

August 10, 2018

The Honorable Judge William H. Pryor, Jr.  
Chair  
United States Sentencing Commission  
Office of Public Affairs  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, DC, 20002-8002

**Re: Public Comment on Commission's Proposed Priorities for 2018-2019 Amendment Cycle  
(Document Citation: 83 FR 30477)**

Dear Judge Pryor:

On behalf of the undersigned coalition of civil rights, criminal justice reform, and human rights groups, we write to provide comments on the Sentencing Commission's Proposed Priorities for 2018-2019 Amendment Cycle published in the Federal Register on June 28, 2018.<sup>1</sup>

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 will address Priority #1, Priority #2, Priority #3, Priority #4, Priority #5, Priority #7, and Priority #9 in detail.<sup>2</sup>

**I. Priority #1: Simplifying Sentencing Guidelines while Reducing Sentencing Disparities and Accounting for Defendant's Role, Culpability, and Relevant Conduct**

Promoting proportionality is a vital consideration in light of the current state of affairs in the criminal legal system. As has been widely recognized, people of color experience discrimination at every stage of the justice system. Disparate treatment is particularly acute in drug law enforcement, which helps explain why nearly 80 percent of those in federal prison and 60 percent of those in state prisons for drug offenses are either black or Latino.<sup>3</sup> These stark incarceration outcomes persist despite findings that people of all

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<sup>1</sup> Proposed Priorities for Amendment Cycle, 83 FR 30477 (proposed June 28, 2018).

<https://www.federalregister.gov/documents/2018/06/28/2018-13937/proposed-priorities-for-amendment-cycle>

<sup>2</sup> *Id.*

<sup>3</sup> "The Drug War, Mass Incarceration and Race." Drug Policy Alliance. January 2018. Accessed July 19, 2018. <http://www.drugpolicy.org/resource/drug-war-mass-incarceration-and-race-englishspanish>.

racial and ethnic backgrounds engage in illicit drug activities at similar rates.<sup>4</sup> The drug war and its associated policies have been a key driver of the disproportionality and sentencing disparities that have become characteristic of the current criminal legal system. Consideration of how drug policy alterations may impact proportionality and sentencing disparities is an essential tool in addressing the inequity of the current criminal legal system.

Further, 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. In the interest of increasing judicial discretion, we recommend that the Commission remove all references to "relevant conduct" in the standards for acceptance of responsibility in the Application Notes to §3E1.1.

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."<sup>5</sup> The Commission should eliminate the impact of non-convicted, relevant conduct from the accepting responsibility reduction in the sentencing phase entirely.

The Application Notes to §3E1.1 recognize that incentivizing the acceptance of responsibility serves "legitimate societal interests."<sup>6</sup> 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.<sup>7</sup> Avoiding trial costs and time is one of the principal purposes of this guideline, and accordingly, §3E1.1 should only require consideration of factors germane to this purpose.

We 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.<sup>8</sup> 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."<sup>9</sup> For example, uncorroborated hearsay is inadmissible at trial, but hearsay that meets the standards of §6A1.3 is

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<sup>4</sup> Johnston, L. D., O'Malley, P. M., Bachman, J. G., & Schulenberg, J. E. (2012). *Monitoring the Future: National Survey Results on Drug Use, 1975- 2012*. Ann Arbor, MI: The University of Michigan Institute for Social Research. Available at: [http://www.monitoringthefuture.org/pubs/monographs/mtf-vol1\\_2012.pdf](http://www.monitoringthefuture.org/pubs/monographs/mtf-vol1_2012.pdf) (Tbls. 4-5, 4-6, and 4-7); Beckett, K., Nyrop, K., & Pflingst, L. (2006). *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*. *Criminology*, 44(1), 105–37 (pp. 16–7); Riley, K. J. (1997). *Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six Major U.S. Cities*. National Institute of Justice. Available at: <https://www.ncjrs.gov/pdffiles/167265.pdf> (pp. 15–16).

<sup>5</sup> Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1325 (2005)].

