United States Sentencing Commission

2024-2025 Amendment Cycle

Public Comment on Proposed Priorities

89 FR 48029

UNITED STATES SENTENCING COMMISSION

2024-2025 PUBLIC COMMENT ON PROPOSED PRIORITIES 89 FR 48029

UNITED STATES SENTENCING COMMISSION

Proposed Priorities for Amendment Cycle

AGENCY: United States Sentencing Commission.

ACTION: Notice; Request for comment.

SUMMARY: As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, and in accordance with its Rules of Practice and Procedure, the United States Sentencing Commission is seeking comment on possible policy priorities for the amendment cycle ending May 1, 2025.

DATES: Public comment should be received by the Commission on or before **July 15, 2024**. Any public comment received after the close of the comment period may not be considered.

ADDRESSES: There are two methods for submitting public comment.

Electronic Submission of Comments. Comments may be submitted electronically via the Commission's Public Comment Submission Portal at https://comment.ussc.gov. Follow the online instructions for submitting comments.

Submission of Comments by Mail. Comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Priorities Comment.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502-4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p). The Commission provides this notice identifying the possible policy priorities that the Commission expects to focus on during the amendment cycle ending May 1, 2025.

In light of the 40th anniversary of the Sentencing Reform Act of 1984, Pub. L. 98–473, 98 Stat. 1987 (1984), the Commission intends to focus on furthering the

Commission's statutory purposes and missions as set forth in the Sentencing Reform Act, including:

(1) Establishing "sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing"—namely, rehabilitation, deterrence, just punishment, and incapacitation. 28 U.S.C. 991(b)(1)(A).

(2) Establishing "sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities." 28 U.S.C. 991(b)(1)(B).

(3) Establishing "sentencing policies and practices for the Federal criminal justice system that . . . reflect, to the extent practicable, advancement of knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. 991(b)(1)(C).

(4) "[M]easuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing." 28 U.S.C. 991 (b)(2).

(5) Establishing "general policies and promulgat[ing] such rules and regulations for the Commission as are necessary to carry out" the Commission's statutory missions. 28 U.S.C. 995(a)(1).

(6) Requesting "such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law." 28 U.S.C. 995(a)(8).

(7) "[S]erving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices." 28 U.S.C. 995(a)(12)(A).

(8) Devising and conducting "seminars and workshops providing continuing studies for persons engaged in the sentencing field" and "training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process." 28 U.S.C. 995(a)(17)–(18).

(9) Making "recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy." 28 U.S.C. 995(a)(20).

(10) Holding "hearings and call[ing] witnesses that might assist the Commission in the exercise of its powers or duties." 28 U.S.C. 995(a)(21).

(11) Performing "such other functions as are required to permit Federal courts to meet their responsibilities under section 3553(a) of title 18, United States Code, and to

permit others involved in the Federal criminal justice system to meet their related responsibilities." 28 U.S.C. 995(a)(22).

The Commission seeks public comment on what work it should prioritize during the amendment cycle ending May 1, 2025. In particular, the Commission invites the public to recommend specific avenues of research or policymaking that would allow the Commission to fulfill the statutory goals cited above. Commenters are encouraged to provide text of proposed amendments, policy statements, or research agendas that might address the relevant priority. Commenters are welcome to propose lines of work that could be completed in the upcoming amendment cycle, as well as priorities that might require multi-year efforts to complete.

The Commission also seeks comment on the following, more specific proposed priorities:

(1) Continuation of ongoing priorities from prior amendment cycles and possible consideration of amendments that might be appropriate, including continued examination of the career offender guidelines (and alternative approaches to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense") as well as exploration of ways to simplify the guidelines (including continuation of its work from last amendment cycle on possible amendments to the *Guidelines Manual* to address the three-step process set forth in §1B1.1 (Application

Instructions) and the use of departures and policy statements relating to specific personal characteristics).

(2) Implementation of any legislation warranting Commission action.

(3) Resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. 991(b)(1)(B) and *Braxton v. United States*, 500 U.S. 344 (1991).

(4) Consideration of other miscellaneous issues coming to the Commission's attention.

The Commission also welcomes comment on any additional priorities commenters believe the Commission should consider in the upcoming amendment cycle and beyond.

Pursuant to 28 U.S.C. 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.

Public comment should be sent to the Commission as indicated in the ADDRESSES section above.

AUTHORITY: 28 U.S.C. 994(a), (o); USSC Rules of Practice and Procedure 2.2, 5.2.

Carlton W. Reeves,

Chair.

COMMITTEE ON CRIMINAL LAW
of the
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Honorable Edmond E. Chang, Chair

July 15, 2024

Honorable Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chairman Reeves and Members of the Sentencing Commission:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, we appreciate the opportunity to offer feedback on the priorities the United States Sentencing Commission should address in the upcoming amendment cycles.

The jurisdiction of the Committee on Criminal Law includes overseeing the federal probation and pretrial services system and reviewing issues relating to the administration of criminal law. The Committee provides comments and feedback to the Commission as part of its consideration of the sentencing guidelines and its role monitoring the workload and operation of probation offices. The Judicial Conference has authorized the Committee to "act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including proposals that would increase the flexibility of the Guidelines."[1] Moreover, the Judicial Conference has resolved that "the federal judiciary

[1] JCUS-SEP 90, p. 69. In addition, the Judicial Conference "shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would

is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible."[2] Past testimony and comments submitted on behalf of the Committee have expressed support for Commission efforts to resolve ambiguity, simplify legal approaches, reduce uncertainty, and avoid unnecessary litigation and unwarranted disparity.

The Committee welcomes the Commission's invitation to provide broad feedback to the Commission on priorities for amendment or further study. At this time, the Committee has identified several proposed priorities.

I. Proposed Priorities

A. Methamphetamine Purity – §2D1.1

The Committee asks the Commission to examine the guidelines' emphasis on drug purity for methamphetamine offenses. According to the Commission's recent data, methamphetamine has been the most prevalent drug in the federal criminal justice system, currently accounting for almost half of all drug trafficking offenses sentenced federally.[3] In Fiscal Year 2022, individuals sentenced for trafficking methamphetamine received an average sentence of 91 months, the longest among all federal drug trafficking sentences;[4] the next year, the average sentence stood at 100 months.[5]

While the guidelines have a ten to one sentencing ratio for actual methamphetamine (or "ice") to methamphetamine mixture, the Commission's recent study found that nearly all federal methamphetamine seizures tested at 93%+ purity.[6] In 1988, when Congress set the differing statutory penalties for actual methamphetamine and methamphetamine mixture, purity could serve as a reasonable proxy for culpability or, at the very least, closeness to the source of supply. In current times, however, because practically all methamphetamine currently trafficked in the United States is highly pure, that correlation between purity and culpability or organizational rank has substantially diminished.[7]

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be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work." *See* 28 U.S.C. § 994(o).

[2] JCUS-MAR 2005, p. 15.

[3] U.S. Sentencing Comm'n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* at 4 (June 2024) (last visited July 15, 2024).

[4] *Id*.

[5] U.S. Sentencing Comm'n, *Quick Facts: Methamphetamine Trafficking Offenses, FY 2023* at 2 (last visited July 15, 2024).

[6] U.S. Sentencing Comm'n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* at 4 (June 2024) (last visited July 15, 2024).

[7] *Id*. at 3.

Some courts thus have criticized the methamphetamine-purity distinction for creating unwarranted sentencing disparities and for not being empirically based.[8] Indeed, the ability to effectively determine drug concentrations is dependent on drug-testing practices that appear to be inconsistent across the 94 federal districts. Additionally, jurisdictions differ over what qualifies as sufficient proof of the purity level.[9]

Having said that, the Commission also should consider whether higher-purity methamphetamine has greater adverse physiological effects and, if so, whether that would provide a basis for retaining some ratio between actual methamphetamine and methamphetamine mixture. In sum, the Committee recommends that the Commission examine amending the Drug Quantity Table and the guidelines commentary as to the significance of the purity distinction.[10]

B. §5D1.2 (Term of Supervised Release)

The Committee requests that the Commission study and consider amending §5D1.2 to explicitly reference the factors set forth in 18 U.S.C. § 3583(c), which courts must consider in determining the appropriate amount of supervised release to impose. Currently, this section bases the minimum term of supervised release solely on the classification of the offense: two years for a Class A or B felony, one year for a Class C or D felony, and one year for a Class E felony or Class A misdemeanor. The classification of the offense is determined solely by the statutory maximum term of imprisonment rather than any defendant-specific or offense-specific criteria. The commentary to §5D1.2(c) contains only a generic reference to 18 U.S.C. § 3583(c) and might very well lead courts to adopt at least the minimum length without the reminder that Section 3583(c) controls.

Especially in light of the anniversary of the Sentencing Reform Act of 1984, forty years after Congress first established supervised release, this would be an ideal time for the Commission to revisit and examine the supervised release terms set out in Part D, Chapter 5 of the *Guidelines Manual*. For that reason, the Committee asks the Commission to conduct an

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[8] *See, e.g., United States v. Robinson*, 2022 WL 17904534 at 2-4 (S.D. Miss. 2022); *United States. v. Bean*, 371 F.Supp.3d 46, 50-52 (D.N.H. 2019) (collecting cases); *United States v. Johnson*, 379 F.Supp.3d 1213, 1223-24 (M.D. Ala. 2019); and *United States v. Nawanna*, 321 F.Supp.3d 943, 950-51 (N.D. Iowa 2018). *See also United States v. Valdez*, 268 F. App'x 293, 297 (5th Cir. 2008) (holding, in a methamphetamine case, that "the district judge can disagree with the Guidelines' policy that purity is indicative of role or that purity is adequately provided for in [the defendant's] base level."). *But cf. United States v. Blackburn*, 2024 WL 1496872 (S.D. Ala. 2024).

[9] *Compare United States v. Walker*, 688 F.3d 416, 423-25 (8th Cir. 2012) (affirming determination that the methamphetamine was "ice" based on witness statements, without forensic testing) and *United States v. Carnell*, 972 F.3d 932, 939-45 (7th Cir. 2020) (finding district court erred in concluding methamphetamine was "ice" based on witness statements).

[10] Along with studying and amending the methamphetamine guideline, the Commission may want to consider requesting a statutory change. In fact, the Commission's proposed priorities include making "'recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy.' 28 U.S.C. 995(a)(20)." *See* https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2024-2025-priorities.

evidence-based study of the terms and factors set out in §5D1.2 and then update Part D based on the result of its analysis. If the analysis shows that there is no evidence-based reason to set minimum terms of supervised release, then the Commission should consider removing the minimum terms.

C. §2J1.2 (Obstruction of Justice)

The Committee requests that the Commission examine and consider amending §2J1.2 to account for cases that involve obstruction outside the context of the court system. The "administration of justice" language present in several of the specific offense characteristics can be interpreted to unnecessarily limit those provisions to cases involving obstruction with the court system. As a result, in cases involving obstruction in other contexts where the offense conduct is covered by statutes referred to §2J1.2, that guideline does not account for specific offense characteristics that might otherwise be analogous to obstruction of court cases.[11]

For example, in *United States v. Brock*, 94 F.4th 49, 51 (D.C. Cir. 2024), the D.C. Circuit held that this "administration of justice" language applied only to "judicial, quasi-judicial, and adjunct investigative proceedings, but does not extend to the unique congressional function of certifying electoral college votes." As such, not only in the cases arising out of the January 6, 2021 attack on the Capitol, but also in any other case involving obstruction of some non-judicial government function (criminalized by a statute referenced to §2J1.2), the guideline range cannot account for such things as causing or threatening physical injury or property damage, or for substantial interference with the government function.[12]

Instead, the Commission should clarify that the §2J1.2 specific offense characteristic at subsection (b)(1)(B) should apply whenever the court finds that the offense involved "causing or threatening to cause physical injury to a person, or property damage," and not just in cases involving judicial and quasi-judicial proceedings. The Commission should also make the same clarification regarding the specific offense characteristic at subsection (b)(3) for an offense that "resulted in substantial interference." The Committee believes that the guideline language directing that the "offense involved" the specified conduct, along with the general provisions of relevant conduct under §1B1.3, are sufficient to narrow application to instances in which the

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[11] For example, according to the *Guidelines Manual*'s Appendix A, statutes referred to §2J1.2 include: 18 U.S.C. § 551 (concealing or destroying invoices or papers [relating to imported merchandise]); § 665(c) (obstructing an investigation under the Workforce Innovation and Opportunity Act); § 1505 (obstruction of proceedings before departments, agencies, and committees); § 1511 (obstruction of enforcement of state gambling laws); § 1512 (obstruction of official proceedings); § 1516 (obstruction of a federal audit); § 1519 (destruction of documents in agency investigations); and 26 U.S.C. § 7212 (interfering with the administration of the Internal Revenue Code).

[12] In other words, the D.C. Circuit's interpretation of "administration of justice" in *Brock* would also limit application of the specific offense characteristic increases at (b)(1)(B) and (b)(3) in cases under the many other statutes referred to §2J1.2 (listed in the previous footnote). Under its interpretation, neither specific offense characteristic could apply in a case where the defendant caused or threatened physical injury or property damage or where the defendant substantially interfered with a government function unless the obstruction involved a court proceeding. As an example, if a defendant obstructed any kind of audit in violation of 18 U.S.C. § 1516 by threatening the life of the auditor, the specific offense characteristics at issue would not apply because the obstruction did not involve a judicial or quasi-judicial proceeding.

specified conduct was tied to the obstruction offense; it is unnecessary to further limit it to cases where that conduct affected the "administration of justice." There is no apparent reason that these enhancements should be limited to obstruction offenses involving only court-related proceedings.

II. Ongoing Priorities

In its Federal Register Notice, the Commission has also requested comment on its continuation of work from prior amendment cycles, including possible consideration of amendments that might be appropriate.

A. Categorical Approach

The Committee encourages the Commission to continue its examination of the career offender guidelines, especially alternative approaches to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense." As the Commission is well aware, application of the categorical approach is extremely complex, consumes a significant amount of time from attorneys, probation officers, and judges, and arguably results in unwarranted sentencing disparities. The Committee also recognizes the difficulty inherent in developing a workable alternative to the categorical approach. As stated in our March 13, 2023 letter (regarding the Commission's previous proposal on the categorical approach), we continue to ask that the Commission allow courts flexibility, particularly regarding evidentiary issues, and work toward a solution that is fair and more straightforward in its application.

B. Simplification

The Committee also supports the Commission's commitment to simplifying the operation of the guidelines and the *Manual* itself. While the Committee applauds the Commission's efforts, it also urges it to be cautious about adding new language or concepts to the *Manual* that could result in unnecessary litigation, such as attempts to paraphrase the Section 3553(a) factors, or changes that could impact the court's flexibility under Section 3553(a).

C. 25% Limit on Guideline Ranges

The Committee asks the Commission to study the so-called "25% rule" set by 28 U.S.C. § 994(b)(2) and to consider proposing to Congress that the 25% limit for imprisonment ranges be increased, especially for the lower offense levels. Section 994(b)(2) requires that the bottom and top of each guideline range be no more than 25% apart (or at least 6 months apart, if that is greater than 25%).[13] This leads to some relatively narrow ranges, especially at lower offense levels. The Commission should consider studying whether to ask Congress to increase the limit

[13] *See* 28 U.S.C. § 994(b)(2). It states:

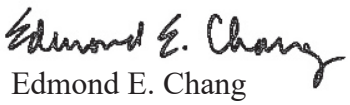
> If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

to some other percentage, such as 33%. To determine the appropriateness of the change, the Commission could study, for example, the recidivism rates of those defendants who were sentenced below the Guidelines range in a hypothetical 33% band. If the recidivism rates are not materially different from those defendants sentenced at the low-end of the 25% band, widening the band would continue to meet the goals of specific deterrence as well as provide sentencing judges with additional discretion, consistent with Judicial Conference policy supporting a "flexible" guidelines system.

III. Conclusion

The Committee appreciates the work of the Commission and the opportunity to comment on its possible proposed priorities for this amendment cycle and beyond. The members of the Committee look forward to working with the Commission to ensure that our sentencing system is consistent with the tenets of the Sentencing Reform Act.

Respectfully submitted,



Edmond E. Chang
Chair, Committee on Criminal Law of the
Judicial Conference of the United States

From: Jon Newman
To: Chair
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Saturday, June 8, 2024 6:02:53 PM

Judge Reeves,

Thanks for you invitation o send suggestions to the Commission.

As you may know, for the past 30 years I have been urging the Commission to make one basic change: simplify the Guidelines. My several articles on this subject are in the Federal Sentencing Reporter.

I will be glad to provide cites to your staff, but I think they are already aware of my thoughts on the subject.

The first Commission wrote that the Guidelines were an evolving process, but there has been no evolution. The basic, highly-detailed structure and the fundamental premises remain.

If I can be of assistance to the Commission, please let me know.

Judge Jon O. Newman

From: Rachel Bloomekatz
Sent: Friday, July 12, 2024 1:21 PM
To: Carlton Reeves

I wanted to respond to the inquiry you made to judges in your role as head of the Sentencing Commission about what the work of the Commission might address in the future. While I did some work on constitutional challenges to juvenile sentencing while in practice, I am far from a sentencing expert and am still learning much about the operation of the Guidelines. Being new here, I have been a bit hesitant to weigh in. (I did clerk for Justice Breyer, so I feel some of it is in my blood from his stories, but much has changed from the first preamble of the Guidelines he authored that he had me look up once.) Despite my trepidation, I thought I might flag for you a broad question that I am seeing in my reading of lots of sentencing transcripts when cases come on appeal, and that is now being raised more explicitly as an appellate issue. That is: how should judges view mental illness in considering the 3553(a) factors.

Let me explain what I mean. Far from a scientific study, but in my first year as an appellate judge, I have seen that mental health is often used as a mitigating factor under the 3553(a) factors. That makes sense, we may view one's conduct as less "culpable" if it is attributable (in part perhaps) to mental illness rather than a depraved intent (though query if that itself doesn't imply mental illness, but I digress). But at other times, I have seen mental health used as an aggravating factor; that it suggests a danger to the public, recidivism, and inability to comply with the law. It's certainly possible that mental illness can cut both ways, as these divergent lines indicate. But it strikes me as important to think about how mental health intersects with sentencing and to provide guidance on how to understand how it cuts given modern understanding about mental health. For instance, it strikes me that not all mental illnesses would give rise to a concern about recidivism, and what if there is a history of compliance with a therapeutic prescription? What do we know that is research-based that can inform analysis, rather than assumptions or general understandings based on experience? How can we extend someone's sentence based on a status (i.e., bipolar, various disorders) that manifest so differently in different people?

This is just an observation I have had.

To the extent that feedback is helpful, I wanted to share.

Many thanks,

Rachel

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Ralph R. Erickson
Circuit Judge

July 15, 2024

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Proposed Priorities for Amendment Cycle

Dear Judge Reeves:

I write this letter in my personal capacity on behalf of myself as a judge who has, for more than thirty years, been involved in sentencing and criminal trials and not in my capacity as chair of the TIAG. I wish to thank the sentencing commission for its request for comment on the sentencing guidelines in general. I believe that it is appropriate that the commission looks at how the sentencing system works as a global system from time to time. There is no more appropriate time than on the fortieth anniversary of the adoption of the Sentencing Reform Act of 1984. We spend so much time studying the sentencing guidelines at a granular level that we run the risk of "not being able to see the forest because the trees are in the way." This call to look at the "big picture" is absolutely essential, and I thank the commission for giving us an opportunity to do so.

One of the problems with focusing on sentencing in isolation is that we run the risk of missing opportunities to make our system of corrections and rehabilitation more effective and just. A few years ago, I was involved in a

project that entailed a comparative and collaborative process with the provincial Ministry of Justice of Saskatchewan which included studying our two systems of supervision with a view towards making improvements in the supervision of inmates reentering the population using accepted evidence-based principles. At the time, the Canadians were several years ahead of us in their move towards evidence-based supervision and we were very interested in studying what they were doing as they seemed to be achieving better results on recidivism and reintegration than we were in the District of North Dakota. The idea was that we might find ways to improve our way of working with supervisees, particularly high risk and isolated supervisees, such that we would obtain better outcomes. While working with the Canadians, it became apparent to me that the methods they were using to manage people in the system were more purposefully designed to achieve positive outcomes than the system we were using.

Each of the systems recognized essentially the same fundamental goals: (1) retribution or imposing sentences that adequately punish perpetrators and restores victims so as to provide justice; (2) incapacitation, the process of protecting the public from individuals who pose a significant risk of violence and threat of harm to society; (3) deterrence, both general and specific; (4) rehabilitation; (5) restitution or restoration, that is, attempting to make sure the sentence restored society and specific victims; (6) rehabilitation and reintegration into society. As we dived deeper into the systems, it appeared to me that the primary program difference between the Saskatchewan system and our system was in the prioritization of the sentencing goals.

The two sentencing schemes both placed the highest priority on protecting the public from possible harm by people who were at the greatest risk to reoffend in a manner that posed a significant risk to the public. That is, both systems placed a priority on sentences that protected the public from identifiably dangerous offenders. Both systems were fully committed to incapacitating dangerous and incorrigible offenders as much as was possible within the sentencing law.

Where the systems differed markedly was on their consideration of rehabilitation, reintegration, and restoration. The Saskatchewan system

placed little emphasis on retributive function of sentencing law and tended to focus on how to safely rehabilitate and reintegrate offenders into society. We, on the other hand, considered retribution to be a significant component of sentencing—we were convinced that the punishment must fit the crime. The most visible practical outcome of this focal point disagreement was that the Canadian experience diverted far more people from prosecution into supervision on the front end. Instead of incarcerative sentences for low-level and medium-level offenders their system tended to focus on making victims whole, retraining offenders to avoid criminogenic thinking, and improving outcomes by focusing on community-based resources to help the offenders stay on the "straight and narrow" path.

Stated simply, the Canadians put far greater emphasis on rehabilitation and restoration that we ordinarily did. They began a significant effort at cognitive and behavioral change at the earliest stages of intervention and had a fully integrated system of cognitive behavioral therapy (CBT) from arrest all the way through release from supervision. The level of services provided was directly tied to the risk level of the person that they were dealing with—but every person in the system received significant CBT. The Canadian system put a significant effort into risk assessment from the outset and tailored individual plans to meet the particularized needs of the offenders. During a pre-trial period, tailored services were provided notwithstanding the presumption of innocence. The idea was that almost everyone within the system, criminal or not, could benefit from some sort of educational, mental health, or occupational support and that they were going to match the services available to the people in the system at the earliest opportunity.

Working with us on the program were recognized experts from Canada who observed that our system suffered from a couple of fundamental flaws: first, we tended to over-supervise and over-incarcerate low-level offenders and that our approach to medium-level offenders was spotty and inadequate to successfully modify behaviors. They opined that the structure of our system was contributing to the problem in ways that would be difficult to overcome without rethinking the entire system. Specifically, they believed that our over-supervision of low-level offenders was actually increasing

criminogenic thinking and behaviors rather than reducing them. In short, we were taking significant numbers of misguided youth who might otherwise outgrow their criminality and introducing them to people with more entrenched and severe criminogenic thinking and behaviors through excess incarceration with the result that these offenders actually were slower to become law abiding than they otherwise would have. They also observed that medium offenders were being deprived of valuable resources because they were being expended by over-supervising and over-incarcerating low-level offenders. This produced a system that was being starved of the resources to accomplish with medium-level offenders all that was possible. They were convinced that our approach was actually increasing mid- and low-level criminality.

They also observed that the structure of the American system made it difficult for the courts to manage the process as well as it could be managed. The system in Saskatchewan provides for a Ministry of Justice which takes control of persons within the system from the time of arrest and continues to exercise control until the time they are released from supervision. The system is unified and fully integrated.

This presence of a unified system means that pretrial detainees, people awaiting sentencing, sentenced offenders, and post-incarceration offenders are all being managed within a unitary system such that common theories of rehabilitation, restoration, and reintegration are being pursued throughout the entire time the offenders are in the system. The system operates under a continuum of care principle that ensures the different parts of the system (pretrial, detention, incarceration, supervision, and reintegration) are all operating on a unified theory. They observed that this system avoided some of the problems that exist in our system—most notably that the prison system is divorced from the strategies that the courts are attempting to pursue for rehabilitation and reintegration. Thus, the BOP is more committed to incarceration and less to rehabilitation than the other parts of the system, which makes sense because they are both in the incarceration system and answerable primarily to the prosecutorial arm of the system. They observed that in many ways our system creates confusion among offenders because the different parts are pursuing different strategies in different ways with no

part being able to fully or adequately implement their strategic vision for preparing offenders to return to society. In short, our system is often at odds with itself.

It seems to me that the single most important sentencing reform is beyond the ability of the USSC to change—that is, the entire system needs to be reformed such that the Bureau of Prisons and the pretrial and supervisions aspects of our system must be more fully, if not completely, integrated. That said, the USSC is capable of being a convening agent for change and so I believe it is imperative to urge Congress to more fully integrate the processes of pretrial detention, incarceration, and reintegration. Ideally, this system would be one with a clear emphasis on rehabilitative and restorative justice as most inmates are returned to society and we owe it to society to release the most law-abiding people possible.

We have long known about the risks of over-supervising and incarcerating low-level offenders. When we introduce people into the system at a higher level of intervention than is necessary, we create people who are more inclined to criminality, not less inclined. Part of this is because we bring more people who are suffering from criminogenic thinking and behaviors into the lives of people who are less inclined to be criminal. We currently have a system that tends to introduce inmates to more criminogenic peers with the predictable result that criminal behaviors become more acceptable to the lesser criminogenic peer. By overincarcerating low-level offenders, we are actually increasing the risk to society.

This brings me to my views on how the sentencing guidelines can be reimagined. First, the Guidelines should both increase the opportunities for diversion and probationary sentences and encourage greater emphasis on rehabilitation for low-level offenders. To do this, we should increase the availability of programming that: (1) reduces the number of criminogenic peers in the offenders lives by purposefully reintegrating them into the community of law-abiding citizens; (2) provides services that increase the employability of people returning into society; (3) encourages substance abuse reduction; and (4) educates the public so they recognize that less punitive systems are actually in the public's best interest because they can

make each of us safer. This will necessarily require us to put greater emphasis on individualized sentencing.

Second, the Sentencing Table is unnecessarily complicated and implies a scientific precision that simply does not exist. The nature of our empirical understanding of sentencing has changed dramatically since 1984 and it is desirable to update the Sentencing Table to reflect current realities. The Sentencing Table places inherent restrictions on sentencing judges by forcing them to either hew closely to it or to vary, oftentimes applying individual judicial views involving widely divergent philosophies driving decisions and resulting in inexplicably divergent sentences. A system with fewer cells would both recognize that sentencing is an art and not a science and that some variation is necessarily going to happen based on the philosophy and experiences of the sentencing judges. I believe this would result in many more guidelines range sentences, increasing public confidence in the system while affording judges the discretion required by our constitutional law. Reducing the number of cells in the Sentencing Table would encourage greater confidence in sentencing and might actually reduce variability in sentencing.

Third, a searching study of the various factors in sentencing should be undertaken to reveal and ameliorate any considerations that may be operating in a way that introduces inappropriate disparity into the sentencing process. As we look at what drives sentences, we need to be careful that they do not become a proxy for the sentencing judge's inherent or latent biases. For example, I might tend to think of a family that looks like my own to be supportive and a source of assistance in reintegration—but fail to see that a much different family structure could also be highly supportive and an aid to reintegration.

Fourth, there is a benefit in moving away from conduct and circumstance-based factors in the calculation of the guidelines range. We currently uniformly apply these enhancements, which defers proper weighing to the variance or departure stage. For example, not all weapons are the same but in the calculation process most result in the same enhancement in Indian Country assault cases. By moving these from

mandatory adjustments to factors for consideration we can move towards a more just calculation system.

Fifth, I would urge that we provide for a supervision process that focuses on rehabilitation and reintegration. As the system currently exists, I see two types of problems occurring with some frequency. First, we have some situations where low-level supervision problems are ignored such that people on supervision get the sense that the process is toothless resulting in more significant offenses that result in long revocations. That is, we ignore their bad behavior until we slam them into prison. The second problem is the inverse—we enforce all sorts of "gotcha" violations and take away the offender's life on the installment plan. We should redesign the supervision system to point judges in the direction of nuanced, step-based supervision violation enforcement. This would mean starting with things like community service, involvement in treatment, extra meetings with supervisors, mentorship programs, and short term incarcerations prior to longer periods of incarceration unless the offender poses a significant risk to the community.

Thank you for the opportunity to address the commission. I wish you all the best in your endeavors and am willing to provide any assistance that I can in your project.

Sincerely yours,

Ralph R. Erickson

From: Stephen Higginson
To: Chair
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Wednesday, June 5, 2024 3:36:55 PM

Dear Carlton,

What wonderful initiative and inquiry--thanks for this leadership, not to mention the experience and insights you voice in your judicial work product.

District judges will have more experienced with Guidelines' ambiguities and areas for improvement. But I will give this responsible thought too.

Four directions I might probe to compose a comment to your Commission, which come up on appeal with frequency are: (1) the consequential world of what PSR information has "indicia of responsibility" enough for a sentencing judge to use (barring objection); (2) alternatively, when can a sentencing judge "pretermit" an objection actually made to a PSR stating the judge won't rely on the disputed point; (3) competing circuit tests for sentencing Guidelines calculations "harmlessness," especially whether/when/how a government-urged, catchall "anyway, same sentence per 3554," insulates guidelines error from review; and (4) perhaps focus on the appellate riddle of striking probation/release terms that appear in a J&C but weren't stated orally at sentencing versus remanding the oversight to the sentencing judge to resolve.

But the burden is on me, appreciatively, to find time to research and offer a comment on one or more of the above. I just wanted to write immediately to thank you for this outreach. My memory is the Guidelines had their origin in getting a feedback loop from sentencing courts, so this invitation is in the best spirit of the Guidelines. Actually, it's in the spirit of so many of our Rules Committees, which should allow judges to comment whenever a practice pickle comes up with a rule.

Yours,

Steve

From: Kent Jordan
To: Chair
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Thursday, June 6, 2024 4:00:13 PM

Dear Judge Reeves – My only suggestion is that you continue to press forward with efforts to take the influence of the categorical approach out of the Guidelines, to the fullest extent possible. Many thanks for all of your and the Commission's excellent work.

Sincerely,

Kent A. Jordan

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

101 West Lombard Street
Baltimore, Maryland 21201

Chambers of
PAUL V. NIEMEYER
United States Circuit Judge

(410) 962-4210
Fax (410) 962-2277

July 9, 2024

Via Email
Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Public Comment for Amendment Cycle 2024-2025 Commission Priorities

Dear Judge Reeves,

Pursuant to your invitation, I am sending you what I perceive to be a growing problem as to the enforceability of the Guidelines official commentary. Moreover, I believe the Commission could well help by defining better what role the commentary serves.

In *Stinson v. United States*, 508 U.S. 36 (1993), the Supreme Court held that Guidelines commentary is authoritative and therefore binding unless it is *inconsistent* with law or the Guideline itself. *Id*. at 38, 43, 44. But in a more recent opinion, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Court limited controlling deference to an executive agency's reasonable interpretation of its own regulations to where "the regulation is genuinely ambiguous." *Id*. at 2415. Thus, if *Kisor* applies to the Sentencing Guidelines, as courts are beginning to believe, much of the commentary will become irrelevant as most Guidelines are not genuinely ambiguous. Yet, this might be inconsistent with the

Guidelines' description of the official commentary that commentary "may interpret the Guideline or explain how it is to be applied" and "is to be treated as the legal equivalent of a policy statement," U.S.S.G. § 1B1.7. Thus, it appears that the Commission intended a larger role for commentary than applying *only* when a Guideline is genuinely ambiguous. *See generally United States v. Moses*, 23 F.4th 347 (4th Cir. 2022); *see also Williams v. United States*, 503 U.S. 193 (1992).

If the larger role for commentary is the Commission's intent, it might consider addressing § 1B1.7 and elevate the authority of official commentary to that of the Guidelines — especially since the commentary too goes through the notice and comment process applicable to the Guidelines. Otherwise, I am afraid that when *Kisor* is applied, most Guidelines commentary can no longer be consulted.

Not an easy problem, but all best wishes.

Sincerely,

Paul V. Niemeyer

PVN/kg

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAMBERS OF
JANE B. STRANCH
CIRCUIT JUDGE

Telephone
(615) 695-4294
Facsimile
(615) 742-1601

July 11, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attention: Public Affairs – Priorities Comment

Re: 40th Anniversary Call for Comment

Dear Judge Reeves and Members of the Sentencing Commission,

Thank you for your invitation, in connection with the Sentencing Commission's 40th anniversary, to offer suggestions for how the Commission might create a fairer, more just sentencing system. My chambers and I well understand the importance of continually striving to improve our sentencing system and appreciate the Commission's central role in realizing this goal. So, I met with my four clerks—Hayley Hahn, Evelyn Hudson, Orion de Nevers, and Alex Bodaken—to discuss their thoughts, which we ultimately distilled into the following five suggestions for the Commission's consideration. These suggestions are based on our collective experience, the current state of empirical research, and our judgment regarding pressing issues suitable for the Commission to address. We would be pleased to respond to any questions the Commission might have.

Amend § D1.1 to Address Drug Purity and Drug Weight

Currently, U.S. Sentencing Guideline ranges for drug-trafficking offenses are anchored to the mandatory minimum sentences in the Anti-Drug Abuse Act of 1986 (ADAA). The ADAA's severe mandatory minimum and maximum sentences aimed to punish managers, organizers, and leaders of drug-trafficking enterprises. But because the drug types and quantities trafficked by a defendant, not a defendant's alleged role in a drug-trafficking enterprise, trigger these sentences, the Guidelines' incorporation of these statutory penalties has penalized a broader category of defendants than the ADAA aimed to punish.

Although the Commission collected data on drug trafficking crimes at the time it developed the Guidelines, it did not rely on this data in setting the Guideline ranges for drug trafficking offenses. District courts across the country have expressed concern that this framework is a poor

proxy for culpability or dangerousness of an offense because it is unsupported by empirical research. For example, the Guidelines apply a 10-to-1 weight disparity between actual methamphetamine and methamphetamine mixture on the assumption that purity is a proxy for a defendant's role in the offense. Yet the Commission's own research reflects that most methamphetamine on the market is actual methamphetamine—regardless of whether the defendant is a high-level kingpin or a low-level user. That highlights at least one area where the Guidelines' unempirical assumption that purity is an appropriate proxy for culpability is mistaken.

The Commission should consider amending § D1.1 so that the penalties for drug-trafficking offenses track the available empirical studies on contemporary drug-trafficking conditions. Such a course is particularly appropriate given that the current Guidelines were formulated without consulting available drug-trafficking data, and thus, did not reflect the practical realities of drug crime, such as the prevalence and impact of specific quantities and purities of drugs, at the time of their passage. Nor do they reflect current drug-trafficking conditions. Amending the base offense levels for drug crimes and revising the drug conversion tables to align with empirical research on the relative dangerousness of drugs can help alleviate these problems. Providing guideposts more appropriately calibrated to the facts on the ground will allow district courts to better realize the sentencing objectives of 18 U.S.C. § 3553(a), and by extension, promote a more just sentencing system.

Add a Federal Defender Ex Oficio Member to the Sentencing Commission

Federal defenders ensure that persons accused of federal crimes receive representation, even if they cannot afford an attorney. This role provides defenders with a unique perspective on our criminal legal system, including sentencing. The U.S. Attorney General (or designee) and the Chair of the U.S. Parole Commission serve as ex oficio, nonvoting members of the Sentencing Commission, ensuring that federal prosecutors and probation officers enjoy a seat at the Commission's table. Federal defenders, however, hold no comparable position. Their perspective is critical. To ensure that sentencing functions fairly, the Commission's composition should account for the perspective of defendants sentenced for federal offenses, which can also aid in designing more effective research on defendants' sentencing. Adding a federal defender ex oficio member to the Sentencing Commission is an important step towards realizing this goal.

Consider Amendments Providing Opportunities to Decrease the Base Offense Level

The Guidelines provide many potential enhancements that increase a defendant's sentence for certain aggravating factors, such as assuming a leadership role in a criminal enterprise or using or possessing a firearm in connection with another felony. Meanwhile, acceptance of responsibility presents the only real opportunity to decrease a defendant's base offense level under the Guidelines. Although the § 3553(a) factors provide courts with the opportunity to vary a sentence based on mitigating circumstances, including features of a defendant's personal background, the Commission should consider adding opportunities that align with recognized goals of sentencing, such as rehabilitation and deterrence, and current research that would enable defendants to appropriately decrease their sentences under the Guidelines.

Amendment to Loss Provision

Section 2B1.1(b) addresses offenses involving stolen property and provides an enhancement for certain "loss" amounts. Although the Guideline does not define "loss," the Commentary states that loss is the "greater of actual loss or intended loss," and then defines both terms. *See* USSG § 2B1.1 cmt. 3(A). In a relatively recent case, the Third Circuit held that this commentary improperly expanded the definition of "loss" beyond its ordinary meaning, and therefore was invalid; it read "loss" as necessarily meaning actual loss. *See United States v. Banks*, 55 F.4th 246, 256-58 (3d Cir. 2022). The Commission recently announced that it intends to move the general definition of loss from the commentary to the Guidelines. The inclusion of "intended loss" as a definition of "loss" remains concerning, however, because it can result in sentences that unjustifiably penalize defendants for a loss that they never could have caused. If the Commission wishes to allow for penalization of intended loss in extraordinary or unusual cases, it could amend the Guideline language to begin: "Actual loss, unless," and then set out conditions in which reference to intended loss would be appropriate. Potential conditions could include the relative sophistication, as demonstrated by education and prior criminal history, of a criminal defendant; circumstantial evidence, such as correspondence or plans, reflecting a clear intent to effectuate a particular loss; and other probative facts that clearly indicate that intended loss serves as a better proxy for harm than actual loss.

Amendment to "Unusually Long Sentence" Provision of Extraordinary and Compelling Reasons Policy Statement

USSG § 1B1.13 is the applicable policy statement defining what constitutes "extraordinary and compelling reasons" justifying a modification of an imposed term of imprisonment under 18 U.S.C. § 3582(c). On November 1, 2023, § 1B1.13(b)(6) went into effect, explaining that an unusually long sentence may represent an extraordinary and compelling reason. In defining what constitutes an unusually long sentence, the Guideline does not specify whether the sentence must be unusually long (1) as compared to other sentences for comparable convictions *at the time the sentence was imposed*, or (2) as compared to other sentences for comparable convictions *today*. This ambiguity is meaningful because many sentences imposed decades ago may have been comparable with other sentences imposed at the time, yet would be drastically different than a sentence imposed for a similar crime today. The Commission should consider explicitly tying the phrase "unusually long sentence" to the present day, making clear that a sentence may be unusually long—and thus constitute an extraordinary and compelling reason justifying modification of the sentence—if it differs significantly from sentences imposed for similar crimes today. This approach is consistent with the purposes of the Fair Sentencing Act and the First Step Act. It also tracks the evolution of the Supreme Court's Eighth Amendment jurisprudence. *See Graham v. Florida*, 560 U.S. 48, 80-82 (2010) (determining, based on contemporary sentencing standards, that imposition of a life without parole sentence on a juvenile defendant who did not commit homicide constitutes cruel and unusual punishment); *see also Atkins v. Virginia*, 536 U.S. 304, 313-17, 321 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)) (concluding, based on state legislatures' recent and widespread bans on imposition of the death penalty on defendants with mental disabilities, that imposition of a capital sentence on a mentally disabled individual

violates the Eighth Amendment "in light of our 'evolving standards of decency'"). Such a change would best serve the purposes of the Guideline, by permitting relief for defendants who are serving sentences inconsistent with the best available evidence on what constitutes a sufficient period of incarceration.

Thank you for creating an opportunity for those of us who deal with these issues regularly to provide input into the important work of the Sentencing Commission. I see your request as accomplishing two key goals—it helps determine what needs to be addressed within our criminal law system and reminds us that we are part of that system and bear responsibility for making it functional and fair. Thanks for the timely reminder that we are all in this together.

Sincerely,

Jane B. Stranch

Jane B. Stranch

JBS:sl

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Circuit Judge Tim Tymkovich, 10th Circuit

Topics:

Simplification

Comments:

Please simply the categorical and non-categorical approach to crimes of violence. I'd get rid of the distinction completely by going to a listing of relevant crimes.

Submitted on: June 5, 2024

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
300 NORTH HOGAN STREET, SUITE 11-100
JACKSONVILLE, FLORIDA 32202-4247

TIMOTHY J. CORRIGAN
CHIEF JUDGE

904-549-1300

July 10, 2024

Honorable Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

(by email only)

Re: Comment re Sentencing Guidelines

Dear Judge Reeves:

Thank you for soliciting the views of the bench on how to create a fairer, more just sentencing system. Though I am currently Chief Judge of my court, I write solely in my capacity as a federal judge who has sentenced thousands of persons in my 21 plus years as a district judge.[1]

First, in the words of the sentencing statute, we are supposed to impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a). I propose the Commission undertake a comprehensive review of how the Sentencing Guidelines could better reflect that paradigm. Putting aside minimum mandatories, the Commission should study whether the whole Guidelines matrix can be shifted to shorten the recommended custodial sentence. In the average case does a guideline of 84-105 months serve the goals of sentencing any better than a sentence of 70-87 or even 63-78 months? They are all significant periods of incarceration, which "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense." Obviously, longer periods of incarceration may well be warranted when the public needs protection from the future acts of the defendant or specific deterrence is an issue. However, those could be handled with a separate "dangerousness" enhancement to the Guidelines or by an upward variance. I recognize that a lot of

[1] In 2016, I authored "Who Appointed Me God? Reflections of a Judge on Criminal Sentencing," Judicature, Vol. 100, No. 3 at 24-33 (Autumn 2016) Duke Law Center for Judicial Studies, which contains some additional thoughts on federal sentencing.

thought and study would need to occur before this idea might see the light of day. But it is worth exploring. There is no inherent value (and there are societal and moral detriments) in incarcerating someone longer than necessary to meet the goals of sentencing.[2]

Second, as has been suggested by the Commission staff itself in its 2012 report, the Commission needs to revisit and comprehensively examine the Guidelines involving child pornography and other sex-based crimes against children. While I understand any changes to the Guidelines in this area is unlikely to be popular (and there are Congressional imperatives at play), the current state of these Guidelines renders them virtually useless. Enhancements such as use of a computer and others combine to raise the Guidelines to great heights even in unremarkable cases and fail to create a spectrum of severity of child pornography offenses. Also, there is misplaced variability in the Guidelines in these cases. As an example, several weeks ago I had three sentencings in the same week in child sex-based cases. The first was a non-contact child pornography trade and online chat case with a defendant who had no criminal history where the Guidelines recommended 210-262 months. The second case, where the defendant actually traveled to meet an underage girl for sex, carried with it Guidelines which were about half the first case. The third case involved a Navy officer who not only possessed child pornography but also was convicted of illegally possessing classified documents. Yet, this defendant's Guidelines paled in comparison to the first defendant's case. While any sex-based crime against children is reprehensible and deserving of significant punishment, the Commission would be well-advised to start all over and create a Guidelines regime in this area that makes sense.

Third, the Guidelines for repeat offenders need to be reconsidered. Over the years, I have had cases, for example, where a bank robber robs three banks in a spree, yet the Guidelines seem to give a "pass" to the robber for the second and third robberies. Other examples exist where the Guidelines for repeat offenders, either in the same case or a previous case, do not increase the punishment commensurate with the repetitive nature of the crimes.

Thank you for your consideration of my views. Of course, I would be happy to discuss or further develop these thoughts at your request.

Respectfully,

Timothy J. Corrigan

---

[2] A similar analysis should also be undertaken concerning the recommended length of supervised release.

From:	Leslie Gardner
To:	Chair
Subject:	Thoughts on a More Fair and Just Sentencing System
Date:	Thursday, June 13, 2024 4:37:08 PM

Chairman Reeves,
Thank you for the opportunity to comment. While it is all of our duty to continuously strive to create a more fair and just system, we don't always have easy opportunities to do this on a systemic level. I thank you for giving me the opportunity to take the time out to think about the challenges I see in my own courtroom and in the larger system. With that, here are the thoughts at the forefront of my mind:

The pure/mixture of methamphetamine disparity. As I was composing my comments, the Commission's report, "Methamphetamine Trafficking Offenses in the Federal Criminal Justice System," was released. As the Commission has done the research on this, I hope that revising the Guidelines to account for the many concerns expressed by advocates and judges over the years and the Commission's findings is a top priority for the Commission.

On a broader note, I am not sure whether the harsh guidelines for drug crimes truly serve to deter future criminal conduct, promote respect for the law, or protect the community (beyond the obvious removal of the offender from society). I would like to see research into the efficacy of these guidelines.

I also believe that the role of active drug addiction in drug and other crimes should be a focus of study. I frequently hear arguments and consider a defendant's addiction as part of the history and characteristics of the defendant, but I would appreciate training on this issue to make sure that I am giving this disease the appropriate consideration when sentencing.

In the same vein, reports, including a 2015 Special Report from the Bureau of Justice Statistics, "Mental Health Problems of Prison and Jail Inmates," have found that approximately 45% of Federal inmates have mental health problems. While we inquire into mental heath to determine competency during plea colloquies and while there is a section regarding mental health issues in the pre-sentence report, I believe that we need to take a closer look at mental health issues among defendants and how to appropriately consider such issues in sentencing. I would love to see research from the Commission and training for probation and judges.

Thank you again,
Leslie Abrams Gardner

From: Sharon Gleason
To: Chair
Subject: Request to Chair, USSC
Date: Wednesday, June 5, 2024 3:52:36 PM
Attachments:

I would request that you prioritize the review of the child pornography possession and distribution guidelines. There are so many enhancements. The use of a computer enhancement applies in just about every case. Maybe there should be a computer enhancement only when it is a particularly sophisticated use of computers. And some of the other enhancements often seem to capture the same behavior, such as the sadistic enhancement and the age of the minor enhancement.
Thank you for asking!
Sharon Gleason

Honorable Sharon L. Gleason, Chief District Judge
United States District Court, District of Alaska
James M. Fitzgerald United States Courthouse
[redacted]

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Mitchell Goldberg, Pennsylvania, Eastern

Topics:

Miscellaneous Issues

Comments:

I have not had the chance to check whether the commission is addressing this issue and haven't thought about whether you can do anything given SCOTUS precedent, but sentencings that require application of the categorical approach can turn into a mess and many results defy common sense. Thank you for your hard work.
J. Mitch Goldberg- EDPA

Submitted on: June 6, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Jack Mccu, Rhode Island

Topics:

Policymaking Recommendations

Comments:

The single biggest problem with the Guidelines, in my opinion, is the drug charges reliance on drug weight to determine base offense level. The amount of drugs involved (actual plus related conduct - and entire conspiracy amounts) is NOT a valid or useful measure for culpability or for sentence determination. This is true for a number of reasons, including: (1) the amount of drugs attributable to a defendant is generally in the hands of the prosecution and law enforcement - e. g., when do police execute when they have CI buys involved (after the first buy? After the second or the third? Or maybe when they realize they have enough for a mandatory minimum sentence?); (2) there is no factual or legal reason to believe that the amount of drugs that the prosecution can attributable to the defendant is at all related to his actual involvement or level of his culpability; (3) there are much better ways to measure the offense level - it would include factors that describe the defendants' actual involvement in the enterprise - are they a street dealer, a runner, a supplier, an importer, a rebranded, etc. (this list could be better developed by folks with more experience that me in the drug dealing world).

The minor role or minimal participant adjustment simply does not make up for the vast discrepancies in the offense level / only 2 or 4 point differential.

If we are truly trying to evaluate sentences that are sufficient but NOT MORE THAN NECESSARY - and if we are truly trying to treat like conduct alike, then using drug weight for drug crimes as the major determinative factor in offense level is simply wrong, ineffective, and prejudicial.

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Kimberly Mueller, California, Eastern

Topics:

Miscellaneous Issues

Comments:

Please consider whether presenting juvenile criminal history in PSRs as part of a continuum with adult history is facilitating judges' consideration of juvenile records. Should this information be presented differently, with more narrative discussion drawing from information on an offender's childhood and youth?

Submitted on: June 6, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Stephanie Rose, Iowa, Southern

Topics:

Policymaking Recommendations

Comments:

The supervised release revocation guidelines are too simplified to capture the nuances of what we see on a regular basis. Grade C violations encompass far too wide a range of conduct. And there is no standardized or measured way to account for multiple violations. The range for one violation is the same range as the one for 20 violations. There should also be some mechanized way to account for a history of prior revocations--something like: "This is a Grade C violation, but the defendant's third revocation, so therefore, [new] advisory guideline range is triggered.

Submitted on: June 6, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Charles Williams, Iowa, Northern

Topics:

Circuit Conflicts

Comments:

Address the disparity between how the guidelines treat ice (pure) meth and meth mixture. Some judges have adopted a policy disagreement and treat them the same.

Submitted on: June 5, 2024

From: William Haskell Alsup
To: Chair
Subject: Re: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Wednesday, June 5, 2024 2:32:05 PM

Carlton,

Thank you.

Here's an important issue. To what extent, if at all, is more lenient sentencing and restorative justice contributing to higher crime and more serious crime ?

Bill

Sent from my iPhone

From: Michael Baylson
Date: June 5, 2024 at 4:29:16 PM EDT
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission

Dear j. reeeves AND PHIL RESTREPO;
Thanks for your invite to comment;
I applaud your commission for its valuable work product; as sentencing is the most difficult job a judge has;
I do think the guidelines are becoming unduly complicated – too many amendments, too many sub paragraphs; too hard to keep track of what new is mandatory, and what is advisory /--I HAvE PUT IN AN OPINON THAT THE GUIDELINES now APPEAR SIMILAR TO THE INTERNAL REVENUE CODE – WHICH IS SURELY very COMPLICATED.
Michael Baylson.

UNITED STATES DISTRICT COURT
Southern District of Mississippi
Post Office Box 928
Natchez, Mississippi 39121

DAVID C. BRAMLETTE
Judge

Telephone:
(601) 442-3006

June 10, 2024

The Honorable Carlton Reeves
United States District Court Judge
Southern District of Mississippi
501 E. Court Street, Suite 5.550
Jackson, Mississippi 39201

Dear Judge Reeves:

Responding to your inquiry, for which I am grateful, I recognize that the mission of the Sentencing Commission is not only to establish and amend the sentencing guidelines but also to work with other agencies to develop effective and efficient crime policy and practices for the federal courts. In furtherance of its objective, the Commission together with Congress and other federal agencies have enacted numerous sentencing reform measures – safety valve, compassionate release, the First Step Act, as well as retroactive considerations. I also recognize that the federal government as well as the various states have developed a number of other policies to address crime and punishment, including early intervention, diversionary programs, and correctional alternatives. Yet, the crime rate is holding its own with some reduction in various venues as well as an increase in others. As an example, in my county of Wilkinson in 2024 there has been some type of gang-related violent activity almost every week with numerous murders since January and most committed by teenagers or others below the age of 30. See the attached article from the June 6 edition of The Woodville Republican, our local paper. None of these violators – not one – has any conception of the consequences of an indictment by a federal grand jury. Although most of these crimes are addressed in the state system, there are some -- mostly drug related violations -- which come into the federal system. As said, these youngsters have absolutely no idea as to the seriousness of a federal offense – the fact that there is no parole in the federal system – as well as the punitive consequences of a conviction -- and the fact that the conviction rate is as much as 80%.

Therefore, as I have mentioned to you previously, it is my opinion that although penal reform is desirable, the crime problem is equally or perhaps better addressed by education. The financial benefit of a prevention program is very likely greater than its cost and, therefore, more emphasis should be placed on a program which informs these young potential violators about the facts involving conviction and incarceration. How can this be done? As I mentioned to you several years ago, the Bureau of Prisons, working with Congress, the Sentencing Commission, the Marshals Service, and other federal agencies could develop a program where federal inmates, in orange prison gear and restraints and in the company of law enforcement, visit schools and other educational institutions around the country, explaining the effects of incarceration, prison life, and life after prison. The Sentencing Commission could recommend some type of sentence reduction for the inmates who participate. Such a program, in my opinion, could have much more favorable results than prison itself. If tutelage prevents unlawful activities, there are two beneficiaries – would be offender and the victim. I recognize, of course, that various states and perhaps the federal government have developed certain diversion programs, but I have not seen any in small-town Mississippi where so much of this crime is being committed.

I realize, Judge, that this response diverges from the specifics of your request, but, again, guidance about the consequences of criminal behavior is, in my opinion, lacking in our society.

On the lighter side, here is how a personal visit by an inmate can make a difference. Back in the days of my youth, the famous Lash LaRue made an in-person visit to Woodville in his exhibition tour around the country. Look him up. After his show and demonstration, we, in our little group of gangsters, laid down our cap pistols and protected ourselves – each of us – with a ten-foot plated leather whip, as did Lash.

We must visit again soon. Haven't seen you in too long a time.

Warmest Regards,

David

DCB/lda

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Woodville Republican

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on the motorcycle was Arionna Harrison, 19, also of Woodville. The crash is being investigated by the Centreville Police Department. Emergency vehicles from the MHP, Centreville Police Department and AMR Ambulance are shown at the scene of the mishap. CPD LaShanda Grayson said, "This is a tragic incident that resulted in the loss of two lives. Off road vehicles such as this motorcycle, four wheelers and side by sides are illegal to operate on streets and highways. These vehicles are made and intended for off road use only." They don't have the lights, turn signals, insurance, horns or license plates needed to operate legally on public roads. — Woodville Republican Photo by Andy Lewis

WPD Arrests Suspects In Three Of Four Recent Murders In Woodville

Woodville, a town of under 1,000 residents, has suffered through a rash of murders over a four-week span covering parts of April and May, 2024, and this week the Woodville Police Department has announced arrests in three of the four shooting deaths, WPD Chief Lemuel Rutledge said on Monday of this week.

Starting on April 26 and spanning to May 25, four men have died from gunshot wounds in the Town of Woodville, which has only 928 residents according to the 2020 Census — a high murder count for such a small town.

On Monday morning, June 3, Chief Rutledge reported arrests in the following shooting deaths which happened in the town of Woodville — three of them on the same street — First West Street — and a fourth on a cross street near the intersection with this same street.

In chronological order, single suspects have been arrested on 2nd Degree Murder charges in the following cases:

• Letedry Earls, 31, whose address is listed at 90 Ironwood Lane, Woodville. He has been arrested in the Friday, April 26, shooting death of Telvin Matthews of St. Francisville, La. Matthews was sitting in a car on First South Street when he was shot and killed.

Earls has been charged with Discharging a Firearm in the city limits and 2nd Degree Murder.

He remains in custody in the Wilkinson County Jail under a bond of $1,132.25 on the firearm charge and $100,000 on the murder count.

Earls has had a preliminary hearing and is bound over to the Wilkinson County Grand Jury.

Earls also has a hold from the Centreville Police Department on a felony charge of Aggravated Assault with a Deadly Weapon. Bond for this charge is $30,000.

• Eric Chisholm, 38, 320 First West Street North, Woodville. Charged in the Wednesday, May 22, shooting death of Henry Dyer, a resident of First West Street North. Dyer's body was discovered at about 7 a.m. lying on the side of the street. The victim was shot once in the back.

Chisholm has been charged by the WPD with three counts related to the shooting death. They are as follows:

1) Possession of a Weapon by a Felon. Bond set at $50,000.

2) Tampering with Evidence. Bond set at $50,000.

3) 2nd Degree Murder. Bond is $200,000.

Chisholm remains in custody in the Wilkinson County Jail on a total bond of $300,000.

He is scheduled to have a preliminary hearing in the case in Woodville Municipal Court on Monday, June 10.

• The third suspect arrested is Jontavious Green, 21, 1015 Hwy. 24 West, Woodville. He is being accused in the Saturday, May 25, shooting death of a 16-year-old juvenile, whose name has not been released. The youth was shot in a car on First West Street North. The white car ended up hitting a residence which caused minor damage.

Charges filed against Green in this case included Discharging a Firearm in the City Limits and Second Degree Murder.

Green is currently lodged in the Wilkinson County Jail under a bond of $1,132.25 on the firearm charge and $200,000 on the murder count.

Green is also scheduled for a preliminary hearing in Woodville Municipal Court on Monday, June 10.

The fourth murder being investigated by the WPD happened on the corner of Main Street and First West Street North and took place on Saturday, May 18, just before midnight.

The victim in this shooting has been identified as Jalarraus Kentrell Stewart, 22, of Woodville. He died at the scene of the shooting.

An estimated 150-200 individuals were attending a party in the area at the time of the shooting.

"We are still investigating this incident. Anyone with any information relating to this murder is asked to call the WPD at 601-888-4411. You do not have to provide your name."

sted In Vidalia, LA

session With Intent

Wilkinson County Board Approves

From: David Stewart Cercone
To: Chair
Subject: Re: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Thursday, June 6, 2024 9:41:43 AM

Dear Judge Reeves,
Thank you for your invitation to provide some input regarding the work of the Commission. Given this opportunity I would like to raise a concern that I have almost every time I sentence a defendant in a child pornography case. While, of course, I am very sympathetic to the poor child victims who are used to produce this filth, I often find myself shocked by the severity of the guidelines in some cases. Naturally I am referring to cases where the defendant had no direct contact with the children in the video.

This is one area that I hope the Commission would prioritize as it carries on is fine work.

Best,
David Cercone
Senior Judge, Western District of PA
Sent from my iPad

From: Skip Dalton
To: Chair
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Wednesday, June 26, 2024 1:19:02 PM
Attachments:

Rework the Guidelines for child pornography. They do not distinguish culpability. Most enhancements apply to almost all defendants, resulting in guideline sentences that are much too long. Remove the purity enhancement for methamphetamine. All Meth is now from Mexico at 95% purity, and the purity enhancement rationale no longer applies.

Roy B. 'Skip' Dalton, Jr.
United States District Judge
Middle District of Florida
[redacted]

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Nora Barry Fischer, Pennsylvania, Western

Topics:

Research Recommendations

Policymaking Recommendations

Comments:

Youthful offender/trauma and impact on criminal behaviors.

Acquitted conduct in state court.

Discussion of Judge Underhill's article in Champion to supervised release being unconstitutional.

AI created sex images/internet harassment/coercion and more

Submitted on: July 10, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Frank Geraci, New York, Western

Topics:

Policymaking Recommendations

Comments:

Rework the child porn guidelines. For example: +2 for use of a computer; +5 for 600 or more images - these criteria seem out of place and often result in downward departures.

Submitted on: June 26, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge James Graham, Ohio, Southern

Topics:

Policymaking Recommendations

Comments:

Compassionate relief - firm up standards - e.g. care of relatives with health issues - likelihood would really do it.

Submitted on: June 26, 2024

From: James Gwin
To: Chair
Subject: Sentencing suggestions
Date: Wednesday, June 5, 2024 2:37:53 PM

Chairman Reeves,

Thank you for soliciting Sentencing Commission recommendations.

I recommend the Commission undertake a study that asks jurors (after guilty verdicts have been given) to individually recommend what the juror believes an appropriate sentence would be.

After sufficient responses have been obtained from as many jurors as possible, I suggest you compare the juror's responses to the case Guidelines ranges.

If sentencing largely attempts to impose just punishment, the jurors' responses will test whether the Guidelines ranges well reflect community sentiment.

As a state court general jurisdiction judge and as a district court judge for more than 25 years, I meet with jurors in the jury room after each verdict to thank the jurors for their service.

In most criminal jury guilty-verdict cases, the jurors usually ask for a general impression what sentence the guilty defendant will likely face? Without a PSR, I can only say in very broad ranges what the Guidelines likely recommend.

In the broad majority of cases, jurors express great surprise that the Guideline ranges are so high.

Because of this, over the last 15 - 20 years, I have asked each criminal juror who is part of a panel that has returned a guilty verdict to individually fill out an anonymous form with their opinion of what a fair and just sentence would be for the crime they have given the verdict on.

Over roughly 50 post-trial and post guilty verdicts, the jurors' median sentence recommendation is about 25% of the Guidelines median recommendation.

I encourage the Commission to consider similar post guilty verdict polling to assess whether Guideline ranges well reflect community sentiment regarding what is appropriate punishment.

Thank you for your consideration of this suggestion.

Jsg

Judge James S. Gwin
U.S. District Court, N.D. Ohio
[redacted]

From:	Robert Hinkle
To:	Chair
Cc:	
Subject:	RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date:	Saturday, June 15, 2024 1:13:54 PM

You're already working on the meth guideline. Other than that, I have no useful comments. Thanks for all the good work you and the others there do.

Robert L. Hinkle
United States District Judge
Northern District of Florida
[redacted]

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Beryl Howell, District of Columbia

Topics:

Miscellaneous Issues

Comments:

Consider amendments to 2J1.2 in response to DC Circuit's opinion in US v. Brock, 94 F.4th 39 (DC Cir. 2024).

Submitted on: June 11, 2024

From: John Kane
To: Chair
Subject: Suggestions for USSC
Date: Thursday, June 6, 2024 10:34:51 AM

Dear Judge Reeves,

As for your request for the Sentencing Commission, I confess I am not a fan or devotee and if my sentences are commensurate, it is a matter of coincidence. I have one observation that I seriously doubt will receive any consideration: *viz*. I think the deduction of points for "acceptance of responsibility" is Orwellian and places extortionate pressure on defendants to plead guilty. When I question defendants in Rule 11 proceedings they frequently advise they wouldn't plead guilty but for the "trial tax" of going to trial. Simply stated, I am not in that business and confine my sentencing criteria to Section 3553. I do not think quantitative calculation is a fitting substitute for qualitative analysis and conscience requires the latter. So, as required, I first determine the accurate guideline calculation and then consider it as one factor in an eclectic analysis.

I wish you well.
Sincerely,
John Kane

Judge John L. Kane
United States Senior District Judge

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Joan Lefkow, Illinois, Northern

Topics:

Research Recommendations

Comments:

I would like the Commission to do something positive about the near elimination of probationary sentences. Perhaps this has been done but, if not, is it possible to compare the pre-Guidelines probationary sentences with
post-Booker sentences to see which offenses are getting prison time compared to the past? I realize the Guidelines are 40-years old, so the data may or may not be useful. Alternatively, can the Commission figure out some way to adjust the Guidelines so nearly everyone does not end up in prison?
Thank you for your consideration. JHL

Submitted on: July 12, 2024

From: Larry Piersol
To: Chair
Subject: Re: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Wednesday, June 5, 2024 2:22:08 PM

I have been a district judge for 30 years with a lot of criminal cases. The mandatory minimums are in many, but not all, cases, too high. The 10 years for soliciting sex from a minor is a serious offense, but the mandatory 10 year minimum is more than guidelines on some hands on sex offenses. And almost always these are first time offenders. Unlike drug cases, these sex cases do not have a possibility of cooperation for a sentence reduction under Rule35. Lawrence Piersol District of South Dakota
Sent from my iPhone

From: Jed Rakoff
To: Chair
Subject: Response to your email of June 5
Date: Monday, June 17, 2024 12:35:47 PM

Dear Judge Reeves,

Since I am a long-time critic of the Sentencing Guidelines, I hesitated to respond to your kind request for judges to indicate their suggestions for reform, since I'm afraid my response would have been to scrap the Guidelines altogether, which in my view have done more mischief (e.g., contributing to mass incarceration) than good (e.g., decreasing sentencing disparities). But I do have one very modest suggestion that I thought I would pass along. I have never understood how the Commission decides on its arithmetic, that is, how it arrives at its starting weight for a given crime and then gives a few added or subtracted points for additional factors. For example, why is the Base Offense Level for Assault (section 2A2.3) 7 points in some circumstances and 4 in others (as opposed to 10 and 3, or 9 and 7, or 15 and 5, etc. etc.) and why do you then add 2 points for the victim receiving bodily injury (as opposed to 3 points, 4 points, etc.) or, if the victim is a spouse, why do you add 4 points (as opposed to 3 points, 6 points, etc.). Possibly the Commission has already articulated its answers to these questions, in which case please excuse my ignorance; but, if it hasn't previously been done, it might be helpful for the Commission to articulate its reasons for these weightings, since they seem kind of arbitrary on their face.

Thank you for inviting input, even from incorrigible critics like me.

Jed Rakoff

From: Keith Starrett
To: Chair
Subject: suggestions in email
Date: Wednesday, June 5, 2024 6:05:40 PM

Great idea to ask every judge for suggestions. You know the lack of consistency in MSSD for diversion programs. These could be done like reentry programs with judicial involvement. Not run together but one right after the other to conserve judge and probation officer time.

As you know judicial involvement with offenders plays an important role in helping to change peoples lives for the better. IT also changes a lot of judges who really take an interest in the lives of people who stood before them at one time to be sentenced. Caring counts.

Keith

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Keith Starrett, Mississippi, Southern

Topics:

Policymaking Recommendations

Comments:

Consistent use of diversion programs in different districts and circuits.

Submitted on: June 26, 2024

United States District Court

DISTRICT OF CONNECTICUT

Chambers of
Stefan R. Underhill
United States District Judge

915 Lafayette Boulevard
Bridgeport, Connecticut 06604
(203) 579-5714

July 11, 2024

Hon. Carlton W. Reeves
Chair
United States Sentencing Commission
Washington, D.C.

Re: Priorities Comment

Dear Chairman Reeves,

Thank you for the opportunity to provide suggestions to the Sentencing Commission regarding needed areas of focus in the coming years. There are a number of topics that merit the Commission's attention. I will outline a few.

1. Supervised Release Policy Statements

The Sentencing Guidelines amendment that would affect the largest number of people and would most significantly improve the fairness of the Guidelines is revision of Chapter 7. Supervised release is a subject that has been overlooked by the Sentencing Commission since the Sentencing Guidelines were first implemented. Supervised release violations are also a source of tremendous disparity in sentencing. The Commission's 2020 Report on Federal Probation and Supervised Release Violations ("2020 Report") noted that there is a *ten-fold disparity* in the rates of supervision violations in the highest versus the lowest districts. 2020 Report at Table 3, p. 18. That disparity reflects the harshness of the Chapter 7 policy statements and the revocation table, which *always* recommend at least some prison for violators; some districts nearly always charge and impose prison sentences for violations (as directed by the revocation table), while other districts do not.

The policy statements in Chapter 7 of the Guidelines should include guidance regarding whether and under what circumstances a term of supervised release should be imposed and, if so, for what term. A term of supervised release is virtually always included as part of a sentence; that reflexive practice does not necessarily serve the rehabilitative interests of a particular defendant. Supervision is sometimes an impediment to rehabilitative progress, so the Guidelines should help judges think through the decision whether to impose it, the length of the term, and the conditions that should apply during the term.

The revocation table should be revised to reflect that most technical violations do not warrant a prison sentence. The revocation table in Chapter 7 encourages judges to imprison supervisees for *every* violation of a supervised release condition, no matter how minor and no matter how minimal the criminal history of the supervisee. My research shows that the vast majority of violation prison sentences are imposed for technical violations. *See generally* S. Underhill, *Supervised Release Needs Rehabilitation*, 10 Va. J. Crim. L. 1 (2024). Such sentences affirmatively undermine the rehabilitative efforts of supervisees and therefore actually decrease

public safety. The revocation table should recommend prison sentences only for serious violations of conditions of supervised release.

"Breach of trust" should be eliminated as a justification for imposing prison sentences for violation of supervised release. A sentencing judge may acknowledge hope for a person by sentencing them to probation, but the idea that a judge reposes trust in a person being sentenced to prison and supervised release is nonsensical. Judges may admonish a defendant or encourage a defendant to reform, but they do not extend trust to persons being sentenced. That trust, after all, would require judges to know defendants personally, which simply does not happen as part of the criminal justice system. Moreover, any such trust would only ripen many months or years after a judge last saw the defendant, when the defendant exits prison to serve a term of supervised release. Persons who violate the conditions of supervised release are punished for the new conduct constituting the violation, not for breaching any theoretical trust that arises between a defendant and the person who decides their punishment. To pretend otherwise merely provides an excuse to reincarcerate for violations of supervised release.

The Guidelines should offer modification of the conditions of supervised release and extension of the term of supervised release as options preferable to incarceration for violations of supervised release conditions. The statute expressly grants judges the authority to modify the conditions of supervised release, and to extend (subject to the applicable statutory maximum) the term of supervised release. 18 U.S.C. § 3583(e)(1). Prison sentences undoubtedly interrupt the rehabilitative process that supervised release was designed to facilitate. Modifications of conditions and extension of the term of supervised release usually can restore rehabilitative progress. Thus, for example, it does no one any good to imprison a drug addict, at a cost of $50,000 per year, for using drugs while on supervised release. Chapter 7 and the revocation table should incorporate non-prison options for addressing violations of supervised release.

The Commission should track violation prison sentences just as it does for all other prison sentences. The federal courts sentence at least 10,000 persons to prison every year for violating conditions of their supervised release, yet we know almost nothing about the length, reasons, or consequences of those sentences. *See* S. Underhill, *Supervised Release Needs Rehabilitation*, 10 Va. J. Crim. L. at 11-22. The minimal research the Commission has undertaken on the topic of supervised release violation sentences is dependent on information gathered by other agencies. *Id.* at 12-14. Until the Commission begins tracking and analyzing supervised release violation sentences, the Commission, Congress, judges, academics, and the public will not have reliable information to use in developing and commenting on this important aspect of sentencing policy.

Early termination of supervised release should be encouraged for those who achieve rehabilitation, but also for those who prove to be unsupervisable. Judges enjoy statutory authority to terminate a defendant's supervised release after one year if early termination "is warranted by the conduct of the defendant released and the interest of justice." 18 U.S.C. § 3583(e)(1). Generally this authority has been used to terminate supervised release when a defendant has achieved rehabilitative goals, but the interests of justice may support its use for a defendant who has shown an inability or unwillingness to rehabilitate. When a supervisee is defiant or simply exceedingly difficult to supervise, termination of supervised release may free up the limited resources of the Probation Office to focus on other persons eager to rehabilitate.

2. Problematic Areas of Sentencing

The Sentencing Guidelines are premised on the idea that counting objective factors such as degree of economic loss, weight of drugs, or number of images results in an accurate proxy for culpability. That premise fails in many, arguably most, cases. Consideration of other factors will lead to fairer sentences and perhaps even less disparity in sentencing.

Sentences for economic crimes should depend less on the amount of loss and more on the impact on the victims of the loss. The loss of any particular amount of money will be felt differently by different victims. A relatively small amount of loss could greatly impact the life of a retired individual, yet have almost no impact on a large corporation. Culpability varies with the scope of the impact on the victim. The economic crimes Guidelines should reflect that reality. Moreover, because intended loss is always less harmful to victims than actual loss, intended loss should no longer be equated with actual loss to avoid unfair sentences. *See United States v. Corsey*, 723 F.3d 366, 377-82 (2d Cir. 2013) (Underhill, J., concurring).

Sentences for drug crimes should depend less on quantity and more on role in the offense. Drug quantity is a poor proxy for culpability. The same kilogram of cocaine may be possessed by a drug mule who carries it into the country, the wholesaler who cuts and packages it for sale, and the street corner teenager who engages in hand-to-hand transactions with purchasers. Yet those three individuals are not equally culpable (or equally compensated for their roles), and the Guidelines reliance on drug weight to bring about consistency in sentencing results in sentencing unfairness. *See generally United States v. Diaz*, 2013 WL 322243 (E.D.N.Y. 2013) (Gleeson, J.). The Commission should reconsider how the offense level is calculated in drug offenses.

Sentences for child pornography crimes should depend less on "objective" factors like number of images and more on the nature of the conduct of the defendant. For the reasons described in *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), the child pornography guidelines are not helpful in distinguishing among defendants because most of the Guidelines enhancements apply in virtually every case. Moreover, the child pornography guidelines can lead to ridiculously high Guidelines ranges. *See United States v. Muzio*, 966 F.3d 61, 66 (2d Cir. 2020) (District Judge incorrectly calculated Guidelines range as 500 years; Court of Appeals correctly calculated the range as a mere 200 years). The Guidelines should more meaningfully distinguish among child pornography defendants, especially those convicted of production offenses. There are any number of factors that could be used to more meaningfully evaluate culpability. *See, e.g., id.* at 78 (Underhill, J., dissenting).

3. Reconfigure the Sentencing Table

The Sentencing Table was developed in the 1980s and has not been comprehensively revised since then. There have been some minor adjustments down and up, especially when Congress directed the Commission to do so, but the data underlying the Table and base offense levels are old and tired. The empirical foundation of the Sentencing Guidelines has become more and more difficult to rely upon when fashioning a fair and just sentence.

Consider periodically revising the Sentencing Guidelines to reflect JSIN data. Now that the Commission has a tool that presents current, five-year data for any particular defendant's combination of crime of conviction and criminal history, there is little reason to continue relying on decades-old sentencing data. Anecdotally, the JSIN data shows that sentences actually imposed over the past five years are consistently below the Guidelines recommended range, even when using JSIN Length of Imprisonment data. It may well be that future judges will find the JSIN data to recommend sentences that are unfairly high or low, but by periodically revising the Sentencing Table based on JSIN, those later disagreements with the Guidelines will result in further revision of the Table.

Expand Zones A, B, and C of the Sentencing Table. Doing so will allow more Guidelines sentences of probation and split sentences. "Before the Guidelines, about 50 percent of all federal defendants received nonimprisonment sentences...." Kate Stith and José A. Cabranes, Fear of Judging (Univ. of Chicago Press 1998), at 5. In 2023, only 5.9 percent of federal sentences were for probation only. U.S.S.C., 2023 Sourcebook of Federal Sentencing Statistics, at Table 13. Probationary sentences are not prohibited by most criminal statutes, yet the Guidelines effectively prohibit them in the vast majority of cases. A sentence of probation is a true, punitive sentence that restricts a probationer's freedom in numerous ways. *Gall v. United States*, 552 U.S. 38, 48 (2007). Probationary sentences should be permitted more often by the Guidelines.

Factor collateral consequences into the Sentencing Table, perhaps by reducing the offense level when such consequences have punitive effect. The Guidelines do not meaningfully account for the often-significant effect of the collateral consequences of conviction. *See United States v. Nesbeth*, 2016 WL 3022073 (E.D.N.Y. May 24, 2016). Alternatively, the Guidelines could recognize a permitted departure for significant collateral consequences. Either approach would make the Guidelines recommendation more consistent with reality.

4. Restore the Fundamental Structure of Criminal History Computation

Limit sentences for prior offenses that are "always counted" to felony offenses. Application note 5 to section 4A1.2 of the Guidelines was amended to provide that convictions for "driving while intoxicated or under the influence . . . are always counted." Amendment no. 766. Prior to that amendment, only felony offenses were always counted for purposes of determining criminal history. *See United States v. Potes-Castillo*, 638 F.3d 106 (2d Cir. 2011). The amendment reflects the Commission's distrust of judges' abilities to determine the seriousness of a particular misdemeanor or petty offense. That discretion should be reinstated by treating this class of misdemeanor and petty sentences like all others.

There are longer, deeper arguments that can be made in support of each of these suggestions. I have tried to provide a top line summary, but would be happy to provide additional information if that would be useful.

There is much for the Commission to do in the coming years, and I thank you for your efforts to make the Sentencing Guidelines more helpful to judges seeking to impose just sentences.

Sincerely yours,

Stefan R. Underhill

From: Lynn Winmill
To: Chair
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date:
Attachments:

Here are my concerns:

1. The disparity between the pure and mixture guidelines for meth, simply don't make sense. And, from my review of the USSC data, it appears that it is resulting in much longer sentences for meth cases than other types of drugs. To my knowledge there is no empirical data supporting longer sentences for meth distribution than for the distribution of other drug types. The pure meth guidelines should be removed and the mixture guidelines re-calibrated – probably upward to bring those sentences into line with the guideline ranges for other drugs.
2. Remove the computer enhancement for any crime, unless the use of the computer had a truly aggravating role in the offense. Computers, tablets, smart phones and the internet are now so ubiquitous that it makes no sense to enhance the punishment for a crime solely because a computer was used.
3. On a related topic, the number of images enhancement on child pornography cases also make no sense. With the use of computers, it requires almost no more effort to download 10,000 images than it takes to download a single image.

B. Lynn Winmill

Senior District Judge
U.S. Courts, District of Idaho
[redacted]

Booker at Twenty

Lynn Adelman

I write in response to the Federal Sentencing Reporter's call for papers relating to the 20th anniversary of *United States v. Booker*, 543 U.S. 220 (2005), which made the Federal Sentencing Guidelines advisory instead of mandatory. *Booker* had the effect of increasing my job satisfaction as a federal district judge enormously, and I am happy to advance a few thoughts on the occasion of its anniversary.

I have long believed that the principal problem with the guidelines is that they are too harsh, and I bring that perspective to these remarks. Although the Sentencing Reform Act (SRA) which led to the guidelines was touted as a statute designed to reduce disparity in sentencing, there can be little doubt that an equally important reason that the law was passed was to make sentences harsher. The U.S. Sentencing Commission, which was responsible for formulating the guidelines, employed a method that was guaranteed to increase the severity of federal sentences. The Commission represented that in creating the guidelines it relied on past sentencing practice, but this was not really so. In the pre-guideline era, some fifty percent of defendants were sentenced to probation. When it established the guidelines, however, the Commission ignored all these probationary sentences and considered only cases in which defendants were sent to prison. The Commission all but eliminated sentences of probation and increased the severity of sentences in a wide variety of cases. As a result, after the guidelines took effect many more federal defendants were incarcerated and for longer periods of time. Between 1988 and 2012, the average time served by federal prisoners more than doubled. Mandatory minimum sentences and the abolition

of federal parole contributed to this increase, but much of it was due to the guidelines. Thus, in 1997 when I became a judge and the guidelines were mandatory, I often found myself compelled to impose sentences that I believed were unfair.

The Supreme Court's decision in *Booker* making the guidelines advisory, therefore, provided cause to rejoice. *Booker* meant that judges did not have to put every defendant who came before them in prison or send them away for the humongous periods of time that many guidelines called for. Former judge Nancy Gertner cautioned district judges not treat *Booker* as a "free at last" decision but, as I saw it, as long as you could articulate good reasons for the sentence you imposed, you were free to impose substantially lower sentences. The tyranny of the guidelines had been removed. In an article shortly after *Booker*, my co-author and I noted that the case "marked a welcome end to a sad chapter in American law"[1] and quoted two sentencing scholars who characterized mandatory guidelines as "one of the great failures at law reform in U.S. history."[2]

I have, however, been disappointed that, as Professor Berman points out in his call for papers, the overall effect of *Booker* on the severity of sentencing and the reliance on imprisonment in the federal system has been very modest. The Commission reports that in fiscal year 2003, before the Supreme Court decided *Booker*, over 69,000 persons were sentenced in federal courts, with almost 87 percent receiving a prison term and the average prison term being 48 months. In fiscal year 2023, well after *Booker*, some 64,000 defendants were sentenced in federal courts with nearly 93

[1] Lynn Adelman and Jon Deitrich, Fulfilling *Booker's* Promise, "Roger Williams University L. Rev. 521 (2006).
[2] Mark L. Miller and Ronald F. Wright, Your Cheatin' Heart(land): The long search for Admin. Sentencing Justice, 2 Buff. Crim. L. Rev. 723, 726 (1999).

percent receiving a prison term and the average prison term being 52 months. Thus, even after *Booker*, the guidelines continue to have an enormous effect on federal sentencing, and sentences continue to be very harsh. While *Booker* has led to an increase in the number of below guideline sentences, sentences are still much longer than they were before the guidelines. They are also longer than sentences in many states for comparable offenses.

For me, the question becomes why is it that after *Booker*, sentences are still so severe. I hoped and believed that *Booker* would start us on path to a more humane sentencing regime, but the numbers clearly show that that has not been the case. I'm not sure why this is so, but several reasons come to mind. First, since at least the 1980s, the United States has been steeped in a "tough on crime" political atmosphere. The SRA, which led to the guidelines and was championed by President Reagan as a law that would "crack down on criminals," was enacted in 1984 and reflected this atmosphere. The guidelines, which took effect in 1987, did likewise. Since then, with several modest exceptions, the guidelines have only become more severe. In other words, harsh punishment has been part of our culture for a long time. Many, if not most, judges came of age in this culture, and many may share its assumptions. Many may disagree with my view that the guidelines are overly harsh. I was lucky to have had extensive experience representing defendants in criminal cases in the pre-guideline era, and this experience certainly affects my belief that the sentences called for by the guidelines are generally much too severe.

The guidelines remain important for another reason. Of the various factors that sentencing judges consider when imposing sentence, only the guidelines provide a

number. Regardless of whether the number has merit, it has force. This is the phenomenon known as anchoring. Sentencing is an inherently subjective decision, and judges provided with a guideline number are likely to pay it particular attention. Judges also tend to be rule followers and, even if they disagree with the sentences called for by the guidelines, their general inclination is not to vary too far from them.

Thus, although I see *Booker* as a godsend, it has not led to a systematic reduction in the severity of federal sentences. What then can be done to create a more humane sentencing regime? The truth is that it will be very difficult. Sentencing in the United States is ultimately determined by politics – severity is determined by people who are elected to office or their appointees – and nothing going on in Washington suggests that Congress has any serious interest in substantially reducing federal sentences. Theoretically, the Commission could effectuate an overall reduction in sentences, but, pursuant to the SRA, it is divided between Republicans and Democrats and, therefore, unlikely to take any dramatic action. My own preference would be to abolish numerical guidelines altogether. Other countries have done so with no adverse results. Prior to the establishment of the guidelines, the United States had a tradition of individualized sentencing and judicial independence. Congress purportedly established the guidelines in response to unjustified disparity, but the empirical evidence of such disparity was minimal. Since then, in their book on federal sentencing, *Fear of Judging*, Kate Smith and José A. Cabranes have definitively established that a sentencing system that is primarily focused on eliminating disparity is bound to fail. Further, there are ways of addressing disparity other than numerical guidelines. These include

requiring a consistency of approach rather than outcome, extensive appellate review, improved data systems and more judicial education regarding sentencing.

18 U.S.C. § 3553(a) specifies both a standard applicable to sentences and the purposes that sentences should serve. If more direction is required, I would favor a system of discursive guidelines which would specify the types of punishment available for an offense but not include numbers. Hopefully, they would provide more options than the present guidelines, which focus almost exclusively on prison. They might also include a more detailed statement of the goals sentencers should seek to accomplish, the criteria and considerations relevant to such goals and common aggravating and mitigating factors for particular offenses. They would, however, leave to individual judges the task of determining precisely how to weigh the relevant goals, criteria, and considerations. Discursive guidelines would make more stringent demands on judges than the present system does. Judges could no longer rely on a pre-established number and would have to provide more detailed explanations of their sentences to the parties, the public, and appellate courts than they presently do. This might make them more thoughtful sentencers.

From: Sharion Aycock
To: Chair
Subject: Request for suggestions
Date: Monday, June 24, 2024 4:00:27 PM

I just want to commend the good work you and the other commissioners are doing. I have now heard you say on a couple of occasions that the Commission will be advocating for alternative sentencing models, including Drug and Re-Entry Courts. I encourage those efforts. I look forward to your suggestions-- particularly because some judges are so opposed to alternative sentencing yet many of us are seeing firsthand how well it can work. Would there be any consideration to making that type sentence mandatory in some situations.

Recently, I had a death case involving fentanyl. Because the fentanyl was mixed with another substance, the USA felt they could not ask for sentencing under the statute due to the inability to substantiate the amount consumed. I wonder if the Commission has given any thoughts on how or what proof would be necessary considering these are generally very small amounts and are consumed?

Keep up the good work. Sharion Aycock

From: Cathy Bencivengo
To: Chair
Subject: Guideline Amendment Proposal
Date: Thursday, June 20, 2024 6:06:13 PM

I am in the Southern District of California. We have a significant number of 1324 cases for bringing in and transporting undocumented people. If the offense involves conduct that puts others, including the aliens, at substantial risk of serious bodily injury or death there is an increase from the base offense level of 12 to 18. (USSG § 2L1.1 (b)(6)). The substantial risk adjustment applies to a wide variety of conduct such as transporting someone in the trunk or carrying substantially more passengers than the rated capacity of the vehicle, as well as transporting a person in the engine compartment (application note 3). The range of conduct that supports a substantial risk adjustment is very varied and the risk of serious bodily injury from being unrestrained in the trunk of a vehicle that is not speeding although real is not comparable to the risk of being shoved into an engine compartment, or being one of 26 people loaded into the back of a Suburban speeding from border patrol on a dirt road.

I suggest a range of adjustment (like the ranges for role §3B1.2) that provides some degree upward adjustment based on the actual conduct.

Thank you for the opportunity to submit a suggestion

Cathy Ann Bencivengo
United States District Judge

From:	Stephen Bough
To:	Chair
Subject:	RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date:	Friday, June 7, 2024 12:40:09 PM

Thanks for the nudge. I am extremely proud and humbled by the great work of the USSC. It helps you look good when the previous years lacked a quorum, but boy are you off and running. Thank you for caring about justice.

The focus on specialty courts is so important to achieving justice. The USSC is doing fabulous work. Not everyone needs prison to reform their ways. Having the line on the guidelines that says someone is eligible for probation is important. Giving permission for counsel and the court to consider that probation is "sufficient, but greater than necessary" makes our system stronger. That same line (or maybe a little farther down the chart) can be used to have a defendant be considered for an intensive front-end specialty court.

I would encourage the Commission to codify front-end specialty courts in the same way the Commission has codified probation. Give the parties and the justice system permission to start a front-end problem-solving court. Recognize that every court is different (drug, trauma, etc.), but that if a court has one, here's a line on the guideline chart that a person could be considered for a front-end specialty court. You already have all the materials collected on how to start a specialty court and can refer readers to your website if they don't.

Opposition comes to creating a front-end specialty court from probation officers, judges, prosecutors, and folks outside the justice system. Putting it in the sentencing commission book makes it official, just another tool to be used to determine "the need for the sentence to be imposed" and "the kinds of sentences available." If you complain, you must volunteer. Put me in, coach, I'm glad to help on this topic. Thanks for considering my crazy ideas.

Stephen R. Bough
U.S. District Court Judge

United States Court
Western District of Missouri
[redacted]

From: Stephen Bough
To: Chair
Subject: Re: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Thursday, June 13, 2024 11:05:37 AM

Round II

One of the more valid points in opposition to specialty courts is funding. Probation officers are vital to the federal criminal justice system. These officers are educated experts, hard-working, and allow specialty courts to flourish. They are in the field going to places of employment and homes, writing detailed reports, coordinating drug testing, ensuring mental health counseling, and providing judges with much needed insight on individuals being supervised. PO's ain't cheap and they are already enormously busy.

Here's some spit ball numbers; $42,000 per year for federal prison and $10,000 per year for federal supervised release. Most front-end problem-solving courts require defendants to plead guilty. The only obstacles standing between taxpayers saving $32,000 per year per defendant per year are a front-end problem-solving court and/or a sentencing date.

Taxpayers demand and we should give them cost effective solutions; we must be good stewards of these hard-earned dollars. Those districts that have a front-end problem-solving court bear the $10,000 cost of supervising a defendant who has already pled guilty. Those districts that don't have a problem-solving court shift the financial burden to the executive branch to pay $42,000 because this defendant becomes an inmate in the BOP. Try explaining to a taxpayer why we can't have a more effective system (reduced recidivism, the defendant stays in the community caring for their family, paying taxes at a job, getting better treatment for addictions, . . .) and cheaper system because of a budget process that allocates some tax dollars to Article II and other tax dollars to Article III ("don't we send it all to the IRS??????").

My solution is that the BOP pays the $10,000 per defendant per year to the district that has a front-end problem-solving court where a defendant has pled guilty. I know, this sounds crazy. Any good government advocate would support this idea. Politicians of all stripes could get behind this effort. I don't know if you would need legislation or just executive action. This is a bi-partisan solution to a very real problem that doesn't cost Americans any money.

Once again I'm complaining. Put me in. Let's get a group together to go to the Attorney General to start a conversation. Thank you for entertaining my rather non-conventional suggestions.

Sent from my iPad

From: Terrence William Boyle
To: Chair
Subject: Guidelines
Date: Wednesday, June 5, 2024 3:47:45 PM

I would prefer that you abandon the requirement for an advisory guideline. I sentenced defendants in criminal cases prior to the effective date of guideline sentencing on November 1, 1987, and my opinion is that the prior rules for sentencing were fairer more just than either mandatory guidelines or advisory guidelines. Fair, Just, and equitable sentences are more likely without guidelines than with guidelines that inevitably are random and impersonal .
T W Boyle , USDJ, EDNC.

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Jeffrey Brown, Texas, Southern

Topics:

Policymaking Recommendations

Comments:

I just hope the Commission will take on the hard work of reworking the child-porn guidelines.

Submitted on: June 5, 2024

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

HONORABLE J. PHILIP CALABRESE
JUDGE

TELEPHONE (216) 357-7265

July 3, 2024

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Re: Public Comment
Human Smuggling and U.S.S.G. § 2L1.1

To the Members of the United States Sentencing Commission:

Earlier this year, I sat by designation in the Northern District of Oklahoma. In doing so, I encountered for the first time a deficiency in the sentencing guidelines that address smuggling, transporting, or harboring an unlawful alien. Accordingly, I write to encourage the Commission to amend Section 2L1.1 of the United States Sentencing Guidelines.

By way of background, in the case that brought this issue to my attention, the defendant belonged to a cartel that, federal agents testified, moves a significant volume of drugs into the country. Part of the cartel's operations involves transporting people across the southern border illegally to distribute those drugs in the United States. Once on the U.S. side of the border, the defendant admitted to picking up the aliens and transporting them to various places throughout the country, from Chicago to New Jersey to North Carolina. He pled guilty to conspiracy to transport aliens unlawfully in the United States for profit, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(v)(I) and 1324(a)(1)(B)(i).

