departure could be used if the court found the criminal history was underrepresented.

The Commission also asked if the proposed reduction should be limited by offense level. We urge the adjustment not be limited by offense level. First offenders populate the entire sentencing table from top to bottom. There are roughly twice as many first offenders at offense level 16 and above than at level 15 and below. Of the first offenders analyzed by the Commission, only 4,550 triggered final offense levels of 15 or lower; more than twice as many were found at offense level 16 and above and the 4,710 drug offenders in the second category accounted for the majority of the difference in numbers.³³ Drug offenders, who face some of the longest sentences in the guidelines, are especially well represented. Drug offenders make up the largest concentration of first offenders and they are concentrated at offense level 16 and higher. They are followed, at a distance, by offenders sentenced under § 2B1.1.³⁴ Almost half of all drug traffickers are in Criminal History Category I.³⁵

We know that drug offenders are assigned guideline levels based on drug quantity, a measure of blameworthiness that has come under a great deal of scrutiny and criticism, including from the Commission itself, which recognized in 2011 that drug quantity is only one of many important factors in establishing an appropriate sentence for drug offender.³⁶ The Commission knows very well that drug quantity overwhelms other important considerations, overstating culpability in many cases. Its work to reduce that reliance has been laudable, most recently with respect to drugs minus two. Nonetheless, it is the quantity of drugs rather than the first offender status that continues to drive these sentences.

If the Commission wishes to recognize and adjust for first offender status, it should not categorically limit the adjustment based on offense level, given how large a part simplistic

³⁰ U.S. Sentencing Comm'n, Tribal Issues Advisory Group, *Report of the Tribal Issues Advisory Group* 10 (May 16, 2016).

³¹ *Id.* at 11.

³² *Id.* at 12.

³³ U.S. Sentencing Comm'n, *Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment* (Public Data Presentation) (December 2016), Slide 15.

³⁴ *Id.*

³⁵ U.S. Sentencing Comm'n, *Quick Facts: Drug Trafficking Offenses* (May 2016).

³⁶ U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 350-351 (2011).

metrics such as drug quantity or, in the economic crime arena, loss, have in determining final offense levels. Moreover, in its most recent study on recidivism, the Commission concluded, “[t]here is not a strong correspondence between final offense level and recidivism.”³⁷

It is not uncommon to see first offenders with extremely high base offense levels drawn from relevant conduct quantity or loss assessments. Ms. L. L. had no prior offenses when she became dependent on methamphetamine. She was in a tragically typical downward spiral when she fell in love with her meth supplier. She was arrested with him when she drove him to what turned out to be a drug sale. The purchaser was a confidential informant. Her car was searched and drugs and a gun were found. More drugs were found in her home and despite her boyfriend’s assertion that she was not involved, Lisa was charged with all the drugs attributed to him and his supplier. She was sentenced to a whopping 151 months, more time than the dealer who supplied the drugs to her boyfriend, later reduced to 121 months by drugs minus two. A first offender reduction of two levels would result in a sentence of 97 months.

Ms. C.R. was in the grips of a severe gambling addiction when she began embezzling money from the credit union that employed her. She would deduct funds from credit union member accounts and then reimburse, as it were, those members, from the credit union’s corporate account. While individual depositors were not harmed by her conduct, the credit union sustained a significant shortfall. When confronted, she admitted her conduct and cooperated in the investigation of her conduct. She was ordered to pay restitution to cover the funds she withdrew and sentenced to a 78-month term of incarceration. She is a mother, grandmother and great grandmother who at 69 years old suffers from significant health problems, including macular degeneration. She is receiving no mental health treatment for her addiction. She reports that she did all she could to help in her own prosecution and writes “I am a sick person that got caught up in the stress and lies and nightmares.” She is a true first offender with a final offense level of 27 driven primarily by loss of between \$1 million and \$2.5 million and enhanced for sophisticated means, and jeopardizing the soundness of a financial institution.

It is precisely because sentences driven higher by relevant conduct and multiple enhancements can be very long that the adjustment to reflect first offender status should be at its most generous in the higher offense levels. At a minimum, the Commission should provide for a two-level reduction for *all* first offenders.

b. First Offender and Non-Incarceration Presumption

Once having defined first offender, the Commission will consider whether to include a presumption of non-incarceration first offenders who fall within Zones A and B – and expand Zone B to include existing Zone C.

FAMM supports the proposal to the extent that it furthers congressional intent as expressed in 28 U.S.C. § 994(j). That statute directed the Commission to “insure the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in

³⁷ *Recidivism Among Federal Offenders* at 20.

which the offender has not been convicted of a crime of violence or other serious offense.” (Emphasis added). The proposal asks whether the Commission should, in addition to limiting the relief to defendants with non-violent crimes as directed by the statute, also exclude prisoners who were found to have credibly threatened or used violence or possessed a firearm in connection with the offense.

The proposed exclusions should not be adopted. They go beyond anything contemplated by Congress and would bar objectively non-violent prisoners, such as those whose personal conduct did not involve any hint of violence or weapon possession, from the presumption.

Take, for example, the firearm enhancement under § 2D1.1(b)(1). The relevant conduct rule directs judges to assess a gun bump in the case of a firearm possessed by another within the scope and in furtherance of the conspiracy and reasonably foreseeable to the defendant.³⁸ First offenders assessed a gun bump due to the conduct of others or whose weapon possession was so de minimus that it did not result in a conviction, should not be barred from a first offender adjustment.