<sup>6</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. background (U.S. SENTENCING COMM'N 2016).

<sup>7</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 n.6 (U.S. SENTENCING COMM'N 2016).

<sup>8</sup> U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 (U.S. SENTENCING COMM'N 2016).

<sup>9</sup> *Id.*

admissible during the sentencing phase.<sup>10</sup> In this context, determining what challenges to relevant conduct constitute “false denials” or “frivolous” arguments is hardly a simple task.

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).<sup>11</sup> Although a defendant is not obligated to truthfully admit to relevant conduct, we are concerned that this is still a factor for consideration. Suggesting to defendants that they admit to conduct for which they were 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.

## II. Priority #2: Synthetic Drug Offenses and Organizational Defendants

We share the Commission’s concerns about the public health harms stemming from synthetic drugs and also share a sense of urgency that something needs to be done to address the opioid crisis. However, we would strongly caution the Commission from resorting to an approach that increases criminal penalties or is class-based. The solution to the current opioid crisis must prioritize public health approaches, including drug abuse education, and comprehensive treatment programs, which have proven to successfully reduce drug use, drug crime, and recidivism rates.

Enhanced penalties for people who use or sell synthetic drugs would further exacerbate overcrowding in federal prisons, divert limited Department of Justice resources to the Bureau of Prisons, and expand the net of people and communities burdened by excessive drug sentencing policies. Studies show that people of color are far more likely to be arrested for selling or possessing drugs and are often more likely to face mandatory-minimum sentences than whites facing similar charges.<sup>12</sup> Increasing the severity of punishment for drug offenses will only exacerbate such disparities.

Moreover, as criminologists and many policymakers have documented, ratcheting up already tough sentences for people with drug convictions will produce little public safety benefit while carrying heavy fiscal, social, and human costs. Many people entering the criminal justice system are in the lower- and middle-levels of a drug operation. Incarcerating these individuals often results in their being replaced by other sellers willing to fill their roles and does nothing to address the substance use disorders that users, and many sellers themselves, struggle with. Increasing already severe prison terms has a limited deterrent effect because most people do not expect to be apprehended for a crime, are not familiar with relevant

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<sup>10</sup> See Ricardo J. Bascuas, *The American Inquisition: Sentencing after the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 33 n.207 (2010).

<sup>11</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM’N 2016).

<sup>12</sup> See “Testimony of March Mauer, Executive Director of The Sentencing Project before Hearing on Unfairness in Federal Cocaine Sentencing: Is it time to Crack the 100 to 1 Disparity?” *The Sentencing Project*, May 21, 2009, <http://www.sentencingproject.org/wp-content/uploads/2016/01/House-Judiciary-Testimony-on-Federal-Cocaine-Sentencing-May-2009.pdf>; See Also Rothwell, Jonathan. “How the War on Drugs Damages Black Social Mobility.” Sept. 30, 2014. <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

legal penalties, or criminally offend with their judgment compromised by substance use or mental health problems.<sup>13</sup>

The Commission must therefore reject any strategy that would displace more families and send more people convicted of low-level drug offenses, disproportionately individuals of color, to prison for unreasonably lengthy sentences.

We are encouraged that the Commission is choosing to focus not on individuals accused of a crime, but rather on those facing organization charges. Today, most individuals sentenced for federal fentanyl offenses are low-level sellers,<sup>14</sup> not the large-scale distributors whose product could potentially reach thousands of people. In many instances, individual sellers do not know they are selling fentanyl, as it has been added to the heroin supply up the distribution chain,<sup>15</sup> a fact that is reflected in the Commission's own data showing only 15.7 percent of people sentenced for fentanyl drug trafficking offenses in FY 2016 clearly knew they had fentanyl.<sup>16</sup> Even when people do know they are selling or possessing fentanyl, they usually do not know its strength or potency since it varies from analogue to analogue, and because it is often mixed with other drugs or cutting agents. We believe that increasing penalties on people who are unaware that they are selling a product that carries the unique risks the Commission is concerned with ignores criminal culpability. Moreover, such an approach would have no deterrent or punitive effect on many drug sellers unaware of the presence of fentanyl or its analogues in the drug supply.