At sentencing, Section 2L1.1(a)(3) provided a base offense level of 12. After evidentiary proceedings resulted in a 3-level enhancement under Section 2L1.1(b)(2), the application of all adjustments resulted in a final offense level of 12. In criminal history category I, the advisory guideline range, then, was 10 to 16 months, which falls within Zone C. Without that 3-level enhancement, the advisory guideline range would have been 4 to 10 months in Zone B.

Given the seriousness of smuggling people across the country, and the ties to organized international drug trafficking, this guideline badly understates the seriousness of the offense, its direct harm to the smuggled victims, and the harms to communities where drugs, including fentanyl, end up. As a result of such conduct, the guidelines should result in an advisory sentence closer to the statutory maximum sentence of ten-years imprisonment. Such a sentence is necessary not only to account

for the seriousness of the offense but also to promote deterrence by making the sentence more than just a cost of engaging in such a lucrative business.

I leave to the Commission and its deliberations how best to amend Section 2L1.1(a) so that advisory sentences under it better address the reality of the circumstances in which human smuggling offenses typically arise. Two options might make sense: (1) remove the distinctions within Section 2L1.1(a) and make the base offense level 25; or (2) if the Commission wishes to maintain the distinction within the guideline based on the status of the aliens transported as an indicator of the seriousness of the offense, then a base offense level for Section 2L1.1(c) of 21 might better reflect the seriousness of the offense and structure of that guideline. In appropriate cases, sentencing judges retain their ability to depart or vary to account for particular facts and circumstances. With its experience and resources and through its deliberations, the Commission might identify better solutions. And Congress could help matters by raising the statutory maximum.

Thank you for your consideration.

Sincerely,

J. Philip Calabrese
United States District Judge
Northern District of Ohio

Judge Sharon Johnson Coleman
United States District Court for the Northern District of Illinois
[redacted]

Re: U.S. Sentencing Commission Request for Comment
June 20, 2024

Dear Judge Reeves,

I write in response to your June 5, 2024 letter requesting comment on the United States Sentencing Commission's Sentencing Guidelines. Specifically, I would like to call your attention to certain issues I have noticed in sentencing related to child pornography and sex offenders.

First, I recommend the Commission research whether, as is my experience, the child pornography sentencing guidelines offer too little leeway for first-time offenders. Other courts have noted these issues too, based on § 2G2.2's enhancements that "apply in nearly all cases." *See United States v. Dorvee*, 616 F.3d 174, 186 (2d Cir. 2010) ("An ordinary first-time offender is therefore likely to qualify for a sentence of at least 168 to 210 months, rapidly approaching the statutory maximum, based solely on sentencing enhancements that are all but inherent to the crime of conviction.").

Second, the Commission should also consider the distinction between the general production of child pornography and "Self-Produced Child Pornography"—that is, explicit images or videos that a child creates of his or herself, often connected in the popular understanding with "sexting." *See* Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues - Structured Prosecutorial Discretion Within A Multidisciplinary Response*, 17 VA. J. SOC. POL'Y & L. 486 (2010). More broadly, I recommend the Commission research the kinds of "sex crimes" that require an offender to register with state or national sex offender registries, and how such registrations affect federal sentences and reentry into society.

Finally, I recommend researching and issuing guidance on the length and conditions of supervised release following a conviction for possession of child pornography. I was recently transferred a case in which the defendant pled guilty to receiving child pornography in violation of 18 U.S.C. § 2252(a)(2) and (b). Although it was the defendant's first offense, he was given 20 years of supervised release after a lengthy prison sentence. Much of the justification for the lengthy supervised release was ostensibly to protect the public from the defendant. But the defendant was also independently required to register on the sex offender registry under the Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20913. If laws like SORNA adequately serve the public-safety function judges hope to achieve through supervised release, extended supervised release without further justification could prove unduly punitive.

Sincerely,

Judge Sharon Johnson Coleman

From: Jackie Corley
To: Chair
Subject: Re: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Thursday, June 13, 2024 11:45:51 AM
Attachments:

Judge Reeves, here is a recent order on Federal Rules of Criminal Procedure 35(a) and correcting clear error in sentencing.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID WAYNE DEPAPE,

Defendant.

Case No. 22-cr-00426-JSC-1

ORDER RE: DEFENDANT'S MOTION IN OPPOSITION TO REOPENING SENTENCING UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 35

Re: Dkt. Nos. 243, 250

On May 18, 2024, the Court granted the government's motion to reopen the sentencing hearing pursuant to Federal Rule of Criminal Procedure 35(a), scheduled the reopened sentencing hearing for Tuesday, May 28, 2024 at 9:30 a.m., and directed any response from Mr. Depape be filed by noon on Wednesday, May 22, 2024. (Dkt. No. 244.)[1] Mr. Depape filed a timely response opposing the Court's reopening of his sentencing. (Dkt. No. 250.) Among other things, Mr. Depape argued Rule 35(a) does not apply to the clear allocution error underlying the reopening of the sentencing procedure. At the May 28, 2024 hearing, the Court gave Mr. Depape the opportunity to orally address his Rule 35(a) argument. After hearing argument, the Court concluded Rule 35(a) applies to the clear sentencing error at issue, set aside its previous sentence, and proceeded to resentence Mr. Depape. This Order reflects the Court's analysis as to the applicability of Rule 35(a).

DISCUSSION

Federal Rule of Criminal Procedure 32(i)(4)(A)(ii) provides "[b]efore imposing a sentence, the court must: . . . address the defendant personally in order to permit the defendant to speak or

[1] Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

present any information to mitigate the sentence." *See Green v. United States*, 365 U.S. 301, 304 (1961) ("Taken in the context of its history, there can be little doubt that the drafters of Rule 32(a) intended that the defendant be personally afforded the opportunity to speak before imposition of sentence. . . . The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."). "In exercising the right to allocution, a defendant has the right to fully present all available accurate information bearing on mitigation of punishment, and the district court has a duty to listen and give careful and serious consideration to such information." *United States v. Mack*, 200 F.3d 653, 658 (9th Cir. 2000). The Ninth Circuit presumes prejudice when a district court fails to accord a defendant his allocution right before imposing a sentence. *United States v. Gunning*, 401 F.3d 1145, 1149 (9th Cir. 2005) ("[W]hen a district court *could have* lowered a defendant's sentence, we have presumed prejudice and remanded, even if we doubted that the district court *would have* done so.").

Under Rule 35(a), the Court "may correct a sentence that resulted from" clear error, which includes "errors which would almost certainly result in a remand of the case to the trial court for further action." Fed. R. Crim. P. 35, advisory committee notes to 1991 amendments. Failing to provide a defendant his Rule 32 allocution right is clear error "which would almost certainly result in a remand of the case." *Id.*; *see, e.g.*, *Gunning*, 401 F.3d at 1149-50 (9th Cir. 2005) (finding district court's failure to provide the defendant his right of allocution at resentencing hearing required remand, saying "we are forced to hold that the district court's **major error was recrudescent**." (emphasis added)); *United States v. Daniels*, 760 F.3d 920, 926 (9th Cir. 2014) (vacating sentence and remanding because "[a] district court that does not offer a supervised releasee the chance to exercise [the right to allocute] **commits plain error**." (emphasis added)); *United States v. Mendez*, 501 F. App'x 619, 620 (9th Cir. 2012) (remanding for resentencing based on district court's denial of allocution right because "**the error is not harmless**, because the district court could have lowered [the defendant's] sentence and we cannot say that a personal statement from [the defendant] would not have made a difference." (emphasis added)); *United States v. Guntipally*, 735 F. App'x 432, 433 (9th Cir. 2018) (vacating sentence and remanding because the defendant "was not personally invited to allocute and, because she "could have

received a shorter sentence, **the denial of the right of allocution is not harmless**." (emphasis added)). So, Rule 35(a) permits the Court to correct Mr. Depape's sentence for failure to provide the opportunity to allocute.

Mr. Depape argued an allocution error "falls outside Rule 35(a)'s ambit" because (1) "an allocution error is not akin to an arithmetical or a technical error," (2) a resentencing hearing is unavailable under Rule 35, and (3) Rule 35 can no longer be used "to seek correction of a sentence on the ground that it was imposed *in an illegal manner*." (Dkt. No. 250 at 11-13.)

A. Denial of Rule 32 Allocution Right Is Readily Ascertainable

Mr. Depape relies on *United States v. M. M.* to insist Rule 35(a) is inapplicable to allocution error. 23 F.4th 216 (3d Cir. 2021). In *M. M.*, the Third Circuit overturned the district court's Rule 35(a) correction of a defendant's sentence for lack of clear error and stated, "clear error must be akin to an arithmetical or a technical error." *Id.* at 221. The Third Circuit reasoned "clear errors subject to correction under Rule 35(a) . . . . are easily identifiable and readily ascertained from the sentencing proceeding and judgment." *Id*. at 221. Because the Third Circuit did "not perceive error from the record at sentencing," the "type of error that occurred [in *M. M.*] simply d[id] not fit the parameters of Rule 35(a)." *Id*. at 223-24. Here, by contrast, the sentencing transcript clearly evidences the denial of Mr. Depape's allocution right. (Dkt. No. 247.) The allocution error is both "easily identified [and] readily ascertainable from the sentencing record." *M. M.*, 23 F.4th at 221. So, allocution error fits within the parameters of Rule 35(a), including the Third Circuit's description of those parameters.

Moreover, *M. M.* acknowledged "clear error would 'extend only to those cases in which an obvious error or mistake has occurred in the sentence' that 'would almost certainly result in a remand of the case to the trial court.'" *Id.* at 220; *see also United States v. Fields*, 552 F.3d 401, 404 (4th Cir. 2009) ("Although courts take different approaches to Rule 35(a), all essentially agree that 'clear error' under the Rule requires some reversible error at the initial sentencing (or here, the initial resentencing) hearing."). As explained above, the Ninth Circuit has repeatedly held the failure to provide a defendant an allocution opportunity is clear error requiring remand. *See, e.g.*, *Gunning*, 401 F.3d at 1149. So, allocution error falls within the scope of the plain language of

Rule 35(a).

B. A Resentencing Hearing Is Available

Mr. Depape contends a resentencing proceeding is unavailable under Rule 35 because Rule 35(a) is "limited only to 'correcting' clear error," and does not encompass plenary resentencing proceedings. Federal Rule of Criminal Procedure 43 "sets the proceedings authorized by § 3582(c)(2) and Rule 35 apart from other sentencing proceedings" as it acknowledges those proceedings can sometimes occur in the defendant's absence. *Dillon v. United States*, 560 U.S. 817, 828 (2010). But *Dillon* concerned whether 18 U.S.C. § 3582(c)(2) "authorize[d] a sentencing or resentencing proceeding" and does not hold resentencing to correct a clear error is unavailable under Rule 35(a). *Id*. at 825. And Rule 43's provision "a defendant need not be present" if a "proceeding involves the correction or reduction of a sentence under Rule 35" does not mandate a defendant's absence. Rule 43 is thus inapplicable when the relevant allocution correction requires the defendant's presence. Indeed, the 1991 advisory committee notes to Rule 35 explain "the Committee contemplates that the court will act in accordance with Rules 32 and 43 with regard to any corrections in the sentence." So, sometimes the defendant needs to be present.

Both the Seventh Circuit and the Fifth Circuit have held a district court can rectify an allocation error by setting aside the sentence, reopening the proceeding, and providing the defendant the opportunity to speak. *United States v. Luepke*, 495 F.3d 443, 448 (7th Cir. 2007) (explaining a "denial of the right to allocation" can "be cured by the district court" if the "trial judge, realizing after sentencing that the right of allocution has been neglected, may rectify the situation by, in effect, setting aside the sentence, reopening the proceeding, and inviting the defendant to speak." (cleaned up)); *United States v. Conour*, 716 F. App'x 538, 542-43 (7th Cir. 2017) ("[a] belated allocution is error unless the district court puts aside its original determination and takes steps to *communicate* effectively to the defendant that, through his statement, he has a meaningful opportunity to influence the sentence.") (quoting *Luepke*, 495 F.3d at 450 (emphasis in original)); *United States v. Delgado*, 256 F.3d 264, 279 (5th Cir. 2001) (holding Rule 35 "was the most appropriate authority under which the district could resentence [a defendant] and correct the clear error of failing to afford him his right to allocute."); *see also United States v. Bustamante-*

Conchas, 850 F.3d 1130, 1150 (10th Cir. 2017) ("For 14 days after the sentencing hearing, the district court could set aside the sentence for the clear error of violating the defendant's right of allocution. *See* Fed. R. Crim. P. 35(a) (correcting clear error in sentence).") (Hartz, J., dissenting).

C. Rule 35(a) Still Covers Clear Error

Finally, Mr. Depape argues the post-1987 version of Rule 35 does not authorize correction of allocution errors.

Prior to 1966, Rule 35 provided "the court may correct an illegal sentence at any time." In *Hill v. United States*, the Supreme Court held this language did not permit the correction of a sentence imposed in an illegal *manner*, and, specifically, a sentence imposed without providing the defendant an opportunity to allocute. 368 U.S. 424, 430 (1962). In 1966, in response to *Hill*, Rule 35 was amended to give courts "power to correct a sentence imposed in an illegal manner." Fed. R. Crim. P. 35, advisory committee notes to 1966 amendments ("The amendment to the first sentence gives the court power to correct a sentence imposed in an illegal manner within the same time limits as those provided for reducing a sentence."); Fed. R. Crim. P. 35(a) (1966) ("The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence."); *see also United States v. Stevens*, 548 F.2d 1360, 1363 n.8 (9th Cir. 1977) ("[The category of sentences imposed in an illegal manner] was created in amendments to Rule 35 intended to change the result in *Hill v. United States*, in which the then Rule 35 was held to be inapplicable to correct a sentence imposed without granting the defendant the right of allocution." (cleaned up)).

In 1984, Rule 35 was rewritten to "eliminate much of [the] overlap [between Rule 35 and the statutory motion to vacate or correct a sentence under 28 U.S.C. § 2255] and to accommodate the Sentencing Reform Act." 3 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 612 (5th ed.). The 1984 amendments went into effect in 1987:

> Rule 35. Correction of Sentence
> (a) CORRECTION OF A SENTENCE ON REMAND. — The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court —
> (1) for imposition of a sentence in accord with the findings of the court

> of appeals; or
> (2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.
> (b) CORRECTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. — The court, on motion of the Government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).

Pub. L. 98-473, Title II, § 215(b).[2]

In 1991, Rule 35 was again amended to add then subdivision (c) (the provision that became today's subdivision (a)), which stated: "The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(c) (1991). The inclusion of the new subdivision was

> intended to adopt, in part, a suggestion from the Federal Courts Study Committee 1990 that Rule 35 be amended **to recognize explicitly the ability of the sentencing court to correct a sentence imposed as a result of an obvious arithmetical, technical or other clear error, if the error is discovered shortly after the sentence is imposed**.

Fed. R. Crim. P. 35, advisory committee notes to 1991 amendments (emphasis added). The advisory committee notes explain a "shorter period of time would also reduce the likelihood of abuse of the rule by limiting its application to acknowledged and obvious errors in sentencing." *Id.*

> The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the

[2] While the 1987 version of Rule 35 did not explicitly afford district courts the authority to reopen sentencing proceedings to correct clear error, some courts continued to hold Rule 35 permitted them such authority. *See, e.g.*, *United States v. Cook*, 890 F.2d 672, 674-75 (4th Cir. 1989) (holding while Congress had amended Rule 35 in 1984 with the purpose "to impose on the new sentencing system a requirement that the sentence imposed in the public forum during the sentencing hearing would remain constant, immune from later modification," that did not alter "the inherent power in a court to correct an acknowledged and obvious mistake," so long as its correction occurred within the "period of time in which either party may file a notice of appeal.").

> sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines.

Id.

The 2002 amendments relocated "[f]ormer Rule 35(c), which addressed the authority of the court to correct certain errors in the sentence," to Rule 35(a). Fed. R. Crim. P. 35, advisory committee notes to 2002 amendments. The 2009 amendments extended the period for the trial court to correct sentencing errors from 7 days to 14 days, and noted "[e]xtension of the period in this fashion will cause no jurisdictional problems if an appeal has been filed, because Federal Rule of Appellate Procedure 4(b)(5) expressly provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a)." Rule 35 has not been amended since.

Nothing in any of these amendments suggest an intent to revert to the *Hill v. United States* regime in which "clear" sentencing errors could not be corrected under Rule 35 unless they resulted in an illegal sentence. To the contrary, as discussed above, after Rule 35 was amended in response to *Hill*, Rule 35 permitted courts to "correct an illegal sentence at any time and" to "correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence" (120 days). So, at the time, "Rule 35 distinguishe[d] among motions to reduce or correct an 'illegal' sentence, a lawful sentence, and a 'sentence imposed in an illegal manner.'" *United States v. Fowler*, 794 F.2d 1446, 1448 (9th Cir. 1986) (quoting 3 C. Wright, *Federal Practice and Procedure* §§ 582-86 at 380-407 (2d ed. 1982 & Supp. 1986)). However, with the 1991 amendments, the text of rule collapsed this distinction: rather than referring to an "illegal sentence" and a "sentence imposed in an illegal manner," the rule now only refers to "a sentence that resulted from . . . other clear error." Accordingly, the rule encompasses sentences that *result* from clear error—such as the failure to afford Mr. Depape an opportunity to allocute during the sentencing proceeding. That failure was a "clear error," and the ensuing sentence "resulted from" that error.

Defendant's arguments to the contrary are unpersuasive. Defendant cites to *Sevilla-Oyola*, arguing "illegal sentences" for the purposes of Rule 35(a) concern *only* the terms of punishment

itself rather than errors that occurred during the sentencing proceeding. (Dkt. No. 250 at 13 (quoting *United States v. Sevilla-Oyola*, 770 F.3d 1, 10 (1st Cir. 2014)). But the "illegal sentence[s]" phrase in *Sevilla-Oyola* quotes from *Hill v. United States*—which, as discussed above, was a 1962 Supreme Court decision applying the pre-1966 version of Rule 35 (the version that explicitly applied only to "illegal sentences" rather than "a sentence that resulted from . . . other clear error"). *Sevilla-Oyola*, 770 F.3d at 10 ("The function of Rule 35(a) is narrowly circumscribed: It 'permit[s] correction . . . of an illegal sentence.'" (quoting *Hill*, 368 U.S. at 430)). Moreover, the *Sevilla-Oyola* court explained "Rule 35(a) does not . . . enable a judge to fix errors committed at trial or during proceedings prior to the imposition of sentence." *Id.* at 11. Indeed, the holding in *Sevilla-Oyola* was "Rule 35(a) does not provide a means to revisit possible errors in the plea colloquy," as the plea colloquy is a separate proceeding from the sentencing. However, in this case, the Court rectified a clear error that occurred at the sentencing *itself*.

CONCLUSION

For the reasons stated above, Rule 35(a) permitted the Court to reopen sentencing to correct Mr. Depape's sentence for failure to provide him with the opportunity to allocute, because that clear error, if left undisturbed, would require remand. *See, e.g.*, *Gunning*, 401 F.3d at 1149 (9th Cir. 2005). The Court was not persuaded by Mr. Depape's other arguments against the Court resentencing Mr. Depape.

IT IS SO ORDERED.

Dated: May 28, 2024

Jacqueline Scott Corley

JACQUELINE SCOTT CORLEY
United States District Judge

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Charles Fleming, Ohio, Northern

Topics:

Policymaking Recommendations

Comments:

Section 4C1.2 allows diversionary dispositions (some) to count towards criminal history. I think this should be revisited.

I also believe the USSC should revisit whether ANY acquitted conduct should be considered as relevant conduct.

Submitted on: June 26, 2024

From: Iain Johnston
To: Chair
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Wednesday, June 5, 2024 2:36:37 PM
Attachments:

Carlton,

Here's my issue. It's the apparent void in the Guidelines with regard to the definition of "firearms" and "machine guns," specifically machine gun conversion devices (more commonly known as "switches").

As you probably know, switches have proliferated incredibly in the last couple of years. Gangs are paying kids to make them using 3D printers. They are being shipped into the country from overseas, too. Switches are pernicious and the Guidelines should address their incredible danger.

And the Guidelines need to fix the void.

I've attached my order on this issue. The first paragraph frames the issue.

If you have any questions, just let me know.

Iain

User Name: Iain Johnston
Date and Time: Wednesday, June 5, 2024 12:53:00PM CDT
Job Number: 225931711

Document (1)

1. *United States v. Hixson, 624 F. Supp. 3d 930*
   Client/Matter: -None-

Neutral
As of: June 5, 2024 5:53 PM Z

United States v. Hixson

United States District Court for the Northern District of Illinois, Western Division

August 30, 2022, Decided; August 30, 2022, Filed

No. 21 CR 50016

Reporter
624 F. Supp. 3d 930 *; 2022 U.S. Dist. LEXIS 155996 **; 2022 WL 3908595

United States of America, v. Javaughn A. Hixson.

Subsequent History: Appeal dismissed by, Motion granted by United States v. Hixson, 2022 U.S. App. LEXIS 36996, 2022 WL 18863675 (7th Cir. Ill., Dec. 1, 2022)

Core Terms

sentence, switches, firearm, Guidelines, machinegun, weapon, offenses, factors, enhancement, departure, confidential informant, Manual, probation, circumstances, possessing, magazine, steps, felony conviction, sentencing court, semiautomatic, calculated, automatic, convert, parole, sears, shoot, impose sentence, incarcerated, trafficking, cousin

Case Summary

Overview

HOLDINGS: [1]-In a case where defendant pleaded guilty to two counts: (1) possession of a machinegun, and (2) unlawful possession of a firearm by a felon, the court sentenced defendant 66 months' imprisonment on each count to run concurrently after applying 18 U.S.C.S. § 3553(a) factors where the nature and circumstances of both offenses were extremely serious and defendant had a prior felony conviction.

Outcome

Order entered.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Departures From Guidelines > Upward Departures > Weapons Violations

HN1 **Upward Departures, Weapons Violations**

The Sentencing Guidelines do not include machine guns—including devices that convert semiautomatic weapons into fully automatic weapons—in the definition of firearms.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN2 **Imposition of Sentence, Factors**

In fashioning a just sentence, the district court can look to the Sentencing Guidelines when it considers the statutory factors identified in 18 U.S.C.S. § 3553(a).

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN3 **Imposition of Sentence, Factors**

The Sentencing Guidelines explicitly recognize that they cannot anticipate every sentencing circumstance. U.S. Sentencing Guidelines Manual § 5K2.0(a)(2).

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > Definitions

Criminal Law & Procedure > ... > Firearms Licenses > Businesses > Sales

Criminal Law & Procedure > ... > Use of Weapons > Commission of Another

Crime > Elements

HN4 **Weapons Offenses, Definitions**

Section 921(a)(3) defines firearm to mean (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. 18 U.S.C.S. § 921(a)(3).

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > Definitions

Criminal Law & Procedure > ... > Weapons Offenses > Trafficking in Weapons > Penalties

HN5 **Weapons Offenses, Definitions**

18 U.S.C.S. § 921(a)(23) defines machinegun by referencing the National Firearms Act, so that the term machinegun has the meaning given such term in § 5845(b) of the National Firearms Act. 18 U.S.C.S. § 921(a)(23). Section 5845(b) of the National Firearms Act defines machinegun as any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person. 26 U.S.C.S. § 5845. In contrast, the Sentencing Guidelines define firearm as only having the meaning given that term in 18 U.S.C.S. 921(a)(3). U.S. Sentencing Guidelines Manual § 2K2.1 application n. 1.

Criminal Law & Procedure > ... > Departures From Guidelines > Upward Departures > Weapons Violations

HN6 **Upward Departures, Weapons Violations**

There exist three references to the statutory definition of a machinegun in U.S. Sentencing Guidelines Manual § 2K2.1. Specifically, in setting the base offense level, a base level of 26 is required, if the offense involved a machinegun and the defendant committed any part of the offense after receiving at least two felony convictions for either a crime of violence or a controlled substance offense. U.S. Sentencing Guidelines Manual § 2K2.1(a)(1). Next, in setting the base offense level, a base level of 20 is required if the offense involved a machinegun and the defendant meets three other requirements. U.S. Sentencing Guidelines Manual § 2K2.1(a)(4). Finally, in setting the base offense level, a base level of 18 is required if the offense simply involved a machinegun. U.S. Sentencing Guidelines Manual § 2K2.1(a)(5). All specific offense characteristics (enhancements providing for an increase in the offense level) under U.S. Sentencing Guidelines Manual § 2K2.1 refer to firearm, including the enhancement when three or more firearms are involved, and the enhancement for trafficking of firearms. U.S. Sentencing Guidelines Manual § 2K2.1(b)(1); U.S. Sentencing Guidelines Manual § 2K2.1(b)(5).

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > Adjustments & Enhancements

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Allocution

Criminal Law & Procedure > Sentencing > Ranges

HN7 **Sentencing Guidelines, Adjustments & Enhancements**

Regardless of the number of steps, the sentencing process has two fundamental requirements: (1) correctly calculating the guideline range, and (2) applying 18 U.S.C.S. § 3553(a). In applying 18 U.S.C.S. § 3553(a), the sentencing court can take guidance from the Sentencing Guidelines Manual, and must give due consideration to counsel's arguments, as well as the defendant's allocution. If that process results in a sentence outside the guideline range, then the sentencing court must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the variance. The sentencing court must then show its work by explaining how and why it reached the sentence imposed, during which it

must address the defendant's main arguments. A sentencing court is under no duty, however, to follow rigidly the *U.S. Sentencing Guidelines Manual § 1B1.1* construct. The sentencing court's only duty is to calculate the correct guidelines range, consider in the context of *18 U.S.C.S. § 3553(a)* the factors the parties have set before it, and respond to those considerations in a meaningful way.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > Adjustments & Enhancements

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN8 **Sentencing Guidelines, Adjustments & Enhancements**

A judge is entitled to impose sentence based on what the defendant actually did, whether or not a particular enhancement applies.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Criminal Law & Procedure > Sentencing > Restitution

HN9 **Imposition of Sentence, Factors**

The district court in determining the particular sentence to be imposed shall consider the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with training, medical care, or other correctional treatment in the most effective manner; the kinds of sentences available; the kinds of sentence and the sentencing range; any pertinent Sentencing Commission policy statement; the need to avoid unwarranted sentence disparities; and the need to provide restitution to any victim of the offense. *18 U.S.C.S. § 3553(a)*.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN10 **Imposition of Sentence, Factors**

Formerly denominated departures and offense characteristics are relevant in the sentencing process and courts should give them conscientious consideration.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Criminal Law & Procedure > ... > Departures From Guidelines > Upward Departures > Weapons Violations

HN11 **Imposition of Sentence, Factors**

The departure provision in *U.S. Sentencing Guidelines Manual § 5K2.0(a)(2)(B)* recognizes that circumstances may be present that the Sentencing Guidelines may not have identified but are nevertheless relevant to determining the appropriate sentence. And the offense characteristics in *U.S. Sentencing Guidelines Manual § 2K2.1(b)* counsel that the total number of firearms involved is a relevant factor as is when firearms are being trafficked.

Criminal Law & Procedure > ... > Use of Weapons > Simple Use > Elements

Criminal Law & Procedure > ... > Departures From Guidelines > Upward Departures > Weapons Violations

HN12 **Simple Use, Elements**

Aggravated unlawful use of a weapon is serious.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN13 **Imposition of Sentence, Factors**

Without doubt, general deterrence does not trump all other factors under 18 U.S.C.S. § 3553(a). It is just one of many factors. But so long as the court provides individualized sentencing to a particular defendant, a court's sentence is allowed to send a message to the larger community. The district court does not find this desire to send a message through sentencing inappropriate per se. Indeed, perhaps paramount among the purposes of punishment is the desire to deter similar misconduct by others.

Counsel: **[**1]** For USA, Plaintiff: Talia M. Bucci, LEAD ATTORNEY, U.S. Attorney's Office, Rockford, IL; Rockford, United States Attorney's Office (Rockford), Rockford, IL; MARS, U.S. Marshal, Rockford, IL; PRO, PROBATION OFFICE, Rockford, IL.

Judges: Iain D. Johnston, United States District Judge.

Opinion by: Iain D. Johnston

Opinion

[*933] MEMORANDUM OPINION AND ORDER[1]

ISSUE

The United States Sentencing Guidelines have a void.[2] HN1[↑] The Guidelines do *not* include machine guns—including devices that convert semiautomatic weapons into fully automatic weapons—in the definition of "firearms". *Compare* 18 U.S.C. § 921(a)(23) (definition of machinegun) *with* § 2K2.1 Application Note 1 (defining firearm to mean the definition in 18 U.S.C. § 921(a)(3)). Whether that void is intentional and whether the United States Sentencing Commission intends to fill that void now that it finally has a quorum is beyond the Court's knowledge.[3] HN2[↑] But, in fashioning a just sentence, the Court can look to the Sentencing Guidelines when it considers the statutory factors identified in 18 U.S.C. § 3553(a). Counsel and the Court were unable to locate any reported decision on the issue raised in this case. It appears that only a few other judges have addressed the issue but not in a written decision.[4] With the proliferation of these devices and the ease by which they **[**2]** can be created using a 3-D printer, the Court anticipates many more sentences in the future.

FACTS

On May 4, 2022, Mr. Hixson pleaded guilty to two counts: (1) possession of a machinegun in violation of 18 U.S.C. § 922(o), and (2) unlawful possession of a **[*934]** firearm by a felon in violation of 18 U.S.C. § 922(g)(1). The statutory maximum sentence and fine for both counts is the same—ten years' imprisonment and a $250,000 fine.

These charges result from Mr. Hixson's relevant conduct from October 2020 to January 2021. All of this relevant conduct occurred while he was on parole after a felony conviction.

On about October 22, 2020, Mr. Hixson exchanged Facebook messages with a confidential informant to sell a device that is a machinegun as defined by statute. As discussed in detail later, these devices are called auto sears, or more specifically in this case, Glock switches. These devices are designed solely and exclusively to convert a semiautomatic weapon into a fully automatic weapon. After Mr. Hixson communicated with the confidential informant, they met on the west side of Rockford, Illinois, so that Mr. Hixson could sell the switch. During this transaction, Mr. Hixson obtained the

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[1] This memorandum opinion and order supplements the Court's statement of reasons.

[2] Nothing in this order should be read as disparaging the good people at the United States Sentencing Commission. In the Court's experience, the Commission's staff is diligent, smart, knowledgeable, and helpful. In addition to studying and reporting on sentencing issues, each year, the staff at the Commission fields countless calls from judges and attorneys, seeking input and guidance. The Court commends them for their work.

[3] HN3[↑] The Sentencing Guidelines explicitly recognize that they cannot anticipate every sentencing circumstance. § 5K2.0(a)(2).

[4] Judge David Godbey is likely the first judge to have addressed this issue. https://www.justice.gov/usao-ndtx/pr/man-sentenced-four-years-machinegun-crime. Judge C.J. Williams appears to have followed shortly afterwards. https://www.justice.gov/usao-ndia/pr/man-who-possessed-3d-printed-glock-switch-sentenced-federal-prison. And Judge John A. Gibney recently sentenced a defendant who used a Glock switch during a shootout. https://www.justice.gov/usao-edva/pr/virginia-beach-man-sentenced-possessing-machine-gun-used-norfolk-shootout.

switch from his source and then sold the switch **[**3]** to the confidential informant for $400.

On November 5, 2020, Mr. Hixson again communicated with the confidential informant to sell two additional Glock switches for $800. The confidential informant told Mr. Hixson that he was going to sell the switches to a third party. Mr. Hixson and the confidential informant agreed to meet at a restaurant on the west side of Rockford for the sale. When Mr. Hixson arrived at the restaurant, the confidential informant got into Mr. Hixson's vehicle, and they drove to meet Mr. Hixson's source. The source arrived in a separate vehicle. Mr. Hixson exited his vehicle, obtained two switches, and returned to his vehicle. Mr. Hixson then sold the two switches for $800.

On November 16, 2020, Mr. Hixson exchanged messages with the confidential informant notifying him that Mr. Hixson had about six switches at that time.

On December 8, 2020, Mr. Hixson and the confidential informant engaged in a nearly identical transaction for the sale of another switch. But this time the price was $350.

In total, Mr. Hixson sold four switches to the confidential informant—one on October 22, 2020, two on November 5, 2020, and one on December 8, 2020. He also admitted to possession **[**4]** of about six switches on November 16, 2020. Assuming the switch sold on December 8, 2020, was one of the switches mentioned on November 16, 2020, the evidence establishes possession of 9 switches.

Finally, at about 2:00 a.m. on January 4, 2021, a Rockford Police Department officer attempted to stop a vehicle. Mr. Hixson was in the front passenger seat. His cousin was driving. But after the officer activated the squad's lights, the vehicle accelerated and did not stop. According to Mr. Hixson, he told his cousin "to go." Dkt. 48, at 7. Eventually, the cousin stopped the vehicle. Mr. Hixson then jumped out and ran but he slipped in the snow. Before the officer could reach Mr. Hixson, Mr. Hixson discarded a firearm in the snow a few feet from where he was caught. The firearm was a 9 mm Glock with an extended magazine, loaded with 28 rounds of ammunition. Dkt. 48, at 7.

AUTO SEARS CONVERT SEMIAUTOMATIC WEAPONS INTO FULLY AUTOMATIC WEAPONS

It appears that as long as semiautomatic weapons have existed, humans have attempted to create devices to make those weapons fully automatic. Indeed, auto sears have existed for decades, if not longer. *See, e.g.,* United States v. Cash, 149 F.3d 706 (7th Cir. 1998) (discussing ATF Ruling 81-4 addressing auto **[**5]** sears); United **[*935]** States v. Bradley, 892 F.2d 634 (7th Cir. 1990) (same). But what were once previously handcrafted metal pieces are now small plastic pieces created by a 3-D printer. Those devices are often referred to as "switches." Unsurprisingly, when installed in Glock handguns,[5] they are referred to as "Glock switches." *Internet Arms Trafficking*, https://www.atf.gov/our-history/internet-arms-trafficking. They are also referred to as Glock conversion devices, Glock conversion kits, and Glock auto sears. When a Glock switch is attached to a semiautomatic Glock, the firearm becomes a fully automatic weapon—essentially a machinegun. So, when the trigger of a Glock with an attached Glock switch is depressed, the firearm can empty a standard magazine in about a second or an extended magazine in about two seconds. The resulting weapon can be difficult to control and is extremely dangerous,[6] which can result in "pray and spray." Moran v. Clark, No. 1:08-

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[5] Glock semiautomatic handguns are the type of weapons often used by drug traffickers. *See* United States v. Wren, 528 F. App'x 500, 509 (6th Cir. 2013); United States v. Williams, 345 F. App'x 979, 980 (6th Cir. 2009). But Glocks are common firearms. Houston v. State, No. CA CR 06-1043, 2007 Ark. App. LEXIS 471, at *11 (Ct. App. Ark. June 13, 2007). Indeed, much of the law enforcement community is armed with Glocks. Just as the ubiquity of cell phones among drug dealers does not mean that all cell-phone users are drug dealers, so too is the fact that possessing a Glock does not necessarily make a person a criminal. In this case, because Mr. Hixon is a felon and knew he was a felon, his possession of the Glock was illegal. 18 U.S.C. § 922(g)(1).

[6] Media outlets as diverse as Vice News and FOX affiliates have reported on Glock switches, providing video of the weapon firing. *See, e.g.*, Alain Stephens, *Tiny "Glock Switches" Have Quietly Flooded the US With Deadly Machine Guns*, March 24, 2022, https://www.vice.com/en/article/pkp8p8/glock-switches-auto-sears; Dennis Shanahan, *What are auto sears and how are they becoming a rising issue*?, April 7, 2022 https://fox40.com/news/sacramento-mass-shooting/gun-recovered-at-mass-shooting-scene-had-been-modified/. In fact, news outlets across the country have recently done stories on https://www.fox2detroit.com/news/man-charged-with-buying-Glock switches. https://abc13.com/glock-switches-are-illegal-downtown-houston-officers glock-switches-that-turn-pistols-to-machine-guns; shot-hpd-shooting/11518379/; https://www.youtube.com/watch?v=vCzbQubIFhY.

cv-01788, 2013 U.S. Dist. LEXIS 146300, at *18 (E.D. Cal. Oct. 9, 2013) ("pray and spray" shooting is a "method of shooting in which [the shooter] fire[s] off shots in a general direction without too much concern as to the specific location where the bullets [will] land). It has been reported that Glocks equipped with switches have been used in mass shootings. Dennis Shanahan, *What are **[**6]** auto sears and how are they becoming a rising issue*?, April 7, 2022 https://fox40.com/news/sacramento-mass-shooting/gun-recovered-at-mass-shooting-scene-had-been-modified/. One can only imagine the surprise of a law enforcement officer—let alone the average person—who encounters a criminal armed with one of these machineguns.

DEFINITIONS OF "FIREARM" AND "MACHINEGUN"

HN4[] Section 921(a)(3) defines "firearm" to mean "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." 18 U.S.C. § 921(a)(3). The definition of "machinegun" is stated elsewhere in Title 18. ***HN5***[] Section 921(a)(23) defines "machinegun" by referencing the National Firearms Act, so that the term "machinegun" "has the meaning **[*936]** given such term in section 5845(b) of the National Firearms Act." 18 U.S.C. § 921(a)(23). Section 5845(b) of the National Firearms Act defines "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function **[**7]** of the trigger. The term shall also include the frame or receiver of any such weapon, *any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun*, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. § 5845 (emphasis added).

In contrast, the Sentencing Guidelines define "firearm" as only having "the meaning given that term in 18 U.S.C. 921(a)(3)." § 2K2.1 Application Note 1. But ***HN6***[] there exist three references to the statutory definition of a machinegun in § 2K2.1. Specifically, in setting the base offense level, a base level of 26 is required, if the offense involved a machinegun and the defendant committed any part of the offens after receiving at least two felony convictions for either a crime of violence or a controlled substance offense. § 2K2.1(a)(1). Next, in setting the base offense level, a base level of 20 is required if the offense involved a machinegun and the defendant meets three other requirements. § 2K2.1(a)(4). Finally, in setting the base offense level, a base level of 18 is required if the offense simply involved a machinegun. § 2K2.1(a)(5). All specific offense characteristics ("enhancements" **[**8]** providing for an increase in the offense level) under § 2K2.1 refer to "firearm," including the enhancement when three or more "firearms" are involved, and the enhancement for "trafficking of firearms." § 2K2.1(b)(1); § 2K2.1(b)(5).

Assuming a sentencing court equated each Glock switch (which, again, is statutorily a machinegun) as a "firearm" under the Guidelines Manual, an offense level would increase based on the number of switches involved over 3. § 2K2.1(b)(1). Likewise, assuming a sentencing court equated a Glock switch as a "firearm" under the Guidelines Manual, the offense level would be increased by 2 levels if the switch were stolen. § 2K2.1(b)(4). Similarly, using the same assumption, the offense level would increase 4 levels if the defendant possessed a switch while leaving or attempting to leave the United States or possessed or transferred the switch with knowledge, intent, or reason to believe that the switch would be transported out of the United States or if the switch was used in connection with another felony offense or with the knowledge, intent, or reason to believe that the switch would be used or possessed in connection with another felony offense. § 2K2.1(b)(6).

SENTENCING PROCEDURE IN THE SEVENTH CIRCUIT

For those judges who prefer **[**9]** the structure of a clear, mechanical sentencing process like that articulated in § 1B1.1 of the Guidelines Manual, determining whether the Seventh Circuit requires two, three, or four steps might be a little vexing. *See* United States v. Settles, No. 21-2780, F.4th , 43 F.4th 801, 2022 U.S. App. LEXIS 22001, at*7 (7th Cir. Aug. 9, 2022) (four steps); United States v. Loving, 22 F.4th 630, 636 (7th Cir. 2022) (three steps); United States v. Pankow, 884 F.3d 785, 793 (7th Cir. 2018) (three steps); United States v. Brown, 732 F.3d 781, 786 (7th Cir. 2013). But it shouldn't be. *See* United States v. Hite, No. 3:11-CR-78, 2012 U.S. Dist. LEXIS 132995, at *3-5 (N.D. Ind. Sept. 18, 2012) ("So long as it does not give undue weight to 'departure' provisions at the expense of non-guideline factors under § 3553(a), and thereby put a thumb on the scale favoring the guidelines **[*937]**

framework, the Court sees no inconsistency between following the instructions in section 1B1.1 and the Seventh Circuit's treatment of 'departures.'").

HN7[] Regardless of the number of steps, the sentencing process has two fundamental requirements: (1) correctly calculating the guideline range, and (2) applying § 3553(a). Brown, 732 F.3d at 786. In applying § 3553(a), the sentencing court can take guidance from the Guidelines Manual, Loving, 22 F.4th at 636, and must give due consideration to counsel's arguments, United States v. Stephens, 986 F.3d 1004, 1009 (7th Cir. 2021), as well as the defendant's allocution, United States v. Griffin, 521 F.3d 727, 731 (7th Cir. 2008). If that process results in a sentence outside the guideline range, then the sentencing court must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the variance. Settles, 43 F.4th 801, 2022 U.S. App. LEXIS 22001, at *7. The sentencing court must then show its work by explaining **[**10]** how and why it reached the sentence imposed, during which it must address the defendant's main arguments. Pankow, 884 F.3d at 793; *see also* Stephens, 986 F.3d at 1009. The Pankow decision succinctly stated the process: "A sentencing court is under no *duty*, however, to follow rigidly the §1B1.1 construct. The sentencing court's only *duty* is to calculate the correct guidelines range, consider in the context of §3553(a) the factors the parties have set before it, and respond to those considerations in a meaningful way." 884 F.3d at 794 (emphasis in original).

The Court addresses these requirements later. But, to avoid any possible confusion, the Court first makes a major detour to explain how it is *not* determining Mr. Hixson's sentence. The Court recognizes that it entered a Rule 32(h) order and notified the parties that it was considering a departure under § 5K2.0, and that after *Booker*, Rule 32(h) "has lost all utility" because departures are obsolete. Brown, 732 F.3d at 786; Dkt. 55. The Court also recognizes that the traditionally very precise and careful Assistant United States Attorney argued that adding two sets of enhancements—one under § 2K2.1(b)(1)(B) and one under § 2K2.1(b)(5)—would increase the offense level to an advisory guideline range of 70 - 87 months, which was also referred to as a "modified range of 70 - 87 months' imprisonment." **[**11]** Dkt. 50, at 4, 7; Dkt. 48, at 31-32. Based on these statements, the Presentence Investigation Report noted that "the government [was] requesting that the Court consider" the § 2K2.1(b)(1)(B) and § 2K2.1(b)(5) enhancements. Dkt. 48, at 8. The Assistant United States Attorney also stated this 70 - 87 month range would "tether" the sentence. The Court acknowledges that—at first blush—its Rule 32(h) order and the United States' position might appear to "come[] dangerously close to formal departure analysis." Settles, 43 F.4th 801, 2022 U.S. App. LEXIS 22001, at *9. And an improper formal departure analysis might be inferred if "tether" means "anchor." *See* United States v. Bravo, 26 F.4th 387, 396-97 (7th Cir. 2022); United States v. Davis, No. 21-2114, 2022 U.S. App. LEXIS 13120, at *6-7 (7th Cir. May 16, 2022) (if guideline range is erroneous, then procedural error occurs because the guideline range anchors the sentencing court's discretion).

But the Court entered the order to give notice to Mr. Hixson's counsel to be prepared to address the precise issue of Glock switches being statutorily defined machineguns but not "firearms" under the Guidelines Manual. The Court often enters orders before hearings, notifying counsel to be prepared to discuss issues that cause the Court concern. This seems not only just but also best practices. Moreover, a fair reading of the United States' official version and its sentencing memorandum shows that **[**12]** the position is more nuanced **[*938]** and consistent with the Court's analysis below. As the Court sees it, the United States' position is that considering the enhancements under § 2K2.1(b)(1)(B) and § 2K2.1(b)(5) allows the Court to sentence Mr. Hixson under a more accurate reflection of the nature and circumstances and severity of the offense using the § 3553(a) factors. Dkt. 50, at 3; Dkt. 48, at 32. The Assistant United States Attorney confirmed the Court's understanding at the sentencing hearing. And, as to the "tether" comment, the Assistant United States Attorney immediately renounced that term. Indeed, she did so in the very next sentence.

The Court is not simply considering the Guidelines Manual's void under § 5K2.0, equating each Glock switch with a "firearm," totaling up the number of switches, and applying § 2K2.1(b)(1)(B) to increase the offense level by 4 levels. Similarly, the Court is not simply equating each Glock switch as a "firearm" to find that Mr. Hixson engaged in firearm trafficking under § 2K2.1(b)(5) to increase the offense level another 4 on top of the § 2K2.1(b)(1)(B) enhancement, resulting in a new total offense level of 25 instead of 17. Engaging in that process might be a mechanical departure analysis inconsistent with Seventh Circuit precedent. Settles, 43 F.4th 801, 2022 U.S. App. LEXIS 22001, at *10. Instead, **[**13]** as explained in more detail later, the Court is sentencing Mr. Hixson based on who he is and what he did, not whether an enhancement applies under

the Guidelines Manual's definition of "firearm." *United States v. Price, 16 F.4th 1263, 1266 (7th Cir. 2021)* (***HN8***[↑] "[A] judge is entitled to impose sentence based on what the defendant actually did, whether or not a particular enhancement applies.").

APPLYING THE PROCEDURE TO FACTS OF THIS CASE

Calculating Correct Guideline Range

The parties and the Court agree that the offense level for Mr. Hixson is 17. His base level is 20 under *§ 2K2.1(a)(4)(B)* because the offense involved a semiautomatic firearm that was capable of accepting a large capacity magazine and Mr. Hixson was a prohibited person—a felon—at the time he committed the offense. Because Mr. Hixson clearly demonstrated acceptance of responsibility for the offense, the offense level is decreased two levels under *§ 3E1.1(a)*. Another decrease of one level applies because of his timely notification to authorities of his intention to plead guilty under *§ 3E1.1(b)*. (20-2 - 1 = 17)

It is also undisputed that Mr. Hixson's criminal history category is III. He had six criminal history points.[7]

[*939] So, the correct and undisputed 2021 Sentencing Guidelines Manual guideline range is 30 - 37 months. **[**14]** (The guideline range would have been identical under the 2018 Sentencing Guidelines Manual.)

The 9 Glock switches involved in this case have not been used to enhance the guideline range. How the Court has considered those switches in fashioning a just sentence is explained next.

Applying *§3553(a)* Factors

Section 3553(a) states, "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2 of this subsection." *18 U.S.C. § 3553(a)*. ***HN9***[↑] The Court in determining the particular sentence to be imposed shall consider the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with training, medical care, or other correctional treatment in the most effective manner; the kinds of sentences available; the kinds of sentence and the sentencing range; any pertinent Sentencing Commission policy statement; the need to avoid unwarranted sentence disparities; **[**15]** and the need to provide restitution to any victim of the offense. *18 U.S.C. § 3553(a)*.

Mr. Hixson is being sentenced for two offenses: possessing a machinegun (the Glock switches on November 5, 2020) and possessing a firearm as a felon on January 4, 2021.

Nature and Circumstances of the Offenses / Seriousness of the Offenses

The nature and circumstances of both offenses are extremely serious.

Mr. Hixson's felon-in-possession conviction alone is very serious. While on parole for an aggravated unlawful use of a weapon felony conviction, Mr. Hixson was armed with a firearm with an extended magazine containing 28 rounds of ammunition. Instead of stopping when confronted by law enforcement, he instructed his cousin to flee. And when his cousin finally stopped the vehicle, Mr. Hixson bolted again. Mr. Hixson was only apprehended after he slipped in the snow, but not

[7] Most of Mr. Hixson's criminal history points are the result of his previous felony conviction for aggravated unlawful use of a weapon. Dkt. 48, at 11-12. This conviction involved a July 15, 2018, arrest, when Mr. Hixson was unemployed. (In fact, he's never held a legitimate job.) At almost 1:00 a.m., Mr. Hixon—who was then 19 years old—was at a liquor store. He then got into a friend's car. After they drove off, they were stopped by a Winnebago County Sheriff's deputy. During the stop, the deputy could smell "a strong order of cannabis coming from the vehicle." Dkt. 48, at 12. A search of the vehicle uncovered three bags of cannabis and two loaded firearms. A search of Mr. Hixson produced two cell phones and $256 in cash—mostly $5 and $20 bills. In a post-arrest interview, Mr. Hixson admitted that one of the loaded firearms—a Taurus Millennium PT111 G2—and one of the bags of cannabis—which contained 17.5 grams of cannabis—were his. He denied knowledge and possession of the other contraband. Mr. Hixson was sentenced to 30 months' probation for this conviction. Two petitions to revoke probation were filed for failing to comply with several conditions of probation. After the second revocation petition, Mr. Hixson's probation was revoked, and he was sentenced to 18 months' imprisonment in the Illinois Department of Corrections. This conviction resulted in three criminal history points.

before he discarded his loaded firearm onto a sidewalk next to a brick building.

Not to minimize the felon-in-possession conviction, but the nature and circumstances of the possession of a machinegun conviction are even more serious. Unfortunately, the seriousness of this offense is not captured by the correctly calculated Sentencing Guidelines' range. **[**16]** The range completely ignores this offense, which simply does not result in a just punishment.

HN10[] Formerly denominated "departures" and "offense characteristics" are relevant in the sentencing process and courts should give them conscientious consideration. Pankow, 884 F.3d at 794. In this case, there are at least one departure and two offense characteristics that the Court considers by way of analogy. Id. at 793. HN11[] The departure provision in § 5K2.0(a)(2)(B) recognizes that circumstances may be present that the Sentencing Guidelines may not have identified but are nevertheless "relevant to determining the appropriate sentence." And the offense characteristics in § 2K2.1(b) counsel that the total number of firearms involved is a relevant factor as is when firearms are being trafficked. So, the failure to incorporate machineguns—here, including Glock switches—into the definition of "firearms" is a void in the Sentencing Guidelines, but selling multiple machineguns is undoubtably "relevant in determining the appropriate **[*940]** sentence." By way of analogy and to use the language of the Sentencing Guidelines, the number of Glock switches involved in Mr. Hixson's offense and that he was essentially trafficking these devices is relevant conduct that must be **[**17]** considered. It is inconceivable that a court could not consider possessing and selling multiple devices that are statutorily defined as machineguns in determining a defendant's sentence. As a result, the Court has considered these facts in determining a sentence for Mr. Hixson.

The sole and exclusive purpose of Glock switches, which are easily manufactured, is to convert an already dangerous firearm into an extremely dangerous machinegun. The dangerousness manifests itself not only in the sheer number of bullets that can be emptied from the magazine in the blink of an eye but also in the resulting lack of control of the firearm when discharging it. The damage a machinegun can inflict is enormous. The damage—intended and unintended—a handheld machinegun can inflict is just as great. This offense involved 9 Glock switches, some of which Mr. Hixson sold believing they would be resold to others.

History and Characteristics of Mr. Hixson

Mr. Hixson's history and characteristics are not positive. Obviously, he has a prior felony conviction, which occurred when he was only 19 years old. Like these offenses, the prior felony conviction involved a firearm. HN12[] Aggravated unlawful use of a weapon is **[**18]** serious. But Mr. Hixson did not take that conviction seriously, as evidenced by his repeated probation violations resulting in the revocation of probation. Then within mere months of being released from the Illinois Department of Corrections, while on parole, he committed the offenses for which he is being sentenced. Mr. Hixson has no educational or employment background. Although he claims to want to obtain his general equivalency diploma, he has taken no steps in that direction. The Court is aware that the Winnebago County Jail has offered classes for the last several years and that some inmates have obtained their diplomas. Additionally, Mr. Hixson has never held legitimate employment, which leads to the question of how he survived. The answer to that question is provided by information surrounding his aggravated unlawful use of a weapon felony conviction. The evidence shows during that time Mr. Hixson was riding around in a vehicle containing multiple bags of cannabis and two loaded firearms in the wee hours of the morning. Police found two cell phones as well as $256 in cash, mostly $5 and $20 bills on Mr. Hixson. This evidence shows that more likely than not Mr. Hixson was selling **[**19]** cannabis.

Promote Respect for the Law

The sentence imposed promotes respect for the law. At the time of both offenses, Mr. Hixson was on parole after his probation was revoked. And he was merely seven months removed from his release from the Illinois Department of Corrections when his criminal conduct restarted. Absent a significant sentence for these offenses, respect for the law is undermined.

Provide Just Punishment

In considering all of these factors as well as the unique circumstances of the offenses and Mr. Hixson's individual history and characteristics, the Court has imposed a just punishment for the offenses. The

sentence is sufficient but not greater than necessary to meet Congress' mandates.

Afford Adequate Deterrence

HN13[] Without doubt, general deterrence does not trump all other factors under § 3553(a). It is just one of many factors. **[*941]** But so long as the court provides individualized sentencing to a particular defendant, a court's sentence is allowed to send a message to the larger community. *See* United States v. Barker, 771 F.2d 1362, 1368 (9th Cir. 1985) ("We do not find this desire to 'send a message' through sentencing inappropriate *per se*. Indeed, perhaps paramount among the purposes of punishment is the desire to deter similar misconduct by others."). **[**20]** The Court is under no illusion that criminals peruse the Federal Supplements, the Chicago Daily Law Bulletin, or Law360. But, at the sentencing hearing, the Court informed Mr. Hixson and the multiple family members who were present that the possession and sale of Glock switches is an extremely serious offense requiring a serious sentence. The Court is confident that word of mouth—supplemented by social media, of course—is a common mode of communication among criminal defendants and their friends and family. Regardless of whether they are in state or federal custody, inmates housed at the Winnebago County Jail talk about the sentences they receive. In fact, they talk about their sentences among each other during the short ride from the Stanley J. Roszkowski United States Courthouse back to the Winnebago County Jail. Those engaged in the sale and distribution of Glock switches must be put on notice that doing so potentially subjects them to a significant sentence. The same is true for felons possessing firearms with extended magazines. This community is awash with people who are prohibited from possessing weapons possessing weapons.

Protect the Public from Further Crimes By Mr. Hixson [21]**

In Mr. Hixson's brief lifetime, the evidence shows that he has a propensity for criminal conduct, often very serious criminal conduct. As his multiple probation violations and revocation shows, his criminal behavior is not deterred when he is not incarcerated. He simply reoffends. The fact that these offenses occurred while Mr. Hixson was on parole also evidences that the public needs protection from his criminal behavior. Both of Mr. Hixson's offenses involve a complete lack of concern for the safety of others. In one offense, he fled law enforcement and threw a loaded weapon on a sidewalk next to a brick building. In the other offense, without hesitation, he sold Glock switches that he was told would be sold to others.

Provide Mr. Hixson with Training, Medical Care, or Treatment

At the sentencing hearing, the Court asked Mr. Hixson and his counsel what types of programs would benefit Mr. Hixson during his incarceration in the Bureau of Prisons. The Court will recommend that Mr. Hixson be considered for these programs. Mr. Hixson's counsel requested that Mr. Hixson be enrolled in the Residential Drug Abuse Program. The Court agrees that this program would be beneficial and will recommend **[**22]** it. Mr. Hixson has no specific medical needs that need care.

Kinds of Sentences Available

Although both offenses are statutorily eligible for probation, the advisory Sentencing Guidelines do not recommend probation. Moreover, a sentence of probation would be unreasonable as it would not adequately or properly take the other factors into account.

Sentencing Range

The Court has correctly calculated the advisory Sentencing Guidelines range. But that sentencing range of 30 - 37 months woefully underrepresents the seriousness of the offenses. In particular, the range completely ignores the Glock switches, which Congress has defined as machineguns. Sentencing Mr. Hixson within **[*942]** the sentencing range does not account for the possession, sale, and distribution of the Glock switches.

Sentencing Commission Policy Statements

The Court has considered the generally applicable Sentencing Commission Policy Statements. No applicable Sentencing Commission Policy Statements exist in § 2K2.1. Moreover, Mr. Hixson has not directed the Court to policy statements that it should consider.

Avoid Unwarranted Sentencing Disparities

Through its research, the Court has attempted to address any unwarranted sentencing disparities. **[**23]** Because there are currently so few cases involving this situation, it is difficult to account for this factor. No nationwide sentencing information exists with the United States Sentencing Commission on this circumstance.

Provide Restitution

Restitution is not applicable in this case for either offense.

Mitigating Factors

At the sentencing hearing, the Court fully addressed Mr. Hixson's arguments in mitigation. For the sake of completeness, however, some are briefly reiterated here. The Court has considered the lack of much adult supervision in Mr. Hixson's life, particularly the absence of his father who was often incarcerated. Although, in the sentencing memorandum, it was represented that Mr. Hixson's mother believes his behavior will change, that belief is not supported by the evidence in the Presentence Investigation Report. In particular, Mr. Hixson's repeated violations of probation and then his nearly immediate return to criminal activity while on parole are strong evidence that his behavior has not and will not change absent significant intervention. Mr. Hixson's admission to the offenses and acceptance of responsibility have also been considered and are incorporated into the **[**24]** sentence, both during the offense level calculations and under the *§ 3553(a)* factors. Although Mr. Hixson's age could be a mitigating factor, his young age also suggests he will likely reoffend, particularly for firearm offenses. *Recidivism of Federal Firearm Offenders Released in 2010*, p. 40, United States Sentencing Commission (November 2021). Finally, in the sentencing memorandum, Mr. Hixson expressed his desire to obtain his general equivalency diploma, but Mr. Hixson has never taken any steps either during his various incarcerations or while out of custody to obtain that diploma despite the opportunities.

SENTENCE

In its discretion and after applying the *§ 3553(a)* factors, the Court sentences Mr. Hixson to 66 months' imprisonment on each count to run concurrently.

No fine or restitution is imposed.

In addition to the 66 months' imprisonment, for each count, the Court also sentences Mr. Hixson to 3 years' supervised release with the conditions identified in open court. The terms of supervised release run concurrently.

Mr. Hixson will also pay a special assessment of $100 for each count, for a total of $200.

The Court will recommend the place of incarceration as well as the programs available in the Bureau **[**25]** of Prisons that were identified in court.

Counts 1 and 3 of the superseding indictment are dismissed under the plea agreement. And the original indictment is dismissed.

By: /s/ Iain D. Johnston

Iain D. Johnston

U.S. District Judge

Entered: August 30, 2022

End of Document

From:	Clay Land
To:	Chair
Cc:	
Subject:	RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date:	Wednesday, June 5, 2024 8:14:38 PM

Dear Chairman Reeves:

Thank you for your service as chair of the U.S. Sentencing Commission and your invitation to provide input on the work of the Commission. I am reluctant to respond, but I found intriguing your request that judges tell the Commission how we can create a "fairer, more just sentencing system." While I suppose no sentencing system can ever be perfect and therefore any system could be made "fairer" and "more just," I am concerned that your inquiry suggests that our current system is not fair and just. Having held hundreds of sentencing hearings and applied thousands of sentencing guidelines during my 20 plus years of service as an active district judge, I have found our federal sentencing system to be fair and just. And I have been dismayed, particularly in recent years, by criticisms of that system and related implications which I have found largely unsupported by the factual record and certainly inconsistent with my experience. Many times these attacks have been of a political nature, which leads me to my input for the Commission. The Commission should avoid being manipulated by the political forces when their accusations are unsupported by the factual evidence. Reactionary responses often lead to ill conceived "solutions."

Despite some contrary loud voices, our justice system remains the envy of the world. Sure, we should always work to improve it and make it fairer and more just. But making decisions based on how loud those voices may be or based upon some preexisting political agenda or to appease some perceived political threat, instead of what the evidence demonstrates, is counterproductive and diminishes that system.

Thanks again for the opportunity to provide this input, which I must emphasize is mine alone and does not necessarily represent the views of any other judges with whom I may serve.

Best regards,

Clay D. Land
U.S. District Judge
Middle District of Georgia

From: Sherri Lydon
To: Chair
Subject: Comments for the Commission
Date: Wednesday, June 5, 2024 3:14:36 PM

Thank you for the work you all do. Only one simple request...(insert laughter)

—Develop a fair, measured mechanism for resolving issues related to the categorical approach.

Sherri A. Lydon
United States District Judge
District of South Carolina
[redacted]

From: Jill Otake
To: Chair
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Wednesday, June 5, 2024 3:24:15 PM

Dear Judge Reeves:

Aloha, and thank you for this important opportunity. I hope all is well with you!

Because I am certain that you will receive many responses, I will keep this short and limit it to one request. Please consider revising the 2D1.1 Drug Quantity Table with regard to methamphetamine. Specifically, the disparity between the base offense levels for generic methamphetamine and actual methamphetamine or "ice" is enormous and was originally based on the belief that only higher-level drug dealers sold actual methamphetamine or "ice." Meth remains the drug of choice in Hawai'i, and I can assure you based on my experience (4 years as an AUSA in this district, and now 6 years on the bench) that even the lowest-level meth dealers are selling very pure (usually 90% or above) meth. The result is that the Guidelines are incredibly high for even the lowest-level meth dealers, the majority of whom are themselves addicts. While the original disparity may have been warranted, at least in the past decade, the policy reason behind the disparity has disappeared.

Thank you for your hard work and service.

Jill Otake
U.S. District Judge
District of Hawaii

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge William Ray, Georgia, Northern

Topics:

Miscellaneous Issues

Comments:

The guidelines commentary that supervised release should not be imposed in illegal rented cases is illogical. It serves as a deterrent for behavior in the future that the defendant has already engaged in, at least once.

Submitted on: June 14, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Christina Reiss, Vermont

Topics:

Policymaking Recommendations

Comments:

Better explanation needed for status points. I like the reduction of status points but the reason given for the change do not make sense. I have heard two from the Commission: (1) It's double counting (all criminal history is double counting); (2) it doesn't reflect recidivism - it is recidivism. The definition of it. In terms of past conviction - recidivism - it is indivisible from a lower criminal history.

Submitted on: June 26, 2024

Hi Carlton -

I hope you are doing well and enjoying your summer. I wanted to update you on the Sentencing Guidelines input you were seeking.

One of our probation officers was able to gather feedback from her colleagues, set forth in the attachment below. But, once the Probation Office received your email they were directed to respond directly to you so my feedback to you is incomplete and I am hoping you will receive more feedback from the rest of our Probation Office.

Best,

Robin

Robin L. Rosenberg
US District Court Judge
Southern District of Florida
[redacted]

Chapter Two

1. Guideline: § 2D1.1(b)(12) - If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by two levels.

Feedback
Officers commented that they find applying this enhancement is unclear in most cases and is often the source of objections, due to the lack of guidance of when to and when not to apply. The suggestion was to provide more factors that would guide the officer when to apply and when not to apply. Also, examples are also helpful.

2. Guideline: § 2G2.1(b)(4)(A) & § 2G2.2(b)(4)(A) - If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence increase by four levels.

Feedback
The application notes do not define "sadistic or masochistic" and guidance is needed.

3. Guideline: § 2G2.1(b)(4)(A) and § 2G2.2(b)(6) – the use of a computer for production/possession of child pornography

Feedback
This has been brought up in many cases. Officers commented that this enhancement is outdated applies in nearly every case. Suggested that the use of the dark web be a more appropriate way to distinguish cases.

4. Guideline: § 2K2.1 and § 2L1.2 – Felon in Possession and Illegal Re-Entry charges

   Feedback
   Both of these guidelines use a defendant's prior history to increase their base offense levels, which officers commented appears to be "double counting."

Chapter Three

5. Guideline: § 3B1.2(b) - If the defendant was a minor participant in any criminal activity, decrease by **2** levels. In cases falling between (a) and (b), decrease by **3** levels.

Feedback
It has been observed that overall, as a district, we do not apply this guideline often. It is also the source of frequent objections. There is guidance is the application notes; however, if examples of when to apply it and when not to apply could be added to the application notes, this could be helpful.

Chapter Five

6. Guideline: Chapter Five: Part H - Specific Offender Characteristics

Feedback

It was also observed that as a district, we rarely recommend downward departures. It was suggested that the language in these sections be clarified to help officers determine when a defendant fits the criteria for a departure. The wording "may be relevant" "not ordinarily relevant" and "unusual degree" appears to create confusion. It's a broad Chapter and we may not be applying it as the commission intended.

From: Rodolfo Ruiz
Sent: Monday, July 1, 2024 12:50 PM
To: Chair
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission

Judge Reeves, I just wanted to reach out and thank you and the Commission for all your hard work this past year. I recently wrote an order on Loss Amount under § 2B1.1(b)(1) (the Intended vs. Actual debate) that was clarified by the Commission's recent amendment designed to address *United States v. Banks*, 55 F.4th 246, 257 (3d Cir. 2022). That amendment also assisted in eliminating some of the uncertainty created by my circuit's opinion in *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc) (discussing the effect of *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), on the Supreme Court's earlier decision in *Stinson v. United States*, 508 U.S. 36 (1993)).

I do not know if there is a working group studying this issue by incorporating certain commentary into the text of the guidelines to address *Kisor*'s purported effect on *Stinson*—an issue that is dividing a growing number of circuits. *See United States v. Vargas*, 74 F.4th 673, 678 & nn. 2–3 (5th Cir. 2023) (en banc).

All my best,
Rudy

The Honorable Rodolfo A. Ruiz II
United States District Judge
Southern District of Florida
[redacted]

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Karen Scholer, Texas, Northern

Topics:

Policymaking Recommendations

Comments:

Address meth purity guideline - all pure in Texas!

Submitted on: June 26, 2024

United States District Court
for the District of Massachusetts

UNITED STATES COURTHOUSE
1 COURTHOUSE WAY
BOSTON, MASSACHUSETTS 02210

LEO T. SOROKIN
UNITED STATES DISTRICT JUDGE

United States Sentencing Commission
Attn: Public Affairs – *Public Comment*
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

July 15, 2024

Re: Response to Request for Comment

Dear Commissioners:

The Commission has invited comments generally regarding sentencing. *See* U.S. Sent'g Comm'n, Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective Nov. 1, 2024, and Request for Comment, 89 Fed. Reg. 36853-01, 2024 WL 1930992 (May 3, 2024). My comments, which reflect insights garnered from my work, follow.

1. Amend Section 5K1.1

In my testimony before the Commission on March 15, 2017, I suggested the Commission expand the government's authority under Section 5K1.1 to request a departure. Specifically, I offered then, and I reiterate now, a proposal to amend this section of the Guidelines with the language in italics below:

> Upon motion of the government stating that the defendant has provided substantial assistance in *(1)* the investigation or prosecution of another person who has committed an offense *or (2) identifying and/or assisting into treatment one or more persons addicted to or regularly abusing controlled substances*

When retail drug dealers are arrested, the identity of their most addicted customers is either known to law enforcement (e.g., from surveillance in the investigation) or easily discovered by obtaining a search warrant for the dealers' seized phones. These customers might sometimes go into treatment upon the arrest of their dealers, but will frequently turn to another source for their drugs. It is my understanding that, for those who look elsewhere, doing so frequently leads to overdoses and deaths. Of course, in the absence of the addicted customers becoming sober, many of the public safety concerns animating the drug laws continue unabated.

My suggestion would further public safety as well as several related important purposes. *First*, it would encourage law enforcement, prosecutors, and defendants to identify persons abusing controlled substances and refer them to treatment providers. In the absence of these referrals, some of these persons will likely die. Reducing deaths from the opioid crisis has been a focus of both the current President and his predecessor.[1] Many addicts are also often a source of low-level crime and community dysregulation. Moving them toward treatment and sobriety would further public safety and community well-being. *Second*, the suggestion would encourage defendants to face and help repair some of the harm wrought by their distribution of controlled substances. *Third*, as a practical matter, this departure would be available only to retail distributors of controlled substances. These defendants are often unable to cooperate because the government has no prosecutorial need for their assistance. The provision would provide an opportunity for such defendants to assist the government.

2. Create A Departure for Completion of Court Rehabilitation Programs

Many federal courts currently operate pre-sentencing programs sometimes called problem-solving courts, therapeutic courts, or treatment courts. Presently, I understand that approximately one-third of the ninety-four district courts operate a front-end, pretrial diversion, or pre-sentencing court program. I suggest the Commission authorize a departure for successful completion of such a program. Because of the variation in the offenses committed by the participating defendants, the nature of the programs, and the depth of the successes of individual defendants, I suggest the Commission authorize a departure rather than a preset, offense-level reduction.

3. Expand the Guidelines to Consider Mens Rea and Causation

The Guidelines should prompt consideration of the following: (1) Why did the defendant commit the crime(s) that authorize the sentencing proceeding? and (2) What is the defendant's culpability, in a mens rea sense, for the crime(s) and/or enhancements resulting in the Guideline sentence? For example, some drug-addicted defendants' records reveal the commission of a crime only when abusing drugs. Of course, this fact in no way excuses the commission of the crimes nor the harms caused by the crimes. It is, however, an important public safety consideration. For example, such a defendant will require a different response for specific deterrence—likely, focused more on immediate accountability over a sustained period for any lapse in treatment and sobriety—than a defendant otherwise presenting similarly but without any form of addiction.

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[1] *See* Exec. Office of the President, Office of Nat'l Drug Control Policy, National Drug Control Strategy 14 (2022), *available at* https://www.whitehouse.gov/wp-content/uploads/2022/04/National-Drug-Control-2022Strategy.pdf (listing reducing overdose deaths as the first objective of the current administration's drug policy); Dep't of Justice, Office of Public Affairs, Press Release: Justice Department Announces Results in Fight Against the Opioid Crisis Two Years after Launch of Operation S.O.S. (Sept. 24, 2020), https://www.justice.gov/opa/pr/justice-department-announces-results-fight-against-opioid-crisis-two-years-after-launch (touting success of a 2018 prosecution initiative based on a reduction in overdose deaths).

4. Consider Shifting the Focus of Sentencing

Under the current Guidelines, sentencing for all defendants is essentially a moment-in-time judgment focused primarily on the defendant's criminal conduct. In amending the Guidelines, the Commission should consider whether, in some cases, the lens through which the sentencing process occurs should widen, treating the moment of sentencing as a step in an ongoing process to protect the public, repair the harm caused by the defendant, and promote the defendant's rehabilitation and participation in society as a sober, employed, law-abiding person.

For some persons, their arrest and conviction mark the beginning of a process of reckoning with their behavior and transforming their relationship to the law and law-enforcement authorities. Frequently, this occurs with participants in my own Court's Restorative Justice program. Many participants describe it as a revelatory, "ah ha" moment. Over time, the words and, importantly, the behavior of these defendants demonstrate meaningful transformation. Instead of blaming the police or others, they take responsibility for their own behavior. Instead of committing crimes, they develop and maintain sober, employed, law-abiding lives. They become positive role models for their children as well as an important, steady presence in their family members' lives. The significance of these types of facts at sentencing depends on the individual circumstances of a particular case, including what crime(s) the defendant committed and the duration as well as the depth of the transformed behavior.

The Guidelines should encourage consideration of changed or transformed behavior at sentencing. The Commission could even consider the possibility of additional sentencing hearings, after the first, with the possibility of a revision in sentence based upon clear, objective criteria established at the original sentencing, though this might require statutory change to implement. Congress itself has permitted courts to revisit and modify sentences for certain categories of offenders in 18 U.S.C. § 3582(c)(1)(A)(1), the compassionate release statute, which provides for a resentencing proceeding in certain circumstances due to, *inter alia*, "extraordinary and compelling reasons." In addition, both Congress and the Commission have provided for the reduction of a previously imposed sentence based on a retroactively applicable amendment to the Guidelines. *See* § 3582(c)(2); U.S. Sent'g Guidelines Manual § 1B1.10.

5. Encourage Alignment between Guidelines and BOP Programs

The Guidelines should become more tightly integrated with what happens in the Bureau of Prisons ("BOP"). For example, in my own District, a pilot program was implemented to connect BOP's RDAP program with sober treatment facilities in the community and intensive supervision in the District's reentry drug court. BOP trained probation officers to determine whether a defendant qualified for RDAP in the PSR. This took little extra work by the Probation Office, and it aided Judges in making appropriate recommendations regarding RDAP. If a defendant from Massachusetts completed RDAP, he could opt into the pilot, resulting in spending the last portion of his BOP sentence in a sober treatment facility instead of the RRC. My understanding is there is little difference in cost. At the conclusion of the BOP sentence, the defendant would enter the District's reentry drug court. Without spending any extra tax dollars,

the pilot created an almost three-year treatment program that follows best practices for promoting long-term sobriety: in-patient treatment (RDAP), followed by residential treatment in the community (the six months in the treatment facility), followed by outpatient treatment with close supervision (the reentry drug court).[2] The Guidelines should promote this type of integration between sentencing, BOP, and supervised release.

Thank you for your consideration of my comments.

Very truly yours,

Leo T. Sorokin
United States District Judge

[2] The pilot was interrupted by the COVID-19 pandemic. The Probation Office is now investigating efforts to restart the pilot.

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Trina Thompson, California, Northern

Topics:

Policymaking Recommendations

Comments:

Under youthful amendment - diversion programs for offenders 18-24 years old (non-violent offenders), low level offenses - which includes work and education as a requirement to graduate: AA degree and part-time or full-time employment to divert out of the federal system. If successful, dismiss to prevent exclusion from workforce.

Submitted on: June 26, 2024

From: Jennifer Thurston
To: Chair
Subject: Work for the Commission
Date: Wednesday, June 5, 2024 1:53:17 PM

Hi,

Here are my thoughts for work the Commission could take on:

1. What does it mean to plead to a significantly lesser offense for purposes of considering a role adjustment? Is this determined only by comparing the Base Offense Levels for the offense plead to and the offense originally charged? Should the Court consider other factors such as whether the "lesser" offense has a mandatory minimum or a statutory maximum, whether safety valve applies such to eliminate the mandatory minimum in the original charge, or whether the Court should consider the impact on the guideline if the defendant is denied the role adjustment, due to pleading to the "lesser" charge compared to the guidelines if the defendant plead to the original charge?
2. Does it still make sense to impose an enhancement for use of a computer in "child porn" cases, since virtually all of these offenses now are committed by computer?
3. Does it make sense to impose a higher base offense level based on the purity of the methamphetamine seized, given the fact that most methamphetamine seized now is of exceptional purity?

Thanks for your good work!

From: Nancy Torresen
To: Chair
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Wednesday, June 5, 2024 3:48:29 PM

Good idea, Judge Reeves!

I am not sure this is the Sentencing Commission's wheelhouse, but I would like to have more, coherently-presented information about what rehabilitation options exist. When Covid hit, it seemed like there was no programming at BOP. At this point, I am not clear on what programs are up and running, what is happening with them, what the chances are of getting a particular defendant into the program, etc. We are directed by statute "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 USC 3553(a)(2)(D), but we don't have easy-to-access, up-to-date information about what is available. Anecdotally, the defense bar recite horror stories about lack of programming, solitary confinement, lack of exercise, etc. Maybe something does exist and I am just not aware of it?

That's what is on my wish-list.

Nancy Torresen
District of Maine

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Karen Williams, New Jersey

Topics:

Policymaking Recommendations

Comments:

Sentencing language that assists in the BoP placement when the individual should be given access to vocational skills, education, mental health treatment, etc . . . application of section 3553 (a) in a meaningful way to impact BoP placement. To the extent sentencing (III) and BoP (II) can work together.

Submitted on: June 26, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District Judge Jennifer Wilson, Pennsylvania, Middle

Topics:

Research Recommendations

Policymaking Recommendations

Comments:

I would like to see the USSC conduct research into and possibly propose an amendment to address the 10:1 differential in USSG 2D1.1 between actual methamphetamine and a mixture and substance containing methamphetamine. I receive many objections and well-supported arguments on this issue.

Submitted on: June 10, 2024

From: Otis Wright
To: Chair
Subject: Feedback for the U.S. Sentencing Commission
Date: Friday, June 7, 2024 1:30:31 AM

Dear Judge Reeves:

Thank you for soliciting comments from those of us who greatly appreciate and use your work product. Thank you also for your flexibility in our modes of communication. I'll be brief.

My deep concern is with mandatory minimums. My position is it would be better if man-mins would be advisory, leaving the judges discretion to fit the punishment to the person. I would love to be able to speak directly with a commissioner. There are situations where imposing a man-min would simply be unduly harsh. While I have encountered a number of situation where I wish my hands weren't tied, one in particular stands out. I'll refer to him as Mr. Ellis. He had finished our year long reentry program where we tackle not only the addiction but the faulty thinking that makes one pick the path to rewards which requires the least amount of effort with no regard to whether that course of action is criminal. Just before he entered our program he and his wife had been living in their car for months. Her birthday was approaching and he promised he would have her out of the car by the time her birthday arrived. Naturally he reverted to the one thing he knew how to do. He got caught and was prosecuted. The drug quantity triggered the 10-year mandatory minimum. Somehow we never learned about that case until after he graduated from our program. I was informed that I would now have to send him away for 10 years. This, after he had done all we had asked of him and had been clean and sober for the better part of a year and had found a decent job which he enjoyed.

It broke my heart that I was now going to have to send him away for 10 years. Before I had an opportunity to act, I received a call, out of the blue, from the Chief of the Criminal Division of our U. S. Attorney's Office. He wanted a meeting about Mr. Ellis. I never interfere with the prosecutorial function so I never opened my mouth during the entire meeting. He had a proposal. He too, was disturbed by what I was required to do, so he suggested that his office file a superseding information omitting the drug quantity language which triggered the man-min. He also elected that his office would not prosecute given the significant strides Mr.Ellis had made in our program over the last year plus. I am not ashamed to admit that tears streamed down my face at this act of kindness. Obviously, this isn't a solution one can always count on. In fact, I doubt I'll ever see it again. It would be preferable that the mandatory minimum sentence would be advisory and in the appropriate case the judge were free to take into consideration other relevant factors which make the required sentence unjust.

Well judge, I said I'd be brief and I believe you understand my point. I'll leave it here. Thank you for the opportunity to voice my concern. Be well.

Otis D. Wright, II | United States District Judge
United States Courthouse | [redacted]

From:	Jay Zainey
To:	Chair
Subject:	Re: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date:	Friday, June 7, 2024 11:08:58 AM

Good Morning Carlton,
I hope that you and your family are well.
First off, thanks again for your service.
The work you and your fellow Commissioners perform is an integral part of our criminal justice system.
I have a few comments :

* I believe that mandatory minimum jail sentences should be eliminated.

I testified before the Sentencing Commission approximately 12 years ago in Austin, Texas, and, of course, my testimony went nowhere except on the second page of USA Today in which it stated that I believed in leniency in child pornography cases.
Of course that was completely incorrect.
I am a firm believer in imposing a sentence in which the punishment fits the crime AND the criminal.
I was merely advocating flexibility in sentencing - which of course is hampered by minimum sentencing requirements.
If my sentence is unreasonably low, the Fifth Circuit , in its wisdom, can always reverse !

* I am a strong proponent of alternative sentencings, especially in the field of community service , where appropriate.
The benefits to society can be life-changing.
If you don't mind, I would like to give you a couple of examples:

1) A famous Grammy award-winning jazz trumpet musician , Irving Mayfield, plead guilty to embezzling over $1 million from our New Orleans Library Foundation Fund.
The statutory maximum was five years, with a restricted guideline range of five years.
He had no prior arrests or convictions, but he was obviously very greedy.
He needed to be incarcerated; however, a five year sentence , in my opinion, would serve no useful purpose to society.
I sentenced him to 18 months in the custody of the BOP, restitution, AND I ordered that he provide 500 hours of community service by teaching trumpet lessons to inner city kids.
I imposed a similar sentence to his codefendant, who was a renowned piano player.
Hopefully the 500 hours of trumphet lessons, and the 500 hours of piano lessons would have a very positive affect on a number of kids who otherwise would never have had the opportunity.
Who knows, society might have future grammy award winners !

b) A local orthodontist plead guilty to tax fraud - the loss was approximately $300,000.
His guideline range was 18 to 24 months.
His wife had phase four breast cancer and they had no children.
She would have passed away alone.
He also had seven employees - all of whom would have been unemployed had he been incarcerated.
Besides restitution, I ordered that he provided 300 hours of free dental services at five local

homeless shelters.
He got the message, our government received restitution, and many people benefited from his free dental services.

* In those cases in which I have to impose lengthy jail sentences, I will determine either from the probation officer or the defendant the type of trade he or she would like to have while incarcerated.
I will then recommend to BOP that the defendant be placed in a facility that will provide that particular vocational training.

Thanks again Carlton for allowing my input.
Best wishes.
Jay

Sent from my iPhone

Public Comment - 2024-2025 Proposed Priorities

Submitter:

James P. Gray, Judge of the State of California

Topics:

Policymaking Recommendations

Comments:

Our Great Country's policy of Drug Prohibition allowed many politicians to "show how tough they were." And this directly resulted in too many people being incarcerated and for too long a period of time. Mandatory Minimum Sentencing was also a direct and inappropriate result, but it made for good politics. It should be repealed!

Yes, hold people accountable for what they do. But I repeat a phrase I once heard at a symposium on sentencing: "Most people cannot be defined by the worst thing they have ever done." And in most prisons, particularly my home state of California, the only thing "correctional" about them is in the name. You probably have the stats, but my understanding is that if a person released from prison on parole has a job, his/her recidivism rate is about 10 percent. But if they don't have a job, and can't get one -- probably due to their criminal record -- their recidivism rate is above 70 percent. Do you think there is a connection? For awhile i had contact with "Open Gate International," which provided a free 12-week class to parolees about how to become a commercial cook, and then had a 90 percent success rate of getting their graduates a job in the restaurant business upon graduation. Their recidivism rate was virtually non-existent.

In addition, please do everything commission-possible seriously to cut back the use of Solitary Confinement! Pure and simple, under many circumstances it is torture.

If I can be of further assistance, or there are any further questions I may address, please contact me either by e-mail or on my cell phone, which is [redacted]. And THANK YOU ALL for what you are doing!

Judge James P. Gray (Ret.)
Superior Court of Orange County, California and author of "Why Our Drug Laws Have Failed and What We Can Do About It: A Judicial Indictment of the War on Drugs (Temple University Press), which was endorsed by Dr. Milton Friedman, Secretary George P. Shultz and CBS Broadcaster Walter Cronkite.

U.S. Department of Justice

Criminal Division

Appellate Section

Washington, D.C. 20530

July 15, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

The Criminal Division of the U.S. Department of Justice is pleased to submit its annual report to the Sentencing Commission pursuant to 28 U.S.C. § 994(o). Please also consider this report to be the Department's response to the Federal Register notice requesting public comment on the Commission's proposed priorities for 2024-2025.[1]

The Department appreciates the Commission's commitment, following the 40th anniversary of the Sentencing Reform Act, to consider measures that would allow the Commission to fulfill the statutory purposes and mission assigned to it under the Act. As explained below, the Department believes that fulfilling those purposes will require the Commission to redouble its commitment to core public safety issues—including violent crime and drug overdoses—that the Commission has prioritized since its founding four decades ago. The Department also believes that the Commission should consider how technological innovations—including the quickly evolving use of artificial intelligence—affect the ways that crimes are committed, solved, and studied.

In addition, the Department submits that the Commission should work to ensure that the guidelines promote just punishment and adequate deterrence for those offenses and offenders that, based on current data and trends, are causing the most serious individual and societal harms. To that end, the Department proposes below amendments to the guidelines—some of which we have previously offered—applicable to firearms offenses, fentanyl distribution, human smuggling, domestic terrorism, and crimes that imperil the integrity of our financial system. We also believe that the time has come to address the categorical approach, one of the issues that has most complicated the application of the Sentencing Guidelines in recent years; and that the Commission can tackle that issue as it continues to consider simplification of the guidelines more broadly.

[1] Notice of Proposed Priorities for Amendment Cycle, 89 Fed. Reg. 48,029 (June 4, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20240531_fr_proposed-priorities.pdf.

I. Top Department Priorities

Machineguns

In June 2021, President Biden and Attorney General Garland announced a comprehensive gun crime reduction strategy to "go after the people who flood our streets with guns and the bad actors who decide to use them to further terrorize the communities."[2] The Department continues to update this strategy to reflect new approaches, new threats, and new evidence-based interventions.[3] Two years ago, Congress passed the Bipartisan Safer Communities Act ("BSCA"), which strengthened federal firearms laws in several critical aspects.[4] As you know, the Commission followed up with amendments addressing unlicensed and untraceable ghost guns and implementing the new straw-purchasing and firearms-trafficking offenses created by BSCA into the guidelines.[5] We thank the Commission for its efforts to address gun violence, but additional updates are needed to meet the moment.

In contrast to a standard firearm, and even in contrast to a semi-automatic firearm, a machinegun is a very different type of weapon. As the Supreme Court recently explained:

> With a machinegun, a shooter can fire multiple times, or even continuously, by engaging the trigger only once. This capability distinguishes a machinegun from a semiautomatic firearm. With a semiautomatic firearm, the shooter can fire only one time by engaging the trigger. The shooter must release and reengage the trigger to fire another shot. Machineguns can ordinarily achieve higher rates of fire than semiautomatic firearms because the shooter does not need to release and reengage the trigger between shots.[6]

Unfortunately, as the Deputy Attorney General highlighted in her February 2024 letter to the Commission, machinegun conversion devices, such as "Glock switches,"[7] convert semiautomatic handguns into machineguns and present a fast-growing and serious danger to

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[2] The White House, *Remarks on Gun Crime Prevention Strategy* (June 23, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/23/remarks-by-president-biden-and-attorney-general-garland-on-gun-crime-prevention-strategy/.

[3] U.S. Dep't of Justice, Press Release, *FACT SHEET: Update on Justice Department's Ongoing Efforts to Tackle Gun Violence* (June 14, 2023), https://www.justice.gov/opa/pr/fact-sheet-update-justice-department-s-ongoing-efforts-tackle-gun-violence.

[4] Pub. L. No. 117-159, 136 Stat. 1313 (2022).

[5] U.S. Sent'g Guidelines Manual, Appendix C, Amendment 819 (November 1, 2023) ("This multi-part amendment responds to …the Bipartisan Safer Communities Act, Pub. L. No. 117-159 … [and] addresses new offenses and other changes in law made by the Act, and revises … §2K2.1 … to account for firearms that are not marked with a serial number.")

[6] *Garland v. Cargill*, 602 U.S, ___, 144 S. Ct. 1613, 1617 (2024).

[7] The term "Glock Switch" is commonly used to identify illegal machine gun conversion devices that are specifically designed to convert Glock-type handguns to fully automatic fire. The devices, however, are not manufactured by Glock Inc., and use of that company's symbols and trademarks by illicit manufacturers is fraudulent.

communities and to law enforcement across the nation.[8] Such devices are proliferating: the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) reports that it collected 570% more machinegun conversion devices in 2021 than it did in 2017.[9] And machineguns have been involved in a growing number of shootings: in 2022, a public safety technology company recorded 75,444 rounds of automatic gunfire in the 127 cities covered by its microphones, a nearly 50% increase from just one year before.[10]

To address this problem, the Department asks the Commission to make the following vital changes. First, the Commission should amend the definition of a firearm in §2K2.1 to ensure that all National Firearms Act (NFA) weapons,[11] including machinegun conversion devices, are considered firearms for purposes of sentencing when the defendant is convicted of trafficking in firearms. The current definition of "firearm" is limited to the meaning given in 18 U.S.C. § 921(a)(3) and therefore does not encompass machinegun conversion devices that fall under the NFA.[12] To correct this significant gap, we ask the Commission to add "or as defined under the National Firearms Act, 26 U.S.C. § 5845(a)," to the definition of firearm in §2K2.1.

Second, the Commission should amend §2K2.1 to provide an increased guideline range for when a convicted felon not only breaks the law by obtaining a firearm, but equips that firearm with a deadly machinegun conversion device, such as a so-called Glock switch for a handgun, or a drop-in auto sear for a rifle. As the Commission is aware, when a felon recidivates

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[8] Lisa Monaco, Deputy Attorney General, Letter to Carlton Reeves, Chair (Feb. 22, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=83 (quoting *United States v. Hixson*, 624 F. Supp. 3d 930, 940 (N.D. Ill. 2022) ("The dangerousness manifests itself not only in the sheer number of bullets that can be emptied from the magazine in the blink of an eye but also in the resulting lack of control of the firearm when discharging it.")).

[9] U.S. Dep't of Justice, Press Release, *Justice Department Announces Publication of Second Volume of National Firearms Commerce and Trafficking Assessment Report Presents Unprecedented Data on Crime Gun Intelligence and Analysis* (Feb. 1, 2023), https://www.atf.gov/news/press-releases/justice-department-announces-publication-second-volume-national-firearms-commerce-and; *see also* Ted Oberg, Jeff Piper, and Carlos Olazagasti, *Incredibly serious: deadly, unpredictable switches add to DC's gun toll; prosecutors seek change*, News 4 (Nov. 29, 2023) (reporting finding 167 switches recovered in 2023 through November, 40 more than in 2022), https://www.nbcwashington.com/investigations/incredibly-serious-deadly-unpredictable-switches-add-to-dcs-gun-toll-prosecutors-seek-change/3482548/.

[10] Ernesto Londoño and Glenn Thrush, *Inexpensive Add-on Spawns a New Era of Machine Guns Popular devices known as "switches" are turning ordinary pistols into fully automatic weapons, making them deadlier and a growing threat to bystanders*, N.Y. Times (Aug. 12, 2023) ("The growing use of switches, which are also known as auto sears, is evident in real-time audio tracking of gunshots around the country, data shows. Audio sensors monitored by a public safety technology company, Sound Thinking, recorded 75,544 rounds of suspected automatic gunfire in 2022 in portions of 127 cities covered by its microphones, according to data compiled at the request of The New York Times. That was a 49 percent increase from the year before."), https://www.nytimes.com/2023/08/12/us/guns-switch-devices.html.

[11] A "machinegun" is defined under 26 U.S.C. § 5845(a) as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, *or combination of parts designed and intended, for sue in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled*." (Emphasis added).

