



August 10, 2018

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

**Comment on USSC Tentative Priorities
for Amendment Cycle Ending May 1, 2019**

Dear Judge Pryor:

The National Association of Defense Lawyers (NACDL) respectfully submits the following comments on the Commission's tentative priorities for the amendment cycle ending May 1, 2019.¹ At 183,488 total inmates² and with 55% inmates convicted of an offense carrying a mandatory minimum penalty³ and 62.7% of Black inmates convicted of an offense carrying a mandatory minimum penalty,⁴ our federal prison population is too big and serving sentences that are too long, with racial disparities that are unacceptable in a civilized democracy. NACDL welcomes all efforts to reduce the rate of incarceration in federal cases, the size and racial disparities of our federal incarcerated population, and the guideline rigidity that discourages or limits the recognition of each offender's humanity and redemptive potential.

Mandatory Minimum Penalties

NACDL supports the Commission's continued commitment to study and reform the mandatory minimum federal penalty scheme, which, as NACDL's recent Trial Penalty report reveals, is one of the key drivers of the exponential increase in the federal prison inmate population, as well as its racial disparities. In particular, NACDL supports the Commission's commitment to "expanding the 'safety valve' at 18 U.S.C. 3553(f), and eliminat[ing] the mandatory 'stacking' of penalties under 18 U.S.C. 924(c)."⁵

¹ 83 Fed. Reg. 30477 (June 28, 2018).

² See https://www.bop.gov/about/statistics/population_statistics.jsp (last visited 8/10/2018).

³ See U.S.S.C., *An Overview of Mandatory Minimum Penalties in the Federal System*, July 2017, at 6, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

⁴ *Id.* at 53.

⁵ 83 Fed. Reg. 30477 (June 28, 2018).

In its extensive Trial Penalty Report, issued on July 10, 2018,⁶ NACDL documented the corrosive impact of mandatory minimum penalties at the federal level -- not just because of the number of cases in which mandatory minimum penalties are charged, but the role mandatory minimum penalties play in generating plea bargains to avoid excessive sentencing and sidelining judges from their traditional supervisory role. Mandatory minimum sentences undermine the integrity of plea bargaining by creating a coercive effect. The threat of a mandatory minimum penalty often forces defendants to enter guilty pleas and give up their constitutional right to trial as the only way to secure leniency. As such, the trial right - a central bulwark in our system of criminal justice against unchecked governmental power -- has become little more than a shadow of the role envisaged for it in our constitution. Moreover, mandatory minimum penalties impact the integrity of the sentencing process by imposing categorical minimums rather than case-by-case evaluation. If a mandatory minimum sentencing statute controls, judges cannot exercise their traditional sentencing role.

In the context of 924(c) enhancements, the Report notes:

The 924(c) enhancement is both vague and overbroad. It goes well beyond addressing the aim of reducing gun violence. For 924(c) to apply, a defendant only has to carry or possess the gun; he need not ever fire or even brandish it. That means that the defendant will face a firearms enhancement even when the gun is unconnected to the violent nature of the crime. In fact, one commentator conducted a study in 2000 revealing that only a minority of cases involving 924(c) convictions were cases where the firearm was actually used.⁷

Noting the disempowerment of judges, the Report adds:

Despite the overbreadth of 924(c), there is little judges can do to regulate its use by prosecutors. Because of their vast discretion in charging, prosecutors can threaten 924(c) enhancements if defendants refuse to plead guilty. Defendants will know that they have no hope of leniency at sentencing because the enhancements are mandatory. Thus, exercising one's right to trial becomes a treacherous route, and the severity of the consequences can easily sway defendants to plead guilty.⁸

⁶ NACDL, *The Trial Penalty Report: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, July 10, 2018, available at <https://www.nacdl.org/trialpenaltyreport/> ("Trial Penalty Report").

⁷ Trial Penalty Report at 49 (citations omitted).

⁸ *Id.*

In sum, NACDL believes that mandatory minimum sentencing statutes should be repealed or subject to a judicial “safety valve” in cases where the court determines that individual circumstances justify a sentence below the mandatory minimum. In particular, NACDL supports any measure to preclude “stacking” of 924(c) penalties or the use of mandatory minimum penalties to coerce waiver of a defendant’s Sixth Amendment rights. Finally, NACDL supports de-coupling the drug guidelines from Congress’s mandatory minimum sentences. These sentences were designed to capture the most serious of drug offenders, and linking the guidelines to these mandatory statutory regimes results in disproportionate punishment of low-level offenders, who are in turn, disproportionately minorities and from marginalized socio-economic groups.⁹

Operation of §5H1.6 (Loss of Caretaking or Financial Support of Minors)

NACDL supports the proposed study of the operation of U.S.S.G. § 5H1.6 (Family Ties and Responsibilities) (Policy Statement) with respect to the loss of caretaking or financial support of minors.