However, much of the governmental response thus far has indicated a regression back to drug war-era approaches to a public health issue. For example, Attorney General Jeff Sessions employed emergency scheduling powers to schedule fentanyl analogues, making it easier to prosecute cases relating to these substances.<sup>17</sup> In turn, drug manufacturers respond to the scheduling of substances by creating more analogues in order to avoid the prosecution that is associated with the original substance, in this case, fentanyl. This is just one current example of how further criminalization and harsher penalties for drug offenses are not effective and often exacerbate a public health crisis. Thus, we encourage the Commission, in considering amendments to Chapter Eight, to keep in mind the destructive and ineffective nature of expanding punishments for drug violations and making a criminal justice issue out of a matter concerning public health.

### **III. Priority #3: “Career Offender” Sentencing Enhancements and Defining “Crime of Violence”**

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<sup>13</sup> Lynch, J., Heimer, K., Peterson, R.D., Miller, J., DeJong, C., Armstrong, G., Zhang, S.X. (2017). Statement of the American Society of Criminology Executive Board Concerning the Trump Administration's Policies Relevant to Crime and Justice. American Society of Criminology.

<sup>14</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2016) (showing that a majority of defendants sentenced for fentanyl offenses are low-level dealers; of the 51 persons convicted of a fentanyl-related offense in FY 2016, 29 served “street-level dealer” “courier/mule” and “employee/worker” functions).

<sup>15</sup> U.S. Sentencing Commission Public Hearing on Fentanyl, December 5, 2017, available at

<https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Logan.pdf>.

<sup>16</sup> U.S. Sentencing Commission, “Public Data Presentation for Synthetic Cathinones, Synthetic Cannabinoids, and Fentanyl and Fentanyl Analogues Amendments” (Jan. 2018). [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018\\_synthetic-drugs.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf)

<sup>17</sup> “Headquarters News Releases, 11/09/17.” Drug Enforcement Administration. November 9, 2017. Accessed July 19, 2018. <https://www.dea.gov/divisions/hq/2017/hq110917.shtml>.

### Recommendations Regarding “Career Offenders”

We support the Commission’s recommendation to Congress to revise the career offender directive at 28 U.S.C. § 994(h) to exclude people who have not been convicted of at least one “crime of violence.” As expressed in the Commission’s 2016 report, there are “clear and notable differences between career offenders who have committed a violent offense and those who are deemed career offenders based solely on a drug trafficking offense,” including lower recidivism rates among those without a history of violence.<sup>18</sup> 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. Removing these sentencing enhancements will create a fairer and more effective and proportional justice system going forward. 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).”<sup>19</sup> We believe this definition is appropriate and the Guidelines should be amended wherever inconsistent with this definition.

## **IV. 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 factors 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,<sup>20</sup> are automatically required by law. In fact, the number of federal mandatory sentences has doubled in the last 20 years,<sup>21</sup> and between 1980 and 2013, the federal imprisonment rate increased

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<sup>18</sup> Report to the Congress: Career Offender Sentencing Enhancements.” (U.S. SENTENCING COMM’N 2016) [https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607\\_RtC-Career-Offenders.pdf](https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf)

<sup>19</sup> U.S. SENTENCING GUIDELINES MANUAL §4b1.2 (U.S. SENTENCING COMM’N 2016).