[12] *See, e.g., United States v. Hixson*, 624 F. Supp. 3d 930, 933 (N.D. Ill. 2022) ("The Guidelines do *not* include machine guns—including devices that convert semiautomatic weapons into fully automatic weapons—in the definition of "firearms." *Compare* 18 U.S.C. § 921(a)(23) (definition of machinegun) *with* § 2K2.1 Application Note 1 (defining firearm to mean the definition in 18 U.S.C. § 921(a)(3)).").

by unlawfully possessing a firearm, he can be prosecuted under 18 U.S.C. §922(g) and, following a conviction, courts are required to apply §2K2.1 to determine the applicable guideline range. Subsection (a)(4)(B) of §2K2.1 currently provides an alternative base offense level of 20 when a defendant is convicted of being a felon in possession of a firearm and the offense involves *either* a semiautomatic firearm that is capable of accepting a large capacity magazine *or* a machinegun.[13]

In other words, once an offender arms himself with a semiautomatic firearm capable of accepting a large-capacity magazine, the guidelines provide for no increase (either as an alternative base offense or otherwise) when the offender takes the extra step of illegally equipping that firearm with, for example, a Glock switch or an AR-type auto sear. Failing to distinguish between those scenarios makes little sense. Congress has made possession of a machinegun a separate, stand-alone crime.[14] The switch or drop-in auto sear even uninstalled is illegal to possess,[15] and when installed converts that semiautomatic handgun or rifle into a machinegun, both as a legal matter and practically, enabling that offender to discharge an entire large-capacity magazine with one pull of the trigger. In contrast, a semiautomatic firearm does not fire more than one shot "by a single function of the trigger."[16] Moreover, because Glock switches fire more quickly, they are more difficult to control and greatly increase the danger to innocent bystanders and law enforcement.[17]

We note that the solution is made more difficult by the complex structure of §2K2.1, which contains multiple alternative base offense levels.[18] If the Commission were to restructure this guideline and add an enhancement for a machinegun conversion device (as described in 26 U.S.C. § 5845(b)) as a specific offense characteristic, the result would not only provide a deterrent and advance the goal of public safety, but would also advance the goal of simplifying the guidelines by making them less complex.[19]

Similarly, when a defendant is convicted of a drug trafficking offense and the offense also involves the possession of a firearm, the drug trafficking guideline does not distinguish between offenders possessing a firearm with six bullets, a firearm with a large-capacity magazine loaded with 20 bullets, and a firearm with a large-capacity magazine loaded with 20 bullets and also equipped with a machinegun conversion device. Rather, §2D1.1 simply provides a two-

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[13] §2K2.1(a)(4) ("20, if … (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; *or* (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense…") (emphasis added).
[14] 18 U.S.C. § 922(o).
[15] 26 U.S.C. § 5845(a).
[16] *Garland v. Cargill,* 144 S. Ct. at 1620.
[17] Daryl McCormick, *Special Agent in Charge of ATF's Columbus Field Division, Trafficker of 3D-Printed "Glock Switches" and "Auto-Sears" Sentenced to Over Seven Years in Federal Prison* (Sept. 14, 2023), https://www.atf.gov/news/press-releases/trafficker-3d-printed-%E2%80%9Cglock-switches%E2%80%9D-and-%E2%80%9Cauto-sears%E2%80%9D-sentenced-over-seven-years-federal.
[18] *See* Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 14 (July 31, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=38.
[19] *See id.* (urging the Commission "to simplify this complicated and often-misapplied guideline").

level increase for when a "dangerous weapon" (defined to include a firearm) is possessed in connection with a drug trafficking offense.[20]

To remedy this problem, and to help deter drug traffickers from carrying such weapons, the Department also requests that the Commission add two prongs to the existing enhancement under the drug trafficking guideline, §2D1.1: one should be an increase for when a drug trafficking offense involves a semi-automatic firearm with a large-capacity magazine; and a second, distinct increase for when the firearm is equipped with a machinegun conversion device.

Fentanyl and Other Deadly Opioids

As we brought to the Commission's attention in September 2022,[21] the United States experienced an estimated 107,000 deaths from drug overdoses during 2021, and more than two-thirds of these were from synthetic opioids like fentanyl.[22] Fueling the problem has been vast quantities of imitation pills containing fentanyl and other synthetic opioids, easily purchased and widely available.[23] As we also noted, many overdose victims, including teenagers, have no idea what they are ingesting, nor the potency of what they are ingesting, until it is too late.[24] In our letter, we asked the Commission to address the problem by amending the drug trafficking guideline to address imitation pills.

The Commission responded by amending the existing four-level enhancement under §2D1.1(b)(13) for knowingly misrepresenting fentanyl as another substance to add an *alternative* two-level enhancement, also under (b)(13), "for offenses where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug."[25] The change took effect on November 1, 2023. Between November 1, 2023, and the end of that calendar year, courts applied the four-level enhancement to only 18 defendants and the new two-level enhancement to one defendant. In comparison, during the same period in 2022, the four-level enhancement was applied to 15 defendants.

These numbers suggest that, although the Commission added the new two-level enhancement to address the harm associated with imitation pills, the new two-level enhancement has proven not to be very useful. That is likely because it requires that the defendant "represented" or "marketed" the fake pills as legitimately manufactured, and drug traffickers are

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[20] §2D1.1(b)(1). "The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the closet." §2D1.1 comment. (n.1).
[21] Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 24 (Sept. 12, 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/doj.pdf.
[22] *See* Ctr. for Disease Control, Press Release, *U.S. Overdose Deaths In 2021 Increased Half as Much as in 2020 – But Are Still Up 15%* (May 11, 2022), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm.
[23] *Id*.
[24] *Id*.
[25] U.S. Sent'g Comm'n, Amend. 818 (eff. November 1, 2023), https://www.ussc.gov/guidelines/amendment/818.

savvy enough to speak in code—or not to make any representations at all, since the shape, color, and appearance of the pills frequently do the talking for them.

Meanwhile, the grave problems described in our September 2022 annual report have continued. According to the CDC, more than 111,000 people died of overdoses in the United States in 2022, and an additional 107,543 died of overdoses last year.[26] The Drug Enforcement Administration (DEA) reports that it seized more than 80 million fentanyl-laced fake pills in 2023 and nearly 12,000 pounds of fentanyl powder, equivalent to more than 381 million lethal doses of fentanyl.[27]

We are now asking the Commission to take additional steps to address this national Public Health Emergency,[28] and to do so in a manner likely to bring about significant, large-scale change. The Department has several suggestions, and we implore you to act in two ways: first, make changes to the guidelines to raise the risk of severe punishment for engaging in certain conduct, described below; and second, issue a public service announcement that you have made such changes to the guidelines, so as to amplify the deterrent effect of your actions.

First, as the Department proposed in last year's annual report,[29] the Commission should create a new enhancement under §2D1.1 for distributing controlled substances to minors. In particular, we recommend a specific offense characteristic applicable to the distribution of fentanyl, fentanyl analogues, and other opioids to children and young adults under 21. Members of that age group have increasingly become victims of drug overdoses. A recent study in the New England Journal of Medicine, for instance, estimates that approximately 22 adolescents (ages 14 to 18 years) died from drug overdoses in the U.S. each week during 2022, and that most of the deaths were due to fentanyl in counterfeit pills.[30]

Second, we renew our request that the Commission create an enhancement for drug trafficking using the dark web or other anonymizing technologies to avoid detection.[31] Drug traffickers are increasingly relying on anonymizing technologies to further their illicit activity, posting advertisements for fentanyl pills on dark web marketplaces where the seller is unknown to the buyer, the transaction involves an exchange of cryptocurrency, and the product is shipped with misleading tracking information.

Third, the Commission should consider an enhancement for drug trafficking where the offense involves fentanyl or another synthetic opioid adulterated with xylazine or medetomidine. As we noted in last year's annual report,[32] drug traffickers are increasingly adulterating fentanyl

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[26] Ctr. for Disease Control, Nat'l Ctr. for Health Statistics, *U.S. Overdose Deaths Decrease in 2023, First Time Since 2018* (May 15, 2024), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2024/20240515.htm.
[27] Drug Enforcement Admin., *DEA Fentanyl Seizures in 2024*, https://www.dea.gov/onepill.
[28] Dep't of Health and Human Serv., *Determination That A Public Health Emergency Exists* (October 26, 2017), https://www.hhs.gov/sites/default/files/opioid%20PHE%20Declaration-no-sig.pdf.
[29] *See* Letter to Hon. Carlton Reeves, Chair, *supra* n.18, at 8.
[30] Friedman and Hadland, *The Overdose Crisis among U.S. Adolescents*, 390 N. Engl. J. Med 97, 97-100 (2024), https://www.nejm.org/doi/full/10.1056/NEJMp2312084.
[31] *See* Letter to Hon. Carlton Reeves, Chair, *supra* n.18, at 8.
[32] *Id*. at 8-9.

with these alpha-2-adrenergic agonists,[33] which can extend a user's high and also serve as a filler and binding agent. The DEA reports that approximately 23% of fentanyl powder and 7% of fentanyl pills seized by the DEA in 2022 contained xylazine.[34] Because these substances are not approved for use in humans, their effects have not yet been fully studied; nevertheless, the effects of xylazine and medetomidine on humans can include heightened sedation and bradycardia.[35] At the same time, these substances are profoundly dangerous because their effects cannot be reversed by life-saving medicines like naloxone (Narcan).[36] Trafficking of substances adulterated with drugs not approved for human consumption is dangerous in and of itself—and especially so when that substance is combined with a drug as deadly as fentanyl or an analogue of fentanyl. We ask the Commission to do what it can to deter such conduct.

Fourth, the Commission should expand the current enhancement at §2D1.1(b)(5) (importation of methamphetamine) to include importation of fentanyl and any analogues of fentanyl. Much of the fentanyl being distributed in the United States (and the chemicals used to make it) originates in other countries. Indeed, more than 90% of illicit fentanyl is seized at official border crossings.[37] In October 2023, the President asked Congress for $1.2 billion in funding for the Department of Homeland Security to assist in interdicting fentanyl pills and powder coming across the nation's borders.[38] While the guidelines provide for a two-level enhancement under §2D1.1(b)(5) for defendants who import methamphetamine or manufacture methamphetamine using unlawfully imported chemicals, they contain no similar enhancement available for fentanyl. The Department recommends adding one.

Fifth, the Commission should add the most prevalent and important fentanyl precursor chemicals to the Chemical Quantity Tables at §2D1.11 for offenses relating to precursors and other chemicals and equipment required to manufacture fentanyl. Doing so would help further the recent action taken by the United Nations Commission on Narcotic Drugs (at the request of

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[33] *See, e.g.*, N.Y. Dep't of Health, Press Release, *New York State Department of Health Issues Public Health Alert for Medetomidine Detected In Drug Samples In Schenectady and Syracuse* (June 21, 2024), https://www.health.ny.gov/press/releases/2024/2024-06-21_medetomidine.htm#:~:text=The%20Public%20Health%20Alert%20was,%2C%22%20State%20Health%20Commissioner%20Dr.

[34] Drug Enforcement Admin., *DEA Reports Widespread Threat of Fentanyl Mixed with Xylazine*, https://www.dea.gov/alert/dea-reports-widespread-threat-fentanyl-mixed-xylazine.

[35] *See, e.g.*, Ctr. for Forensic Science, Research, and Education, *Medetomidine Rapidly Proliferating Across USA — Implicated In Recreational Opioid Drug Supply & Causing Overdose Outbreaks* (May 20, 2024), https://www.cfsre.org/nps-discovery/public-alerts/medetomidine-rapidly-proliferating-across-usa-implicated-in-recreational-opioid-drug-supply-causing-overdose-outbreaks.

[36] *DEA Reports Widespread Threat of Fentanyl Mixed with Xylazine*, *supra* n.34; N.Y. State Office of Addiction Services and Supports, *Advisory: Another Potent Sedative, Medetomidine, Now Appearing in Illicit Drug Supply* (May 31, 2024), https://oasas.ny.gov/advisory-may-31-2024.

[37] Dep't of Homeland Sec., *Fact Sheet: President's State of the Union Highlights DHS Efforts on the Front Lines Combating Illicit Opioids, Including Fentanyl* (March 8, 2024), https://www.dhs.gov/news/2024/03/08/fact-sheet-presidents-state-union-highlights-dhs-efforts-front-lines-combating#:~:text=This%20Administration%20is%20working%20intensively,vehicles%20driven%20by%20U.S.%20citizens.

[38] The White House, *White House Calls on Congress for Immediate Action to Continue the Administration's Work to Disrupt Fentanyl Trafficking* (Oct. 20, 2023), https://www.whitehouse.gov/ondcp/briefing-room/2023/10/20/white-house-calls-on-congress-for-immediate-action-to-continue-the-administrations-work-to-disrupt-fentanyl-trafficking/.

the United States) to control three chemicals used by drug traffickers to produce illicit fentanyl.[39] This could be done through a separate table targeting precursors for fentanyl, fentanyl analogues, and fentanyl-related substances, similar to the current table for three methamphetamine and amphetamine precursor chemicals.[40] The fentanyl chemicals could include, for example, 4-piperidone; N-phenethyl-4-piperidone (NPP); 4-AP; 1-boc-4-AP; and benzylfentanyl.

Sixth, the Commission should create a new enhancement for chemicals and equipment used in fentanyl production. This could be done by adding fentanyl to §2D1.12(b)(1), which currently provides for a two-level increase when the covered chemicals and equipment are used to produce methamphetamine.

Finally, the Commission should create a new enhancement under §2D1.1 for a drug trafficking offense also involving a tableting machine or an encapsulating machine (commonly referred to as a pill press). Significant quantities of fentanyl pills are being pressed in the United States, as evidenced by alarming recent seizures. For example, as part of drug investigations in just the last six months, agents in New Orleans seized 80,000 fentanyl pills made to look like Xanax, oxycodone, and MDMA, along with 2 pill presses (and fentanyl powder and 13 firearms); agents in Louisville seized an electronic "TDP 5" pill press with M-30 punch die molds, a large quantity of counterfeit M-30 pills containing fentanyl, and approximately one kilogram of powder containing a mixture of fentanyl; and agents in the Bronx, New York seized two industrial-scale pill presses, approximately 130,000 pills, approximately three kilograms of a powder containing fentanyl, approximately 20 pounds of powder containing methamphetamine, and approximately 3.5 pounds of suspected crystal meth.[41]

In each of these takedowns, agents seized enough drugs (and firearms) to ensure that the defendants, if convicted, would face substantial sentences and would not quickly return to their production of deadly substances. But the fact that the guidelines do not account for the presence of a pill press in a drug trafficking operation raises the possibility that, in cases involving less timely takedowns that result in the seizure of one or more pill presses accompanied by smaller quantities of drugs, the guideline range will substantially understate the seriousness of the offense conduct.

Human Smuggling

On June 14, 2024, Attorney General Garland announced that the work of Joint Task

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[39] The White House, *At Urging of U.S., UN Commission Acts Against "Precursor" Chemicals Used to Produce Illicit Fentanyl* (March 16, 2022) ("Today's action by CND adds three fentanyl precursor chemicals – 4-anilinopiperidine (4-AP), 1-(tert-butoxycarbonyl)-4-phenylaminopiperidine (boc-4-AP), and N-phenyl-N-(piperidin-4-yl) propionamide (norfentanyl) – to the list of chemicals under Table I of the 1988 Convention Against Illicit Traffic of Narcotic Drugs and Psychotropic Substances, one of the three international drug control conventions that guide global efforts to reduce drug use and trafficking. The CND also voted today to schedule brorphine and metonitazene, two synthetic opioids, under Schedule I of the 1961 Convention on Narcotic Drugs and eutylone, a synthetic stimulant, under Schedule II of the 1971 Convention on Psychotropic Substances."), https://www.whitehouse.gov/ondcp/briefing-room/2022/03/16/at-urging-of-u-s-un-commission-acts-against-precursor-chemicals-used-to-produce-illicit-fentanyl/)

[40] §2D1.11(d) (Methamphetamine and Amphetamine Precursor Chemicals).

[41] Drug Enforcement Admin., *Recent DEA Seizures of Pill Presses*, April 9, 2024, https://www.dea.gov/stories/2024/2024-04/2024-04-09/recent-dea-seizures-pill-presses.

Force Alpha—a U.S. Department of Justice and U.S. Department of Homeland Security joint task force focused on the most prolific and dangerous human smuggling groups—has resulted in more than 300 domestic and international arrests and more than 240 convictions on human smuggling offenses.[42] During the announcement, the Attorney General remarked that smugglers' singular focus is profit and that they "do not care whether the migrants they take advantage of live or die."[43] Because of the depravity of smuggling crimes, the Department has continued to prioritize holding these offenders accountable. During the 2023 Fiscal Year, federal courts sentenced 4,731 defendants for human smuggling under §2L1.1, up from 4,056 during the 2022 Fiscal Year.[44]

One of the critical, enduring values of the Sentencing Guidelines is to help courts identify offenses involving the most serious offense conduct, and to distinguish these offenses from offenses that are less serious, so that courts are better able to comply with Congress's requirement that courts "impose a sentence sufficient, but not greater than necessary … to reflect the seriousness of the offense, to provide respect for the law, and to provide just punishment for the offense; to provide adequate deterrence."[45] Yet the provisions of §2L1.1 do not adequately distinguish the most serious of human smuggling offenses from the less serious.

To start, §2L1.1 fails to adequately account for the number of migrants that any one defendant smuggles. The base offense level of §2L1.1 remains unchanged whether a defendant smuggles one, three, or five migrants because the enhancement at subsection (b)(2) is triggered only when the defendant smuggles six or more persons.[46] At that point, the guidelines apply the same three-level enhancement when the defendant smuggles six persons, all the way up to 24 persons.[47] Likewise, it applies the same six-level enhancement whether the defendant smuggles 25 persons, 50 persons, or 75 persons, all the way up to 99 persons,[48] essentially treating human beings the same way the guidelines count money or weigh drugs. This contradicts the intent of 8 U.S.C. § 1324, which provides for terms of incarceration "for each alien in respect to whom such a violation occurs."[49] Congress's intent is clear: to provide increased punishment for each additional alien smuggled. The guidelines do not reflect that intent.

To address that deficiency, and as the Department further explained in a recent legislative proposal transmitted to Congress,[50] the Commission should amend subsection (b)(2) by

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[42] U.S. Dep't of Justice, *Attorney General Merrick B. Garland Delivers Remarks on Human Smuggling* (June 14, 2024), https://www.justice.gov/opa/video/attorney-general-merrick-b-garland-delivers-remarks-human-smuggling.
[43] *Id*.
[44] U.S. Sent. Comm'n, *Interactive Data Analyzer*; U.S. Sent. Comm'n, *Quick Facts, Alien Smuggling Offenses* (FY 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Alien_Smuggling_FY22.pdf.
[45] 18 U.S.C. § 3553(a).
[46] §2L1.1(b)(2) ("If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows …").
[47] §2L1.1(b)(2)(A).
[48] §2L1.1(b)(2)(B).
[49] 8 U.S.C. § 1324(a)(1)(B) ("A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs— … not more than 10 years … not more than 5 years …").
[50] U.S. Dep't of Justice, Press Release, *Readout of Joint Task Force Alpha's Third Anniversary Meeting* (June 11, 2024) (explaining that the proposal would amend §2L1.1 "by creating steeper penalty tiers based on the number of

narrowing the ranges and imposing appropriate enhancements for the number of people smuggled, ranging from a two-level enhancement for smuggling up to four people to a ten-level enhancement for smuggling 49 or more people. The proposed changes are more closely aligned with the actual language of § 1324, more accurately reflect the culpability of the defendant's conduct, and are more likely to deter large scale human smuggling.

Similarly, subsection (b)(7) does not draw a distinction between one migrant suffering bodily injury after being locked in a compartment, or five migrants suffering that harm. The two-level enhancement prescribed in that provision applies whether the smuggler injures one victim, five victims, 10 victims, or more.[51] That scheme is inconsistent with the statutory requirement that the Commission promulgate guidelines that account for "the nature and degree of the harm caused by the offense, including whether it involved … a number of persons."[52] The Commission can address this issue by amending §2L1.1(b)(7) so that the offense level increases for each person who is injured or dies.

Relatedly, and of no less importance, the Commission should amend §2L1.1 to ensure that it provides an adequate punishment range in cases where the defendant sexually assaults migrants in the course of the smuggling offense. In her 2016 letter to the Commission concerning human smuggling, then-Director of ICE Sarah Saldaña wrote that "the safety of migrants is rarely a consideration, and the results are apparent in the countless incidents of sexual assault."[53] Yet as currently drafted, the four-level enhancement under subsection (b)(7) is limited to instances of death or bodily injury. That definition may not reach sexual assaults perpetrated against migrants because, as the Department has previously explained, such assaults do not necessarily entail physical violence of the sort that results in bodily injury.[54] Smugglers, after all, need not employ physical violence (and consequently cause physical injury) when they can sexually exploit the emotional, mental, and physical control they have over a vulnerable victim in an inherently coercive setting.

Even when the four-level enhancement applies, moreover, it may not be sufficient to capture the gravity of sexual assault that smuggling victims endure. Because the base offense level for this guideline is only 12 for a smuggler who commits the standard § 1324 violation, a

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people smuggled by the defendant; increasing penalties when the defendant's conduct results in injury or death to more than one person; and ensuring defendants are subject to sentencing enhancements for sexual assault and other types of prohibited sexual conduct committed during the smuggling offense, even if that conduct occurred outside U.S. jurisdiction"), https://www.justice.gov/opa/pr/readout-joint-task-force-alphas-third-anniversary-meeting.

[51] §2L1.1(b)(7)(B) ("If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury").

[52] 28 U.S.C. § 994(c)(3).

[53] Sarah R. Saldaña, Dir., U.S. Immigr. and Customs Enf't, Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Jan. 15, 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20160321/DHS.pdf.

[54] Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 33 (Feb. 22, 2024) ("[J]ust like the falsity that most sexual assaults are committed by strangers, so too is the falsity that most sexual assaults involve violence or threats of violence or that defendants are first-time offenders. The starkest examples include law enforcement officers, human traffickers, and defendants who target vulnerable victims unable to fight back. Officers who target those in their custody do so by weaponizing their authority to obtain their victims' submission.") (internal citations omitted), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=78.

four-level increase brings the offense level up to 16, resulting in a guideline range of 21-27 months for a smuggler with no criminal history, or 12-18 months after a reduction for a timely guilty plea.[55] A guideline range of 21-27 months as applied to a smuggler who has sexually assaulted a migrant is wholly inadequate. In fact, even this example understates the inadequacy. As noted above, the four-level enhancement under (b)(7) applies regardless of the number of victims or number of sexual assaults that a defendant committed.[56]

The migrant victims in such cases, as one judge explained to the Commission, "are for all practical purposes in the same position as a kidnapping victim" in that they may be compelled "by threats of harm either to their children or family members."[57]

To ensure adequate punishment, the Commission should consider adding a cross-reference to subsection (c) of §2L1.1 instructing courts to apply the appropriate guidelines from Chapter II, Part A, Subpart 3. The change would align with the treatment of offenses resulting in death, as the cross-reference in §2L1.1(c)(1) provides for application of "the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline."[58]

This is not the first time that the Executive Branch has brought the foregoing concerns with §2L1.1 to the Commission's attention. In September 2022, the Department asked the Commission to amend §2L1.1 to "account for the serious victimization caused by human smuggling, including sexual assault, serious bodily injury, and death," and also to "address offenses where the defendant personally was involved in sexual abuse or sexual assault of a migrant, was involved in the death or serious bodily injury of more than one person, was involved in smuggling a known or suspected terrorist, or was involved in subjecting a child to serious risks of injury or death, regardless of whether the child was "unaccompanied."[59] On October 16, 2022, Department of Homeland Security Secretary Alejandro Mayorkas also wrote to the Commission, and, after noting that he agreed with the Department's letter, specifically mentioned that "the Commission should, among other things, consider enhancements to the guidelines to account for the offenses in which migrants were sexually abused or sexually assaulted."[60] The Commission did not act then. It should act now.

Accordingly, the Department renews our prior request for amendments to §2L1.1 and urges the Commission to make the changes described above and in the Department's June 2024 legislative proposal, including: 1) provide more gradations in the advisory guideline ranges for the number of migrants smuggled, as well as a higher maximum increase for the most prolific smugglers; 2) provide offense-level increases under §2L1.1(b)(7) for each migrant who suffers bodily injury (2 levels per person), serious bodily injury (4 levels per person), permanent or life-threatening injury (6 levels per person), or death (10 levels per person) as a result of the offense,

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[55] U.S.S.G. Ch. 5 Pt. A (Sentencing Table).
[56] §2L1.1(b)(7)(B) (add 4 levels "if any person" sustained serious bodily injury).
[57] Hon. Andrew S. Hanen, Letter to U.S. Sent'g Comm'n (March 9, 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160316/20160316_Hanen.pdf.
[58] §2L1.1(c)(1).
[59] Letter to Hon. Carlton Reeves, Chair, *supra* n.21, at 24-25.
[60] Alejandro Mayorkas, Secretary, Department of Homeland Security, Letter to Hon. Carlton Reeves, Chair (Oct. 16, 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/dhs.pdf.

subject to an appropriate offense-level cap; and 3) provide a cross reference to specifically address human smuggling offenses involving sexual assault.

Use of Artificial Intelligence to Commit or Avoid Apprehension for Crimes

The Commission has announced that, "[i]n light of the 40th anniversary of the Sentencing Reform Act of 1984, Public Law 98-473, 98 Stat. 1987 (1984), the Commission intends to focus on furthering [its] statutory purposes and missions as set forth" in the Act.[61] The Department supports that focus, which necessarily involves looking both back and ahead: back toward the "fundamental changes to federal sentencing" effectuated through the Act,[62] and ahead to how the Commission can best fulfill its mission against the backdrop of a sentencing framework and criminal-justice landscape that differ markedly from the ones that Congress addressed in 1984.

Looking toward the future, all participants in the federal criminal justice system need to take account of technological changes that affect the ways individuals commit crimes, solve crimes, and analyze relevant data. One such change is the existence, and increasingly widespread availability, of powerful artificial intelligence (AI) tools. As Deputy Attorney General Lisa Monaco recently explained, when used responsibly, AI can be of valuable assistance to law enforcement agents as they strive to solve crimes and to prosecutors as they marshal evidence needed to prosecute offenders.[63] AI may similarly aid those gathering and analyzing data concerning the criminal-justice system—as the Commission does through its statutorily prescribed data-collection and -analysis functions.[64]

At the same time, AI poses significant risks of dangerous misuse. It can make crimes easier to commit; amplify the harms that flow from crimes once committed; and enable offenders to delay or avoid detection. AI also raises particular concern in certain areas—such as cybercrime and election security—where its misuse can have societal ramifications beyond the impact on individual victims.[65]

In light of those concerns, the Deputy Attorney General announced in February 2024 (1) that Department of Justice prosecutors would, where permitted by law, seek stiffer sentences for offenses made significantly more dangerous by the misuse of AI; and (2) that if the Department determined that existing sentencing enhancements do not adequately address the harms caused by misuse of AI, we would seek reforms to those enhancements to close that gap.[66]

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[61] Notice of Proposed Priorities for Amendment Cycle, 89 Fed. Reg. 48,029 (June 4, 2024).
[62] *Pepper v. United States*, 562 U.S. 476, 488-89 (2011).
[63] U.S. Dept. of Just., *Deputy Attorney General Lisa O. Monaco Delivers Prepared Remarks at the University of Oxford on the Promise and Peril of AI* (Feb. 14, 2024), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-university-oxford-promise-and.
[64] *See* 28 U.S.C. § 991(b)(2) (requiring the Commission to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing"); 28 U.S.C. § 995(a)(12)(A) (authorizing the Commission to establish a research and development program in order to "serv[e] as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices").
[65] *Remarks at the University of Oxford on the Promise and Peril of AI*, *supra* n.63.
[66] *Id*.

In line with those remarks, and as the Commission works to ensure that sentencing policies and practices promote deterrence, just punishment, and incapacitation, the Department recommends that the Commission consider how the guidelines should account for the risks posed by the misuse of AI. In the short term, the Department recommends that the Commission consider a Chapter 3 enhancement applicable to cases in which the defendant used artificial intelligence during the commission of an offense, in preparation for the offense, or in an attempt to avoid apprehension for the offense. Such an enhancement would differ from the sophisticated-means enhancement that applies to defendants whose guideline range is set by §2B1.1, because it would apply to all offenses of conviction—not just those keyed to §2B1.1, and not just those where the use of artificial intelligence was sophisticated. It would also be distinct from the special-skill enhancement in §3B1.3 because it would apply regardless of whether special skill was required to use the AI. Although the impact of AI will surely warrant further study going forward, an enhancement of this nature would recognize the danger posed by AI-fueled crime and send a valuable early signal that those exploiting this new form of promising technology will face increased penalties.

Domestic Terrorism

In our September 2022 letter, we asked the Commission to address the increasing number of domestic terrorism offenses where the perpetrator's purpose is to intimidate a civilian population through violent acts but where the defendant is not convicted under one of the "federal crimes of terrorism" included in §3A1.4. For example, a mass shooting intended to intimidate persons based on their political viewpoint may not trigger the offense-level enhancement in §3A1.4(a) and may likewise fall outside the circumstances in which Application Note 4 provides for an upward departure.

The Commission did not act on our 2022 request. But we continue to believe that this area of sentencing law is important and urge the Commission to give it further consideration.

Bank Secrecy Act

Under the Bank Secrecy Act (BSA), 31 U.S.C. § 5311 *et seq.*, financial institutions are required to have appropriate anti-money laundering programs to protect customers, the financial institution, and the U.S. financial system from the risk of money laundering, terrorist financing, and illicit finance. Criminal failures to implement anti-money-laundering programs can allow hundreds of millions or billions of dollars to flow through the U.S. financial system without any safeguards or controls. In recent years, the risks posed by those failures have become especially acute in the field of cryptocurrency and digital assets, where criminals use exchanges and other money transmitting businesses that provide digital-asset-transfer services to transmit funds to finance criminal activity and the resulting ill-gotten gains across the globe in the blink of an eye.

Currently, however, the advisory guideline ranges for violations of the BSA's anti-money laundering program provision do not reflect the severity of the criminal act. In particular, in our experience, the offense level for a BSA program violation under §2S1.3 is never higher than a 12 (yielding a range of 10-16 months at criminal history category I) before application of any leadership enhancements. Such low offense levels have contributed to sentences of little or no

incarceration for offenders who admitted to serious BSA program violations involving millions or billions of dollars, thereby undermining the deterrent value of the statute's criminal penalties. This was precisely the case for Chengpeng Zhao, founder and CEO of Binance, the world's largest cryptocurrency exchange. Zhao was sentenced to four months of imprisonment for his role in allowing trillions of dollars in transactions that were not subject to an effective anti-money laundering program and enabling more than $898 million in transfers that violated U.S. sanctions.

To address that deficiency, the Department recommends that the Commission amend §2S1.3 to provide enhancements that take into account the scope and severity of the BSA violations. Concretely, the Department recommends that the Commission add a new specific offense characteristic referencing violations under 31 U.S.C. §§ 5318, 5318A, and 5322, and then add a table raising the offense level based on the value of the criminal proceeds transacted in the offense.

The Categorical Approach and Simplification

The Commission has published as a proposed priority the continued examination of the career offender guideline (and alternative approaches to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense"), as well as the exploration of ways to simplify the guidelines.[67] In our view, the goal of simplification is not necessarily to shorten the Guidelines Manual, but to make the application of the guidelines less complex, so that the results are more consistent and can be anticipated by the defendant, the prosecutor, crime victims, and the public. We think the most suitable starting place is with the career offender guideline, as this provision has become among the most complex in the entire Guidelines Manual.

In 2018, the Commission published proposed changes to the guidelines to address the categorical approach. The Commission's rationale was based largely on the complexity of the process involved in applying the categorical approach to the definition of a crime of violence or of a controlled substance offense, and the resulting inconsistency of results:

> The Commission has received significant comment over the years regarding the categorical approach, most of which has been negative. Courts and stakeholders have criticized the categorical approach as being an overly complex, time consuming, resource-intensive analysis that often leads to litigation and uncertainty. Commenters have also indicated that the categorical approach creates serious and unjust inconsistencies that make the guidelines more cumbersome, complex, and less effective at addressing dangerous repeat offenders.[68]

For a number of years, and most recently in our March 27, 2023 comment letter to the Commission, the Department has suggested that the best way to address the categorical approach

[67] Proposed Priorities for Amendment Cycle, 89 Fed. Reg. at 48029.
[68] U.S. Sent'g Comm'n., Proposed Amendments to the Sentencing Guidelines, p. 23 (December 20, 2018), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20181219_rf-proposed.pdf.

is to permit courts to consider actual conduct.[69] In our view, that approach would result in less complex, less opaque, and more predictable and consistent outcomes: in other words, such a change would simplify the guidelines.

Ongoing circuit conflicts concerning application of the controlled substances offense definition make prompt resolution of this issue especially important. As the Commission is aware, courts remain divided over (1) whether the term "controlled substance" is limited to drugs regulated by the federal Controlled Substances Act,[70] and (2) whether courts conducting a categorical analysis consider the version of the Controlled Substances Act in effect at the time the defendant committed the prior offense or instead the version in effect at the time of the current federal sentencing.[71] The Supreme Court's recent decision in *Brown v. United States*, 144 S. Ct. 1195 (2024), addressed the latter question in the context of the Armed Career Criminal Act but did not directly resolve the question under the guidelines.

Finally, any effort at simplification—of the categorical approach or otherwise—will have to account for principles of administrative law that have undergone significant changes in recent years (and months). As the Commission is aware, courts have disagreed about the effect of, and judicial deference owed to, the guideline commentary. The Commission has responded by amending the guidelines to move certain provisions from the commentary to the text. Future efforts at simplification, whether directed at the categorical approach or other areas, will have to be responsive to the evolving legal framework.

II. Other Programmatic Issues

False Statements to Financial Institutions

In addition to the harms described above flowing from criminally deficient anti-money-laundering programs, the integrity of the financial system can be compromised when individuals obtain access to banking services under false or fraudulent pretenses and use those services to hide their profits from past crimes or facilitate future ones. Offenders may, for example, conceal that funds deposited into or transacted through an account constitute proceeds of business done in sanctioned jurisdictions—placing the financial institution at risk of violating sanctions law itself.

When, however, the individual's use of the fraudulently obtained account access does not result in a monetary loss to a financial institution or a victim, offense-level enhancements under §2B1.1's loss table will not be available. The resulting guideline range will therefore often be

[69] Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 27 (February 27, 2023) ("The Department has long maintained that the best way to address the categorical approach is to retain the current definitions (as amended in Parts B-D and in Part B regarding Circuit Conflicts) but permit courts to consider actual conduct."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=457.

[70] *See United States v. Lewis*, 58 F.4th 764, 768-69 (3d Cir.) (collecting cases), *cert denied*, 144 S. Ct. 489 (2023).

[71] *Id.* at 771 (joining the Sixth and Eighth Circuits in adopting a time-of-prior-offense rule but explaining that the First, Second, and Ninth Circuits have adopted a time-of-federal-sentencing rule).

low, despite the risks that this category of fraudulent conduct presents to the affected financial institution and the system as a whole.

To ensure just punishment and adequate deterrence, the Department recommends that the Commission consider two changes to §2B1.1 for violations of 18 U.S.C. §§ 1014, 1344, and 1349 that involve fraudulently obtaining banking services, rather than loans. First, the Commission could amend the guidelines to ensure that where the crime involves obtaining services from a financial institution through fraud and no monetary loss can be shown, the offense level be based on the volume of transactions conducted as a result of the offense. Second, the Commission could consider an additional offense-level enhancement where the defendant was convicted under the same statutes for defrauding a bank into providing services and the defendant knew or believed that the transactions processed through those services involved proceeds of unlawful activity or were intended to promote unlawful activity.

Trade Secrets

Trade secret theft and economic espionage pose an increasing threat, not only to American businesses and our competitive advantage, but in some cases to critical infrastructure, national security, and public safety. The applicable guideline ranges for convictions for trade secret and economic espionage offenses under 18 U.S.C. §§ 1831 and 1832 are insufficient to reflect the seriousness of the offenses, and to provide adequate deterrence, and we ask that the Commission raise the advisory guideline ranges for these offenses.

Trade secrets—for example, scientific and technical research, chemical formulas, manufacturing processes—provide U.S. businesses with an essential competitive advantage in the marketplace. These trade secrets are commonly developed over years or even decades, at enormous cost, and the theft of this information represents a tremendous loss to the business. When the trade secrets are transmitted outside of the United States, the loss implicates the national interest, potentially resulting in lost jobs, decreased competitiveness, and empowerment of adversary regimes.

For example, in March 2024, after an electric vehicle manufacturer spent at least $13 million developing trade secrets concerning battery assembly, the defendants stole the trade secrets and used those secrets in establishing competitor businesses located in China, Canada, Germany and Brazil.[72] In another example, a former Google engineer was arrested in March 2024 for stealing AI-related trade secrets while secretly working for two China-based technology companies.[73] In February 2024, a defendant was arrested for allegedly stealing trade secrets developed for use by the U.S. government to detect nuclear missile launches and track ballistic

[72] U.S. Dep't of Justice, *Owners of China-Based Company Charged with Conspiracy to Send Trade Secrets Belonging to Leading U.S.-Based Electric Vehicle Company* (March 19, 2024), https://www.justice.gov/opa/pr/owners-china-based-company-charged-conspiracy-send-trade-secrets-belonging-leading-us-based; *see also* U.S. Dep't of Justice, *Resident of China Pleads Guilty to Conspiracy to Send Leading Electric Vehicle Company's Trade Secrets to Undercover U.S. Agent* (June 13, 2024), https://www.justice.gov/opa/pr/resident-china-pleads-guilty-conspiracy-send-leading-electric-vehicle-companys-trade-secrets.

[73] U.S. Dept. of Just., *Chinese National Residing in California Arrested for Theft of Artificial Intelligence-Related Trade Secrets from Google* (March 6, 2024), https://www.justice.gov/opa/pr/chinese-national-residing-california-arrested-theft-artificial-intelligence-related-trade.

and hypersonic missiles.[74] According to the victim company, it had invested tens of millions each year for more than seven years to develop the technology.[75]

At the same time, American businesses face increasingly aggressive and sophisticated efforts to misappropriate or steal valuable confidential data by competitors, both domestic and foreign, using methods ranging from bribing, coopting, or poaching key employees privy to sensitive data, to phishing campaigns, social engineering schemes, or brute force cyber-attacks to gain access to corporate networks and exfiltrate this confidential information. Yet detection and prosecution of these violations can be difficult. Given the nature of trade secrets, a successful theft may be virtually impossible to detect. But even in cases where a theft is detected or suspected, the victims in trade secret theft cases may be reluctant to report thefts, share with government investigators and prosecutors the type of sensitive confidential information necessary to prosecute a criminal case, or disclose the estimated losses caused by the trade secret theft for fear that such information will become public as a result. Despite the use of protective orders, the potential for disclosure of confidential business information is a frequent concern, and sometimes an implicit threat defendants can use to discourage prosecution. These challenges are all the greater in economic espionage cases, where witnesses and evidence may be located abroad, and where the information needed to establish essential facts may be under the control of the same government benefitting from the trade secret theft at issue.

Currently, trade secret offenses under 18 U.S.C. §§ 1831 and 1832 are sentenced, like many other economic offenses, under §2B1.1. Trade secret offenses receive a base offense level of 6 and then an additional enhancement based on the loss resulting from the offense as specified in the table in §2B1.1(b)(1). As a result of amendments promulgated by the Commission in 2013,[76] a two-level enhancement applies if the defendant knew or intended that a trade secret would be transported or transmitted out of the United States, and a four-level enhancement (with a minimum of 14 levels) applies if the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent.[77]

To address the harms caused by these offenses, and to ensure maximum deterrent effect from prosecutions that require substantial government resources, the Department asks that the guidelines applicable to trade secret theft and economic espionage offenses be amended to provide more significant penalties. Increases are especially warranted for those offenses involving the transmission or transportation of a trade secret outside the United States and for offenses committed for the benefit of a foreign government, instrumentality, or agent. Specifically, all offenses involving theft of a trade secret should receive at least a two-level enhancement, and the existing two- and four-level enhancements applicable to defendants who knew or intended transmission outside the United States or benefit of a foreign government should be increased by another two levels.

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[74] U.S. Dep't of Justice, *Justice Department Announces Charges and Arrest in Two Separate Illicit Technology Transfer Schemes to Benefit Governments of China and Iran* (February 7, 2024), https://www.justice.gov/opa/pr/justice-department-announces-charges-and-arrest-two-separate-illicit-technology-transfer.
[75] *Id*.
[76] U.S.S.G. Appendix C, Amendment 771 (eff. Nov. 1, 2013).
[77] §2B1.1(b)(14)(A) and (B).

The proposed two-level increase for trade secret offenses as a category would also align the guidelines applicable to these offenses with those applicable to other types of intellectual property offenses. For comparison, intellectual property offenses such as copyright infringement and trademark counterfeiting are sentenced under §2B5.3, which provides for a base offense level of 8, along with enhancements based on the "infringement amount" (referenced to the §2B1.1 loss table). Somewhat analogous to §2B1.1(b)(14)(A)'s enhancement for transmission—that is, export—of a stolen trade secret outside the United States, §2B5.3(b)(3) provides a two-level enhancement for offenses involving, among other things, importation of infringing items.

Computer Fraud and Abuse Act (CFAA)

The CFAA, 18 U.S.C. § 1030, provides important protections against hackers and cybercriminals, including those who cause grave harms to computer systems and individual users through the use of ransomware, malware, and other nefarious methods. Recent experience has shown, however, that the guidelines applicable to several categories of § 1030 violations are inadequate in some respects.

First, the guidelines governing some violations of § 1030 tie offense-level enhancements to the amount of monetary or property damage caused by the offense or the amount of money that the offender seeks to extort or obtain from a victim. When, however, the primary harm from the computer intrusion is injury to an individual's privacy interests, such enhancements do not apply; instead, the guidelines provide a single two-level enhancement if the court finds that the offense involved either an intent to obtain personal information or the unauthorized public dissemination of personal information.[78] The resulting guidelines range in those cases may therefore be insufficient to reflect the gravity of the harm caused and provide general deterrence. This may be true, for example, in cases where an offender unlawfully gains access to others' accounts to obtain and later share intimate images of the account holder or in ransomware cases—where a single computer intrusion could result in the unauthorized public dissemination of personal information for dozens, hundreds, or even thousands of persons. To address this deficiency, the Commission should consider amendments to the guidelines governing § 1030 violations that provide for additional offense-level increases where the harm is to one or more individuals' privacy and cannot readily be measured in monetary terms.

Second, §2B1.1 can substantially understate the seriousness of the offense in certain cases involving damage or unauthorized access to "protected computers," as defined in 18 U.S.C. § 1030(e)(2). In cases where the perpetrators have employed malware or analogous means to carry out their computer-fraud schemes, law enforcement officers often identify victim computers according to their Internet Protocol (IP) addresses. However, the overwhelming majority of Internet Service Providers in the United States (and overseas) only maintain records of which IP addresses they assigned to specific customers for a period of six months to a year. That practice often prevents law enforcement officers from identifying customers associated with the IP addresses assigned to computers that were damaged or accessed without authorization during the offense. Such victims, despite having sustained actual loss as a result of the offense, are undercounted in §2B1.1.

[78] §2B1.1(b)(18).

The Department recommends that the Commission consider potential amendments to address this systematic undercounting of harm to computer-fraud victims. Possible solutions could include (1) adding a specific offense characteristic that treats each unique IP address as a "victim" without requiring proof of "financial hardship," as do §2B1.1(b)(2)(B) and (C); (2) amending the table in §2B1.1(b) to provide that the loss for each unique IP address damaged or accessed without authorization shall be not less than a specified value (for example, the average cost of repairing a protected computer); or (3) providing a new enhancement to increase the offense level based on the number of protected computers that have been damaged or accessed without authorization. Whatever the particular solution, the undercounting of victims warrants the Commission's consideration.

Third, the Department requests a technical fix to the guidelines to ensure that two existing enhancements apply equally to those who scheme to violate § 1030. Specifically, the enhancements in §§2B1.1(b)(18) and (19) have been held to apply only if "the defendant was convicted of an offense under 18 U.S.C. § 1030," not where the defendant was convicted under the general conspiracy statute of conspiring to violate § 1030.[79] Prosecutors often charge hacking and other computer-intrusion schemes under that general conspiracy statute (18 U.S.C. § 371) because § 1030 itself does not prescribe a separate penalty range for conspiracies. Yet because of that charging practice and the language of §2B1.1, the guidelines range can differ substantially in cases involving the same conduct merely because the offenses resulted in convictions under different statutes—§ 371 instead of § 1030—even where the object of the § 371 conspiracy is a violation of § 1030. The Commission could avoid that discrepancy, and ensure an advisory range that adequately reflects the severity of the offense conduct, by amending §§2B1.1(b)(18) and (19) to apply to convictions for an offense under § 1030 or a conspiracy to commit such an offense.

Foreign Agents Registration Act (FARA)

In our September 2022 and July 2023 annual letters to you, the Department recommended creating a new guideline for offenses related to the actions of agents of foreign principals and governments in violation of the Foreign Agents Registration Act (FARA) and 18 U.S.C. § 951 (agents of foreign governments). The Commission declined to consider the issue during the two previous amendment cycles. We again ask that the Commission create a new guideline for these offenses and add enhancements for disseminating information using a means of mass communication without the required disclosure of a foreign agent's status and for false and misleading statements or submissions to the Department of Justice. The Department has demonstrated a renewed focus on bringing prosecutions under FARA, and several recent prosecutions have also involved defendants acting as agents of a foreign government and allegations of bribery.[80]

[79] *See United States v. Nicolescu*, 17 F.4th 706, 730 (6th Cir. 2021).
[80] *See* U.S. Dep't of Justice, Foreign Agents Registration Act Home, Recent Cases (updated May 31, 2024), https://www.justice.gov/nsd-fara/recent-cases. *See also United States v. Chaoquin*, No. 23-1262, 2024 WL3355141, at *12 (7th Cir. July 10, 2024) (noting the parties' agreement that no guideline applied to the defendant's violation of 18 U.S.C. § 951).

III. Additional Proposals: Technical Fixes and Implementing Legislation

Technical Fixes

New Exceptions to §4C1.1 (Adjustment for Certain Zero-Point Offenders) created April 2023

The Department asks that the Commission revisit the exceptions it included for the new §4C1.1 (Adjustment for Certain Zero-Point Offenders) created in April of 2023. We suggest the following situations should exclude eligibility because the defendants in such situations do not warrant a reduction for being a first-time offender:

The defendant received an adjustment under §3B1.3 (Abuse of a Position of Trust or Use of a Special Skill). Defendants who receive an abuse of position of trust enhancement, per the guideline provision itself, are those who used their position of trust or special skill in a manner that facilitated the commission or concealment of the offense. The professional skills or managerial discretion that these individuals used to commit the offense sets them apart from the routine criminal. The adjustment covers such categories of offenders as a physician who runs a "pill mill," a prison guard who abuses his position to illegally transport and sell drugs, a high-ranking law enforcement officer who creates a scheme to defraud a state or local government out of overtime funds, or a bank president who embezzles millions of dollars. Typically, these individuals—as required to gain the positions of trust that they occupy—do not have criminal histories, and should not benefit from a reduction as a result.

The defendant's instant offense of conviction is covered by Chapter 2, Part M (Offenses involving National Defense and Weapons of Mass Destruction). Defendants convicted of national-security offenses such as treason, espionage, and providing material support to terrorism should not benefit from a reduction.

The defendant received an adjustment under §3C1.1 (obstruction or impeding the Administration of Justice). Defendants who receive an adjustment under §3C1.1, where the obstructive conduct related to the defendant's offense of conviction and any relevant conduct, should not benefit from a reduction.

The defendant has significant ties to cartels or human smuggling organizations. It is not uncommon in prosecutions of largely extraterritorial conduct that the defendant may be eligible for a two-level decrease because they have no qualifying criminal history. For example, a defendant may have only foreign convictions, which are excluded under §4A1.2(h). Or it may be impossible to ascertain whether or not the defendant has a criminal record, due to an absence of law enforcement or judicial information-sharing or record-keeping. Such defendants should not benefit from a reduction.

The defendant committed COVID fraud while a public employee. Although public servants are not likely to have criminal histories, public employees who commit fraud in connection with major disaster economic relief programs, in a manner analogous to the

abuse of public or private trust adjustment under §3B1.3, should not benefit from a reduction.

The defendant is a government employee or has a security clearance. Defendants with security clearances are not likely to have criminal histories, but such defendants who use their employment and or clearances to commit a crime should not benefit from a reduction.

Technical Fix: Illegal Export of Certain Firearms

On March 9, 2020, certain non-automatic and semi-automatic firearms equal to .50 caliber or less, including rifles, handguns, shotguns, and ammunition were transferred from the U.S. Munitions List,[81] to the Commerce Control List, Supplement 1 to Part 774 of the Export Administration Regulations (EAR).[82] As a result, such firearms are now controlled through the Export Control Reform Act (ECRA), 50 U.S.C. § 4819, and the EAR, rather than the Arms Export Control Act (AECA), 22 U.S.C. § 2778, and the International Traffic in Arms Regulations. A technical edit is in order to add 50 U.S.C. § 4819 to the Statutory Provisions listed in §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) and to update Application Note 1 to make clear that §2M5.2 continues to apply to the illegal export of non-fully automatic small arms and related ammunition now controlled through ECRA and the EAR.

Technical Fix: Evasion of Export Controls

On August 13, 2018, Congress passed the Export Control Reform Act, 50 U.S.C. §§ 4801-4852, providing permanent statutory authority for the Export Administration Regulations (EAR), 15 C.F.R. parts 730-774. A technical edit is in order to add 50 U.S.C. § 4819 to the Statutory Provisions listed in §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism) and to delete reference to the repealed Export Administration Act, 50 U.S.C. § 4601 *et seq*.

Implementing New Legislation into the Guidelines

Implement New Offense of Animal Crushing Created by Preventing Animal Cruelty and Torture Act of 2019

In our September 2022 annual report, we recommended that the Commission amend the guidelines to implement the then-recent Prevention of Animal Cruelty and Torture Act ("PACT Act").[83] The Commission did not address the issue then, nor during the following amendment year. The PACT Act created a new offense of animal crushing,[84] in addition to the distinct

[81] Section 121.1 of the International Traffic in Arms Regulations (UTAR), 22 C.F.R. parts 120-130.
[82] 15 C.F.R. parts 730-774; *see* 85 Fed. Reg. 4136 (Jan. 23, 2020).
[83] Pub. L. No. 116-72, 133 Stat. 1151 (Nov. 25, 2019).
[84] 18 U.S.C. § 48(a)(1).

offenses of creating and distributing animal crush videos.[85] Although § 48 is already referenced to §2G1.3 under the Statutory index (Appendix A), §2G1.3 is intended to address the *creation and distribution* of obscene material,[86] and not the illegal act of crushing animals. Additionally, §2G3.1 is inconsistent with the statutory maximum penalty of seven years per offense and with the guideline applicable to the comparable offense of animal fighting. Because the Commission has not acted and because the new offense is treated just like the existing offense in the guidelines, the courts are faced with an advisory range that equates the two crimes.

In 2016, the Commission raised the offense level for most animal-fighting offenses, which have a five-year statutory-maximum sentence. The Commission has previously adopted specified guidelines resulting from animal-cruelty legislation, increasing the corresponding offense level of those acts.[87] As recognized by Congress through this legislation and by the Commission in other guideline amendments involving violence against animals,[88] sentences must adequately reflect this egregious conduct as well as its distribution.[89] Because the Commission has not yet implemented the PACT Act, we recommend the Commission add a new subsection to §2G3.1 to include the offenses covered under 18 U.S.C. § 48 in order to provide appropriate guideline penalties and address existing sentencing disparities.

The Department also notes that we agree with a 2024 letter to the Commission from 48 nonprofit organizations recommending an increase to the base level of §2Q2.1 from 6 to 8, and recommending a new enhancement under §2Q2.1 for being "engaged in the business," in order to adequately deter organized crime involved in transnational Wildlife and Plant Trafficking.

Further Incorporate 18 U.S.C. § 250 into Existing Guidelines

In March 2022, when Congress reauthorized the Violence Against Women Act (VAWA), it enacted 18 U.S.C. § 250 (penalties for civil rights offenses involving sexual misconduct). When charged in conjunction with Chapter 13 substantive civil rights offenses, Section 250 calls for felony penalties consistent with the gravity of the type of sexual assault underlying the civil rights offense. This statute is most often used when government actors commit sexual assault in violation of 18 U.S.C. § 242, though it also applies to other civil rights offenses, such as federal hate crimes.

On April 5, 2023, the Commission integrated this statute and other new sexual abuse offenses enacted under the 2022 VAWA. The changes included adding the new § 250 penalty

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[85] 18 U.S.C. § 48(a)(2).

[86] §2G3.1, cmt. bkgnd ("Most federal prosecutions for offenses covered in this guideline are directed to offenses involving distribution for pecuniary gain.")

[87] *See* U.S. Sent'g Comm'n, Amendment 800, 81 Fed. Reg. 2295 (Nov. 1, 2016) ("This amendment responds to two legislative changes" and "increases the base offense level for offenses involving an animal fighting venture from 10 to 16" to "better accounts for the cruelty and violence that is characteristic of these crimes"); U.S. Sent'g Comm'n, Amendment 721, 73 Fed. Reg. 26923 (Nov. 1, 2008).

[88] *See* 18 U.S.C. § 48(a)(1)-(2); U.S.S.G. §2E3.1, Upward Departure Provision ("an upward departure may be warranted if . . . the offense involved extraordinary cruelty to an animal").

[89] *See, e.g.*, Gov't Sent. Mem. at 10, *United States v. Scott*, No. 1:21-cr-49 (S.D. Ind. Nov. 4, 2021) ("Defendant asphyxiated the pregnant cat she acquired from Person 1 by placing a ligature around its neck, and strangling the cat until it died. Defendant then removed the unborn kittens from inside the cat's body, and used Social Media Application B to post a series of images depicting the animal crushing act.").

statute to the general guideline for civil rights offenses under §2H1.1. Notably, §2H1.1 cross references to §2A3.1 and §2A3.4, which govern the Chapter 109A offenses of sexual abuse and abusive sexual contact, when the underlying conduct involves the conduct covered by those two sections. The Department would propose that the Commission integrate § 250 into the entire guidelines scheme, consistent with how Chapter 109A sex offenses are integrated.

Implement the Protecting Lawful Streaming Act (PLSA)

As we noted in our September 2022 letter to you, the Protecting Lawful Streaming Act of 2020 (PLSA), Pub. L. No. 116-260, 134 Stat. 1182, created a new felony offense at 18 U.S.C. § 2319C for operating an "illicit transmission service"—that is, for providing infringing content via streaming. Last year the Commission referred § 2319C offenses to §2B5.3. However, other changes are necessary to implement the PLSA or otherwise to address streaming offenses.

First, revisions to the application notes to §2B5.3 to address the calculation of "infringement amount" in streaming cases are critical for the guidelines to address § 2319C cases, as well as streaming cases prosecuted under the criminal copyright statute in § 2319. Second, the PLSA provided enhanced penalties for offenses involving "works being prepared for commercial public performance," a new term distinct from the existing term "work being prepared for commercial distribution" already used in §2B5.3. Revision to the guidelines are necessary to implement the PLSA as Congress intended, and to accurately track distinct, non-overlapping parts of copyright law.

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We appreciate the opportunity to provide the Commission with our views, comments, and suggestions, and we look forward to working with the Commission on these and other issues in the coming amendment year.

Sincerely,

Scott Meisler

Scott Meisler, Deputy Chief, Appellate Section
Criminal Division
U.S. Department of Justice
ex-officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director
Kathleen Grilli, General Counsel

Secretary
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Homeland Security

July 12, 2024

The Honorable Carlton W. Reeves, Chair
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Dear Judge Reeves:

I respectfully submit this letter in support of the U.S. Department of Justice's proposed amendments to the United States Sentencing Guidelines for human smuggling crimes. In addition, I urge the United States Sentencing Commission to amend the Sentencing Guidelines for the crimes of illegal exportation of firearms and components, and wildlife trafficking.

On October 16, 2022, I wrote to the Sentencing Commission urging it to, among other measures, increase the base offense level for human smuggling crimes. A copy of my letter is enclosed. I reaffirm the recommendations I set forth in my October 16, 2022 letter to you. Since that time, the smuggling organizations, which have grown in sophistication over the past ten years, have become only more violent.[1] A criminal justice response that applies the appropriate sentencing guidelines is critical in breaking the cycle of human smuggling and related crimes.[2]

The Sentencing Guidelines for human smuggling crimes must align with the seriousness of the offense and the harm caused. Our frontline agents and officers bear witness every day to the gravity of the offense and the tragedies that too often follow. In fiscal year 2019, United States Border Patrol Agents rescued 4,921 migrants and identified 300 who died at the U.S. border. That number has grown exponentially each fiscal year, with 43,340 migrants rescued and 704 deaths having occurred in fiscal year 2023. These figures do not account for the sexual assaults, physical injuries, and mental health trauma that the migrants suffer at the ruthless hands of the smugglers and that our agents and officers heartbreakingly discover.

The base offense level found at Section 2L1.1 of the Sentencing Guidelines should be increased from the high of 25 to 32, the level applied to the crimes of abduction, kidnapping, and unlawful restraint pursuant to Section 2A4.1 of the Sentencing Guidelines. In addition, and as the U.S. Department of Justice has advocated, the Sentencing Guidelines should be amended to

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[1] Migration Policy Institute, "Migration at the U.S.-Mexico Border, A Challenge Decades in the Making," January 2024: https://www.migrationpolicy.org/research/migration-border-challenge-decades (accessed July 10, 2024); Harvard Kennedy School, "Dismantling Migrant Smuggling Networks in the Americas: A Strategy for Human Security and Homeland Security Along Migration Routes," June 2022; https://www.belfercenter.org/sites/default/files/files/publication/Paper13_Cabrera_DismantlingMigrantSmuggling_V2.pdf (accessed July 10, 2024).
[2] Id.

include enhancements for the number of people smuggled, death or serious injuries inflicted, and any nexus to sexual exploitation or abuse. With these amendments, the punishment will better fit the seriousness of the offense conduct and serve the goal of deterrence that is one cornerstone of the criminal justice system.

The illegal exportation of firearms and components also has exacted a great deal of tragedy and human suffering. The unfortunate reality is that the cartels – the transnational criminal organizations based in Mexico that are metastasizing throughout the region and across the Atlantic and are responsible for the trafficking of fentanyl and other dangerous drugs, countless homicides and assassinations, corruption, and other organized criminal activity – are often equipped with firearms and components illegally exported from the United States.[3] DHS law enforcement offices work continuously to interdict and seize illicit weapons and components before they are exported from the United States. As an example, U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement, in partnership with the Bureau of Alcohol, Tobacco, Firearms and Explosives, conduct Operation Without a Trace, which targets the illegal exportation of guns and ammunition from the United States to Mexico. Since its inception, Operation Without a Trace has led to over 700 arrests and the seizure of over 1,900 firearms and over 850,000 rounds of ammunition as of fiscal year 2023.

In addition, the recent commercial proliferation and availability of 3D printing systems and components for privately manufactured firearms, commonly known as "ghost guns," has led to an increase in the illegal exportation of firearm components.[4] These components include barrels, trigger assemblies, upper receivers for rifles, and slides for semi-automatic pistols. They are integral and necessary to the construction of ghost guns that are increasingly used in criminal activity and are difficult to trace. Under federal law, these components are not defined as a "firearm." They are often smuggled out of the country and used in the construction of ghost guns abroad.[5]

I respectfully urge the Sentencing Commission to address the increasing severity of the criminality and harm that the illegal exportation of firearms and components cause by amending Section 2M5.2 of the Sentencing Guidelines to explicitly include firearm components. In addition, it is critical that the Sentencing Guidelines be updated to reflect a regulatory change that occurred in 2020, when the listing of smuggled firearms, ammunition, and weapons components were, for export purposes, transferred from the United States Munitions List to the

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[3] Bureau of Alcohol, Tobacco, Firearms and Explosives, "Firearms Trace Data: Mexico – 2017-2022 Data Source: Firearms Tracing System," (March 10, 2023); https://www.atf.gov/resource-center/firearms-trace-data-mexico-2017-2022 (accessed July 10, 2022); National Firearms Commerce and Trafficking Assessment (NFCTA): Firearms Trafficking Investigations - Volume Three," April 4, 2024); https://www.atf.gov/firearms/national-firearms-commerce-and-trafficking-assessment-nfcta-firearms-trafficking (accessed July 10, 2024). GAO Report, GAO-21-322, "Firearms Trafficking: U.S. Efforts to Disrupt Gun Smuggling into Mexico Would Benefit from Additional Data and Analysis," (February 22, 2021).

[4] *Id.*; FACT SHEET: Biden-Harris Administration's Ongoing Efforts to Stem Firearms Trafficking to Mexico, https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/14/fact-sheet-biden-harris-administrations-ongoing-efforts-to-stem-firearms-trafficking-to-mexico/ (June 14, 2023).

[5] *Id.*

Commerce Control List.[6] This regulatory change did not alter the fact that transnational criminal organizations and their facilitators continue to export these items for nefarious purposes, nor did the listing change in any way lessen the severity of the harm caused. Therefore, I urge the Sentencing Commission to make clear that the enhancement language found in Section 2M5.2 of the Sentencing Guidelines should be applied to and reference items that were previously on the Munitions List. In parallel, the notes to Section 2M5.2 should be amended to ensure that defendants convicted of the illegal export of weapons listed on the Commerce Control List remain subject to the enhancement.

Lastly, I would respectfully request that the Commission consider amending the Sentencing Guidelines applicable to wildlife trafficking offenses, specifically Section 2Q2.1 of the Sentencing Guidelines. Since my October 16, 2022 letter to you, the Department of Homeland Security has conducted 242 criminal investigations that reveal that transnational criminal organizations are increasingly engaged in wildlife trafficking, in addition to their human trafficking, illicit arms distribution, trade-based money laundering, and narcotics smuggling activities.

According to recent Interpol estimates, illegal wildlife trafficking generates approximately $20 billion per year in illicit revenue globally and has become one of the world's largest criminal activities.[7] Despite the magnitude of profit that transnational criminal organizations derive from illegal wildlife trafficking each year, penalties under the Sentencing Guidelines remain disproportionately low when compared with other criminal activity that may produce illicit windfalls of similar scale for a transnational criminal enterprise. Currently under Section 2Q2.1 of the Sentencing Guidelines, a wildlife trafficker found guilty in a case involving the illegal sale of $10 million in wildlife products would be subject to a base offense level of 23, which would correspond to a first-offense sentencing range of 46 to 57 months. Yet, an individual found guilty of laundering $10 million on behalf of the same wildlife trafficker would likely face a sentence of imprisonment of 70 to 87 months.

To align the seriousness of wildlife trafficking offenses and the harm they cause with the corresponding consequence regime, we urge the Sentencing Commission to amend Section 2Q2.1 of the Sentencing Guidelines as follows:

1. Increase the base offense level under Section 2Q2.1 of the Sentencing Guidelines from 6 to 8, which is the equivalent base offense level for money laundering offenses under Section 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity).

2. Add a Specific Offense Characteristic enhancement of 4 levels under Section 2Q2.1(b) for defendants "in the business" of wildlife trafficking, corresponding to the money laundering "in the business" enhancement under Section 2S1.1(b)(2)(C).

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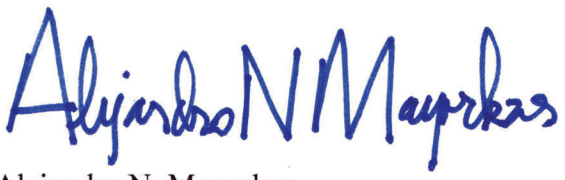
[6] 85 Fed. Reg. 3,819 (January 23, 2020); 85 Fed. Reg. 4,136 (January 23,2020).
[7] "Illegal wildlife trade has become one of the 'world's largest criminal activities,'" https://www.interpol.int/en/News-and-Events/News/2023/Illegal-wildlife-trade-has-become-one-of-the-world-s-largest-criminal-activities (November 6, 2023).

3. Add offenses involving wildlife or endangered species to the list of exemptions from the "Zero-Point Offenders" provision of Section 4C1.1, which would prevent wildlife traffickers from benefiting unduly from the fact that they have no criminal history in the United States.

The amendments we seek are designed to more effectively achieve the Sentencing Guidelines' objective of ensuring that the criminal sentencing imposed corresponds to the seriousness of the offense conduct and the harm caused. I appreciate your consideration and am available to discuss these important matters at your convenience.

Sincerely,



Alejandro N. Mayorkas
Secretary

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

October 16, 2022

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

I am writing in support of the U.S. Department of Justice's (DOJ) proposed amendments to the federal sentencing guidelines for human smuggling.

In Fiscal Year (FY) 2022, the frontline personnel of the Department of Homeland Security (DHS) processed more than two million migrant encounters at the southwest border and recorded more migrant deaths along the southwest border (557) than in any other year since the agency began collecting data on migrant deaths in 1998. This surge in migration has been driven, in large part, by transnational criminal organizations (TCOs) that put migrants' lives at risk for profit. These highly coordinated and increasingly sophisticated organizations facilitate the movement of migrants under dangerous conditions, using global networks that reach into the United States. The trailer truck accident that killed 55 migrants in Chiapas, Mexico last December, and the July 2022 incident in San Antonio, Texas, in which 53 migrants died of the heat in appalling conditions, are just two examples of many in which TCOs engaged in human smuggling prioritize profit over safety, often with tragic consequences.

Disrupting human smuggling is a top priority for our Department, and we have invested significant time and resources in the effort to disrupt and dismantle the TCOs that support human smuggling. In June 2021, Attorney General Merrick Garland and I created Joint Task Force Alpha (JTFA), a law enforcement task force composed of agents and personnel from DHS and DOJ, in order to strengthen our joint efforts to combat the most prolific human smuggling organizations operating in Mexico, Guatemala, Honduras, and El Salvador. JTFA seeks to identify, disrupt, and dismantle the human smuggling networks that endanger, abuse, or exploit migrants and engage in other types of transnational organized crime. Countering human smuggling is a law enforcement and national security priority. It is also a moral imperative.

Following an extensive JTFA investigation, an indictment of thirteen alleged human smugglers was unsealed last month. The facts highlight the imperative of action. As described in the indictment, the smugglers allegedly used drivers to pick up migrants near the U.S.-Mexico border and transport them further into the interior of the United States. The drivers allegedly

crammed migrants into suitcases, the back of tractor-trailers, covered beds of pickup trucks, and repurposed water tankers and wooden crates strapped to flatbed trailers. Migrants were transported in spaces with little ventilation, no temperature control, and other conditions that placed them at great risk. Other investigations have revealed the ways in which migrants also are often held hostage by their smugglers to extort additional money from their families in the United States, subjected to sexual assault and physical attack, and sometimes even murdered.

Changes to the current guidelines are necessary to address such egregious conduct, deter smugglers, and disrupt these human smuggling networks. According to U.S. Sentencing Commission data, during Fiscal Year 2021 the average sentence for human smuggling was fifteen months. In contrast, the average sentence for drug trafficking offenses during the same time period was 74 months. Critically, lower average sentences negatively affect prosecutors' ability to negotiate plea agreements and obtain cooperation in the prosecution of other co-conspirators. As a result, human smuggling organizations and networks often survive and thrive, as their key members are rarely severely penalized for engaging in these heinous crimes.

Even in cases in which dozens, if not hundreds, of vulnerable migrants are transported and subjected to dangerous and inhumane conditions, the resulting sentences belie the seriousness of the offense. In October 2017, for example, a Pakistani citizen who was sentenced for his role as the primary organizer in a large-scale smuggling scheme admitted to subjecting migrants to harsh conditions that caused a substantial risk of serious bodily injury or death. Migrants paid as much as $15,000 USD to travel the dangerous routes. The defendant was sentenced to only 31 months' imprisonment. Similarly, in October 2019, a Canadian national was interdicted by Turks and Caicos Islands authorities on a barely seaworthy vessel carrying more than 150 migrants. Despite the dangerous conditions in which he put the migrants, and despite two prior felony convictions for smuggling offenses, he was sentenced to only 32 months' imprisonment. Both of these sentences were issued in accordance with the guidelines, resulting in sentences of less than three years.

In 2016, then-Director of U.S. Immigration and Customs Enforcement Sarah R. Saldaña asked the Commission to revise the human smuggling guidelines, describing human smuggling as involving "countless incidents of sexual assault, injuries, and deaths as a result of the actions of human smugglers, all at the hands of interconnected groups of smugglers first exposing migrants to increasing risks along each stage of their journey, and then preying upon migrants to extract from them more money, sex, and forced labor." Since then, the Commission has made only narrow changes to the smuggling guidelines. Unfortunately, the problem has not gone away since that 2016 plea. It has only worsened.

The need for smuggling guidelines that reflect the seriousness of the offense and affords adequate deterrence has never been greater. We agree with DOJ that the Commission should, among other things, consider enhancements to the guidelines to account for the offenses in which migrants were sexually abused or sexually assaulted; instances in which migrants were physically assaulted; and instances in which a minor was subject to serious risk of injury or death, whether or not accompanied by a parent or legal guardian. We further urge provisions to better account for, and impose meaningful consequences on, repeat offenders; and we urge a general increase of the relevant base offense level to account for the seriousness of the human

smuggling offenses. These changes will enable us to better deter and disrupt the TCOs that exploit and victimize migrants.

The time to act is now. I thank you for your attention to this matter and will make myself available to discuss these concerns, as appropriate.

Sincerely,

Alejandro N. Mayorkas
Secretary

FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

801 I Street, 3rd Floor
Sacramento, California 95814

Chair: Heather Williams Phone: 916.498.5700

July 15, 2024

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Defender Comment on Proposed 2024–2025 Priorities

Dear Judge Reeves:

This year and next mark two milestones: the SRA's fortieth anniversary and *Booker*'s twentieth.[1] Almost since the Guidelines Manual went live, the Commission has studied significant potential reforms in response to complaints that the Manual is too complicated and that it calls for sentences that for many common offenses are too high. In 2009, it seemed like we'd finally see change: the Commission held listening sessions around the country to consider what a post-*Booker* Manual should look like.[2] But today, nearly 20 years post-*Booker*, the Manual looks much the same as it did when it launched—just bigger.

To be clear, we understand. There are always discrete issues that demand the Commission's attention: circuit splits, Supreme Court opinions, new criminal statutes. But we have taken note that the Commission's request for policy priorities this year looks different than in the past. The Commission has turned the question back to us: what are *our* priorities? It has suggested a willingness to consider real, big-picture reforms. So, while Defenders do not abandon the policy priorities we recommended in our recent

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[1] *See United States v. Booker*, 543 U.S. 220 (2005).

[2] *See* USSC, News Release re Public Hearing (May 22, 2009).

annual letter, we use this opportunity—*Booker*'s upcoming twentieth anniversary and the Commission's open-ended request for proposals in light of the SRA's fortieth anniversary—to ask the Commission to prioritize real, significant reforms that are empirically based and that will also simplify the Guidelines Manual.

We offer three big changes: (1) recalibrating downward some of the most common guidelines (below); (2) reforming the "relevant conduct" rules so that guideline calculations center around offenses of conviction and knowing or intentional behavior (beginning at page 9); and (3) contracting the "career offender" guideline so that it covers only what Congress has required it to cover, and no more (beginning at page 17).

This letter focuses on the "why": why these reforms should be priorities. As for the "how," in this letter's final section, we propose an innovation: stakeholder working groups that would meet with Commission staff (and potentially Commissioners themselves) to hash out the details. We are hopeful that this sort of collaborative, dynamic input could finally break through the inertia that has stymied structural reform for decades.

I. Recalibrating sentencing ranges down

Over the years, each Commission has made piecemeal additions to the Manual, resulting in sprawl atop a platform of already-shaky empirical underpinnings and in guideline ranges that are very often too high. It is time for an overhaul. This Commission can and should recalibrate guideline ranges downward to better "reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process."[3]

The original Manual is no sacred text. The first Commission, faced with a gargantuan task, recognized that the initial guidelines were "but the first step in an evolutionary process."[4] The first Commission did not employ empirical means to calibrate many of the original guidelines, including some

[3] 28 U.S.C. § 991(b)(1)(C).

[4] USSG, ch. 1, part A (Original Introduction to the Guidelines Manual).

of today's most frequently applied guidelines—regarding firearms,[5] economic crimes,[6] and drugs.[7] And it is unclear if the creators of the first Manual studied or simulated how the initial guidelines might deliver unintended racially disparate outcomes once implemented,[8] even though we now understand that it is almost impossible to discuss the federal criminal legal system without considering racial disparities present at every decision point in a case.[9]

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[5] *See* USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 18 (1987) ("*1987 Supplementary Report*") ("[S]tatistical analyses usually provided the starting point for the guidelines that were adopted, [but] in some instances these analyses were of little value in explaining or rationalizing current sentences. Firearms violations provide a notable example.") (footnote omitted).

[6] *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 20–23 (1988) ("A second area of traditional compromise involves the Commission's decision to increase the severity of punishment for white-collar crime.").

[7] *See Kimbrough v. United States*, 552 U.S. 85, 96 (2007) ("The Commission did not use [an] empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the [Anti-Drug Abuse Act of 1986's (ADAA)] weight-driven scheme."); *United States v. Diaz*, No. 11-CR-00821-2(JG), 2013 WL 322243, *3–*6 (E.D.N.Y. Jan. 28, 2013) (explaining the origins of the drug guidelines, including the original Commission's decision to "jettison[] its data entirely" and incorporate the ADAA's mandatory minimums into the drug quantity table).

[8] *1987 Supplementary Report*, *supra* note 5; Michael K. Block & William M. Rhodes, *Forecasting the Impact of the Federal Sentencing Guidelines*, 7 Behavioral Science & the Law 51 (1989); *see also* Brent Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987,* 45 Hofstra Law Review 1167, 1299 (2017) ("The original Commission undertook a study that estimated the effect that the guidelines, along with the new mandatory minimum statutory penalties that Congress also recently had enacted, would have on the federal prison population.").

[9] *See* Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, 58 Am. Crim. L. Rev. 1685, 1714 (Apr. 2021) ("From policing, to pretrial detention, to charging decisions, the War on Drugs has facilitated massive destruction. . . . Therefore, a Reconstruction Sentencing model cannot [be] solely about sentencing."). A 2022 Commission report provided a promising step in the holistic research direction, by examining race in

The original Commission actively chose to disregard past practice and it prioritized imprisonment over the use of probation, fine-only, or alternative sentences.[10] Non-prison sentences were far more common in the pre-Sentencing Guidelines era: for federal convictions terminating in 1985, 37% of convicted individuals were sentenced to probation only, 34% were sentenced to imprisonment only, 16% were sentenced to both incarceration and probation, and 12% were sentenced to pay a fine only.[11] In fiscal year 2023, almost 90% of sentenced cases received a sentence of imprisonment alone.[12]

Sentence lengths, too, ballooned under the Guidelines. Pre-Guidelines, the average time served in prison was 23 months in drug cases, 7 months in fraud cases, 6 months in immigration cases, and 14 months in firearms cases.[13] While an apples-to-apples comparison is not possible given changes in variables, statutes, and other factors, the difference in contemporary sentencing proves dramatic. In fiscal year 2023, the average sentence length

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case events prior to conviction. USSC, *What Do Federal Firearms Offenses Really Look Like?* 33 (2022) ("The Commission's analysis revealed racial differences between the 27.5 percent of firearms offenders arrested following a routine police patrol compared to firearms offenders who were arrested for other reasons").

[10] *See* Melissa Hamilton, *Prison-By-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration*, 51 Hous. L. Rev. 1271, 1290 (2014) ("[T]he Commission chose to analyze in depth those past sentences in which a term of imprisonment was given and only those that went to trial, though acknowledging that, at the time, 85% of cases were pleas which often attracted reduced sentences." (citations omitted)).

[11] U.S. Dept. of Just., Bureau of Just. Stats., Compendium of Federal Justice Statistics, 1985 41 (July 1990).

[12] USSC, *2023 Sourcebook of Federal Sentencing Statistics* fig. 6 (2023) ("*2023 Sourcebook*") (89.8% received an imprisonment-only sentence; 2.6% received a sentence of imprisonment and alternatives); *see also* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 43 & fig. 2.2 (Nov. 2004) ("*Fifteen Year Report*") (showing trends away from probation and toward more prison and split sentences, in the early years of the Guidelines).

[13] *See 1987 Supplementary Report*, *supra* note 5, at 69, tbl. 3.

was 81 months for drug offenses,[14] 22 months for fraud offenses, 12 months for immigration offenses, and 49 months for firearms offenses.[15]

In addition to being harsh, the Sentencing Guidelines are also needlessly complex—and have grown ever more so. And the Guidelines' ever-increasing complexity has compounded its harshness.[16] The Commission explored a proposal for simplifying the Guidelines almost thirty years ago.[17] Justice Breyer, architect of the Guidelines, has urged simplification, pointing out the problem of what he termed "add-ons."[18] But instead of becoming simpler, over the years, the guidelines have only grown in complexity and severity as each Commission has reacted to discrete legal developments and made piecemeal changes to the Manual.[19]

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[14] This includes both drug possession and drug trafficking offenses combined.

[15] *See 2023 Sourcebook*, *supra* note 12, at tbl. 15. These figures include alternative months; because courts employ alternatives sparingly, the resulting averages would likely not change much without them.

[16] Justice Breyer has noted the danger of offense-level creep over time. *See* Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 36 Fed. Sent. Rep. 244, 249 (2024 reprint, orig. pub'd 1999) ("[D]ifferent individuals . . . . may not fully work out the effect of their proposals on aspects of the Guidelines that may seem mere details but that, in fact, are critical to the Guidelines' basic structure. For example, every additional six levels doubles the amount of punishment."); *see also* R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines*: *Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 753 (2001) ("[T]he guidelines system has become precisely what the first Commission tried to shy away from when it abandoned the pure real offense system: a system where the Commission lists precisely which harms to take into account and how to calculate them. However, the system is inherently unstable because of continual factor creep.").

[17] *See* 60 Fed. Reg. 49,316 (Sept. 22, 1995).

[18] Stephen G. Breyer, *The Original U.S. Sentencing Guidelines and Suggestions for a Fairer Future*, 46 Hofstra L. Rev. 799, 804 (2018) ("My final suggestion, one for the Commission, is simplification. Simplification is important and everybody knows that.").

[19] *See, e.g.*, Breyer, *Guidelines Revisited*, *supra* note 16, at 249.

The table below shows how this factor creep has led to elevated offense levels under the (currently) most commonly-applied guidelines:

	1987[20]			2023[21]		
	Lowest BOL	Highest BOL	Number of SOC enhancements	Lowest BOL	Highest BOL	Number of SOC enhancements
§2B1.1	4	4	6	6	7	20
§2D1.1	6	43	1	6	43	16
§2K2.1[22]	9	9	1	6	26	7
§2L1.1	6	6	2	12	25	8
§2L1.2	6	6	1	8	8	3

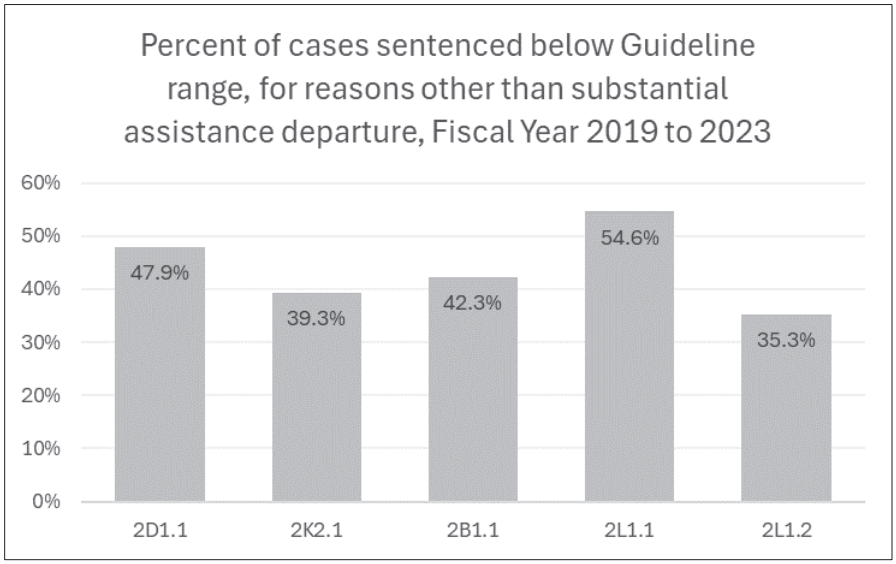
The bulk of the resulting complex and inflated sentencing ranges did not stem from careful empirical study. And while it is difficult to know what courts would do absent mandatory minimums or advisory guideline ranges, what we do know is that for these most commonly-applied guidelines, sentences routinely fall well below the advisory guideline range.

Below, the next figure illustrates the proportion of cases sentenced below the guideline range (for reasons other than substantial assistance departures) for the five most common primary guidelines during the past five fiscal years:

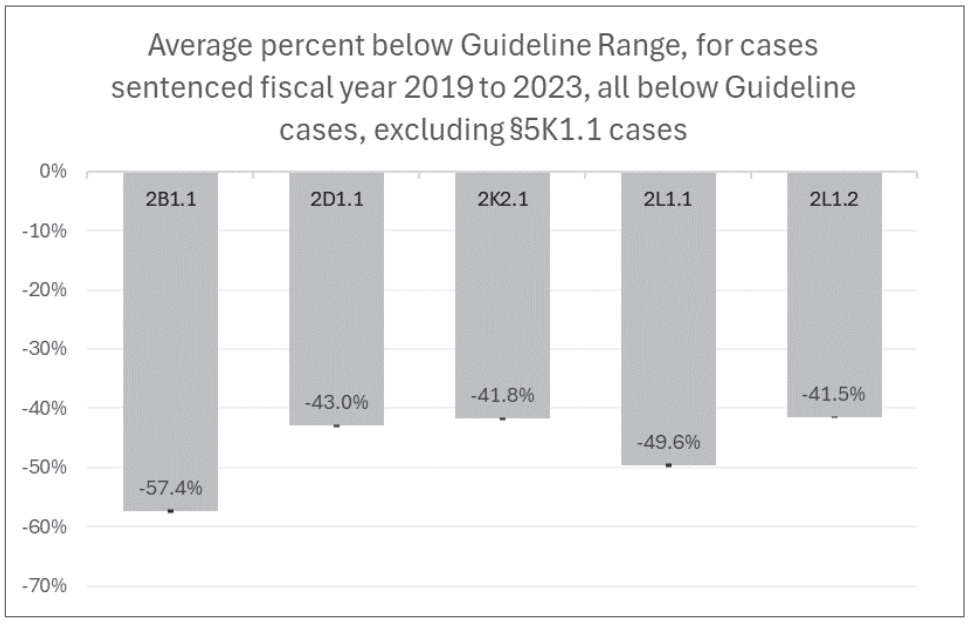
[20] *See* USSG, ch. 2 (Nov. 1, 1987).

[21] *See* USSG, ch. 2 (Nov. 1, 2023).

[22] There were three different firearms guidelines in the original manual. Section 2K2.1 dealt specifically with receipt, possession, or transportation of a firearm by a prohibited person. In 1987, §2K2.2 and §2K2.3 had highest available base offense levels of 12.



Moreover, courts aren't just deviating from guideline ranges a bit, they are imposing well-below-range sentences. The figure below illustrates the average percentage below the guideline range, for cases sentenced below the range for reasons other than substantial assistance departures, for the five most common primary guidelines during the past five fiscal years:



In short, the data show that courts in the post-*Booker* era often give sentences well below the advisory range, despite the ranges' powerful anchoring effect. The sentencing ranges that the Guidelines Manual produces thus are out of step in most cases with the sentences that judges find to

advance penological purposes in line with § 3553(a).[23] The original Commission expected that "continuing research, experience, and analysis will result in modifications and revisions to the guidelines," which is why the Commission was established "as a permanent agency to monitor sentencing practices in the federal courts."[24] It is high time for the Commission to listen to sentencing courts and reduce the Guidelines' harshness and complexity.

The Commission should revisit and recalibrate the most commonly-applied guidelines—by lowering base offense levels, untethering offense levels from failed quantity-based proxies such as drug weight or loss amount, eliminating Chapter Two provisions that double-count criminal history,[25] and liberally pruning specific offense characteristics. And more generally, the Commission should encourage the increased use of problem-solving courts, non-custodial sentences like probation, and alternatives to incarceration such as community or home confinement.[26] These changes would both simplify the Guidelines Manual and bring sentencing ranges down—closer to what sentencing judges deem appropriate under § 3553(a).

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[23] *See also* 18 U.S.C. § 3553(a)(1).

[24] USSG, ch. 1, part A (Original Introduction to the Guidelines Manual).

[25] This is a problem in the three most common primary guidelines: §§2D1.1, 2L1.2, and 2K2.1. As originally promulgated, neither §2D1.1 nor §2K2.1 contained enhancements based on prior convictions; §2L1.2(b)(1) contained only one two-level increase for individuals who previously had unlawfully entered the United States. *See* USSG §§2D1.1, 2K2.1, 2L1.2 (1987). Since then, the Commission has added enhancements based on prior convictions (which already increase the range along the criminal history axis), compounding punishment. *See* USSG §§2D1.1, 2K2.1, 2L1.2 (2023). The vast majority of individuals sentenced under these guidelines are Black and Hispanic, and double-counting criminal history in these guidelines compound racial disparities that pervade our nation's criminal legal systems.

[26] The Commission should also deploy its empirical might to study key drivers of disparity that happen before sentencing such as policing, arrest, and charging practices. Racial disparities in sentence length are real, but they are not solely attributable to judges imposing sentences, given the outsized role of prosecutors in charging and plea practices. *See* M. Marit Rehavi & Sonja Starr, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L. J. 2, 78 (2013) ("Our research suggests that racial disparities in recent years have been largely driven by the cases in which judges have the least sentencing discretion: those with mandatory minimums.").

II. Revisiting "relevant conduct"

Earlier this year, the Commission began the process of reigning in the expansive relevant-conduct guideline by limiting the use of acquitted conduct in calculating the sentencing range.[27] This decision was animated by "persistent concern[s]" raised by jurists and others about the unfair practice of enhancing a person's guideline range for conduct that a jury found was not proven beyond a reasonable doubt.[28] As a logical outgrowth of this new policy, the Commission should prioritize additional §1B1.3 reforms.

As discussed below, the Commission should: (1) restrict the use of uncharged and dismissed conduct (including cross-references to more serious guidelines) in calculating sentencing ranges; (2) require specific intent, rather than reasonable foreseeability, to hold an individual accountable for jointly undertaken criminal activity; and (3) establish a default "knowledge" or "intent" requirement for application of Chapter Two base offense level enhancements and specific offense characteristics where the relevant enhancement does not otherwise explicitly set forth a mens rea requirement. These changes would promote certainty, proportionality, and fairness in sentencing and reduce unwarranted disparities,[29] with the added benefit of dramatically simplifying operation of the guidelines.

Uncharged and Dismissed Conduct. While the staunchest criticisms of the Guidelines' relevant-conduct rules have been aimed at acquitted-conduct sentencing,[30] judges and other stakeholders have also long condemned the use of unadjudicated conduct to increase guideline ranges

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[27] *See* USSC, *Amendments to the Sentencing Guidelines and Reasons for Amendment* 1–5 (Apr. 30, 2024).

[28] *Id.* at 1.

[29] *See* 28 U.S.C. §§ 991(b)(1)(B), 994(f).

[30] *See, e.g.*, *McClinton v. United States*, 600 U.S. __, 143 S. Ct. 2400, 2402 (2023) (Sotomayor, J., statement respecting denial of certiorari) (distinguishing acquittals from "conduct that was never charged and passed upon by a jury" because of the significance the Founders attached to the jury's ability to modulate punishment through a verdict of acquittal).

under the Commission's "modified real-offense" approach.[31] In a 2010 Commission survey, 69% of judge respondents said they believed it was not advisable to consider dismissed conduct at sentencing, and 68% said the same thing about uncharged conduct referenced only in the PSR.[32] Defenders and others have, over the years, encouraged the Commission to eliminate or

[31] *See generally, e.g.*, Transcript of Public Hearing before the U.S. Sent'g Comm, Atlanta, GA, at 73 (Feb. 10–11, 2009) (Lyle Yurko, Practitioners Advisory Group) ("[T]he relevant conduct portion of the guidelines needs further reform. Relevant conduct is complex and therefore sometimes unevenly applied."); NACDL & John R. Steer, *An Interview with John R. Steer, Former Vice Chair of the U.S. Sent'g Comm'n*, 32-SEP Champ. 40, 42 (2008) (recommending decreasing the weight given to unconvicted conduct that is part of the same course of conduct or scheme as the convicted conduct under §1B1.3(a)(2)–(3) because "[t]hat is the aspect of the [relevant conduct] guideline . . . most difficult to defend"); Am. College of Trial Lawyers Fed. Crim. Proc. Comm., *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463 (2001) (suggesting changes to address the unfairness of the relevant conduct rules); David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan. L. Rev. 523 (1993); Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681 (1992); Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 Fed. Sent. Rep. 355, 356 (1992) ("The single feature of the federal sentencing guidelines that state judges and judges and judicial administrators outside the United States find most astonishing is the Commission's policy decision to base guideline application on the defendant's relevant conduct, including conduct alleged in charges that were dismissed or that resulted in acquittals or that were never filed. More than once when describing the relevant conduct system to government officials and judges outside the United States, I have been accused of misreporting or exaggerating."); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161 (1991) (law review article written by an Eighth Circuit judge recommending the Commission move toward an offense-of-conviction model to avoid the unwarranted disparities and due process problems of the modified real-offense model); *United States v. Silverman*, 976 F.2d 1502, 1519–31 (6th Cir. 1992) (Merritt, C.J., dissenting); *United States v. Galloway*, 976 F.2d 414, 437 (8th Cir. 1992) (Bright, J., dissenting, joined by Arnold, C.J., Lay, J., and McMillian, J.).

