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CAUTIONclick

National Campaign for Reform

July30th., 2018

Honorable William H. Pryor
Re; Public Affairs priorities comment

Our organization. Caution Click National Campaign for Reform (CCNCR) is a national grassroots advocacy organization dedicated to promoting public safety by working toward evidence-based policy reform of the federal sentencing guidelines and management practices for those persons charged with child pornography possession, and whose charges do not include any production, hands-on offending, or who have no previous offenses, respectfully requests that the following be included or added as necessary to the tentative list of 2019 USSC Priorities:

1) **Make supervised release a maximum of five years for the population described above to avoid sentences of excessive or lifetime supervised release.**

Currently, 18 U.S.C. §3583(k) requires a five-year minimum mandatory of supervised release for those convicted of sex offenses. Under Section 5D1.2 of the United States Sentencing Guidelines, the United States Sentencing Commission has issued a policy statement recommending the imposition of the statutory maximum term of supervised release for all sex offenders. "The statute, however, provides for a range of five years to a lifetime term of supervision. Therefore, Congress clearly contemplated that there would be instances where less than the maximum would be reasonable." United States v. Fraga, 704 F.3d 432, 441-42 (5th Cir. 2013). The empirical research demonstrates that the non-contact child pornography offender with no prior criminal history is a low risk to reoffend and thus should be sentenced to the statutory minimum of supervised release. A report[1] released by the United States Sentencing Commission to Congress on February 27, 2013, echoes the prevailing finding in scientific research in this area and reiterates that research has not established that viewing child pornography causes the typical offender to progress to other sex offending against minors. The recidivism studies in U.S.S.C.'s report conclude that 7.4% of non-production child pornography offenders committed a new sex offense, and only 3.6% committed a new contact sex

[1] Eke, A., Seto, M., & Williams, J. (2011). Examining the criminal history and future offending of child pornography offenders: An extended prospective follow-up study. Law and Human Behavior, 35, 466-478.

offense. (See, pp. 299-303). Thus, the U.S.S.C.'s own investigation has effectively dispelled the myth that child pornography possession is the gateway to hands-on sexual offending against minors. (See, Executive Summary).

In addition, we recommend early termination of supervised release under 18 U.S.C. § 3583(1) as appropriate prior to the expiration of the five-year statutory minimum and especially for those who are currently serving beyond the five-year statutory minimum due to having been given lifetime supervised release. See, United States V. Spinelle, 41 F.3d 1056, , 1060 (6th Cir. 1994) ("Seen as two separate chronological phases, the statute mandating a specific sentence of supervised release and the statute authorizing the termination of a prior imposed sentence are quite consistent...neither statute prohibits the other from working."); see also, United States v. King, F.Supp. 2d 1298, 1300-01 (D. Utah 2008) (adopting the reasoning in Spinelle); United States v. Zarn, No. CR 08-73-GF-BMM (D. Mont. Jan. 19, 2017) (child pornography offender granted early termination of supervised release after 54 months); United States v. Wanberg, No. CR 11-32-M-DWM (D. Mont. Nov. 7, 2017) (child pornography offender granted early termination of supervised release after 53 months).

"Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration." See, United States v. Johnson, 529 U.S. 53, 59 (2000).

The general criteria used by U.S. Probation to determine a suitable candidate for early termination of supervised release are outlined in the Guide to Judiciary Policy, Vol. 8, Part E § 380.10(b). The criteria reads as follows:

1. Stable community reintegration (residence, family, employment)
2. Progressive strides toward supervision objectives and in compliance with all conditions of supervision.
3. No aggravated role in the offense of conviction.
4. No history of violence (sexually assaultive, predatory behavior or domestic violence).
5. No recent arrests or convictions or ongoing patterns of criminal conduct.
6. No recent evidence of drug or alcohol abuse.
7. No recent psychiatric episodes.
8. No identifiable risk to the safety of any identifiable victim.
9. No identifiable risk to public safety based on the risk prediction index.

To further support early termination of supervised release, the most recent studies on risk research indicates low risk offenders require little if any intervention, as the public safety risk to reoffend is so low. Typically, this categorical group of offenders falls into the very low to low risk group. "Offenders who are classified as low risk pose no more risk of recidivism than do individuals who have never been arrested for a sex-related offense but have been arrested for some other crime See ¶ 13."[2] Hanson's work also recommends that" rather than considering all sexual offenders as continuous, lifelong

[2] U.S. District Court Middle District of Alabama, Doe#1 v. Luther Strange et al. Declaration of R. Karl Hanson

threats, society will be better served when legislation and policies consider the cost benefit break point after which resources spent tracking and supervising low-risk sexual offenders are better redirected toward the management of high-risk sexual offenders, crime prevention, and victim services."

2. In direct connection with item #3 in the USSC proposed priorities for Amendment Cycle, the issue of 'crime of violence' needs to be further defined:
CCNCR requests that the Commission exclude 18 U.S.C. § 2252(a) from the "crime of violence" definition under U.S.S.G. § 4B1.2. The United States Supreme Court defines "crime of violence" within the United States Code as violent force capable of causing physical pain or injury to another person. See, Leocal v. Ashcroft, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (interpreting "crime of violence" definition in 18 U.S.C. § 16); Johnson v. United States, 130 S.Ct. 1265, 1271 (2010) (interpreting "crime of violence" definition in 18 U.S.C. § 924(c)(3)). Contrary to these decisions, 18 U.S.C. § 3156(a)(4)(C) includes any felony under chapter 110 as a "crime of violence" even though the required elements of violent physical force are not present within the plain statutory language of 18 U.S.C. § 2252(a).

To further complicate matters, the Commission's definition of "crime of violence" provides enumerated offenses which includes "forcible sex offenses". In 2016, the Commission amended the definition of "forcible sex offense" as an offense with an element where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The Commission commented that this definition is consistent with U.S.S.G. § 2L1.2, and that certain forcible sex offenses which do not expressly include as an element the use, attempted use, or threatened use of physical force against the person of another should nevertheless constitute "crimes of violence" under § 4B1.2. However, for the purposes of U.S.S.G. §2L1.2(b)(1), the terms "child pornography offense" and "crime of violence" are separately and exclusively defined. See, Commentary Application Note 1(B)(ii),(iii). This suggests that a violation under 18 U.S.C. § 2252(a) is neither a "forcible sex offense" nor a "crime of violence". To avoid the inconsistencies within the United States Code and the United States Sentencing Guidelines, we request that the Sentencing Commission consider amending its § 4B1.2 Commentary to specifically exclude 18 U.S.C. 2252(a) from the "crime of violence" definition. CCNCR respectfully asserts that this change is appropriate and consistent with the Supreme Court's decisions.

3. Ensure that required treatment programs currently assigned by probation, meet the standard as outlined by the Association of Sexual Abusers (ATSA) www.atsa.com/atsa-pratice-guidelines.
"The ATSA Practice Guidelines are offered to ATSA members to assist them in performing their professional duties to help client's lead satisfying and law-abiding lives and contribute to community safety. The guidelines will help practitioners protect their clients and the public against unethical, incompetent or unprofessional practices." In the event that concerns arise in the quality and appropriateness of treatment, CCNCR recommends that a non-punitive mediation process be implemented in order to accomplish the goal of public safety and successful reentry of those receiving treatment.

Currently the completion of treatment is not based on success in the program but only on the completion of time on supervised release.

Respectfully,

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