<sup>20</sup> 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>

<sup>21</sup> See “Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System.” *United States Sentencing Commission*. Oct. 2011. <http://www.uscc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

518 percent.<sup>22</sup> Thankfully, over the last four years, the Bureau of Prisons (BOP) population has dropped by more than 30,000,<sup>23</sup> due to the Commission's own actions to reduce the Sentencing Guidelines for drug offenses, President Obama's Department of Justice Smart on Crime Initiative, and passage of the Fair Sentencing Act. In 2017, Attorney General Sessions revoked the Obama-era charging and sentencing policy at DOJ and instructed federal prosecutors to increase their reliance on mandatory minimum sentences for low-level drug convictions.<sup>24</sup> The BOP currently operates at 16 percent over its intended capacity<sup>25</sup> and DOJ's forecasts a 2 percent increase in the federal prison population.<sup>26</sup>

Mandatory minimum sentences 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 the person being sentenced. Through eliminating judicial discretion, mandatory minimums give more power to the prosecutor, as their charging decisions have more of an impact on the sentence imposed.<sup>27</sup> This is particularly concerning, as prosecutors are more likely to charge African Americans with a crime that carries a mandatory minimum than a white person, whether due to conscious bias or not.<sup>28</sup> 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.<sup>29</sup> One of the few ways to curb the federal prison population, and disparities in sentencing, is by addressing time served and increasing a judge's ability to engage in individualized sentencing.<sup>30</sup>

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."<sup>31</sup> We

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<sup>22</sup> 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>.

<sup>23</sup> See "Federal Inmate Population Declines." *Federal Bureau of Prisons*. Oct. 4, 2016. [https://www.bop.gov/resources/news/20161004\\_pop\\_decline.jsp](https://www.bop.gov/resources/news/20161004_pop_decline.jsp).

<sup>24</sup> Sessions, J. (2017). Attorney General Jeff Sessions Delivers Remarks at Sergeants Benevolent Association of New York City Award Presentation. The United States Department of Justice.

<sup>25</sup> See "Federal Inmate Population Declines." *Federal Bureau of Prisons*. Oct. 4, 2016. [https://www.bop.gov/resources/news/20161004\\_pop\\_decline.jsp](https://www.bop.gov/resources/news/20161004_pop_decline.jsp).

<sup>26</sup> Reinhard, B. (2017, June 8). Federal Prison Population Expected to Grow Under Trump. *The Wall Street Journal*.

<sup>27</sup> Starr, Sonja B., and M. Marit Rehani. "Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker." *The Yale Law Journal*. October 2013. Accessed July 19, 2018. <https://www.yalelawjournal.org/article/mandatory-sentencing-and-racial-disparity-assessing-the-role-of-prosecutors-and-the-effects-of-booker>.

<sup>28</sup> Starr, Sonja B., and M. Marit Rehani. "Racial Disparity in Federal Criminal Sentences." University of Michigan Law School Scholarship Repository. 2014. [https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.washingtonpost.com/news/wonk/wp/2017/11/16/black-men-sentenced-to-more-time-for-committing-the-exact-same-crime-as-a-white-person-study-finds/?utm\\_term=.f91d2a952ae2&httpsredir=1&article=2413&context=articles](https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.washingtonpost.com/news/wonk/wp/2017/11/16/black-men-sentenced-to-more-time-for-committing-the-exact-same-crime-as-a-white-person-study-finds/?utm_term=.f91d2a952ae2&httpsredir=1&article=2413&context=articles).

<sup>29</sup> 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](http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf)

<sup>30</sup> See, generally Federal Public Defender, Southern District of Texas, Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012.

<sup>31</sup> U.S.S.C. Report to Congress, Mandatory Minimum Penalties in the Federal Criminal Justice System, October 2011, at 345.

therefore support the following specific recommendations regarding mandatory minimums:

- Expanding the safety valve at 18 U.S.C. § 3553(f) to include people who receive two, or perhaps three, criminal history points under the guidelines.<sup>32</sup> (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.<sup>33</sup>
- 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.<sup>34</sup>
- 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 people who have not previously been convicted of an offense under § 924(c).<sup>35</sup>
- 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 a defendant will receive an excessively severe punishment.<sup>36</sup>
- Finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act’s mandatory minimum penalty.<sup>37</sup>

We 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.”<sup>38</sup> 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.”<sup>39</sup> 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

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<sup>32</sup> *Id.* at 355-56.

<sup>33</sup> *Id.* at 356.

<sup>34</sup> *Id.* at 364.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 365.

<sup>38</sup> Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, October 2011 at xxxi.