[32] *See* USSC, Results of Survey of United States District Judges January 2010 through March 2010 tbl. 5 (2010).

significantly limit the effect of unconvicted conduct on the guideline range, and we encourage the Commission to revisit those letters and suggestions.[33]

There are three primary policy reasons to revisit this rule:

- *First*, the use of uncharged or dismissed conduct that was "part of the same course of conduct or common scheme or plan as the offense of conviction"[34] drastically increases prosecutors' power to manipulate sentences by declining to bring weakly-supported charges that wouldn't withstand the "beyond a reasonable doubt" standard, while advocating for an increased sentence based on those same allegations under a less exacting standard.[35]

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[33] *See, e.g.*, Fed. Defenders' Annual Letter to the U.S. Sent'g Comm, at 24–31 (May 17, 2013); Fed. Defenders Comment on the U.S. Sent'g Comm's Proposed Priorities for Amendment Cycle Ending May 1, 2013, at 33–36 (July 23, 2012); Fed. Defenders Comments on the U.S. Sent'g Comm's Proposed Priorities for Amendment Cycle Ending May 1, [2012], at 29–33 (Aug. 26, 2011); Testimony of Alan Dubois and Nicole Kaplan on behalf of Fed. Defenders before the U.S. Sent'g Comm on "The Sentencing Reform Act of 1984: 25 Years Later," Atlanta, GA, at 24–26 (Feb. 19, 2009); *cf.* Fed. Defenders' Annual Letter to the U.S. Sent'g Comm, at 4–7 (June 14, 2018) (focusing primarily on "acquitted conduct" but also discussing the problems with using uncharged conduct to enhance the guidelines).

[34] *See* §1B1.3(a)(2) (this section applies to aggregable offenses such as fraud and drug trafficking).

[35] *See, e.g.*, Am. College of Trial Lawyers, *supra* note 31, at 1490–91 (discussing the "strategic advantage" the relevant conduct rules provide prosecutors, who can introduce "problematic charges through the Presentence Report at sentencing"); Freed, *supra* note 31, at 1714 ("The basic conceptual flaw in applying 'relevant conduct' following a guilty plea is that, contrary to the Commission's rationale, it *enhances* rather than reduces the power of the prosecutor. Indeed, it allows a prosecutor to increase [a person's] sentence more easily by *dropping* charges than by bringing them!"); Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. Cal. L. Rev. 289, 307 (1992) ("The alternative of seeking sentence enhancements instead of convictions certainly adds to the prosecutor's arsenal and affects the balance of power in sentencing, not simply by limiting the judge's power but by shifting it to the prosecutors and probation officers who draft the facts on which the sentencing will be based."); Benson B. Weintraub, *Hidden Disparity Under the Sentencing Guidelines*, 4 Fed. Sent. Rep. 148, 148 (1991) ("Perhaps the most serious form of hidden disparity comes from the shift toward predetermination of sentences by the government. In addition to the charging process, the prosecutor largely

- *Second*, this practice carries with it basic fairness, notice, certainty, and proportionality problems for individuals convicted of one offense who are then subject to (at times, extreme) sentencing enhancements for other uncharged crimes without the procedural safeguards attendant to a trial.[36]

- *Third*, as the Commission has long acknowledged, using uncharged and dismissed conduct to enhance sentences under §1B1.3(a)(2) leads to unwarranted sentencing disparities.[37] Because the rules are complex and rely on untrustworthy evidence, and because different actors hold different views toward relevant conduct, their application can vary widely from one courtroom to the next.[38]

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determines the time to be served by an [individual] by controlling the flow of information to the United States Probation Officer and district judge which impact relevant conduct determinations, adjustments under Chapter 3, and potential grounds for departure."); Reitz, *supra* note 31, at 564 ("[I]t is exceedingly strange to cast real-offense sentencing as a brake on prosecutorial power when the great force of its impact is in the opposite direction. Real-offense practice gives the government two opportunities to establish criminal conduct: once at trial or by plea, and again at sentencing. Indeed, the second bite at the apple is a dramatic addition to the state's arsenal because so many trial protections have fallen by the wayside. This creates the temptation, if not the practice, of undercharging or underbargaining on the part of prosecutors, who can wait for sentencing to make out their full case."); Heaney, *supra* note 31, at 229.

[36] *See, e.g.*, Am. College of Trial Lawyers, *supra* note 31, at 1502 (highlighting the lack of notice of relevant conduct facts until the PSR is issued); Heaney, *supra* note 31, at 208–12, 217–25 (addressing the serious due process issues raised by the relevant conduct rule); Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. Crim. Law & Criminol. 1550, 1564 (1981) ("Real offense sentencing undermines the importance of the substantive criminal law, nullifies the law of evidence, and is irreconcilable with the notion that punishment can be imposed only in respect to offenses admitted or proven.").

[37] *See* USSC, *Simplification Draft Paper: Relevant Conduct and Real Offense Sentencing* (Nov. 1996) ("Since the initial set of guidelines were issued in 1987, the Commission's training staff has found that the relevant conduct guideline has been among the most troublesome for application and that the guideline's application has been very inconsistent across districts and circuits.").

[38] *See, e.g.*, *Fifteen Year Report, supra* note 9, at 50, 87 (Nov. 2004) (noting that the relevant conduct rule is inconsistently applied because of ambiguity in the

In addition to these concerns, supposed real-offense sentencing is in tension with the Commission's enabling statute, which dictates that guidelines should reflect the appropriateness of imposing an incremental penalty for each offense that a person "is *convicted of*."[39] The enabling statute also instructs the Commission avoid unwarranted disparities among people with similar records "who have been *found guilty of* similar conduct."[40] And, as with using acquitted conduct to enhance a guideline range, the use of uncharged conduct can lead to severe, multifold increases in sentences that

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language of the rule, law enforcement's role in establishing it, and untrustworthy evidence); Freed, *supra* note 31, at 1715 ("District judges, prosecutors, defenders, and probation officers are today demonstrating widely different attitudes and practices respecting relevant conduct within and across districts."); Yellen, *supra* note 31, at 451 ("The complexity of the relevant conduct standard also contributes to unwarranted disparity. Complexity invites errors in application or inconsistent interpretation of key concepts."); Pamela B. Lawrence & Paul J. Hofer, Federal Judicial Center Research Division, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 4 Fed. Sent. Rep. 330, 331–34 (1992) (relevant conduct hypotheticals administered by the FJC to a representative sample of probation officers resulted in wide variation in base offense levels and guidelines ranges for three similarly-situated individuals charged with drug trafficking); *United States v. Quinn*, 472 F. Supp. 2d 104, 106–11 (D. Mass. 2007) (discussing drastically different applications of relevant conduct rule by two different probation officers in similar cases).

[39] 28 U.S.C. § 994(l)(1) (emphasis added); *see also Galloway*, 976 F.2d at 430–31 (Beam, J. dissenting, joined by Lay, Bright, McMillian, JJ.) ("The clear implication [of § 994(l)] is that Congress did not intend the guidelines to punish separate instances of unconvicted conduct incrementally. Any other interpretation renders the words chosen by Congress meaningless. Had Congress wanted separate unconvicted offenses to be punished incrementally, it could have done so simply by replacing the phrase 'is convicted of' with the word 'commits.'" (citations omitted)).

[40] 28 U.S.C. § 991(b)(1)(B); *see also Galloway*, 976 F.2d at 432 (Beam, J. dissenting, joined by Lay, Bright, McMillian, JJ.) ("The plain language of [§ 991(b)(1)(B)] indicates that Congress sought, in large part, to equalize sentences based on *convicted* criminal conduct."); *cf.* Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. Pa. L. Rev. 1599, 1628 ("Congress did not command [that the Guidelines instruct judges to consider relevant conduct], nor is there any evidence in the Sentencing Reform Act's legislative history that suggests Congress even intended this outcome. Instructing judges to consider 'real' conduct was a discretionary decision by one set of Commission members who seemed to believe that Guidelines could and should occupy the entire field.").

are out of all proportion to culpability.[41] The combined impact of the drug and fraud guidelines' focus on drug quantity or loss amount instead of better indicators of culpability *and* their reliance on uncharged or dismissed relevant conduct is particularly pernicious.[42] As one scholar observed: "The pervasiveness of the effect of relevant conduct under the guidelines, both in theory and in practice, renders it a rather large tail wagging a small dog."[43]

Now, on the SRA's fortieth anniversary and on the heels of the *Booker*'s twentieth anniversary (*Booker* being about protecting rights that are undermined by reliance on facts not found by juries), the Commission should investigate ways to contract §1B1.3. Fortunately, this Commission would not be starting from scratch. In fact, since the early days of the Guidelines Manual, the Commission has considered limiting the impact of uncharged and dismissed conduct, although these efforts have never led to meaningful reforms. Through its "simplification project" in the 1990s, Commission staff laid out several options to reduce the influence of uncharged and dismissed

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[41] *See, e.g.*, *United States v. Barfield*, 941 F.3d 757, 760 (5th Cir. 2019) (uncharged methamphetamine trafficking conduct alleged in PSR increased drug quantity from 25 grams to 12.2 kilograms, yielding a base offense level of 38 and a guidelines range of 360 months to life); *United States v. Rose*, 20 F.3d 367, 370–73 (9th Cir. 1994) (uncharged money laundering increased loss amount from $275,000 to $2.5 million and resulted in a seven-year increase in the sentence); *United States v. Townley*, 929 F.2d 365, 369 (8th Cir. 1991) (uncharged drug conduct led to an 18-level increase in the base offense level and a seven-fold increase in the guidelines range); *United States v. Ebbole*, 917 F.2d 1495, 1495–96 (7th Cir. 1990) (uncharged drug conduct more than tripled the sentencing range from 27 to 33 months to 92 to 115 months).

[42] *See* Yellen, *supra* note 31, at 451–52 ("Proportionality, too, has been an elusive goal. In fact, the aggregation required by the Guidelines' alleged related-offense principle, combined with the Guidelines' excessive reliance on harm- and quantity-based specific offense characteristics has reinforced disproportionate sentencing." (footnotes omitted)); Am. College of Trial Lawyers, *supra* note 31, at 1493–94 ("While approximately 80% of all cases are sentenced on the basis of a quantity or amount-driven guideline, many judges, scholars, prosecutors, and members of the public believe that the Guidelines overemphasize quantity to the exclusion of situational and [personal] characteristics that are better indicators of culpability. The inclusion of uncharged aggregable offenses magnifies this disproportionality." (footnotes omitted)).

[43] Heaney, *supra* note 31, at 217.

conduct on guideline ranges.[44] Others have suggested similar reforms.[45] The Commission even announced as a policy priority during the 1996–97 amendment cycle, "substantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence."[46]

The Commission has, in the past, looked for guidance from the states—which have widely "adopted an offense of conviction system under which uncharged conduct generally remains outside the parameters of the guidelines."[47] It should continue this exploration, and perhaps invite state sentencing commissioners to join the conversation. There's no evidence to suggest that the states' decision to focus sentencing primarily on the offense(s) of conviction has decreased public safety; on the contrary, many

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[44] *See Relevant Conduct Simplification Paper, supra* note 37.

[45] *See* Am. College of Trial Lawyers, *supra* note 31, at 1495–97 (proposing a four-level or 25% cap on the increase for uncharged, aggregable offenses and the removal of cross-references to more serious guidelines in favor of a discretionary upward departure); NACDL & Steer, *supra* note 31, at 42 ("Why should, for example, the drugs associated with an uncharged, or charged and dismissed, count be given the same guideline weight as an equivalent drug quantity in the count(s) of conviction? Why don't we, instead, give less weight to the unconvicted conduct by, for example, counting all the drugs in the convicted counts but only half the drugs in the unconvicted conduct?"); Dubois & Kaplan 2009 Testimony, *supra* note 33, at 26 (encouraging the Commission to (1) eliminate uncharged and acquitted offenses from the definition of relevant conduct, (2) limit the impact of dismissed counts on the guidelines range to the lesser of four levels or 25% of the number of levels in the applicable table attributable to the offense of conviction under §1B1.3(a)(1), and (3) eliminate cross-references to guidelines for more serious offenses than the offense of conviction).

[46] USSC, *Notice of Priority Areas for Commission Research and Amendment Consideration*, 61 Fed. Reg. 34,465, 34,465 (July 2, 1996).

[47] Phyllis J. Newton, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent. Rep. 68, 69 (1995); *see also* Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, 81-SEP Fed. Probation 28, 28 (2017) (noting that state sentencing systems "rely more heavily on the charged offense to differentiate between crimes and to assign appropriate sentences" than the federal guidelines system).

states have maintained low crime rates and reduced incarceration rates after adopting their guidelines.[48]

Other amendments to §1B1.3. Revising the relevant-conduct guideline to eliminate dismissed and uncharged conduct is the most essential reform that's needed. But when the Commission undertakes this reform, it makes sense to address other problems with that guideline. The two that we raise here both relate to mens rea.

- The current relevant conduct rule requires individuals engaged in "jointly undertaken criminal activity" to be held accountable for the conduct of others under a "reasonable foreseeability" standard—a civil tort standard.[49] This "standard is a familiar feature of civil liability in tort law, but is inconsistent with the conventional requirement for criminal conduct—*awareness* of some wrongdoing."[50] The Commission should require that the individual knew about, intended, and agreed to the acts or omissions of another before holding her liable for those acts or omissions.[51]

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[48] *See* Defenders' 2013 Annual Letter, *supra* note 33, at 31 (citations omitted).

[49] *See* §1B1.3(a)(1)(B).

[50] *Elonis v. United States*, 575 U.S. 723, 737–38 (2015) (cleaned up); *see also Morissette v. United States*, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

[51] The Commission has explored other options for this provision in the past. *See* 80 Fed. Reg. 2570, 2578–79 (Jan. 16, 2015); *see also* Statement of Jon Sands on behalf of Fed. Defenders to the U.S. Sent'g Comm on Proposed Amendments to "Mitigating Role," "Single Sentence Rule," and "Jointly Undertaken Criminal Activity," at 23 (Mar. 12, 2015). And Defenders have written about the issue many times. *See* Fed. Defender Comments on the U.S. Sent'g Comm's 2023—24 Proposed Priorities, at 18 (Aug. 1, 2023); Fed. Defenders' Annual Letter to the U.S. Sent'g Comm, at 11–12 (Sept. 14, 2022); Fed. Defenders' Annual Letter to the U.S. Sent'g Comm, at 7–8 (June 14, 2018); Fed. Defenders' Annual Letter to the U.S. Sent'g Comm, at 7 (PDF p. 11) (June, 2015).

- The relevant conduct rule should provide a default mens rea requirement that would ensure that guideline calculations are more closely tied to culpability.[52] We have raised this issue in the recent past.[53] We again urge the Commission to prioritize mens rea reform throughout the Manual, and we think that this could be accomplished easily and efficiently by adding a default knowledge or intent requirement to §1B1.3.

III. Contracting the career-offender definition as much as possible

We all know the career-offender guideline is a problem: it calls for sentences that are greater than necessary for most individuals; it exacerbates racial disparities; and it reduces Chapter Four's predictive accuracy. Where the career-offender guideline applies, courts give below-guideline sentences in most cases—especially in drug cases, but also in crime-of-violence cases.[54] The Commission in 2016 called for Congress to amend the directive that spawned the career-offender guideline, 18 U.S.C. § 994(h), to eliminate the possibility of "[d]rug trafficking only career offenders."[55]

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[52] As originally drafted in 1987, §1B1.3 appears to have contained a limited default mens rea requirement for determining "injury relevant to the offense of conviction," which included "harm which is caused *intentionally*, *recklessly* or by *criminal negligence* in the course of conduct relevant to the offense of conviction." USSG §1B1.3 (Nov. 1, 1987) (emphasis added). However, that language was removed two years later. *Cf.* §1B1.3 (Nov. 1, 1989); *see also* USSG App. C, Amend. 76 (Nov. 1, 1989) (stating the referenced language was removed as "unnecessary and potentially confusing").

[53] *See, e.g.*, Fed. Defenders' Annual Letter to the U.S. Sent'g Comm, at 13 & n.28 (May 15, 2024); Defenders' 2022 Annual Letter, *supra* note 51, at 10–11 (providing examples from §§2K2.1, 2D1.1, and 3B1.4).

[54] USSC, *Career Offender QuickFacts* (this information was compiled from the Sentencing Commission's individual datafiles for fiscal years 2019 through 2023); *see also* USSC, Report to the Congress: Career Offender Sentencing Enhancements 34–37 (Aug. 2016) ("Sentences Imposed and Relative to the Guideline Range," separated out by "career offender pathway").

[55] USSC 2016 Report to the Congress, *supra* note 54, at 3.

We hope Congress will eventually amend § 994(h). But in the meantime, the Commission should contract the problematic career-offender guideline as much as § 994(h) permits. We are optimistic that this reform can become reality this amendment cycle. In February, the Commission held a day-long roundtable discussion of the career-offender guideline and categorical approach that brought together judges, defense attorneys, prosecutors, and academics.[56] The idea was to try to find novel solutions to a seemingly intractable problem: the categorical approach that is used to determine who is a "career offender" is deeply unpopular, but every analytical alternative would have the effect of expanding the reach of the problematic career-offender guideline.

The roundtable was lively and productive. And by the end of the day, participants with very different interests and views were coalescing around the idea of pairing any elimination of the categorical approach with two changes that would significantly reduce the number of prior convictions that get assessed (under any analytical approach) under §4B1.2:

- Eliminating prior state drug convictions entirely from the analysis—an idea that Defenders proposed in our comments to the Commission in 2023.[57]

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[56] *See* USSC, *Roundtable on Career Offender & the Categorical Approach* (Feb. 7, 2024).

[57] *See* Fed. Defender Comment on the U.S. Sent'g Comm's 2023 Proposed Amendments on Circuit Conflict re: Controlled Substance Offense (Proposal 4B) and Proposals to Amend Career Offender Guideline (Proposal 6), at 22–25 (Mar. 14, 2023). Section 994(h) refers only to prior federal drug convictions. Most prior convictions are state convictions, so eliminating prior state drug convictions would go a long way toward the Commission's larger goal of eliminating drug offenses entirely from the career-offender guideline. And while, at first glance, it may seem incongruent to eliminate state drug predicates while keeping federal drug predicates, it is entirely rational for the federal courts to focus on prior convictions that reflect federal legislative and executive priorities and where we know that federal judicial and prosecutorial standards were met. This change would eliminate the categorical approach as it relates to drug offenses without further ado: courts would need only determine whether there was a prior conviction under one of the listed federal statutes. This change would also eliminate a circuit split over the definition of "controlled substance offense."

- Requiring that any potential "crime of violence" garnered significant prison time, in order to avoid capturing convictions for theoretically "violent," but actually quite minor, offenses.[58]

We urge the Commission to prioritize amending the career-offender guideline this year in a manner that contracts, rather than expands, the reach of that guideline, in line with what was discussed at February's roundtable. This would be a major reform in its own right. But also, it would free-up the Commission to focus on other big, structural reforms, rather than continuing to debate the categorical approach year after year.

IV. Enlisting stakeholders to collaborate to find workable solutions to tough problems

The Commission's productive career-offender roundtable, discussed above, opened our eyes to the value of processes that get stakeholders and Commissioners talking to one another to find solutions to tough problems. The Commission has already done what is needed—hopefully—for career offender. We encourage the Commission to organize similar roundtables, or perhaps working groups that meet regularly for a set period, to figure out how best to implement other significant reforms.

The Commission's formal amendment process has its place. But although it works well for minor amendments and updates, it may well stymie more significant reforms. Under the formal process, stakeholders submit comments to the Commission and present testimony advocating for their positions. We do not see other stakeholders' advocacy until immediately before the hearings and, at the hearings, stakeholders generally talk around each other. After hearings, Commissioners go behind closed doors to make decisions. This process does not encourage collaboration or compromise or creativity, which may make it difficult for the Commission to take bold steps.

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[58] The prior sentence would not be a perfect reflection of an offense's seriousness, given that state charging and sentencing practices vary widely, but it may be the best evidence we have. One way the Commission could reduce disparities based on state sentencing practices is to focus on the length of sentence that was actually served, not just imposed, given that a judge's decision to impose a three-year sentence in a state with a parole system that permits release after six months is not equivalent to a three-year sentence in a state with no parole.

Last year's "Simplification" proposal regarding departures provides a case in point. The elimination of departures requires extensive amendments so, to some extent, it is a major change. But witnesses agreed last year that the concept of departures is mostly obsolete, so perhaps the Commission's simplification proposal was less a structural reform than a post-*Booker* update. Even so, that proposal stalled. Defenders supported eliminating departures generally but objected to how the proposal accomplished that. Our comment provided a roadmap for eliminating departures without creating new problems.[59] At the same time we filed our comment, other stakeholders—notably CLC and DOJ—criticized many of the same aspects of the proposal we did, but, rather than commenting on our roadmap (which they did not have when they wrote their comments), they asked the Commission to slow down. At the hearing, this disconnect was on display: when Commissioners asked various witnesses what they thought about eliminating departures in line with what we had proposed, their responses were generally positive, but no one had gotten into the nitty-gritty. With that, the comment period ended.

If the Commission were to adopt the first and second priorities that Defenders propose in this letter, it is hard to imagine getting to a set of amendments without doing things differently. And it should be noted that while these priorities are significant reforms, they aren't *groundbreaking*. If the Commission truly wants to think big, it could study and learn from the experience of other countries within the common law tradition and explore punishment structures beyond the grid.[60] And we encourage this exploration. But the point here is that it should be relatively easy to recalibrate many (or most, or even all) guidelines downward and to significantly limit the relevant-conduct guideline. But under the Commission's typical process, we worry that it could be challenging indeed.

Defenders propose, then, that the Commission set up collaborative processes for these and/or other significant reform priorities, to help the

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[59] *See* Fed. Defender Comment on the U.S. Sent'g Comm's Proposed Amendment on Simplification of the Three-Step Process (Proposal 7) (Feb. 22, 2024).

[60] *See, e.g.*, Julian V. Roberts, *The Evolution of Sentencing Guidelines in Minnesota and England and Wales*, 48 Crime & Just. 187, 188 (2019) ("No other country has adopted a two-dimensional matrix structure for its guidelines.").

Commission get from priorities to proposals, and ultimately to amendments. The most important component of a productive process would seem to be the participation of individuals with a solid grasp of the policy issues and relevant experience, along with a willingness to speak frankly, listen earnestly, and work collaboratively. Working groups of this sort might include Commissioners but could also utilize Commission staff. If the Commission is interested in this concept but isn't sure how best to set up processes, Defenders would be happy to share additional ideas and we're confident that other stakeholders would do the same.

Very truly yours,

Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Leslie E. Scott, Shelley Fite, Tina Woehr
Sentencing Resource Counsel
Federal Public and Community Defenders

cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex Officio*
Scott A.C. Meisler, Commissioner *Ex Officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Federal Public and Community Defenders

Topics:

Career Offender

Legislation

Miscellaneous Issues

Comments:

The Federal Community Defender for the Eastern District of Pennsylvania suggest the following areas of consideration in the coming year:

1) that the Commentary to U.S.S.G. section 4A1.3(b) and/or section 4B1.1 be amended to specifically address the propriety of downward departures or variances in instances in which the predicate offenses for Career Offender status involve (a) street-level distribution of controlled substances only, (b) crimes of violence in which no weapon was visibly possessed and no physical injury was inflicted, or (c) sentences for conduct that did not follow release on any prior predicate sentence.

2) With respect to USSG section 2K2.1(b)(4)(B), that the enhancement not apply (1) to a defendant being sentenced for firearm trafficking where there is no evidence that any firearm was illegally trafficked after the serial number(s) had been altered or obliterated or (2) unless all serial numbers on the firearm have been erased or obliterated.

3) It is suggested that the Commission look at the disparity in the guidelines for distribution of pure methamphetamine and a mixture containing a detectable amount of methamphetamine to determine whether the disparity or the level of disparity is justified and that the guideline be suitably amended.

4) With respect to possible legislation, there does not appear at this time to be any reason why there should not be a safety valve provision for the mandatory minimum sentence in 18 U.S.C. section 1028A, along the lines of 18 U.S.C. section 3553(f). It is not uncommon for a less-culpable participant in a fraud scheme that involves conduct sufficient to justify a charge of aggravated identity theft to be the only one charged, because of the limits of the evidence resulting from the government's investigation. Very often in this situation the defendant tries to

provide substantial assistance, but has been sufficiently kept in the dark by the principal(s) in the fraud scheme and is thereby unable to provide the necessary information to earn a motion pursuant to section 3553(e). These situations often lead to the sentence judge expressing regret at having to impose an incarceration sentence of two years, when the judge thinks that a lesser sentence would be sufficient, but not greater than necessary, to achieve the goals of sentencing.

Submitted on: July 15, 2024

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

July 15, 2024

Hon. Carlton W. Reeves
Chair, United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
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Washington D.C. 20008-8002

RE: Practitioners Advisory Group Comment on Possible Policy Priorities for the Amendment Cycle Ending May 1, 2025

Dear Judge Reeves:

In response to the Commission's request for comment on possible policy priorities for its next amendment cycle, the Practitioners Advisory Group (PAG) suggests that the Commission consider three "big picture" issues that promote the statutory goals of sentencing.[1] In addition, the PAG proposes that the Commission consider discrete issues specific to several individual guidelines. The first section of this letter addresses the "big picture" items, and the second section discusses issues specific to particular guidelines.

I. Promoting the Statutory Goals of Sentencing

The PAG has identified two issues that surface in nearly every sentencing proceeding in federal criminal cases: (1) use of relevant conduct and (2) scoring of criminal history. When originally designed, relevant conduct and criminal history were intended to promote greater uniformity and fairness in sentencing. In practice, PAG members find that the application of these two concepts results in unreasonably lengthy and unfair sentences. In addition to reviewing the scope of relevant conduct and the method by which criminal history is calculated, the PAG asks the Commission to consider a third topic, which is ways to incorporate the views of jurors in sentencing decisions.

[1] *See* U.S. Sent'g Comm'n, *Proposed Priorities for Amendment Cycle*, 89 FR 48029 (June 4, 2024).

Given the expansive nature of each of these proposed priorities, consideration of these issues may be facilitated by conducting workshops with stakeholders, as the Commission did in connection with its examination of the career offender guideline in the last amendment cycle.

A. Rethinking Relevant Conduct

Relevant conduct is the lynchpin of the guidelines.[2] It is the mechanism through which the Commission implemented the Guidelines' "modified real offense" system.[3] The Commission's stated reason for choosing a modified real offense system over a charge-based system was that a charge offense system permits prosecutors "to influence sentences by increasing or decreasing the number of counts in an indictment."[4] Thus, the Commission made clear that a significant goal in creating the modified real offense system with its relevant conduct framework was to constrain the power of the prosecution to control sentences with its charging decisions. In the Commission's view, a real offense system – or at least, a charge offense system with a significant real offense component – was the preferable option because "the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence."[5] At the core of the relevant conduct concept, then, is the notion that it would act as a natural limit on prosecutorial power.[6]

If the original purpose of a "modified real offense" system was to limit the influence of prosecutorial control, that aim has been undermined by actual practices. In the PAG's experience, the modified real offense system that the Commission crafted to constrain the power of prosecutors has tilted the criminal justice playing field in the government's favor. The relevant conduct framework essentially relieves the prosecution of its burden of proof:

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[2] Relevant conduct encompasses "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant;" certain acts "jointly undertaken . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;" acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction;" "all harm that resulted from . . . [and] that was the object of such acts and omissions;" and "any other information specified in the applicable guideline." *See* §1B1.3(a)(1)-(4).

[3] U.S. Sent'g Comm'n, Real Offense v. Charge Offense Sentencing, *Guidelines Manual 2023* ("Guidelines Manual"), Ch. 1, Pt. A (1)(4)(a).

[4] *Id*.

[5] *Id.*

[6] *See* Stephen G. Breyer, *The Original U.S. Sentencing Guidelines and Suggestions for a Fairer Future*, 46 Hofstra L. Rev. 799, 801 (2018) ("Breyer Article") ("What we wanted to do was to take power away from the prosecutor and to have the sentence imposed roughly reflect what was, in fact, the behavior that underlay the crime and the characteristics that underlay the offender."), available at: https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=3016&context=hlr.

> Our criminal justice system gives prosecutors only one shot at convicting a defendant of charged conduct. However, sentencing courts have used actual offenses, of which a defendant was never convicted and is presumed innocent, as uncharged conduct. This use of relevant conduct leads to a disturbing trend in criminal prosecutions. Pre- and post-*Booker*, defendants are regularly punished for separate and greater crimes without notice, a jury trial, admissible evidence, or a heightened proof burden.[7]

In practice, the use of relevant conduct has contributed to longer and harsher sentences based on conduct that the government is not required to charge and prove to a jury beyond a reasonable doubt.

Every day, in every federal court in this country, defendants are sentenced on the basis of conduct for which they have not been convicted. Courts that were once "skeptical of the relevant conduct enhancement,"[8] have largely become accustomed to uncritically applying those enhancements. Far from breeding contempt, familiarity seems to have bred complacency, with many courts reflexively ratcheting up guidelines based on relevant conduct set forth in Presentence Investigation Reports ("PSRs").

Typically, the government provides the probation office a description of the offense conduct for inclusion in the PSR. Even if there is a valid challenge to the uncharged conduct that the government seeks to include in the PSR, more often than not, the uncharged conduct makes its way into the PSR. While technically the government bears the burden of establishing the uncharged conduct, the reality is that once the uncharged conduct is in the PSR, the defendant must prove that the uncharged conduct is not reliable or did not occur as the government contends.[9] To challenge the inclusion of uncharged conduct in the PSR, a defendant risks losing acceptance of responsibility.[10] PAG members often are compelled to counsel defendants with valid factual objections to forego those objections so as not to risk losing acceptance of responsibility credit. A system in which the government is able to include its version of the defendant's "actual

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[7] Christine E. Hoy, *Comment: Uncharged Conduct and Disproportionate Impact: Amending the Guidelines to Protect Due Process Interests at Sentencing*, 48 Seton Hall Legis. J. 858, 873 (2024), available at: https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1979&context=shlj.

[8] *United States v. Brasher*, 2024 WL 3219036, at *7 (7th Cir. 2024) (Jackson-Akiwumi, J., concurring).

[9] *See, e.g.*, *United States v. Carbajal*, 290 F.3d 277, 287 (5th Cir. 2002) ("As a general rule, information in the pre-sentence report is presumed reliable and may be adopted by the district court 'without further inquiry' if the defendant fails to demonstrate by competent rebuttal evidence that the information is 'materially untrue, inaccurate or unreliable.'") (quoting *United States v. Parker,* 133 F.3d 322, 329 (5th Cir. 1998)).

[10] *See* §3E1.1 cmt. 1(A) (noting that a defendant may lose credit for acceptance of responsibility if the defendant "falsely denies, or frivolously contests, relevant conduct that the court determines to be true.").

conduct" and the defendant risks losing the benefit of his bargain if he objects, is inconsistent with the Commission's original intent in creating the guidelines.

The limitless reach of the relevant conduct guideline has frustrated the very purpose the guidelines were meant to foster: avoiding unwarranted disparity. And that is to say nothing of the relevant conduct guideline's other infirmities: diluting the protections of the Fifth and Sixth Amendments;[11] creating unpredictability;[12] and producing widely divergent outcomes.[13] In other words, "sentencing a defendant based on uncharged conduct is suspect as both a constitutional and policy matter."[14]

The PAG is not the first stakeholder to recognize the relevant conduct guideline's shortcomings,[15] and nearly thirty years ago, the Commission proposed a priority to consider "[s]ubstantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence."[16] In all these years, the Commission has not limited the scope of relevant conduct. The 40th anniversary of the Sentencing Reform Act seems an appropriate time to examine this guideline in more depth and to consider alternatives to it. "The United States Sentencing Commission has the authority to address these issues, and it should."[17] There

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[11] *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Mem.) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.").

[12] *See* U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 50, 87 (Nov. 2004) (relevant conduct rule is inconsistently applied because of ambiguity in the language of the rule, law enforcement's role in establishing it, and disparities in application of the guideline), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.

[13] *See* Pamela B. Lawrence & Paul J. Hofer*, An Empirical Study of the Application of the Relevant Conduct Guideline §1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent'g Rep. 16 (1997) (sample test administered by researchers for the Federal Judicial Center to probation officers resulted in widely divergent guidelines ranges for three similar defendants); *United States v. Quinn*, 472 F.Supp.2d 104, 111 (D.Mass. 2007) (two PSRs prepared by different probation officers based on information provided by the same prosecutor assigned different offense levels to two co-defendants based upon analysis of relevant conduct).

[14] *Brasher*, 2024 WL 3219036, at *10 (Jackson-Akiwumi, J., concurring).

[15] "Jurists and practitioners alike have been unsparing in their criticism of increasing a sentence based on conduct for which the defendant has not been convicted." *Brasher*, 2024 WL 3219036, at *7 (Jackson-Akiwumi, J., concurring).

[16] *See* U.S. Sent'g Comm'n, *Sentencing Guidelines for United States Courts,* 61 Fed. Reg. 34465 (July 2, 1996).

[17] *Brasher*, 2024 WL 3219036, at *10 (Jackson-Akiwumi, J., concurring).

are a number of alternatives that the Commission could consider to ameliorate the often harsh impact of the relevant conduct guideline.

For example, the Commission could remove the relevant conduct guideline altogether. Dispensing with relevant conduct would curb the power of prosecutors to seek punishment for conduct they have not proven or, in many cases, have not even charged. This would be easy to implement and it also would restore respect for defendants' jury trial and due process rights.[18]

The Commission also could limit the guideline's application. Previously, the Commission considered whether to provide a limited enhancement for conduct beyond the offense of conviction.[19] An explicit limitation on how many offense levels a court may assess pursuant to the relevant conduct provision could curb prosecutorial power and prevent sentences that are largely driven by unproven, and often uncharged, conduct. Another means of limiting the scope of the relevant conduct guideline would be to require that any court seeking to apply the relevant conduct guideline "explicitly state and support . . . its finding that the unconvicted activities bore the necessary relation to the convicted offense."[20] This bright-line rule used to be applied by the Seventh Circuit to guard against the "fearsome tool" that was the relevant conduct regime, but has since been abandoned.[21] Amending the guideline or adding commentary to require relevant conduct to be closely related to the offense conduct would be a meaningful way to limit its scope.

Another option to consider is revising the relevant conduct guideline to require a heightened standard of proof. To be sure, federal appellate courts have uniformly held that the due process clause requires no more than the preponderance of evidence standard at sentencing.[22] But the

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[18] *See, e.g.*, ABA Standards for Criminal Justice Sentencing § 18-3.6 (3d ed. 1994) (establishing sentencing standard that "[t]he offense of conviction should be fixed by the charges proven at trial or established as the factual basis for a plea of guilty or nolo contendre. Sentence should not be based upon the so-called 'real offense,' where different from the offense of conviction."), available at: https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_sentencing_blk/#3.6.

[19] *See, e.g.*, U.S. Sent'g Comm'n, Guidelines Simplification Draft Paper, *Relevant Conduct and Real Offense Sentencing* (Nov. 1996), available at: https://www.ussc.gov/research/research-and-publications/simplification-draft-paper-3.

[20] *United States v. Duarte*, 950 F.2d 1255, 1263 (7th Cir. 1991) (citations omitted) (describing "aggregation rule" for relying on uncharged conduct to increase a defendant's base offense level)

[21] *See Brasher*, 2024 WL 3219036, at *7 (Jackson-Akiwumi, J., concurring).

[22] *United States v. Lucas*, 101 F.4th 1158, 1163, 1159 (9th Cir. 2024) (en banc) (overruling prior precedent that required "trial courts to make factual findings by clear and convincing evidence 'when a sentencing factor has an extremely disproportionate effect on the sentence relative to the conviction.'") (quoting *U.S. v. Staten*, 466 F.3d 708, 717 (9th Cir. 2006)) (additional citations omitted).

PAG continues to believe that application of a heightened standard of proof furthers, rather than frustrates, the goals of fairness and truth in sentencing.[23]

In the PAG's experience, the relevant conduct guideline poorly serves the goals of sentencing; raises concerns about defendants' constitutional due process and jury trial rights; and frustrates the intent of the original Commission by creating an even greater imbalance of power between prosecutors and defendants. For these reasons, the PAG recommends that the Commission consider revisions to the relevant conduct guideline in the next amendment cycle.

B. The Criminal History Score

The PAG asks the Commission to conduct further study with the goal of revising the manner in which criminal history points are assessed. The criminal history score plays a significant role in determining the defendant's guidelines range. Under the current system,

> [t]he guidelines establish a method for evaluating an offender's criminal history by assigning points to some prior criminal convictions and adjudications of juvenile delinquency based on the length of the sentence imposed for those offenses. Through the process the court calculates an offender's "criminal history score," which is then assigned one of six Criminal History Categories (CHCs). The combination of the "offense level" of an offender's instant offense and the offender's CHC determines a range of confinement, expressed in months, for the offense.[24]

Convictions that result in sentences of 13 months or more are assigned 3 points; convictions for sentences of at least 60 days but less than 13 months are assigned 2 points; and all other convictions are assigned 1 point.[25] Three-point convictions "are considered the most serious convictions under the sentencing guidelines" and "[o]ne-point convictions are considered the least serious convictions that receive points."[26] While this points-based system may have been designed with the goal of reflecting the seriousness of prior offenses, in practice, the points assigned to a conviction often do not accurately capture the nature of a prior offense.

One of the most significant anomalies PAG members regularly see is the nature of prior convictions that are assigned 3 criminal history points. Truly violent crimes are scored exactly

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[23] *See* Breyer Article at 800 ("The original Sentencing Commission sought to bring more fairness and more honesty into the sentencing process.").

[24] U.S. Sent'g Comm'n, *The Criminal History of Federal Offenders* ("Criminal History Report") 7 (May 2018), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180517_criminal-history.pdf.

[25] This is a simplified version of criminal history scoring, and other factors, such as the age of the conviction and whether a sentence results from revocation also are considered when assigning criminal history points. *See id*.; *see also* §4A1.1 & §4A1.2.

[26] Criminal History Report at 8.

the same as non-violent offenses, which are often drug offenses. One PAG member currently represents a defendant who has a prior federal drug conviction that was entirely non-violent. This defendant has the same criminal history score as a defendant with a violent conviction, such as robbery or carjacking. A person who 10 years ago spent 18 months in prison for marijuana trafficking will have the same criminal history score as someone who was released after serving 10 or 20 years for a robbery conviction where a person was injured or shot.[27]

Another issue arises where a defendant is assigned 3 criminal history points for a conviction that was originally sentenced to probation, but because of revocation time, the defendant has served, in the aggregate, more than 13 months. That 13-month sentence does not reflect the severity of the underlying case, and often, a client will agree to revocations for all kinds of reasons that are not related to their dangerousness or risk of recidivism. A good example is a state court revocation for a relatively minor offense when a defendant is charged with a federal offense. A PAG member just represented a client who agreed to a probation revocation of a state theft case because of a newly charged federal case, which resulted in an 18 month sentence on the state revocation. This resulted in 4 additional criminal history points (3 points for the 18 month sentence plus 1 status point), even though the underlying theft case was non-violent and the state court judge had found the offense appropriate for a probation sentence.

Still another way in which the assignment of criminal history points results in unfairness is the way in which cases that may be resolved by the sentencing court as a single case are counted separately and assigned separate criminal points. This is the result of the "intervening arrest" rule, where even if a defendant is sentenced in one proceeding to concurrent time in multiple cases, because these cases resulted from multiple separate arrests, the defendant is assigned numerous criminal history points. One PAG member has represented clients who have only been sentenced once in their life, to concurrent sentences, but who have up to 12 criminal history points because their prior offenses involved intervening arrests.

In addition to intervening arrests, a defendant's criminal history score is increased if, at the time of arrest, multiple charges are filed in separate courts because some are felonies and others are misdemeanors (or even municipal citations). If the defendant is convicted of these charges in different courts, even though the charges arose from the same arrest, these convictions are counted separately because they are not contained in the same charging instrument. The only way that these convictions are not separately counted is if the defendant is sentenced in both courts on the same day.

There also are other structural issues that produce unfair results. State offenses are not treated uniformly between states, or sometimes even between counties within a state. As a result, those disparities are baked into a defendant's federal criminal history score. A PAG member has had

[27] The criminal history score also unfairly punishes those who are marginalized and come from difficult backgrounds. A PAG member has seen multiple cases where defendants who as teenagers or were impoverished jumped the subway turnstile and were charged with theft of services, and spent a night in jail. Later in life, when these individuals are in federal court, they receive the same criminal history points for that prior offense as the defendant who commits a simple assault or a more serious offense.

countless clients sentenced in an urban part of a state to probation for an offense that in an outlying, rural county would result in prison time.

Finally, there is a mountain of research, some produced by the Commission, that reflects how mass incarceration and our criminal justice system are fundamentally rooted in this country's racial injustices. And that means that the guidelines, in relying on prior sentences, are continuing to perpetuate those racial injustices. Closely examining how criminal history scoring under the guidelines exacerbates the inequality already inherent in our system of criminal justice is an important issue for the Commission to consider, and for all of the reasons outlined above, the PAG urges the Commission to do so in the next amendment cycle.

C. Juror Input in Sentencing Decisions

This Commission has very recently recognized the importance of the "historical role of the jury" and the fact that the "public's perception that justice is being done" is "vital to the legitimacy of the criminal justice system."[28] The Supreme Court has repeatedly emphasized the key role of juries in the American justice system as "a bulwark between the State and the accused."[29] And yet, jurors play no role whatsoever in federal sentencing. As one former state judge has wryly noted, "[o]ne of the paradoxes of the American criminal justice system is that it reposes almost unassailable confidence in jurors' ability to reach just verdicts on guilt or innocence, but almost no confidence in their ability to impose just sentences."[30]

Maintaining the legitimacy of the criminal justice system is of paramount importance not just to the Commission, but to all stakeholders. A key component in any criminal justice system's claim to legitimacy is whether the sentences imposed on offenders "give a fair measure of the community's sense of the appropriate punishment."[31] In creating the guidelines, the Commission expressly grounded its justification for its "Basic Approach" in community values. The Commission justified its empirical approach on the basis that it revealed distinctions in sentencing practice "that the community believes, or has found over time, to be important from either a just deserts or crime control perspective."[32]

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[28] U.S. Sent'g Comm'n, Amendments to the Sentencing Guidelines at 1 (Apr. 30, 2024) ("2024 Amendments") (quoting *McClinton v. United States*, 143 S.Ct. 2400, 2401 & n.2 (2023) (Sotomayor, J., statement respecting the denial of certiorari), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf.

[29] *Southern Union Co. v. United States,* 567 U. S. 343, 350 (2012).

[30] Morris B. Hoffman, *The Case for Jury Sentencing*, 52 Duke L.J. 951, 953 (Mar. 2003).

[31] James Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*("Juror Sentiment on Punishment"), 4 Harv. L. & Pol'y Rev. 173, 174 (Winter 2010).

[32] Guidelines Manual, Ch. 1, Pt. A(1)(3).

If the goal is a sentencing regime that results in sentences the community views as appropriate for the crime, the PAG respectfully submits that the current system is not meeting that goal. As early as 2005, critics of the guidelines noted that "[t]he guidelines [are] a one-way upward ratchet increasingly divorced from considerations of sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules."[33] Sentence lengths have only increased since then.[34] Moreover, as a jury study conducted between 2007 and 2010 by Judge Gwin of the Northern District of Ohio revealed, there is an enormous disparity between the sentences that convicting juries believe are just and appropriate and the sentences imposed under our current federal sentencing system.[35]

Accordingly, the PAG suggests that the Commission consider as a priority an amendment to incorporate jury sentencing recommendations as a consideration in arriving at a sentence that is sufficient, but not greater than necessary to serve the purposes of sentencing.[36] Incorporating jury recommendations would serve several salutary purposes. First, doing so would buttress and legitimize the historical and constitutional role of the jury as a "bulwark." Second, the collection of jury recommendations would give the Commission important data that would, over time, permit it to recalibrate sentences to bring them more in line with community values. Finally, judges imposing sentences after giving voice to convicting juries can be confident that the sentences they are imposing are viewed as reasonable by the communities they serve.

II. Specific Guideline Issues

In addition to the issues discussed above, the PAG asks the Commission to consider amending: (1) the career offender guideline; (2) the drug guideline; (3) the acceptance of responsibility guideline; and (4) to clarify the recent amendment to §2K2.1(b)(4)(B), the enhancement for an altered/obliterated serial number. The PAG also asks the Commission to continue working on its proposal to simplify the guidelines; to overhaul the loss guideline, §2B1.1; and to incorporate

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[33] Frank O. Bowman III, *The Institutional Concerns Inherent in Sentencing Regimes: The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-1320 (May 2005).

[34] "The average length of time served by federal inmates more than doubled from 1988 to 2012, rising from 17.9 to 37.5 months." Pew Research Center, *Prison Time Surges for Federal Inmates: Average period of confinement doubles, costing taxpayers $2.7 billion a year*, (Nov. 2015), available at: https://www.pewtrusts.org/-/media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf. By 2022, the median prison term imposed on federal defendants had reached 41 months. *See* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Justice Statistics 2022 at 12 & Table 7 (Jan. 2024), available at: https://bjs.ojp.gov/library/publications/federal-justice-statistics-2022.

[35] *See* Juror Sentiment on Punishment at 175-176, 187-188.

[36] Judge Gwin proposes the use of a short questionnaire that asks each juror what he or she believes an appropriate sentence would be for the crime or crimes of which the defendant has been convicted. The Court can then use that poll as one factor in determining an appropriate sentence. *See id*. at 193-195.

within the guidelines mitigating circumstances such as a defendant's excellent pre-trial conduct and/or participation in a drug treatment program or recovery court.

A. The Career Offender Guideline

In last year's amendment cycle, the Commission convened a working group to brainstorm and discuss how the career offender guideline could be amended to be more equitable. The PAG recommends that the Commission revise the career offender guideline in certain cases, and, the PAG recommends that instead of developing an alternative to the categorical approach, that the Commission maintain it.

1. *Drug Trafficking Only Defendants*

As the Commission continues to examine the career offender guideline, the PAG urges the Commission to focus on mitigating the impact of the career offender guideline on those defendants whose instant cases are drug trafficking cases, and whose prior career offender predicate convictions are solely drug trafficking offenses. In 2016, the Commission's data showed that the career offender guideline is inappropriate for such drug-trafficking only offenders: "[d]rug trafficking only career offenders are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increases in penalties required by the career offender directive."[37] Defendants categorized as career offenders based solely on drug trafficking offenses had lower recidivism rates than other career offenders; indeed, drug trafficking only career offenders had relatively similar recidivism rates as non-career offenders.[38] The Commission also found that the average sentence imposed on career offenders who only had drug trafficking offenses was well-below the career offender guideline range, and in fact approximated what the non-career offender guideline range would have been.[39]

In addition to the Commission itself, other entities recognize the inappropriateness of the career offender guideline for many defendants. The Department of Justice has stated that the career offender guideline can result in sentences that are "overly long," and the guideline produces "a clear racial disparity in application."[40] Sentencing judges have expressed disagreement with the career offender guideline by imposing below-guideline sentences in nearly 80% of cases in

[37] *See* U.S. Sent'g Comm'n, *Report to the Congress: Career Offender Sentencing Enhancements* ("2016 Career Offender Report") at 3 (Aug. 2016), available at: https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements.

[38] 2016 Career Offender Report at 40-41.

[39] 2016 Career Offender Report at 3.

[40] *See* Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Department of Justice to U.S. Sent'g Comm'n at 27 (Feb. 27, 2023), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/DOJ4.pdf.

Fiscal Year 2023, and 57.3% of career offenders received a variance, with 98.8% of those variances being a downward variance.[41]

Congress mandated the creation of the career offender guideline in 28 U.S.C. § 994(h), and the PAG recognizes that the statutory language prevents the Commission from entirely removing drug-trafficking only defendants from the purview of the career offender guideline. In defining predicate offenses that should trigger sentences near the statutory maximum, however, Congress did not include all drug trafficking offenses. Rather, Congress included only federal drug trafficking crimes under the Controlled Substances Act (21 U.S.C. § 841) and the Controlled Substances Import and Export Act (21 U.S.C. §§ 952(a), 955 & 959). While the statute only includes federal drug offenses as triggering predicates, the career offender guideline expands those predicates to include state controlled substance offenses. The Commission should amend the guideline definition of controlled substance offenses to mimic 28 U.S.C. § 994(h). Only prior federal drug trafficking offenses should trigger the application of the career offender guideline.

Such an amendment would address the recidivism and sentencing differences found in the Commission's 2016 report and it would reflect the fact that federal drug convictions typically involve far more serious conduct than state drug convictions. In the PAG's experience, federal drug prosecutions tend to involve higher quantities of controlled substances; larger sums of money; larger drug trafficking organizations; and large-scale suppliers. State prosecutions, on the other hand, often target individual dealers who sell small or personal use amounts directly to consumers – the corner boys selling dime bags. As state convictions often reflect far less serious conduct, it makes sense to amend the career offender guideline to target those with prior federal drug trafficking offenses rather than street level dealers with prior state drug convictions. If the Commission is concerned by the outliers – those with prior state convictions that reflect large quantities of controlled substances or those with prior federal convictions that reflect street level, personal-use amounts of activity – such outliers can be addressed with an application note suggesting upward or downward departures or variances in such cases.

By amending the career offender guideline to apply only to federal drug trafficking offenses as defined in 28 U.S.C. § 994(h), the Commission also would avoid the applicability of the categorical approach in determining what qualifies as a "drug trafficking" predicate, as any prior conviction under federal drug trafficking statutes would count as a predicate offense, and all others would not.

2. *Maintaining an Elements-Based Approach to Prior Convictions*

The PAG appreciates the difficulties of using an elements-based approach, specifically the categorical approach and the modified categorical approach, to determine whether a prior conviction constitutes a crime of violence or a controlled substance offense for purposes of the

[41] *See* U.S. Sent'g Comm'n, *Quick Facts: Career Offenders* (2023), available at: https://www.ussc.gov/research/quick-facts/career-offenders.

career offender guideline. Despite difficulties in application, the reasons for an elements-based approach, expressed by the Supreme Court on multiple occasions, are still sound:

> [A]n elements-focus avoids unfairness to defendants. Statements of "non-elemental fact" in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he "may have good reason not to"— or even be precluded from doing so by the court. When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.[42]

As recently as last month, the Court again recognized that documents underlying prior convictions, including *Shepard* documents, can be prone to error when it comes to non-essential, non-elemental, facts.[43]

While the Supreme Court has not directly held that the categorical approach must apply to the guidelines, every Circuit Court of Appeals has applied the categorical approach to the guidelines.[44] The need for an elements-based approach applies not just to recidivist statutes like the Armed Career Criminal Act (18 U.S.C. § 924(e)), but also to the career offender guideline. Going beyond the elements necessary for a prior conviction, the manner in which a prior offense was committed, invites uncertainty and unreliability in how the guideline is applied. The actual conduct underlying a prior offense is often not clear from the documents available for the court's review. Moreover, documents, such as a criminal complaint, affidavit supporting an arrest warrant, or plea memorandum, often reflect only the police or prosecution's version of how the underlying offense occurred. For strategic reasons or in the context of plea bargaining, defense counsel and the defendant may choose not to contest alleged facts that simply are not material to the elements of the offense or the ultimate outcome of the case. Going beyond the elements of the offense would allow a sentencing court to rely on such unreliable alleged facts.

For all of the reasons described above, the PAG recommends that the Commission maintain an elements-based approach (the categorical approach) to the career offender guideline. Further, the

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[42] *Mathis v. United States*, 579 U.S. 500, 512 (2016) (citing *Descamps v. United States*, 570 U.S. 254, 270 (2013)) (internal citations omitted); *see also Taylor v. United States*, 495 U.S. 575, 601-602 (1990).

[43] *See Erlinger v. United States*, __ U.S. __, 144 S.Ct. 1840, 1855-56 (2024).

[44] *See, e.g., e.g.*, *United States v. Rabb*, 942 F.3d 1, 3-4 (1st Cir. 2019); *United States v. Scott*, 990 F.3d 94, 104 (2d Cir.) (en banc), cert. denied, 142 S.Ct. 397 (2021); *United States v. Bullock*, 970 F.3d 210, 214–15 (3d Cir. 2020); *United States v. Carthorne*, 726 F.3d 503, 511 (4th Cir. 2013); *United States v. Zuniga*, 860 F.3d 276, 284 (5th Cir. 2017); *United States v. Camp*, 903 F.3d 594, 599-600 (6th Cir. 2018); *Adams v. United States*, 911 F.3d 397, 405 (7th Cir. 2018); *United States v. Brown*, 1 F.4th 617, 619–20 (8th Cir. 2021); *United States v. Barragan*, 871 F.3d 689, 713–14 (9th Cir. 2017); *United States v. Ontiveros*, 875 F.3d 533, 535 (10th Cir. 2017); *United States v. Gandy*, 917 F.3d 1333, 1339 (11th Cir. 2019); *United States v. Sheffield*, 832 F.3d 296, 314 (D.C. Cir. 2016), overruled on other grounds by *Beckles v. United States*, 580 U.S. 256 (2017).

PAG submits that applying a conduct-based approach would quickly become far more burdensome and resource-intensive than the current categorical approach. Any alternative, such as a conduct-based approach, must include significant procedural protections for the defendant because of the exponential increase in guideline ranges caused by applying the career offender guideline. Such procedural protections could include a standard of proof of beyond a reasonable doubt; the application of the Federal Rules of Evidence at sentencing; and the right of cross-examination or confrontation by the defendant. Only with these procedural protections can a court reliably and accurately determine the conduct underlying a prior conviction.

B. The Drug Guideline

The PAG suggests that the Commission consider revising the drug guideline because it results in disproportionately elevated sentences. And even if the Commission does not revise this guideline, the PAG urges the Commission to amend the methamphetamine guideline and to finally eliminate the disparity between crack and powder cocaine.

1. *The Drug Trafficking Guideline is a Strong Candidate for Reconsideration*

The drug trafficking guideline, §2D1.1, does not fairly reflect a defendant's culpability for a drug trafficking offense because it is driven exclusively by drug quantity. This is because "the Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants."[45] The drug trafficking guidelines ranges "are excessively severe because they subject all drug trafficking defendants to the harsh weight-driven regime the ADAA [Anti-Drug Abuse Act of 1986] intended only for managers and leaders of drug organizations."[46] By linking the guidelines to drug quantities based on the ADAA,

> the Guidelines ranges for drug trafficking offenses elevate all offenders – no matter their role in the offense – to those categories so long as the offense triggers the threshold quantities of heroin, cocaine, or crack. Moreover, by scaling punishment for greater and lesser quantities of drugs according to the ADAA's mandatory minimums, the Guidelines ranges increase the severity of drug trafficking sentencing ranges overall. As a result, the vast majority of federal drug offenders who are neither managers nor leaders are subjected to the harsh sentencing scheme that Congress intended only for those who occupy such roles.[47]

The severity of the drug trafficking guideline is reflected in how district court judges treat them. "[I]f the Commission had gotten it right, the number of sentences below the applicable range

[45] *United States v. Diaz*, Memorandum Explaining a Policy Disagreement with the Drug Trafficking Offense Guideline, No. 11-CR-00821-2(JG), 2013 WL 322243, at *1 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.).

[46] *Id*.

[47] *Id.* at *6.

would be at least roughly equal to the number of above-range sentences. But the Commission's own data over the years have illustrated just how wrong it was."[48] Downward departures far outweigh upward departures under the drug offense guidelines, with average reductions of over 30% below the bottom end of the applicable guidelines ranges for crack, cocaine and heroin offenses.[49] Because the drug guideline remains linked to the drug quantities and mandatory minimum provisions of the ADAA, it remains "unnecessarily severe and produces unjust outcomes."[50]

Accordingly, the PAG proposes that the Commission further study the impact of this guideline and work with stakeholders, through working groups or other collaborative efforts, to develop proposals for basing this guideline on a factor other than exclusively drug quantity.

2. *The Methamphetamine Guideline*

The PAG requests that the Commission eliminate the disparities between methamphetamine contained in a mixture, methamphetamine actual, and ice. These distinctions have little meaning because almost all methamphetamine currently seized in connection with drug trafficking offenses is pure. "The average purity of methamphetamine tested in the first half of 2019 was 97.2%."[51] Notably, in Fiscal Year 2022, "[w]hen the methamphetamine [] was tested, the average drug purity was well above 80% and did not vary statistically, regardless of the primary methamphetamine type in the offense."[52] "In offenses where mixture was the primary drug, the average purity was 91.0 percent (median 98.0%), compared to 92.6 percent (median 98.0%) for actual. The average purity was 97.6% for Ice offenses (median 99.0%)."[53]

By statute, penalties for methamphetamine mixture and methamphetamine actual have a 10:1 quantity ratio, and this ratio also is reflected in the guidelines; the guidelines treat ice the same as methamphetamine actual.[54] Given that "nearly all the methamphetamine seized in federal drug trafficking offenses was highly pure (93% pure on average),"[55] purity does not accurately reflect

[48] *Diaz*, 2013 WL 322243, at *8.

[49] *See id*. at *8-*9.

[50] *Id.* at *14.

[51] U.S. Sent'g Comm'n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* 9 (June 2024) ("Methamphetamine Study"), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf.

[52] Methamphetamine Study 32 & Fig. 18.

[53] *Id.* at 33.

[54] *See id*. at 13-15.

[55] *Id*. at 52.

a defendant's culpability. Moreover, these distinctions based on methamphetamine purity result in significantly increased sentences for defendants convicted of methamphetamine offenses. Methamphetamine defendants received the longest sentences of all drug trafficking defendants, and they received longer sentences than defendants convicted of trafficking crack, heroin and fentanyl.[56]

The purity of methamphetamine creates a distinction with no meaningful difference, since nearly all methamphetamine is highly pure. As a result, the PAG asks the Commission to revise the drug trafficking guideline to eliminate the disparity between methamphetamine actual and methamphetamine mixture.

3. *Powder/Crack Cocaine Disparity*

While the PAG commends the Commission's work to reduce the disparity between the treatment of crack and powder cocaine under the drug guideline, the PAG urges the Commission to finally eliminate the disparate treatment of crack and powder cocaine. There is no scientific evidence that supports treating crack cocaine more harshly than powder cocaine, and stakeholders in the criminal justice system agree on this fact.[57] To that end, the Department of Justice's policy at sentencing is that

> prosecutors should advocate for a sentence consistent with the guidelines for powder cocaine rather than crack cocaine. Where a court concludes that the crack cocaine guidelines apply, prosecutors should generally support a variance to the guidelines range that would apply to the comparable quantity of powder cocaine.[58]

Rather than rely on the sentencing policies adopted by the Department of Justice, the PAG asks the Commission to revisit the issue of the disparate treatment of crack and powder cocaine under the drug guideline so that defendants are treated consistently across the country. The Commission itself has recognized that there is no empirical basis for treating crack and powder

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[56] *See* Methamphetamine Study at 4.

[57] *See, e.g.*, The Office of the Attorney General, Memorandum for all Federal Prosecutors, *Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases* at 4 & n.3 (Dec. 16, 2022), available at: https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_additional_department_policies_regarding_charges_pleas_and_sentencing_in_drug_cases.pdf ("the crack/powder disparity is simply not supported by science, as there are no significant pharmacological differences between the drugs: they are two forms of the same drug, with powder readily convertible into crack cocaine.").

[58] *Id*. at 5.

cocaine differently,[59] and over the years the Commission has amassed significant evidence supporting the equal treatment of crack and powder cocaine. The PAG requests that the Commission consider an amendment to equalize the treatment of these two forms of cocaine under the drug guideline.

C. Acceptance of Responsibility

The PAG asks the Commission to consider assembling a working group to study §3E1.1's effect on the exercise of a defendant's constitutional rights, particularly with respect to the practice of plea bargaining. While plea bargaining is "an essential element of the U.S. criminal justice system,"[60] the process should never infringe upon a defendant's constitutional rights. In many federal districts, the PAG fears that §3E1.1 does exactly that. Even in the strongest of cases, jury trials have no guarantees and pose a realistic possibility of conviction. Faced with the potential loss of the 3-level reduction for acceptance of responsibility, PAG members across the country have represented clients who have chosen not to proceed to trial, even when they had strong challenges or defenses.

Criticism of §3E1.1 is not new. Over the years, courts and commentators have voiced concerns over the guideline and the problems it presents to our adversarial system of justice.[61] While the PAG does not suggest that the Commission repeal §3E1.1, it asks the Commission to better define the criteria for what constitutes "acceptance of responsibility." Most importantly, the PAG requests that the Commission amend the guideline to more clearly provide that there is *no* blanket rule that a defendant who goes to trial is precluded from receiving the adjustment.

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[59] *See* U.S. Sent'g Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 198 – 200 (Feb. 1995) ("strongly recommend[ing] against a 100-to-1 quantity ratio" and explaining reasons for this finding), available at: https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report_Full.pdf; U.S. Sent'g Comm'n, *Amendments to the Sentencing Guidelines for the United States Courts*, 60 Fed. Reg. 25075-25077 (1995) (proposing to reduce the crack/powder quantity ratio from 100-to-1 to 1-to-1).

[60] *See* Michael Conklin, *In Defense of Plea Bargaining: Answering Critics' Objections*, 47 W. St. L. Rev. 1, 28 (2020).

[61] *See, e.g.*, Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 Cal. L. Rev. 425, 443–56 (2004) (summarizing the feedback of forty federal criminal defense attorneys regarding §3E1.1 and how this guideline diminished their ability to represent clients zealously); Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility:" The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 Nw. U. L. Rev. 1507, 1542–60 (1997) (discussing how §3E1.1 chills the exercise of constitutional rights, subverts the actual goals for which the guideline was promulgated, and creates unnecessary litigation, unwarranted disparities, discriminatory impact, and dishonesty in sentencing); Anne L. Showalter, *Penalties, Benefits, and Baselines: The Constitutional Controversy Surrounding the Federal Sentencing Guidelines Acceptance of Responsibility Provision*, 3 Va. J. Soc. Pol'y & L. 147 (1995) (examining the Fifth Amendment problems associated with §3E1.1, specifically its effect on the privilege against self-incrimination).

Finally, the PAG recommends that the proposed working group brainstorm other ways that the guidelines might facilitate plea bargaining in a manner that better protects defendants' constitutional rights.

D. Clarifying §2K2.1(b)(4)(B)

The Commission has just submitted its 2024 amendments to Congress, which include an amendment to §2K2.1(b)(4)(B) that resolves a circuit split as to when this enhancement for a firearm's altered or obliterated serial number should apply.[62] In the course of current litigation, a PAG member has become aware of an interpretation of this amended guideline that would undermine what the PAG understands to be the very purpose of this amendment.

A PAG member has a case where a firearm has the serial number imprinted in more than one location on the firearm. One of the serial numbers is legible, but one serial number is not. Probation has taken the position that if there are multiple serial numbers on a firearm, the enhancement should apply if *any* of the serial numbers is illegible. That is because §2K2.1(b)(4)(B) states that if *"a"* serial number is "rendered illegible or unrecognizable to the unaided eye," then the amendment applies; it does not read if "*all*" serial numbers are illegible.

The PAG submits that such a technical reading of the amended §2K2.1(b)(4)(B) nullifies the amendment. The Commission initially adopted this enhancement to curb the trafficking of untraceable firearms,[63] and its recent amendment recognized that if a firearm has a serial number that is legible, there is no purpose for an enhancement to prevent untraceable firearms. Similarly, if there are multiple serial numbers on a firearm and at least one of those serial numbers is legible to the unaided eye, there is no reason to more harshly punish the defendant because the firearm remains traceable. The PAG asks the Commission to consider clarifying this amendment to ensure that the 4-level enhancement in §2K2.1(b)(4)(B) is not applied in cases where there is at least one legible serial number on the firearm.

E. Additional Issues

Finally, in addition to the guidelines discussed above, the PAG suggests that the Commission: (1) continue its work on simplifying the guidelines;[64] (2) conduct a comprehensive examination

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[62] *See* 2024 Amendments at 20-21.

[63] "This amendment is consistent with the Commission's recognition in 2006 of 'both the difficulty in tracing firearms with altered and obliterated serial numbers, and the increased market for these types of weapons.'" 2024 Amendments at 18 (citing App. C, amend. 691 (effective Nov. 1, 2006)).

[64] *See, e.g.,* Breyer Article at 804 ("My final suggestion, and one for the Commission, is simplification."); *see also* PAG Letter to the U.S. Sent'g Comm'n at 26 (Feb. 22, 2024) (proposing to simplify the guidelines by eliminating most departures), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=245.

of §2B1.1 as raised during the last amendment cycle;[65] and (3) consider including mitigating factors in the guidelines that reflect a defendant's excellent pretrial conduct and/or participation in treatment or recovery courts.

III. Conclusion

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's recommendations on the priorities that the Commission should consider in the upcoming amendment cycle. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

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[65] *See* U.S. Sent'g Comm'n, Proposed Amendments to the Sentencing Guidelines at 12 (Dec. 26, 2023), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf.

PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

July 12, 2024

The Honorable Carlton W. Reeves
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following commentary to the United States Sentencing Commission (USSC) regarding the proposed priorities for the upcoming amendment cycle.

Chapter 1: USSG §1B1.1 - Physically Restrained

According to USSG § 3A1.3, the offense level should be increased by two levels "if a victim was physically restrained in the course of the offense." Additionally, USSG §2B3.1(b)(4)(B), as well as USSG §2B3.2(b)(5)(B), provides, "…if any person was physically restrained to physically facilitate commission of the offense or to facilitate escape, increase by two levels." In each of these sections, the commentary relies on the definition under USSG §1B1.3, comment. (n.1(L)), which defines "physically restrained" as "the forcible restraint of the victim such as by being tied, bound, or locked up."

POAG encourages the Commission to expand the definition as it appears in Chapter One, in part to take into consideration the widely interpreted definition by Circuits [as an example, the Third, Seventh, and Eighth Circuits hold that a defendant physically restrains a person under USSG §2B3.1(b)(4)(B) when the defendant leaves the person with no alternative to compliance. *See United States v. Doubet,* 969 F.2d 341, 346–47 (7th Cir. 1992); *United States v. Kirtley,* 986 F.2d 285, 286 (8th Cir. 1993); *United States v. Copenhaver,* 185 F.3d 178, 180–82 (3rd Cir. 1999). The Eleventh Circuit cited this standard, applying the enhancement because the mere "obvious presence of handguns ensured the victims' compliance and effectively prevented them from

leaving the room" during a bank robbery. *United States v. Jones,* 32 F.3d 1512, 1519 (11th Cir. 1994). Some courts have reasoned that the two-level enhancement under USSG §2B3.1(b)(4)(B) requires that the victim's movements be sufficiently controlled or limited by the defendant by use of actual restraints ("tied, bound or locked up"), or by force or intimidation, actual or implied. Black's Law Dictionary defines "restraint" as "Confinement, abridgment, or limitation. Prohibition of action; holding or pressing back from action. Hindrance, confinement, or restriction of liberty." POAG recognizes there are a variety of ways a person can be restrained with limited to no movement and favors the Commission developing a definition that takes this into consideration as well.

Chapter 1: USSG §1B1.10 - Reduction in Term of Imprisonment as a Result of an Amended Guideline Range

POAG recommends the Commission continue the process to amend USSG §1B1.10, which commenced during 2019 but was never finalized. For background, POAG notes that, on December 20, 2018, the Commission issued Proposed Amendments to the United States Sentencing Guidelines, which included two proposed revisions to USSG §1B1.10. Public comment was received, but there was not a hearing to address the 2019 proposed amendments and the amendment cycle was subsequently paused until 2022 pending the nomination of a full quorum of commissioners. The public comment submitted in response to the 2019 amendment, including POAG's prior written response, can be reviewed at the following link: Public Comment from February 19, 2019 | United States Sentencing Commission (ussc.gov). With the last two amendment cycles including numerous retroactive considerations, the previously proposed amendments to USSG §1B1.10 have renewed significance.

Part A of the 2019 proposed amendment addressed a possible amendment to USSG §1B1.10 in light of *Koons v. United States*, 138 S. Ct. 1783 (2018). In summary, *Koons* addressed application of USSG §1B1.10(c), which was added to the 2014 version of the Guidelines Manual, and is as follows:

> Cases Involving Mandatory Minimum Sentences and Substantial Assistance. If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).

Specifically, *Koons* addressed application of USSG §1B1.10(c) and held that defendants whose initial guideline ranges fell entirely below a statutory mandatory minimum penalty, but who were originally sentenced below that penalty pursuant to a government motion for substantial assistance, are ineligible for sentence reductions under 18 U.S.C. § 3582(c)(2). *Koons* found that, in these cases, the sentences were not "based on" their guideline ranges but were instead "based on" the

statutory minimum penalties and the substantial assistance reduction pursuant to 18 U.S.C. § 3553(e).

POAG also included the above analysis of the pending need to update USSG §1B1.10 as part of our 2023 retroactive submission. The intent at that time was to highlight that the proposed amendment to this guideline remained unresolved. As of this writing, USSG §1B1.10 remains inconsistent with *Koons v. United States,* putting the Court in the position to unknowingly allow for a reduction for certain cases when it is precluded by *Koons*, thereby compounding the Court's workload in the event the retroactive sentence is subject to remand. POAG has equal concern with the potential impact on incarcerated individuals who proceed with release planning after having their sentence amended, only to later learn that they are not eligible for release due to misapplication of USSG §1B1.10(c). This would cause an emotional toll on those individuals and their families, and it would understandably give them the perception that the process is unfair. For these reasons, POAG continues to recommend the Commission address the *Koons* impact on USSG §1B1.10(c) and provide further application instructions prior to implementing any future retroactive amendments.

Chapter 2: USSG §2D1.1 - Offenses Involving Drugs

Disparate Treatment of 4-ANPP

In various areas around the country, the United States Attorney's Office has had chemists and other experts on controlled substances provide testimony regarding 4-ANPP, which is considered a fentanyl analogue under the United States Sentencing Guidelines, but it does not have an effect on the central nervous system. The precursor 4-ANPP is used exclusively in the illegal manufacture of fentanyl and other fentanyl analogues, and the control of it is necessary to prevent or limit the continued illegal manufacturing of fentanyl.

POAG observes a potential emerging disparity related to 4-ANPP. Specifically, in a few jurisdictions, the Court has adopted the government's position that 4-ANPP should be calculated as fentanyl, rather than a fentanyl analog. One could argue that this is outside of the guideline definition but consistent with the statutory definition contained in 21 U.S.C. § 802(32).

POAG recommends that the Commission examine the fentanyl/4-ANPP issue and consider possible solutions, such as developing a separate classification of fentanyl precursors that are used to produce fentanyl and fentanyl analogues, but do not have an effect on the central nervous system when taken independently.

Disparate Treatment of Methamphetamine Mixture and Actual / Ice, and Cocaine and Crack Cocaine

POAG suggests the Commission reexamine the drug tables, specifically, whether the significant distinctions between methamphetamine mixture and methamphetamine actual / ice and cocaine and crack cocaine, respectfully, are still appropriate, useful, relevant, and/or necessary.

Methamphetamine Offenses

In the Commission's June 2024 report, Methamphetamine Trafficking Offenses in the Federal Criminal Justice System, the Commission determined that methamphetamine offenses comprise 48.7% of all federal drug offenses and that they have the longest average sentences of any drug type (of 91 months). As the Commission noted in its report, the differences between the sentences imposed for methamphetamine offenses and other drug offenses is largely driven by the statutory and guideline penalty provisions, which provide different sentences based on the purity of methamphetamine involved in the offense. Furthermore, while purity was once considered to be an indicator of a defendant's culpability; methamphetamine is now at least 80% pure in the majority of cases in which it is tested, such that purity no longer appears to be a strong measure of culpability. POAG recommends the Commission further examine the methamphetamine guidelines given both the prevalence of methamphetamine offenses and the disparity in sentencing trends across jurisdictions.

Another concern is the disparity in sentencing between cases in which the methamphetamine is tested and those cases in which it is not. The Commission's report also notes that drug testing is not performed consistently across the 94 federal districts. During fiscal year 2022, 48.4% of the cases involved instances where all methamphetamine substances had been tested and, in contrast, in 24.4% of the cases none of the methamphetamine had been tested. Defendants in cases which have laboratory reports indicating the purity of the methamphetamine tend to receive longer sentences due to the harsher punishment associated with pure methamphetamine, while those with no lab reports or fewer lab reports receive the benefit of having their sentence determined by the default assessment as methamphetamine (mixture). This is further exacerbated when the methamphetamine in question is a historical estimate using the seized quantity as a reference. As a result, the process varies such that, in some cases, the sentence is determined based upon an estimate of the quantity with the lowest purity of what was tested, while in others the sentence is determined based upon the highest purity of what was tested, whereas others might default to methamphetamine mixture for any unseized prior quantities.

POAG has observed an increase in challenges to the distinctions between methamphetamine mixture and methamphetamine actual/ice between districts and within districts. Individual judges in several jurisdictions have declared policy disagreements with the guidelines' treatment of methamphetamine mixture and methamphetamine actual/ice and treat all methamphetamine as a mixture, regardless of its purity. This pattern appears to be driven by the philosophy that methamphetamine actual/ice guideline ranges are disproportionately harsh when compared to methamphetamine mixture cases. For additional reference, see POAG's August 1, 2023, submission regarding methamphetamine cases.

Cocaine and Crack Cocaine Offenses

POAG recommends that the Commission also examine the powder cocaine versus crack cocaine issue. While the Commission has not published any recent studies regarding the disparate treatment of these substances, POAG has noticed the courts continue to challenge it. As the Commission has noted in its retroactivity studies, black males accounted for majority of offenders

who received a sentence reduction under the Fair Sentencing Act "drugs minus two" amendment of 2010. Furthermore, as noted in its August 2020 Retroactivity and Recidivism report, there was no statistically significant difference between the recidivism rates for cocaine trafficking offenders who received a sentence reduction under the "drugs minus two" amendment and those who had completed their sentences before the reduction took place, suggesting increased penalties for crack cocaine offenders may not be as meaningful as they might have previously been thought to be. POAG also observes a pattern of individual judges in several jurisdictions have declared policy disagreements with the guidelines' treatment of cocaine and crack cocaine. This pattern also appears to be driven by the philosophy that crack cocaine guideline ranges are disproportionately harsh when compared to cocaine cases.

Commonalities Between Treatment of these Offenses

In December 2022, the Attorney General issued guidance that significantly limited the situations in which they should pursue minimum mandatory charges (Memorandum for All Federal Prosecutors, *General Department Policies Regarding Charging, Pleas, and Sentencing*s). As a result, plea agreements may contain language agreeing to treat methamphetamine actual/ice as a mixture, or crack cocaine as cocaine, via a variance or via manipulation of the actual guideline application. Re-aligning offense levels for these substances may be a way in which the Commission could simplify the sentencing guidelines, a goal the Commission has expressed in recent years. POAG does acknowledge that offense level distinctions between these substances are largely attributed to directives from Congress. However, POAG encourages that the Commission should work towards taking steps within their authority to close the gap between how these substances are treated within the guidelines.

Guidance Regarding Application of USSG §2D1.1(b)(5) in Methamphetamine Cases

POAG recommends the Commission issue further guidance regarding application of USSG §2D1.1(b)(5), which provides a two-level enhancement "if the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine […]" There is a disparity in the application of this guideline in that some jurisdictions apply the enhancement in all cases involving pure methamphetamine, while other jurisdictions engage in fact-finding to establish a scienter requirement that the defendant have knowledge of the substance's importation.

Chapter 2: Part G

Reference via the following links are made to POAG's prior submission of August 1, 2023, and October 17, 2022, which reference earlier submissions from July 22, 2016, and August 10, 2018, that recommended continued study and refinement of Chapter 2, Part G, which incorporated this and other issues. By way of this submission, POAG's earlier submissions are incorporated for reconsideration by the Commission.

POAG examined certain specific offense characteristics (SOCs) and special instructions found within Chapter 2, Part G of the Guidelines Manual due to concern involving near automatic application and clarity.

POAG recommends amendment of the SOC in USSG §2G2.2(b)(6). Nearly all sexual offenses prosecuted in which USSG §2G2.2 is applied involve the use of a computer or an interactive computer service for the possession transmission, receipt, or distribution of the material, or for accessing with intent to view the material. In turn, the offense level is universally increased two levels. While Congressional directives necessitate the SOC or any future alteration, POAG has two suggested amendments. The first involves altering the beginning of the SOC to reflect, "If the offense did not involve the use of a computer…," along with altering the 2-level to enhancement with a 2-level reduction. The spirit of this amendment follows such language found USSG §2G2.2(b)(1) where a 2-level decrease is applied following a 3-part examination of the conduct in cases where the higher base offense level (BOL) is applied in USSG §2G2.2(a)(2). The second involves the addition of an application note for (b)(6) to require several factors that would narrow application.

POAG further recommends amendment of the SOC in USSG §2G2.2(b)(7) regarding an enhancement for the number of images in the offense. Given the digitization of images and storage capabilities, the enhancement for the offense involving more than 600 or more images has become commonplace. Amendment of the SOC is recommended to allow for a lesser enhancement, for instance, an offense involving less than 500 images and incremental increases thereafter to account for those who have substantially more images. Further consideration could also be given to determine if there are other offense conduct considerations that should be accounted for that better relate to risk and harm beyond the number of images stored on a digital device.

POAG also recommends an amendment to the special instructions in USSG §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), USSG §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), and USSG §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production). As presently written, the special instructions direct that, if the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant's prohibited sexual conduct against each victim had been contained in a separate count of conviction. However, the expanded relevant conduct provisions under USSG §1B1.3(a)(2) do not apply because USSG §§2G1.1, 2G1.3 and 2G2.1 are not listed as groupable offenses under USSG §3D1.2(d). Therefore, relevant conduct is limited to USSG §1B1.3(a)(1). This conflict has led to confusion as to when and how to apply the special instructions.

Because of the restriction of relevant conduct under USSG §1B1.3(a)(1), these special instructions are only applicable to victims who were victimized in preparation for, during, or to avoid detection of the offense of conviction. For example, if it is determined that a defendant convicted of one

count of production of child pornography involving Victim 1 also victimized Victims 2 and 3 at the same time as Victim 1 (during offense of conviction), the special instruction under USSG §2G2.1(d) would apply to Victims 2 and 3, resulting in an increase under USSG §3D1.4 of several offense levels. Conversely, if it is determined that Victims 2 and 3 were not victimized at the same time as Victim 1, the special instruction would not apply and there would be no increase to the offense level under USSG §3D1.4. However, because of the way they are written, the special instructions have likely been construed and applied broadly.

To eliminate this confusion, POAG recommends the application note for each special instruction (Application Note 5 of USSG §2G1.2; Application Note 6 of USSG §2G1.3; and Application Note 7 of USSG §2G2.2) be amended to clarify that relevant conduct is limited to USSG §1B1.3(a)(1) and the expanded relevant conduct provisions under USSG §1B1.3(a)(2) do not apply. It is further recommended that those application notes include specific examples of when it is applicable and when it is prohibited.

Chapter 2: USSG §2K1.1

POAG suggests the Commission revise USSG §2K2.1 to account for Glock "switches" and similar conversion devices. In the last several years, it has become common to convert semi-automatic Glock pistols to full-automatic pistols by attaching a small device, known as a "switch." The switches themselves are considered a machinegun under 26 U.S.C. § 5845(b), and a machinegun is considered a firearm under 26 U.S.C. § 5845(a). However, Glock switches (and other similar devices) do not meet the definition of a firearm in USSG §2K2.1, comment. (n.1); which refers to the definition in 18 U.S.C. § 921(a)(3). Accordingly, POAG submits that there are numerous cases in which the possession of conversion devices (not connected to a firearm), is not accounted for within this guideline. As an example, in the case where an individual is responsible for 100 Glock switches, transfers the switches to another person who intends to sell them illegally, and/or possess the switches in connection with another felony offense, few, if any, of the enhancements in the firearm guideline would apply.

Accordingly, POAG recommends the Commission review this issue and revise the definition of a firearm or add a specific offense characteristic or language in the commentary to cover conversion devices. If the Commission does revise USSG §2K2.1 to account for these devices, POAG expects many cases would be impacted by the offense level cap of 29. Therefore, the Commission may want to consider how this cap interacts with the revisions and the new statutory penalties for firearms offenses.

Chapter 4: USSG §§4A1.1(a) and 4A1.2(e)(1)

POAG recommends that the Commission reevaluate applying three points under USSG §§4A1.1(a) and 4A1.2(e)(1) based on the defendant "being incarcerated during any part of such fifteen-year period." POAG suggests that the guideline focus on when the sentence was imposed versus the date of release. In some jurisdictions, the state prison system assigns one correctional number to a defendant and one discharge date applies, regardless of the number of convictions. In

those circumstances, the defendant receives one discharge date for several different sentences, which makes it difficult and sometimes impossible, to determine the discharge date for a specific case. POAG would add that this is also the process used by the Federal Bureau of Prisons in that, if a defendant is a serving a sentence for a supervised release violation and a sentence for a new federal offense, the sentences are aggregated, and the defendant is given one discharge date. As a result, convictions that would have been discharged prior to the fifteen-year time period are assessed with criminal history points, causing some defendants to qualify as a career offender based on prior convictions that would otherwise be deemed incredibly stale. See *United States v. Jones*, 662 Fed.Appx. 486, 493-4 (8th Cir. 2016) (unpublished). Therefore, the criminal history scoring and career offender determination is impacted by the sentence computation practices and policies of the correctional system in each individual state. Amending the scoring provisions under USSG §4A1.2(e)(1) would also be consistent with the Commission's ongoing goal of simplification. Criminal history scoring could be determined based solely upon court records, and records from each institution verifying the discharge date would no longer be required or relevant in determining the criminal history scoring. Further, it would simplify the process for the parties as well given that, unlike prison records, the parties would have access to court records for prior convictions at the pretrial stage and better assess whether the defendant would qualify as a career offender, if convicted. The impact of career offender on the ultimate sentence can be pivotal in deciding how to proceed and also potentially influence the parties' plea agreement stipulations.

Chapter 4: Categorical Approach / Career Offender

POAG has previously written extensively on issues relating to the career offender guidelines, the categorical approach, and the sentencing disparities and circuit splits that have resulted from this issue. POAG feels very strongly that the career offender guideline is presently the most complicated aspect of federal sentencing. Resolution of this issue will provide for ease of application and reduce the amount of resources needed to apply this guideline.

As reflected in the previous letters submitted to the Commission dated July 22, 2016, and July 31, 2017, POAG strongly encourages the Commission's continued work to implement the recommendations set forth in its 2016 report to Congress titled Report to the Congress: Career Offender Sentencing Enhancements. This report recommends the revision of the career offender directive at 28 U.S.C. § 994(h) to focus on defendants who have committed at least one crime of violence and the adoption of a uniform definition of crime of violence. The Commission's research has found that defendants who qualify as a career offender are receiving lower sentences, including variances below the guideline range, in cases where defendants' predicate offenses are controlled substance offenses. POAG members continue to attest that courts are varying downward from the career offender range in these circumstances.

POAG believes that alternative approaches to the "categorical approach" in determining which offenses qualify as a "crime of violence" or "controlled substance" are needed and that the current approach simply does not work. There is a strong need to implement amendments based on an alternative approach to this issue. Specifically, POAG indicated in our March 13, 2023, comment regarding the 2023 proposed amendments that the categorical approach has created ever-increasing

difficulties for districts around the country. One of the primary issues POAG raised included the fact that application of the current USSG §4B1.2 definitions has created considerable consternation as practitioners work to keep up with the changes in interpretation and the pending litigation. As a result of these issues, the guideline definitions no longer function as originally designed. Application issues aside, the true impact of this issue is defendants are more or less severely punished not based upon their relative risk, but based upon the location of where they committed the offense and the structure of the underlying statute. Such unwanted sentencing disparities is the very issue that the guidelines sought to address.

POAG notes the disparities in sentences for career offenders amongst circuits and districts, based on each state's definitions of what may be a crime of violence or a controlled substance offense. When utilizing the categorical approach, application of the guidelines becomes a "geographical elements lottery," where if you are convicted in one state, you might face a harsher guideline exposure, but if you are convicted in another state, you might face a more lenient guideline exposure, for essentially the same crimes. As evidenced by case law across the country, using state statutes from 50 different states in the categorical approach, and the entirety of the Career Offender litigation, has created sentencing disparities; the Guidelines Manual was at least partially established to minimize those sentencing disparities. Suggestions of utilizing a similar approach as incorporated by the First Step Act and Immigration guidelines (USSG §2L1.2), where any increase would be based on the custodial sentence imposed in the prior sentence, as opposed to solely looking at the definition of the prior. For example, a Robbery in one circuit qualifies, but a Robbery in another does not; however, if the guidelines direct officers to look to the prior sentence imposed on that named *crime of violence* conviction, the disparities amongst all circuits could begin to decrease. The same can be said of prior *controlled substance* offenses. Were the guidelines to focus on the prior sentence imposed as opposed to the many different state statutes that may or may not be a *crime of violence* or *controlled substance offense,* an analysis would not be as necessary and would allow for greater consistency in sentences imposed.

On February 19, 2019, POAG submitted the following recommendation, and it is being resubmitted for further consideration. POAG recommended that courts continue to apply the categorical or modified categorical approach to determine if a predicate offense was a "crime of violence" or a "controlled substance offense." However, courts would have the option of using the modified categorical approach to determine what portion of a statute the defendant was convicted, whether or not the statute is divisible in construction. Such an amendment would allow practitioners to resume the practice of referring to records to determine whether the means the defendant engaged in to satisfy an element would meet the definition of either a "crime of violence" or a "controlled substance offense." This amendment significantly simplifies the application of this guideline. As the dissent acknowledged in *Descamps v. United States*, 133 S. Ct 2276 (2013) "Determining whether a statute is divisible will often be harder than the Court acknowledges." The dissent's concern has proven prescient, as distinguishing means from the elements of an offense often involves complex legal analysis and requires extensive research of state law in determining whether the modified categorical approach applies. This amendment resolves that concern and eliminates complicated analysis of statutory construction before applying the modified categorical approach.

Further, this amendment resolves one of the main reasons POAG believes this guideline is broken. As our current process has evolved, serious criminal offenses no longer qualify as predicate convictions simply because the statutory language is overly broad. With this amendment, certain state statutes, such as aggravated assault, robbery, and various controlled substance offenses, would no longer be categorically precluded from qualifying as a predicate offense. Courts will be able to review the record and rule out any concern that qualifying convictions encompass any portion of a statute considered overly broad. In essence, this amendment corrects the primary flaw of our current practice and will resolve the concern of serious criminal offenses being categorically excluded from consideration solely due to statutory construction.

During 2019, the majority of POAG representatives were in favor of the proposed amendments to USSG §4B1.2, comment. (n.2(B)(i)-(iv)), which identified the following as sources the court may consider when determining the conduct that formed the conducted-based inquiry pursuant to USSG §4B1.2, comment. (n.2(A)):

> (i) The charging document.
>
> (ii) The jury instructions, in a case tried to a jury; the judge's formal rulings of law or findings of fact, in a case tried to a judge alone; or, in a case resolved by a guilty plea, the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.
>
> (iii) Any explicit factual finding by the trial judge to which the defendant assented.
>
> (iv) Any comparable judicial record of the information described in subparagraphs (i) through (iii).

Before discussing the sources the Court may consider when determining the basis for the defendant's conviction, it is important to understand the availability of these collateral documents. The records noted in (ii) and (iii), including the plea agreement, the jury instructions, the transcript of colloquy between the judge and the defendant discussing the factual basis for the guilty plea, and the explicit factual findings by the trial judge, are either very rarely received or not easily obtained. Many members of POAG expressed concerns regarding the availability of the identified documents, noting that the amendment may not have much impact on the analysis given these challenges – particularly when these records exist outside one's jurisdiction of practice. In reality, the records that are commonly available include docket sheets; the charging document, which often simply recites the statutory language; the order accepting the guilty plea or verdict; and the sentencing order. Within the bounds of a conduct-based approach, these documents often fall short in providing a qualitative description of an offense. While transcripts of proceedings can be quite helpful in analysis, they are the most difficult records to obtain.

The most commonly available *Shepard* documents often do not include details establishing the basis of the conviction, which is exacerbated by the fact that court records are becoming more automated and streamlined with less narrative. Therefore, POAG discussed (iv) in terms of what types of documents would be considered "comparable judicial records of information." POAG suggests that (iv) provide more specific examples of what may and may not meet that standard. The majority of POAG members in 2019 believed that probable cause affidavits and sworn

complaints were comparable in nature to the documents identified in (i)-(iii). The consensus was that documents sworn under penalty of perjury by a law enforcement officer had similar indicia of reliability to the other listed documents. Most POAG members believed that expanding the current *Shepard* documents to include probable cause affidavits and sworn complaints is a necessary amendment if the goal is to rely on a conduct-based approach in determining if an offense qualifies as a predicate offense.

POAG also discussed whether the types of documents to be considered should be expanded beyond this, to include presentence reports (federal and state) and/or police reports. In the federal system, it is a common practice for judges to accept presentence reports within their formal findings of fact. However, there was concern regarding the quality of state presentence reports, as well as the reliability and accuracy of police reports for purposes of determining the offense of which the defendant was convicted. The majority was hesitant to extend the class of documents to those not vetted through the court and sworn under penalty of perjury.

