

To: United States Sentencing Commission

From: Judith Jennings, Ph.D.

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Subject: Public Comment on Proposed Priorities for Amendment Cycle

Concerning study of the operation of 5H1.6 (Family Ties and Responsibilities (Policy Statement)) with respect to the loss of caretaking or financial support of minors

Date submitted: August 9, 2018

1) Statement of issue: In *Family Matters: The Role of Family Ties and Responsibilities in Sentencing*, *Stanford Journal of Criminal Law and Policy* (2015), Tali Yohalom Leinwand notes that the dynamic of restricted sentencing discretion changed in the aftermath of *United States v. Booker*. In *Booker*, the Supreme Court untied judges' hands by rendering the Guidelines effectively advisory, thereby facilitating judicial consideration of family circumstances when determining sentence length. While *Booker* freed judges to consider family-related factors more broadly, it simultaneously left them without any guidance on how to integrate such consideration into sentencing decisions.

A one-size-fits-all solution is impossible. However, a one-size-fits-many framework that maintains judicial flexibility would be preferable to the ad hoc approach to family-based sentence adjustments that has dominated sentencing law. Though objective factors are properly the main focus of sentencing, the subjective factor of the family is impossible to ignore. We must provide judges with effective tools to assess this factor consistently in service to sentencing uniformity and the overarching goals of punishment.

2) Brief review of research concerning parental incarceration and children's health:

The Special Project in collaboration with the Metro Louisville (KY) Center for Health Equity has recently concluded a Health Impact Assessment of parental incarceration and children's health. The research was supported by a grant from the Health Impact Project, a collaboration of the Robert Wood Johnson Foundation and The Pew Charitable Trusts, with funding from the Kresge Foundation.

The Centers for Disease Control and Prevention identify having an incarcerated parent as an Adverse Childhood Experience (ACE). Kentucky has the second highest rate in the nation of children who have experienced parental incarceration. Dr. Carolyn Browne, an expert in early childhood development, states that Adverse Childhood Experiences can have a powerful, inverse correlation to adult health status. As the Robert Wood Johnson Foundation further explains, ACEs are traumatic childhood events, which if continued unmitigated, can derail healthy brain development. If the health stresses associated with ACEs are prolonged and continue without remediation, they can rise to the level of toxic stress (Center on the Developing Child, Harvard University 2017).

Data shows that local Louisville patterns of incarceration mirror national trends of race and gender disparities. People of color, especially Black males, represent a disproportionate share of the Louisville Metro Department of Corrections incarcerated population (LMDC Fact Sheet, 2017). The overrepresentation of incarcerated Black males in turn creates racial disparity for Black children, who comprise the majority of children affected by

parental incarceration. In addition to this racial disparity, LMDC struggles with overcrowding in its facility, which can negatively affect the health of incarcerated parents and adversely impact their relationship with their children.

Having an incarcerated parent often disproportionately burdens younger children of color living in poverty (Schwartz-Soicher, Geller & Garfinkel, 2011). These traits, considered in the context of racism and disparities in root cause distribution make this population more vulnerable to parental incarceration. Furthermore, imprisonment of the head of household can lead to children suffering both from their parental absence as well as from financial instability (The Sentencing Project Fact Sheet: Trends in U.S. Corrections, 2017)

3) Why the Commission should make this issue a priority:

As Leinwand points out in his published note cited above, what is most needed now is a consistent and factually based tool that judges can use to take families ties and responsibilities into consideration. The New York state-based Osborne Association has developed the Family Responsibility Statement as a prototype of such a tool that can be used by judges as well as probation and parole officers.

<http://www.countyhealthrankings.org/new-york-initiative-children-incarcerated-parents>

The Urban Institute has developed a tool kit for local jurisdictions to develop and use the Family Responsibility Statement. The original name, Family Impact Statement, was changed to Family Responsibility Statement because of initial confusion with Victim Impact Statements.

<https://www.urban.org/sites/default/files/publication/53651/2000253-Toolkit-for-Developing-Family-Impact-Statements.pdf>

The primary recommendation of the recently completed Health Impact Assessment of parental incarceration and children's health in Louisville is to use the Toolkit created by the Urban Institute and the National Institute of Corrections to develop and implement a Family Responsibility Statement and conduct a pilot program in Jefferson County (KY) District Courts that makes sense in terms of improving children's health, public safety, efficiency, costs, and effectiveness.

Metrics of success for the pilot project include:

1. Maintaining public safety, decreasing jail overcrowding, and tracking recidivism rates of parents.
2. Families are strengthened as measured by pre- and post-participation in the Parents Assessment of Protective Factors Instrument developed by the national Center for the Study of Social Policy.
3. District-level judicial case loads and overcrowding at Louisville Metro Department of Corrections are reduced.
4. Indicators of the health benefits of using the Family Responsibility Statement are developed and tested in neighborhoods in zip codes most affected by parental incarceration.

Successful completion of this pilot project will provide a consistent measurable tool necessary for district court judges to consider family ties and responsibilities in sentencing in 2019.