<sup>39</sup> Mandatory Minimum Penalties, October 2011 at 159-160.

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 those whose conduct does not justify serving long sentences in federal prison.

## V. Priority #5: Circumstances that Correlate with Increased or Reduced Recidivism

### 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. Because barriers to reentry and recidivism are inextricably linked, there must be a concerted effort to address both issues simultaneously.

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.<sup>40</sup> 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.<sup>41</sup> 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.

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

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<sup>40</sup> 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>.

<sup>41</sup> *Id.*



the availability of current data will assist in analyzing how best to implement reforms.

## VI. Priority #7: Criminal History Scores

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.

First, revocation sentences are not related to the severity of the underlying offense, which is what criminal history calculations are meant to reflect. 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. Even separately counting the revocation sentence could result in placing a defendant 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. Examples of technical violations include a violation of general conditions; use of drugs; absconding; and the willful nonpayment of a court imposed obligation. 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." 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.

Mass incarceration is a grave threat to the goals of liberty and equality. Revocation of parole for a violation that does not constitute a criminal, punishable offense in any established jurisdiction, under "(B) a violation of any other condition of supervision" of the Guidelines, is a contributing factor to this problem. Although available statistics do not reveal an entirely clear picture, many analysts have concluded that only about half of those whose supervision was revoked actually committed a new criminal offense.<sup>42</sup> Further, violations of parole account for close to 30 percent of all prison admissions across the nation.<sup>43</sup> Missing an appointment with a parole or probation officer, failing a urine test, or being out past curfew and other such minor violations account for at least 61,000 people nationwide

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<sup>42</sup>"When Offenders Break the Rules: Smart Responses to Parole and Probation Violations." The PEW Center on the States. November 2007.

[http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2007/%20when20offenders20break20the20rules.pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2007/%20when20offenders20break20the20rules.pdf.pdf)

<sup>43</sup>Sherburne, Morgan. "Minor Parole Violations behind High Rate of Reincarceration." University of Michigan News. October 03, 2017. Accessed July 19, 2018. <https://news.umich.edu/minor-parole-violations-behind-high-rate-of-reincarceration/>.

having their freedom taken away, and being returned to prison.<sup>44</sup> This is one of the factors that has contributed to unmanageable growth in the prison system and we would encourage that the Commission consider removing this as a factor in the sentencing guidelines.

Parole conditions also vary widely depending on the state a particular defendant is in. In Kansas, Kentucky, and Hawaii, parolees are prevented from drinking alcohol and going into bars. California has 20 basic conditions of parole including that a defendant cannot be around guns or a “thing that looks like a real gun.” 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 dual impact 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.<sup>45</sup> For instance, § 4A1.1(d) proscribes adding two additional points to an offense if an person commits an offense under “probation, parole, supervised release, imprisonment, work release or escape status.”<sup>46</sup>

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.

## VII. Priority #9: Family Ties and Responsibilities and Compassionate Release

We strongly support study of §5H1.6 (Family Ties and Responsibilities (Policy Statement)). The impact of imprisonment on family members should be a mitigating circumstance in consideration of sentencing. A report by the Ella Baker Center for Human Rights, Forward Together, and Research Action Design found that 65 percent of families with an incarcerated member were unable to meet their family’s basic needs: 49% struggled with meeting basic food needs and 48% had trouble meeting basic housing needs because of the financial costs of having an incarcerated loved one.<sup>47</sup> Due to the fact that drug laws and sentencing on a broad scale disproportionately impact individuals of color, this should be taken into consideration during sentencing as communities are devastated by incarceration of family members. One in 28 children in the United States has an incarcerated parent, while one in nine black children have a parent in a correctional facility. Of those children, those with an incarcerated parent are more likely to

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<sup>44</sup> Hager, Eli. "At Least 61,000 Nationwide Are in Prison for Minor Parole Violations." The Marshall Project. April 23, 2017. Accessed July 19, 2018. <https://www.themarshallproject.org/2017/04/23/at-least-61-000-nationwide-are-in-prison-for-minor-parole-violations>.