With regard to enumerated offenses, POAG's feedback and discussion on this issue evolved into consideration of three primary options:

> (1) The Commission should provide a definition for all of the enumerated offenses, rather than relying on the "contemporary, generic definition."
>
> (2) The Commission should parse down the list of enumerated offenses and all statutes with those named offenses would qualify as a predicate (for example, any conviction for kidnapping would count, regardless of how the state defines kidnapping).
>
> (3) The Commission should not alter the list of enumerated offenses or the approach of using the "contemporary, generic definition" of those offenses, as we have an existing body of caselaw to rely on in this area.

POAG members discussed difficulties in finding consistent definitions of the "generic" offense, and circuit conflicts reaching opposing conclusions as to what conduct falls within "generic" offense definitions. Another problem with relying on caselaw for a generic definition is that cases tend to focus on the generic definition with respect to one specific provision (e.g., whether generic robbery includes threats against property), rather than providing a start-to-finish definition of the enumerated offense. POAG recommended that a generic definition for each enumerated offense be crafted in such a manner that encompasses the elements of a variety of state statues as they are currently written and does not unknowingly exclude an entire class of state offenses on the basis of a minor discrepancy. With this process, courts would then compare the elements of the state offense with the elements of the generic definition in determining if an offense qualifies as an enumerated offense.

POAG recommended that the list of enumerated offenses would be limited to the offenses the Commission believes should qualify as crimes of violence in every circumstance, such as murder and kidnapping, regardless of how they are defined, with the understanding that all other offenses would qualify as a crime of violence under the elements clause. Although the outcomes are not

always desirable or nationally uniform, they rely on variances to appropriately account for outlier predicate offenses that involve aggravating or mitigating conduct.

Chapter 4: USSG §4B1.5

USSG §4B1.5, Repeat and Dangerous Sex Offender Against Minors, provides an enhancement for offenders whose instant offense of conviction is a sex offense committed against a minor and who present a continuing danger to the public. As part of POAG's October 17, 2022, submissions, POAG identified a disparity issue at USSG §4B1.5. Specifically, USSG §4B1.5(a) provides two options for determining the offense level in cases in which the defendant's offense of conviction is a covered sex crime, USSG §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction after sustaining at least one prior sex offense conviction. In these instances, the offense level is the greater of the offense level determined under Chapters Two and Three or the offense level from the listed table; and the criminal history category is the greater of the criminal history category determined under Chapter Four, Part A, or criminal history category V. USSG §4B1.5(b) sets forth the guidelines for determining the offense level for defendants who have committed a covered sex crime, engaged in a pattern of activity involving prohibited sexual conduct and neither USSG §§4B1.1 nor 4B1.5(a) applies. In those instances, the offense level shall be 5 plus the offense level determined under Chapters Two and Three, but not less than 22; and the criminal history category shall be determined under Chapter Four, Part A. This application can result in a disparity in the guideline range between offenders who have a prior sex offense conviction and those who do not.

To illustrate this disparity, POAG previously provided an example of a husband and wife who both molested multiple minors on several occasions and were both convicted of production of child pornography. The husband had one prior sex offense conviction, resulting in the application of USSG §4B1.5(a). Because the offense level determined under Chapters Two and Three was greater than the offense level contained in the table at USSG §4B1.5(a)(1)(B), there was no increase to his total offense level, which was determined to be 37. Conversely, the wife, who had no prior sex offense conviction, received a five-level increase pursuant to USSG §4B1.5(b), which resulted in a total offense level of 42.

To eliminate this disparity, it is recommended that at the beginning of the guideline it is added that the greater of USSG §4B1.5(a) or (b) is applied in determining the offense level. Further, if the defendant has one or more prior sex offense convictions, then the criminal history category is to be determined under USSG §4B1.5(a)(2). Otherwise, the criminal history category is to be determined under USSG §4B1.5(b)(2).

Chapter 4: USSG §4C1.1

As noted in POAG's October 17, 2017, response to requests for public comment on proposed holdover amendments and October 17, 2022, response related to proposed priorities, POAG has been a supporter of change to the Criminal History Category within the Sentencing Table. Specifically, POAG recognized a need to distinguish a true zero-point offender and suggested an

expansion to the Sentencing Table to include a stand-alone category "zero" to separate the defendant with truly no past criminal conduct. POAG understood the challenge in creating a definition and standard of what is a "true first-time offender" whose current criminal action was limited in nature and did not involve any violent conduct. The addition of the Part C – Adjustment For Certain Zero-Point Offenders pursuant to USSG §4C1.1 appears to be the Commission's response to this need. However, POAG believes that the criteria set forth in subsections (a)(1) through (a)(10) in the 2023 USSG Guidelines Manual may provide for some unintended results. As an example, probation officers have witnessed situations where an individual's conduct would exclude them from this adjustment; however, by virtue of what they were convicted of, the adjustment was applicable. Subsection (3) specifically states the defendant did not use violence or credible threats of violence, however, what if they induced another to do so? They could still see the benefit of USSG §4C1.1 given how narrowly subsection (3) is written, while the language in subsection (7) seems to better capture overall culpability, intent, and cause of that conduct. The one that is most prevalent and seems to be outside the spirit of this adjustment, is to reward individuals who, in some instances, have an extensive criminal history; however, due to age, did not receive any criminal history points. It seems unjust to treat that individual the same as someone else who until committing this first and only instant offense, led a law-abiding lifestyle. Similarly, if the offense of conviction was committed over a protracted timeframe or involved substantial planning or sophisticated means, it seems incongruent with the intent of the reduction. It is for these reasons and others that POAG favors revisions and potentially an expansion of the exclusionary criteria in USSG §4C1.1.

Chapter 5: USSG §5C1.1

POAG recommends the Commission consider amending USSG §5C1.1 to expand upon the types of restrictions that would satisfy a Zone B or C sentence to include curfews.

POAG suggests a carefully crafted curfew could accomplish a similar end result as home detention while better accommodating defendants who often qualify for these types of sentences and making supervision of these defendants more efficient. As part of POAG's July 22, 2016, submission, POAG previously addressed a similar issue with regard to the Zone provisions and the resulting impact on expending resources on low-risk defendants. One of the biggest challenges is having to request, approve, and then verify every single excused leave every single day, and follow up daily when schedules change. This becomes all the more challenging when defendants have irregular work, childcare responsibilities, and/or frequent medical appointments. POAG notes that oftentimes, defendants falling in Zones B and C are those convicted of non-violent offenses or fraud, but by putting these individuals on home detention, probation officers are spending their time and resources on low-risk individuals when those resources are better utilized on high-risk individuals. Those same defendants could instead be ordered to be subject to a curfew that results in them being confined to their home for the majority of the day, while alleviating the need to maintain schedule changes for appointments and irregular work schedules. For example, a court could impose a curfew of 6 p.m. to 7 a.m., which would substantially restrict the defendant's freedom, while allowing them to fulfill their work, childcare obligations, and/or appointments.

That curfew could be more stringent for someone who did not work full time, or did not face the same schedule unpredictability. As it presently stands, a curfew would not appear to fall within the parameters established by USSG §5C1.1(c) or (d) or the definition of "home detention" at USSG §5F1.2, Application Note 1. Re-assessing this guideline would also further the Commission's stated goal of expanding alternatives to incarceration.

Chapter 5: Variance

While variances are embedded in 18 U.S.C. § 3553, POAG would like the Commission to consider adding a section to the Guidelines regarding variances. Several policy statements, application notes, commentary, and specific offense characteristics have stemmed from statutes; therefore, variances could similarly be incorporated. National sentencing is disproportionate given that some circuits apply variances heavily, while defendants who have faced sentences in other circuits received minimal or no variance for similar reasons. As set forth in USSG §1B1.1(c), the Court should consider 18 U.S.C. § 3553(a) factors. Perhaps this could be expanded to include specific appropriate variance grounds. Alternatively, this section may also be incorporated in Chapter 5: Determining the Sentence if the Commission believes it would be better placed in that chapter. Regardless of the location, POAG believes that including this guidance will allow for more uniform and fair sentencing practices nationally.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to be part of our evolving process of federal sentencing by sharing the perspective of the dedicated officers who make up the U.S. Probation Office.

Respectfully,

Probation Officers Advisory Group
July 12, 2024

United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

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July 15, 2024

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
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Washington, DC 20002-8002

Re: Proposed Priorities for Amendment Cycle

Dear Judge Reeves:

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the Proposed Priorities for the 2024-25 Amendment Cycle, announced by the United States Sentencing Commission on June 1, 2024.

Proposed Priority: Furthering the Commission's Statutory Purposes and Missions as Set Forth in the Sentencing Reform Act

In light of the 40th anniversary of the Sentencing Reform Act of 1984, the Commission is calling for a more broadly based focus on the statutory purposes and missions of the Sentencing Reform Act with a particular focus on how the Guidelines might be revised or improved to meet those purposes and missions. TIAG is extremely grateful for this opportunity to reflect on the federal sentencing process, including the Guidelines, and its impact on Indians living in Indian Country. TIAG observes that the current sentencing process poses unique difficulties in much of Indian Country and that this fortieth anniversary of the passage of the Sentencing Reform Act of 1984 is a fitting time to reflect and take a more global view of the process. While we acknowledge that many of the problems we observe are beyond the statutory mission of the United States Sentencing Commission to remedy, it is also true that one of the roles of

the Commission is to act as a convening agent, which allows for transmission of ideas and suggestions between all of the persons and entities impacted by sentencing policy and the Congress. This flow of information in the Commission's reports to Congress can be a powerful agent for institutional change and we welcome the Commission's broadly stated priority as a potential vehicle to begin a discussion about sentencing policy in the United States generally and in Indian Country specifically.

A. Lack of uniform interest and presence in Indian Country by federal agencies.

TIAG understands there are systemic problems that are beyond the Commission's power to rectify but which make it very difficult for Indian offenders living in Indian Country to succeed. Some of the issues are a result of the patchwork quilt of interest by the Federal Government in Indian Country. The lack of uniform interest and presence in Indian Country by the Federal Government is an ongoing problem. One of the biggest improvements in Indian Country sentencing would be an even-handed and uniform presence by the relevant federal agencies in Indian Country. The current patchwork quilt of federal presence in Indian Country leads to lack of uniformity in sentencing and greater variability of outcome. Greater interest and collaboration with tribal entities by federal government agencies will likely lead to greater uniformity and better outcomes.

B. Guidelines Complexity and Simplification

The current Guidelines manual places offenders on a Sentencing Table that is framed by six criminal history categories and 43 separate offense levels. An offender is placed, after a complex calculation, into one of 258 sentencing cells on the table. This system is based on a 1980's view of empiricism that is not likely supported by more recent empirical data. TIAG does not question the need for sentencing policy and reform to be well-grounded in evidence-based empirical analysis, but we believe that the current Guidelines Sentencing Table implies far greater scientific certainty about sentencing than is supportable by our current understanding of the scientific data. TIAG is also concerned that some of the guidelines may have inadvertently "baked into the process" factors that may have unintended consequences on sentencing. As an example, a supportive family consists of a much broader group of people in many tribal communities and often times includes people unrelated by marriage or kinship

but who have ties that are familiar in nature. To fail to afford these extended relationships the same deference as more traditional nuclear families can lead to unjust results.

TIAG believes that the sentencing process and manual could be substantially improved by having a grid with fewer criminal history categories and offense levels, which would result in a substantially smaller number of sentencing ranges on the Sentencing Table. While the broader sentencing ranges could theoretically lead to greater sentencing disparity, TIAG believes that a more likely outcome would be a narrowing of sentence disparity. The reason for this would be that a broader range would likely lead to a greatly reduced need for imposing a variance. The broader range would actually cabin the sentences in a way that the current guidelines do not, and judges would likely find it easier to impose a guidelines sentence. The benefits of this sort of sentencing would be important both in public acceptance of sentencing and in improving the ability of the Commission to capture data without the need to spend as much effort trying to capture outlier varying sentences.

TIAG believes that as we create a new vision of sentencing guidelines, care should be taken to rebalance the approach to ensure we do not put too much emphasis on retribution and incapacitation at the cost of failing to adequately provide for restoration, rehabilitation, reintegration into society. Modern sentencing policy should do more to produce law-abiding, taxpaying citizens at the end of supervision.

C. Any sentencing policy that applies in Indian Country should encourage and facilitate cooperation, support, and consultation with Indian Nations. Federal sentencing judges should have a consultative and cooperative relationship with tribal governments and courts.

TIAG observes that there is great disparity throughout Indian Country in the nature of the relationships that exist between the federal courts, federal and state law enforcement authorities, and the tribes. The Commission should encourage supervision schemes that more fully integrate the needs and desires of the tribal communities they serve. The federal courts that operate in Indian Country are often times functioning in the same role in the tribal communities as state and county courts do in the state systems. Because of the inherent isolation of these federal systems from the tribal government, care must be taken by the federal courts, supervising officers, and federal law enforcement authorities to communicate with and cooperate with tribal governments. The

Commission needs to consider that ramifications of poor communication with outside agencies is of greater concern when dealing with tribal communities because they do not have the same access to state agencies and facilities that other communities might have.

Of particular concern to native communities are the problems arising out of supervision schemes that do not adequately integrate the input of the local community, do not understand the resources or lack of resources available on tribal land or the risks involved in ignoring the situation on the ground. Often times supervisees are required to participate in treatment programs and job programs that are "off-reservation." When these people complete supervision and return to the reservation, they are often required to go back to a place where they have criminogenic peers, high unemployment, no aftercare treatment, and little support. After a time, many people in this situation without resources relapse. The requirement that people are removed from their communities to obtain treatment and services is reminiscent of the Indian Boarding School period. It is not fair that people are removed from their communities simply because the communities are too remote or poor to provide adequate programming.

Given the need to improve the quality of resources in Indian Country, courts should be more actively involved in the crafting of conditions so the conditions can be readily complied with by the persons under supervision. For example, some tribes have high unemployment rates—as much as 80%. In these situations, imposing a condition that requires someone to maintain employment may be an unattainable condition in spite of a strong desire to comply.

D. Greater concern with public safety in Indian Country.

The federal courts can and should as a convening agent bring state, federal and tribal groups together with a view towards improving public safety in Indian Country. Among the areas of concern are the general safety of women and children in Indian Country. It is a well-known phenomenon that Native American women disappear in greater numbers and with greater frequency in Indian Country that elsewhere in the United States. Likewise, it appears that Indian children in Indian Country are more frequently exposed to neglect, abuse, and intense poverty than in many other parts of the country. TIAG believes the courts have a role to play in education, consultation, and convening other players in Indian Country to increase the level of cooperation with state, federal, and tribal authorities.

E. Structure of the U.S. Sentencing Commission

TIAG believes that inclusion of *ex officio* members of the Commission brings voices and expertise to the table that is not otherwise readily available. In particular, TIAG believes the power to ask questions that is afforded *ex officio* members of the Commission is a powerful tool for development of better sentencing guidelines. We acknowledge the questions asked by the *ex officio* Department of Justice member is invaluable in the process. That said, we believe that balance would be better if an *ex officio* slot was created on the Commission. We believe that the presence of a defender in an *ex officio* capacity would be of great use to the commission.

* * *

Thank you for consideration of our views and for being responsive to our concerns regarding how the Commission's sentencing priorities may impact defendants who are tribal members. As always, we look forward to working continuing our collaboration in the future.

Sincerely yours,

Ralph R. Erickson

Ralph R. Erickson, Chair

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

United States Sentencing Commission
One Columbus Circle, N.E.
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July 15, 2024

RE: VAG's Comment on Proposed Priorities for Amendment Cycle ending May 1, 2025

Dear Chair Reeves and Members of the Commission:

The Victims Advisory Group (VAG) appreciates the opportunity to provide written suggestions and comments to the Commission's Proposed Priorities for the 2024-2025 Sentencing Guideline Amendment Cycle.

Included with these suggestions are the VAG response to Chair Reeves' special separate request, in honor of the 40th anniversary of the Commission, for ideas of to create a "fairer, and more just sentencing system." Crime victims are major stakeholders in the criminal court system and its sentencing procedures. "[J]ustice, though due to the accused, is due to the accuser also.

The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[1]

Pursuant to its duties outlined in §1 of the VAG's Charter, the VAG offers the following to assist the Commission in determining its priorities. The VAG's membership includes experts from across the country on victim issues. Many of the members directly work with victims either as advocates, attorneys with non-profit organizations, or private attorneys representing victims of crime. As the Commission is aware, the VAG has worked tirelessly to assist the Commission by sharing the viewpoint of victim survivors of crime. The VAG recognizes the importance of, and indeed in many instances agrees with, some efforts at criminal justice reform. However, the VAG wishes to again underscore that no matter how valuable those steps are, such efforts at reform should not be done at *the expense of* victim survivor rights. Reform can occur concurrently with protection of victim survivor rights as long as victim survivors are in the forefront of the minds of policy makers. Only when victim survivors are treated as true stakeholders in the criminal justice process – i.e., their legal rights recognized both in the letter and spirit of the law, will our system truly be just.

> *(1) Continuation of ongoing priorities from prior amendment cycles and possible consideration of amendments that might be appropriate, including continued examination of the career offender guidelines (and alternative approaches to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense") as well as exploration of ways to simplify the guidelines (including continuation of its work from last amendment cycle on possible amendments to the Guidelines Manual to address the three-step process set forth in §1B1.1 (Application 6 Instructions) and the use of departures and policy statements relating to specific personal characteristics).*

Priority 1 speaks broadly of possible amendments but includes only two separate topics,

[1] *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

noted as ongoing priorities from prior amendment cycles: Career Offender Guidelines and Simplification of the Guidelines. VAG will address each separately.

a. *Continued examination of the career offender guidelines (and alternative approaches to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense").*

The VAG supports the elimination of the categorical approach to determine whether a prior conviction is a crime of violence or controlled substance offense for purpose of applying the career offender guideline under USSG § 4B1.1. The VAG supports a conduct-based approach as more aptly determining the actual or increased risk of physical or psychological injury to crime victims and better assuring the inclusion of violent offenses, such as burglary (§ 2B2.1), sex trafficking (§ 2G1.1), and violent offenses involving the reckless disregard for human life or serious bodily injury. [2]

b. *Exploration of ways to simplify the guidelines (including continuation of its work from last amendment cycle on possible amendments to the Guidelines Manual to address the three-step process set forth in §1B1.1 (Application 6 Instructions) and the use of departures and policy statements relating to specific personal characteristics).*

The VAG supports clarity in the Sentencing Guidelines. The VAG recommends to the Commission that any simplifying amendments the Commission may propose for the Guidelines not be at the expense of crime victim survivor rights and the process they are due.

Based on the Commission's 2023-2024 Proposed Amendment on Simplification of the three-step process, which the Commission did not adopt, the VAG refers the Commission to its submitted February 22, 2024, Public Comment and its March 6, 2024, Public Hearing testimony on that proposed amendment. Ensuring that federal courts can readily navigate sentencing

[2] (See e.g., KST 21-5403 (second degree murder includes homicide committed recklessly under extreme risk to human life).

guidelines helps assure that sentences imposed account for the gravity of the offense suffered by crime victims, who are the people "directly and proximately harmed as a result of the commission of a Federal offense," Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(e)(2). This is a goal VAG supports the Commission in achieving.

Pursuant to the CVRA, 18 U.S.C. § 3771(a), crime victims are afforded a number of rights implicated in any proposal to alter federal sentencing. Among these are the rights to: protection (a)(1); the right to be reasonably heard (a)(4); the reasonable right to confer with the attorney for the government (a)(5); the right to full and timely restitution (a)(6); the right to proceedings free from unreasonable delay (a)(7); and the right to be treated with fairness and with respect for their dignity and privacy (a)(8). To abide these rights, any simplification must be characterized by certain components: (1) clarity and transparency and (2) retention of current protections of victim survivor rights and interests.

A primary concern for the VAG with the Commission's 2023-2024 Proposed Amendment on Simplification was its breadth which, in February and March 2024, just four months ago, lacked extensive research by the Commission as to how the proposed amendment would unfold in practice. Without any greater detail provided in the 2024-2025 Proposed Priority of how a proposed amendment on Simplification will be presented, how it has been modified since March 2024, or research to support the proposed amendment, the VAG is still left concerned about how a proposed amendment may affect crime victim rights.

The VAG supports a simplification of the guidelines that s truly neutral and offers no hidden substantive changes to the Guidelines. Therefore, any proposals must be thoroughly researched individually to determine their specific effect on sentences and ensure they are truly

content neutral. Pinpointing some examples of concern for crime victims from VAG's February 22, 2024, Public Comment on Simplification:

· The deletion of the steps outlined in USSG § 1B1.1(b) that implicate Chapter 5 parts H and K and the reclassification of them, as "general considerations" in the proposed new Chapter 6 do not appear to make these provisions "neutral";

· Current §§ 5H1.1 – 5H1.12 (Policy Statements) provide important language explaining the relevance *and limiting factors* of Specific Offender Characteristics. Citing specifically as examples, § 5H1.2 (Education and Vocational Skills) and § 5H1.4 (Drug or Alcohol Dependence or Abuse), the VAG explained that the 2023-2024 Proposed Amendment § 6A1.2 removed that clear guidance, leaving it to the sentencing court to consider how such characteristics "may be relevant" which would broadly allow sentencing downward departures not permitted in the current text.

· The Commission proposed to eliminate departures directly tied to victims currently found in § 5K. For example, courts would no longer be directed that it is proper to depart *upward* due to Death (§ 5K2.1), Physical Injury (§ 5K2.2), Extreme Psychological Injury (§ 5K2.3), Use of Extreme Conduct (§ 5K2.8), or Public Welfare (§ 5K2.14). These are among the most common reasons given to depart upward.[3] While then-Proposed § 6A1.3 read that these factors "may be relevant," that is not the same as directing the court that these factors are appropriate for an upward departure. Such a change is not neutral.

· Of the nine primary sentencing guidelines listed in the Commission's statistics as most frequently involving departures, seven of them involve victims, including narcotics distribution,

[3] Other Departure Reasons Given by Sentencing Courts, https://www.ussc.gov/education/backgrounders/2024-simplification-data.

firearms offenses, theft, alien smuggling, robbery, and child pornography. The VAG would like further study on the types of crimes and numbers of victims affected by these and all the proposed changes.

These pinpoints each demonstrate to the VAG how the 2023-2024 Proposed Amendment on Simplification would have made sentencing under the Guidelines less predictable and, very likely, substantially lower. Such outcomes directly affect crime victims and their CVRA rights. When crime victims, and the government, have less information on what guidance the Guidelines are providing the court, crime victims suffer: a loss of protection; a reduced ability to be heard by the court; and a constrained ability to reasonably confer with the attorney for the government. When crime victims, already harmed by the offender, are then further harmed by the court process, their right to be treated with fairness and with respect for their dignity is diminished, and they may be left with a lesser sense of justice.

In its February 22, 2024, Public Comment to the 2023-2024 Proposed Amendments, pp. 41-43, VAG also asked the Commission to closely study the conformity of its Simplification proposals with federal statutory requirements. VAG does not want the Commission to act outside its legal authority in trying to simplify the Guidelines. Citing as an example the Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 (PROTECT Act), the VAG expressed concern that the Commission's 2023-2024 Proposed Amendments eliminated PROTECT Act requirements within the Guidelines.

The PROTECT Act legislatively diminished the abilities of courts to engage in practices which disproportionally affected women and girls and favored men. Not only did Congress pass legislation statutorily designed to prevent courts from doing so, it also drafted specific

amendments to the Sentencing Guidelines.[4] The Guidelines note the PROTECT Act's reaffirmance that circumstances warranting departure should be rare:

> As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the "PROTECT Act", Public Law 108–21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.[5]

The PROTECT Act legislatively required specific language resisting downward departures in USSG §5K2.0. The Commission's 2023-2024 proposal appeared to delete that legislation's effects on the Guidelines with the Commission's proposed deletion of USSG § 5H.

These and other examples cited in the VAG February 22, 2024, Public Comment, begged the question for VAG as to whether there are other federal statutory provisions similarly contradicted, as it appears to VAG that the PROTECT Act is. VAG asks the Commission to undertake extensive research to assure that any future proposed simplification amendments do not go beyond the Commission's authority by contradicting federal legislation.

(2) Implementation of any legislation warranting Commission action.

The Commission's proposed priorities do not identify any legislation currently warranting Commission action. When such legislation is identified, the VAG will fulfill its responsibility to the Commission to offer the Commission its suggestions and comments as to how such legislation may affect victims and their statutory rights under the CVRA.

[4] *See* USSG § 5K2.0, Commentary (backg'd.); § 2G2.2, Commentary (backg'd.)
[5] USSG § 5K2.0, Commentary (backg'd.)

(3) Resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991).

The Commission's proposed priorities do not identify any circuit court conflicts currently warranting Commission action. If any such conflicts are identified, the VAG will fulfill its responsibility to the Commission to offer the Commission its suggestions and comments as to how the Commission's proposed resolution of such conflicts may affect victims and their statutory rights under the CVRA.

(4) Consideration of other miscellaneous issues coming to the Commission's attention.

Proposed Priority 4 is forward looking, asking for additional issues to be brought to the Commission's attention. The sentence following Priority 4 also encourages comment: "The Commission also welcomes comment on any additional priorities commenters believe the Commission should consider in the upcoming amendment cycle and beyond." Additionally, Chair Reeves made a special separate request, in honor of the 40th anniversary of the Commission, for ideas of to create a "fairer, and more just sentencing system."

From VAG members' work with victims, VAG asks the Commission, when considering its statutory responsibilities to administer and modify the Sentencing Guidelines, to consider that many victims seek that "true balance" that "justice" is due to the accused as well as to the victim. A "just sentencing system" simply keeps its promise about what is due to offenders and to victims when laws are broken and harms inflicted, *without later sentencing changes that reopen wounds and cast doubt on the integrity of the system.* Since victims are the persons harmed by the offender, and many feel that a "more just system" will focus on that harm inflicted as much as on the background of the offender. A "more just system" for victims will provide meaningful rehabilitation programs for the incarcerated, so that upon their release they may successfully

reintegrate in their communities and not simply be released early. A "more just system" will require that restitution orders are enforced and open until satisfied.

The VAG offers the following specific issues for the Commission's consideration.

a. **Presentence Reports.**

A fairer and more just sentencing system will allow crime victims access to the Presentence Report. One of the many benefits of the modern sentencing system is the creation of the Presentence Report. This report affords offenders the opportunity to place before the court information relevant to their life experiences, but also critically gives victims an opportunity to provide essential information to the court about the offender, the offense, and its impact.

However, offenders and the government have the opportunity to both review the report prior to the hearing and to make corrections but victims do not. Victims are denied a physical copy of the report or even a review of the report.

The VAG observes through its work with victims that victims must have access to these reports for several reasons. First, information about the case, what has happened, why the offense was committed, and what factors may have motivated or influenced the offender to act, are crucial pieces of information for the court and the victim. None of these may be fully explained at either a plea hearing or at trial, beyond a description of the facts necessary to meet the essential statutory elements of the offense. When a victim attends a sentencing hearing, he or she does not know what the Court was told in the report about the offense, the victim, or the defendant's history.

Second, the victim has a right to be meaningfully heard at sentencing. "It is hard to see how victims can meaningfully provide 'any information' that would have a bearing on the

sentence without being informed of the Guidelines calculations that likely will drive the sentence and reviewing the document that underlies those calculations."[6] Without this information, the victim's comments cannot be as meaningful on how they were harmed, which then undermines their role as a stakeholder in the sentencing process and places greater focus on the offender's background than on the harm suffered by the victim from the offense.

Third, the victim does not know if the author of the presentence report accurately documented the victim's statements. Members of the VAG recount situations in which this information is simply incorrect, but without seeing the report beforehand the victim survivor does not learn of the misinformation until after sentencing. Incorrect information cannot be considered by a court at sentencing, yet there is no mechanism for a victim to ensure his or her information has been accurately conveyed.

The entire goal of the Presentence Report specifically, and the Guidelines generally, is to aid the Court in producing an accurate sentence based on relevant conduct and actions. Only one person knows certain information - the victim - and the victim needs the opportunity, just as the offender does, to ensure the information provided to the court is accurate and to object if not. A judge simply cannot be guaranteed he or she is fashioning a just sentence if it is based on inaccurate information. The only way to ensure the information is accurate is to allow the victim to also see the information and make corrections as needed.

If there is good and proper cause that a victim should not see a full Presentence Report (objections may be had to specifics of a defendant's mental health or medical history), then

[6] Paul Cassell, Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act, 2005 B.Y.U. L. Rev 835, 894-895 (2005).

alternatively a redacted Presentence Report could be made available for a victim, allowing review of their own statement, the defendant's version of the offense, the basis of the calculations, and any other reference to either the victim or the facts of the offense.

The VAG recognizes that the Commission does not control the Federal Rules of Criminal Procedure or the local procedural rules. However, the Commission does control many aspects of sentencing. The VAG notes this growing problem – particularly with the lack of access to the Presentence Report and its negative effect on the goals of sentencing. It asks the Commission to utilize its authority to allow victims access to the Presentence Reports and also make recommendations to Congress, the Supreme Court, the Judicial Conference, and the Standing Committee on Rules[7] and recommend that these provisions change such that the work of the Commission to effectuate accurate sentences can be realized more fully.

b. **Victim Notification on Term of Imprisonment Modifications due to Retroactive Commission Amendments Lowering Guidelines.**

A fairer and more just sentencing system will require broader notification of victims and enforcement of their right to be heard when terms of imprisonment may be lowered. VAG asks the Commission to amend Guideline USSG § 1B1.10 to provide Commentary regarding victim notification and a right to be heard in court proceedings pursuant to 18 U.S.C. § 3582(c)(2), just as the Commission did recently for USSG § 1B1.13.

USSG § 1B1.10 addresses court procedure, pursuant to 18 U.S.C. § 3582(c)(2), for a reduction in term of imprisonment based upon the Commission's subsequent amendment of a

[7] *See*, Rules Enabling Act, 28 U.S.C. §§ 2071-2077.

guideline range. Pursuant to USSG § 1B1.10(a)(3), the Commission directs that proceedings under 18 U.S.C. § 3582(c)(2) do not constitute a "full resentencing." [8]

Any modification of sentence, including a reduction in term of imprisonment affects victims, even if the sentence modification is not deemed a "full resentencing." Victims have anticipation at the sentencing hearing that the federal court case is over and that a final sentence is imposed. If post-sentencing modifications are made reducing the term of imprisonment, there has been no finality to the court proceeding and victim rights under the (CVRA), 18 U.S.C. § 3771, are affected, including the right to protection, to be heard, and to reasonably confer with the attorney for the government.

The right of the victim to be heard is particularly important since USSG § 1B1.10, Application Note 1(B)(ii), requires that the court "shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b)." The best public safety consideration of danger to any person or the community is for the court to hear from the person actually harmed by the offender in the crime of conviction.

As noted above, the current Commentary under USSG § 1B1.13, provides for notification and the right for the victim to be reasonably heard:

> **Notification of Victims**.—Before granting a motion pursuant to 18 U.S.C. § 3582(c)(1)(A), the Commission encourages the court to make its best effort to ensure that any victim of the offense is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified.

[8] USSG § 1B1.10(a)(3) reads: "LIMITATION.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant."

The VAG recommends at a minimum an identical Commentary following USSG § 1B1.10, simply substituting "§ 3582(c)(2)" for "§ 3582(c)(1)(A)," as a Proposed Amendment for the Commission's 2024-2025 cycle.

c. Recognize that Firearm Trafficking and Drug Trafficking Offenses are not Victimless Crimes but Have a Profound Impact on Victimizing Communities

A fairer and more just sentencing system will have the Commission explicitly recognize that Firearm Trafficking and Drug Trafficking offenses are never "victimless" crimes.

The increase in firearm violence has a devastating effect on communities. Firearm trafficking offenses directly lead to criminal violence which is injurious and fatal to people, destructive of communities, and has a disproportionate impact on communities of color and those in poverty.[9] The unlawful use of firearms is always directed to criminal violence against people. "Eight-in-ten U.S. murders in 2021 – 20,958 out of 26,031, or 81% – involved a firearm."[10] Robberies, burglaries, assaults and non-fatal shootings are all criminally violent offenses against people, many of which involve firearms. Not all criminal offenders using firearms use stolen firearms, but the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) finds that "stolen firearms are a significant source of firearms to violent criminals."[11]

Similarly, drug trafficking offenses are never victimless, even when an "identified victim" is lacking. Drug trafficking offenses resulting in death or serious bodily injury have

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[9] Gun Violence is a Racial justice Issue, BradyUnited (2022), available at https://www.bradyunited.org/issue/gun-violence-is-a-racial-justice-issue.
[10] Pew Research Center, April 26, 2023. https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/.
[11] National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns, Vol. II, Pt. V: Firearm Thefts, at 23 (Jan. 2023) https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-v-firearm-thefts/download.

identifiable victims. Drug trafficking recidivism often has identified victims. But, in addition to real people harmed, there are also families and communities directly harmed emotionally, financially, and culturally by drug trafficking offenders,

The word "victimless" is found once in the Guidelines at USSG § 3D1.2, Commentary (Backg'd.), referencing "societal harms" in the context of grouping closely related counts. But who should address the court on those societal harms is not identified in the Guidelines. The Guidelines make a distinction between "indirect" or "secondary" victims and a singular person directly and most seriously affected and identifiable as the "victim" but also note that "society at large is the victim" and "the 'victim' […] is the societal interest that is harmed." USSG § 3D1.2, Commentary, App. Note 2.

The Commission should undertake further research on the continuing impact on communities of Firearm Trafficking and Drug Trafficking offenses. This research should be conducted with a future focus on broadly identifying who may address the court at sentencing to speak for the society at large on the societal interests harmed by these offenses. While the U.S. Attorney may have the public interest in mind when prosecuting federal criminal offenses, and is allowed, pursuant to 18 U.S.C. § 3771(d)(1), to assert the crime victim rights identified in § 3771(a), broadening the stakeholders to include community members to speak to the actual societal harms they experience from firearms and drug trafficking offenses may provide a better sense of justice for those societally harmed and a better sense of community involvement to find solutions and not just punishments for these offenses.

d. Encourage Congress to Allocate Funds to the Department of Justice to Increase the Number of Victim Witness Specialists Employed in U.S. Attorney Offices.

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A fairer and more just sentencing system will recognize victim needs when they are thrust into the federal court system. This is a system which they often do not understand but are forced to navigate while at the same time suffering the emotional trauma of having been criminally harmed by the offender. A fair system ensures victims can understand both the system and their rights.[12] One component of doing this is through each U.S. Attorney's Office's Victim Witness Specialist whose job responsibilities include providing:

- Information on court proceedings and case status;
- Referrals to counseling, medical and other social services;
- Court accompaniment;
- Special services for child victims, the elderly, and handicapped victims;
- Crime victims' compensation claims assistance;
- Assistance with completing victim impact statements;
- Assistance with travel and lodging for out of town witnesses;
- Support witnesses throughout court proceedings; and
- Assistance with restitution issues.

VAG members with experience working with Victim Witness Specialists know that they are generally well-dedicated to providing empathetic and compassionate service to victims. They are also generally overwhelmed by the numbers of victims that need their assistance, especially in times of budgetary shortfalls. With the enactment of a broad expansion of so called "compassionate release," as well as other retroactive amendments, advocates now are further stretched as they attempt to notify victims of cases long since closed and address new cases. The Commission's encouragement of Congress to allocate additional funding for hiring needed

[12] Notably victims of federal crimes have the right to be advised by a lawyer of their rights under the CVRA, 18 U.S.C. § 3771, and to have that lawyer represent them in criminal trial and appellate courts. Unfortunately, very few victims have counsel. While increasing access to counsel would also be critical to a more fair criminal justice system, the VAG is not specifically detailing recommendations for Commission action on that critical issue.

Victim Witness Specialists may greatly benefit victims and allow victims to feel better treated with the fairness and respect for their dignity and privacy that is required by the CVRA.

e. Pursuant to 28 U.S.C. 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.

The Commission's last, but unnumbered, reference is to "*the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority. "* The Commission's proposed priorities do not identify any identified priorities where reducing costs of incarceration and overcapacity of prisons is relevant. If the Commission were to identify these issues and their relevance to identified priorities, the VAG will fulfill its responsibility to the Commission to offer the Commission its suggestions and comments as to how such issues may affect victims and their statutory rights under the CVRA.

The VAG thanks the Chair and Commission for this opportunity to address proposed priorities for the 2024-25 cycle.

Respectfully,

Mary Graw Leary
Chair
Victims Advisory Group

cc: Advisory Group Members

31 May 2024

Letter to United States Sentencing Commission

Dear Members of the United States Sentencing Commission,

We, the undersigned organizations, write to propose amendments to Section 2Q2.1 of the Federal Sentencing Guidelines to impose higher penalties on individuals involved in international wildlife trafficking, particularly the high-level offenders (kingpins) orchestrating these illicit operations across transnational supply chains.

In the illegal wildlife trade, kingpins – the most impactful offenders who pose the greatest threat to vulnerable species – operate with sophisticated networks across the globe, enabling them to evade law enforcement and perpetuate this devastating trade. The United States (US) has an important role to play against this global scourge, such as through the Lacey Act which provides it with a powerful instrument to spearhead the prosecution of transnational organized wildlife crime, thereby assuming a pivotal role in safeguarding our planet's biodiversity.

Wildlife trafficking poses a severe threat to biodiversity and ecosystem stability, with far-reaching impacts on local communities and global security. At present, wildlife crime is estimated to be the fourth most profitable global crime, following the trafficking of drugs, humans, and firearms. Interpol estimates that the illegal wildlife trade is worth up to USD 20 billion a year, noting that it has become a major area of activity for organized crime groups and is increasingly linked with armed violence, corruption, and other forms of organized crime.[1] Due to its high profits and perceived low risks, wildlife crime remains an extremely attractive industry for criminal networks to engage in. In its recently issued report, the United Nations Office on Drugs and Crime notes that wildlife trafficking persists worldwide despite two decades of concerted action at international and national levels.[2]

> *"That little bit of money is nothing… We do this business, 5,000 [USD] is too little you know, 5,000 [USD] we don't care. At least we do a few millions [RMB]."* – Kingpin Ah Nam, talking to Wildlife Justice Commission investigators, June 2019. [3]

The US Sentencing Commission is in a position to help shift the paradigm of the "low risk, high reward" scenario prevalent in the trafficking of vulnerable species worldwide. Understanding the critical role that legislative and regulatory frameworks play in deterring and addressing the issue of wildlife crime, we recognize the outstanding job that US federal investigators and prosecutors have done in several recent cases of investigating major international wildlife traffickers and bringing them to justice in federal

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[1] https://www.interpol.int/en/News-and-Events/News/2023/Illegal-wildlife-trade-has-become-one-of-the-world-s-largest-criminal-activities#:~:text=With%20the%20black%20market%20for,other%20forms%20of%20organized%20crime

[2] https://www.unodc.org/documents/data-and-analysis/wildlife/2024/Wildlife2024_Final.pdf

[3] Ah Nam was a Kingpin (a wholesale broker) in a transnational organized crime group that trafficked massive quantities of ivory and rhino horn from Africa to China via Vietnam. It was documented that Ah Nam had access to over 17 million USD in illegal wildlife products (incl. ivory in the equivalent of 1,760 elephants and rhino horn equating to about 106 rhinos). Ah Nam's conviction and heavy penalty (11 years in prison) sent an important message that that the risk-reward ratio for wildlife crime was changing in Vietnam. See: Ah-Nam-Report-SEP2022-V09-Spreads.pdf (wildlifejustice.org)

courts in the US. Yet the sentences handed down by the courts in these cases have often been relatively light, given the magnitude of the trafficking activity and the defendant's leading roles in those crimes. In one recent example, excellent work by the US Fish and Wildlife Service and the US Attorney's Office for the Southern District of New York resulted in the successful prosecution of Malaysian wildlife trafficker Teo Boon Ching on charges of trafficking "hundreds of kilograms of rhinoceros horns worth millions of dollars."[4] Yet at his sentencing on September 19, 2023, Ching received a sentence of only 18 months' imprisonment. In contrast, kingpins of a comparable stature received significantly higher sentences for wildlife trafficking offences in other countries such as Vietnam, China, and Tanzania.[5]

We propose that the Federal Sentencing Guidelines be recalibrated to ensure that sentences reflect the gravity of these crimes. Unlike other illicit commodities, our environment is bound by finite limits. Once a species faces extinction or an ecosystem is decimated, the irreversible consequences are undeniable.

> *"[Before we started] the justice system prioritised other cases. But our animals were dying, some of our species were going extinct. I'm playing my part to reverse this."* – Judge Gladys Kamasanyu, Uganda. [6]

We, as organizations committed to safeguarding the environment by taking a criminal law approach, can attest to the devastating consequences of wildlife trafficking on biodiversity, ecosystems, local communities, and national security. The alarming scale of this illegal trade is evident in the impact on iconic species like pangolins, rhinos, tigers, elephants, turtles, and sharks. Nearly 10,000 African rhinos have been lost to poaching in the last decade alone, while the Sumatran rhino population dwindles to fewer than 47 individuals. Over 100 million sharks are killed annually due to overfishing, with many species facing extinction. The depletion of species playing a vital role in regulating the ocean ecosystem, such as sharks and sea cucumbers, also stands as a significant catalyst of climate change. These staggering statistics emphasize the urgent need for enhanced global efforts to combat wildlife trafficking and protect these vulnerable species from imminent extinction.

Furthermore, the illegal wildlife trade poses significant threats to human lives. Globally, approximately 150 rangers die each year protecting parks and wildlife.[7] In addition, three-quarters of all emerging infectious diseases are zoonotic, with illegal wildlife markets contributing to the transfer of illnesses between species. Wildlife crime also severely undermines political and economic security. The same

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[4] Southern District of New York | Teo Boon Ching Sentenced To 18 Months In Prison For Large-Scale Trafficking Of Rhinoceros Horns | United States Department of Justice. In a similar case listed on the Homeland Security Investigations website, an undercover sting operation succeeded in luring a prolific trafficker to Seattle, where he was arrested and charged with attempting to sell $3.5 million worth of elephant ivory, rhinoceros horn, and pangolin scales. The lead defendant received a sentence of 20 months, his co-defendant 14 month. See https://www.ice.gov/features/wildlife, and https://www.nationalgeographic.com/animals/article/homeland-security-to-combat-wildlife-trafficking-crime.

[5] For instance, Ah Nam in Vietnam with 11 years, the ivory-smuggling Chen organized crime group in China with 15 years, and 'Ivory Queen' Yang Fenglan in Tanzania with 15 years. See: Ah-Nam-Report-SEP2022-V09-Spreads.pdf (wildlifejustice.org), https://wildlifejustice.org/wp-content/uploads/2024/02/WJC_Bringing-down-the-Dragon_Report_February-2022_SPREADS.pdf, https://www.bbc.com/news/world-africa-47294715

[6] https://www.theguardian.com/global-development/2023/apr/04/i-speak-for-the-animals-the-ugandan-judge-who-strikes-fear-into-poachers

[7] https://www.thegef.org/news/risking-lives-protect-wildlife-and-wildlands-stories-rangers-field

criminal networks involved in wildlife trafficking often engage in other serious organized crimes such as drugs, human trafficking, migrant smuggling, and money laundering. Corruption fuels this illicit trade, eroding trust in governmental systems and undermining the rule of law. In addition, the poaching and illegal trade of wildlife affects livelihoods, tourism, and economic opportunities for local communities, with the cost of environmental crime estimated to amount to as much as USD 1–2 trillion a year.[8]

To offer an appropriate response to this scourge in the US, we propose amendments to the Federal Sentencing Guidelines for wildlife crimes. The current guidelines often result in light sentences for major wildlife traffickers compared to other serious offenses like drug trafficking or money laundering. For instance, a trafficker responsible for the sale of $10,000,00 of illegal wildlife products might receive a guideline sentencing range of 46 to 57 months, far less than the 108 to 135 months a drug trafficker would likely face for a similar value of cocaine. This disparity fails to deter wildlife crime effectively and reflects outdated guidelines that do not account for the current organized nature of wildlife trafficking. The Federal Sentencing Guidelines, while not mandatory, nevertheless form the basic structure governing the sentences handed down for federal offenses. Light sentences meted out to hardened traffickers fail to afford adequate deterrence to criminal conduct or protect the public from further crimes by the defendant. As a result, we believe that sentences for large-scale wildlife traffickers should equal or exceed the sentences for those who launder their illegal profits.

Specifically, we recommend the following changes:

1. Raise the base offense level under Section 2Q2.1 from 6 to 8, equivalent to money laundering offenses under Section 2S1.1.[9]
2. Add a Specific Offense Characteristic enhancement of 4 levels under Section 2Q2.1(b) for defendants “in the business” of wildlife trafficking, matching the money laundering “in the business” enhancement under Section 2S1.1(b)(2)(C).[10]
3. Add offenses involving wildlife or endangered species to the list of exemptions from the new Section on 4C1.1 “Zero-Point Offenders” provision, which would prevent wildlife traffickers from benefiting unduly from the fact that they have no criminal history in the United States.

We urge the US Sentencing Commission to consider revising sentencing guidelines to ensure that those convicted of orchestrating international wildlife trafficking operations face significantly higher penalties. By imposing stricter sentences on kingpins and key figures involved in these criminal enterprises, we can disrupt trafficking networks and send a powerful deterrent message to others who consider engaging in similar activities.

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[8] https://thedocs.worldbank.org/en/doc/482771571323560234-0120022019/original/WBGReport1017Digital.pdf

[9] In response to concerns about over-sentencing minor criminals, it is important to note that a first-time minor offender sentenced under the proposed new offense level of 8 will be looking at a 0-6 month sentencing range, the same range as under the old offense level of 6. This means that offenders not involved in the business of wildlife trafficking are still likely to receive a sentence of probation. By contrast, the base offense level for defendants engaged in animal fighting as part of a federal gambling offense is level 16, twice as high as the proposed wildlife crime level of 8. (U.S.S.G. § 2E3.1)

[10] This is not duplicative of the current “pecuniary gain or otherwise involved a commercial purpose” enhancement in Section 2Q2.1(b)(1), as that enhancement could apply equally to a one-time offender who sought to sell a single prohibited wildlife item.

It is within your power to make a profound impact on the fight against wildlife trafficking and we are ready to support your efforts in any way possible and commend your leadership in addressing this pressing issue. Together, we can ensure that those profiting from the destruction of our planet's precious wildlife face appropriate consequences for their actions.

Thank you for your consideration of our recommendations. We look forward to continuing our collaboration and supporting effective measures to tackle wildlife crime.

Sincerely,

Non-Governmental Organizations

1. ADM Capital Foundation, Hong Kong SAR
2. Adventure Travel Trade Association, USA
3. Amazon Conservation Association, Amazon Basin
4. American Society of Mammalogists, USA
5. Association of Zoos and Aquariums, USA
6. Biologists without Borders, USA
7. Born Free USA, USA
8. Brookfield Zoo Chicago, USA
9. Center for Environmental Forensic Science, USA
10. Columbus Zoo and Aquarium, USA
11. Conservation Allies, USA
12. Conservation Council for Hawaii, USA
13. Conservation X Labs, USA
14. Dallas Zoo, USA
15. Dazzle Africa, USA
16. Detroit Zoological Society, USA
17. Earthday.org, USA
18. Earth League International, USA
19. ENV Wildlife Conservation Trust, USA, Vietnam, Other Southeast Asia and Africa
20. Environmental Investigation Agency, USA
21. Global Conservation Corps, USA and South Africa
22. Global Initiative to End Wildlife Crime, Global
23. Humane Society International, Global
24. Humane Society Legislative Fund, USA
25. International Wildlife Trust, USA
26. Kansas City Zoo & Aquarium, USA
27. Lawyers for Animal Protection Africa (LAPA), Kenya
28. Liberia Chimpanzee Rescue & Protection, Liberia
29. Lincoln Park Zoo, USA
30. National Whistleblower Center, USA
31. National Wildlife Federation, USA

32. Natural Resources Defense Council (NRDC), USA
33. Partners in Animal Protection and Conservation, USA
34. Re:Wild, USA
35. Santa Barbara Zoo, USA
36. SEE Turtles, USA
37. S.P.E.C.I.E.S, USA
38. The Humane Society of the United States, USA
39. The Living Desert Zoo and Gardens, USA
40. The Wilds, USA
41. TraCCC (Terrorism, Transnational Crime and Corruption Center), George Mason University, USA
42. WildAid, USA
43. Wildlife Jewels, USA
44. Wildlife Justice Commission, Global
45. World Wildlife Fund, USA
46. Woodland Park Zoo, USA
47. Zoo Atlanta, USA
48. ZooTampa at Lowry Park, USA

CJHD Center for Justice and Human Dignity | www.cjhd.org

United States Sentencing Commission
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Suite 2-500, South Lobby
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Attention: Public Affairs – Priorities Comment

July 15, 2024

Public Comments on Potential 2024-2025 Priorities of the United States Sentencing Commission

Dear Chairman Reeves and Members of the Commission:

We are grateful for the opportunity to provide our suggestions for potential priorities for the 2024-2025 amendment cycle.

Our organizations are continually heartened by the active and effective work the Commission is doing to create a more fair and just sentencing system. This latest initiative—soliciting input from the public on what its priorities should be—is yet another example of the Commission's laudatory approach to potential Guidelines reforms.

Specifically, we recommend that the Commission adopt, as priorities for the next amendment cycle, proposed amendments to the Guidelines and other actions that:

(1) advance the state of knowledge surrounding federal **alternative-to-incarceration programs** (also known as problem solving courts) through greater data collection and analysis; formulate recommendations for improvements; and provide a downward departure for defendants who successfully complete such programs;

(2) reverse the **presumption of incarceration** by making non-prison sentences more frequently available under the Guidelines;

(3) increase the role that a defendant's **personal characteristics** play in determining the Guideline range;

(4) ameliorate the unfairness resulting from the so-called **trial penalty**;

(5) revise the **loss table** for the fraud and theft Guideline, 2B1.1, to better reflect a defendant's relative culpability for, and the mitigating factors that often accompany, such offenses; and

(6) explore and implement measures to **simplify the Guidelines**.

We discuss each of these in further detail, below.

The Center for Justice and Human Dignity

The Center for Justice and Human Dignity ("CJHD")[1] is a nonprofit organization whose mission is safely reducing the use of incarceration in the United States while improving conditions for those imprisoned and correctional staff. The Center promotes human dignity and shared safety while keeping in mind the needs of survivors, system-impacted people, and society at large. Alongside diverse partners, the Center works with judges and prosecutors on ways to expand the use of alternatives to incarceration; with correctional leaders on the conditions of confinement; and with policymakers on legislative reforms to the criminal legal system. At its October 2023 Rewriting the Sentence II Summit on Alternatives to Incarceration, CJHD convened nearly 400 key stakeholders to discuss and formulate strategies for implementing innovative sentencing practices in the criminal legal system.

CJHD is closely guided by the expertise of its steering committee, comprised of 20 current and former federal judges. CJHD's board also lends the guidance of a range of experts, including the Honorable Larry D. Thompson, former U.S. Deputy Attorney General; the Honorable Nancy Gertner, Senior Lecturer, Harvard Law School and former U.S. District Judge; the Honorable Jeremy D. Fogel, Executive Director of the Berkeley Judicial Institute, former U.S. District Judge, and former Director of the Federal Judicial Center; and Alan Vinegrad, former U.S. Attorney for the Eastern District of New York.

The Aleph Institute

The Aleph Institute ("Aleph")[2] served as the incubator for CJHD's formation. Aleph was founded in 1981 and has a decades-long history of direct service in prisons around the country, and has worked with judges, legislators, executive branch officials (including prosecutors and prison officials), academics, and legal practitioners on criminal justice reform. Aleph was honored to have been a part of the bipartisan effort resulting in the passage of the First Step Act of 2018, which brought about much-needed reform to our federal criminal legal system.

Aleph also has submitted alternative sentencing recommendations in dozens of criminal cases around the country. In many of them, the judge imposed a below-Guideline sentence, based at least in part on considerations set forth in Aleph's submissions. Most frequently, courts in these cases rely upon defendants' genuine expressions of remorse and acceptance of responsibility, their prior service to their community, the damage that would be caused to their family members were the defendant to be imprisoned, and their willingness to make amends. These are among the very factors that support the government's expanded use of alternatives to incarceration, especially for defendants who do not pose a risk to public safety.

[1] https://www.cjhd.org.
[2] https://www.aleph-institute.org.

In 2016, Aleph convened an Alternative Sentencing Key Stakeholder (ASKS) summit at the Georgetown Law Center, featuring nearly 200 current and former leaders and senior government officials serving in the criminal justice system. And in 2019, Aleph co-hosted (with Columbia Law School) a second summit on Alternatives to Incarceration—titled Rewriting the Sentence—to examine the significant changes taking place in the alternatives to incarceration arena. This summit was attended by approximately 300 criminal justice system stakeholders, including federal and state judges, prosecutors, defense counsel, probation and pretrial officers, individuals directly affected by incarceration, advocacy groups, and other key stakeholders. Aleph also was a co-host of the 2023 Rewriting the Sentence II Summit discussed above.

1. **Increasing Analysis Of and Improving Alternatives to Incarceration**

We recognize and applaud the Commission for its recent efforts to increase awareness of federal alternative-to-incarceration (ATI) programs (or, what it refers to as problem solving courts). The Commission's use of its website and podcasts is an important contribution to the overarching effort to reduce the well-documented over-reliance on prison as the preferred means of punishment.

The Commission's efforts are well-justified. This is because the benefits of alternatives to incarceration have been demonstrated through data, case studies, and scholarly articles as well as the actual implementation of these alternatives in justice systems throughout the country—and yet alternative sentences have remained relatively rare in the federal system, at least for many decades. We note with great favor that the use of such alternatives is on a path to scaling up significantly, pursuant to actions by the President of the United States,[3] the U.S. Attorney General,[4] and (through its dedication in this area) the Sentencing Commission in recent years. But more can be done.

To the extent that ATI programs are proliferating—in particular, in the federal criminal legal system—their effectiveness, and the precise impacts of these programs and related measures on recidivism, would be fruitful areas for data collection and analysis by the Commission. Such efforts could assist system stakeholders in learning from the experiences of others and fashioning (or modifying) their respective programs to achieve the most positive outcomes, including lowering the risk of recidivism among the programs' participants.

The Commission can play a critical role here. While individual districts do report on the results of their ATI programs,[5] there is, to our knowledge, no single comprehensive publicly-available

[3] *Executive Order on Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety*, May 25, 2022.

[4] *Memorandum From the Attorney General To All Federal Prosecutors*, Dec. 16, 2022, at 2.

[5] *See, e.g.*, Laura Baber, Kevin Wolff, Jonathan Muller, Christine Dozier, and Roberto Cordeiro, *Expanding the Analysis: Alternatives to Incarceration Across 13 Federal Districts*, Dec. 2021 (individuals who successfully completed pretrial diversion programs were "significantly less likely" to be re-arrested on supervision); Amanda Garcia, Chief

source of this data. The Commission is well-positioned to fill this informational gap, by collecting, analyzing and disseminating data from all the federal districts that operate such programs. Such data could include graduation rates as well as recidivism rates—including new arrests or convictions, violations of probation or supervised release, participating in or completing educational programs, obtaining or maintaining employment, and obtaining, maintaining or completing mental health, substance abuse or other forms of treatment. The Commission could also utilize this data to formulate recommendations for improvements in these programs. Such steps could go a long way to maximizing knowledge about these programs and enabling system actors to design the most effective programs possible.

We also advocate an amendment to the Guidelines expressly authorizing a downward departure for defendants who successfully complete a court-supervised alternative sentencing program (in addition or as an alternative to programs that authorize the outright dismissal of charges). Such an amendment would provide an appropriate opportunity for leniency for defendants who qualify for these programs and thereafter demonstrate—to the sentencing court's satisfaction—that they abided by the program's requirements, received any necessary treatment, made any necessary amends, and do not require imprisonment as an additional sanction.

The amendment also could include alternatives to formal diversion programs that achieve similarly positive outcomes. One example is when a judge decides to defer the sentencing of a defendant to allow them to pursue rehabilitation (on their own or with support) as well as other measures (relating to education, employment and other aspects of their lives), even if they do not qualify for a formal, district-wide diversion program. In these cases, the judge can take into account a far more robust record of the defendant's post-offense conduct up until the time of sentencing and, if circumstances show that the defendant is deserving of a non-prison sentence, the court should be able to downwardly depart from the applicable Guideline range in order to achieve that outcome.

2. **Reversing the Presumption of Prison**

28 U.S.C. § 994(j) directs the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense…." This statutory directive, issued in 1984, was addressed briefly in the Guidelines' introductory commentary in 1987 and, to our knowledge, has not been addressed by the Commission since. And yet that very same commentary recognizes that "sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies"—an accurately predictive statement, given the mass incarceration that has enveloped the nation since the Guidelines were first promulgated, and the serious questions that have been raised

U.S. Pretrial Services Officer, N.D. Ill., *Comment letter to U.S. Sentencing Commission*, Oct. 6, 2022 (no re-arrests among 20 most recent graduates of district's pretrial diversion program); Hon. Ronnie Abrams and Hon. Sarah Netburn, S.D.N.Y., *Comment letter to U.S. Sentencing Commission*, Oct. 17, 2022 (recidivism rates among graduates of S.D.N.Y.'s Young Adult Opportunity Program has been "gratifyingly low," with outcomes that "are nothing short of extraordinary").

about the effectiveness of incarceration as punishment, especially for less serious offenses. Robust implementation of section 994(j) is therefore long overdue.

Data supports this. Over the last 40 years, our federal criminal justice system has embraced a presumption of imprisonment as the favored form of punishment. In 1987, 53% of federal defendants were sentenced to prison; by 2023, the number skyrocketed to 92%. But much has changed in the last 37 years—prison overcrowding; alternatives to incarceration programs; recidivism data showing that individuals convicted of lower-level offenses can be released into their communities safely—all of which makes clear that prison should no longer be the presumptive form of punishment that it has become, especially for cases at the lower end of the severity scale.

The Commission should consider making explicit what is already implicit in its designation of certain sentencing ranges as with Zones A, B, and C of the sentencing table: that defendants within those zones ought to be given sentences at the lowest end of the sentencing spectrum. Given that the highest range within those zones is only 12-18 months' imprisonment, it would be entirely reasonable for the Commission to make clear that for first-time offenses when a defendant was not convicted of a crime of violence, that defendant should ordinarily receive a non-prison sentence. Such guidance would help effectuate Congress's clear preference for non-prison sentences for defendants at the lower end of the culpability scale, while reserving to courts the ability to impose a prison sentence in an unusual case where circumstances required greater punishment.

Similarly, the Commission should consider whether to expand modestly the category of defendants eligible for such consideration by expanding the reach of Zone C—for example, from Level 13 to Level 15 for defendants with little or no criminal history. This would further reflect the current understanding that prison has been resorted to all too frequently for persons and offenses for whom it is unnecessary to achieve the ends of justice, and in many cases is downright counterproductive given the collateral harms caused by prison to defendants, their families, their communities and others that depend on them.

At the same time, the Commission's guidance should, to the extent practicable, avoid any categorical exclusion of an offense as being "otherwise serious." Rather, this determination ought be made only after a thorough consideration of all of the factors pertaining to the offense in question, including but not limited to the length of time during which the offense was committed; the resulting injury or loss; the defendant's role in the offense; the defendant's motivation in committing the offense; and any mitigating circumstances that may have contributed to or caused the conduct constituting the offense, including extenuating circumstances not amounting to a complete legal defense to the charge.

3. **<u>Greater Consideration of Personal Characteristics</u>**

The Commission should examine and, to the extent it is able to, rectify the structural disparity between the treatment of a defendant's personal characteristics under governing federal sentencing statutes and under the Guidelines.

Under 3553(a), the primary federal sentencing statute, courts are *required* to consider seven factors in determining what sentence to impose. The first factor includes "the history and characteristics of the defendant[.]"[6] That factor is not qualified in any fashion, or given any less weight than any other. It has equal status. Thus, personal characteristics, along with the other 3553(a) factors, must be taken into account by sentencing courts in determining what sentence is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing in 3553(a)(2).

Similarly, 18 U.S.C. § 3661 provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." This is consistent with 3553(a)'s directive to consider a defendant's history and characteristics, without limitation.

The Guidelines are different. A defendant's Guideline range is essentially dictated by two factors: the offense conduct (and whether the defendant pled guilty), and the defendant's criminal history. Many personal characteristics—age; education; employment; mental and emotional conditions; physical conditions; family ties and responsibilities; military, civic, charitable and public service, and prior good works—have no role in the determination of that range. Moreover, policy statements provide that some personal characteristics (such as a disadvantaged upbringing) are never a relevant basis for departure, and that other factors must be present to an "unusual" or "extraordinary" degree to warrant departure. In this way, many of a defendant's personal characteristics—which define who a defendant is as a person; their lifelong track record; their potential amenability to rehabilitation or treatment; and the impact their sentence may have on others—are given "second-class" status, marginalized by the Guidelines, as compared to the other factors that impact a defendant's sentence.

The wisdom, efficacy, and fairness of that approach is suspect, and our sentencing scheme is imbalanced, given that the Guidelines increase sentences for virtually any and every prior *bad* act, but then provide that a wide variety of prior *good* acts (such as civic, charitable, or public service; employment-related contributions; and similar prior good works) are ordinarily irrelevant in sentencing departure determinations, thus relegating these acts to potentially affecting merely where within an often-narrow sentencing Guideline range a sentence should fall.

To be sure, we recognize that at least some of this structural disparity exists because Congress has provided that certain personal characteristics generally should not be considered when determining prison terms. *See* 28 U.S.C. § 994(e) ("The Commission shall assure that the

[6] 18 U.S.C. § 3553(a)(1).

guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."). But there are steps the Commission can take to rectify the situation.

For example, the Commission can recognize that certain personal characteristics (such as age, military, civic, charitable and public service, and prior good works) are *not* constrained by 994(e) and therefore should not require extraordinary justification before a sentencing court can depart from the Guideline range on these grounds. This is precisely what the Commission did just a few months ago, when it eliminated the limiting criteria relating to a defendant's age. *See* 5H1.1.

The Commission also can ensure that the Guideline provisions for personal characteristics covered by 994(e) are not unduly restrictive when data or experience supports having these characteristics play a greater role in the Guideline process. One example of a potential Guideline amendment worthy of such revision is 5H1.6, dealing with family ties and responsibilities. As now written, such factors are generally *not* a basis for a downward departure, and may only serve that role if they are present to an unusual or extraordinary degree. Moreover, in the case of a loss of family caregiving or financial support, four additional criteria must be met—including a showing that the defendant's support is not only helpful or even important, but "irreplaceable."[7] Read literally, a defendant is deprived of any downward departure, despite being the sole means of caregiving and financial support for several children, if there were, say, a second cousin or a distant aunt who could contribute in their stead—even if the quantity or quality of that support was inferior, and even if it was undisputed that the defendant was the person who could provide the *best* support for their family. Indeed, it requires no citation of authority to recognize that parents can have a crucial, if not indispensable, role in their children's upbringing. Guideline 5H1.6 ought to be amended to better reflect the critical role that primary caregivers often have in the lives and well-being of their dependents.

Finally, the Commission can, at the appropriate time, recommend amendments to 994(e) so that it comports with 3553(a), 3661 and the legitimate—indeed, critical—role that personal characteristics should and do play in fashioning an appropriate sentence for a defendant in each individual case.

4. **Reducing the Trial Penalty**

Both the Aleph Institute and CJHD have experience with law and policy relating to the constellation of issues often referred to as the "trial penalty." Because the conditions that created this phenomenon are complex and systemic, we hope to see a multi-agency, multi-branch effort to ensure that we restore and protect the fundamental constitutional right to a jury trial. Accordingly, we support the selection of this priority for the Commission's 2024-2025 amendment cycle.

[7] Guideline 5H1.6, Application Note 1(B)(iii).

The "trial penalty" has been described as "the substantial difference between the sentence offered in a plea offer prior to trial versus the sentence a defendant receives after trial. This penalty is now so severe and pervasive that it has virtually eliminated the constitutional right to a trial. To avoid the penalty, accused persons must surrender many other fundamental rights which are essential to a fair justice system."[8] In essence, instead of merely conferring a reasonable benefit on people who accept responsibility and plead guilty, the current system gives prosecutors nearly unfettered power to threaten vastly increased sentences to people who assert their constitutional presumption of innocence and challenge the government to meet its burden of proof at trial.

The magnitude of the effects on our current system cannot be overstated. Only three percent of criminal cases go to trial today, in contrast with prior periods in which approximately 20 percent of criminal cases went to trial. "The vast majority of felony convictions are now the result of plea bargains—some 94 percent at the state level, and some 97 percent at the federal level. Estimates for misdemeanor convictions run even higher."[9] The late William J. Stuntz, a former Harvard Law School professor and criminal justice scholar, noted that "those who are punished most severely are often those who made the worst deals, not those who committed the worst crimes."[10]

Not infrequently, the significant leverage given to prosecutors under the current system even causes innocent people to give up their constitutional rights, rather than risk draconian sentences by going to trial. As has been explained by U.S. District Judge Jed Rakoff of the Southern District of New York,[11] it often makes sense for people who have committed no crime whatsoever to convict themselves by accepting a plea offer subject to the explicit or implicit threat that, if they fail to do so, the charges will be vastly increased and they will be subjected to the risk of a much harsher sentence if they are convicted after a trial. As Judge Rakoff notes, the modern criminal legal system "provide[s] prosecutors with weapons to bludgeon defendants into effectively coerced plea bargains."[12] Moreover, "the typical person accused of a crime combines a troubled past with limited resources: he thus recognizes that, even if he is innocent, his chances of mounting an effective defense at trial may be modest at best. If his lawyer can obtain a plea bargain that will reduce his likely time in prison, he may find it 'rational' to take the plea… This has "caus[ed] the virtual extinction of jury trials in federal criminal cases."

One example of trial penalty injustices is that of Daniela Gozes-Wagner, a single mother of two young children, who was sentenced to 20 years in prison for her subordinate role in a health fraud scheme.[13] Meanwhile, several ringleaders (and beneficiaries) in the scheme pleaded guilty

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[8] National Association of Criminal Defense Lawyers ("NACDL"), *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It,* July 2018, available at https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth amendment- right-to-trial-on-the-verge-of-extinction-andhow-to -save-it.pdf.

[9] Emily Yoffe, *Innocence Is Irrelevant: This is the age of the plea bargain—and millions of Americans are suffering the consequences, The Atlantic*, Sept. 2017.

[10] William J. Stuntz, *The Collapse of American Criminal Justice* (2011), at 58.

[11] Jed S. Rakoff, *Why Innocent People Plead Guilty,* The New York Review of Books, Nov. 20, 2014.

[12] *Id.*

[13] *United States v. Gozes-Wagner*, 14-cr-637 (S.D. Tex.).

and were given sentences of 5 or 6 years. According to her trial attorney, "… Daniela was also offered the opportunity to plead guilty to a single count of conspiracy to defraud the United States (18 U.S.C . § 371), which carries a 5-year maximum. … I reasonably anticipated that the government would have recommended that Daniela receive a guidelines sentence of 48 months…" But he notes that Daniela was a devoted mother… [who] could not face the possibility of separation from her children, and she chose to go to trial."[14]

Ms. Gozes-Wagner ended up paying an intolerably severe price for that decision. Indeed, the imposition of such a long sentence on Ms. Gozes-Wagner was based, in the judge's own words, on the fact that she "exercised the constitutional rights that she has in the United States to plead not guilty."[15] Ms. Gozes-Wagner's sentence drew the condemnation of numerous interested parties, including in the form of an amicus brief (spearheaded by the Aleph Institute and co-authored by CJHD), signed by six former U.S. Attorneys General, two former Solicitors General, a former FBI Director, and nearly 100 former federal and state judges and U.S. Attorneys.

The trial penalty also has the unfortunate effect of shifting authority over the proper sentence from impartial judges to prosecutors. By offering plea deals that include reduced charges or promises not to seek sentencing enhancements to those who accept them, and piling charges and sentencing enhancements on those who do not, prosecutors often persuade judges that they have no choice but to impose a sentence vastly out of proportion to the actual culpability of the defendant. These practices also give prosecutors immense leverage to extract guilty pleas in multiple-defendant cases, because the first co-defendants to accept a plea offer almost always get far better dispositions than those who plead later or insist on going to trial, a practice that often bears no relationship to either the defendant's culpability or their amenability to rehabilitation.

We urge the Commission to lend its considerable expertise to this important issue. Indeed, we are unaware of any major report on the issue since the NACDL's report in 2018, or any significant traction at the federal government level for examining it. America's criminal jury trial system needs significant attention in order to divert its path away from complete extinction.

In short, the imposition of the trial penalty is a blemish on the nation's criminal legal system. The diminution of trial rights has become an intractable systemic problem that can only be addressed with the participation of all relevant stakeholders—including the Sentencing Commission. We believe it is incumbent upon all to do what they can to restore this crucial component of our system to its rightful place.

We recognize that, in a system that accepts and depends on plea bargaining, some form of trial penalty is unavoidable. But that penalty has, in at least some cases, gotten far too severe, with negative consequences for both defendants who suffer it and others who take undesirable steps

[14] Letter of Ms. Gozes-Wagner's trial attorney T. B. Todd Dupont II, Nov. 11, 2020.
[15] *United States v. Gozes-Wagner*, ROA.20157:1234.

(like pleading guilty to crimes they didn't commit) to avoid it. The Commission should robustly explore options to ameliorate the trial penalty phenomenon.

For example, the Commission could call for the disclosure of a plea offer to the sentencing judge, to identify changes to the Guideline calculation from the plea offer to the post-trial stage, and thereby allow greater scrutiny of whether those changes are fully supported and justified. Alternatively, the Commission should consider whether to implement a presumptive "cap" on the differential between a plea offer and the ultimate sentence to be imposed, such that the sentence cannot (absent exceptional circumstances) be a certain percentage greater than the plea offer. In these and perhaps other ways, the Commission can help reduce the risk that a defendant who chooses to go to trial does not pay an exorbitant price for doing so.

5. **Revising the Loss Table**

Much has been said over the years about 2B1.1's loss table. Criticism of it is plentiful—in terms of the outsize role it has in determining a defendant's Guideline range, its flaws as a proxy for culpability, and the sheer harshness of the results it produces.[16] Examples of the excesses produced by the loss table abound; for two examples of cases in which the Aleph Institute was involved at various stages, *see United States v. Gozes-Wagner*, 14-cr-637 (S.D. Tex.) (20-year sentence in health care fraud case for mid-level first-time offense by a single mother of two children) and *United States v. Rubashkin*, 08-CR-1324 (N.D. Iowa) (27-year sentence in bank fraud case for first-time offense by a defendant with 10 children). Indeed, it is not a coincidence that, in the most recent reporting year, sentencing courts granted downward variances in 42.7% of fraud and theft case – a strong indication that Guideline sentences in these cases are excessive.[17]

The *Gozes-Wagner* case was addressed above (at pp.8-9); the *Rubashkin* case prompted a letter to the sentencing court from six former Attorneys General of the United States and many other former high-ranking federal law enforcement officials, excoriating the draconian nature of the loss guideline. *See* Letter to Hon. Linda Reade, Apr. 26, 2010, at 2 ("We cannot fathom how truly sound and sensible sentencing rules could call for a life sentence—or anything close to it—for Mr. Rubashkin, a 51-year-old, convicted of a first-time, nonviolent offense whose case involves many mitigating factors and whose personal history and extraordinary family circumstances suggest that a sentence of a modest number of years could and would be more than sufficient to serve any and all applicable sentencing purposes."). Justice was ultimately achieved in both cases only because of the extraordinarily rare exercise of Presidential commutation authority—but numerous defendants are far less fortunate.

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[16] *See, e.g.*, B. Boss and K. Kapp, *How the Economic Loss Guideline Lost its Way, and How to Save It*, Ohio State Journal of Criminal Law, Vol.18.2, 605 (2021); R. Eliason, *The New Sentencing Guideline for Fraud Cases*, May 4, 2015, *available at* https://www.sidebarsblog.com/p/the-new-sentencing-guideline-for-fraud-cases; American Bar Association Criminal Justice Section, *A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes*, Nov. 10, 2014, *available at* https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf.

[17] U.S. Sentencing Commission, *2020 Sourcebook of Federal Sentencing Statistics*, at 90.

At the same time, our criminal justice system has begun to come to terms with the harms of the reflexive, and excessive, resort to incarceration as the preferred means of punishment in this country. Alternatives to incarceration are being used more often. Pretrial diversion programs have taken hold in many federal districts, with more to come by virtue of the United States Attorney General's commendable directive, in December 2022, for every U.S. Attorney's Office to have a pretrial diversion policy.[18] And since 2005, when the Guidelines were made advisory,[19] courts downwardly vary frequently from the Guidelines, including imposing non-incarceratory sentences in cases in which the Guidelines call for imprisonment.[20]

Moreover, data show that many individuals can be held accountable without imprisoning them, consistent with public safety. To take one recent, striking example: since the spring of 2020, 13,204 incarcerated individuals have been released early to home confinement pursuant to the CARES Act of 2020, on the grounds that they suffered from vulnerability to COVID and were low-risk individuals least likely to re-offend. Three years later, only 22 of them (a fraction of 1%) have been arrested on new charges, the vast majority of which were for nonviolent offenses.[21] This demonstrates that many individuals (including ones sentenced based on 2B1.1) who were in prison, did not need to be (or at least, did not need to be there for as long as their sentences provided)—and that prison space, personnel, and programmatic resources can be more effectively deployed.

All of these phenomena support the conclusion that the Commission should review rigorously the loss table and the overall severity of 2B1.1, and consider amending it to better conform it to current federal sentencing policies, practices, and data. By lowering the loss amount thresholds, as well as the number and severity of the numerous specific offense characteristics that increase the Guideline range so substantially, the Commission can, at long last, reverse the decades-long trend of increasingly and unnecessarily severe punishments in these cases. By so doing, the Commission can deliver on what it said nearly 40 years ago—that in many economic crime cases, a "short" prison term will provide adequate punishment.[22]

6. **Simplifying The Guidelines**

Simplifying the Guidelines is a worthy and long-overdue endeavor. Several data points illustrate the need. The 1987 Guidelines Manual is 290 pages. The 2021 manual is 600 pages, with another 1,460 pages devoted to the 813 amendments that have been promulgated. 2B1.1, the principal economic offense guideline, has 20 specific offense characteristics, 14 of which have one or more subparts. 2D1.1, the principal narcotics offense guideline, has 17 specific offense characteristics, 6 of which have one or more subparts. This, of course, does not take into account all of the other components of computing an advisory Guideline range—victim adjustments, role adjustments,

[18] *Memorandum From The Attorney General To All Federal Prosecutors*, Dec. 16, 2022, at 2.
[19] *United States v. Booker*, 543 U.S. 220 (2005).
[20] U.S. Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics*, at 90 (downward variances in 32.2% of all cases).
[21] Sen. Cory A. Booker, *CARES Act Home Confinement Three Years Later*, June 2023, at 4.
[22] Guideline 1A4(d)).

obstruction adjustments, multiple-count adjustments, acceptance of responsibility adjustments, and the criminal history category (with its own myriad set of intricate rules)—as well as upward departures and downward departures from that range. The considerable time and energy required to perform the task of working though the Manual to calculate the range for a specific set of charges appears even more disproportionate, given that the Guidelines (since 2005) no longer control the sentencing process as they once did, but instead provide a non-binding reference point for what a defendant's sentence should be.

The Commission ought to thoroughly review the Guidelines Manual to identify opportunities to streamline its contents, consistent with the advisory role the Guidelines now play in the sentencing process and the fact that, in some instances, they are more complicated than is necessary to fulfill that function.

Conclusion

We commend the Commission for soliciting input on potential priorities for the 2024-2025 amendment cycle. We stand ready to assist the Commission in any way it sees fit.

Respectfully,

Christopher Poulos
Executive Director
Center for Justice and Human Dignity

Rabbi Sholom Lipskar
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Alan Vinegrad
Pro Bono Counsel, Aleph Institute
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July 15th, 2024

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Public Comment of Suggestions for 2024 Agenda

Dear Judge Reeves and Members of the Commission,

For over a decade, the Conservative Political Action Coalition ("CPAC") and the Faith & Freedom Coalition have been working to modernize and strengthen our criminal justice system to meet our shared goals of accountability and redemption.

We appreciate the opportunity to offer to the United States Sentencing Commission ("Commission") ideas to create a fair and just federal sentencing system. Our organizations are strongly committed to promoting public safety, prioritizing rehabilitation, growing the workforce, and strengthening the family. To that end, we believe the following topics are worthy of the Commission's research consideration.

I. Recidivism: Studying Best Practices to Achieve Positive Public Safety Outcomes

A. Defining Recidivism

Recidivism is a critical measure of the success of the criminal justice system. Ensuring that individuals returning to society do not commit subsequent offenses is in the interest of all Americans concerned about the safety of the communities we live in. However, as we attempt to assess this critical objective of our justice system, there remains no standardized definition of recidivism. This poses a significant challenge for researchers and policymakers. It is imperative that a clear and consistent definition be established to enhance research quality, facilitate comparison, and improve communication of results. Therefore, we urge the Commission to standardize the metric that defines reoffending along with a time period to evaluate whether an individual has recidivated under law.

We believe the standard for defining recidivism should be reconviction because it is consistent with our system's presumption of innocence. Other proposed measures, such as establishing the line of demarcation at rearrest, presume guilt where in fact the arrested may be proven innocent in later proceedings. This is antithetical to the presumption of innocence afforded by the Due Process Clause of the Fifth Amendment. Re-arrest skews the data to reflect a recidivism rate that is higher than the actual conviction rate.

Moreover, we oppose simply using reincarceration as the standard measure because it does not account for offenses that result in other types of penalties such as fines, deferred prosecutions, and time-served agreements, which would underreport the full extent of recidivism. With our stated goal of improving public safety and outcomes in the justice system, measuring the point of conviction serves as the most transparent metric that is consistent with Constitutional values and tells the actual story of whether another crime was committed.

Additionally, the follow-up period is often overlooked when defining recidivism. We acknowledge that a longer follow-up period more accurately captures the performance of the corrections system, however, existing data shows that these rates of re-offense drop as time goes on.[1] As the Commission works towards a standard definition of recidivism, our organizations encourage a follow-up period within a small number of years post incarceration that aligns with existing data showing most subsequent offenses occur shortly post-incarceration.

B. Quantifying the Impact of the CARES Act

During the COVID-19 Pandemic, Congress enacted the CARES Act to provide relief to those adversely affected by the pandemic and to mitigate virus transmission. In the prison system, low-risk offenders with COVID-19 risk factors completed their sentences under home confinement.[2] The Department of Justice (DOJ) conducted a study comparing recidivism rates between those receiving CARES Assignment and those who did not for similar offenses. The study found that early release with home confinement did not lead to higher recidivism rates.[3] In fact, offenders with a CARES Assignment had a lower recidivism rate.[4]

We ask that the Commission continue gathering data on home confinement and recidivism to observe trends in recent data. This data should also reflect the specific factors that were evaluated for each individual who was released early under the law. We also request the Commission conduct a study identifying corrections budgets pre- and post- CARES Act to show how the system handled the immediate influx of individuals being placed on supervisory release while also ensuring those still behind bars were being provided effective services.

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[1] U.S. SENT'G COMM'N, RECIDIVISM AND FEDERAL BUREAU OF PRISONS PROGRAMS: DRUG PROGRAM PARTICIPANTS RELEASED IN 2010, 7-8 (May 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220517_Recidivism-BOP-Drugs.pdf.

[2] FED. BUREAU OF PRISONS, U.S. DEP'T. OF JUST., CARES ACT: ANALYSIS OF RECIDIVISM, 2 (Mar. 2024), https://www.bop.gov/resources/research_projects/published_reports/recidivism/202403-cares-act-white-paper.pdf. Those who received a CARES Assignment were low risk offenders with less than half of their sentence remaining or completed at least 25% of sentence with less than 18 months left. Violent, terrorist, or sex offenses rendered an individual ineligible.

[3] *Id.*

[4] *Id.*

C. Quantify the Impact of Expungement, Housing, and Employment on Recidivism Rates

Stable employment and housing are key to successfully reintegrating formerly incarcerated individuals and to prevent recidivism.[5] Research has shown that stable full-time employment decreases the likelihood of reoffending.[6] Educational programs in prisons, such as college education, vocational training, and adult basic education, improve post-release job success and lower recidivism rates.[7] Prison employment programs including work release and prison labor, also enhance employment post-imprisonment.[8] However, the direct effects of these employment programs on recidivism remains unclear.[9]

We are interested in the impact of expungement programs on recidivism, housing, and employment outcomes for previous offenders. A study conducted in Michigan revealed that expungement lowers recidivism, and by clearing a criminal record, expungement removes barriers to employment, allowing individuals to compete fairly in the job market.[10]

Securing employment gives the formerly incarcerated the ability to acquire housing which is important as individuals who experience homelessness or lack stable housing upon release from prison have higher rates of recidivism.[11] However, the rising costs of housing and the background screenings used by private landlords and public housing authorities make finding affordable housing difficult for those with prior convictions.[12] With a cleared record, expungements allow those with prior convictions to overcome the criminal background check barrier to acquiring housing.

Based on the research above, we ask the commission to conduct a study clarifying the effect of work release and prison labor on recidivism. We also ask that the Commission provide data on

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[5] Calvin Johnson, *Why Housing Matters for Successful Reentry and Public Safety*, HUD USER OFFICE OF POLICY DEVELOPMENT AND RESEARCH (Apr. 19, 2022), https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-041922.html.

[6] Grant Duwe & Makada Henry-Nickie, *A better path forward for criminal justice: Training and employment for correctional populations*, BROOKINGS-AMER. ENTER. INST. 59 (Apr. 2021), https://www.brookings.edu/wp-content/uploads/2021/04/6_Better-Path-Forward_Ch6_Training-and-Employment.pdf.

[7] Steven Sprick Schuster & Ben Stickle, *Are Education Programs in Prison Worth It*, MACKINAC CTR. PUB. POL'Y. 4-5 (Jan. 24, 2023), https://www.mackinac.org/archives/2023/s2023-01.pdf.

[8] Grant Duwe & Makada Henry-Nickie, *supra* note 6, at 60.

[9] *Id*. at 59; *see also* NAT'L INST. OF JUST., PROGRAM PROFILE: FLORIDA WORK RELEASE PROGRAM, (Sept. 5, 2017), https://crimesolutions.ojp.gov/ratedprograms/558#4-0 (finding work release programs reduce recidivism among those who commit non-income generating crimes and noting a stronger effect on reducing recidivism among high school educated and older prisoners).

[10] J.J. Prescott & Sonja Starr, *The Power of a Clean Slate*, CATO INST. (2020), https://www.cato.org/regulation/summer-2020/power-clean-slate (referencing J.J. Prescott and Sonja Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HVLR 2460 (2020)).

[11] Leah A. Jacobs & Aaron Gottlieb, *The Effect of Housing Circumstances on Recidivism*, CRIM. JUST. BEHAVIOR (Aug. 6, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8496894/. Homelessness at the start of probation and over the course of probation tended to increase recidivism by 35-44%, even for low-risk recidivists.

[12] Justin Dorazio, *Strengthening Access to Housing for People with Criminal Records Is Key to Successful Reentry*, CTR. FOR AMERICAN PROGRESS (Apr. 17, 2023), https://www.americanprogress.org/article/strengthening-access-to-housing-for-people-with-criminal-records-is-key-to-successful-reentry/.

expungement and recidivism at the federal level generally and in the context of housing and employment.[13]

II. Taking a Stand: Restoring Rights at Trial

A. Does Exercising 5th Amendment Rights Negatively Impact Defendants?

Defendants facing criminal penalties must decide whether to testify at trial. Although, at first, this seems to be solely a strategic decision, taking the stand can have significant collateral consequences in the federal system. Specifically, the Federal Code allows for sentencing enhancements when an individual takes the stand and is later found guilty through the jury or plea process. In *United States v. Grayson,* the Court held that sentence enhancements are not unconstitutional because the defendant's right to testify is limited to testifying truthfully.[14] Per Sentencing Guidelines passed by Congress, a defendant's sentence is automatically enhanced when the defendant commits perjury at trial. The 3C1.1, or obstruction enhancement, is put into effect where the defendant willfully gives false testimony under oath for a material matter of the case to "substantially affect the outcome of the case."[15]

The Court's policy considerations–retribution and incapacitation–which necessitate the sentence enhancement appear to be driven by a concern with the defendant's *mens rea*, as those who obstruct an investigation by circumventing a legal proceeding are thought to be more culpable than those who comply.[16] We are concerned that in practice, upholding and enforcing sentence enhancements have a potential chilling effect on the defendant's choice to testify, especially in situations where the defendant may testify truthfully in good faith, but their account does not align with the factual determination of the jury.[17] A defendant who stands to lose their liberty in the wake of a criminal conviction should be able to take the stand without fear of receiving an enhanced sentence if the defendant's testimony does not align with the jury's factual determinations.

We ask that the Commission gather data to determine whether defendants are declining the opportunity to take the stand for fear of perjury sentence enhancements. Specifically, we seek information on how often the sentence enhancement is invoked in criminal trials and circumstances that typically result in invoking sentence enhancement.

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[13] Diana Kawka, *Expungement: The Missing Federal Piece*, MINN. J. L. & INEQ. (2023), https://lawandinequality.org/2023/05/10/expungement-the-missing-federal-piece/. Expungement availability is currently very limited at the federal level.

[14] 438 U.S. 41, 54 (1978).

[15] *United States v. Dunnigan*, 507 U.S. 87, 94-5 (1993); s*ee also* Peter J. Henning, *Balancing the Need for Enhanced Sentences for Perjury at Trial Under Section 3C1.1 of the Sentencing Guidelines and the Defendant's Right to Testify*, 29 AM. CRIM. L. REV. 933, 935 (1992), https://digitalcommons.wayne.edu/lawfrp/122.
This enhancement does not apply in instances of "confusion, mistake, or faulty memory[,]" and the defense may raise "lack of capacity, insanity, duress, or self-defense" to corroborate such instances.

[16] *Dunnigan*, 507 U.S. at 97-8.

[17] *See* Peter J. Henning, *supra* note 15, at 934.

B. Mandatory Minimums: What Effect Does This Have on Overdoses and Public Safety Outcomes?

Mandatory minimum sentencing has long been used in federal sentencing under the premise that by guaranteeing a certain sentence, those in the illicit drug markets would be deterred from use and sale. These laws were intended to target "kingpins," who control drug trafficking or other criminal enterprises. [18] We are concerned that mandatory minimums are penalizing users instead of the kingpins allowing drug trafficking to continue. Additionally, we are worried that prioritizing incarceration over treatment has failed to curb the drug addiction crisis.[19]

Where mandatory minimum sentencing laws remain effective, safety valve or statutory relief provisions expanded by the First Step Act (FSA) give judges discretion to abandon the mandatory minimum sentence for drug trafficking in certain situations.[20] As a result, more than half of offenders charged with mandatory minimums received relief from their original sentence.[21]

We ask the commission to conduct an updated study regarding the effect of mandatory minimums on recidivism.[22] To explore the effects of mandatory minimum sentencing on the drug addiction crisis, we also request the Commission determine whether mandatory minimum sentencing has affected drug overdose rates. Considering many mandatory minimum offenders are now sentenced according to safety valve provisions, we ask the commission to study recidivism with respect to safety valve relief.

III. From Entry to Exit: Measuring Success in Programing and Supervision

A. Revocations for Technical Violations

According to a Council of State Governments report, nearly 45% of state prison admissions are due to violations of probation or parole.[23] At the state level, incarcerating individuals for technical violations places a substantial financial burden on the taxpayer. In 2019, New York

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[18] Sal Nuzzo, *Mandatory Minimums, Crime and Drug Abuse: Lessons Learned and Paths Ahead*, JAMES MADISON INST. (2019), https://jamesmadison.org/mandatory-minimums-crime-and-drug-abuse-lessons-learned-and-paths-ahead/. Repealing mandatory minimums at the state level proved successful for New York and Michigan in reducing crime rates and recidivism.

[19] Adam Gelb, Phillip Stevenson, Adam Fifield, Monica Fuhrmann, Laura Bennett, Jake Horowitz & Erinn Broadus, *More Imprisonment Does Not Reduce State Drug Problems*, PEW RESEARCH (Mar. 8, 2018), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems.

[20] U.S. SENT'G. COMM'N., MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 11 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf [hereinafter "Mandatory Minimum Penalties"].

[21] *Id.* at 6.

[22] Mandatory Minimum Penalties, *supra* note 20, at 62. Mandatory minimum sentencing tends to produce lower recidivism rates. However, research suggests this lower rate is attributable to the older age of offenders at release, not the penalty itself.

[23] COUNCIL OF STATE GOV'TS JUST. CTR, CONFINED AND COSTLY: HOW SUPERVISION VIOLATIONS ARE FILLING PRISONS AND BURDENING BUDGETS, (June 18, 2019), https://csgjusticecenter.org/publications/confined-costly/.

State spent approximately 683 million dollars on incarcerating individuals for technical parole violations.[24] Similarly, in Connecticut, incarcerating people for noncriminal behaviors costs taxpayers about $1,200 per week per person.[25]

Given the substantial financial burden at the state level, our organizations suspect that Federal costs related to supervisory release are both excessive and ineffective. To that end we ask the Commission to provide data on imprisonment as a result of technical parole/supervision violations in the federal prison system. Additionally, we request that the Commission identify common causes of technical violations, gather research on alternative sanctions as an effective punishment, and research effective interventions for reducing technical violations.