Numerous studies have established the devastating impact on children of parental incarceration. This is especially pronounced in the context of the incarceration of mothers.¹⁰ It is also especially pronounced in the context of children of color. As set forth in the 2014 book *Children of the Prison Boom: Mass Incarceration and the Future of American Inequality*, researchers from Rutgers University-Newark and Yale University found that one-quarter of black children born in 1990 had a parent in jail or prison by the time the child was 14 years old - more than double the rate for black children born in 1978.¹¹ The unequal distribution of mass incarceration across the population and its inordinate impact on communities of color and impoverished communities necessarily results in an unequal distribution of impact due to incarcerated parents, including the effect on children’s educational outcomes. Indeed, only 1% to 2% of students with incarcerated mothers and 13% to 25% of students with imprisoned fathers graduate from college, according to a 2013 report from the American Bar Association and the White House.¹² Children of incarcerated parents have higher rates of attention deficits than those with parents missing because of death or divorce, and higher rates of behavioral problems, speech and language delays, and other developmental delays, according to a study published in Summer 2014 in the *Journal of Health and Social Behavior* that analyzed data from a national survey of children's health.¹³

⁹ See, e.g., *United States v. Diaz*, 2013 WL 322243, *1 (E.D.N.Y. Jan. 28, 2013) (highlighting the “fateful choice by the original Commission to link the Guidelines ranges for *all* drug trafficking defendants to the onerous mandatory minimum penalties in the Anti-Drug Abuse Act of 1986 that were expressly intended for only a few”).

¹⁰ See Myers et al., *Children of Incarcerated Mothers*, *Journal of Child and Family Studies*, Vol.8, No. 1 (1999) at 1 (“Children whose mothers are in prison or jail are among the riskiest of the high risk children in the nation”).

¹¹ Oxford University Press, 2013.

¹² American Bar Foundation, *Talking about Parental Incarceration at the White House: Creating a National Dialogue Between Researchers, Practitioners and Policy Makers*, 2013, available at http://www.americanbarfoundation.org/uploads/cms/documents/rl_vol_24_no_3_summer_2013web.pdf.

¹³ See Kristin Turney, *Stress Proliferation across Generations? Examining the Relationship between Parental Incarceration and Childhood Health* 55 *Journal of Health and Social Behavior* 319 (2014),

We applaud the Commission’s interest in studying the operation of Family Ties and Responsibilities policy statement. Every member of a family is impacted when an individual is incarcerated, and more so the children. Especially given the disproportionate distribution of mass incarceration across the population, a better understanding of the impact a parent’s or family member’s incarceration has on children is necessary to help better serve the communities of color and impoverished community and help those communities thrive. It is necessary to identify sentencing practices that do not further these destructive cycles.

Operation of §1B1.13 (Motions for Compassionate Release)

The explosion in incarceration over the last several decades has led to the “graying” of our inmate population, which, coupled with already over-stretched medical and mental health budgets further diminishes our prisons’ capacity to ensure the basic needs of the individuals in their care.¹⁴ Compassionate release is one mechanism to alleviate this financial and emotional burden, but it is sadly used sparingly and often too late to be meaningful.¹⁵

NACDL welcomes the Commission’s proposal to review the operation of §1B1.13, and specifically, whether it “effectively encourages the Director of the Bureau of Prisons to file a motion for compassionate release when ‘extraordinary and compelling reasons’ exist.”

NACDL endorses FAMM’s National Campaign for Compassionate Release, “urg[ing] the creation, expansion, and robust use of federal and state programs that grant early release to prisoners with compelling circumstances, such as a terminal or age-related illness” and its statement of principles focusing on “the humanitarian, public safety, and economic benefits of granting early release to elderly prisoners, those with disabilities, or prisoners facing extreme family changes.”¹⁶ The Campaign is a necessary reminder that our prisons are especially punishing on older and ill prisoners, and those whose family circumstances become dire while incarcerated.

First-Time Offenders

Finally, NACDL joins with FAMM in expressing its concern that the Commission no longer lists the sentencing of first-time offenders as a priority. As set forth in NACDL’s previous submission on this issue,¹⁷ NACDL supports the broadest possible definition of “first offender,” to include all defendants in Criminal History Category

available at <https://nrccfi.camden.rutgers.edu/files/Journal-of-Health-and-Social-Behavior-2014-Turney-302-19.pdf>.

¹⁴ See <http://www.pewtrusts.org/en/research-and-analysis/reports/2017/10/prison-health-care-costs-and-quality>.

¹⁵ See <https://oig.justice.gov/reports/2013/e1306.pdf>.

¹⁶ Available at <https://famm.org/wp-content/uploads/Signatory-Statement-Comp-Rel-.pdf>.

¹⁷ Available at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170220/NACDL.pdf>.

(“CHC”) I (those scored with up to one criminal history point). Distinguishing the various subcategories of CHC I offenders seems not only impractical, but also a task properly addressed by analyzing and revising of the CHC system itself. NACDL notes that the “Total Offense Level,” which measures an instant offense’s seriousness, is neither designed to measure nor correlated with recidivistic risks. It would therefore be inappropriate to key any adjustments to offense level on a final instant offense level that has nothing to do with risks of re-offense. Further, NACDL does not believe that excluding additional offenses from rebuttable presumptions against imprisonment would serve sentencing’s purposes. Imprisonment in these circumstances, just for the sake of meting out prison time, not only ignores the final goals of sentencing – promoting rehabilitation and a crime-free existence; prison for prison’s sake also exceeds the punishment allowed under 18 U.S.C. § 3553(a) (the “Parsimony Provision”).

Conclusion

In conclusion, we hope these issues become concretized in meaningful amendment proposals in the coming amendment cycle and look forward to submitting additional comments on such proposals.

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