<sup>45</sup> See, e.g. U.S. SENTENCING GUIDELINES MANUAL §4A1.1(d) (U.S. SENTENCING COMM’N 2016).

<sup>46</sup> *Id.*

<sup>47</sup> <https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf>

experience poverty or household instability.<sup>48</sup> Revising sentencing guidelines to account for families of the incarcerated, especially considering that the current guidelines disproportionately impact families of color, is highly supported. (For more background on this issue, see Justice Strategies’ joint letter on Family Ties and Responsibilities.)

The Sentencing Reform Act of 1984 authorized the federal Bureau of Prisons (BOP) to request that a federal judge reduce an inmate’s sentence for “extraordinary and compelling” circumstances. This practice is also known as compassionate release. The request can be based on either medical or non-medical conditions that could not reasonably have been foreseen by the judge at the time of sentencing. While consistency and finality of sentences is an important goal of the criminal justice system, judicial discretion and review is equally as important to ensure the fairness of punishment and that the system continues to serve the purpose of justice. Congress recognized the importance of ensuring that justice be balanced with mercy when it created compassionate release.<sup>49</sup> It is the Commission’s responsibility to determine the definition of “extraordinary and compelling” circumstances.

We are concerned that the definition the Commission established for “extraordinary and compelling” circumstances in § 1B1.13 is not effectively encouraging the Director of the BOP to file a motion for compassionate release when “extraordinary and compelling reasons” exist.” In 2013, the Department of Justice Office of the Inspector General (IG) issued a report on the BOP’s compassionate release program, which found “that the existing BOP compassionate release program has been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and terminally ill inmates dying before their requests were decided” and included 11 recommendations for improving the program.<sup>50</sup> In the intervening years, the BOP has failed to make necessary improvements despite recognizing that “an effectively managed compassionate release program would result in cost savings for the BOP, as well as assist the BOP in managing its continually growing inmate population and the significant capacity challenges it is facing.”<sup>51</sup> According to a recent report issued by The Marshall Project and The New York Times, from 2013 to 2017, the BOP approved just six percent of the 5,400 applications it received for compassionate release, and 266 of those applicants died in custody. Half of the 266 people who died were convicted of nonviolent crimes.<sup>52</sup>

While we commend the Commission for expanding compassionate release eligibility in 2016,<sup>53</sup> in light of the exceedingly low approval numbers, we urge the Commission to continue to work with the BOP to encourage the use of compassionate release, as well as to improve the application process to include basic procedures to ensure fair and reasoned decision making. Ultimately, BOP should align its policy with that

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<sup>48</sup> “Children and Families of the Incarcerated Fact Sheet.” National Resource Center on Children & Families of the Incarcerated. <https://nrccfi.camden.rutgers.edu/files/nrccfi-fact-sheet-2014.pdf>.

<sup>49</sup> FAMM and Human Rights Watch, “THE ANSWER IS NO: Too Little Compassionate Release in US Federal Prisons” (December 2012).

<sup>50</sup> U.S. Department of Justice Office of the Inspector General, “The Federal Bureau of Prisons’ Compassionate Release Program” (April 2013). <https://oig.justice.gov/reports/2013/e1306.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> The Marshall Project, “Old, Sick and Dying in Shackles” (Mar. 7, 2018).

<sup>53</sup> U.S. Sentencing Commission, “Amendments to the Sentencing Guidelines” (Apr. 28, 2016).

[https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20160428\\_Amendments.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20160428_Amendments.pdf).



of the Commission, which would provide more opportunities for resentencing under these circumstances and provide resource saving sentence reductions.

**VIII. 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](mailto:cook@civilrights.org) or Jesselyn McCurdy, Deputy Director, at [jmccurdy@aclu.org](mailto:jmccurdy@aclu.org).

Sincerely,

American Civil Liberties Union  
 Drug Policy Alliance  
 Human Rights Watch  
 The Leadership Conference Education Fund  
 The Leadership Conference on Civil and Human Rights  
 The Sentencing Project