B. Effectiveness of Bureau of Prisons (BOP) Programming

Access and participation in effective programming while incarcerated is critical when considering progress toward rehabilitative goals. Research demonstrates that prison programs positively impact in-prison conduct, recidivism, and post-release employment. The First Step Act included provisions to help increase program offerings in federal prisons, including through partnerships with community and faith-based organizations. However, there has been a very limited expansion of programming. Under the FSA, BOP programming is divided into two categories: Evidence-Based Recidivism Reduction Programs (EBRRs), and Productive Activities (PA). EBRRs are structured activities empirically shown to reduce recidivism by addressing identified needs, while PAs are meant to enhance skills and promote productive activities to maintain or achieve low-risk levels.[26] However, the program review process implemented by BOP, and not required by statute, has served as a barrier to entry for many promising and widely utilized programs especially faith-based programming.

While formal evaluations in this area are minimal, research has linked participation in faith-based programs to recidivism reduction.[27] Therefore, we ask the Commission to gather empirical data on the impact of faith-based programming on recidivism rates including current program offerings within the Bureau of Prisons, examining the level of participation, expansion of programming since the passage of the FIRST Step Act, and any qualifying factors for the accrual of earned time credits. Additionally, we request the Commission provide more comprehensive guidelines for distinguishing between EBRRs and PAs.

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[24] David Glovin, *The $300M Cost of NY Reincarceration: Technical Violations of Parole*, THE CRIME REP. (March 11, 2021), https://thecrimereport.org/2021/03/11/the-300m-cost-of-ny-reincarceration-technical-violations-of-parole/.

[25] Peter Wagner & Leah Wang, *Probation and Parole Reforms Need to Focus on Reducing Technical Violations*, PRISON POL'Y INITIATIVE (May 23, 2023), https://www.prisonpolicy.org/blog/2023/05/23/probation-parole-reforms/.

[26] FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., FIRST STEP ACT APPROVED PROGRAMS GUIDE, 2 (Sept. 2023), https://www.bop.gov/inmates/fsa/docs/fsa_guide_eng_2023.pdf [hereinafter "First Step Act Programs"].

[27] Kimberly D. Dodson, Leann N. Cabage & Paul M. Klenowski, *Evidence-Based Assessment of Faith-Based Programs: Do Faith-Based Programs 'Work' to Reduce Recidivism*, 50 J. OFFENDER REHABILITATION 367, 367-383 (2011), http://dx.doi.org/10.1080/10509674.2011.582932.

IV. Conclusion

We are thankful for the opportunity to submit public comment on what the U.S. Sentencing Commission should prioritize in the coming amendment cycle. CPAC and Faith & Freedom believe that the research areas set forth above will not only contribute to public safety through evidence-based solutions, but also meet the Commission's goals of improving federal sentencing policies to provide certainty and fairness and avoid sentencing disparities.[28] The requests made will provide data to guide researchers and policymakers ensuring that the criminal justice community is able to effectively help incarcerated individuals successfully reintegrate into society.

CPAC and Faith & Freedom applaud the Commission's desire to receive public input on how to create a fair and just federal sentencing system. We hope that our research goals will be considered.

[28] Proposed Priorities for Amendment Cycle,18 Fed. Reg. 48029 (proposed Jun 4, 2024).

IOWA | Federal Criminal Defense Clinic
Clinical Law Programs

July 11, 2024

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South Lobby
Washington, D.C. 20002-8002

Re: Revisiting the Sentencing Guidelines on Reductions in Sentence Extraordinary and Compelling Category, § 1B1.13(b)(4) - Victim of Assault

Dear Judge Reeves:

Professors Meredith Esser, Director of the Defender Aid Clinic at the University of Wyoming College of Law, and Alison Guernsey, Director of the Federal Criminal Defense Clinic at the University of Iowa College of Law, welcome this opportunity to comment on the priorities of the U.S. Sentencing Commission for the upcoming amendment cycle. We are both professors engaged in clinical law teaching and pedagogy and former lawyers with the Federal Defender organization. As such, we support the Commission in its aim to "fulfill its mission to make the federal criminal legal system fairer and more just."

Over the past year, our clinics have represented seven victims of abuse by Bureau of Prisons (BOP) staff. Abuse that was inflicted while our clients were incarcerated at the now-defunct Federal Correctional Institution (FCI) Dublin. In 2023, our clinics strongly supported the Commission's decision to amend U.S.S.G. § 1B1.13(b) to include a category for "victims of sexual assault . . . committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody" as an extraordinary and compelling reason for compassionate release.[1] Our clinics have seen first-hand the importance of including sexual abuse as an extraordinary and compelling

[1] U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(4) (U.S. SENT'G COMM'N 2023).

circumstance that may warrant release so our clients, and others like them, can receive sentencing relief and start to recover from the traumas they have experienced.

However, given our clinics' experience litigating reduction-in-sentence cases arising out of FCI Dublin both before and after the promulgation of (b)(4), for the reasons outlined below, we have two recommendations for the Commission's focus as it considers the future of U.S.S.G. § 1B1.13(b)(4):

(1) Revisit the overly-draconian and impracticable substantiation requirement,[2] and

(2) Broaden the definition of "sexual abuse."

A. We commend the Commission's inclusion of U.S.S.G. § 1B1.13(b)(4) in the definition of "extraordinary and compelling" reasons that justify a sentence reduction.

Over the past two years, FCI Dublin has frequently made national headlines because of the rampant and systemic sexual violence and abuse perpetrated by BOP employees against incarcerated survivors in their "care." The egregious nature of what happened in FCI Dublin highlights the importance of the Commission's decision to promulgate U.S.S.G. § 1B1.13(b)(4). But important changes are needed. As necessary background for our concerns, it is worth reviewing some of what transpired at FCI Dublin:

In December 2022, a jury found the former warden of FCI Dublin, Ray Garcia, guilty of eight counts of sexual abuse and one count of lying to the Federal Bureau of Investigation (FBI).[3] This conviction was the first of many. To date, seven correctional officers who were working at FCI Dublin have been convicted and sentenced for repeatedly raping and sexually abusing incarcerated women and orchestrating efforts to cover up their offenses.[4] As of this writing, the Department of Justice (DOJ) is

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[2] For a detailed critique of the substantiation requirement, parts of which are included in this comment letter, *see* Meredith Esser, *Who Bears the Burden When Prison Guards Rape?*, 109 IOWA L. REV. ONLINE 188 (2024).

[3] Lisa Fernandez, *Dublin prison warden sex abuse trial: How the jury came to its guilty verdict*, KTVU Fox 2, Dec. 9, 2022, https://www.ktvu.com/news/fci-dublin-warden-sex-abuse-trial-how-the-jury-came-to-its-guilty-verdict.

[4] *See Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the Subcomm. on Investigations, Comm. on Homeland Sec. & Gov't Affs.*, 117 Cong. 26 (2022) [hereinafter

investigating at least seventeen current or former employees at FCI Dublin for sexual misconduct.[5] Sixty-three civil suits have been filed against FCI Dublin, the BOP, and its former employees based on sexual abuses that occurred at the prison.[6] A federal judge in the U.S. District Court for the Northern District of California, Judge Gonzalez Rogers, appointed a special master to oversee the facility.[7] And in April 2024, because of an inability to fully address the widespread misconduct, the BOP closed it entirely.[8]

The abuse at FCI Dublin was particularly egregious because of both its scope and the manner in which BOP officials deliberately hindered survivors' attempts at recourse. The abuse escalated when the prison shut down to outsiders during the pandemic, effectively eliminating regular contact with the outside world.[9] Moreover, because the then-warden was an abuser himself, all internal checks were ineffective. For example, during the former warden's trial, several of his victims and a former FCI Dublin prison psychologist, Dr. Cynthia Townsend, testified that the then-warden often bragged that he would not be investigated for his sexual misconduct because he was close friends with the head of the Special Investigative Services (SIS). The head of SIS is in charge of all criminal matters within the prison and determines, with the warden's

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Hearing on Sexual Abuse of Female Inmates] (noting five former FCI Dublin employees had been indicted); *See also* Press Release, Dep't of Just., Off. of Pub. Affs., Seventh Correctional Officer at Federal Facility in Dublin, California, Sentenced to Prison for Sexual Abuse of Female Prisoners (Mar. 27, 2024), https://www.justice.gov/opa/pr/seventh-correctional-officer-federal-facility-dublin-california-sentenced-prison-sexual (explaining that the seventh former FCI Dublin employee was sentenced for crimes related to sexual abuse at the facility).

[5] *Hearing on Sexual Abuse of Female Inmates*, *supra* note 4, at 17.

[6] Alex Hall, *What Happened at the Dublin Federal Women's Prison Last Week and What to Expect Next*, KQED (Mar. 19, 2024), https://www.kqed.org/news/11979936/judge-certifies-class-action-lawsuit-for-women-incarcerated-at-fci-dublin.

[7] Sydney Johnson, *Judge Chooses Top Pick for Special Master to Oversee Women's Prison Following Rampant Abuse*, KQED (Apr. 5, 2024), https://www.kqed.org/news/11982014/judge-chooses-top-pick-for-special-master-to-oversee-womens-prison-following-rampant-abuse.

[8] Michael R. Sisak, Michael Balsamo & Christopher Weber, *Bureau of Prisons to Close California Women's Prison Where Inmates Have Been Subject to Sex Abuse,* ASSOCIATED PRESS (Apr. 15, 2024, 7:39 PM), https://apnews.com/article/federal-prison-dublin-california-sexual-abuse-bureau-of-prisons-17731ecb5d0a14adf6011e853bf7e05d.

[9] Lisa Fernandez, *2 More Women Sue 3 Dublin Prison Officers for Alleged Illegal Sexual Behavior*, KTVU Fox 2 (July 18, 2023), https://www.ktvu.com/news/2-more-women-sue-3-dublin-prison-officers-for-illegal-sexual-behavior.

assistance, whether a matter should be referred to Federal, state, or local law enforcement.[10]

Not only were our clients repeatedly harassed, abused, and raped without recourse at FCI Dublin, but they also were (and continue to be) unable to access the mental-health treatment necessary to start to heal from their custodial traumas. As Judge Gonzalez Rogers concluded in her open letter to district courts considering reduction in sentence motions based on conditions at FCI Dublin, "despite all the criminal activity, BOP provided the victims with little, to no, mental health counseling."[11]

Sexual abuse and violence cause high rates of posttraumatic stress disorder, depression, anxiety, and increase the risk of suicidal ideation and attempts.[12] Prior to incarceration, many women, including our clients, had already experienced high rates of trauma and maltreatment, adverse family experiences, substance abuse, and psychosocial stressors.[13] Experts conclude that being sexually abused in prison serves to re-traumatize people in custody, over and over again.[14]

Victims of sexual violence or abuse need proper mental-health treatment and continued incarceration prevents them from healing.[15] Survivors of sexual violence or abuse by BOP employees are currently required to address their trauma in a setting that is very similar, if not the same, to where their abuse took place.

The Commission must act to ensure that victims subjected to sexual violence and abuse by BOP staff have an opportunity to heal. It has taken the commendable first step of adopting U.S.S.G. § 1B1.13(b)(4), but it must go further to realize the provision's goal.

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[10] Department of Justice, Federal Bureau of Prisons, *Program Statement 1350.01, Criminal Matters Referral*, Jan. 11, 1996.

[11] Letter to U.S. District Court Sentencing Judge, Re: Compassionate Release Applications from AICs Previously Incarcerated at FCI Dublin, *Cal. Coal. Women Prisons v. U.S. Bureau Prisons*, No. 23-CV-4155-YGR (N.D. Cal. May 8, 2024), ECF No. 301-3.

[12] *See* Attachment A (report of Dr. Kate Porterfield).

[13] *Id.*

[14] *See* Attachment B (report of Dr. Terry Kupers).

[15] Jennifer Hartsfield, Susan Sharp, and Sonya Conner, *Cumulative Sexual Victimization and Mental Health Outcomes Among Incarcerated Women*, Dignity: A Journal of Analysis of Exploitation and Violence, Vol. 2: Iss. 1 (2017); *see also* Attachment A (Porterfield report) and Attachment B (Kupers report).

B. The Commission should revisit the requirement contained in U.S.S.G. § 1B1.13(b)(4) that sexual misconduct be substantiated by a criminal conviction, finding of civil liability, or an administrative finding.

U.S.S.G. § 1B1.13(b)(4) articulates a "substantiation requirement," or a requirement that an abuser's misconduct be independently adjudicated through administrative, criminal, or civil proceedings. *See* U.S.S.G. § 1B1.13(b)(4) ("For purposes of this provision, the misconduct must be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding, unless such proceedings are unduly delayed or the defendant is in imminent danger.").

This requirement raises a host of unnecessary and inadvisable barriers to relief and should be eliminated for three reasons: (1) it uses the wrong metric to gauge veracity of the abuse; (2) it poses proof barriers on the party least able to meet them while failing to impose a production requirement on the party with the best access to information; and (3) it perpetuates the trope that victims of sexual abuse should be discounted.

First, the substantiation requirement predicates eligibility for early release on the wrong metric. It focuses not on the punitive nature of the abuse or on the experience of the survivor when determining whether a reduction is appropriate. Instead, it focuses on the success of external processes. Embedded within this requirement is a failure to recognize the imperfect nature of the legal process and the very real fear of retaliation that people face when they report institutional sexual abuse such that they may choose not to avail themselves of administrative, civil, or criminal procedures at all.[16]

Looking to the substantiation requirement's inclusion of "administrative proceedings," relying on these processes is deeply flawed because they can be, and often are, controlled by abusers or their allies so as to be functionally non-existent. FCI Dublin is a tragic example. As one person who was incarcerated at FCI Dublin testified before Judge Gonzalez Rogers during a two-day evidentiary hearing in January 2024, during the height of the abuse, "PREA [did] not exist."[17] This was credited by Judge

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[16] *See, e.g.*, Jenny-Brooke Condon, *#MeToo in Prison*, 98 WASH. L. REV. 363, 417 (2023) ("[W]hen women who are incarcerated report sexual abuse, they are likely to face severe retaliatory harm such as loss of privileges, punishments, and threats to their safety.").

[17] Trial Tr. at 402:22–25, *United States v. Garcia*, No. 21-CR-429-YGR (N.D. Cal. Nov. 29, 2022), ECF No. 88 ("I've seen inmates – I've seen inmates sit in the SHU forever. I've

Gonzalez Rogers, who noted that at the time of the January 2024 hearing FCI Dublin *still* did not have an institutional PREA plan in place to ensure "that allegations of sexual abuse are referred for investigation to [the] agency with the legal authority to conduct criminal investigations."[18]

But even assuming that a facility has an adequate PREA plan in place such that administrative proceedings can be conducted, that does not mean that people feel comfortable availing themselves of the processes. Retaliation is a very real fear. Using FCI Dublin as an example, Judge Gonzalez Rogers specifically found that people who were sexually abused at FCI Dublin endured "retaliation by staff seeking to cover up their own misconduct," including placement in solitary confinement and loss of good-time credits and other privileges.[19]

Given the difficulties and dangers associated with internal reporting, many victims of sexual violence or abuse wait months or years to report being sexually abused by a BOP employee.[20] Indeed, for some victims, the first time they disclose being sexually abused may be when requesting that the warden file for compassionate release on their behalf to satisfy the exhaustion requirement of 18 U.S.C. § 3582(c)(1)(A). This is true for many of our clients, who had to wait for a transfer from FCI Dublin to report sexual violence. Like many survivors, our clients understandably feared for their safety.

In addition to being dangerous and ineffective, an administrative proceeding may be lengthy, especially one involving the investigation and termination of prison

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seen the harassment. I've seen stuff you couldn't even imagine in prison. So that's what I mean when PREA does not exist in Dublin.").

[18] Order Granting Part & Den. Part Mot. Prelim. Inj. at 27, *Cal. Coal. Women Prisoners v. U.S. Bureau Prisons*, No. 23-CV-4155-YGR, (N.D. Cal. Mar. 15, 2024), ECF No. 222.

[19] Letter to U.S. District Court Sentencing Judge, Re: Compassionate Release Applications from AICs Previously Incarcerated at FCI Dublin, *Cal. Coal. Women Prisons v. U.S. Bureau Prisons*, No. 23-CV-4155-YGR (N.D. Cal. May 8, 2024), ECF No. 301-3.

[20] *See generally* Lisa Fernandez, *Retaliation is real, FCI Dublin prison psychologist testifies at warden trial*, KTUV Fox 2, Nov. 30, 2022, https://www.ktvu.com/news/retaliation-is-real-fci-dublin-prison-psychologist-testifies-at-warden-sex-trial (explaining that incarcerated women in FCI Dublin could not safely report being sexually abused to any BOP employees while in FCI Dublin because of reporting requirements of the psychologist and how rampant the abuse was).

employees.[21] During the Commission's public hearing in April 2023, the DOJ was unable to provide even an estimate for how long an investigation to substantiate a victim's experience might take. At the very least we know that some of our clients have now been waiting for over a year for the BOP to investigate their claims, and the Legislative and Correctional Issues Branch of the federal Bureau of Prisons has still been "unable to provide an estimate" as to how long at least one proceeding will take.[22]

Furthermore, the resolution of such proceedings may be non-public, even as to the survivor. In fact, in response to one of our client's Freedom of Information Act requests related to the employment status of her abuser and his ground for termination—which could qualify as an "administrative finding" sufficient to meet the substantiation requirement—the BOP took the position that the mere fact of termination is exempt from disclosure.[23]

Authorizing substantiation through a criminal conviction or a finding of liability in a civil case only compounds the difficulties associated with the Guideline. Criminal and civil cases can take months or years before resolution, and the survivor of the abuse has no control over the process.

Significantly, prosecutors control which abuse allegations are investigated in the first instance. In other words, control over what abuse is substantiated is squarely in the hands of parties who have an ambivalent relationship to abuse victims. On the one hand, federal prosecutors need some victims to testify to secure convictions. On the other hand, however, the DOJ is directly adverse to the early release interests of incarcerated survivors—they are the adverse party in sentence reduction proceedings. If prosecutors have identified enough victims to move forward with an indictment of a particular abuser, they may stop short of investigating other legitimate claims of abuse if that investigation is duplicative, onerous, or diverts resources from prosecutions of other assailants—leaving many victims with claims that go uninvestigated.

Allegations against certain assailants may be too difficult to investigate or prove or may not be prosecutorial priorities. Thus, while named victims of high-profile abusers such as the Warden or the Chaplain of FCI Dublin may be able to meet the difficult burden of substantiating their claims of sexual assault, the majority of victims

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[21] *See, e.g.*, *Hearing on Sexual Abuse of Female Inmates*, *supra* note 4, at 15–17 (describing the multistep process for administrative investigation of sexual abuse allegations at Federal Correctional Institution, Dublin).

[22] Attachment C (Redacted Email).

[23] *U.S. v. Wahpeta*, 17-cr-41-PHX-GMS-3, ECF No. 150-3 (D. Ariz. Dec. 11, 2023).

will have a much more difficult time doing so. And in some cases, it will be impossible. For example, if an alleged abuser commits suicide and is unavailable for prosecution, as happened with FCI Dublin, it will effectively end an investigation.[24] Similarly, the BOP determines whether an administrative proceeding should move forward.[25]

Again, FCI Dublin provides us with an example of the difficulties that this creates. In at least one case of which we are aware, even where the U.S. Attorneys Office prosecuting the abuser considered the survivor to be a "victim" of the abuse, the U.S. Attorneys Office in the district in which a motion is filed argued that in order to meet the substantiation requirement the survivor must be one of the victims named in the indictment.[26] But this survivor had absolutely no control over whether they were named in the indictment.

Finally, civil proceedings against prisons or prison officials can take many years, and often result in settlements that are non-public or might not involve a finding or admission of liability.[27] Jaehyun Oh, a partner at Jacob D. Fuchsberg Law Firm, LLP, "routinely represents clients who are injured while incarcerated," including many of the victims of abuse at FCI Dublin. In the attached declaration, Ms. Oh details the incredible barriers to timely relief for tort claims arising out of the federal BOP, from the inability

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[24] Jeanita Lyman, *Dublin Prison Worker Dies by Suicide Amid Investigation into Inmate Abuse*, Pleasanton Weekly (Sept. 11, 2022), https://www.pleasantonweekly.com/news/2022/09/11/dublin-prison-worker-dies-by-suicide-amid-investigation-into-inmate-abuse/.

[25] *See, e.g.*, *Hearing on Sexual Abuse of Female* Inmates, *supra* note 4, at 15–17 (describing the multistep process for administrative investigation of sexual abuse allegations at Federal Correctional Institution, Dublin).

[26] *See generally U.S. v. Wahpeta*, 17-cr-41-PHX-GMS-3 (D. Ariz.).

[27] A comprehensive study from the Institute for the Advancement of the American Legal System at the University of Denver concluded that the average time to resolve a civil rights case in the District of Colorado was 423.61 days from the time of filing to the time of disposition. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 28 (2009). This statistic would include cases that settled, meaning that some cases that did not resolve in settlement would last far longer than that. *See id.* "The median time from filing of proceedings to termination for criminal defendants was 9.8 months." U.S. COURTS, *U.S. District Courts—Judicial Business 2021*, https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2021#:~:text=Combined%20filings%20of%20civil%20cases,nearly%201%20percent%20to%2074%2C465. (last visited June 8, 2024).

to speak with clients to the time-consuming nature of the proceedings themselves.[28] Ms. Oh "expect[s] a typical civil case [involving sexual abuse in a prison] to take between two and five years from inception to trial."[29] That is years of a survivor's life during which they are unable to start the healing process.

Although the current Guideline provides that the substantiation requirement can be excused if proceedings are "unduly delayed," there is no definition of "undue delay," and, in at least one case, the U.S. Attorneys Office has not conceded that delays approximately a year are "undue."[30] And at least one district court judge has determined that a delay of 10 months from an alleged abusers indictment—even without a trial date on the horizon and years after the alleged abuse—was insufficient to meet the standard.[31]

In short, even though the abusive conduct might be the subject of litigation, and even though parties may have an understanding that the misconduct occurred, the final resolution of a case is unlikely to meet the strict text of the Guideline. The substantiation requirement thus undercuts the provision's larger purpose by using the wrong metric of veracity.

Second, structural barriers exist that make substantiating claims in the manner required impracticable or even dangerous for abuse survivors. The Guideline contains no discovery requirement or process through which an incarcerated person would be able to obtain documentary support that would substantiate their claim of sexual abuse.[32] Moreover, survivors of institutional sexual abuse—even those who testified against FCI Dublin employees—are not currently entitled to counsel to assist with litigating their early release claims.[33] Instead, these survivors have relied on a network

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[28] Attachment D (Oh Declaration)

[29] *Id.* at 24.

[30] *See generally U.S. v. Wahpeta*, 17-cr-41-PHX-GMS-3 (D. Ariz.).

[31] *United States v. Left Hand*, No. 1:16-CR-189, 2024 WL 579206, at *5 (D.N.D. Feb. 13, 2024) ("It is fairly debatable whether this criminal proceeding has been 'unduly delayed,' a phrase the Sentencing Guidelines do not define. A review of the docket sheet in the criminal case does not reveal a trial date or a plea agreement. . . . The Court concludes Left Hand has not established 'extraordinary and compelling reasons' for a sentence reduction because the corrections officer that sexually abused her has not been convicted.").

[32] U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(4) (U.S. SENT'G COMM'N 2023).

[33] *See* Federal Criminal Justice Act ("CJA") 18 U.S.C § 3006A(1) (2018) (noting who is entitled to appointment of counsel).

of volunteer, pro bono counsel, and some public defenders who have worked to identify and file sentence reduction motions on their behalf.[34] Without access to counsel or a discovery tool that would require prosecutors, civil attorneys, or administrative bodies to turn over documents related to proceedings against assailants, there is little chance that a survivor will be able to substantiate their claims in accordance with the mandate of the policy statement.

And neither the BOP nor DOJ will voluntarily turn over reports about the investigation of prison staff suspected of perpetrating abuse without a court order or other discovery mandate. We have experienced this refusal from both the BOP and DOJ first hand in our cases.

Thus, although the new remedy of release may enable some victims of institutional sexual abuse to seek and receive sentence reductions, the substantiation requirement is likely to hinder access to relief for most victims, often for reasons beyond their control.[35] In short, requiring a substantiation of liability on the part of an official effectively places the burden onto the survivor movant to prove misconduct by some outside actor rather than focusing on a survivor's subjective experience. But this evidentiary burden does not come with the access to counsel, discovery tools, or investigative mandate necessary to meet that burden.

Third, the substantiation requirement draws on longstanding stereotypes about women's credibility, and further entrenches the notion that women often fabricate allegations of rape.[36] Limiting U.S.S.G. § 1B1.13(b)(4) to situations in which any sexual misconduct is already substantiated creates a higher burden for defendant-survivors of sexual abuse than for other defendants seeking a sentence reduction based on other grounds. Under 18 U.S.C. § 3582(c)(1)(A)(i), courts may reduce a defendant's term of imprisonment when a *defendant's circumstances* are extraordinary and compelling. For example, in compassionate release cases based on a defendant's medical condition, a court is not asked to determine whether BOP doctors or staff committed malpractice or misconduct regarding medical care. Determining a BOP employee's guilt, liability, or

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[34] *See, e.g.*, *Second Chances*, FAMILIES FOR JUSTICE REFORM, https://famm.org/our-work/compassionate-release [https://perma.cc/29QP-2CK7] (last visited June 8, 2024).
[35] *See* Glenn Thrush, *Justice Dept. Struggles to Carry Out Early Release Program for Abused Inmates*, N.Y. TIMES (Feb. 22, 2023), https://www.nytimes.com/2023/02/22/us/politics/federal -prisons-inmate-abuse.html.
[36] *See generally* DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS (Harper Collins ed. 2021) (highlighting individuals' experiences of the aftermath of sexual assault).

discipline is not a prerequisite to granting a defendant's motion for sentence reduction in the medical context. Requiring this heightened standard in sex-abuse cases furthers the narrative that survivors of sexual abuse lie.

Accordingly, the Commission should revisit the U.S.S.G. § 1B1.13(b)(4) requirement that any "misconduct [be] established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding."

C. The Commission should amend the definition of "sexual abuse" to broaden its meaning beyond "sexual act" as defined in 18 U.S.C. § 2246(2).

Our second concern with § 1B1.13(b)(4) is the limitation on what qualifies as "sexual abuse." Currently, "sexual abuse" must involve a "'sexual act,' as defined in 18 U.S.C. § 2246(2)." This definition is underinclusive and neglects to include incredibly harmful types of carceral sexual abuse, including, among others: touching of breasts and genitals over clothing, ejaculation on a person's face or body, forced sexual dancing and "strip tease," forced sexual touching with other people, forced masturbation, and exposure to a sexually violent and dangerous environment. Yet these are all types of sexual abuse that we have seen in our cases from FCI Dublin, none of which is covered by the plain text of § 1B1.13(b)(4).

Certainly, the Commission recognized when amending § 1B1.13 that it could not identify every single act that would qualify as "extraordinary and compelling," and, for that reason promulgated § 1B1.13(b)(5). But criminal legal stakeholders have expressed concern about the administrability of (b)(5) given the lack of definition of "similar in gravity,"and the Government is now challenging the Commission's authority to promulgate (b)(5) in the first place.[37]

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[37] *United States v. McIntosh*, No. 1:05-cr-00119-JMS-TAB, ECF No. 83 at 20-21 (S.D. Ind. May 29, 2024) ("[B]ecause Section (b)(5) does not provide either 'criteria to be applied' or 'a list of specific examples' for what might constitute a permissible circumstance for granting compassionate release, this subsection fails to comply with the delegation authority granted to the Sentencing Commission by Congress in 28 U.S.C. § 994(t). Because the Sentencing Commission exceeded its delegation authority, U.S.S.G. § 1B1.13(b)(5) does not constitute a permissible basis for relief for this or any other defendant.").

The Commission should consider expanding the definition of sexual abuse to include "sexual act" as defined in 18 U.S.C. § 2246(3) as well further defining what amounts to "sexual abuse" beyond the limited acts contained within § 2246.

D. Conclusion.

We commend the Commission for adopting U.S.S.G. § 1B1.13(b)(4) "victim of assault" category to the list of extraordinary and compelling reasons enumerated in policy statement § 1B1.13. But we urge the Commission to revisit the substantiation requirement and amend the definition of "sexual abuse."

We appreciate the opportunity to comment on the Commission's priorities. Please contact us if you have any questions or would like to discuss our comment further.

Sincerely,

Alison Guernsey
Clinical Professor
Director of the Federal Criminal Defense Clinic
University of Iowa College of Law
[redacted]

Meredith Esser
Assistant Professor of Law
Director of the Defender Aid Clinic
University of Wyoming College of Law
[redacted]

Attachment A

Katherine Porterfield, Ph.D.
[redacted]

Laura Rovner
[redacted]

March 13, 2023

Dear Ms. Rovner:

You have asked for my opinion on the psychological impact of institutional sexual violence on women in a custodial context and recommendations around therapeutic care after sexual abuse or sexual violence in an institution. This report draws on my clinical expertise as a psychologist who has specialized in the evaluation and treatment of severe trauma for the past twenty-five years, as well as on scientific and clinical literature that examines the deleterious impact of sexual abuse on victims and treatment outcomes. For this report, I was not provided with any records nor was I asked to opine on any case-specific facts.

Specifically, in this report, I will address:

1. The impact of sexual violence as a trauma
    A. Definitions of sexual violence
    B. Outcomes of sexual violence

2. Institutional sexual violence: Environmental factors, power dynamics and barriers to disclosure
    A. Outcomes
    B. Carceral environmental factors in institutional sexual abuse or sexual violence
    C. Power dynamics in carceral settings with sexual abuse or sexual violence
    D. Disclosure of sexual abuse or sexual violence

3. Standard of therapeutic care for victims of institutional sexual abuse or sexual violence

Qualifications

My qualifications are outlined in my curriculum vitae, attached. In sum, I am a clinical psychologist, licensed to practice in the State of New York. I received my Ph.D. in Clinical Psychology from the University of Michigan in 1998. My pre-doctoral and post-doctoral training included extensive training in the evaluation and diagnosis of mental disorders. Since 1998, I have worked as a psychologist at Bellevue Hospital and NYU School of Medicine at the

Bellevue/NYU Program for Survivors of Torture. I have evaluated, treated, and supervised the treatment of numerous children, adolescents, and adults who have experienced war trauma, abuse, and torture. I have evaluated individuals and served as an expert for court proceedings in the Military Commissions in Guantanamo Bay; US Federal Court, Southern and Eastern Districts in New York and the Western District of Missouri; Superior Court, Skagit County, Washington, and for immigration proceedings in courts through the Executive Office of Immigration Review. I have trained hundreds of health professionals and attorneys on the evaluation and treatment of childhood trauma, war, and torture and have lectured or conducted seminars on issues of torture and complex trauma sponsored by a wide variety of organizations, including human rights organizations, governmental entities, universities, and the International Criminal Court.

I have co-authored several publications pertaining to the assessment and treatment of trauma, including that suffered by survivors of torture, including as a contributor to the United Nations' *Istanbul Protocol: Manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment*. I have also published on treatment of traumatic stress in children. These peer-reviewed articles have been published in textbooks and professional journals, including *The Journal of Nervous and Mental Disease*; *The Prevention Researcher*; *Psychiatry: Interpersonal and Biological Processes*; *OMEGA – Journal of Death and Dying*; and *Journal of the American Academy of Child & Adolescent Psychiatry*. I serve as an ad-hoc reviewer on several peer-reviewed journals and presses, including *Anxiety, Stress, and Coping: An International Journal, Cambridge University Press Medical Group, International Journal of Law and Psychiatry, Journal of Clinical Child and Adolescent Psychology,* and *Journal of Clinical Psychology.*

The trauma of sexual violence

The experience of sexual violence is widely understood to be a seriously deleterious event, with potentially wide-ranging negative health and mental health effects on victims. There is a robust body of scientific research, as well as extensive clinical literature that demonstrates the harm done to individuals who suffer sexual assault. The terms sexual assault or sexual violence can constitute a range of offenses done to another person.[1] For purposes of this report, the National Institute of Justice definition of sexual violence will be used, which is: "a specific constellation of crimes including sexual harassment, sexual assault, and rape."[2]

Sexual violence can range from harassment to assault to rape. For the purposes of this report, definitions widely agreed upon and operationalized through the United States Department of Justice are cited here:[3]

1. Sexual harassment: Ranges from "degrading remarks, gestures, and jokes to indecent exposure, being touched, grabbed, pinched, or brushed against in a sexual way."

[1] For the purposes of this report, I will use the term "sexual violence" to include sexual victimization, sexual abuse, and sexual assault.
[2] *Overview of Rape and Sexual Violence*, NAT'L INST. OF JUST. (Oct. 25, 2010), https://nij.ojp.gov/topics/articles/overview-rape-and-sexual-violence#note1.
[3] *Id.*

2. Sexual assault: "Covers a wide range of unwanted behaviors—up to but not including penetration—that are attempted or completed against a victim's will or when a victim cannot consent because of age, disability, or the influence of alcohol or drugs. Sexual assault may involve actual or threatened physical force, use of weapons, coercion, intimidation, or pressure and may include—
    a. Intentional touching of the victim's genitals, anus, groin, or breasts.
    b. Voyeurism.
    c. Exposure to exhibitionism.
    d. Undesired exposure to pornography.
    e. Public display of images that were taken in a private context or when the victim was unaware."
3. Rape: "…nonconsensual oral, anal, or vaginal penetration of the victim by body parts or objects using force, threats of bodily harm, or by taking advantage of a victim who is incapacitated or otherwise incapable of giving consent. Incapacitation may include mental or cognitive disability, self-induced or forced intoxication, status as minor, or any other condition defined by law that voids an individual's ability to give consent."

The serious negative impact of sexual violence has been well-documented across several decades of extensive research and clinical study. As the field of traumatology—the study of the impact and treatment of physical injuries emanating from traumatic events—expanded over the past decades to include the study of psychological injuries that occur due to traumatic events, knowledge as to how sexual violence harms people psychologically and what is needed for healing and recovery has also expanded and deepened.

Outcomes of sexual violence:

Psychiatric disorders

There is extensive multidisciplinary research demonstrating the negative outcomes of sexual violence on individuals' biological, psychological and social functioning. Research has revealed an increased risk of multiple psychiatric conditions, as well as poor health and behavioral outcomes in survivors. Survivors of sexual assault have shown high rates of posttraumatic stress disorder (17-65% of survivors meet criteria across studies), depression (13-51% met criteria), anxiety (13-49% met criteria), alcohol use disorders (13-49% met criteria), drug use disorders (23-44% met criteria).[4]

Posttraumatic stress disorder (PTSD) has received extensive attention in terms of sexual violence because it is a diagnosis that is linked specifically to suffering traumatic events. Rape survivors, along with combat veterans, were some of the first patients identified as suffering from the particular constellation of symptoms that came to be known as posttraumatic stress disorder. These symptoms were: somatic (body-based) complaints, fear and anxiety, and self-blame. Over time, empirical study of and clinical experience with survivors of rape and other traumas have uncovered the complex neurophysiology that leads trauma survivors to develop PTSD. Trauma, defined as a life-threatening event, or an event in which there is severe threat to

[4] Rebecca Campbell, Emily Dworkin & Giannina Cabral, *An Ecological Model of the Impact of Sexual Assault on Women's Mental Health*, 10 TRAUMA, VIOLENCE & ABUSE (special issue) 225, 225-26 (2009).

the individual's bodily and/or psychic safety, mobilizes neurochemical and endocrine systems throughout the brain and body to react to the threat. These reactions—such as "fight or flight" activation and/or shut down and dissociation--while adaptive to the individual's survival in the moment of trauma, can lead to difficulties after the trauma. Memories of the traumatic events return intrusively, thereby activating the same brain and body reactions that occurred during the trauma and leading to severe discomfort and impairment in survivors. PTSD, then, entails symptoms across multiple domains, including intrusive reexperiencing of memories, alterations in arousal and mood, and avoidance and numbing. These symptoms are frequently seen in survivors of all types of sexual violence, even when individuals do not meet the full threshold for PTSD.

Behavioral outcomes: Problems with self and others

Sexual violence has been shown to lead to a range of behavioral problems in survivors, including increased drug and alcohol use, risk-taking behaviors, isolation and withdrawal from others and suicidal ideation and actions. Survivors of sexual violence often report intense feelings of self-hatred and shame in the aftermath of victimization, feelings that often center around the thought that they should have prevented the abuse or somehow handled it differently. Survivors report feeling "changed" and "damaged," sometimes to a degree that leads them to try to harm or kill themselves. Survivors of sexual assault have been found in multiple studies to be at substantial risk for suicidal ideation and attempts.[5] Risk-taking behaviors, such as putting themselves in dangerous situations, are not uncommon, as survivors attempt to gain mastery over feelings of powerlessness. Indeed, revictimization is common in survivors of sexual violence.

Sexual violence leads to distortions in thinking in many survivors that can affect their reactions to other people, as they may overestimate or underestimate threats in their environments. Individuals who suffer from a hyperaroused nervous system "uproar" in the aftermath of victimization may feel hypervigilant and always on alert for further threat, leading them to isolate or avoid other people, feeling unable to trust or feel secure. Conversely, survivors who had to dissociate or "shut down" during the sexual violence may continue to experience dissociative responses that lead them to misinterpret their environment or detach from reality in ways that can risk further harm coming to them. Survivors of sexual abuse often demonstrate a poor ability to discern safety, protect themselves, and respond to internal cues of discomfort and danger due to dissociation.[6] This vacillation between states of fear and hyper-threat detection and shut-down detachment leads survivors to appear erratic and unstable in their decisions and behaviors at times. Indeed, multiple experiences of victimization may lead survivors to minimize or deny the coercive aspects of the sexual violence, even leading them to feel that they consented. People around them may feel confused about their inconsistent responses to the world, not realizing that the survivor is flipping between states of arousal and shut-down as a result of their trauma. Seeking help may seem impossible to sexual violence survivors, as they feel unable to explain their bewildering feelings and behaviors.

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[5] Emily R. Dworkin, Suvarna V. Menon, Jonathan Bystrynski & Nicole E. Allen, *Sexual Assault Victimization and Psychopathology: A Review and Meta-Analysis*, 56 CLINICAL PSYCH. REV. 65, 66 (2017.)

[6] Judy Cashmore & Rita Shackel, *The Long-Term Effects of Child Sexual Abuse*, CFCA Paper No. 11, Austl. Inst. of Fam. Serv. 1, 12 (2013).

Impact on memory:

There is wide variability in trauma survivors' acquisition, retrieval and recounting of memories of traumatic events. For some, the details and aspects of the trauma are vividly remembered and able to be recalled with specificity, even years later. For others, neurophysiological, psychological and social factors may influence their ability to recall specifics, creating lapses or ruptures in their memory and their recall. One critical neurobiological function affected by trauma is the encoding and retrieval of autobiographical memory—that is, events that happened to a person. Healthy memory functioning results in the accurate encoding of information in the brain and the subsequent ability of the person to recall and recount the information in a clear, stable manner. Any part of this process--the encoding, the retrieving or the recounting--can be affected by trauma. A trauma survivor may have fragmented memories of what occurred during a trauma, due to faulty encoding because of dissociation during the trauma, or she may have difficulty retrieving the memory because of psychophysiological arousal that occurs when the events are recalled or she may be unable to recount the memory, due to shame and disgust and the concomitant avoidance that accompanies these emotions. Thus, there are multiple, interrelated pathways—neurophysiological, emotional, and social—towards impaired or altered memory in survivors after sexual abuse. Survivors also may have parts of sexual abuse that they remember vividly and other aspects that are foggy, vague, or confused, or aspects of the memory that change across time.[7] This variability must be considered when survivors are asked to describe sexual abuse, as they may become symptomatic and suffer severe distress or have gaps in their memories. Questioning that focuses on clarifying details should be done with trauma-sensitive interviewing techniques, so as to not retraumatize a survivor.

Institutional sexual violence: Environmental factors, power dynamics and barriers to disclosure

Institutional sexual violence is defined as any type of sexual assault, harassment or rape perpetrated by an official or staff of an institution on an inmate/resident. It is critical to note that incarcerated people cannot legally consent to a sexual act because of their position as wards of the state.[8] Sexual abuse of incarcerated people can occur on the premises of that institution or in some other setting or context or circumstance where the institution has in any way allowed, facilitated or created the circumstances that made the abuse possible.[9] There are difficulties in determining the prevalence of institutional sexual violence because of the nature of it—i.e. exploitation of inmates in circumstances with tremendous power differentials from their perpetrators, dependency on perpetrators for basic needs and coercion techniques designed to keep inmates from disclosing the abuse. In one large study of rates of reported sexual abuse of women in state prisons, 7.6% of women inmates reported sexual victimization and 1.7% reported

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[7] Anke Ehlers & David M. Clark, *A Cognitive Model of Posttraumatic Stress Disorder*, 38 BEHAV. RSCH. & THERAPY 319, 324 (2000).
[8] *Deterring Staff Sexual Abuse of Federal Inmates*, OFF. OF THE INSPECTOR GEN. (2005), https://oig.justice.gov/sites/default/files/archive/special/0504/index.htm.
[9] Tamara Blakemore, James Leslie Herbert, Fiona Arney & Samantha Parkinson, *The Impacts of Institutional Child Sexual Abuse: A Rapid Review of the Evidence*, 74 CHILD ABUSE & NEGLECT 35, 36 (2017).

sexual assault.[10] Those who study sexual violence against inmates in prisons estimate that 33% of victims of sexual violence by staff in prisons are women, though women make up only 7% of inmates in the US.[11] Several aspects of institutional sexual abuse are considered that make it a uniquely destructive form of sexual violence. Below, factors unique to institutional abuse in a carceral settings will be discussed.

Vulnerable victims

Individuals in prisons and detention centers are likely to have a number of other stressors in their lives that precipitated or contributed to their having been incarcerated. Inmates in these settings often have suffered adverse life events and have mental illness and other functional impairments. It is well-documented that incarcerated women have high rates of early trauma and maltreatment, adverse family experiences such as family conflict and abandonment, and substance abuse and psychosocial and medical problems.[12] As discussed earlier, previous victimization may leave an incarcerated person more vulnerable to further abuse or coercion. Additionally, conditions of poverty, discrimination, and community violence may be factors in the lives of incarcerated women that have contributed to their poor functioning before they were incarcerated. Thus, women who suffer sexual violence in institutions may have other trauma and adversity in their lives that make them even more vulnerable after suffering abuse.

Carceral environmental factors

Prisons, jails and detention centers have conditions that make sexual violence more likely and potentially more severe for victims. Prisons and jails inherently entail restrictions on inmates' freedom, including restrictions on movement, on communication with the outside world, and on activities in which they can engage. The physical space of prisons and detention centers is widely varied, ranging from dormitory housing to locked individual or shared cells around a common area to solitary confinement units where isolated prisoners have no contact with anyone except guards. Prisoners' movement is restricted and highly controlled by staff. Staff may make decisions about how and where to move a prisoner, thereby creating opportunities for abuse to occur away from other inmates, staff or video cameras. Additionally, staff may enter prisoners' cells and require restraints, such as handcuffs or shackles that greatly hamper inmates' ability to move or protect themselves. Thus, overall, prisoners are in highly restrictive settings where staff have potentially unfettered access to them, including in physically isolated and restrictive environments.

Power dynamics in carceral settings

Power dynamics in institutional settings such as prisons and detention centers create the conditions for those in custody to be exploited and to then have little recourse as to how to

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[10] Nancy Wolff, Cynthia L. Blitz, Jing Shi, Ronet Bachman & Jane A. Siegel, *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. OF URB. HEALTH 835, 844 (2006).
[11] Gina Fedock, Cristy Cummings, Sheryl Kubiak, Deborah Bybee, Rebecca Campbell & Kathleen Darcy, *Incarcerated Women's Experiences of Staff-Perpetrated Rape: Racial Disparities and Justice Gaps in Institutional Responses*, 36 J. of Interpersonal Violence 8668, 8669 (2019).
[12] *See generally,* BARBARA OWEN, JOYCELYN POLLOCK, JAMES WELLS & JENNIFER LEAHY, CRITICAL ISSUES IMPACTING WOMEN IN THE JUSTICE SYSTEM: A LITERATURE REVIEW (Nat'l Inst. of Corrs. 2014).

respond, report or prevent further harm coming to them. Sexual abuse of women prisoners takes place in an environment in which the victims have highly restricted physical liberty, as well as extensive time in the presence and control of perpetrators. Also, guards and correctional officers and even other prison staff have the power to enact punishment on those in their custody, remove and grant them privileges, and affect decisions that are made about their conditions of confinement. Staff members with more institutional power, such as those higher up the chain of command, are likely to be perceived by incarcerated women as having more ability to control them, punish them or affect their conditions of confinement. Additionally, as mentioned above, inmates have limited contact and communication with people on the outside world. Further, women prisoners' already-restricted movements and communications are also monitored by prison guards and staff.

There is a "continuum of coercion" that can occur in institutional settings where sexual victimization takes place, where those in power use a range of privileges, punishments, threats and frank violence to enact sexual violence against their stewards.[13] On the one hand, some perpetrators use their power and control to "groom" victims until the person feels complicit in the sexual activities that the perpetrator enacts. Grooming refers to the building of trust with victims, so as to then engage in inappropriate activity with them (usually sexual in nature), while preventing them from disclosing or challenging the behaviors. Critical to the process of grooming is that the perpetrator offers inducements to behaviors that are inappropriate, such as rewards for engaging in sex acts, allowing explicit photographs, etc. For example, a guard or prison staff member allows an inmate more time out of her cell, only to then demand sexual activity from her. The victim, then, experiences these activities as something she "chose" to do and so she will be even less likely to disclose the activities, fearing blame or retaliation. In particularly coercive dynamics of sexual violence, victims cling to moments of positive emotion, kindness and small tokens or privileges from the abuser, even believing that the perpetrator cares for them, and they try to block out the reality of how much they are being threatened, used and hurt. Victims learn to deny their own feelings and do what is necessary to keep themselves from being abused in a worse way.

Institutional sexual violence can involve frank coercion, in which abusers use force, power and threat to enact abuse on victims. These types of dynamics are more common in "closed systems," where perpetrators have high power and close extended proximity to inmates. In these situations, perpetrators control their victims' environment, their access to basic bodily needs, their privacy and, in doing so, create a culture of compliance. Threats of institutional consequences become a powerful force for control as staff/perpetrators demand silence from those they abuse. The staff's coercive control—"the systematic repetitive infliction of psychological trauma"— takes away the victim's sense of autonomy.[14] While violence can be used in this process, simply the threat of harm or punishment is also effective in creating compliance, especially in individuals with little power or recourse. This process can result in

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[13] BARBARA OWEN, JAMES WELLS, JOYCELYN POLLOCK, BERNADETTE MUSCAT & STEPHANIE TORRES, GENDERED VIOLENCE AND SAFETY: A CONTEXTUAL APPROACH TO IMPROVING SECURITY IN WOMEN'S FACILITIES vii, viii, 42, 92 (2008).

[14] Judith Lewis Herman, *Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma*, 5 J. of Traumatic Stress 377, 383 (1992).

passivity or seeming acquiescence in victims, sometimes called "learned helplessness," as they stop resisting abuse and even appear to move towards it.

Peer dynamics in prisons

Peer dynamics in prisons or detention facilities also contribute to the deleterious effects of sexual violence and the unlikelihood that inmates will disclose their victimization. Many factors make the disclosure of abuse a highly problematic choice for a victim. An inmate who has suffered sexual violence can be ostracized and shunned by other inmates, further magnifying what can be intense feelings of shame surrounding the event. Information about sexual violence also travels quickly, both inside and outside of prison, adding to the humiliation of the event. Inmates can be vulnerable to being victimized again because other inmates view her as weak and damaged. Victims of sexual violence in prison must redouble their efforts to be perceived as "tough" in order to prevent additional abuse. All of these dynamics contribute to the widely proven fact that survivors of institutional abuse may not disclose abuse for years, if ever.

Disclosure of sexual trauma: Why don't victims tell?

Studies and investigations repeatedly demonstrate that people who have been sexually abused in prison do not disclose their abuse. One study found that only 8% of sexually victimized inmates had reported their abuse.[15] This finding, robustly reported in multiple studies of sexual abuse, demonstrates the profound barriers to inmates' ability to come forward after violence by staff. The dynamics of institutional sexual violence described above—coercive control, grooming and environmental control—contribute to the difficulty victims have in disclosing the abuse. Even seemingly contrasting dynamics, in fact, are often used in combination by perpetrators to prevent disclosure. Small privileges and actions designed to make a victim feel "special" are combined with harsh, threatening responses that make clear the power differential that exists between the victim and abuser. Additionally, peer dynamics in prisons or detention facilities of residents scapegoating and further victimizing those who have been abused create powerful reasons for survivors to stay silent.

Pragmatically, the nature of imprisonment is that information that inmates wish to convey must go through the channels within the institution, especially for inmates who do not have attorneys or supportive relationships on the outside. Thus, survivors of institutional abuse must report their abuse to the very staff who may be aware of it already, may have colluded or ignored the abuse in some way or, in the very least, may not believe inmates or want to create negative consequences for staff peers. Reporting staff abuse has been shown to result in retaliation against inmates, including punishment, loss of privileges or frank abuse.[16]

In addition to all of the systemic barriers to reporting abuse, survivors also may struggle with emotional reactions to sexual violence that prevent them from coming forward. Shame, humiliation and feelings of guilt can occur, particularly if the coercion from the staff entailed rewards or privileges that make the survivor feel somehow complicit in the abuse. Self-blame is

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[15] RAMONA R. RANTALA, JESSICA REXROAT & ALLEN J. BECK, DEPT. OF JUST., NCJ 244227, SURVEY OF SEXUAL VIOLENCE IN ADULT CORRECTIONAL FACILITIES, 2009-11 – STATISTICAL TABLES (2014).
[16] Fedock et al., *supra* note 11, at 8673.

a frequent experience for survivors of sexual violence across all settings. Additionally, other mental health struggles, such as depression, addiction, or psychosis, that affect mood, motivation and clarity of thought could also inhibit a survivor from coming forward.

Treatment for sexual victimization

Experts in the treatment of sexual violence note that sexual assault and rape, unlike other crimes, lead to outcomes that frequently do not resolve without proper mental health treatment.[17] As discussed above, the experience of sexual violence has been shown to lead to pervasive and severe negative outcomes in survivors, many of which are exacerbated by the particular dynamics and conditions of institutional sexual violence. These negative mental health and behavioral outcomes frequently require professional evaluation and treatment in order to be addressed and are unlikely to remit on their own.

There is extensive treatment literature on effective practices for evaluating and treating survivors of sexual violence. Components of assessment and treatment that have shown to be most effective will be discussed below.

Assessment of survivors

Because the potential harmful consequences of sexual violence encompass a wide range of physical, emotional, cognitive and behavioral problems, treatment of sexual violence survivors must begin with a thorough, trauma-focused evaluation. For survivors of institutional sexual violence, it is critical that assessment begins from a position of determining the survivors' condition in a manner that allows them to be completely open about what happened to them. This means they must be free of concerns about retribution or retaliation for reporting their abuse. Survivors who are incarcerated by the institution or system in which the abuse took place are unlikely to be able to freely describe what happened to them, not only because they may fear reataliation, but also because their symptoms will be heightened by being in the setting where the abuse took place.

Survivors' symptoms may change over time, so it is important to assess them at multiple points if possible—in the immediate aftermath of the assault, after initial medical assessment and any needed medical care and at later points, as the survivor has settled into a post-acute stage. Some survivors will have a decrease in symptoms over the course of several months, post-assault, but it has been shown that about 50% of sexual assault survivors will go on to have ongoing symptoms several months and even years after the assault.[18] Assessment of survivors of sexual violence requires an evaluation to determine what diagnosis, if any, the survivor is suffering from and what symptoms are causing the person difficulty or impairment.[19] Assessment must include thorough evaluation of PTSD, depression, suicidality, and any other

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[17] Katrina A. Vickerman & Gayla Margolin, *Rape Treatment Outcome Research: Empirical Findings and State of the Literature* 29 Clinical Psych. Rev. 431, 432 (2009).
[18] Edna B. Foa, Barbara O. Rothbaum, David S. Riggs & Tamera B. Murdock, *Treatment of Posttraumatic Stress Disorder in Rape Victims: A Comparison Between Cognitive-Behavioral Procedures and Counseling*, 59 J. of Consulting & Clinical Psych. 715 (1991).
[19] EDNA B. FOA & BARBARA OLASOV ROTHBAUM, TREATING THE TRAUMA OF RAPE: COGNITIVE-BEHAVIORAL THERAPY FOR PTSD 91-93 (Guilford Press 1998).

symptoms or problems in functioning. Survivors' symptoms—such as avoidance of memories, hyperarousal and dissociation—may directly affect the survivors' ability to recount what happened to her and how it is affecting her. Thus, an evaluation must be conducted that uses care and trauma-informed methods of interviewing, so as not to retraumatize the subject.

Treatment after sexual violence: Best practices

Despite the many negative health and mental health outcomes that have been shown to come from sexual violence, there is also robust evidence that therapeutic intervention that addresses the negative impacts of sexual violence can be highly effective. Empirical study of therapeutic practice for treatment of survivors of sexual assault and violence has identified several components of treatment that are most effective in decreasing mental health problems and behavioral problems, such as PTSD, dysregulated emotions, anxiety, substance abuse, and addiction. There is evidence that individual therapy is most effective for sexual assault survivors, rather than group therapy.[20] Treatment for sexual assault is best described as multi-modal in that a number of techniques and approaches are used to assist the survivor, with cognitive behavioral techniques showing the most efficacy.[21] There are several therapeutic components that are widely recognized to be effective in decreasing symptoms. These are:

1. Establishment of safety: The first component of treatment after trauma of any kind, much less sexual violence, is to determine if the individual is free from the threat of further harm, abuse, or victimization. This principle is widely accepted as the starting point of therapy because meaningful improvement of trauma-based symptoms and conditions cannot take place if there is ongoing trauma occurring for the individual. Thus, for individuals who are suffering intimate partner violence, family abuse, or abuse in an institution such as a prison—all situations in which the person may still reside with a perpetrator--the establishment of safety takes priority before any movement into treatment. As Judith Herman, one of the pioneering experts in trauma treatment, has written,

   > The first task of recovery is to establish the survivor's safety. This task takes precedence over all others, for no other therapeutic work can possibly succeed if safety has not been adequately secured. No other therapeutic work should even be attempted until a reasonable degree of safety has been achieved.[22]

   For individuals who suffered sexual violence by staff while incarcerated, it is essential that they be removed from the facility where they were abused. Consideration must be then given to whether these victims can receive meaningful treatment in another carceral setting, particularly one that is administered and run by the same institutional authorities who supervised the facility in which they were abused. If perpetrators were able to abuse those in their custodial care with impunity, these victims are unlikely to feel free from

[20] Joanne E. Taylor and Shane T. Harvey, *Effects of psychotherapy with people who have been sexually assaulted: A meta-analysis*, 14 Aggression and Violent Behavior 273, 282-83 (2009).
[21] Vickerman & Margolin, *supra* note 17, at 438.
[22] JUDITH L. HERMAN, TRAUMA AND RECOVERY 159 (Basic Books 1992).

further abuse or retaliation simply by being moved to a different facility in the same system. Additionally, environmental factors—such as cells, guards' keys and video cameras—may serve as visceral reminders of the abuse, "flipping" the survivor into states of reexperienced trauma as she sees the triggering item and is brought back to the state of powerlessness and fear. Indeed, for survivors of interpersonal violence, environmental reminders of their victimization are potent triggers that often worsen symptoms substantially.

2. Psychoeducation: Once safety has been established for a survivor of sexual violence, several components of therapy are recommended. First, survivors are encouraged to learn about and understand the reactions and symptoms that are causing them difficulty, with a goal of understanding the neurophysiological reactions to trauma that have led to their current condition. Thus, survivors are taught about normal reactions to trauma and taught to recognize them in themselves.

3. Coping enhancement and stabilization: Most treatment of sexual violence victims entails a focus on building coping strategies to deal with symptom management, including hyperarousal, anxiety, intrusive reexperiencing, avoidance, and negative thinking. This can include the teaching of array of skills, including breathing techniques, mindfulness, thought-stopping and distraction. The development of these practices assists survivors in developing more stable functioning.

4. Narrative expression: Once coping has been enhanced, treatment protocols for trauma survivors often contain a component of narrative expression and exposure to the traumatic memory. Repeated exposure to the trauma narrative in a careful, therapeutic context has been shown to be highly effective at decreasing symptoms after trauma in general, and sexual assault, specifically. This phase of treatment can take time and requires that the survivor be in a safe, stable living condition with coping resources available to her.

5. Cognitive treatment: Finally, most trauma-focused treatments for sexual violence address cognitive distortions and meanings that the survivor is struggling with, in order to decrease negative, self-blaming, and guilt-based thoughts and feelings. Treatment with this type of cognitive appraisal requires a trained practitioner in cognitive-behavioral methods.

Overall, treatment for survivors of sexual violence has shown good effectiveness, with certain important parameters. First, the survivor must not be suffering ongoing trauma or threat of victimization or there will not be a meaningful opportunity to recover from the past victimization. Second, a multi-modal treatment protocol that addressed neurophysiological symptoms, cognitive distortions and social impact of trauma is best suited for survivors of sexual violence. Finally, practitioners who provide the treatment must be trained in trauma-focused treatment and evidence-based practices with the most effective methods available.

Summary

Sexual abuse of inmates in institutional, custodial settings is highly traumatizing for the victims. The deleterious effects of sexual violence are widely accepted and proven in clinical practice and empirical study in the field of psychology. Sexual violence can lead to longstanding, pervasive problems in functioning, including in psychological, physical, social and behavioral domains. Experiencing sexual violence has been shown to increase the risk of psychiatric disorder, suicidality, emotional dysregulation, memory problems, and interpersonal and cognitive distortions. Institutional abuse in carceral settings takes place within an environment of high control and isolation, thereby exacerbating the likelihood of worse victimization across time and multiple perpetrators. The dynamics of grooming, coercion, threats, and a peer culture of scapegoating contribute to the high likelihood that victims will not disclose their abuse, a robustly proven finding. Neurophysiological responses to abuse, such as dissociation and memory impairment also serve as barriers to disclosure, as victims detach from and block access to memories, both consciously and unconsciously. People may wait years before coming forward to report that they were sexually abused, if they come forward at all. Sexual abuse of prisoners by those who are supposed to protect them has devastating consequences and can contribute to difficulties in psychological, social and physical health across the lifespan.

Survivors of sexual violence require therapeutic intervention to address the damaging consequences of victimization. The first principle of trauma treatment is the ensuring of safety for the survivor. That is, it is widely proven that meaningful treatment cannot take place if individuals feel that they are still in danger of harm or threats of retaliation. Safety requires that an individual is in an environment of protection and freedom from further threats or abuse. For survivors of institutional abuse, continuing to be held by the same institutional stakeholders, in the setting in which the abuse took place, with myriad triggers and environmental reminders, will likely prevent any therapeutic benefit from taking hold. In order to plan treatment, a trauma-focused assessment is required to determine the breadth and depth of symptoms, as well as any diagnoses of the survivor. Individual treatment that entails psychoeducation, skill-building, narrative and cognitive/behavioral methods is most appropriate for individuals who have been victims of sexual violence. This treatment is complex and must be performed by trained clinicians, with expertise in working with sexual violence survivors.

If I can provide further information, please do not hesitate to contact me.

Sincerely,

Katherine Porterfield, Ph.D.
[redacted]

Attachment B

Expert Report of Terry A. Kupers, M.D., M.S.P.

Re: Sexual Abuse in Federal Women's Prisons & Mental Health Treatment For the Survivors

I. Background and Qualifications

I have been retained by attorney Erica Zunkel, of the University of Chicago Law School's Federal Criminal Justice Clinic, to provide my expert opinions about the conditions that give rise to sexual abuse and misconduct by correctional staff in carceral settings, the effects of such abuse and misconduct, and the adequacy and effectiveness of prison mental health treatment for women survivors. My report will focus specifically on the Federal Bureau of Prisons (BOP), including custodial sexual abuse at FCI Dublin.[1]

I am a board-certified psychiatrist, Professor Emeritus at the Wright Institute, Distinguished Life Fellow of the American Psychiatric Association, and an expert on the psychiatric effects of prison conditions and correctional mental health issues. I have testified more than thirty times in state and federal courts about the psychiatric effects of jail and prison conditions, the quality of correctional management and mental health treatment, and prison sexual assaults. I have served as psychiatric expert witness in multiple lawsuits about the above topics, including *Everson v. Michigan Department of Corrections*, 222 F. Supp. 2d 864 (E.D. Mich. 2002), rev'd and remanded, 391 F.3d 737 (6th Cir. 2004); and *Neal v. Dep't of Corr.*, No. 285232, 2009 Mich. App. LEXIS 182, at *1 (Ct. App. Jan. 27, 2009). I have interviewed over a hundred women around the country about prison and jail conditions, including sexual abuse and misconduct, retaliation, and related topics.

[1] Custodial sexual abuse involves perpetrator(s) who are correctional personnel and victim(s) who are women prisoners.

I have served as a consultant to the U.S. Department of Justice and Human Rights Watch about various prison confinement issues. I am author of Solitary: The Inside Story of Supermax Isolation and How We Can Abolish It (University of California Press, 2017); and Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It (Jossey-Bass/Wiley, 1998). I am co-editor of Prison Masculinities (Temple University Press, 2001); and a Contributing Editor of Correctional Mental Health Report. I have authored and co-authored dozens of professional articles and book chapters, including "Posttraumatic Stress Disorder (PTSD) in Prisoners," in Managing Special Populations in Jails and Prisons, ed. Stan Stojkovic, Kingston, NJ: Civic Research Institute, 2005; "Gender and Domination in Prison," Western New England Law Review, 39, 2017; "The Role of Misogyny and Homophobia in Prison Sexual Abuse," UCLA Women's Law Journal, 18,1, 2010; "Prison and the Decimation of Pro-Social Life Skills," in The Trauma of Psychological Torture, Editor Almerindo E. Ojeda, Volume 5 of Disaster and Trauma Psychology Series, Westport, Connecticut: Praeger, 2008; "Violence in Prisons, Revisited," (with Hans Toch), Journal of Offender Rehabilitation, 45,3/4, 49-54; "A Community Mental Health Model in Corrections," Stanford Law & Policy Review, 26, 119-158, Spring, 2015: 2007; and two entries: "Posttraumatic Stress Disorder in Incarcerated Offenders" and "Imprisonment and Stress," in the Sage Encyclopedia of Criminal Psychology, Sage Publications, 2019. I have followed the FCI Dublin sexual abuse scandal closely and have been interviewed by news media several times about it.

My *curriculum vitae* and a list of cases in which I have served as an expert in the past four years are attached to this report as Exhibits A & B.

II. Summary of Conclusions

- Custodial sexual abuse in a carceral setting can only happen where there is a culture of misogyny and it is acceptable for staff to demean women in multiple ways.

- A very large proportion of women survivors of sexual abuse in prison have had multiple traumas in their life prior to incarceration, including childhood physical and sexual abuse as well as domestic violence as an adult.
- When an officer is inappropriately sexual with a woman prisoner, other staff know about it, but mostly fail to report their colleague's misconduct. There is an unspoken "Blue Code" among correctional officers and prison staff and one does not "snitch" on a colleague for bad deeds.
- In cases where staff do have the courage to publicly call out officers' abusive conduct, they are shunned or actually attacked in retaliation for "snitching," and often transferred to another prison.
- Women underreport sexual abuse in prison, often because they fear retaliation if they report, usually in the form of bogus disciplinary "tickets" that result in their being denied visits with children. Or there is the likelihood they will be consigned to solitary confinement after reporting, even if it is rationalized as protection. Women particularly dread solitary confinement, and that dread prevents many from reporting sexual abuse.
- Women who are abused in prison are severely traumatized. Not only are they victims of unacceptable behavior, but the behavior is perpetrated by staff whose duty it is to protect them and help them get their lives together. It's a double betrayal, the abuse itself, and then the betrayal by authority figures.
- For women who have suffered trauma before, sexual abuse in prison constitutes "re-traumatization." That means the earlier traumas are rekindled and exacerbated, making the current trauma exceptionally harmful and disabling. The women often suffer posttraumatic mental health problems, including but not limited to Posttraumatic Stress Disorder (PTSD). There are accompanying changes in brain structure and functioning that make the harm long-lasting.
- Women who have suffered sexual abuse in prison need intensive mental health treatment to help them recover from the psychological harm.
- While there may be "trauma-informed" treatment programs available in the BOP, it is next to impossible for women who have survived sexual trauma at the hands of custodial staff to be treated effectively for their posttraumatic symptoms and disabilities in prison. There are too many reminders of the sexual abuse, too many "triggers" such as strip searches, even if the woman is at a different facility than where the abuse occurred.

- Women who have been sexually abused in prison have great difficulty forming the kind of trusting relationship with a BOP therapist or other staff member, which is a prerequisite for effective therapy and rehabilitation. After all, the perpetrator was a staff member, and other staff may have known about the abuse and failed to report or intervene.
- I strongly recommend that women survivors of significant sexual abuse in prison be released so they can seek effective mental health treatment in the community while living free of constant reminders of their dreadful trauma in prison.

III. Preparation

I have reviewed the following documents:

- Transcript of Trial Proceedings, *USA v. Ray J. Garcia*, Northern District of California, No. CR 21-00429-YGR (2022).
- Report by Dr. Katherine Porterfield on sexual abuse in prisons, dated March 13, 2023.
- Glenn Thrush, "Justice Dept. Struggles to Carry Out Early Release Program for Abused Inmates," New York Times, February 22, 2023.
- Memorandum of Opinion, *USA v. Rashidah Brice* (U.S. Dist. Ct, E.D. Pa., No. 13-cr-206-2), December 15, 2022.
- Office of the Inspector General, U.S. Dept. of Justice, "Review of the Federal Bureau of Prisons' Use of Restrictive Housing for Inmates with Mental Illness," July 2017.
- "Care Level Classifications for Medical and Mental Health Conditions or Disabilities," Federal Bureau of Prisons Clinical Guidance, May 2019, http://www.bop.gov/resources/health_care_mngmt.jsp.
- U.S. Dept. of Justice, Program Statement: Treatment and Care of Inmates with Mental Illness, May 1, 2014.

- U.S. Dept. of Justice, Program Statement: Psychology Services Manual, August 25, 2016.
- U.S. Dept. of Justice, Psychology Treatment Programs, May 26, 2016.
- Federal Bureau of Prisons, Directory of National Programs, September 13, 2017.
- U.S. Dept. of Justice, Program Statement: Female Integrated Treatment (FIT), August 11, 2022.
- U.S. Dept. of Justice, Federal Bureau of Prisons, "Evidence-based Recidivism Reduction (EBRR) Programs and Productive Activities (PA)," undated.
- U.S. Government Accountability Office (GAO), Federal Prisons: Information on Inmates with Serious Mental Illness and Strategies to Reduce Recidivism, February 2018.

IV. Sexual Abuse and Custodial Misconduct in Women's Prison

A. Background

Sexual abuse of varying forms and degrees is a significant problem in women's prisons, and the most common perpetrators are male staff.[2] In 1996, both Human Rights Watch and Amnesty International published reports reflecting the widespread occurrence of sexual abuse in women's prisons.[3] Prior to these two groundbreaking reports, little was known about sexual abuse in women's prisons. These reports led to a number of lawsuits that exposed the omnipresence of sexual abuse and rape in

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[2] Julie Kunselman et al., Prison Sex: Practice and Policy 27–47 (Christopher Hensley ed., 2002). *See generally* Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 THE PRISON J. 379 (2000); *see also What We Do*, JUST DETENTION INT'L, https://justdetention.org/what-we-do/; and Angela Browne et al., *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT'L J. L. PSYCH. 301, 301-322 (1999).

[3] HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: Sexual Abuse of Women in U.S. State Prisons (1996), https://www.hrw.org/legacy/reports/1996/Us1.htm [https://perma.cc/8H8U-MQE5].

women's prisons by correctional staff. I subsequently testified as an expert witness at trial in two major Michigan class action lawsuits about sexual abuse in women's prisons, *Everson vs. Michigan D.O.C.* (2002) and *Neal vs. Michigan D.O.C.* (2009).[4]

In 2003, President George W. Bush signed into law the Prison Rape Elimination Act (known as PREA), outlining legal requirements to reduce the prevalence of sexual abuse and sexual harassment in jails and prisons. Subsequently, as mandated by PREA, there were hearings by the Prison Rape Elimination Commission about proper implementation of PREA's requirements. In 2012, Attorney General Eric Holder approved the national PREA Standards that originated in the Commission's work.[5]

The Standards proclaim zero tolerance for sexual abuse and harassment in jails and prisons, direct all correctional administrations to report the prohibited activities, ensure a confidential reporting mechanism, effectively adjudicate complaints of abuse from prisoners, establish adequate assessment and treatment of women survivors of sexual abuse and harassment (both medical and psychiatric), post instructions on filing a confidential complaint prominently in all jails and prisons, and so forth. In spite of PREA, there continue to be very many unfortunate eruptions of sexual abuse in federal and state prisons. In fact, following reported widespread sexual abuse and misconduct at the FCI Dublin women's facility in the past year, it came to light that the FCI Dublin warden, who would eventually be convicted of sexual abuse of a ward, was the designated director of training for PREA at the prison.[6]

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[4] *Everson v. Michigan Dep't of Corr.*, 222 F. Supp. 2d 864 (E.D. Mich. 2002), rev'd and remanded, 391 F.3d 737 (6th Cir. 2004); *Neal v. Dep't of Corr.*, No. 285232, 2009 Mich. App. LEXIS 182, at *1 (Ct. App. Jan. 27, 2009).

[5] 28 C.F.R. § 115 (2012).

[6] Press Release, U.S. Attorney's Office, Northern District of California, Warden of Federal Corrections Institute in Dublin Charged with Sexual Abuse of a Ward (Sept. 29, 2021), https://www.justice.gov/usao-ndca/pr/warden-federal-corrections-institute-dublin-charged-sexual-abuse-ward.

B. A Culture of Misogyny

For widespread sexual abuse and misconduct to occur within a prison, there has to be a culture of misogyny.[7] The culture is expressed in demeaning comments, for example referring to grown women as "girls," "bitches," or worse. Female prisoners tell me how, too often, some of the female staff members treat them as horribly as the male staff, and too many (but certainly not all) male staff infantilize them, demand their subservience, and even sexually assault them. There are daily sexual innuendos, for example a C.O.'s belittling comments to women prisoners such as "Nice breasts," or "I'd like to see you with no clothes on." Or, a male officer stands outside a woman's cell peering through the small window in the cell door while the woman undresses or uses the toilet. Then there are deceptively friendly-seeming pats on the buttocks and inappropriate "pat searches," where a male correction officer lingers a little too long feeling breasts, or touching very intimate places like nipples or crotch. These component parts of a culture of misogyny are both part of the daily culture and part of the sexual abuse.

Because of the carceral nature of prison, there are many opportunities for sexual abuse and misconduct to occur.[8] Routine searches occur almost daily, for example when women are leaving the cafeteria and the administration wants to prevent their carrying contraband food back to their cells. Or officers conduct "strip searches," where women are stripped naked and searched. Officers also conduct intrusive cavity explorations, presumably in an effort to find contraband drugs or weapons. During daily pat searches and "counts" (officers checking at frequent intervals on the whereabouts of prisoners), there are all too many opportunities for an officer, in the name of a search or

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[7] Terry A. Kupers, *The Role of Misogyny and Homophobia in Prison Sexual Abuse*, 18 UCLA WOMEN'S L. J. 107, 109–12 (2010).

[8] Barbara Owen et al., In Search of Safety: Confronting Inequality in Women's Imprisonment (1st ed. 2017).

a count, to peer lasciviously at women who are undressed or partially clad, or to touch a woman inappropriately, or worse.

I do not mean to imply that all prison staff are misogynists nor that all male staff abuse, harass, or assault women prisoners. In fact, quite a few female prisoners have told me that the only way they survived imprisonment was with the support and encouragement of female staff members. But a much more frequent violation of female prisoners, practiced almost universally by staff in women's facilities, is complicity by silence as colleagues carry out the abuse (discussed in more detail below).

C. Prior Traumas Make Women Vulnerable to Sexual Abuse.

Female prisoners have often experienced abuse and trauma in their lives prior to coming to prison, and are therefore uniquely susceptible to abuse. Because of the level of sexual and physical abuse in their backgrounds and their resulting psychological make-up, women who were previously traumatized may be less able than many other women to know when their boundaries are being violated or they are being harassed or disrespected. And because of early and/or repeated boundary violations (usually involving the people they should have been able to trust, for instance a father, a friend, partner, or employer, or a close male relative), because of the resulting guilt, confusion and diminished self-esteem, and because of a lack of confidence that a man in a position of power might heed their wishes or commands, they may not recognize or know how to respond to the early stages of an evolving sexual assault, privacy invasion or violation of bodily integrity.

For example, this dynamic plays out when a male officer makes a lewd or infantilizing comment or conducts an inappropriately sexualized pat search. Women who have been abused in the past may partially dissociate, become passive and let the abuse develop without angrily protesting. The offending staff take this as a signal, not of consent, but rather that this woman is unlikely to submit a grievance or sound an alarm when he assaults her, and consequently he may more confidently continue to

make demeaning comments or move ahead with the evolving sexual assault. In fact, staff who repeatedly abuse and take advantage of female prisoners tend to be very attuned to this pattern, so much so that they identify new prisoners with low self-esteem who have a history of abuse and single them out for sexual assaults. This happened at Dublin, where correctional staff used private information from medical records about women's mental health to manipulate and sexually abuse them.[9]

Prior abuse not only makes women more vulnerable to custodial sexual abuse, it also makes the resulting psychological damage worse, as I will discuss in Section IV, below.

D. Other Prison Staff Know About the Sexual Abuse and Fail to Report: The Blue Code.

It is almost never the case that other staff are unaware when one staff member is sexually inappropriate with women prisoners. There is the "Blue Code," an unwritten code of silence among correctional officers (and police).[10] The unofficial code of conduct prohibits informing on each other. The supervising officer, the warden and others are typically involved in sexually abusing female prisoners, or they know about it and simply look the other way. That can have a ripple effect in prisons, where subordinate officers are more likely to sexually abuse women when they see their superior officers do it or condone it without consequences. When officers call adult women "girls" and grope and maul them in the name of pat searches, they are setting the stage for rape and other forms of sexual abuse. They are evolving a culture of misogyny where sexual abuse will inevitably follow.

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[9] Lisa Fernandez, *Women at Center of Dublin Prison Sex Scandal Say Guard Used Mental Health Files to Prey on Her*, KTVU (Mar. 14, 2022), https://www.ktvu.com/news/woman-at-center-of-dublin-prison-sex-scandal-says-guard-used-mental-health-files-to-prey-on-her.

[10] *See generally* Gary R. Rothwell & J. Norman Baldwin, *Whistle-Blowing and the Code of Silence in Police Agencies: Policy and Structural Predictors*, 53 CRIME & DELINQ. 605 (2007).

I testified as an expert in a 2002 case about sexual misconduct in the Michigan Department of Corrections, *Everson v. McGinnis*, about why having male custody staff patrolling women's housing units where the women sleep, shower, and use the bathroom promoted abuse:

> In an institutional setting where men are in positions of authority and women are under their control, it causes very real damage for the men in authority to address and refer to the women under their control in patronizing, infantilizing and disrespectful ways. For instance, during my tours of the women's facilities in Michigan, I heard male staff refer to women prisoners as "the girls." Women reported being referred to as "bitches" or "ho's," or even worse demeaning and sexualized terms. The atmosphere created by small acts of disrespect make more overt acts of sexual harassment and abuse more likely and sexual abuse more easily contemplated and accomplished without detection. It also creates a pervasive sense of unsafety in women prisoners, especially in light of their known history of prior abuse and lack of recourse.[11]

A female correctional officer who was brave and ethical enough to speak out about ongoing sexual abuse at FCI Dublin last year discussed the culture of misogyny at that prison. She stated in a television news clip, "the way they (male officers) referred to them (female prisoners), they are 'bitches,' . . . um, those are the nicer terms they used." She continued, "When we leave, these women (prisoners who are sexually abused), are left here alone with these perpetrators. . . . 90% of these women have serious trauma in their backgrounds."[12] This correctional officer had tried to report abusive officers, and said that not only was nothing done, but she was punished for reporting the sexual abuse: "I got called into my supervisor's office, for the first time in 25 years. I got a letter of reprimand."[13] Then, after she made public statements about the ongoing abuse, she

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[11] *Everson*, 222 F. Supp. 2d at 864.
[12] KTVU, *Powerless in Prison: Surviving Sex Abuse*, YOUTUBE (Sept. 23, 2022), https://www.youtube.com/watch?v=GtgtEOLig84.
[13] *Id.*

was abruptly transferred to a federal prison in another state.[14] Another female correctional officer at FCI Dublin also spoke out during the same newscast, saying, "We've been reporting this stuff for years, and they still work there."[15]

During the trial of Ray Garcia, Dublin's ex-warden, several witnesses confirmed the culture of silence, "The Blue Code," and the very real concerns about retaliation at Dublin. Dr. Cynthia Townsend, a BOP psychologist testified that when one of Garcia's victims came to talk to her about the abuse, the woman told her that "she did not want anything reported because she was concerned about retaliation."[16] Ultimately, Dr. Townsend advised the woman to report the abuse to her attorney rather than through BOP channels because Dr. Townsend herself was "concerned that adverse action might be taken . . . in terms of being placed in the Special Housing Unit, where she wouldn't have contact with her family[.]"[17] Dr. Townsend had reason to believe that could happen because she had seen "an inmate that had been placed in the Special Housing Unit due to an investigation into staff misconduct" and the inmate was there "over 11 months and then transferred far away."[18] Ultimately, Dr. Townsend "didn't believe we could protect her or that action would be taken if it were to be reported internally."[19]

Garcia's victims likewise testified about the culture of silence and retaliatory practices at Dublin. One explained how officers "have control over everything. They have control over your housing units, over your jobs, over how you interact on the compound, whether you can be on the compound or if you have to be in Special Housing Units," which discourages reporting.[20] She further testified that she "dealt with

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[14] *Id.*
[15] *Id.*
[16] Trial Transcripts, *United States v. Garcia*, Case Number 21-CR-00429-YGR, at 574:22-575:2 (Nov. 30, 2022).
[17] *Id.* at 575:25–576:3.
[18] *Id.* at 576:8–13.
[19] *Id.* at 585:11–12.
[20] *Id.* at 745:14–17 (Dec. 1, 2022).

multiple times of retaliation and multiple forms of retaliation" after she reported Garcia.[21]

There are exceptions to the Blue Code, for example whistle blower correctional officers who report sexual abuse of women prisoners, and even some who testify at trial about it. But they are very rare exceptions. In almost every instance of sexual abuse that I have uncovered in preparation for my expert testimony in civil lawsuits brought by the survivors of prison sexual abuse, there were other officers who knew about the abuse, and in many cases provided alibis for the perpetrators. The Blue Code, like the background culture of misogyny, is a prerequisite and active ingredient in custodial sexual abuse.

E. Fear of Retaliation for Reporting Sexual Abuse

Women who speak up about sexual abuse in prisons overwhelmingly face retaliation. Subservience is drilled into female prisoners. She is taught to passively follow orders and remain silent when she is mistreated or abused. If she protests or demands her rights, too often there is retaliation in the form of bogus disciplinary write-ups and time in "the hole," or solitary confinement, which is also a form of retaliation against women who report custodial sexual abuse.

Many women have reported to me their dread that, were they to report the officer who abused them, his or her colleagues would subsequently write a bogus disciplinary report and, as punishment, they will be denied visits with their children. More than sixty-five percent of female prisoners have children, and often their problems with self-esteem and depression have much to do with their sense they have failed as mothers.[22] Given the "Hobson's Choice" of losing contact with their children or allowing

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[21] *Id.* at 788:23–25.

[22] Suzanne Allen et al., *Throwaway Moms: Maternal Incarceration and the Criminalization of Female Poverty*, 25 AFFILIA: FEMINIST INQUIRY IN SOC. WORK 160, 160 (2010).

the perpetrator of sexual abuse to go unpunished, they choose to protect visits with their children.

Solitary confinement is another tool used to keep abuse in prisons and jails under wraps. Women who have been sexually abused in prison dread going to "the hole," "segregation," or solitary confinement. Indeed, there is a large amount of research evidencing the psychological harm of solitary confinement.[23] I testified twice before the PREA Commission, among other things, about the harmful effects of consigning women who allege sexual abuse to solitary confinement "for their protection" while investigations are ongoing. And while the PREA Standards generally prohibit solitary confinement subsequent to a woman reporting sexual abuse by prison staff,[24] the dread of solitary confinement still looms because the PREA Standards are not perfectly enforced, and because solitary confinement is such a widespread practice in corrections.[25]

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[23] Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. UNIV. J. OF L. & POL'Y 325, 325–53 (2006); *see also* Craig Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*, 49 CRIME & DELINQ. 124, 124–56 (2003); Terry Kupers, Isolated Confinement: Effective Method for Behavior Change or Punishment for Punishment's Sake? 213–32 (Bruce Arrigo & Heather Bersot eds., 1st ed., 2013); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST 441, 441–528 (2006).

[24] *See* PREA STANDARDS, Implementation, §§ 115.68, 115.43 (where the standards generally prohibit solitary confinement, with certain exceptions, for example when the woman's consignment to solitary is necessitated by security concerns).

[25] The Office of the Inspector General reported in July, 2017, that 7% of prisoners in the BOP are in some form of solitary confinement, compared to an average of 5% in state DOCs, and "[a]lthough the BOP states that it does not practice solitary confinement, or even recognize the term, we found inmates, including those with mental illness, who were housed in single-cell confinement for long periods of time, isolated from other inmates and with limited human contact." OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, EVALUATION AND INSPECTIONS DIVISION 17–05, REVIEW OF THE FEDERAL BUREAU OF PRISONS' USE OF RESTRICTIVE HOUSING FOR INMATES WITH MENTAL ILLNESS, at i (2017). In other words, in spite of prohibitions in the PREA Standards, women in prison (men, too) are always at risk of "going to the hole."

Before the 2012 PREA Standards were promulgated, I spoke to at least a hundred women in prison about sexual abuse they had experienced and they universally told me that their dread of solitary confinement, which they considered a punishment as well as a form of retaliation for reporting, had prevented them from reporting the abuse. It was only after a legal team began investigating sexual abuse and several other women came forward, that they mustered the courage to step forward and complain of the sexual abuse.

Recent revelations at FCI Dublin illustrate this phenomenon well. Only after one woman bravely stepped forward and complained, only after a female correctional officer publicly corroborated her report, and only after newspaper articles and television news segments appeared, did dozens more women prisoners report that they too had been sexually abused at Dublin.[26] I cannot emphasize too strongly that in spite of efforts to curtail custodial sexual abuse in the Federal Bureau of Prisons, and in spite of efforts to effect the requirements of PREA, sexual abuse continues to occur, there is retaliation for reporting, and solitary confinement is utilized widely in spite of the PREA Standards advising that it be utilized only very rarely.

As a result, in practice, dread of being consigned to solitary confinement has caused and continues to cause many women – possibly a large majority of those who suffer sexual abuse behind bars – to refuse to report the abuse. An example of the continuing threat of solitary confinement that causes women not to report sexual abuse emerged in the case of *United States v. Brice*, 2022 WL 17721031 (E.D. Pa. 2022). Ms. Brice moved for a sentence reduction after she was sexually abused in BOP custody.[27] The Court noted in its order releasing Ms. Brice that she "initially did not feel she could

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[26] Lisa Fernandez, *Dozens of Women Detail Rape and Retaliation at Dublin Prison*, KTVU (Sept. 23, 2022), https://www.ktvu.com/news/dozens-of-women-detail-rape-and-retaliation-at-dublin-prison-real-reform-is-questioned.

[27] *Brice*, 2022 WL 17721031, at *1.

report this abuse because the officer's supervising lieutenant was also an abuser."[28] Ms. Brice "further testified at the hearing before me that inmates who reported sexual assault were placed in solitary confinement, purportedly for the reporting inmate's protection."[29] She saw "'two or three different girls' placed in solitary confinement for talking about sexual assault over the phone."[30]

Even if women do report, there is no guarantee that anyone will believe them. I have spoken to quite a few women prisoners who have reported sexual abuse by a particular officer, an investigation followed, and then it was determined that there was insufficient evidence to find the officer guilty. Subsequently that officer approached the woman who complained and said something like, "Now you are mine, I can have my way with you and no one will interfere."

IV. Mental Health Consequences of Sexual Abuse in Prison

The unfortunate harsh realities of life in prison combine to form a "perfect storm" for "re-traumatization" in previously-traumatized women. As discussed above, for a large majority of women in prison, their pre-incarceration backgrounds include much more trauma than the average person experiences and then when they go to prison new traumas await them, including crowded conditions (research points to a strong correlation of prison crowding with increased violence, psychiatric breakdown and suicide[31]), a frighteningly high prevalence of physical and sexual assault, and time spent in segregation and solitary confinement. These conditions all contain new traumas that occur behind bars and are more difficult to cope with because of the past history of

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[28] *Id.* at *2.
[29] *Id.*
[30] *Id.*
[31] Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313, 313–53 (1983); Paul B. Paulus, Garvin McCain & Verne C. Cox, *Death Rates, Psychiatric Commitments, Blood Pressure and Perceived Crowding as a Function of Institutional Crowding*, 3 J. NONVERBAL BEHAV. 107 (1978).

multiple traumas.[32]

Because so many women prisoners have histories of physical or sexual abuse prior to incarceration, the sexual abuse they are subjected to in prison opens and greatly exacerbates old wounds, i.e., they suffer "re-traumatization." In prison, there are a large number of daily reminders that this is prison, and prison is where the sexual abuse occurred, even when the woman is transferred to a different facility. There are the locked cells, the strict rules, and the experience of being ordered around by officers multiple times each day. Aspects of the physical environment remind of the trauma. Thus, the woman who was abused in her cell, a bathroom, or search room is reminded of the abuse whenever she enters a comparable location in any prison.

In addition, women are "triggered" by things that remind them of the perpetrator of their abuse or a setting that is similar to the place where the abuse took place. These kinds of triggers tend to make the women feel they are back in the abusive situation. They panic at unpredictable times, and those around them may discount or minimize their fears. But the terror is secret and silent – it is in the memories of the trauma, and those memories are painful, and very personal. Absent a complaint being sustained and the officer being terminated, the same officer who sexually abused her might even remain in total control of the woman. As discussed above, for the most part, officers fail to report colleagues who sexually abuse women prisoners and officers go unpunished. Subsequently, the mere presence of uniformed male officers in the prison can constitute a re-traumatization for the women.

In addition, the deprivation of privacy that is inherent in incarceration can, unfortunately, be another trigger for a woman who has survived sexual abuse in prison. Previously traumatized women who might choose to avoid the gaze of males in order to

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[32] Naomi Breslau, Howard D. Chilcoat, Ronald C. Kessler & Glenn C. Davis, *Previous Exposure to Trauma and PTSD Effects of Subsequent Trauma: Results From the Detroit Area Survey of Trauma*, 156 AM. J. PSYCHIATRY 902 (1999).

create a safe place are forced to live in a situation where male officers are constantly present and might intrude on their most personal and private activities at any moment. They tend to retreat into themselves, wanting to stay out of the way of potentially dangerous staff. This makes participation in treatment and rehabilitation very problematic.

PTSD is a psychiatric condition – recognized in the DSM-5 – that occurs in some (but not all) people who experience a severe trauma such as the personal experience of rape or sexual abuse, witnessing a murder, or some other loss or painful experience that is outside the usual range of human events. The disorder consists of intrusive symptoms (flashbacks, nightmares, reliving the experience), hyper-arousal symptoms (startle reaction, insomnia, hyper-vigilance), and constrictive symptoms (emotional numbing, isolation, fear of leaving one's room or cell or participating in activities or relationships reminiscent of the trauma). There are also changes in mood and cognition, a tendency toward hyperarousal or sharp startle, and often dissociative symptoms, for example a sense one is not really alive, or one has a sense of unreality.[33] The intrusive and constrictive symptoms alternate over time until either they resolve, and then there is no PTSD to diagnose, or a chronic pattern of symptoms evolve, including emotional numbing, depression, constricted life, low self-esteem, insomnia, nightmares, flashbacks, chronic fatigue, re-living, and panic.[34]

Different individuals react differently to trauma. Some individuals develop diagnosable PTSD. Other individuals become very anxious, have trouble sleeping and experience flashbacks and nightmares, become depressed and/or suicidal, but their symptoms do not rise to the level a diagnosis of PTSD. Regardless of whether a woman who was the victim of custodial sexual abuse in prison exhibits sufficient criterion

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[33] *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5-TR) 271–90 (American Psychiatric Association Publishing, 5th ed. 2013).
[34] Caron Zlotnick, et al., *Chronicity in Posttraumatic Stress Disorder (PTSD) and Predictors of Course of PTSD in Patients with Anxiety Disorders*, 12 J. TRAUMA STRESS 89 (1999).

symptoms to be diagnosed PTSD, the trauma of sexual abuse will almost certainly have severe and lasting damaging effects.

Multiple traumas have a very different effect than a single trauma, and that condition is called "complex PTSD."[35] The healing process that begins after a single trauma is most likely to proceed if a safe environment and sensitive help is available. On the other hand, if the trauma is repeated (e.g., repeated child abuse, domestic violence, captivity where the perpetrator of the trauma continues to dominate the survivor, or traumas that occur in jail or prison), the repetitive traumas multiply the emotional damage and preclude real healing. A more complicated posttraumatic clinical picture results, usually with more severe and lasting symptoms and disability. In effect, just as the intensity of emotional reactions and the need to constrict affect and activities begin to diminish, a new trauma comes along and sets the whole process off again, intensifying the intrusive emotional symptoms, magnifying the arousals, and heightening the need to constrict.