The Commission’s 2004 first offenders’ report revealed that the vast majority of first offenders (87.1 percent) had no violence or weapon enhancements.³⁹ Moreover, limiting the relief to Zones A and B, even if the latter is combined with Zone C, means that the number of defendants who present with such low final offense levels – ones that include the enhancement for firearm or violence – will be quite small.

FAMM also opposes excluding so-called “white collar” offenses from those eligible for other than incarceration sentences under amended § 5C1.1. That exclusion would fly in the face of the statutory directive to ensure that first offenders convicted of other than a crime of violence be considered under a guideline that would impose a sentence other than incarceration. Of the 6,986 offenders sentenced under § 2B1.1 in 2016, the majority – 70.1 percent -- were located in Criminal History Category I,⁴⁰ which is itself composed primarily of first offenders.⁴¹ More than two-thirds of economic crime offenders, 70.1 percent, were sentenced to prison terms.⁴² The same recidivism rates for defendants with prior convictions for fraud offenses are very low, well under the average for all offenders.⁴³

Because the guidelines assess relevant conduct to include conduct not directly engaged in by the defendant, many otherwise deserving defendants would be excluded from this relief, notwithstanding congressional intent that they receive non-incarceration sentences. We can see no reason to exclude such defendants and doing so was not contemplated by Congress.

³⁸ U.S.S.G. § 1B1.3(a)(1)(B).

³⁹ *Recidivism and the First Offender* at 24, Ex. 4.

⁴⁰ U.S. Sentencing Commission, *Quick Facts: Theft, Property Destruction, and Fraud Offenses* (Aug. 2017) (“*Quick Facts*”).

⁴¹ *Public Data Presentation* at 7.

⁴² *Quick Facts*.

⁴³ *Recidivism Among Federal Offenders* at 10, fig. 2. In 2004, the Commission found the overall recidivism rate for fraud and larceny offenders was 18 percent. See U.S. Sentencing Comm’n, *Measuring Recidivism: The Criminal History Computations of the Federal Sentencing Guidelines* 30, Exhibit 11 (May 2004).

c. Retroactivity

FAMM encourages the Commission to study retroactivity of the first offender amendments should they be adopted. We believe they fit the criteria for retroactivity. First offenders who might benefit from retroactivity would nonetheless face important hurdles. The court considering retroactivity will need to determine that early release will not impair public safety and will consider a variety of factors including the offense conduct and the prisoner's behavior while incarcerated.⁴⁴ The reductions will of course be limited to that authorized by the Commission to one, or hopefully two, levels.

The Commission considers the purpose of the amendment, the magnitude of the change, and the difficulty of applying the change when making an amendment retroactive. To the extent we have information; all of these considerations weigh heavily in favor of retroactivity.

As discussed above, recognizing first offenders is long overdue and that more than justifies retroactivity for those prisoners whose sentences should have been adjusted had the Commission acted earlier on the matter. The proposals are welcome, even more so because overdue. Prisoners should benefit for the same reason that defendants will.

While the Commission has not indicated how many prisoners would be affected by the first offender adjustment and is considering alternative approaches, there is no question of the magnitude of the adjustment. According to the Commission's 2016 released figures, 44.3 percent of the criminal history sample of the 2014-sentenced population was first offenders.⁴⁵ Of those, 60.3 percent had no prior convictions and an additional 21.8 percent had non-countable prior convictions.⁴⁶ In 2014, 75,836 defendants were sentenced.⁴⁷ If the statistics hold, then over 20,000 prisoners could be eligible first time offenders from 2014 alone, minus prisoners whose sentences were short enough that they have already been released or were never subject to incarceration in the first place.

At least as to the one- or two-level adjustment, assessing magnitude will be enhanced by an impact study from the Commission that could provide numbers of eligible prisoners, sentence length, and expected reductions. However, it is safe to say that given the large number of first offenders, the impact of retroactivity on the prison population would be significant, saving bed spaces and tax dollars.

While those on the front lines of the system – prosecutors, judges, probation officers and federal defenders – bear the brunt of implementing retroactivity, we think it is safe to say that it could be done with relative ease. Three significant reductions have taken place, with Commission leadership, starting in 2008. The resources developed over those years include

⁴⁴ U.S.S.G. § 1B1.10, App. Note 2 requires the judge to “consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the . . . term of imprisonment.”

⁴⁵ *Public Data Presentation* at 6.

⁴⁶ *Id.* at 7.

⁴⁷ U.S. Sentencing Comm'n, *2014 Sourcebook of Federal Sentencing Statistics*, Introduction.

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knowledge, good will, and experience in handling reductions. That collaborative framework will be readily available to the parties handling first offender retroactivity.

Applying a one- or two-level reduction should be quite straightforward. Using Presentence Investigation Reports, the parties can determine easily who has qualifying zero points. Motions similar to those fashioned in the last three rounds could be used.

Of course the Commission can help answer whether these considerations are met by providing a retroactivity impact report. We ask that it vote to study retroactivity at the same time it votes for the amendment, should it do so.

1. Conclusion

Thank you for considering our views. We look forward to working with the Commission this year.

Sincerely,



Kevin A. Ring
President



Mary Price
General Counsel