In addition to leading to diagnosable conditions like PTSD, there is extensive research evidencing changes in brain structure and function following serious trauma such as sexual abuse.[36] Brain imaging technologies such as functional MRI's (fMRI) and Photon Emission Tomography (PET scan) can show changes in the relative rate of neuronal firing in different parts of the brain. Individuals who have suffered significant

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[35] Complex PTSD is a condition that is widely referenced in the professional mental health literature and in clinical forums but is not yet listed as an official disorder in the DSM-5. Dr. Judith Herman, in her groundbreaking 1992 book, Trauma and Recovery: The Aftermath of Violence, described Complex PTSD and how it differs from PTSD caused by a single traumatic event. JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR (Basic Books 1992).

[36] *See* J. Douglas Bremner, *Neuroimaging Studies in Post-Traumatic Stress Disorder*, 4 CURR. PSYCHIATRY REP. 254 (2002); Katherine H. Taber & Robin A. Hurley, *PTSD and Combat-Related Injuries: Functional neuroanatomy*, 21 J. NEUROPSYCH. CLIN. N. 1 (2009); Bruce S. McEwen & Huda Akil, *Introduction to Social Neuroscience: Gene, Environment, Brain, Body*, 1231 ANN. N.Y. ACAD. SCI. at vii (2011).

trauma evidence relatively more firing of neurons in the temporal lobe of the brain, the site of the limbic system and the amygdala, and relatively less firing of neurons in the pre-frontal cortex, the area of the brain contiguous to the forehead. Generally, the limbic system is the brain area related to emotional reactions and impulsivity while the pre-frontal cortex is the site of executive functioning, including rationality, judgement, conscience and consideration of the consequences of one's actions.

Optimally, the pre-frontal cortex channels the emotional outpouring of the limbic system so that a person can function rationally and exhibit good judgement. With increased firing of neurons in the limbic system relative to their firing in the pre-frontal cortex, individuals who have experienced significant trauma are prone to emotional experiences they feel they cannot control (including anxiety, anger outbursts, flashbacks, etc.), and this hampers their cognitive functioning, their judgement, their capacity to follow the rules, and so forth. This is merely one finding of the evolving research utilizing brain imaging and other relatively new technologies to gauge the impact of trauma.[37] Trauma, especially severe and repeated trauma, causes physical changes in the brain. With a lack of effective mental health treatment, these changes become chronic and prevent the brain from functioning in an optimal and healthy manner.

V. The Path to Healing

Psychiatrist Dr. Judith Herman describes how the healing process following trauma occurs in three phases.[38] The first and very critical phase focuses on establishing

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[37] S. Mirzaei et al., *Regional Cerebral Blood Flow in Patients Suffering from Post-Traumatic Stress Disorder*, 43 NEUROPSYCHOBIOLOGY 260 (2001); Ajai Vyas, Savita Bernal & Sumantra Chattarji, *Effect of Chronic Stress on Dendritic Arborization in the Central and Extended Amygdala*, 965 BRAIN RES. 290 (2003); Bruce S. McEwen, *The Neurobiology of Stress: From Serendipity to Clinical Relevance*, 886 BRAIN RES. 172 (2000); J. Douglas Bremner et al., *MRI and PET Study of Deficits in Hippocampal Structure and Function in Women with Childhood Sexual Abuse and Posttraumatic Stress Disorder*, 160 AM. J. PSYCHIATRY 924 (2003).

[38] JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR (Basic Books 1992).

safety. In the second phase of healing, after safety has been attained, there is the working through of the trauma itself. This is when the trauma is dissected in great detail, and the way forward is envisioned. And the third phase involves preparing for re-integration into daily life, i.e., a return to one's ordinary activities.[39] It is very important to get the three phases of healing in the right order.

A. Phase I

In order to complete Phase I, the woman who suffers trauma-related symptoms needs to feel safe – safe enough to start examining the past traumas and embarking on a healing journey. Prison is simply not a place that is conducive to the effective practice of mental health treatment for women who have been sexually abused in prison because of continuing incarceration and the many reminders or "triggers" of the sexual trauma in the prison environment and routine that are discussed above.

It is only after sufficient safety has been established that the second phase of treatment (remembering the trauma, mourning, and working through the traumatic experience with the help of a therapist) and the third phase (reconnecting with other people and reestablishing a daily life) can proceed. Getting the phases out of order can cause harm.

B. Phases 2 and 3

To be effective, treatment for PTSD, or for symptoms and disabilities that are caused by trauma but do not technically fit the precise criteria for a diagnosis of PTSD, must include some form of talking therapy in a safe setting, as well as robust rehabilitative programming. The treatment usually involves a combination of individual and group psychotherapy, where the individual can talk about what happened and

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[39] *Id. See also* BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (Penguin Books 2015); JASMIN LEE CORI & ROBERT SCAER, HEALING FROM TRAUMA: A SURVIVOR'S GUIDE TO UNDERSTANDING YOUR SYMPTOMS AND RECLAIMING YOUR LIFE (Hachette Books 2008); CHRISTINE A. COURTOIS & JULIAN D. FORD, TREATING COMPLEX TRAUMATIC STRESS DISORDERS: AN EVIDENCE-BASED GUIDE (Guilford Press 2009).

about her emotional reactions in the presence of a psychotherapist who is trained to provide psychotherapy to people who have experienced severe trauma. This talk therapy must be trauma-informed. Treatment must also include quality visits with loved ones, as well as participation in meaningful rehabilitation programs, educational pursuits, work opportunities, and so forth. Psychotropic medications can be helpful as an adjunct to psychotherapy and rehabilitative programming, but alone do not constitute adequate treatment.

I have had the opportunity to review documents about the mental health treatment programs available in the BOP that are referenced in Section II above. However, I have not had an opportunity to tour the programs nor to observe their operation, so I cannot opine about the adequacy of practices within the BOP in carrying out each program I reviewed. That said, there appears to be a wide variety of programming, including the Resolve Program, which provides cognitive behavioral therapy that is designed to address the trauma-related mental health needs of inmates.

However, even if the BOP offers treatment for survivors of custodial sexual abuse, it cannot be effective if administered within a carceral setting. Regardless of what BOP treatment programs are available, the women will be stuck in Phase I of the healing process. All of the stark realities of incarceration and daily reminders of the trauma discussed above mean that women who have been sexually abused in prison will tend never again to feel safe in prison, even in a well-designed treatment unit where the staff are aware of the realities of trauma and competent in its treatment.

Women also know that correctional mental health staff are inclined to take the side of custody staff, for example while adjudicating disciplinary write-ups. As a result, they have trouble forming trusting therapeutic relationships with mental health staff. And then there is simply the prison environment, the cells, the bars, the searches, the demeaning glances from staff that are too subtle to permit grievances. None are conducive to safety or healing.

VI. Rehabilitation in Prison

Women who are sexually abused by prison staff have great difficulty participating and succeeding in rehabilitation programs designed to teach them the skills that will help them succeed at "going straight" when they are eventually released from prison. Symptoms caused by the sexual trauma, including anxiety, flashbacks, re-living experiences, reclusiveness and so forth, interfere with their motivation, participation and capacity to learn in education and rehabilitation programs. Women who have suffered the trauma of sexual abuse in prison tend to seek isolation in or near their cell, and are reluctant to participate in congregate activities, including rehabilitation programs.[40] The shame and low self-esteem they feel on account of their sexual trauma tend to make them feel unworthy of success at rehabilitation. And the distrust they feel toward correctional staff prevents them from seeking the help they need to succeed in education and rehabilitation programs.[41]

For example, women who suffered significant trauma prior to their incarceration, and then suffered sexual abuse in prison, usually function very poorly in classrooms and vocational training programs behind bars.[42] The problem is magnified by the betrayal they suffered at the hands of authority figures who sexually abused them in prison, and thereafter they have great difficulty seeking the help they need from teachers and counselors on the prison staff. Their posttraumatic symptoms can be overwhelming and preclude their studying. Then, their inability to participate and/or poor performance in rehabilitation programs usually leads to greater recidivism.[43]

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[40] Vittoria Ardino, Luca Milani & Paola Di Blasio, *PTSD and Re-Offending Risk: The Mediating Role of Worry and a Negative Perception of Other People's Support*, 4 EUR. J. PSYCHOTRAUMATOL. 1 (2013).

[41] *Id.*

[42] Sandra B. Morissette et al., *The Effects of PTSD Symptoms on Educational Functioning in Student Veterans*, 18 PSYCHOL. SERV. 124 (2021).

[43] Holly Harner & Ann W. Burgess, *Using a Trauma-Informed Framework to Care For Incarcerated Women*, 40 J. OBSTET. GYNECOL. NEONATAL NURS. 469 (2011).

VII. Conclusion

Prison is simply not a place that is conducive to the practice of effective mental health treatment for women who have been sexually abused in prison. It does not provide "safety," and the harmful psychological effects of being in prison include the exacerbation of symptoms and disabilities related to prior traumas as well as the ongoing reminders of sexual abuse by correctional officers. Therefore, any mental health treatment, educational classes, or vocational programs in prison – even treatment that is of good quality – is undermined and stymied by the harmful effects of being incarcerated. This can severely undermine the rehabilitative goals underlying the sentence. Moreover, the traumas incurred while incarcerated make psychiatric conditions worse. The mental health treatment fails, in large part because of the memories, the triggers, and because of the fact that they have trouble forming trusting therapeutic relationships with correctional staff including mental health clinicians and teachers. Then, their inability to participate and/or poor performance in rehabilitation programs usually leads to greater recidivism.[44]

Women who have been sexually abused by correctional staff must be released from prison if they are ever to regain their mental stability and ability to work as law-abiding community members once they get out of prison. There are many very effective mental health treatment programs in the community to address the harms and trauma of sexual abuse in prison. Freed from the harsh prison environment, freed from the tough demeanor prisoners have to take on to discourage assailants, and freed from the constant surveillance in prison and the fear of being abused again, they can finally relax and participate fully in the treatment program. This in stark contrast to what will happen to them if they remain in prison while seeking mental health treatment for the problems that were caused by the sexual abuse.

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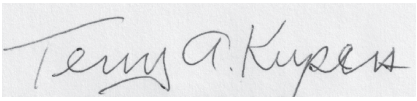
[44] *Id.*

Respectfully submitted,



Terry A. Kupers, M.D., M.S.P.

Dated: April 28, 2023

Attachment C

Guernsey, Alison K

From: [redacted] (BOP) [redacted]
Sent: Monday, May 20, 2024 4:42 PM
To: Guernsey, Alison K
Subject: RE: Supplement to May 9, 2023 Request for RIS [redacted]

There is a pending investigation into this matter and we are unable to provide an estimate at this time.

[redacted]

[non-relevant portions of the email chain ommitted]

From: Guernsey, Alison K [redacted]
Sent: Friday, May 17, 2024 1:08 PM
To: [redacted] (BOP) [redacted]
Cc: Guernsey, Alison K [redacted]
Subject: [EXTERNAL] RE: Supplement to May 9, 2023 Request for RIS [redacted]

Hello –

I'm reaching out to obtain information on the status of [redacted] request for a reduced sentence from the Bureau of Prisons. It's now been approximately a year since [redacted] first requested the BOP act.

Sincerely,

Alison K. Guernsey
Clinical Professor

Attachment D

I, Jaehyun Oh, attest to the following:

1. I am an attorney admitted to practice law in the States of New York and New Jersey, as well as federal districts including those of New York, New Jersey, Connecticut, and Maryland.
2. I am a partner of the Jacob D. Fuchsberg Law Firm, LLP.
3. My work is focused on providing civil representation to victims of civil rights violation, medical malpractice, and personal injury. I head the civil rights practice of the Jacob D. Fuchsberg Law Firm, LLP and lead a team consisting of two other attorneys, two paralegals, two interns, and other support staff.
4. I routinely represent clients who are injured while incarcerated. On their behalf, I pursue Federal Torts Claims Act ("FTCA") claims against the federal government, 42 U.S.C. § 1983 claims against state, county, and municipal officers, and other related state torts claims. I have been the lead attorney on about 90 such cases.
5. Recently, more than half of my practice has been devoted to representing survivors who were sexually abused while incarcerated in the custody of Federal Bureau of Prisons ("BOP").

6. I currently represent approximately fifty (50) clients who were sexually abused by employees or contractors of BOP. Most of these clients were incarcerated when they first contacted me for representation.
7. I am familiar with the policy statement for compassionate release that went into effect on November 1, 2023, wherein, to qualify for reduction in sentence, incarcerated victims will need to establish sexual abuse by BOP staff with a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding, unless such proceedings are unduly delayed or the victims are in imminent danger.
8. Because of my background, I have extensive experience regarding substantial delays as well as other challenges in obtaining a finding or admission of liability in civil cases, as relevant to the policy statement's requirements for a sentence reduction in paragraph 7.
9. From my experience and knowledge, it typically takes several years for an incarcerated survivor to pursue civil claims for sexual abuse they suffered during incarceration. There are multitudes of substantial delays built into the process of obtaining compensation in the form of either settlement or verdict.
10. It typically takes a year or longer for a competent attorney to satisfy the conditions precedent to the lawsuit, to investigate the claim including

through record requests and witness interviews, and to draft the complaint. Once a lawsuit is instituted, litigation takes about two years at a minimum. I am personally aware of cases where litigation lasted for over five years before a settlement was reached.

11. There are numerous delays inherent to pursuing civil claims against the federal government and the abuser, and especially so for incarcerated plaintiffs.

12. Even the most basic steps such as establishing secure attorney-client contact can be challenging and time-consuming when survivors are incarcerated.

13. Incarcerated survivors typically reach out to me through word-of-mouth, having heard about my representation from other survivors. They have no way of contacting me initially other than on the prison phone line, regular mail, or Corrlinks (*i.e.*, an email system available to some incarcerated persons). These channels of communication are all monitored by BOP staff, which often include former or present colleagues of the abuser or the abuser him/herself. Therefore, survivors rarely share any workable detail regarding their circumstances in their initial communication to me.

14. Therefore, after initial contact, I need to secure either a confidential legal call or a legal visit with the survivors to assess their claim.

15. Depending on the specific BOP facility and the unit team that has custody over the potential client, it can be challenging – to the point of frustration – to secure a legal call.

16. I have been told by at least two BOP institutions that they are unable to provide me with unmonitored legal calls with my clients. The rationale provided was that requests for legal calls pertaining to civil cases are considered lower priority compared to requests pertaining to criminal cases.

17. In response, I contested that civil matters often have time-sensitive deadlines as well. I also elevated the issue beyond the staff level and spoke directly with BOP legal counsel. Nonetheless, I was told that if an "alternate" means of communication exist (such as in-person visits), it was within BOP's discretion to deny my requests for confidential legal calls. I was told that I could make a separate petition to the court to challenge this determination. However, given the expected delays associated with a judicial petition that did not accommodate my clients' needs at the time, I had to make in-person visits to see incarcerated clients instead of being able to speak to the clients on a confidential call line with my file and computer available to me.

18. BOP's scrutiny of my requests for legal calls also posed another problem, in that BOP staff would ask for the purpose of the legal calls, purportedly so that they could assess the priority level of my requests. When I explained

that I cannot reveal such information, my requests for legal calls were denied for that reason.

19. There are BOP facilities that allow unmonitored legal calls upon request, without such questioning. However, even though it is theoretically possible to schedule legal calls, it is practically challenging to do so without a significant dedication of time and resources.

20. I have two paralegals who spend a significant portion of their days making, and following up on, requests for legal calls with clients' unit team staff. My paralegals often need to make repeated attempts, over a course of days and sometimes weeks, before BOP staff responds with a date and time. This issue pervades throughout BOP facilities, and I am aware of at least four BOP facilities for which three or more attempts were needed before we could secure a legal call with clients this year. This is in addition to the times that we are told we need to wait for the unit team to return from vacation.

21. When there is an urgency in the need for a legal call and my paralegals elevate the request to, for example, the executive assistant of the housing facility, the unit team has complained to me, claiming they will get in trouble with their supervisors. Unfortunately, without this level of follow-up, the requests simply go unanswered, and we are not provided with a legal call.

22. In addition, there are at least two BOP facilities where, even though legal calls are offered, BOP staff refuse to schedule them as a matter of practice, making the clients place the legal calls on a designated secure phone line at a time of their choosing.

23. This creates two issues in my experience. The first is that given my limited availability throughout the day, it is challenging for the clients to reliably connect with me without a pre-arranged appointment; the second is that there is a high demand for legal calls, so clients often need to wait in line for their turn to make a legal call, which can be exhausting as well as stressful.

24. I also know that at least one of these facilities has the phone out in an open area, and hence, the client's conversation can be heard by other incarcerated persons as well as BOP staff. Given the extremely sensitive topics they discuss with me, including sexual abuse and associated trauma, just the possibility of being overheard is anxiety-inducing to them.

25. Notably, at least six BOP facilities have rejected my requests for legal call on a video platform, even though it is my understanding that such requests can be accommodated and have been accommodated by at least two BOP facilities upon judicial petition. To the extent that a video call would alleviate some of the concerns regarding client discomfort, it simply is not an option in most BOP facilities that I have been in contact with.

26. As for legal visits, while it is a theoretical alternative to legal calls, it is challenging to secure one in a reliable manner and even more challenging to conduct the visit in a way that serves the clients' needs.

27. The same challenges in getting the attention of BOP unit teams and scheduling legal calls applies to scheduling legal visits as well. My staff have had to follow up with BOP staff numerous times over a span of weeks before they would confirm that a legal visit can occur. Even though it is understandable that BOP staff need to obtain an approval for legal visit through their chain of command, to the extent that legal visit is posed as an alternative to legal call as a method of client contact, it is clearly deficient.

28. At least one BOP facility has demanded that legal visits be requested at least two weeks in advance. When my office clarified that we did request a visit more than two weeks in advance, we were told that the counselor assigned to the clients happened to be on vacation, so by the time she returned to work and submitted the request for approval, it was less than two weeks' time. This occurred even though in that counselor's absence, we had also called and emailed other counselors as well as the executive assistant, but they were unresponsive. I had to raise this issue with the US Attorney's office before the visit was finally approved, due to an extremely time-sensitive deadline.

29. Another BOP facility initially suggested that they were available for a legal visit on a certain date, and after we made travel arrangements, the same BOP staff who had offered the date attempted to cancel it at the last minute without providing a reason. I again had to raise this issue with the US Attorney's office and was able to secure a visit on the original date.

30. It is my understanding that other civil lawyers suffer from similar challenges, and potentially even worse, if they do not have the resources or ability to be able to pursue these issues.

31. There is a further significant challenge in communicating with clients through legal visits in that I am typically only allowed to bring pen and papers into the facilities, without access to any technology or a way to reliably preserve the clients' statements made during the visits.

32. This year alone, on seven occasions by three different BOP facilities, my requests to bring in a simple voice recorder with no cable or internet access was denied, even though my requests were made citing the proper standard—wherein any recordings made will only be used for the sole purpose of facilitating attorney-client communication. I was not provided with any reason other than that the wardens of each BOP facility have discretion to refuse such requests for any reason or no reason.

33. The chief purpose of client meetings in these cases is to review the facts and chronology during a face-to-face conversation, assuring the clients' comfort in a private setting. I have resorted to bringing paper copies of as many relevant documents as I can bring with me to the legal visits, but not having access to the investigative files, digital memoranda, and other electronic resources significantly hamper my ability to effectively conduct these client meetings. I also am unable to retain what my clients say other than by handwriting. I cannot record or typewrite what they share. This is especially damaging in cases involving sexual abuse, as clients' having to repeatedly re-tell their stories can further traumatize them and impacts their trust in me.

34. To exacerbate the problem, at least one BOP facility has refused to let me hand my clients legal paperwork, claiming that it may be contraband. This was after I went through x-ray screening as well as manual pat-down when entering the facility. This same facility also refused to let my clients hand me any legal paperwork, for an unknown reason.

35. At least two BOP facilities also had their legal visits occur not in an enclosed space, but in an open space with BOP staff sitting in view. Even though the staff members claim that they are not paying attention and cannot hear from afar, given the extreme sensitivity of the subjects being discussed, clients

feel uncomfortable just knowing that they are being watched and can be heard.

36. At least one BOP facility has subjected my clients to strip searches right after legal visits. They did so despite the fact that I was inspected when I entered the facility; and that BOP staff had their eyes on my clients and me throughout the visits. When I complained about this practice, which is especially traumatizing to my clients as survivors of sexual abuse, I was told that there is nothing I can do at the time and that I can raise it with the executive staff.

37. Another modality of secure communication with incarcerated clients is through snail mail, marked as "legal mail" to receive the protection of attorney-client privilege. Per federal regulations, 28 C.F.R. § 540.18, properly marked legal mail remains sealed until it is delivered to an incarcerated person and is only opened in their presence.

38. However, the regulations do not dictate what the officers can do once the mail is opened in the incarcerated person's presence. While the inspection is supposed to be cursory, just to ensure that there is no contraband inside the envelope, there is no real way of preventing the officers from reading the content of the paperwork.

39. At least one BOP facility has admitted to opening and reading my letter addressed to a client, purportedly to ensure that my name appears on the law firm's letterhead. Why this cannot be done by searching my name on the law firm's website or by calling the law firm is unknown to me. It should be noted that this letter, like every other letter that my staff sends to incarcerated clients, was clearly marked as a privileged and confidential legal mail on the envelope in addition to having the law firm's logo and name printed on it.

40. In addition to mail tampering by BOP staff, there have been substantial delays in snail mail getting to the clients and back to my office. It is not unusual for a letter that I send out to arrive in the client's hands after a month or more. It is also not unusual for legal mail sent out by a client to take a month or longer to arrive at my office.

41. There are also circumstances where clients cannot secure enough postage to mail out many pages of documents or their mail is otherwise returned to them because of an unforeseen clerical reason—creating further delays in the process.

42. As part of my practice, I instruct my paralegals to include self-addressed return envelopes with proper postage on them when we send documents that the clients need to return to us. At least three BOP facilities have refused to

provide these envelopes to the clients without an explanation, even though they are fully able to inspect the envelopes and ensure that they are not contraband.

43. Many of my incarcerated clients are destitute and make less than a dollar an hour in their prison jobs. It is difficult for them to have to collect a few dollars or more for postage—and it can be more costly for time-sensitive paperwork that they need to send out by certified mail, as is the case for requests for administrative remedies as will be explained further below.

44. All these difficulties described in Paragraphs 12-43 cause substantial delays in pursuing civil matters. I typically require several hours of conversation as well as review of various legal documents with each client before I file a torts claim form with the BOP—which is a pre-requisite to filing a civil lawsuit against the government.

45. While I attempt to file torts claim form as soon as feasible, it sometimes takes several months to gather sufficient facts to do so. Then, once the torts claim form is delivered to BOP, I am required under the law to give six months for the BOP to respond to the claim before I can file a lawsuit in a court of law. Even though it is theoretically possible for BOP to respond before the 6-month period lapses, allowing me to file a lawsuit sooner, in my

recent experience, there is less than 5% chance that BOP will respond within six months.

46. In addition to the presentation of torts claim, some courts consider the exhaustion of administrative remedies within the BOP system as an additional pre-requisite before an incarcerated person can bring certain claims under the Prison Legal Reform Act. Whenever feasible, I advise my incarcerated clients to exhaust their administrative remedies before a lawsuit is filed. What this means is that the clients need to go through the process of submitting a grievance form (often known as "BP" forms in the BOP system), wait for the response, and appeal the response through three or four different levels of administrative hierarchy.

47. It takes at least six months for an incarcerated client to completely exhaust the administrative remedies, even if they follow all my instructions correctly and promptly. Sometimes, clients are unable to do so because of their cognitive, literary, or mental health challenges. Other times, clients feel unable to submit grievances because they have a justified fear that their grievances will be read by BOP staff, especially when they remain incarcerated at the same facility where they were sexually abused. This is common, as many incarcerated clients first confide in me as a lawyer about BOP staff's sexual abuse before they share it with anyone within the BOP.

48. Many clients express fear of being outed as a sexual assault victim to BOP staff, which can include the abuser as well as his/her colleagues. Fear of retaliation and ridicule is prevalent and often justified, as I have had clients who suffer harassment by correctional officers throughout the course of litigation. The fear of retaliation is so great that I have had at least one victim of sexual abuse considering and declining civil representation, because to her, the fear of persecution by correctional officers was greater than the potential benefit of pursuing a case.

49. For the clients who decide to proceed with the administrative remedy process, a long road awaits.

50. The process starts with an informal resolution attempt (known as "BP-8") with the unit team, followed by submission of a request for administrative remedies (known as "BP-9") to the warden of the facility where the clients are currently housed. While BOP should handle BP-8 promptly and respond to BP-9 within 20 days of submission, I have had clients who had to wait several months before they receive the responses to BP-9.

51. For survivors of sexual abuse perpetrated by BOP staff, there are exceptions to the typical administrative remedy process wherein they are allowed to circumvent the above-mentioned steps and file a BP-9 directly with the Regional Counsel. The regulations also allow survivors' attorneys to assist

the survivors by filing a BP-9 on their behalf. 28 C.F.R. § 115.52 (e)(1). Unfortunately, the reality does not comport with these seemingly straightforward provisions.

52. I have attempted to file BP-9's on the Region on my clients' behalf to expedite the process, explaining that the grievance is regarding sexual abuse by BOP staff and therefore qualifies as a sensitive submission. I have requested that, given the extremely sensitive nature of the grievance, the responses and the underlying grievance should not be sent to the client in a way that can be read by BOP staff at the housing facility; and that subsequent responses and correspondence should be directed to me instead.

53. At least two Regions have rejected my grievances outright, claiming, contrary to the plain letter of 28 C.F.R. § 115.52 (e)(1) and the practice of at least some other Regions, that a submission by an attorney is unacceptable *per se* despite the circumstances. Another Region simply ignored my grievance submissions; therefore, I still had to have my clients submit the grievances themselves to preserve their rights.

54. Another Region accepted my submission but refused my request to honor the sensitivity of the submission and to direct all responses to me. Therefore, clients in this Region received copies of my BP-9 submission as well as the Region's response by mail at their housing facility. The mail was then

opened and inspected by BOP staff. This defeats the purpose of sensitive submission and, in fact, makes it safer for the clients to mail out BP-9 to the Region themselves despite the associated delays. At least, that way, clients can designate the mail as privileged legal mail and decide which mail room staff to hand it to.

55. Unfortunately, not every client can fill out and submit BP-9's correctly. Many clients suffer from mental health or other cognitive challenges that make it impossible. Others cannot afford the mailing fee, especially when the mail needs to be certified to confirm the date of receipt by the Region.

56. Regardless of whether the BP-9 is submitted by clients or me, the Region rarely abides by the 30-day response deadline prescribed by the rules. The typical turnaround is about three months. That said, I have clients whose BP-9 has not been responded to for over five months, even though receipt was confirmed by the Region. I also have two other clients who confirmed the Region's receipt of BP-9 by tracking the certified mail through the United States Postal Service ("USPS"), but the Region erroneously claimed in its letter that it received the BP-9 a month after it arrived—thereby delaying the process.

57. According to the rules, an untimely response by the Region can be appealed through a BP-11 submitted to the BOP's Central Office. However, the

Central Office has been rejecting these appeals, claiming that the grievant must first await the Region's response and attach it to the BP-11.

58. Once a client receives the Region's response and files a BP-11 attaching the response, it takes between two and five months for the Central Office to issue a final response.

59. Notably, even when the initial BP-9 is filed by an attorney, Regional Counsel sometimes requires that the incarcerated survivor herself mails the subsequent appeal to the Central Office. This creates further delays as survivors often experience hardship in the mailing process. When submitting a BP-11, survivors are required to attach four copies of the prior BP-9 and the Region's response, and many clients have expressed to me that they are unable to make copies or process the mail without relying on BOP staff. This exacerbates the fear that BOP staff will read the grievance paperwork.

60. In my experience, the entirety of pre-suit grievance and torts claim process takes close to a year on average. As time-consuming as they are, it is unclear to me what their practical purpose is, as the final responses to the grievances and torts claims tend to be boilerplate language claiming that the allegations were "referred to the appropriate authority" for review and "proper action will be taken as deemed necessary." Survivors are not informed regarding what review or action, if any, is performed.

61. In addition to exhausting the administrative remedies and presenting torts claims, I must perform additional investigations on behalf of my clients prior to filing a lawsuit. These investigations are time-consuming, especially in the context of BOP sexual abuse cases.

62. At the outset of each case, I make record requests on behalf of my clients. My requests specify and itemize the types of records I am requesting, including basic ones such as medical records, psychological records, and disciplinary records, as well as pertinent personnel records of the abusers and investigative memoranda from any discussions or interviews had with the survivors. I submit the requests to the Central Office via the Freedom of Information Act ("FOIA") as well as to individual BOP facilities.

63. At least six BOP facilities have outright rejected our requests in their entirety, claiming that any such requests must be processed by the Central Office through FOIA. It remains unclear why the facilities cannot at least provide the records that they have within their possession and control, such as medical records, psychological records, and disciplinary records—which, once the lawsuits are filed, are typically exchanged by the government as a matter of mandatory initial disclosure.

64. Then, when I resort to FOIA, the Central Office informs me that there are hundreds of FOIA requests being processed and that they cannot produce relevant records in less than a year.

65. Indeed, even a year is an underestimation. As an example, I submitted a FOIA request in July 2020 to obtain certain protocols pertaining to a specific BOP facility. Protocol requests are expected to take less processing time than individual record requests. Nonetheless, I only received the response with relevant protocols in March 2023, after the relevant lawsuit had been filed and resolved.

66. There are dozens of other FOIA requests that we have submitted in the past two years, where the Central Office acknowledged receipt, but no response has been provided to date.

67. Even when I finally get responses, the Central Office refuses to release certain records, such as employment records of the abusers; or investigative memoranda, including when the survivors had previously reported their sexual abuse to BOP staff, Special Investigative Services ("SIS"), Office of Inspector General ("OIG"), Federal Bureau of Investigations ("FBI"), or US Attorneys' office ("USAO"). I typically do not gain access to these records until after I initiate lawsuits, during discovery and sometimes only after discovery motion practice.

68. When my office pushes the Central Office for expedited responses to FOIA requests, they refer us back to the individual BOP facilities—thus creating a loop where Central Office puts the onus on individual facilities and vice versa. In the meantime, survivors are put at a significant informational disadvantage where even basic pieces of information, including their own health records and prior statements, are not readily accessible.

69. When clients feel comfortable, I have asked that they request copies of their own medical and psychological records from their current housing facility. Once the requests are made, survivors typically need to wait several months before they are provided with the records. Some clients have also expressed discomfort that these requests have prompted BOP staff to question them about the purpose of their requests.

70. Having the clients request the records is also costly. BOP facilities charge clients per page, and the fee often amounts to a substantial sum for the clients.

71. My office has requested that we be allowed to pay the costs on the clients' behalf. Different BOP facilities have either ignored or rejected this request, and we were again told to submit FOIA requests to the Central Office. As explained above, I estimate the current waiting period for FOIA responses to be between one and three years.

72. In addition to record requests, I typically need to interview several witnesses to obtain additional information and verify certain details regarding clients' allegations. I estimate that I have spoken with about 250 witnesses over the course of the last two years in connection with the 50 clients I currently represent in relation to sexual abuse they suffered in BOP custody.

73. Establishing contact with witnesses, locating them, confirming their willingness to speak with me, and securing their statements can take a few weeks to a few months, and the delay is especially significant when the witnesses are also incarcerated. The same challenges in communicating with incarcerated clients also apply to incarcerated witnesses.

74. After all these steps are taken, I draft the civil complaint and typically review it with each client to receive their feedback. Given the inherent delay in communication, this step can take a month or two.

75. Once the complaint is filed, it typically takes a few months for the government and other defendants to respond by filing an appearance through an attorney. The defendants have the right to answer the complaint or move to dismiss the complaint.

76. In my experience, it is common for defendants to file a motion to dismiss the complaint in these cases. Once that occurs, discovery on cases is stayed until the motion is resolved, which typically takes about a year or longer.

77. Once the complaint survives a motion to dismiss, the discovery process including paper discovery, depositions, expert report exchange, and expert depositions necessarily takes over two years on average. After that, defendants can choose to file a motion for summary judgment, which again stays the case and results in a further delay of a year or longer until the Court reaches a decision on the motion.

78. It is also common in these cases that there are criminal or investigative proceedings against the abuser that occur simultaneously with the civil cases. In my experience, once I file torts claim or grievance, agents from the OIG, FBI, or USAO often request to interview the survivors to assess whether they can criminally prosecute the abuser for his conduct.

79. It should also be noted that there are delays in participating in criminal prosecution. Survivors are often terrified of the prospect of speaking to federal agents and prosecutors about their experiences. It also depends on the agents' and prosecutors' schedule when the interviews can occur. I also need to coordinate my schedule to personally accompany survivors to the interviews. I have had cases where clients were interviewed prior to my representation, and BOP staff members stayed within earshot, causing the clients to feel extremely uncomfortable. Given the sensitivity of the allegations, clients' comfort level in sharing their experience with federal

agents and prosecutors fluctuates greatly, depending on whether they also have a friendly face sitting next to them and advocating for them.

80. This year, I have represented over 15 survivors in their interviews with the FBI, OIG, or USAO regarding their sexual abuse by BOP staff. Even after these interviews, it typically takes several months for criminal charges to be brought against the abuser, if at all. It is my understanding that it takes a significant amount of time for the government to secure witness statements, evidence, and corroboration sufficient to bring forth a case that they can prove beyond a reasonable doubt. Because of the high legal standard applicable to criminal cases, there are also circumstances where the government agrees that the survivor's account was credible and instrumental in the prosecution, and yet charges are not brought for that survivor.

81. Once criminal charges are filed, the Courts typically stay the civil cases during the pendency of the criminal cases. The rationale is that criminal cases should be prioritized over civil cases given the Speedy Trial Act and other protections given to criminal defendants. However, this sometimes results in a lengthy delay in the civil cases.

82. In my recent experience, from the time a criminal complaint is filed against the abuser, a criminal case takes about two years if the case proceeds to trial. Even though the process can take less time if the defendant pleads guilty, the

fact remains that civil cases are often stayed for a year or longer when there is an ongoing criminal case against the abuser. Notably, this can be the case even when the plaintiff is not one of the named victims in the criminal case or the plaintiff was not a direct victim of the criminal defendant, but the criminal defendant was otherwise involved in the underlying case.

83. Considering the likelihood of discovery stays because of motion practice or pending criminal prosecution, I would expect a typical civil case of this type to take between two and five years from inception to trial.

84. I would estimate that a trial would take between 10 and 20 days in these cases. There is also a possibility of a post-verdict appeal, which would cause a further delay of a year or more depending on the nature of the appeal.

85. In my experience, it is more common for these civil cases to be resolved by settlement rather than by verdict. Even though settlement can occur at any juncture of the lawsuit, it typically does not occur until after the conclusion of the criminal case against the abuser and the motion practice to dismiss the complaint.

86. It should also be noted that when these cases are settled, the government imposes certain non-negotiable conditions of settlement, and one of those conditions is typically that the settlement cannot be interpreted as a finding

or admission of liability. It is unclear how this condition would interact with the new compassionate release guideline.

87. In my opinion, delaying compassionate release determinations until after there is a finding or admission of liability in civil cases is impractical and flawed. Delays in the civil process, both before and during the lawsuits, are inevitable and substantial. Survivors often risk their safety to initiate the process, including by subjecting themselves to law enforcement investigations and seeking legal representation—neither of which goes undetected by their housing facilities.

88. Moreover, I have had cases where I have obtained substantial settlement awards, and the abuser was found guilty in a criminal case—and yet the government would not agree to include a finding or admission of liability in the settlement agreement. Settlement is reached to avoid the risk at trial on both sides, and therefore, the government would argue that they do not have an obligation to agree to any factual finding. It is my opinion that conditioning compassionate release on a finding or admission of liability in a civil case creates a hurdle that is practically impossible for incarcerated survivors to overcome, given the way that the government typically negotiates these cases.

89. Despite my dedication to civil litigation, I must observe that the justice system is practically and necessarily not swift. I believe that this is a reality that many of my clients who were sexually abused during incarceration must contend with; and that any relevant policy guideline would be incomplete without considering this reality.

Executed this 30th day of November 2023 in New York, New York.

July 15, 2024

The Honorable Carlton W. Reeves
U.S. Sentencing Commission
One Columbus Circle, NE
Washington D.C., 20002-8002

Dear Chair Reeves and Members of the Commission:

Thank you for seeking public comment on what the U.S. Sentencing Commission (hereafter "Commission") should prioritize during the amendment cycle ending May 1, 2025. On behalf of Right on Crime—a national criminal justice campaign of the Texas Public Policy Foundation focused on conservative, data-driven solutions to reduce crime, restore victims, reform offenders and lower taxpayer costs—and Due Process Institute—a nonprofit bipartisan organization that works to honor, preserve, and restore procedural fairness in the criminal justice system— we are pleased to submit the following recommendations.

In its solicitation dated June 1, 2024, the Commission wrote that it was seeking recommendations on "specific avenues of research or policymaking that would allow the Commission to fulfill [its] statutory goals" of improving federal sentencing policies and practices to increase consistency, avoid unwarranted sentencing disparities, and more accurately reflect the realities of the criminal justice system.[1] We applaud the Commission for pursuing input from the public on how to improve the federal Sentencing Guidelines (hereafter "Guidelines"). Such a transparent and communicative process is essential for good governance and building trust. As such, this amendments process will assuredly encourage a comprehensive dialogue on meaningful and data-driven improvements to the criminal justice system that the Commission can undertake, while understanding that other solutions may be better delegated to Congress.

To that end, Right On Crime and Due Process Institute respectfully submit to the Commission the below recommendations to the Guidelines for the amendment cycle ending May 1, 2025.

Relevant Conduct

Uncharged conduct:

Relevant conduct is a broad term encompassing "[a] range of conduct that is relevant to determining the applicable offense level."[2] Its extensive application in sentencing makes it a "cornerstone" of the Guidelines.[3] But such ubiquity is not always good. For instance, the Guidelines permit somewhat unlimited consideration of uncharged conduct for sentencing purposes. Such consideration can invariably lead to the imposition of a more severe sentence than what is necessary or fair. As the Guidelines currently permit, relevant conduct easily encompasses too much uncharged conduct and results in defendants being sentenced for acts not covered in a count of conviction. In fact,

[1] Proposed Priorities for Amendment Cycle, 89 Fed. Reg. 47892 (June 4, 2024); *see also* Sentencing Reform Act of 1984, 28 U.S.C. § 991(b)(1)(A) et. seq.
[2] U.S.S.G. § 1B1.3, comment background.
[3] U.S. Sentencing Comm'n, *Simplification Draft Paper: Relevant Conduct and Real Offense Sentencing*.

not only can prosecutors enhance sentences without having to prove the conduct beyond a reasonable doubt, but they can also increase sentence lengths without even bringing an indictment alleging that conduct. This flies in the face of constitutional fairness and underlying due process principles. The Guidelines' wide berth acceptance of consideration of uncharged conduct unfortunately negates the need for a grand jury and findings of guilt. Simply put, "sentencing a defendant based on uncharged conduct is suspect as both a constitutional and policy matter."[4] To that end, the "Commission has the authority to address th[is] issue[], and it should."[5]

To remedy this problem, we recommend that the Commission assesses how to narrow the scope and application of uncharged relevant conduct, similar to how it has addressed acquitted conduct sentencing to date.[6] Specifically, the Commission could narrow the scope of relevant uncharged conduct, moving closer to a charge-offense system where a defendant is sentenced only to those charges of which he or she is found guilty. Alternatively, the Commission could change the way relevant uncharged conduct is used. For instance, there could be a cap on the increases attributable to uncharged conduct or a bar on its consideration except for purposes of mitigation. A combination or individual consideration of either would greatly improve fairness, predictability, and consistency of sentencing.

Acquitted conduct:

Earlier this year, the Commission amended the Guidelines to prohibit conduct for which a person was acquitted in federal court from being used in calculating a sentence range under the Guidelines.[7] This unanimous vote was a long-awaited and meaningful step towards ending the unfair practice of allowing federal judges to consider acquitted conduct to enhance a criminal defendant's sentence. However, the Commission's most recent amendment did not forbid its use wholesale; rather, the prohibition of considering acquitted conduct by a sentencing court is limited to federal acquitted conduct that does not also establish the instant offense of conviction.

This curtailed approach is much appreciated and needed. But more can be done. To that end, we recommend that the Commission proposes an amendment that would completely prohibit the use of acquitted conduct in federal sentencing except for the purposes of sentence mitigation. Such an approach has already been considered by this Commission[8] and in bipartisan legislation.[9] The Commission can use this amendments cycle to finish this important job and ban acquitted conduct from being considered in federal sentencing.

Drug Crimes

Methamphetamine purity considerations:

Methamphetamine is the most common drug in the federal criminal legal system.[10] But, unlike the vast majority of the illicit drugs subject to federal criminal penalties, methamphetamine offenders are subjected to different sentences based on the purity of the drug involved in the offense. The current statutory penalties effectively create a 10-to-1 ratio, where it takes ten times less pure methamphetamine to trigger the same penalty as it would for a more pure, detectable amount of methamphetamine.[11] The Guidelines similarly use drug purity as a proxy for a

[4] *U.S. v. Brasher*, No. 23-1180 (7th Cir. June 28, 2024).
[5] *Id*.
[6] *See* more on this below; *see also infra* n. 3.
[7] Amendments to the Sentencing Guidelines, Amendment 1 (U.S. Sentencing Comm'n 2024).
[8] *Id*.; *see also* Proposed Amendments to the Sentencing Guidelines, Proposed Amendment 3 (U.S. Sentencing Comm'n 2023).
[9] "Prohibiting Punishment of Acquitted Conduct Act of 2023," S. 2788, 118th Cong. (2024); H.R. 5430, 118th Cong.
[10] U.S. Sentencing Comm'n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* (June 13, 2024).
[11] *Id*.

defendant's culpability.[12] This disparity has resulted in overly punitive and lengthy sentences for offenders culpable of the same conduct.

The impetus of the purity distinction for methamphetamine offenders was rooted in addressing the domestic production crisis earlier this century.[13] However, most methamphetamine now distributed and used in the United States originated in Mexico and is smuggled across the southwest border.[14] And more so, the purity of this Mexican-made methamphetamine rarely tests less than 90% pure.[15] So the alleged purpose behind the purity disparity is now moot.

A growing number of federal courts have recognized the absurdity of this purity distinction.[16] To that end, we urge the Commission to eliminate this arbitrary and meaningless purity distinction, and instead apply the "mixture" Guidelines for all methamphetamine cases. This will result in more predictable and consistent sentencing ranges for offenders while still ensuring that culpable actors are held accountable for their illegal methamphetamine-related acts.

Measuring drug quantity:

It is no secret that production, manufacture and distribution of illicit drugs has radically changed in the last decade. What used to be a plant-based trade is now largely synthetic, with drug cartels and trafficking organizations capitalizing on a high-volume and low-cost business model.[17] Americans see this most vividly in the spread of methamphetamine and synthetic opioids, like fentanyl. Synthetic drugs like fentanyl are responsible for nearly all the fatal overdoses and poisonings in our country.[18]

Currently, the statutory penalties and accompanying Guidelines are based on the quantity of drugs. These were largely created when plant-based drugs, such as cocaine and heroin, still dominated the criminal legal system. But the quantities to trigger many of these mandatory minimums and associated sentencing ranges are not entirely effective for synthetic drugs like fentanyl, fentanyl analogues, and methamphetamine. It is not our recommendation for Congress to lower the quantity thresholds of these drugs for mandatory minimums to trigger, or for the Commission to consider similar quantity readjustments to make it easier for harsh sentences to be imposed. Rather, we urge the Commission to evaluate and consider the utility, effectiveness, and dangers of the current drug quantities needed for federal sentences to be imposed with the advent and continued growth of synthetic drugs.

The imprecise and troubling nature of quantity-based sentences is particularly apparent when considering the discrepancy in available sentences between the weight of a finished drug product and the amount of precursors or drug materials found. In general, once a drug is found and its identity is determined, the next step in a prosecution is to measure the drug quantity. The quantity may be a "mixture or substance containing a detectable amount of the controlled substance."[19] Determining this quantity is, unfortunately, an imprecise science. In fact, except in cases where the government seizes and then measures all the drugs attributable to a defendant, the court must

[12] U.S.S.G. § 2D1.1 comment 27(C).
[13] *Supra* n. 10.
[14] U.S. Drug Enforcement Administration, *National Drug Threat Assessment 2024*, p. 2 (July 5, 2024).
[15] *Supra* n. 10.
[16] *See, e.g., United States v. Robinson*, No. 21-14, 2022 WL 17904534 (S.D. Miss. Dec. 23, 2022); *United States v. Moreno*, 583 F. Supp. 3d 739 (W.D. Va. 2019).
[17] *Supra* n. 14.
[18] According to the Centers for Disease Control and Prevention (CDC), synthetic opioids were involved in 74,225 deaths in 2022–68% of the total 111,036 deaths that year–and psychostimulants, the class of drugs that includes methamphetamine, were involved in 31% of the overall deaths. Provisional CDC data for January-June 2023 shows that nearly 38,000 people died as the result of a synthetic opioid (usually fentanyl) overdose or poisoning in the first six months of the year.
[19] U.S.S.G. § 2D1.1, Notes to Drug Quantity Table (A); *see also* comment 1.

"approximate the quantity of the controlled substance."[20] This means that courts are forced to exercise significant discretion in estimating drug quantities.

This is in and of itself worrisome, illustrating the vast discrepancies that could unfurl from a discretionary determination about quantity. But two other considerations make this even worse. First, courts may rely on financial records to estimate drug quantity.[21] When cash is seized as part of a drug investigation, courts may equate it with a corresponding drug quantity. Second, courts may use the size or capability of a drug laboratory to estimate drug quantities.[22] The "theoretical mass yield" that can be calculated based on these two premises is bizarre and disconnected to actual drug quantities possessed by a defendant.

Courts have signaled hesitancies with these Guidelines provisions, urging that they must be applied "on the side of caution" when estimating drug quantities and that a court must determine the lesser punishment when possible.[23] In short, using the Guidelines to get a theoretical mass yield of a drug quantity for sentencing purposes has been "discouraged[,]" and deemed to be both "an inappropriate methodology to calculate drug quantity[,]" and "unreliable[.]"[24]

We urge this Commission to remove financial records and laboratory capabilities language from the Guidelines—thus removing guess work and unreliable methodologies—so that criminal defendants are sentenced based on the quantity of drugs actually in their possession.

Role vs. quantity:

In a similar vein, the undersigned organizations believe that the Commission should study and consider a revision of its Guidelines language that focuses an individual's culpability on all the circumstances of the case as opposed to just quantity. Sentencing enhancements already exist that are at a prosecutor's disposal for identifying leaders, organizers or managers of criminal enterprises. Therefore, if a particular defendant's case warrants it, those enhancements are applied. But as both the methamphetamine purity issue and the growing prevalence of synthetic drugs illustrate, quantity-based determinations for sentencing are no longer probative. A role-based approach is likely a better long-term solution, and the Commission is uniquely equipped and situated to evaluate this method.

Intended Loss

When an individual commits a theft, embezzles, or damages property, prosecutors are tasked with determining the amount of property lost. In general, the Guidelines currently define "loss" as the "greater of actual loss or intended loss."[25] The higher the victim's calculated loss, the higher the sentencing range can be. For a prosecutor, a key question is if the defendant should be on the hook for "intended loss," a concept that is mentioned only in the Commentary and not in the loss Guideline itself.

Intended loss can far exceed what is actually lost. This Commentary language grants prosecutors with a great deal of discretion to inflate a defendant's sentencing range, which can lead to a significant and unreasonable disparity in prison sentences.

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[20] *Id*. at comment 5.
[21] U.S.S.G. § 2D1.1 comment 5 ("[T]he court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant[.]").
[22] *Id*. ("[T]e court may consider . . . the size or capability of the laboratory involved.").
[23] *United States v. Forrester*, 616 F.3d 929, 949 (9th Cir. 2010); *see also United States v. Chase*, 499 F.3d 1061, 1069 (9th Cir. 2007).
[24] *Id*. (citing *Chase*, 499 F.3d at 1069).
[25] U.S.S.G. § 2B1.1 comment 3(A).

We urge the Commission to eliminate the Commentary language allowing for considerations of intended loss, instead only allowing a sentencing range to apply to the amount of actual loss. This will result in a more consistent and fair adjudication of cases and will put the Commission in line with some federal courts that have recently rejected the "intended loss" approach.[26]

White Collar Crimes

Sophisticated means:

For white collar crimes, the Guidelines provide a sentencing enhancement if "sophisticated means" were used. This is defined as conduct that is "especially complex or especially intricate."[27] However, the Guidelines illustrate such "complex" and "intricate" conduct as the main office for a telemarketing scheme being in one jurisdiction while the solicitation operations are in another jurisdiction.[28] Also, "hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore accounts" are cited as examples of "sophisticated means."[29]

This two-level enhancement is easily overused in our modern, digital world. "Sophisticated means" is an extremely subjective standard, particularly when looking at our highly–if not entirely–digitized world and what was once "sophisticated" is now mundane. The Commission should consider how to better refine the definition of and attendant examples for "sophisticated means." The Commentary language should be updated to better reflect modern business practices and issues. We do not think that this sentencing enhancement is wholly without purpose and should therefore be maintained. However, it is being overused and has the capacity for misuse. The Commission can and should proactively work to prevent this.

Position of trust:

The Guidelines permit a sentencing enhancement when a defendant abuses his or her position of public or private trust, which is based on the notion that people who hold a position of trust relative to a victim are viewed as more culpable.[30] Based on the application notes, it is fair to say that this enhancement should apply when there is a professional or managerial discretion afforded to the defendant's role.

We believe this sentencing enhancement serves an important role in holding certain defendants accountable. However, this language should be clarified to rectify confusion over when the enhancement applies. For instance, the current language–directed and limited almost entirely to those in professional or managerial positions–is too broad. Based on its text, prosecutors could argue that the enhancement applies to almost anyone. The argument could easily be made that someone in the human resources department holds a position of trust, even if not in a managerial role relative to a victim. The broad language of the amendment could also be read to encompass a manager at a fast-food restaurant, a substitute teacher, or mid-level manager at a paper company. Surely, this enhancement loses its intent and teeth when it can be over-applied.

To that end, the Commission should limit a "position of trust" to instances where a fiduciary or quasi-fiduciary obligation exists. Several courts have already interpreted "position of trust" to mean this.[31] In refining the language to encompass fiduciary or quasi-fiduciary relationships, the universe of eligible defendants will inevitably narrow,

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[26] *See United States v. Banks*, No. 19-3812, 20-2235 (W.D. Penn. March 29, 2022).
[27] U.S.S.G. § 2B1.1(b)(10)(C) comment 9(B); *see also* 2T1.1(b), comment 5; 2T3.1(b)(2), comment 5.
[28] *Id*.
[29] *Id*.
[30] U.S.S.G. § 3B1.3.
[31] *See, e.g., United States v. Huggins*, No. 15-1676 (2d Cir. Dec. 19, 2016); *see also United States v. Ntshona*, 156 F.3d 318, 320 – 21 (2d Cir. Sept. 10, 1998); *United States v. Jolly*, 102 F.3d 46, 49 (2d Cir. Dec. 5, 1996); *United States v. Brunson*, 54 F.3d 673, 677 (10th Cir. 1995).

but the intent of the enhancement will importantly be clarified. This will result in far more consistency in the handing down of criminal sentences among circuits.

Obstruction of Justice

Enhancements:

If a federal criminal defendant obstructs justice, there are several avenues a prosecutor may pursue to enhance his or her sentence. Pursuant to § 2J1.2(b)(3), the sentencing range may be increased by two levels if the offense was "extensive in scope, planning, or preparation[.]" No further notes or information is provided by the Commission on what it means for an offense to be so extensive in scope or that the government had to do so much planning or preparation as to warrant the two-level enhancement. To wit, such vague language is easily weaponized and used against criminal defendants unfairly. This is particularly easy to imagine in a politically motivated or emotionally heightened prosecution.

Therefore, it is our recommendation that this language be entirely removed from the Guidelines. In the alternative, the Commission must clarify what "extensive in scope, planning, or preparation" means.

Eliminate obstruction enhancements for people who testify in their own defense:

If a criminal defendant chooses to take the stand and testify in his or her own defense in a criminal prosecution, there is nothing in statutory law or in the Guidelines prohibiting the government from seeking an obstruction charge or obstruction enhancements for allegedly slowing down the prosecution. A defendant has the right to testify in his own defense, and similarly is afforded the constitutional privilege to not testify. Coercing his or her testimony is unlawful. To wit, any use of an obstruction charge or sentencing enhancement in the presence or absence of such testimony runs afoul of the promised constitutional protections of the Fifth Amendment. It follows that the Guidelines should do its best to ensure such protections. Therefore, we recommend that the Guidelines explicitly prohibit the use of obstruction of justice offenses[32] or enhancements[33] when a criminal defendant testifies in his or her own defense.

We greatly appreciate the Commission's thoughtful and thorough review of these recommendations and look forward to continuing to work with the Commission to improve our criminal justice system.

Sincerely,

Brett Tolman
Executive Director
Right on Crime

Shana-Tara O'Toole
Founder, President
Due Process Institute

[32] U.S.S.G. § 2J1.2.
[33] U.S.S.G. § 3C1.1.

July 9, 2024

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Reeves:

Thank you for the opportunity to provide input as to the question of how the United States Sentencing Commission "can create a fairer, more just sentencing system".

The U.S. Pretrial Services Agencies in the District of New Jersey and the Eastern District of New York initiated alternative to incarceration programs over a decade ago. These initiatives target individuals with documented substance addictions through the Pretrial Opportunity Program (POP) and, in the EDNY, young adults aged 18 to 25 through the Special Options Services (SOS). POP is a front-end Alternative to Incarceration (ATI) drug court aimed at motivating participants, who meet specific eligibility criteria, to make transformative positive changes in their lives. Participants in both types of programs are required to maintain employment, actively work towards vocational or educational goals, reconnect with family, remain drug-free, and comply with the law. Successful completion of the program signals to the court and the broader community that participants merit consideration for an alternative sentence.

Since their inception, these programs have been instrumental in helping individuals achieve sobriety and rebuild their lives from the ground up. Many participants have avoided prison sentences, and in some cases, have avoided the stigma of a felony conviction. As pretrial professionals, we have given new significance to front-end intervention and justice through the effective implementation of these initiatives.

To evaluate the efficacy of federal ATI Courts, 13 federal probation and pretrial services offices contracted with Dr. Kevin Wolff[1] of John Jay College of Criminal Justice to conduct a study of 13 federal districts. The results were published in the Federal Probation Journal, and entitled *Expanding the Analysis: Alternatives to Incarceration across 13 Federal Districts.* The U.S. Courts website reflects the following regarding this contribution:

> *"Recognizing the recent proliferation of ATI programs in the federal system, several districts that had been at the forefront of implementing these programs sought to contribute to the knowledge base about the effectiveness of such programs by collaborating on a research effort that quantifies the association of ATI program*

[1] https://www.jjay.cuny.edu/faculty/kevin-t-wolff

participation with short-term outcomes. Results suggest that defendants who participated in an ATI program exhibit outcomes more favorable than their matched counterparts who did not participate." [2]

The team's more recent work, published in Federal Sentencing Reporter and entitled *Recidivism in Alternatives to Incarceration Programs Across Thirteen Federal Districts*[3], indicates that federal ATI participants evidence lower rates of re-arrest and more favorable case outcomes compared to defendants who did not participate.

"The results of the current analysis reveal evidence of a substantial reduction in the incidence of re-arrest among ATI participants as compared to their matched counterparts. While year one of follow-up revealed superior re-arrest rates, years two and three showed no meaningful differences between the group of defendants who participated in an ATI program and those who did not. Coupled with the favorable pretrial outcomes shown in the two previous studies examining this group, a comparatively lower rate of re-arrests during the first year after program exit strongly suggests that ATI participation is an effective alternative to traditional sentencing practices."[4]

The results from this analysis provide evidence that averted and abbreviated sentences resulting from ATI dispositions offer significant fiscal benefits without compromising community safety. ATI programs enable persons charged with federal crimes to avoid the lifelong adverse consequences of lengthy custodial terms, which most scholars agree are criminogenic.

Our future work will include an in-depth survey of ATI program participants to understand the broader impacts of their participation. This survey aims to gather qualitative data on how the ATI program has influenced various aspects of their lives, including their personal development, family relationships, employment stability, and overall reintegration into the community. By capturing these personal experiences, we hope to provide a more comprehensive evaluation of the program's effectiveness and identify areas for improvement as seen by the participants.

We believe this body of research suggests that ATIs represent a promising, yet currently limited strategy in federal criminal justice reform. The scalability and long-term sustainability of alternatives to incarceration programs depends upon the judiciary's commitment, demonstrated through adequate funding, policy support, and rigorous evaluation.

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[2] https://www.uscourts.gov/federal-probation-journal/2021/12/expanding-analysis-alternatives-detention-across-13-federal

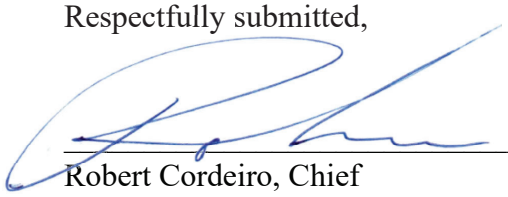
[3] Wolff, Kevin T.; Baber, Laura; Dozier, Christine; Cordeiro, Robert; Muller, Jonathan. *Federal Sentencing Reporter*, Vol. 36, pp. 141-150, 2024.

[4] Ibid, pp. 147.

As such, we strongly recommend that the Commission incorporate defendants' participation in and successful completion of an alternative to incarceration program into the formal Guidelines structure.

Thank you for your careful consideration of this issue.

Respectfully submitted,



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Access to Doorways
298 Grand Ave #100, Oakland, CA 94610

June 28, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Courtney Watson, and I am submitting this comment letter on behalf of the Access to Doorways. Access 2 Doorways is a 501(c)(3) nonprofit organization founded to expand access to treatment and training for BIPOC, Queer and gender diverse folx to heal in the (re)emerging psychedelic therapy field. I am writing today concerning the United States Sentencing Commission's (USSC) oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, we urge the Commission to conduct a complete review and revision of the Tables.

For over half a century, the United States' drug policy has ripped families and communities apart while failing to achieve its stated purpose of realizing a drug-free world. Richard Nixon announced the War on Drugs in 1971 and, in doing so, perpetuated an ongoing rhetoric and myth of Black criminality[1]. Ronald Raegan escalated the impact of this policy by prioritizing punishment over treatment, thereby causing a significant increase in the incarcerated population, especially for nonviolent drug offenses.

While over fifty years of ongoing political and educational messaging demonizing drug use and stigmatizing drug users has failed to realize a drug-free world, the underlying racial and social motivations have succeeded. Since its inception, the drug war has been overwhelmingly enforced in BIPOC communities, especially low-income ones,[2] causing the country's inflated prison

[1] John Ehrlichman, Nixon's Assistant for Domestic Affairs, said: "You want to know what this [war on drugs] was really all about? The Nixon [Administration] . . . had two enemies: the antiwar left and [B]lack people . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did." (Equal Justice Initiative. *Nixon Adviser Admits War on Drugs Was Designed to Criminalize Black People*. March 25, 2016. https://eji.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/)

[2] *See*, Colleen Walsh, *Solving Racial Disparities in Policing*, Feb. 23, 2021, https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing/; *see also*, ACLU DC, *Racial Disparities in Stops by the DC Metropolitan Police Department*, June 16, 2020,

population to be disproportionately comprised of Black, Latino, and Indigenous people.[3] It has led to lengthy terms of imprisonment for relatively low-level offenses and for those with little to no criminal history[4], which perpetuates cycles of trauma and violence. The same conditions have fueled and perpetuated violence internationally and in inner-city neighborhoods nationwide,[5] and have led to increases in concentration, adulteration, and toxicity of the substances themselves.

An increasingly multi-partisan coalition is calling for change. In 2017, the USSC published a report describing, in part, how drug-related mandatory minimum penalties have been "applied more broadly than Congress may have anticipated."[6] Such non-discretionary sentencing fails to promote public health. Instead, it has the effect of incarcerating people for longer amounts of time than the evidence shows deters further criminal activity[7] - at the taxpayer's expense.

While reversing and mending the harms of the war on drugs will take effort from people across the government and political spectrum, one way to shift policy in a more humane direction - and in alignment with contemporary evidence - is to go to one of the current roots of the problem: drug sentencing. The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and harms would lead to more accuracy in sentencing decisions, which would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

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https://urldefense.com/v3/__https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf__;!!Phyt6w!M3tbrIzizSTS6KMjsaPASYXWMFeEA1fkh6tY9rjOLLeAtcunXEj6k0DAkg0%24)

[3] "The incarceration boom fundamentally altered the transition to adulthood for several generations of [B]lack men and, to a lesser but still significant extent, [B]lack women and Latino men and women. By the turn of the 21st century, [B]lack men born in the 1960s were more likely to have gone to prison than to have completed college or military service." (Vera, *American History, Race, and Prison*, https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison)

[4] *Id*.

[5] Heather Ann Thompson explained in a 2015 interview with Nursing Clio that "intensive incarceration has emptied communities of their elders, their parents, their grandparents, and their children now, through the juvenile justice system. It has made them even poorer because there are no jobs. It has basically created an environment where violence can flourish . . . Should we be surprised that violence is a problem when we make an economy illegal, and make it the only economy that is available because there are no factories?" (Nursing Clio, *An Interview with Historian Heather Ann Thompson (Part 2)*, Nov. 5, 2015, https://nursingclio.org/2015/11/05/an-interview-with-historian-heather-ann-thompson-part-2/#:~:text=What%20we%20start%20to%20see,environment%20where%20violence%20can%20flourish)

[6] USSC, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System*, Oct. 2017, at 6. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf

[7] National Institute of Justice. *Five Things About Deterrence*. May 2016. https://www.ojp.gov/pdffiles1/nij/247350.pdf

This is not only a significant opportunity[8] but a timely one. In April 2024, following the Health and Human Services Department's recommendation, the Drug Enforcement Administration (DEA) announced its decision to reschedule cannabis to Schedule III.[9] Given that the Tables presently translate quantities of various illegal drugs into their marijuana-equivalent quantities for the purpose of determining relative harm, it would be appropriate to utilize the multi-agency review already happening with cannabis to review and update the tables.

Additional research about other historically stigmatized substances should also inform this review. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, and again granted two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019.[10] In 2024, the FDA extended the same status to an LSD formula for the treatment of generalized anxiety disorder.[11] The FDA is also reviewing a new drug application for MDMA-assisted therapy[12], for which they will likely have a decision by August 2024.

Meanwhile, there has been growing bipartisan support to fund clinical trials exploring the use of psychedelics[13] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[14] For instance, in the 2024 National Defense Authorization Act, the Department of Defense authorized funding a study on psychedelics for the treatment of PTSD in military members.[15] In March 2024, the Department of Veterans Affairs passed a budget allocating $20 million for clinical trials for MDMA and psilocybin.[16] The National Institutes of Health has also opened funding opportunities for studying

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[8] Drug offenses make up the largest portion of the federal docket. (*See*, Fiscal Year 2021 Overview of Federal Criminal Cases. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf)

[9] Alicia Wallace et al. CNN. *Justice Dept Plans to Reschedule Marijuana as a Lower-risk Drug.* April 30, 2024. https://www.cnn.com/2024/04/30/economy/dea-marijuana-rescheduling/index.html

[10] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[11] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[12] *Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD*, February 9, 2024, https://news.lykospbc.com/2024-02-09-Lykos-Therapeutics-Announces-FDA-Acceptance-and-Priority-Review-of-New-Drug-Application-for-MDMA-Assisted-Therapy-for-PTSD

[13] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[14] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

[15] Herrington, *Biden Signs Defense Spending Bill Funding Psychedelic Research* Forbes.

[16] Curtis, *VA-funded psychedelic therapy trials for PTSD could save lives, veteran organization says* Fox 13 News

psychedelic-assisted therapy for chronic pain in older adults.[17] This shift in the evidence base, and concurrent changes in federal policy, reflects an increasing willingness and mandate to reevaluate long-held assumptions about controlled substances, paving the way for more drug policies driven by data rather than dogma.

Alongside the evidence and government agencies, recent polls have found an overwhelming majority of American voters are also eager for a new approach to drug laws and responses to drug-related offenses.[18] Over 60% support ending the War on Drugs; "eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services"; repealing mandatory minimum sentences for drug crimes; and commuting, or reducing, the sentences of people incarcerated for drugs.[19] Representing one of "the few truly bipartisan issues in American politics," the "breadth and depth of support for change suggests that there are few issues for which the nation's laws so misrepresent the preferences of the American people as for drugs."[20]

Despite these widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables remain based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors.[21] Congress[22] and this Commission[23] have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine. For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the drug or other substance," potentially positive "pharmacological effect[s],"[24] and likelihood of misuse and dependence[25].

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[17] *See e.g., Safety and Early Efficacy Studies of Psychedelic-Assisted Therapy for Chronic Pain in Older Adults (UG3/UH3 Clinical Trial Required) NOFO*

[18] ACLU. *Poll Results on American Attitudes Toward War on Drugs*. June 9, 2021. https://www.aclu.org/documents/poll-results-american-attitudes-toward-war-drugs

[19] *Id.*

[20] *Id.*

[21] Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021).

[22] Aris Folley, *Congress Set to Tackle Crack, Powder Cocaine Sentencing Disparity Before Year's End*, December 18, 2022, https://thehill.com/business/3778680-congress-set-to-tackle-crack-powder-cocaine-sentencing-disparity-before-years-end/

[23] *Change In Federal Cocaine Sentencing Policy Recommended Findings To Be Submitted To Congress*, April 5, 2002, https://www.ussc.gov/about/news/press-releases/april-5-2002

[24] United States Drug Enforcement Administration. *The Controlled Substances Act*. https://www.dea.gov/drug-information/csa

[25] Any inquiry should take into account ways harm reduction approaches, public education, and proven methods of avoiding harm and use among minors can reduce the likelihood of misuses and dependence. Revising the Tables

Access to Doorways and countless other organizations across the political spectrum and around the country are coming together to organize and inform the USSC and the general public about the importance of this issue. The United States is long overdue for sentencing reform, and the urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Sincerely,
Courtney Watson
Founder, Access to Doorways

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would likely lead to a reduction in resources spent on enforcement, prosecution, and punishment. Those resources could then be reinvested to bolster effective harm reduction and public education efforts. (*See*, Counsel of State Governments, Justice Reinvestment Initiative, https://csgjusticecenter.org/projects/justice-reinvestment/#:~:text=Justice%20Reinvestment%20is%20a%20data,Justice%20Reinvestment)

July 15, 2024

Dear Hon. Carlton W. Reeves, and the U.S. Sentencing Commission,

We are writing as leaders of Amend at UCSF to offer some ideas on how the Commission can fulfill its mission to make the federal criminal legal system fairer and more just.

Amend at the University of California, San Francisco is a physician-led public health and human rights program that works with prisons to reduce their adverse health effects on people who are incarcerated and prison staff, while also supporting policy makers and community leaders as they imagine new systems for accountability and healing in the U.S. Amend at UCSF identifies, invests in, and supports prison staff across disciplines and at all levels who are dedicated to transforming U.S. prison culture. We provide immersive training programs and technical assistance that draw on healthcare quality improvement, behavior change, and on the dignity-driven and public health-oriented correctional practices advanced in Norway and elsewhere. We aim to inspire and support immediate and sustainable changes to improve the safety, health, and well-being of people who live or work in prison while cultivating leaders who are dedicated to improving the conditions and culture in their own prison system. Although we write today as leaders of Amend, we are not permitted to represent the views of the University of California San Francisco, and our views do not imply a position of the University.

We believe that U.S. sentencing policies and the public's understanding of those policies must reflect the fact that most incarcerated people will eventually return to our communities, our workforce, and our collective lives. We must recognize that even in the US, which doles out some of the world's longest sentences, the deprivation of liberty does not exist in perpetuity. Moreover, in a country with such high rates of imprisonment, half of American adults have an immediate family member currently or previously incarcerated. Incarceration is associated with excess morbidity and mortality, including an estimated 2-year decline in life expectancy for each year served. The adverse health impacts of incarceration also extend to children of incarcerated parents, causing intergenerational health-related harms to affect families and communities. Recent studies also show that prison work also causes health-related harm to staff; correctional officers suffer high rates of chronic health conditions, mental health crises and family strife than other workforces.

Several bipartisan acts have been introduced recently that could address unfair health-related harms in sentencing. We would underscore the importance of the following proposals:

- Extend mandatory minimum sentencing to those sentenced prior to First Step Act, realigning sentences with what similar offenses would receive today and allowing courts to consider sentence reduction for people who committed crimes as youth (**First Step Implementation Act**; S1014, 2023).
- Prospectively and retroactively eliminate persistent federal sentencing disparities between crack and powder cocaine offenses, which drive racial disparities in sentencing (**Eliminating a Quantifiably Unjust Application of the Law Act (EQUAL)**; S79, 2023).
- Correct arbitrary First Step Act exclusion of the oldest individuals in federal prison (convicted prior to 1987), allowing an aging prison population to access compassionate release and home detention programs (**Safer Detention Act**; S1248, 2023).

Additionally, the **Federal Prison Oversight Act**, has recently been met with legislative success. For this Act to be as transformational as possible, it is imperative that medical professionals, rather than politicians or prison administrators craft the metrics for judging adequacy of medical and mental healthcare, so that carceral healthcare aligns with community standards as much as possible and accounts for the unique healthcare needs of incarcerated persons.

Finally, the Sentencing Commission is asked to "[M]easure the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing." 28 U.S.C. 991(b)(2) and to make "recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy." 28 U.S.C. 995(a)(20). To this end, in light of overwhelming medical and sociological evidence demonstrating the adverse health effects of profound isolation (aka "solitary confinement"), we recommend that the sentencing commission call for the development of true **alternatives to solitary confinement**, including (1) commissioning a descriptive landscape analysis of all such programs throughout the nation's state and federal prisons, and (2) commissioning the development of training programs for prison staff working in restrictive housing units on the harms of isolation and approaches to supporting behavior change to reduce the use of solitary confinement.

For more on our Culture Change Initiative and other areas of work, please visit or contact us at: https://amend.us

Sincerely,

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*Titles for Identification purposes only; do not imply a position of the University

Rebecca Brodey, Bourelly, George and Brodey
Tess Lopez, Sentencing Mitigation Specialist

Co-Chairs, ABA Criminal Justice Section Sentencing Committee

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, NW, Suite 2-500
Washington, D.C. 2002-8002

July 15, 2024

Re: 2024-2025 Proposed Priorities

Dear Chair Reeves and Members of the Sentencing Commission:

We appreciate the Sentencing Commission's request for guidance as to what it should prioritize during the amendment cycle ending May 1, 2025. In our individual capacity but also as co-chairs of American Bar Association Criminal Justice Section's Sentencing Committee, we recommend that the Commission prioritize increased accessibility to alternatives to incarceration and expansion of Zones B and C of the Guidelines Table. These requests are consistent with ABA Policy.

I. Alternatives to Incarceration Should be a Priority for 2024-2025

We echo the sentiments expressed by Chair Reeves in October 2023 about the current Federal Guidelines scheme: "No, what is outrageous—what is offensive—what is disgraceful—is our system's restriction of empathy, mercy, and non-prison sentences to the few, rather than

the many."[1] In this inspiring speech, Judge Reeves makes a call to the Commission and to its partners in the legal community to move away from a federal sentencing scheme where prison is the default.[2] He touches upon the harms and inequities of a criminal justice system that punishes street drugs and immigration violations (offenses largely committed by men of color) more harshly than attempts to overthrow our government.[3] In a criminal justice system that is plagued by mass incarceration, racial and socioeconomic inequality, and a failing federal prison system, we ask the Commission to prioritize non-custodial punishments in 2024-2025.

Moreover, we submit that one effective way to enhance accessibility to the myriad non-carceral punishments including diversion, home detention, rehabilitation, and other programs is to expand Zones B and C beyond Level 13 of the Sentencing Guidelines Table. Specifically, we recommend that the Commission consider expanding Zone B to apply to levels 9-13 so that more individuals would benefit from Zone B sentencing options, without jeopardizing public safety. We also ask the Commission to consider expansion of Zone C to apply to levels 14-16.

Expansion of Zones B and C should also be coupled with the Commission's encouragement of alternatives to incarceration for individuals in Zone D who have been convicted of nonviolent offenses and who suffer from either substance abuse, addiction, or

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[1] Hon. Carlton W. Reeves, "Alternatives to Incarceration and the Sentencing Commission: A Call for Progress Through Partnership," *Federal Sentencing Reporter,* 36 Fed. Sent. R. 130 (Feb. 1, 2024). Chair Reeves initially delivered these remarks at the "Rewriting the Sentence II Summit" in Washington, DC on October 16, 2023, they were subsequently reprinted in "Alternatives to Incarceration and the Sentencing Commission: A Call for Progress Through Partnership," by the February 2024 Federal Sentencing Reporter.

[2] *Id*. at 132 (Judge Reeves asks advocates, members of the public, scholars, journalists, practitioners, incarcerated individuals and their families to "partner with us" and work with the Commission to "keep fighting" to ensure their policies "reflect the realities of incarceration–and the need for fundamental change.").

[3] *Id*. at 131 (Noting that the sentence imposed on the January 6th Capitol rioter "who recruited, directed, and encouraged the assault" was "many years less than the federal sentences given out to Black and Brown men who did nothing more than get caught up in a 'stash house" sting concocted by the government.")

mental illness. Community treatment rather than imprisonment is much more likely to benefit individuals suffering from mental health issues and/or substance dependence and will also benefit the public because such programs are more successful in keeping the public safe as they reduce recidivism.

We also ask that the Commission focus on Alternatives to incarceration including, but not limited to: (1) Pre-plea programs such as pretrial diversion; (2) drug court; (3) probation; (4) community service; (5) intermittent Confinement; (6) home confinement with electronic monitoring; (7) vocational training, (8) educational programs, (9) inpatient treatment at rehabilitation facilities, and (10) monetary penalties. Finally, we request that the Commission continue its 2023-2024 priorities[4] of:

> (1) Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2) and considering any appropriate responses including possible consideration of recommendations or amendments.
>
> (2) Compilation and dissemination of information on court-sponsored programs relating to diversion and other alternatives-to-incarceration.

II. Encouragement of Alternatives to Incarceration is Consistent with the Commission's Past Priorities

The Commission has increasingly considered alternatives to incarceration over the last 20 years. Professor Douglas Berman summarized the Commission's attention to alternatives to incarceration since 2007 when "the Commission formally identified as a policy priority the study of 'alternatives to incarceration, including information on and possible development of any

[4] U.S. Sentencing Commission, Federal Register Notice of Final 2022-2023 Priorities (Oct. 2022).

guideline amendments that might be appropriate in response to any research reports.'"[5] Following the designation of this policy priority, the Commission published reports in 2009 and 2015 on "Alternative Sentencing in the Federal Criminal Justice System," and then in 2017 with "Federal Alternative-to-Incarceration Court Programs."[6] Despite the publication of these reports, "nearly 90 percent or more of all federal sentencings" every year end with a term of at least some imprisonment.[7]

The Commission has made some larger strides toward lessening imprisonment in the last year. Most recently, Amendment 821, the Zero Point offender adjustment, provided offenders who meet certain criteria with a two-level reduction, effectively expanding eligibility for non-custodial sentences to more offenders. We are encouraged by the Commission's amendment which can help qualifying individuals to reduce their sentences by six to twelve months. Still, we find that this amendment is insufficient to remedy the problems associated with over incarceration as it is applicable only to first time offenders and has so many disqualifying criteria (*e.g.*, any aggravating role renders an offender ineligible for this reduction).

Also in seeming recognition of the need to expand accessibility to non-custodial punishments, the Commission prioritized two initiatives last year which have the effect of supporting alternatives to incarceration: (1) assessing the BOP's ability to implement programming that meets the criteria of 18 U.S.C. § 3553 and (2) compiling court-sponsored diversion programs and alternatives to incarceration.[8] In keeping the momentum of the

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[5] Douglas Berman, "A New Alternatives Agenda for the U.S. Sentencing Commission?," *Federal Sentencing Reporter,* 36 Fed. Sent. R. 111 (Feb 1, 2024) (Vera Inst.Just.).
[6] *See generally* U.S. Sentencing Commission, Problem-Solving Court, Timeline of Commission Work, www.ussc.gov/education/problem-solving-court-resources (last visited July 15, 2024).
[7] Berman at 111.
[8] Berman at 112.

Commission's commendable work, we ask the Commission to continue the prioritization of enhancing access to alternatives to incarceration.

III. Alternatives to Incarceration Can Foster Rehabilitation and Be Tailored to the Individual

Alternatives to Incarceration can be tailored to a particular offender and can address the factors required in 18 U.S.C. § 3553(a): just desserts, deterrence, incapacitation, and rehabilitation—facilitating the nuance in sentencing that the statute affords.[9] Alternatives to incarceration are not simply a mechanism to shorten prison sentences but, rather, serve as punishments and rehabilitative systems *other than* prison.

For instance, technology may afford sufficient tracking to facilitate pretrial release of individuals who would otherwise be detained.[10] Alternatives to incarceration can include drug rehabilitation programming, community service, GPS location monitoring, diversion programs, vocational training, educational training and other measures that can be cost effective, protect the public and provide rehabilitation. Many of these programs can also help to reduce recidivism and promote successful reentry into society.

By prioritizing alternatives to incarceration and authorizing these alternatives under the Guidelines Table, the Commission can help transform sentencing from a binary conversation regarding the number of months an offender serves to a more nuanced approach that includes rehabilitation, reentry, maintaining family ties, and equity.

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[9] Hon. Stephen Breyer, "Federal Sentencing Guidelines Revisited," *Federal Sentencing Reporter*, 36 Fed. Sent. R. 244, 245 (June 1, 2024) (Vera Inst. Just.).

[10] *See e.g.*, Peter N. Salib, "Why Prison?: An Economic Critique," 22 Berkeley J. Crim. L. 111, 164 (2017) (explaining an "efficient system" where "bad actors could be monitored much more closely and their activities controlled much more tightly via the use of technology").

IV. Mass Incarceration and Over Incarceration are a Blight on American Society

The Commission is aware of the problems associated with American rates of incarceration, especially with regard to men of color. "Mass incarceration is the most urgent civil rights issue of our time. America's stubborn commitment to the failed war on drugs, tough-on-crime policies, and lengthy prison sentences has resulted in the caging of a breathtaking number of black and brown people."[11]

Judge Reeves explained in his speech that incarceration itself was initially an "alternative" criminal sanction that transformed into a mainstream punishment as it was frequently used to imprison black people who had escaped slavery. Today, as noted by Mark Fonarcaro et al., "prisons have risen as the predominant means of social control."[12] According to data published by The Sentencing Project, one in five black men born in 2001 is likely to experience imprisonment within their lifetime and men were imprisoned at 5.5 times the rate of white men in 2021.[13] Described by Mark Bennett as "slow motion lynching," the Commission must focus on alternatives to incarceration as a means to curing this blight on our society.

V. Conclusion

We appreciate the Commission's consideration of our suggested priorities and accept Judge Reeves' invitation to serve as partners with the Commission. We ask the Commission to

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[11] Malcolm Jenkins & Austin Mack, *Vote Yes on 1: Why We Must Treat and Not Jail Addiction*, MEDIUM (Nov. 2, 2018), https://medium.com/@kristi_70932/vote-yes-on-1-why-we-must-treat-and-not-jail-addiction-90d6ed844e39; *see also* Carrie Pettus-Davis & Matthew W. Epperson, *From Mass Incarceration to Smart Decarceration*, (Am. Acad. of Soc. Work & Soc. Welfare, Working Paper No. 4, 2015), https://aaswsw.org/wp-content/uploads/2015/03/From-Mass-Incarceration-to-Decarceration-3.24.15.pdf

[12] Mark R. Fondacaro et al., "The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles," 41 OHIO N.U. L. REV. 697, 707 (2015).

[13] Nazgol Ghandnoosh, Ph.D., " One in Five: Ending Racial Inequity in Incarceration," The Sentencing Project (Oct 11, 2023) (available at https://www.sentencingproject.org/reports/one-in-five-ending-racial-inequity-in-incarceration/ (last visited July 15, 2024).

prioritize alternatives to incarceration, expansion of Zones B and C of the Guidelines Table, and continuing its assessment of the Bureau of Prisons and court sponsored non-carceral programs. We hope that the Commission will expend its resources this year in supporting a federal sentencing system that manifests the call of the Commission's Chair: to "reflect empathy," "deliver mercy," and "embrace alternative ways of achieving justice." Thank you for your consideration.

Respectfully,

Rebecca Brodey
Partner
Bourelly, George + Brodey

Tess Lopez
Sentencing Mitigation Specialist

Co-chairs, ABA Criminal Justice Section Sentencing Committee

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

July 15, 2024

Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Submitted via https://comment.ussc.gov

Dear Judge Reeves,

The United States Sentencing Commission has issued a notice for comment on its tentative priorities for the 2024-25 Amendment Cycle. U.S. Sent'g Comm'n, *Proposed Priorities for Amendment Cycle*, 89 Fed. Reg. 48029 (June 4, 2024). This year, the solicitation asks for comments on possible policy priorities for the amendment cycle ending May 1, 2025.

In response, the American Civil Liberties Union respectfully submits the following comment. We believe this furthers the Commission's statutory purposes and missions, specifically establishing "sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing [and] avoiding unwarranted sentencing disparities." 28 U.S.C. § 991(b)(1)(B).

We suggest a policy priority adding an adjustment lowering a defendant's offense level when the government violates the Fourth Amendment in the course of conducting an investigation. This amendment would have two significant benefits. First, it would promote the development of Fourth Amendment law by encouraging suppression motions and judicial rulings that would not otherwise affect a defendant's ultimate guilt or innocence or sentencing after conviction. And second, it would disincentivize unconstitutional conduct for which there is currently little or no downside for government officials.

The United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures." U.S. Const. amend. IV. To give these words effect, the U.S. Supreme Court long ago announced an exclusionary rule, holding that courts must exclude evidence that is uncovered during an illegal search as well as evidence that indirectly derives from the unlawful search. *See Weeks v. United States*, 232 U.S. 383, 398 (1914); *Boyd v. United States*, 116 U.S. 616, 638 (1886); *see also Murray v. United States*, 487 U.S. 533, 536–37 (1988).

The exclusionary rule serves vital purposes. "Ever since its inception," the exclusionary rule "has been recognized as a principal mode of discouraging lawless police conduct." *Terry v. Ohio*, 392 U.S. 1, 12 (1968). By preventing police officers from using evidence acquired in violation of the Fourth Amendment, the rule seeks to "compel respect for the" Fourth Amendment "by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). To be sure, excluding evidence in a criminal case often impairs the State's ability to prosecute an alleged

crime. But the exclusionary rule rests, among other things, "on the judgment that the importance of deterring police [mis]conduct . . . outweighs the importance of securing the conviction of the specific defendant on trial." *United States v. Caceres*, 440 U.S. 741, 754 (1979).

Unfortunately, the Commission's guideline for "relevant conduct" undermines the exclusionary rule. U.S. Sent'g Comm'n, Guidelines Manual § 1B1.3 (Nov. 2023). The Guidelines attempt to limit prosecutors from manipulating sentences. The Commission was especially concerned with preventing "prosecutors [influencing] sentences by increasing or decreasing the number of counts in an indictment." U.S.S.G. Ch. 1 Pt. A(1)(4)(a). The Sentencing Commission expressly sought to prevent prosecutors from manipulating a defendant's sentence by treating, for example, multiple counts of drug trafficking totaling 300 grams of a controlled substance the same as if the government charged the defendant with one count of drug trafficking a total of 300 grams of a controlled substance. *Id*.

The Guidelines implement sentencing based on relevant conduct instead of individual charges in an effort to mitigate this abuse. But the relevant conduct inquiry also has costs. Consider, for example, a prosecution that begins with multiple counts of drug trafficking. The defendant successfully moves to exclude much of the evidence against them because the government obtained it through illegal searches of the defendant's home, cell phone or other digital evidence, or location information. As a result, the judge dismisses all but one count, but there is sufficient admissible evidence to convict the defendant for possessing a quantity of a relevant controlled substance with the intent to distribute. 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C). At sentencing, the illegally obtained suppressed evidence comes back—because a court can and often will consider the fruits of illegal searches at that stage as evidence of relevant conduct, which serves to increase a defendant's offense level and ultimately their Guideline range.

The Commission's relevant conduct rule therefore disincentivizes defense attorneys and their clients in some cases from filing meritorious suppression motions that, even if granted, will not benefit the client at sentencing. Addressing this problem is well within the Commission's mandate, because it has become clear that the Guidelines themselves have had the inadvertent effect of compounding the problem of illegal searches and seizures.

The so-called "good faith exception" to the exclusionary rule has created a similar problem. The Supreme Court has stated that the "prime purpose" of the exclusionary rule is "deter[ring] future unlawful police conduct," rather than remedying the constitutional violations suffered by a defendant. *United States v. Calandra*, 414 U.S. 338, 347 (1974). In this vein, the Court created and expanded a loophole to the exclusionary rule, allowing prosecutors to use evidence obtained in violation of the Fourth Amendment where law enforcement had done so "in good faith." This exception is not based on officers' actual subjective good intentions, but on the Court's conclusion that suppression where officers acted in an objectively reasonable way would not, in fact, incentivize better protection of constitutional rights. *United States v. Leon*, 468 U.S. at 919 n.20.

The Supreme Court has applied this good faith exception in cases where it found law enforcement actions to have been objectively reasonable in reliance on a faulty warrant, unconstitutional statute, technical error, or subsequently reversed binding precedent. *Illinois v. Krull*, 480 U.S. 340, 342 (1987); *Arizona v. Evans*, 514 U.S. 1, 4 (1955); *Herring v. United States*, 555 U.S. 135, 137 (2009); *Davis v. United States*, 564 U.S. 229, 247 (2011). This shift deprives

defendants of "a remedy necessary to ensure that [Fourth Amendment] prohibitions are observed in fact." Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1389 (1983).

Research shows that the good faith exception also has a detrimental impact on the development of Fourth Amendment law. *See generally* Matthew Tokson, *The Aftermath of* Carpenter*: An Empirical Study of Fourth Amendment Law 2018–2021*, 135 Harv. L. Rev. 1790 (2022). When courts admit contested evidence based on good faith, they sometimes do so without addressing the constitutional validity of the search. This risks a self-perpetuating cycle where constitutional rights, including those around the most pressing issues concerning privacy in the technological age, remain unclear simply because they have not been adjudicated.

The avoidance effect is not merely hypothetical. A recent study shows that in roughly 30% of cases (in both district and appellate courts) applying the "good faith" exception, the court declined to resolve the underlying substantive Fourth Amendment issue. *See, e.g.*, Matthew Tokson & Michael Gentithes, *The Reality of the Good Faith Exception*, 113 Geo. L. J. (forthcoming 2025) (manuscript at 20–21), https://perma.cc/3Y8T-RQWL. In those cases, the court declined to create precedent to guide law enforcement to reduce future Fourth Amendment violations. What's more, the courts best positioned to guide future courts on substantive interpretations of constitutional law—the federal courts of appeals—were nearly twice as likely as district courts to avoid the merits in Fourth Amendment suppression cases. *Id*. at 22 & n.109. Overall, federal courts of appeals avoided substantive Fourth Amendment issues in 52.4% of cases applying the good faith exception. *Id*. at 21. This trend is troubling, because "[i]f every court confronted with a novel Fourth Amendment question were to skip directly to good faith, the government would be given *carte blanche* to violate constitutionally protected privacy rights, provided, of course, that" some basis for good faith applied. *United States v. Warshak*, 631 F.3d 266, 282 n.13 (6th Cir. 2010). When courts of appeals decline to clarify the contours of Fourth Amendment rights, they are likely to remain ambiguous and prone to misinterpretation or abuse.

Moreover, as a result of the good faith exception, there is a steadily decreasing incentive for law enforcement to be concerned with the Fourth Amendment.[1] This is especially a concern as law enforcement officers increasingly rely on novel technologies to gather information in criminal investigations. Fourth Amendment protections regarding a number of newly developed forensic tools—geofence location searches, reverse keyword searches, and cell site location imitators (IMSI catchers), just to name a few—are undeveloped or non-existent in the case law.

The modern good faith exception enables the police to use old, general-purpose statutes to justify new and invasive forms of surveillance. Even when courts eventually strike down a novel surveillance technique as unconstitutional, the good faith exception all but ensures that the evidence will still be admitted in court. *See, e.g.*, Tokson & Gentithes, *supra*.

[1] As one member of this Commission recently explained, a similar effect has been observed due to developments in the doctrine of qualified immunity. *See Green v. Thomas*, No. 3:23-CV-126, 2024 WL 2269133 (S.D. Miss. May 20, 2024) (Reeves, J.), *appeal docketed*, No. 24-60314 (5th Cir. June 18, 2024).

To promote better compliance with and judicial development of the Fourth Amendment, the Commission should consider adding an adjustment (*i.e.*, mandatory offense level reduction) that would apply when the government violated an individual's Fourth Amendment rights, or an amendment to the relevant conduct guideline that specifically excludes suppressed evidence. Such an amendment would go a long way toward ensuring that Fourth Amendment rights continue to matter and that courts continue to develop Fourth Amendment law, even when violations do not ultimately affect an individual's guilt or innocence. In effect, this kind of amendment would introduce a currently absent middle ground: Even where a constitutional violation does not require suppression of evidence at trial, it does trigger a reduction in a defendant's sentence. Were this amendment adopted, defendants would have renewed motivation to raise Fourth Amendment issues in suppression motions.

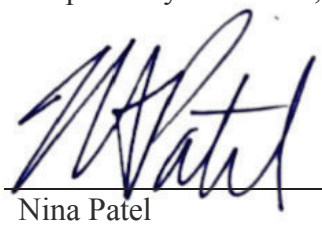
Importantly, this proposal would not be inconsistent with 18 U.S.C. § 3661, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing a sentence." Excluding certain evidence from a Guidelines calculation does not in any way constitute excluding it from a court's consideration in overall sentencing, as a court can still use that same information to decide where within the guideline range to sentence a defendant. *See* 18 U.S.C. § 3553(a); *see also* U.S. Sent'g Comm'n, *Amendments to the Sentencing Guidelines* 1–5 (Apr. 30, 2024), https://perma.cc/DY84-FLBS (promulgating amendment to the acquitted conduct rule notwithstanding 18 U.S.C. § 3661).

The protections of the Fourth Amendment have been unintentionally diminished by the relevant conduct guideline and by the good faith exception. We believe that an amendment like the one proposed would help remedy the problem by ensuring that there is some accountability for illegal searches and seizures, and that an incentive remains to challenge those unconstitutional acts and thereby advance Fourth Amendment common law.

* * *

Thank you for the opportunity to provide comments. If you have any questions, please contact Nina Patel, Senior Policy Counsel, Justice Division, at [redacted]

Respectfully submitted,



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Public Comment - 2024-2025 Proposed Priorities

Submitter:

Amnesty International USA

Topics:

Research Recommendations

Policymaking Recommendations

Comments:

Thank you for this opportunity to weigh in on the priorities for the Commission for the coming year. One issue that would be great for the Commission to study is the issue of brain development and maturation when it comes to individuals who commit crimes as minors, but also those adults who are between the ages of 18-25 years old when it comes sentences such as life without parole and the death penalty. The burgeoning science on this issue is definitive and demonstrates that this ongoing brain development should impact how we view and sentence these individuals. Far too many individuals are sentenced to life without parole or the death penalty without consideration of this science, despite this science and their ability to mature and understand the consequences of their actions. It would be momentous for the Commission to review this science and make recommendations on either limiting or even eliminating these sentences for individuals within this age range or on considering the science of brain development during sentencing.

Submitted on: June 27, 2024

Dr. Zachary Tackett
Cofounder and Executive Director
Autism Innocence Project
6587 Willowbank Pl SW
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[redacted]
July 15, 2024

Honorable Judge Carlton W. Reeves
Chair, U.S. Sentencing Commission
One Columbus Circle, NE Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves,

I am writing to you as the Cofounder and Executive Director of the Autism Innocence Project and as an advocate for fair treatment of autistic individuals within the American criminal justice system. I urge the U.S. Sentencing Commission to consider autism as a significant mitigating factor in sentencing decisions and to implement specific measures to ensure justice for autistic individuals.

Autism Spectrum Disorder (ASD) is a developmental disability affecting communication, behavior, and social interactions. Individuals with autism often face challenges in understanding social cues, which can lead to misunderstandings and misinterpretations of their actions by law enforcement and the judicial system. These challenges are compounded by sensory sensitivities, anxiety, and difficulties in adapting to new environments or stressful situations.

In the criminal justice context, autistic individuals are often at a disadvantage due to their unique needs and behaviors. For example, they may exhibit repetitive behaviors, have difficulty making eye contact, or struggle to respond to questions in a conventional manner. These behaviors can be misinterpreted as non-compliance, deceit, or even aggression. Consequently, autistic individuals are more likely to be wrongfully accused, convicted, and subjected to harsher sentences.

Furthermore, Title II of the Americans with Disabilities Act (ADA) mandates that public entities, including the criminal legal system, provide reasonable accommodations to individuals with disabilities. This includes ensuring that autistic individuals receive the necessary support and modifications to participate fully and fairly in legal proceedings.

Accommodations might include providing communication aids, modifying interrogation techniques, and offering sensory-friendly environments.

I respectfully request that the U.S. Sentencing Commission consider the following specific recommendations:

1. **Options for Diversion**: Develop and implement diversion programs specifically tailored for individuals on the autism spectrum. These programs should focus on treatment and support rather than punishment, recognizing the unique needs and challenges faced by autistic individuals.

2. **Dropping Mandatory Minimums**: Eliminate mandatory minimum sentences for cases involving autistic individuals. Mandatory minimums do not account for the mitigating factors related to autism and can result in disproportionately harsh sentences for these individuals.

3. **Training for Personnel**: Provide comprehensive training for law enforcement, judicial personnel, and prison staff on understanding and appropriately responding to autistic behaviors. This training should emphasize de-escalation techniques and the importance of accommodations under the ADA.

By recognizing autism as a mitigating factor, providing appropriate accommodations, and implementing these specific recommendations, the U.S. Sentencing Commission can help prevent unjust outcomes and promote a more equitable justice system for all individuals, regardless of their neurological differences.

Thank you for your attention to this critical matter.

Sincerely,

Zachary Tackett

Dr. Zachary Tackett
Co-Founder and Executive Director
Autism Innocence Project

BRENNAN CENTER FOR JUSTICE

July 15, 2024

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

RE: Proposed Priorities for 2024 – 2025 Amendment Cycle

Dear Judge Reeves:

The Brennan Center for Justice at New York University School of Law welcomes the opportunity to share our views on sentencing matters that we believe merit the United States Sentencing Commission's serious consideration this year.[1] We offer our suggestions in light of a litany of major operational challenges that beset the federal Bureau of Prisons, such as severe understaffing, persistent overcrowding, and aging infrastructure.[2] These grim conditions threaten the safety and lives of both incarcerated people and correctional staff alike, and they show few signs of abatement.[3] These circumstances also undermine critical access to programming and

[1] The recommendations we state here are based on the in-person remarks we proffered in person on June 27, 2024 to Commission staff.

[2] For staffing shortages, see U.S. Dep't of Just., Office of the Inspector General, *Evaluation of Issues Surrounding Inmate Deaths in Federal Bureau of Prisons Institutions* 64-69 (2024), https://oig.justice.gov/sites/default/files/reports/24-041.pdf. For overcrowding challenges, see Fed. Bureau of Prisons, *Program Fact Sheet* 2, May 13, 2024, https://www.bop.gov/about/statistics/docs/bop_fact_sheet.pdf?v=1.0.10. For infrastructure problems, see U.S. Dep't of Just., Office of the Inspector General, *Audit of the Federal Bureau of Prisons' Efforts to Maintain and Construct Institutions* 5, 2023, https://oig.justice.gov/reports/federal-bureau-prisons-efforts-maintain-and-construct-institutions.

[3] For effects of poor BOP conditions on incarcerated individuals and BOP staff, see, e.g., U.S. Gov't Accountability Off., *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure* 25 (2012), https://www.gao.gov/assets/gao-12-743.pdf. Regarding projections concerning BOP challenges, see U.S. Dep't of Just., Fed. Bureau of Prisons, *FY 2024 Performance Budget: Congressional Submission* 7, https://www.justice.gov/d9/2023-03/bop_se_fy_2024_pb_narrative_omb_cleared_3.23.2023.pdf (stating that the BOP projects that its incarcerated population will exceed capacity by 10 percent in 2024); and *The Nation's Correctional Staffing Crisis: Assessing the Toll on Correctional Officers and Incarcerated Persons, Hearing Before the Subcommittee on Criminal Justice and Counterterrorism,* Senate, 118th Cong. 2024 (statement of Brandy Moore White), https://www.judiciary.senate.gov/imo/media/doc/2024-02-28_pm_-_testimony_-_white.pdf (noting that BOP staffing levels for correctional officers are, despite numerous hiring initiatives undertaken by the agency, 40 percent below what BOP leadership has deemed minimally necessary safe and proper operation of facilities).

services that are fundamental to successful reintegration into society upon release, such as job training, education, and substance-abuse and mental-health treatment.[4]

Under 28 U.S.C. § 994(g), in promulgating the United States Sentencing Guidelines, the Commission must work to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." The Commission, then, has a statutory obligation through its critical Guidelines work to alleviate overcrowding within BOP facilities which could allay the outsize impact of myriad other operational shortcomings like staffing shortages. Thus, pursuant to 28 U.S.C. § 994(o), we offer suggestions that, if adopted, would reduce unnecessary incarceration in the nation's federal prisons and jails.

I. To better determine culpability in drug-trafficking cases, amend U.S.S.C. § 2D1.1 to focus a defendant's role in an offense.

When establishing the Guidelines for drug-trafficking offenses, the Commission did not use its characteristic empirical approach; instead, it employed the weight-driven scheme of the Anti-Drug Abuse Act of 1986.[5] This approach to sentencing policy, coupled with overly harsh federal drug laws enacted in the 1980s, led to "historically unprecedented" imprisonment rates for low-level drug crime.[6] While the Commission over the past two decades has taken several steps to mitigate the severity of federal drug sentencing policy — including giving retroactive effect to many of its amendments which has doubtless helped reduce the federal prison population — the Commission can and should go still further.[7] And one way is by updating U.S.S.C. § 2D1.1 and making those changes retroactive.

Under § 2D1.1, to arrive at a base offense level and sentencing ranges, judges look to the type and quantity of controlled substances attributable to a defendant. Simply put, the higher quantity of a controlled substance associated with a defendant — no matter that defendant's culpability in fact — the more severe the potential sentence. Quantity is, however, a poor proxy for culpability; it often results in disproportionate and unfair sentences.

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[4] See, e.g, *The Nation's Correctional Staffing Crisis: Assessing the Toll on Correctional Officers and Incarcerated Persons, Hearing Before the Subcommittee on Criminal Justice and Counterterrorism*, Senate, 118th Cong. 2 2024 (statement of Sen. Cory Booker), https://www.judiciary.senate.gov/committee-activity/hearings/the-nations-correctional-staffing-crisis-assessing-the-toll-on-correctional-officers-and-incarcerated-persons (highlighting the nexus between inadequate access to treatment in federal prisons and difficulties reentering society).

[5] *Kimbrough v. United States*, 552 U.S. 85, 96 (2007) ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme.").

[6] See Jeremy Travis et. al., Nat'l Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 120, 152 (2014); *see generally* Lauren-Brooke Eisen, *Excessive Punishment: How the Justice System Creates Mass Incarceration* (New York: Columbia University Press, 2024); Jed Rakoff, *Why the Innocent Plead Guilty and the Guilty Go Free: And Other Paradoxes of Our Broken Legal System* (2021).

[7] See, e.g., USSG, App. C., Amends. 706 (Nov. 1, 2007), 750 (Parts A & C) (Nov. 1, 2011), 782 (Nov. 1, 2014).

United States v. Dossie proves the point.[8] In that sentencing action out of the Eastern District of New York, the defendant was "a young, small time, street-level drug dealer's assistant" — far from a key, essential player in a drug-trafficking organization.[9] And yet his advisory Guidelines range was 57-71 months. That range is, as the sentencing judge correctly put it, "too severe for a low-level addict selling drugs on the street."[10] Individuals who are essential to narcotics trafficking operations and retain a great deal of the profits are typically not the ones who carry, manufacture, or sell the drugs; rather, those people sit atop the drug enterprise, organizing it and managing its financial details.[11] No matter, because the judge could not exercise discretion or depart from the Guidelines, the judge was forced to hand down a sentence within the excessive sentencing range.[12] Accordingly, we urge the Commission to shift the focus of Section 2D1.1 to the role a defendant played in an offense, which would function as a better yardstick for culpability, and apply its amendment retroactively to shorten terms of imprisonment and thereby reduce the federal prison population.

II. Pursuant to the policy statement for U.S.S.G. § 1B1.10, eliminate the bar on retroactive sentence reductions for below-guidelines sentences.

According to federal law, "a judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment and may not be modified."[13] But 18 U.S.C. § 3582(c) contains an exception: Judges may resentence individuals who received a term of imprisonment based on a sentencing range that the Commission has subsequently reduced.[14] In 2011, the

[8] *United States v. Dossie*, 851 F. Supp. 2d 478 (E.D.N.Y. 2012).
[9] Id. at 481.
[10] Id.
[11] Id. Another problem with U.S.S.C. § 2D1.1 is that it turns upside-down one of the fundamental principles of sentencing, proportionality, the idea that the severity of a punishment should match the seriousness of the offense. That important sentencing object is reflected in the 18 U.S.C. § 3553(a) factors that judges use in meting out sentences as well as 28 U.S.C. § 991(b)(1)(A) which instructs the Commission to establish sentencing policies that fulfill the goals of sentencing which include the need for sentences to reflect the seriousness of the offense. And yet Section 2D1.1 fails to advance proportionality for judges are effectively precluded from differentiating between defendants of differing, actual culpability. So the result of this weight-driven scheme has been, and is, that the street-level dealers, mules, couriers and the like receive long, harsh sentences, while narcotics trafficking flourishes.
[12] Id. at 483 (E.D.N.Y. 2012) (explaining that the court could not deviate from the Guidelines because the defendant had already received a reduction for accepting responsibility for the offense, not to mention the defendant's criminal history).
[13] *Dillon v. United States*, 560 U.S. 817, 824 (2010) (citation omitted).
[14] See U.S.S.G. § 1B1.10 ("In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2)."); *see also* 18 U.S.C. § 3582(c)(2) ("In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.").

Commission changed its policy statement regarding resentencings triggered by changes to the Guidelines to bar courts from applying retroactive amendments that could result in sentence reductions for individuals who had received a below-guidelines sentence.[15]

That seems misguided twice over. First, the plain text of 18 U.S.C. § 3582(c) provides that a defendant who receives a sentence "based on a sentencing range" can be eligible for a sentence reduction. The question whether a defendant may be eligible for a sentence reduction, therefore, turns on whether a below-guidelines sentence is a sentence "based on a sentencing range" and we contend it is.[16] When courts sentence a defendant bearing in mind the Guidelines — even if they dole out a sentence with variances or departures in either direction — courts are necessarily basing their decision on the Guidelines sentencing ranges within the meaning of 18 U.S.C. § 3582(c).[17]

Second, the Commission's exclusion of individuals who obtained a below-guidelines sentence from consideration for lighter sentences can also result in unwarranted sentencing disparities.[18] For example, it is entirely conceivable that two defendants convicted of the same offense with similar criminal histories and identical guidelines ranges could receive different final sentences.[19] That could be because one defendant, to a court's mind, has mitigating personal circumstances that qualify for a downward departure under 18 U.S.C. § 3553(a), while the other defendant does not.[20] Yet if the Commission promulgates an amendment retroactively applicable to both defendants, because of its policy statement to § 1B1.10, only the defendant without the mitigating personal characteristics would be eligible for a reduced sentence, while the other defendant would not be eligible at all.[21]

This sort of disparity is irrational, and one way the Commission could address this is by reverting to its original rule pertaining to sentence modifications in light of Guidelines amendments: "In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c), the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time." In other words, judges should be able to lower sentences consistent with federal statutory law irrespective of whether an original sentence was below a newly changed guideline range. Shifting to this

[15] "Notice of Final Action Regarding Amendment to Policy Statement 1B1.10," *United States Sentencing Commission*, November 1, 2011, https://www.ussc.gov/sites/default/files/20110707_FR_Amendment_on_Retroactivity.pdf.
[16] See generally 18 U.S.C. § 3582(c).
[17] The Supreme Court appears to share our reading of Section 3582(c). In *United States v. Hughes*, in addressing retroactive amendments to the Guidelines, the Court explained: "A district court imposes a sentence that is 'based on' a Guidelines range if the range was a basis for the court's exercise of discretion in imposing a sentence. 584 U.S. 675, 686 (2018).
[18] See generally Stephen R. Sady, *Retroactive Guidelines Amendments Must Apply to Individuals Who Receive Below-Guidelines Sentences to Protect the Individualized Sentencing Required by Federal Sentencing Statutes,* 36 Fed. Sent. Rep. 153 (2024).
[19] *Id*.
[20] *Id*.
[21] *Id*.

position would prove more faithful to the plain text of federal statutory law, limit the likelihood of unwarranted sentencing disparities, and lead to more rational and just sentencing outcomes. Critically, it would also result in more sentence reductions which would limit the number of people in federal prison.

III. Amend U.S.S.G. § 5D1 and related policy statements to limit unnecessary terms of supervised release post-incarceration.

In 1984, Congress replaced parole with supervised release primarily to facilitate rehabilitation and reintegration into society after a federal prison term "for those, and only those, who need[] it."[22] Today it is required of most people confined to federal prisons and jails upon release.[23] Supervision can be revoked if a person either fails to comply with the associated conditions or if they are arrested for committing a new criminal offense. Relevant here, when a person fails to comply with release conditions — committing what is commonly called a "technical violation" — they can be sent back to prison. Technical violations encompass a broad array of conduct such as failing a drug test, although it does not include the commission of a new crime.

In 2021, over 10,000 people serving terms of federal supervision were reincarcerated and technical violations made up most cases, around 60 percent.[24] Especially given the BOP's operational shortcomings, federal incarceration should be reserved for people who pose genuine threats to public safety. Judges should therefore make individualized assessments of the necessity of supervision post-release. And when courts do find it proper to place a person on post-incarceration supervision, they should be required to provide on-the-record explanations for their decisions; currently judges offer scarcely little insight into these crucial determinations.[25]

Moreover, judges should have greater flexibility in responding to technical violations, and there should be a presumption of early termination of supervision for individuals who demonstrate compliance and do not risk public safety after a certain time period. These changes could diminish

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[22] Johnson v. United States, 529 U.S. 694, 709 (2000). See also 18 U.S.C. § 3553; Comm. on the Judiciary, Comprehensive Crime Control Act of 1983, S. Rep. No. 98-225, at 124 (1983); *United States v. Johnson*, 529 U.S. 53, 54 2000 (recognizing that supervision is intended to "fulfill rehabilitative ends, distinct from those served by incarceration").

[23] See, e.g., United States Sentencing Commission, 2022 Sourcebook of Federal Sentencing Statistics, (2023) Table 18, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Table18.pdf.

[24] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Probation and Parole in the United States* 2021, https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus21.pdf; Administrative Office of the U.S. Courts, *Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes* 2022, https://www.uscourts.gov/news/2022/06/14/just-facts-revocations-failure-comply-supervision-conditions-and-sentencing-outcomes.

[25] "Federal Probation and Supervised Release Violations," *United State Sentencing Commission*, July 2020, 30, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf.

the near-automatic approach of courts to imposing terms of supervision after a term of incarceration. And importantly, these changes would limit unnecessary incarceration that is bloating the federal prison population, reserving scarce law enforcement resources for the individuals who present the gravest risks to the nation's public safety.

In closing, the Brennan Center, again, appreciates the opportunity to offer our thoughts to the Commission as the agency discharges its important duties, and we would be pleased to discuss any of our suggestions with the Commission.

Respectfully,

/s/ Hernandez D. Stroud
Hernandez D. Stroud
Senior Counsel, Justice Program
Brennan Center for Justice

cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
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July 15, 2024

Honorable Judge Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 2002-8002

RE: Proposed Priorities for the 2024-2025 Amendment Cycle

Dear Judge Reeves:

The Center for Justice Innovation (Center), formerly the Center for Court Innovation, respectfully submits the following comments related to the Commission's proposed priorities for the 2024-2025 Amendment Cycle, and the federal courts and sentencing system generally. The Center's comments focus on three areas: (1) expanding opportunities for pretrial diversion and alternatives to incarceration, including programs co-created with community and restorative practices, (2) measuring success beyond recidivism, and (3) using people-centered language, specifically replacing the term "offender."

The Center is a non-profit, nonpartisan organization that works with communities and justice systems to advance equity, increase safety, and help individuals and communities thrive. The Center's goal is to identify and resolve as early as possible the challenges that bring people into the criminal and civil legal systems. It does this in a number of ways—by developing and implementing programs that reduce the need for incarceration and enhance economic opportunity, conducting original research to identify what works, and sharing what we learn from our programming and research with those seeking to transform justice systems around the world.

The Center is a 900-employee, $125 million nonprofit that accomplishes its vision through three pillars of work: creating and scaling operating programs to test new ideas and solve problems, performing original research to determine what works (and what doesn't), and providing expert assistance and policy guidance to justice reformers around the world. The Center's deep knowledge and expertise in state and local systems—and the positive results and impacts of pretrial diversion and alternatives to incarceration, measuring success beyond recidivism, and using people-centered language in these spaces—offer insights and opportunities for innovation at the federal level.

Focus Area #1: Expanding opportunities for pretrial diversion and alternatives to incarceration, including programs co-created with community and restorative practices.

Incarceration is an expensive method of pursuing public safety, and research has consistently shown that incarcerating people at increased rates has a weak or nonexistent association to lower crime rates. Research also shows that most survivors of crime prefer a system that focuses on rehabilitation for those who have caused harm rather than a system focused on punishment. Community-based interventions, including pretrial diversion and sentencing alternatives to incarceration programs, are promising ways of reducing crime without the use of incarceration. When structured properly with expansive eligibility criteria—for example, allowing individuals with prior system contact to participate and not charging any fees—alternatives to incarceration initiatives can address some of the racial disparities perpetuated by the current reliance on a system of punishment. Restorative practices specifically respond to the needs of survivors by creating space for healing. *See generally*, *Alliance for Safety and Justice.* 2022. "Crime Victims Speak Survivors Speak Up September 2022." *Justice Research and Statistics Association.* Maryfield, B., Myrent, M., and Przybylski, R. 2020. "Research on Restorative Justice Practices." Stemen, D. 2017. "The Prison Paradox: More Incarceration Will Not Make Us Safer." *Vera Institute of Justice*. Wang, L. 2023. "Racial disparities in diversion: A research roundup." *Prison Policy Initiative*.

Focus Area #2: Measuring success beyond recidivism.

Public safety is more than incidents of crime and violence. Measuring recidivism is only one piece of binary data and its limitations include greater police presence in places where people of color and people experiencing poverty live. Measuring factors of desistance (crime severity, time to failure), and social development (employment, graduation rates), and community well-being (perceptions of a safe neighborhood) is more rigorous and offers a more nuanced understanding of individual and system accountability. *See generally*, Butts, J. and Schiraldi, V. 2018. "The Recidivism Trap." *The Marshall Project*. Klingele, C. 2019. "Measuring Change: From Rates of Recidivism to Markers of Desistance." *Journal of Criminal Law and Criminology* 109:4, 769-817. Northwestern Law School.

Focus Area #3: Using people-centered language, specifically replacing the term "offender."

Dehumanizing language and labels cause harm by emphasizing a person's system involvement over their humanity, contributing to stigmatization that can negatively impact efforts at rehabilitation and reintegration. Research shows that terms such as "offender," "inmate," and "felon" increase public support for more punitive sentences and decrease support for important justice reforms, such as diversion programs. Conversely, placing the person first—ahead of the descriptor of their status in the criminal legal system—is in line with values of respect and compassion for those who experience system involvement. *See generally*, Federal Bureau of Prisons, "BOP Announces New Mission, Vision and Core Values"; Bryant, E. and Jefferson, R. 2022. "Words Matter: Don't Call People Felons, Prisoners, or Inmates." *Forbes*; Jules, J., Sheppard, M., and Comfort, M. 2022. "Why Use 'Criminal Legal System' Instead of 'Criminal Justice System?: A Closer Look at the Evolving Language of Law." *Advancing Pretrial Policy & Research*.

Lastly, the Center encourages the Commission to consider adding the Federal Public Defender as an *Ex Officio*, non-voting member with similar access to hearings and materials as the other *Ex Officio* members.

The Center commends the efforts of the Commission to hear and learn from a diverse audience, and for its efforts to advance rehabilitation and decarceration. The Center welcomes opportunities to join future dialogue related to improving the federal system to make it fairer and more just.

Thank you for your time and attention.

Respectfully,

Theron P. Pride, Jr.

Theron P. Pride, Jr.
Managing Director, National Initiatives & Research

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Citizens Against Government Entrapment

Topics:

Research Recommendations

Policymaking Recommendations

Legislation

Comments:

Most of the online "child predator" sting operations are not saving or children from any real threat or risk to children online. The sole purpose of ICAC task forces is to create ICAC cases for funding purposes, not to try to save or protect real children from real online threats and risks. Please visit our website for more information about this. cage.fyi We are a nationwide group with over 100 members, composed of victims of this disgusting scam and family members and friends of those victims.

Those trapped in online sting operations should NOT be receiving the same sentences as those who have hurt an actual child. The sting operation cases are completely created by the decoys by forcing the idea of sex with an underage person on men who are online seeking a consenting adult to meet for a casual hookup or casual sex. Law enforcement officers and vigilante groups encourage the men to do this with an underage person instead of with a consenting adult, like the men trapped in these online sting operations were legally seeking online (typically on adult hookup or sex websites).

This behavior of forcing the idea of sex with an underage person on men who are on adult hookup or sex websites, clearly seeking a consenting adult who is seeking a man to meet for sexual purposes, needs to be made illegal. This has really gotten out of hand, and it's cause so much harm to so many families. It's hurt so many people's view of our justice system, and now with Trump's convictions, there is a lot more focus on our criminal justice system - the misuse of it - misapplying laws to individuals for the purpose of creating benefits for others who work in our government.

"Believed age" was added to the laws that are now used to prosecute these victimless crimes where there was not ever a real child in danger or would have been. "Believed age" was added to address the real issue of online predators targeting underage individuals for the purpose of

sexually exploiting and abusing them.
This does not apply to the online sting operation cases because in those cases, the men are targeted specifically because they are using the internet to find consenting adults to meet for sexual purposes. In many of those cases, the men were lured by first making them believe that they were contacting or responding to an adult who was seeking a man to meet for sexual purposes. Those who run this disgusting scam justify their disgusting behavior by claiming this is about "sex trafficking". However, in most of these cases it was not about paying for sex. It was about meeting a consenting adult on an adult website, for casual sex, a website that is used for this.

Two people who are responsible for helping spread this disgusting scam across our country are Carlos Rodriguez, who used to work for Washington State Patrol and Sheriff Christopher Swanson, in Genessee County, MI. Both have been tied to Tim Ballard - Operation Underground Railroad. That should tell you a lot more about this.

To learn more about Carlos Rodriguez, you can check out the reports by Damion Moore with American Crime Journal and reports by Lynn Packer.
This recent piece here talks about Carlos Rodriguez:
https://americancrimejournal.com/utah-attorney-general-sean-reyes-tim-ballard-targets-of-joint-criminal-probe-by-salt-lake-and-davis-county-district-attorneys/

To learn about Sheriff Chris Swanson, you can check out the podcast episodes he did with Marisol Nichols.
Part 1 - https://youtu.be/BHAEUu7Fal0?si=82G4KS4eNmeaFnUi

Part 2 - https://youtu.be/_8C0Xo-FUKI?si=KrSU-tx51ZVHqxtf

You'll see that he is very Tim Ballard like. He has the story telling (for effect) down really well, just like Tim Ballard. They talk a lot about stories of real predators, that have nothing to do with their sting operations. This is what they use to make their dirty sting operations appear believable to the public. They are master con-artists.

There are so many admissions from this sheriff in these podcast episodes. I can break those down for you, if you'd like. I can show you exactly what they have done to make their fake sting operations believable to the public, the courts, and jurors.

In this podcast episode (below), Tim Ballard talks about his good friend Sheriff Chris Swanson and training Swanson for what he does now. To find that part, start listening at an hour and 4 minutes into this episode:

https://youtu.be/9hmIw8ygwlE?si=yiWClRdDPoWSu2bx

And here you can find confirmation to Ballard's claims about providing this training to Sheriff

Chris Swanson:

https://www.mycitymag.com/the-fight-against-human-trafficking/

The point is that Rodriguez and Swanson are two men responsible for helping spread the sex sting operation scam across our country, and they've clearly been tied to Tim Ballard. They are con-artists. I'm sure there are more from that same group. This is a huge money-making scam. It's a misuse of our justice system, and it's destroyed so many lives, damaging real children too - by ripping their lives apart (removing fathers, grandfathers, and brothers from their lives). It's a great contributor to helping destroy our country - destroying families and destroying the trust in our system. Please help stop this.

Submitted on: June 5, 2024

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July 15, 2024

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Re: University of Minnesota Law School Clemency Project Comment on Proposed Priorities for the Commission – 24-25 Cycle

Dear Judge Reeves:

The University of Minnesota Law School Clemency Project Clinic is pleased to submit a suggestion for research to the United States Sentencing Commission.

Our suggestion relates to the Commission's purpose to "establish sentencing policies and practices for the Federal criminal justice system" that (a) assure the purposes of sentencing, as set forth in 18 U.S.C. § 3553(a)(2) and (b) "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(A) & (C).

Specifically, our proposal is that the Commission study the criminal and penal systems of some foreign countries with low incarceration rates for insights that could be applicable to the U.S. experience.

Over the past two years, our clinic visited Norway and The Netherlands to study their criminal and penal justice systems. Our focus was both the mechanisms they use to keep their incarceration rates low as well as the policies and practices that keep recidivism rates low as well. While there are obvious differences between the United States and these European countries – not least, the amount of money spent on their prison systems, their robust social welfare systems, their relatively homogenous cultures, their low crime rates and low violent crime rates, and their strong gun regulations – there

are nonetheless aspects of the criminal and penal systems we visited that we believe provide useful insights and guidance for the American system of criminal justice in general, and the Commission's work in particular to fulfill the goals of sentencing. Below, we highlight five such aspects.

1. Sentence Length and Recidivism

Our clinic's work comparing sentencing length and recidivism rates between the United States federal system and the Norwegian and Dutch carceral systems reinforces many researchers' calls for the Commission to continue scrutinizing this issue.

Norway and The Netherlands not only have very low incarceration rates (55[1] and 65[2] per 100,000, respectively, as compared to the U.S. rate of 531[3] per 100,000), the sentences they impose are considerably shorter than those imposed in the United States. The average length of a prison sentence in Norway of all crimes and sentences handed out between 2018-2020 is just *seven months*.[4] The average sentence in The Netherlands is *three and a half months*.[5]

The short sentences in these countries correlate with significantly reduced recidivism rates. In 2020 in Norway, only 16% of offenders who had been released from prison in the past 2 years were reconvicted for a new crime.[6] By contrast, in the US, the average length of the sentence imposed on inmates who were serving time in federal prison as of January 2024 was 149 months.[7] A study conducted by the US Bureau of Prisons found that 44% of inmates that were released in 2010 were rearrested within one year, and 68% were rearrested within 3 years.[8] It would be inappropriate to assert a direct causal connection between Norway's sentencing and recidivism rates as there are many socioeconomic and cultural factors that likely also affect the recidivism rates in Norway. Nonetheless, these numbers suggest that at the very least that it is very possible to reduce recidivism rates without imposing excessively long and punitive sentences.

These comparative examples ought to inspire the Commission to handle its recent findings on this issue with skepticism, as many other researchers have suggested. The

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[1] World Prison Brief (Norway), https://www.prisonstudies.org/country/norway.
[2] World Prison Brief (The Netherlands), https://www.prisonstudies.org/country/netherlands.
[3] World Prison Brief (U.S.A.), https://www.prisonstudies.org/country/united-states-america.
[4] *Kriminalomsorgen,* Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018-2022, https://img3.custompublish.com/getfile.php/5258292.823.qmbb7tnuilunsu/Correctional%2BStatistic%2B-%2BNordic%2Bcountries%2B2018_2022_final.pdf?return=www.kriminalomsorgen.no ("Correctional Statistics").
[5] Prison Insider Country Profile (Norway), https://www.prison-insider.com/en/countryprofile/pays-bas-2021.
[6] Correctional Statistics*, supra n.4.*
[7] *United States Sentencing Commission,* Individuals in the Federal Bureau of Prisons, https://www.ussc.gov/research/quick-facts/individuals-federal-bureau-prisons#:~:text=The%20average%20length%20of%20imprisonment,supervision%20after%20release%20from%20prison.
[8] Mariel Alper, et al, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)* (Bureau of Justice Statistics, May 2018), https://bjs.ojp.gov/library/publications/2018-update-prisoner-recidivism-9-year-follow-period-2005-2014.

United States Sentencing Commission's 2022 report, suggesting that a prison sentence of least 60 months is correlated with lower recidivism rates,[9] has garnered criticism from other scholars for failing to control for significant variables such as rehabilitative carceral programing, treating arrests as sufficient for a reoffence, and lack of transparency.[10] Additionally, other research suggests that the drop in recidivism is not caused by the longer sentence in and of itself but is attributable to the offender's old age upon release.[11] Furthermore, the report is an outlier amongst many other studies suggesting that longer sentences, at best, have no effect on recidivism or, at worst, contribute to recidivism.[12] The Norwegian and Dutch systems add to these many reasons to approach the Commission's recent report with circumspection and offer actual examples of shorter sentences contributing to lower recidivism rates.

2. The Normality Principle

The most salient feature of the Norwegian and Dutch prisons is "the normality principle." As the Norwegian prison service describes it:

> The punishment is the restriction of liberty; no other rights have been removed by the sentencing court. Therefore, the sentenced offender has all the same rights as all other who live in Norway. No-one shall serve their sentence under stricter circumstances than necessary for the security in the community. Therefore, offenders shall be placed in the lowest possible security regime.
>
> During the serving of a sentence, life inside will resemble life outside as much as possible.[13]

Thus, the *only* right that shall be taken away from inmates is their right to freedom of movement.[14] In practice, as we observed, this means allowing prisoners to live in safe, clean, pleasant and enriching environments. In Norway's Halden prison, for example,

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[9] U.S SENT'G COMM'N, *Length of Incarceration and Recidivism*, 4 (June 21, 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220621_Recidivsm-SentLength.pdf.

[10] Tina M. Woehr & Allison L. Bruning, *Limitations of the Commission's "Length of Incarceration and Recidivism" Report (2022)*, 35 Fed. Sent. R. 43, 43–44 (2022).

[11] Daniel S. Nagin, Francis T. Cullen, Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME J. 115, 136–37 (2009).

[12] Kevin L. Nunes et al., *Incarceration and Recidivism Among Sexual Offenders*, 31 L. & Human Behavior 305, 314 (2007) ("Consistent with meta-analyses on both sexual . . . and general offenders . . . our results are most in line with the notion that incarceration has little, if any, impact on recidivism . . . .In contrast, there is evidence that recent treatment programs for sexual offenders are effective at reducing sexual recidivism[.]"); Rodger Pryzbylski et al., *The Impact of Long Sentences on Public Safety: A Comple Relationship*, 36 FED.SENT.R. 81, 81 (2023) ("[T]he weight of the evidence indicates that long sentences have either no effect on recidivism or slightly increase recidivism when compared to shorter sentences."); *see also* Michelle R. Suskauer, *A Hard Look at Our Criminal Justice System*, 93 FLA. B. J. 4, 6 (2019) (describing the success of Florida's specialty courts and diversion programs for juvenile offenders in reducing recidivism rates).

[13] *About the Norwegian Correctional Service*, KRIMINALOMSORGEN, https://www.kriminalomsorgen.no/?cat=536003# (commas added).

[14] *Id.*

inmates are allowed to purchase their own fresh food from a normal-seeming grocery store within the prison. They have fridges in their cells so that they are not limited to purchasing highly processed and unhealthy food. Furthermore, there is a house located within Halden's walls where prisoners can stay overnight with their families (if they have children) so that the children are shielded from the prison environment and to maintain parent-child relationships that feel as normal as possible. Additionally, prisoners take turns making dinners for their cohort, using sharp knives, setting the table, doing dishes, etc., much like free people would ordinarily do with their family, friends, or roommates. Prisoners and correctional officers even sit down to eat their meals and socialize together each day.

Maintaining a sense of normalcy, self-respect, dignity, and shared humanity plays a role in helping prisoners reintegrate into society successfully. The way Norwegians and the Dutch see it, these prisoners will one day be their neighbors again, and therefore it is in everyone's best interest that they are allowed to maintain normalcy as much as possible behind bars. While some of the features of these European prisons may be expensive to implement (the low staff to inmate ratio, for example), others – such as increased informal interactions between correctional officers and prisoners – could be implemented in the U.S. federal prison system at a manageable cost.[15]

3. Restorative Justice

In both Norway and The Netherlands, the prison systems follow a restorative justice model, that emphasizes rehabilitation over punishment.[16] Most notably, in The Netherlands, there is a pre-adjudication restorative justice program.

During the 2010s,[17] The Netherlands introduced a pilot program that established a criminal mediation program, which is a form of presentencing victim-offender dialogue.[18] The program was implemented in full in 2018. Every Dutch court now has a mediation bureau that facilitates the process.[19] The goal of criminal mediation is to remedy the emotional and other damages that occurred as a result of the offense.[20] Cases are prescreened by mediators to determine whether criminal mediation is appropriate.

The criminal mediation takes place with two mediators in a comfortable and safe setting. The victim and offender both complete an individual intake before the mediators decide if/when it is appropriate to move forward to a joint session. The hope for the joint

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[15] *See generally* Jordan M. Hyatt et al., *We Can Actually Do This: Adapting Scandinavian Correctional Culture in Pennsylvania*, 58 Am. Crim. L. Rev. 1715 (2021).
[16] *See What We Can Learn From Norway's Prison System: Rehabilitation & Recidivism* (First Step Alliance, January 2022), https://www.firststepalliance.org/post/norway-prison-system-lessons; *Sentencing and Prison Practices in Germany and the Netherlands* (Vera Institute, October 2013), https://www.vera.org/publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states.
[17] Information not otherwise cited comes from the Clemency Project Clinic's conversation with a Dutch criminal mediator in March of 2024.
[18] Jolien Stoffels, *Victim-offender mediation in the Netherlands* (June 14, 2020), https://arno.uvt.nl/show.cgi?fid=156041.
[19] *Mediation alongside legal proceeds*, https://www.rechtspraak.nl/English/Pages/mediation.aspx.
[20] *Id.*

session is that it will end an "agreement" between the victim and offender, which may include how to avoid future interactions and what to do if the parties come across one another. For example, if the parties use the same grocery store in the same neighborhood, the offender might agree to do their shopping at a different grocery store to minimize potential future contact. Mediation does not replace prosecution of the offender. At the offender's sentencing, the judge will consider whether the offender participated in the mediation process and the outcome of the mediation, along with other sentencing factors.

In the United States, victim offender dialogue typically takes place after sentencing and potentially years after the fact. For example, in Minnesota there are extremely low numbers of restorative justice conversations or communications taking place at all.[21] Criminal mediation before sentencing allows healing to take place early for the victim. Of course, not every case is appropriate for mediation and the mediators should screen those cases out beforehand. But overall, presentencing criminal mediation can provide huge benefits for both parties.[22]

4. Female Offenders

Certain European incarceration practices reduce gender disparities in both sentencing and the collateral consequences of incarceration. As the United States' rate of female incarceration continues to skyrocket, these already overlooked disparities will only grow more dire.

As a preliminary matter, we believe that researchers should be vigilant when considering how the Federal Sentencing Guidelines affect women and reject the oversimplified conclusion that women benefit from gender disparities in federal sentencing. It is generally true that women are prosecuted at lower rates and receive shorter federal sentences than men for the same offenses.[23] However, this does not mean that the Sentencing Guidelines betray some indelible gender bias favoring women. Rather, this is a reflection of how many gender-neutral considerations that encourage judges to issue lesser sentences are more circumstantially consistent with patterns of female criminal behavior in the United States.[24] For example, women are more likely to have lower criminal history scores, a non-principal or coerced role in the offense, or relevant familial circumstances compared to their male counterparts—all of which the Guidelines permit factoring into one's sentence.[25] Accordingly, the Commission must be wary of uncritical claims of gender bias in federal sentencing seemingly desirous of nothing more than harsher sentences for women. If anything, the Commission ought to

[21] *Performance Report 2023* at 26, 29, Minnesota Department of Corrections, https://mn.gov/doc/assets/2023%20DOC%20Performance%20Report_Accessibility_Final_v2_tcm1089-608441.pdf (reporting that in 2023 only six apology letters were actually delivered to victims and one victim-offender dialogue conversation took place).
[22] *See generally* Jolien Stoffels, *Victim-offender mediation in the Netherlands* (June 14, 2020), https://arno.uvt.nl/show.cgi?fid=156041.
[23] Margareth Etienne, *Sentencing Women*, 14 J. Gender Race & Just. 73, 73 (2010).
[24] *Id.* at 81–82; Judge Nancy Gertner, *Women and Sentencing*, 57 Am. Crim. L. Rev. 1401 (2020).
[25] Gertner, *supra*, 1408–10.

consider how the heat-of-passion and self-defense excuses contribute to *greater* sentences for women convicted of domestic violence.[26]

Turning to our clinic's comparative legal work, we propose that the Sentencing Commission explore how alternatives to custodial sentences may mitigate the disparate collateral consequences of conviction that befall women and their families. Fifty-eight percent of women in U.S. state and federal prisons are mothers.[27] While the incarceration of either parent exposes their child to a six-times-greater chance of criminal involvement, trauma-based antisocial behavior, lower educational attainment, and economic detriment, all of these impacts are exacerbated when the parent incarcerated is the child's primary caregiver.[28] Predictably, surveys demonstrate that most incarcerated mothers were their child's primary caregiver, whereas most incarcerated fathers were not.[29] Finally, the societal stigma children face for having an incarcerated parent is exacerbated when that parent is their mother.[30] As such, the execution of custodial sentences for women results in a unique and disparate set of collateral consequences deleterious to entire families.

Our clinic's exposure to the Dutch penal system's application of restorative justice solutions to avoid imposing such collateral consequences on mothers and their families may be informative to the Commission in considering this issue. As noted above, the Dutch maintain a robust practice of criminal mediation where offenders and affected parties can air their conflict and contract to a mutually agreed-upon punishment. As applied to mother-offenders, such agreements often function to keep them in their communities and with their children, albeit under a set of behavioral guidelines to ensure the comfort and privacy of the affected party. For example, the parties may agree that the offender must enroll their children at a different school than those of the affected party so the latter does not have to worry about running into the former on school grounds. While a pilot criminal mediation program may be outside of the Overton window, the underlying principles of finding creative solutions that keep mothers in their childrens' lives and empowering crime victims in sentencing decisions ought to guide the Commission.

The Dutch also have a unique program whereby mothers can be incarcerated with children aged up to five years old.[31] We visited one such prison (Ter Peel), where the mother-child section resembled a suburban home. Given the average sentence in The

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[26] *See generally* Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 Harv. J.L. & Gender 447 (2005).
[27] Wendy Sawyer & Wanda Bertram, *Prisons and jails will separate millions of mothers from their children in 2022*, Prison Pol'y Inst. (May 4, 2022), https://www.prisonpolicy.org/blog/2022/05/04/mothers_day/.
[28] Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, Natl' Inst. Justice 2-4 (May 2017), https://www.ojp.gov/pdffiles1/nij/250349.pdf.
[29] Dona Playton, *The High Cost of Incarceration*, 21 Conn. Pub. Int. L.J. 45, 56 (2021) (in a survey of state prisons, 88% of incarcerated fathers but only 37% of incarcerated mothers reported the other parent was the primary caregiver).
[30] Keva. M. Miller, *The Impact of Paternal Incarceration on Children*, 23 Child & Adolescent Social Work Journal 472, 477 (2006).
[31] Peter Tak, *Women in prison in the Netherlands* (Cambridge University Press, September 2018), https://www.cambridge.org/core/books/abs/women-in-prison/women-in-prison-in-the-netherlands/A7E83D7E793A633DDC7D08B91CE47E44.

Netherlands is about three months, the children do not experience the prison environment for a long period.

Additionally, the Commission should consider how changes to drug sentencing may also reduce the collateral consequences of imprisoning mothers, again using the Netherlands as a rough guide. Recent research suggests that drug convictions disproportionately affect mothers, as they are more likely to commit drug- or property-based "crimes of survival" to support their families.[32] While the Netherlands' decriminalization of certain narcotics has meant a reduction in the mothers incarcerated for such crimes, such changes seem unlikely in the United States in the medium-term—and beyond the scope of the Commission's mission and advocacy focus, in any event. More relevant to its work may be a reconsideration of how parenthood might factor into presumptive commitments for federal drug offenders.

5. Sparing and Non-Punitive Use of Solitary Confinement

The United States is an exceptionalist in Western democracies in its use of solitary confinement.[33] The federal system utilizes this form of confinement excessively too.[34] In Norway, however, solitary confinement is used far less frequently and, critically, not as a punitive measure.[35] Norway's Execution of Sentences Act allows for the use of solitary confinement only to "a. prevent inmates from continuing to influence the prison environment in a particularly negative manner, b. prevent inmates from injuring themselves or acting violently or threatening others, c. prevent considerable material damage, d. prevent criminal acts, or e. maintain peace, order and security."[36] The correctional facilities in Norway must not keep prisoners in solitary confinement longer than is necessary to de-escalate a situation or prevent harm, and they must re-evaluate regularly whether it remains necessary.[37] We were told that the average length of time a prisoner is confined in solitary detention in Norway is under a day.[38]

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[32] *See* Torrey McConnell, Note, *The War on Women: The Collateral Consequences of Female Incarceration*, 21 Lewis & Clark L. Rev. 493, 496 (2017); Niki Monazzam & Kristen M. Budd, Incarcerated Women and Girls, The Sentencing Project (Apr. 3, 2023), https://www.se New report reveals over 122K are held in solitary confinement in U.S. prisons and jailsntencingproject.org/fact-sheet/incarcerated-women-and-girls/.

[33] *See* Erik Ortiz, *New report reveals over 122K are held in solitary confinement in U.S. prisons and jails* (NBC News, May 23, 2023), https://www.nbcnews.com/news/us-news/new-report-reveals-122k-are-held-solitary-confinement-us-prisons-jails-rcna84840.

[34] *See* Federal Prisons Haven't Addressed Longstanding Concerns About Overuse of Solitary Confinement (GAO, February 6, 2023), https://www.gao.gov/blog/federal-prisons-havent-addressed-longstanding-concerns-about-overuse-solitary-confinement

[35] Gabriella Wannall, *Re-evaluating Solitary Confinement* (October 2020), https://www.researchgate.net/profile/Gabriella-Wannall-2/publication/344803556_Re-evaluating_Solitary_Confinement/links/5f910181a6fdccfd7b7462e0/Re-evaluating-Solitary-Confinement.pdf.

[36] *See* The Execution of Sentences Act (Norway) https://lovdata.no/dokument/NLE/lov/2001-05-18-21.

[37] *Id.*

[38] *See also* Ahalt & Williams, *Reforming Solitary-Confinement Policy — Heeding a Presidential Call to Action*, 374 The New England Journal of Medicine 18, 1704 (May 5, 2016), https://escholarship.org/content/qt9w76f381/qt9w76f381_noSplash_041d07ffb12c00bce8e6373c488463f0.pdf?t=qcqols.

Norway's use of isolation is not completely free of criticism. Prisoners in many of the Norwegian prisons remain locked in their individual cells for more than 16 hours a day, primarily due to lack of adequate staffing.[39] Nonetheless, compared to the U.S., Norway's use of solitary confinement is short-lived, relatively rare and accompanied by extensive mental health intervention, and does not involve the same lengthy solitary confinement periods of months, years, or even indefinite length that are sometimes given here in the U.S.[40]

***

In sum, there is much to be learned and absorbed about the European approach to criminal and penal justice, which can inform the Commission's work and mandate to ensure criminal justice and penal policies comply with the purposes of sentencing.

Thank you again for the opportunity to submit this comment and please do not hesitate to contact the undersigned for additional information.

Respectfully submitted,

Prof. JaneAnne Murray
Associate Clinical Professor of Law

Samuel Buisman ('25)
Amy Cohen ('24)
Myah Grimm ('25)
Bethany Jewison ('24)
Anna Mitchell ('24)

[39] *See Special Report on Solitary Confinement in Norwegian Prisons* (Norwegian Parliamentary Ombudsman, 2019), https://www.sivilombudet.no/en/news/prevention-torture/article-from-annual-report-2019-special-report-on-solitary-confinement-in-norwegian-prisons/.

[40] *Compare* Skotte, S. and Olsen, H., *Solitary Confinement in Norway* (2022), https://www.solitaryconfinement.org/_files/ugd/Mapping-Solitary-Confinement-Norway.pdf *with* Andreea Matei, *Solitary Confinement in US Prisons* (Urban Institute, August 2022), https://www.urban.org/sites/default/files/2022-08/Solitary%20Confinement%20in%20the%20US.pdf.

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Council on Criminal Justice

Topics:

Policymaking Recommendations

Comments:

Since public perceptions about crime trends can help shape attitudes toward sentencing, we commend to you the following information and ideas produced by the independent Crime Trends Working Group organized by the Council on Criminal Justice.

https://counciloncj.foleon.com/crime-trends-working-group/final-report/

Submitted on: July 11, 2024

Brian Kelmar, Commander US Navy (Retired)
President and Co-founder
Decriminalize Developmental Disability
13926 Hull Street Rd. #170
Midlothian, VA 23112
[redacted]

Honorable Judge Carlton W. Reeves
Chair, U.S. Sentencing Commission
One Columbus Circle, NE Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves,

I am writing to you as a parent of an autistic child and as the co-founder/President of Decriminalized Developmental Disabilities, a national advocacy organization with members in every state working on criminal justice reform for our most vulnerable population of those with Intellectual/Developmental Disabilities (I/DD) such as autism My son along with over 1000 of our families have family members whose autism has a direct impact on them being caught up in the criminal justice system. We have worked with legislators here in Virginia for diversion instead of prosecution or incarceration which should be similar to federal sentencing

Laws throughout the US in the past have unfortunately not recognized these disabilities and instead have created laws with unintended consequences for those with autism. We have had court cases that have recognized this situation and recommended diversion programs instead of prosecution. The diversion programs provide appropriate sexual behavior education for autistic individuals. We have tracked over 100 cases over the past 10 years and there have been zero cases of recidivism. I/DD/Autistic individuals who due to their disability their social development and sexual understanding is more than one-fourth of their chronological age which has been shown in the research for those with autism. In other words, due to his limited capacity to pick up social norms and social taboos, along with a lack of sexual health education geared toward autistics, their social development is that of a preteen or younger. They need education on appropriate social norms that autistics cannot instinctively pick up like neurotypicals his age can. Due to a person's disability, the entire family will suffer horrifically. They will lose the support services that they will need and be even further isolated from society that does not understand autism. The impact of the sentencing for a person with autism is so severe that it is often referred to as "a civil death". The results often mean the loss of supports they need and

will most likely end up being homeless. The emotional, financial, and psychological toll on the entire family is even more devastating.

I am requesting that the U.S. Sentencing Commission ensure that Title II of the Americans with Disabilities Act (ADA) is fully upheld, providing necessary accommodations to autistic individuals in the criminal legal system.

Autism Spectrum Disorder (ASD) significantly impacts an individual's ability to communicate and interact socially. These challenges often lead to misunderstandings and misinterpretations by law enforcement and judicial personnel, resulting in unjust treatment and sentencing. The criminal justice system must recognize and accommodate the unique needs of autistic individuals to prevent these injustices.

Title II of the ADA requires that public entities, including the criminal justice system, provide reasonable accommodations to individuals with disabilities. This legal mandate ensures that autistic individuals can fully participate in legal proceedings and receive fair treatment. Accommodations may include:

1. **Communication Support**: Providing interpreters, communication devices, or modified questioning techniques to ensure that autistic individuals can understand and respond appropriately.
2. **Sensory Accommodations**: Creating environments that minimize sensory overload, such as reducing noise and bright lights, which can cause significant distress for autistic individuals.
3. **Behavioral Understanding**: Training law enforcement and judicial personnel to recognize and appropriately respond to autistic behaviors, such as repetitive movements or difficulty maintaining eye contact, which may be misconstrued as non-compliance or deceit.

Additionally, I respectfully request that the U.S. Sentencing Commission consider the following specific recommendations:

1. **Options for Diversion**: Develop and implement diversion programs specifically tailored for individuals on the autism spectrum. These programs should focus on treatment and support rather than punishment, recognizing the unique needs and challenges faced by autistic individuals.
2. **Taking their disability into account at the beginning of the judicial process**.
3. **Dropping Mandatory Minimums**: Eliminate mandatory minimum sentences for cases involving autistic individuals. Mandatory minimums do not account for the mitigating factors related to autism and can result in disproportionately harsh sentences for these individuals.
4. **Training for Personnel**: Provide comprehensive training for law enforcement, judicial personnel, and prison staff on understanding and appropriately responding to autistic

behaviors. This training should emphasize de-escalation techniques and the importance of accommodations under the ADA.

5. **Advocates**: having a person who can advocate for the individual throughout the criminal proceedings. This is part of the ADA of having accommodation for those with a disability. Due to the low processing speed of their executive functions, a person with I/DD/Autism will not have the capacity to understand the proceedings or the questioning. An advocate that can help them understand just as if a deaf person would have someone with sign language present to translate

The failure to provide these accommodations not only violates the ADA but also perpetuates systemic injustices against autistic individuals. By ensuring that the criminal justice system adheres to the requirements of Title II of the ADA and implementing these specific recommendations, the U.S. Sentencing Commission can help create a more just and equitable system for all individuals, regardless of their neurological differences.

Thank you for your attention to this vital issue.

Sincerely,

As I mentioned we have cases throughout the United States, but we also work with Canada, the UK, and Australia, all of which realize the disability issues and work to address them through their laws to take their disability into account. If you have any questions, please call me directly on my cell at [redacted].

Very respectfully,

Brian A. Kelmar

Brian Kelmar, Commander US Navy (Retired)
President and Co-founder, Decriminalize Developmental Disability (Dthree)

DC Friends of Psychedelic Science
9922 Cottrell Ter
Silver Spring, MD 20903

7/15/24

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is James Moran, and I am submitting this comment letter on behalf of the DC Friends of Psychedelic Science. We are an organization that provides education, support, and a trusting community to practitioners of psychedelic science in the DC area and beyond. I am writing today concerning the United States Sentencing Commission's (USSC) oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, we urge the Commission to conduct a complete review and revision of the Tables.

For over half a century, the United States' drug policy has ripped families and communities apart while failing to achieve its stated purpose of realizing a drug-free world. Richard Nixon announced the War on Drugs in 1971 and, in doing so, perpetuated an ongoing rhetoric and myth of Black criminality. Ronald Reagan escalated the impact of this policy by prioritizing punishment over treatment, thereby causing a significant increase in the incarcerated population, especially for nonviolent drug offenses.

While over fifty years of ongoing political and educational messaging demonizing drug use and stigmatizing drug users has failed to realize a drug-free world, the underlying racial and social motivations have succeeded. Since its inception, the drug war has been overwhelmingly enforced in BIPOC communities, especially low-income ones, causing the country's inflated prison population to be disproportionately comprised of Black, Latino, and Indigenous people. It has led to lengthy terms of imprisonment for relatively low-level offenses and for those with little to no criminal history, which perpetuates cycles of trauma and violence. The same conditions have fueled and perpetuated violence internationally and in inner-city neighborhoods nationwide, and have led to increases in concentration, adulteration, and toxicity of the substances themselves.

An increasingly multi-partisan coalition is calling for change. In 2017, the USSC published a report describing, in part, how drug-related mandatory minimum penalties have been "applied more broadly than Congress may have anticipated." Such non-discretionary sentencing fails to promote public health. Instead, it has the effect of incarcerating people for longer amounts of time than the evidence shows deters further criminal activity - at the taxpayer's expense.

While reversing and mending the harms of the war on drugs will take effort from people across the government and political spectrum, one way to shift policy in a more humane direction - and in alignment with contemporary evidence - is to go to one of the current roots of the problem: drug sentencing. The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and harms would lead to more accuracy in sentencing decisions, which would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

This is not only a significant opportunity but a timely one. In April 2024, following the Health and Human Services Department's recommendation, the Drug Enforcement Administration (DEA) announced its decision to reschedule cannabis to Schedule III. Given that the Tables presently translate quantities of various illegal drugs into their marijuana-equivalent quantities for the purpose of determining relative harm, it would be appropriate to utilize the multi-agency review already happening with cannabis to review and update the tables.

Additional research about other historically stigmatized substances should also inform this review. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, and again granted two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019. In 2024, the FDA extended the same status to an LSD formula for the treatment of generalized anxiety disorder. The FDA is also reviewing a new drug application for MDMA-assisted therapy, for which they will likely have a decision by August 2024.

Meanwhile, there has been growing bipartisan support to fund clinical trials exploring the use of psychedelics to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans. For instance, in the 2024 National Defense Authorization Act, the Department of Defense authorized funding a study on psychedelics for the treatment of PTSD in military members. In March 2024, the Department of Veterans Affairs passed a budget allocating $20 million for clinical trials for MDMA and psilocybin. The National Institutes of Health has also opened funding opportunities for studying psychedelic-assisted therapy for chronic pain in older adults. This shift in the evidence base, and concurrent changes in federal policy, reflects an increasing willingness and mandate to reevaluate long-held assumptions about controlled substances, paving the way for more drug policies driven by data rather than dogma.

Alongside the evidence and government agencies, recent polls have found an overwhelming majority of American voters are also eager for a new approach to drug laws and responses to drug-related offenses. Over 60% support ending the War on Drugs; "eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services"; repealing mandatory minimum sentences for drug crimes; and commuting, or reducing, the sentences of people incarcerated for drugs. Representing one of "the few truly bipartisan issues in American politics," the "breadth and depth of support for change suggests that there are few issues for which the nation's laws so misrepresent the preferences of the American people as for drugs."

Despite these widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables remain based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. Congress and this Commission have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine. For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the drug or other substance," potentially positive "pharmacological effect[s]," and likelihood of misuse and dependence.

DC Friends of Psychedelic Science and countless other organizations across the political spectrum and around the country are coming together to organize and inform the USSC and the general public about the importance of this issue. The United States is long overdue for sentencing reform, and the urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Sincerely,
James Moran
Founder, DC Friends of Psychedelic Science

Doctors for Drug Policy Reform
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(202)930-009
D4DPR.org

July 15. 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Kristel Carrington, M.D. and I am submitting this comment letter on behalf of the Doctors for Drug Policy Reform- an international coalition of healthcare professionals and scientists from 47 states and 21 countries. Our mission is to advocate for evidence-based drug policies that advance public health, minimize harm, and reduce stigma associated with drug use. D4DPR takes an anti-prohibition stance rather than a pro-drug position, recognizing that drug criminalization has negatively impacted public health. Our organization leverages medical expertise to promote harm reduction, health-focused approaches, and policy reform, aiming to influence drug policies to improve public health, human rights, and social justice.

I am writing today concerning the United States Sentencing Commission's (USSC) oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, we urge the Commission to conduct a complete review and revision of the Tables.

For over half a century, the United States' drug policy has ripped families and communities apart while failing to achieve its stated purpose of realizing a drug-free world. Richard Nixon announced the War on Drugs in 1971 and, in doing so, perpetuated an ongoing rhetoric and myth of Black criminality[1]. Ronald Reagan escalated the impact of this policy by prioritizing

[1] John Ehrlichman, Nixon's Assistant for Domestic Affairs, said: "You want to know what this [war on drugs] was really all about? The Nixon [Administration] . . . had two enemies: the antiwar left and [B]lack people . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies

punishment over treatment, thereby causing a significant increase in the incarcerated population, especially for nonviolent drug offenses.

While over fifty years of ongoing political and educational messaging demonizing drug use and stigmatizing drug users has failed to realize a drug-free world, the underlying racial and social motivations have succeeded. Since its inception, the drug war has been overwhelmingly enforced in BIPOC communities, especially low-income ones,[2] causing the country's inflated prison population to be disproportionately comprised of Black, Latino, and Indigenous people.[3] It has led to lengthy terms of imprisonment for relatively low-level offenses and for those with little to no criminal history[4], which perpetuates cycles of trauma and violence. The same conditions have fueled and perpetuated violence internationally and in inner-city neighborhoods nationwide,[5] and have led to increases in concentration, adulteration, and toxicity of the substances themselves.

An increasingly multi-partisan coalition is calling for change. In 2017, the USSC published a report describing, in part, how drug-related mandatory minimum penalties have been "applied more broadly than Congress may have anticipated."[6] Such non-discretionary sentencing fails to promote public health. Instead, it has the effect of incarcerating people for longer amounts of time than the evidence shows deters further criminal activity[7] - at the taxpayer's expense.

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with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did." (Equal Justice Initiative. *Nixon Adviser Admits War on Drugs Was Designed to Criminalize Black People*. March 25, 2016. https://eji.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/)

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While reversing and mending the harms of the war on drugs will take effort from people across the government and political spectrum, one way to shift policy in a more humane direction - and in alignment with contemporary evidence - is to go to one of the current roots of the problem: drug sentencing. The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and harms would lead to more accuracy in sentencing decisions, which would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

This is not only a significant opportunity[8] but a timely one. In April 2024, following the Health and Human Services Department's recommendation, the Drug Enforcement Administration (DEA) announced its decision to reschedule cannabis to Schedule III.[9] Given that the Tables presently translate quantities of various illegal drugs into their marijuana-equivalent quantities for the purpose of determining relative harm, it would be appropriate to utilize the multi-agency review already happening with cannabis to review and update the tables.

Additional research about other historically stigmatized substances should also inform this review. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, and again granted two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019.[10] In 2024, the FDA extended the same status to an LSD formula for the treatment of generalized anxiety disorder.[11] The FDA is also reviewing a new drug application for MDMA-assisted therapy[12], for which they will likely have a decision by August 2024.

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[12] *Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD*, February 9, 2024, https://news.lykospbc.com/2024-02-09-Lykos-Therapeutics-Announces-FDA-Acceptance-and-Priority-Review-of-New-Drug-Application-for-MDMA-Assisted-Therapy-for-PTSD

Meanwhile, there has been growing bipartisan support to fund clinical trials exploring the use of psychedelics[13] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[14] For instance, in the 2024 National Defense Authorization Act, the Department of Defense authorized funding a study on psychedelics for the treatment of PTSD in military members.[15] In March 2024, the Department of Veterans Affairs passed a budget allocating $20 million for clinical trials for MDMA and psilocybin.[16] The National Institutes of Health has also opened funding opportunities for studying psychedelic-assisted therapy for chronic pain in older adults.[17] This shift in the evidence base, and concurrent changes in federal policy, reflects an increasing willingness and mandate to reevaluate long-held assumptions about controlled substances, paving the way for more drug policies driven by data rather than dogma.

Alongside the evidence and government agencies, recent polls have found an overwhelming majority of American voters are also eager for a new approach to drug laws and responses to drug-related offenses.[18] Over 60% support ending the War on Drugs; "eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services"; repealing mandatory minimum sentences for drug crimes; and commuting, or reducing, the sentences of people incarcerated for drugs.[19] Representing one of "the few truly bipartisan issues in American politics," the "breadth and depth of support for change suggests that there are few issues for which the nation's laws so misrepresent the preferences of the American people as for drugs."[20]

Despite these widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables remain based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal

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[13] Referred to as "hallucinogenic substances" in the Controlled Substances Act.
[14] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/
[15] Herrington, *Biden Signs Defense Spending Bill Funding Psychedelic Research* Forbes.
[16] Curtis, *VA-funded psychedelic therapy trials for PTSD could save lives, veteran organization says* Fox 13 News
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[19] *Id.*
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culpability, or other public safety factors.[21] Congress[22] and this Commission[23] have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine. For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the drug or other substance," potentially positive "pharmacological effect[s],"[24] and likelihood of misuse and dependence[25].

Doctors for Drug Policy Reform and countless other organizations across the political spectrum and around the country are coming together to organize and inform the USSC and the general public about the importance of this issue. The United States is long overdue for sentencing reform, and the urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Sincerely,

Kristel Carrington, M.D.
Doctors for Drug Policy Reform

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[21] Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021).
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[23] *Change In Federal Cocaine Sentencing Policy Recommended Findings To Be Submitted To Congress*, April 5, 2002, https://www.ussc.gov/about/news/press-releases/april-5-2002
[24] United States Drug Enforcement Administration. *The Controlled Substances Act*. https://www.dea.gov/drug-information/csa
[25] Any inquiry should take into account ways harm reduction approaches, public education, and proven methods of avoiding harm and use among minors can reduce the likelihood of misuses and dependence. Revising the Tables would likely lead to a reduction in resources spent on enforcement, prosecution, and punishment. Those resources could then be reinvested to bolster effective harm reduction and public education efforts. (*See*, Counsel of State Governments, Justice Reinvestment Initiative, https://csgjusticecenter.org/projects/justice-reinvestment/#:~:text=Justice%20Reinvestment%20is%20a%20data,Justice%20Reinvestment)

Doorway Therapeutic Services
298 Grand Ave #100, Oakland, CA 94610

June 28, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Courtney Watson, and I am submitting this comment letter on behalf of the Doorway Therapeutic Services. At Doorways we provide trauma-focused therapeutic services, social justice-oriented work, LGBTQ+ informed therapy, and BIPOC-centered counseling, among others. I am writing today concerning the United States Sentencing Commission's (USSC) oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, we urge the Commission to conduct a complete review and revision of the Tables.

For over half a century, the United States' drug policy has ripped families and communities apart while failing to achieve its stated purpose of realizing a drug-free world. Richard Nixon announced the War on Drugs in 1971 and, in doing so, perpetuated an ongoing rhetoric and myth of Black criminality[1]. Ronald Raegan escalated the impact of this policy by prioritizing punishment over treatment, thereby causing a significant increase in the incarcerated population, especially for nonviolent drug offenses.

While over fifty years of ongoing political and educational messaging demonizing drug use and stigmatizing drug users has failed to realize a drug-free world, the underlying racial and social motivations have succeeded. Since its inception, the drug war has been overwhelmingly enforced in BIPOC communities, especially low-income ones,[2] causing the country's inflated prison

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population to be disproportionately comprised of Black, Latino, and Indigenous people.[3] It has led to lengthy terms of imprisonment for relatively low-level offenses and for those with little to no criminal history[4], which perpetuates cycles of trauma and violence. The same conditions have fueled and perpetuated violence internationally and in inner-city neighborhoods nationwide,[5] and have led to increases in concentration, adulteration, and toxicity of the substances themselves.

An increasingly multi-partisan coalition is calling for change. In 2017, the USSC published a report describing, in part, how drug-related mandatory minimum penalties have been "applied more broadly than Congress may have anticipated."[6] Such non-discretionary sentencing fails to promote public health. Instead, it has the effect of incarcerating people for longer amounts of time than the evidence shows deters further criminal activity[7] - at the taxpayer's expense.

While reversing and mending the harms of the war on drugs will take effort from people across the government and political spectrum, one way to shift policy in a more humane direction - and in alignment with contemporary evidence - is to go to one of the current roots of the problem: drug sentencing. The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and harms would lead to more accuracy in sentencing decisions, which would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

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Sincerely,
Courtney Watson
CEO, Doorway Therapeutic Services

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Drug Policy Alliance
131 West 33rd Street, 15th Floor
New York, NY 10001

June 21, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Hanna Sharif-Kazemi, and I am submitting this comment letter on behalf of the Drug Policy Alliance. The Drug Policy Alliance is the leading organization in the U.S. working to end the drug war, repair its harms, and build a non-punitive, equitable, and regulated drug market. I am writing today concerning the United States Sentencing Commission's (USSC) oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, we urge the Commission to conduct a complete review and revision of the Tables.

For over half a century, the United States' drug policy has ripped families and communities apart while failing to achieve its stated purpose of realizing a drug-free world. Richard Nixon announced the War on Drugs in 1971 and, in doing so, perpetuated an ongoing rhetoric and myth of Black criminality[1]. Ronald Raegan escalated the impact of this policy by prioritizing punishment over treatment, thereby causing a significant increase in the incarcerated population, especially for nonviolent drug offenses.

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While reversing and mending the harms of the war on drugs will take effort from people across the government and political spectrum, one way to shift policy in a more humane direction - and in alignment with contemporary evidence - is to go to one of the current roots of the problem: drug sentencing. The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and harms would lead to more accuracy in sentencing decisions, which would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

Disparities in Stops by the DC Metropolitan Police Department, June 16, 2020, https://urldefense.com/v3/__https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf__;!!Phyt6w!M3tbrIzizSTS6KMjsaPASYXWMFeEA1fkh6tY9rjOLLeAtcunXEj6k0DAkg0%24)

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[4] *Id*.

[5] Heather Ann Thompson explained in a 2015 interview with Nursing Clio that "intensive incarceration has emptied communities of their elders, their parents, their grandparents, and their children now, through the juvenile justice system. It has made them even poorer because there are no jobs. It has basically created an environment where violence can flourish . . . Should we be surprised that violence is a problem when we make an economy illegal, and make it the only economy that is available because there are no factories?" (Nursing Clio, *An Interview with Historian Heather Ann Thompson (Part 2)*, Nov. 5, 2015, https://nursingclio.org/2015/11/05/an-interview-with-historian-heather-ann-thompson-part-2/#:~:text=What%20we%20start%20to%20see,environment%20where%20violence%20can%20flourish)

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Meanwhile, there has been growing bipartisan support to fund clinical trials exploring the use of psychedelics[13] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[14] For instance, in the 2024 National Defense Authorization Act, the Department of Defense authorized funding a study on psychedelics for the treatment of PTSD in military members.[15] In March 2024, the Department of Veterans Affairs passed a budget allocating $20 million for clinical trials for MDMA and psilocybin.[16] The National Institutes of Health has also opened funding opportunities for studying

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[10] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[11] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[12] *Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD*, February 9, 2024, https://news.lykospbc.com/2024-02-09-Lykos-Therapeutics-Announces-FDA-Acceptance-and-Priority-Review-of-New-Drug-Application-for-MDMA-Assisted-Therapy-for-PTSD

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[14] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

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psychedelic-assisted therapy for chronic pain in older adults.[17] This shift in the evidence base, and concurrent changes in federal policy, reflects an increasing willingness and mandate to reevaluate long-held assumptions about controlled substances, paving the way for more drug policies driven by data rather than dogma.

Alongside the evidence and government agencies, recent polls have found an overwhelming majority of American voters are also eager for a new approach to drug laws and responses to drug-related offenses.[18] Over 60% support ending the War on Drugs; "eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services"; repealing mandatory minimum sentences for drug crimes; and commuting, or reducing, the sentences of people incarcerated for drugs.[19] Representing one of "the few truly bipartisan issues in American politics," the "breadth and depth of support for change suggests that there are few issues for which the nation's laws so misrepresent the preferences of the American people as for drugs."[20]

Despite these widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables remain based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors.[21] Congress[22] and this Commission[23] have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine. For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the drug or other substance," potentially positive "pharmacological effect[s],"[24] and likelihood of misuse and dependence[25].

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[19] *Id.*

[20] *Id.*

[21] Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021).

[22] Aris Folley, *Congress Set to Tackle Crack, Powder Cocaine Sentencing Disparity Before Year's End*, December 18, 2022, https://thehill.com/business/3778680-congress-set-to-tackle-crack-powder-cocaine-sentencing-disparity-before-years-end/

[23] *Change In Federal Cocaine Sentencing Policy Recommended Findings To Be Submitted To Congress*, April 5, 2002, https://www.ussc.gov/about/news/press-releases/april-5-2002

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[25] Any inquiry should take into account ways harm reduction approaches, public education, and proven methods of avoiding harm and use among minors can reduce the likelihood of misuses and dependence. Revising the Tables

Drug Policy Alliance and countless other organizations across the political spectrum and around the country are coming together to organize and inform the USSC and the general public about the importance of this issue. The United States is long overdue for sentencing reform, and the urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Sincerely,
Hanna Sharif-Kazemi
Policy Coordinator, Drug Policy Alliance

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would likely lead to a reduction in resources spent on enforcement, prosecution, and punishment. Those resources could then be reinvested to bolster effective harm reduction and public education efforts. (*See*, Counsel of State Governments, Justice Reinvestment Initiative, https://csgjusticecenter.org/projects/justice-reinvestment/#:~:text=Justice%20Reinvestment%20is%20a%20data,Justice%20Reinvestment)

ease
Empowerment, Advocacy
& Sexuality Education

General Appeal for Consideration of Autism as a Mitigating Factor

Melissa Hochberg, M.Ed & Arlene Lechner, M.Ed
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www.EaseEducates.org
[redacted]

July 14, 2024

Honorable Judge Carlton W. Reeves Chair,
U.S. Sentencing Commission
One Columbus Circle, NE Suite 2-500, South Lobby Washington, DC 20002-8002

Dear Judge Reeves,

We are writing to you as a concerned educators of youth and adults with autism and as an advocate for fair treatment of autistic individuals within the American criminal justice system. *We urge the U.S. Sentencing Commission to consider autism as a significant mitigating factor in sentencing decisions and to implement specific measures to ensure justice for autistic individuals*. Autism Spectrum Disorder (ASD) is a LIFELONG developmental disability affecting communication, behavior, and social interactions. Individuals with autism often face challenges in understanding social cues, which can lead to misunderstandings and misinterpretations of their actions by law enforcement and the judicial system. These challenges are compounded by sensory sensitivities, anxiety, and difficulties in adapting to new environments or stressful situations.

In the criminal justice context, autistic individuals are often at a disadvantage due to their unique needs and behaviors. For example, they may exhibit repetitive behaviors, have difficulty making eye contact, or struggle to respond to questions in a conventional manner. These behaviors can be misinterpreted as non-compliance, deceit, or even aggression. Consequently, autistic individuals are more likely to be wrongfully accused, convicted, and subjected to harsher sentences.

Furthermore, Title II of the Americans with Disabilities Act (ADA) mandates that public entities, including the criminal legal system, provide reasonable accommodations to individuals with disabilities. This includes *ensuring that autistic individuals receive the necessary support and modifications to participate fully and fairly in legal proceedings.* Accommodations might include providing communication aids, modifying interrogation techniques, and offering sensory-friendly environments.

We respectfully request that the U.S. Sentencing Commission consider the following specific recommendations:

1. Options for Diversion: Develop and implement diversion programs specifically tailored for individuals on the autism spectrum. These programs should focus on treatment and support rather than punishment, recognizing the unique needs and challenges faced by autistic individuals.

2. Dropping Mandatory Minimums: Eliminate mandatory minimum sentences for cases involving autistic individuals. Mandatory minimums do not account for the mitigating factors related to autism and can result in disproportionately harsh sentences for these individuals.

3. Training for Personnel: Provide comprehensive training for law enforcement, judicial personnel, and prison staff on understanding and appropriately responding to autistic behaviors. This training should emphasize de-escalation techniques and the importance of accommodations under the ADA.

By recognizing autism as a mitigating factor, providing appropriate accommodations, and implementing these specific recommendations, the U.S. Sentencing Commission can help prevent unjust outcomes and promote a more equitable justice system for all individuals, regardless of their neurological differences.

Thank you for your attention to this critical matter. Ease would be interested in working to develop training for the law enforcement, judicial personnel, and prison staff on understanding and appropriately responding to autistic behaviors.

Sincerely,

Melissa Hochberg, M.Ed & Arlene Lechner, M.Ed

The Etheridge Foundation
15821 Ventura Boulevard, Suite 370
Encino, CA 91436

July 1, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Melissa Etheridge, and I am submitting this comment letter along with Executive Director Anna Symonds on behalf of the Etheridge Foundation. The Etheridge Foundation works to advance innovative new treatments for opioid use disorder (OUD), particularly in funding clinical research on groundbreaking psychedelic therapies.

I urge the United States Sentencing Commission (USSC) to conduct a complete review and revision of the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables).

My family and I know too well the pain of losing a loved one to substance abuse. In 2020, my son Beckett passed away of an opioid overdose, at the age of 21.

Through excruciating personal experience, it became clear to us that there is a dire lack of effective treatment available for people with substance use disorders. (Data supports this as well.)

Equally, it is clear that current sentencing policies are not reducing drug use, and are in fact further harming our communities. Addiction and overdose deaths in the US have increased to record levels along with our population of incarcerated people.

Prioritizing punishment over treatment, especially for nonviolent drug offenses, has led to lengthy terms of imprisonment for people with little to no criminal history for relatively low-level offenses.

Incarceration further marginalizes people who are already struggling, creating new barriers and making progress more difficult.

Substance use disorders often originate from trauma, pain, and mental health disorders. Incarceration actively perpetuates these struggles in a person's life as well as causing intergenerational harm to children and other family members.

United States drug policy also enables racially disproportionate enforcement and has led to racially unjust outcomes. Drug laws have overwhelmingly been enforced in BIPOC communities, especially low-income ones,[1] causing the country's inflated prison population to be disproportionately comprised of Black, Latino, and Indigenous people.[2]

While political and educational messaging focuses on demonizing drug use and stigmatizing people who use drugs, the substances themselves have dramatically increased in concentration, adulteration, and toxicity.

It is past time for change, an increasingly multi-partisan coalition is supporting drug policy reforms. A crucial element of shifting policy in a more humane and evidence-based direction is addressing one of the roots of the problem: drug sentencing.

The USSC itself published a report in 2017 describing, in part, how drug-related mandatory minimum penalties have been "applied more broadly than Congress may have anticipated."[3] Such non-discretionary sentencing fails to promote public health. Instead, it has the effect of incarcerating people for longer amounts of time than the evidence shows deters further criminal activity[4] - and at the taxpayer's expense.

The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and harms would lead to more accuracy in sentencing decisions, which would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

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Despite these widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables remain based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors.[18] Congress[19] and this Commission[20] have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine. For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the drug or other substance," potentially positive "pharmacological effect[s],"[21] and likelihood of misuse and dependence[22].

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The Etheridge Foundation is joining with numerous other organizations across the political spectrum and around the country to inform the USSC and the general public about the importance of this issue. The United States is long overdue for sentencing reform, and the urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Sincerely,

Melissa Etheridge
Founder, Etheridge Foundation

Anna Symonds
Executive Director, Etheridge Foundation

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F.R.E.E. Gaia
93 Pleasant St. Winthrop, MA 02152

Monday, July 8th, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Sarko Gergerian, and I am submitting this comment letter on behalf of F.R.E.E. Gaia. Our organization works to educate first responders on the power of entheogenic compounds when used in psychospiritual religious contexts for wellness, resilience, and capacity expansion. I am writing today concerning the United States Sentencing Commission's (USSC) oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, we urge the Commission to conduct a complete review and revision of the Tables.

For over half a century, the United States' drug policy has ripped families and communities apart while failing to achieve its stated purpose of realizing a drug-free world. Richard Nixon announced the War on Drugs in 1971 and, in doing so, perpetuated an ongoing rhetoric and myth of Black criminality[1]. Ronald Raegan escalated the impact of this policy by prioritizing punishment over treatment, thereby causing a significant increase in the incarcerated population, especially for nonviolent drug offenses.

While over fifty years of ongoing political and educational messaging demonizing drug use and stigmatizing drug users has failed to realize a drug-free world, the underlying racial and social motivations have succeeded. Since its inception, the drug war has been overwhelmingly enforced in BIPOC communities, especially low-income ones,[2] causing the country's inflated prison

[1] John Ehrlichman, Nixon's Assistant for Domestic Affairs, said: "You want to know what this [war on drugs] was really all about? The Nixon [Administration] . . . had two enemies: the antiwar left and [B]lack people . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did." (Equal Justice Initiative. *Nixon Adviser Admits War on Drugs Was Designed to Criminalize Black People*. March 25, 2016. https://eji.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/)

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population to be disproportionately comprised of Black, Latino, and Indigenous people.[3] It has led to lengthy terms of imprisonment for relatively low-level offenses and for those with little to no criminal history[4], which perpetuates cycles of trauma and violence. The same conditions have fueled and perpetuated violence internationally and in inner-city neighborhoods nationwide,[5] and have led to increases in concentration, adulteration, and toxicity of the substances themselves.

An increasingly multi-partisan coalition is calling for change. In 2017, the USSC published a report describing, in part, how drug-related mandatory minimum penalties have been "applied more broadly than Congress may have anticipated."[6] Such non-discretionary sentencing fails to promote public health. Instead, it has the effect of incarcerating people for longer amounts of time than the evidence shows deters further criminal activity[7] - at the taxpayer's expense.

While reversing and mending the harms of the war on drugs will take effort from people across the government and political spectrum, one way to shift policy in a more humane direction - and in alignment with contemporary evidence - is to go to one of the current roots of the problem: drug sentencing. The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and harms would lead to more accuracy in sentencing decisions, which would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

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[3] "The incarceration boom fundamentally altered the transition to adulthood for several generations of [B]lack men and, to a lesser but still significant extent, [B]lack women and Latino men and women. By the turn of the 21st century, [B]lack men born in the 1960s were more likely to have gone to prison than to have completed college or military service." (Vera, *American History, Race, and Prison*, https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison)

[4] *Id*.

[5] Heather Ann Thompson explained in a 2015 interview with Nursing Clio that "intensive incarceration has emptied communities of their elders, their parents, their grandparents, and their children now, through the juvenile justice system. It has made them even poorer because there are no jobs. It has basically created an environment where violence can flourish . . . Should we be surprised that violence is a problem when we make an economy illegal, and make it the only economy that is available because there are no factories?" (Nursing Clio, *An Interview with Historian Heather Ann Thompson (Part 2)*, Nov. 5, 2015, https://nursingclio.org/2015/11/05/an-interview-with-historian-heather-ann-thompson-part-2/#:~:text=What%20we%20start%20to%20see,environment%20where%20violence%20can%20flourish)

[6] USSC, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System*, Oct. 2017, at 6. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf

[7] National Institute of Justice. *Five Things About Deterrence*. May 2016. https://www.ojp.gov/pdffiles1/nij/247350.pdf

This is not only a significant opportunity[8] but a timely one. In April 2024, following the Health and Human Services Department's recommendation, the Drug Enforcement Administration (DEA) announced its decision to reschedule cannabis to Schedule III.[9] Given that the Tables presently translate quantities of various illegal drugs into their marijuana-equivalent quantities for the purpose of determining relative harm, it would be appropriate to utilize the multi-agency review already happening with cannabis to review and update the tables.

Additional research about other historically stigmatized substances should also inform this review. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, and again granted two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019.[10] In 2024, the FDA extended the same status to an LSD formula for the treatment of generalized anxiety disorder.[11] The FDA is also reviewing a new drug application for MDMA-assisted therapy[12], for which they will likely have a decision by August 2024.

Meanwhile, there has been growing bipartisan support to fund clinical trials exploring the use of psychedelics[13] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[14] For instance, in the 2024 National Defense Authorization Act, the Department of Defense authorized funding a study on psychedelics for the treatment of PTSD in military members.[15] In March 2024, the Department of Veterans Affairs passed a budget allocating $20 million for clinical trials for MDMA and psilocybin.[16] The National

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[8] Drug offenses make up the largest portion of the federal docket. (*See*, Fiscal Year 2021 Overview of Federal Criminal Cases. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf)

[9] Alicia Wallace et al. CNN. *Justice Dept Plans to Reschedule Marijuana as a Lower-risk Drug.* April 30, 2024. https://www.cnn.com/2024/04/30/economy/dea-marijuana-rescheduling/index.html

[10] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[11] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[12] *Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD*, February 9, 2024, https://news.lykospbc.com/2024-02-09-Lykos-Therapeutics-Announces-FDA-Acceptance-and-Priority-Review-of-New-Drug-Application-for-MDMA-Assisted-Therapy-for-PTSD

[13] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[14] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

[15] Herrington, *Biden Signs Defense Spending Bill Funding Psychedelic Research* Forbes.

[16] Curtis, *VA-funded psychedelic therapy trials for PTSD could save lives, veteran organization says* Fox 13 News

Institutes of Health has also opened funding opportunities for studying psychedelic-assisted therapy for chronic pain in older adults.[17] This shift in the evidence base, and concurrent changes in federal policy, reflects an increasing willingness and mandate to reevaluate long-held assumptions about controlled substances, paving the way for more drug policies driven by data rather than dogma.

Alongside the evidence and government agencies, recent polls have found an overwhelming majority of American voters are also eager for a new approach to drug laws and responses to drug-related offenses.[18] Over 60% support ending the War on Drugs; "eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services"; repealing mandatory minimum sentences for drug crimes; and commuting, or reducing, the sentences of people incarcerated for drugs.[19] Representing one of "the few truly bipartisan issues in American politics," the "breadth and depth of support for change suggests that there are few issues for which the nation's laws so misrepresent the preferences of the American people as for drugs."[20]

Despite these widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables remain based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors.[21] Congress[22] and this Commission[23] have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine. For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the

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[17] *See e.g., Safety and Early Efficacy Studies of Psychedelic-Assisted Therapy for Chronic Pain in Older Adults (UG3/UH3 Clinical Trial Required) NOFO*

[18] ACLU. *Poll Results on American Attitudes Toward War on Drugs*. June 9, 2021. https://www.aclu.org/documents/poll-results-american-attitudes-toward-war-drugs

[19] *Id.*

[20] *Id.*

[21] Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021).

[22] Aris Folley, *Congress Set to Tackle Crack, Powder Cocaine Sentencing Disparity Before Year's End*, December 18, 2022, https://thehill.com/business/3778680-congress-set-to-tackle-crack-powder-cocaine-sentencing-disparity-before-years-end/

[23] *Change In Federal Cocaine Sentencing Policy Recommended Findings To Be Submitted To Congress*, April 5, 2002, https://www.ussc.gov/about/news/press-releases/april-5-2002

drug or other substance," potentially positive "pharmacological effect[s],"[24] and likelihood of misuse and dependence[25].

F.R.E.E. Gaia and countless other organizations across the political spectrum and around the country are coming together to organize and inform the USSC and the general public about the importance of this issue. The United States is long overdue for sentencing reform, and the urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Sincerely,
Sarko Gergerian
Executive Director/ Founder
F.R.E.E. Gaia

[24] United States Drug Enforcement Administration. *The Controlled Substances Act*. https://www.dea.gov/drug-information/csa

[25] Any inquiry should take into account ways harm reduction approaches, public education, and proven methods of avoiding harm and use among minors can reduce the likelihood of misuses and dependence. Revising the Tables would likely lead to a reduction in resources spent on enforcement, prosecution, and punishment. Those resources could then be reinvested to bolster effective harm reduction and public education efforts. (*See*, Counsel of State Governments, Justice Reinvestment Initiative, https://csgjusticecenter.org/projects/justice-reinvestment/#:~:text=Justice%20Reinvestment%20is%20a%20data,Justice%20Reinvestment)

July 15, 2024

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Priorities for the 2025 Amendment Cycle

Dear Judge Reeves,

FAMM was founded in 1991 to pursue a broad mission of creating a more fair and effective justice system. By mobilizing communities of incarcerated persons and their families affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing and corrections reform. FAMM has been an active advocate with the Commission since our founding by submitting public comments, participating in hearings, and meeting with staff and commissioners.

The Sentencing Guidelines are so much more than the name suggests. The Guidelines touch countless lives, including many of our members – over 75,000 people nationwide. We welcome the opportunity to suggest priorities for the Commission in the 2025 amendment cycle. Our priorities range from specific amendment recommendations to research initiatives. We look forward to seeing what the Commission does with the myriad of recommendations it receives.

1. **Amending "victim of assault" in §1B1.13(b)(4)**

Beginning in 2022, FAMM has operated a compassionate release clearinghouse to find pro bono counsel for survivors of BOP staff sexual abuse. As of the writing of this letter, we have placed 31 cases with pro bono counsel. All the clearinghouse clients survived sexual abuse at FCI Dublin[1] and sexual abuse at FCI Tallahassee. So far, we are aware of 17 survivors who received reduction in sentence orders. And these are only the cases that we know about from survivors who have

[1] We are certain the Commission is aware of the saga of abuse at FCI Dublin that led to the closing of the facility. For more information about Dublin, see the priorities letter from Meredith Esser and Alison Guernsey. We also suggest the following: Lisa Fernandez, *Powerless in Prison*, KTVU INVESTIGATION, https://www.ktvu.com/news/powerless-in-prison-the-shutdown-of-fci-dublin; *see also* ECF No. 222 Order Granting the Mot. for Class Certification at Attach. A*, Cal. Coal. Women Prisons v. U.S. Bureau Prisons*, No. 4:23-cv-4155-YGR (N.D. Cal. Mar. 15, 2024).

demonstrated great bravery in coming forward. FCI Dublin was the canary in the coal mine.[2] There are likely many more survivors of abuse who are suffering in silence.[3] We are certain that more cases will materialize in the near future.[4] And as the number of (b)(4) motions increase, the Commission's standard articulated in §1B1.13(b)(4) becomes increasingly important.

Our work on behalf of survivors began when there was no binding policy statement on compassionate release. During that time, judges, defense counsel, and, occasionally, prosecutors were able to work together to identify cases of sexual abuse and use the reduction in sentence (RIS) statute to provide relief for survivors of heinous acts.[5]

With this experience in mind, FAMM wrote to the Commission in 2022 to encourage the inclusion of sexual abuse at the hands of BOP personnel as an extraordinary and compelling reason (ECR).[6] As we said then, "[s]exual abuse in custody is unequivocally an extraordinary and compelling circumstance. Prisoners who are abused by the very people responsible for ensuring their safety must have an avenue to seek a sentence reduction."[7] We were pleased that the Commission proposed amendment (b)(4). We were hopeful that when the Commission included sexual abuse as a ground for a reduction in sentence in the policy statement, that recognition would help more survivors. Unfortunately, however, aspects of the policy statement have made the path forward for survivors difficult and uncertain.

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[2] *See Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the Subcomm. on Investigations, Comm. on Homeland Sec. & Gov't Affs*., 117th Cong. 26 (2022) (observing that sexual abuse has occurred in 2/3 of the facilities that house women), https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/2022-12-13%20PSI%20Staff%20Report%20-%20Sexual%20Abuse%20of%20Female%20Inmates%20in%20Federal%20Prisons.pdf.

[3] BOP likely knows of many survivors who have raised claims internally. We have asked BOP and DOJ multiple times to proactively initiate RIS cases for survivors of sexual abuse because we only know the cases that we know about. But BOP has refused to do so. We have also asked BOP on a number of occasions to update its Program Statement 5050.50 on RIS to align with the Commission's policy statement at §1B1.13, but the BOP has yet to do so. The lack of a program statement aligned with USSG §1B1.13 means that people eligible for compassionate release, including but not limited to abuse survivors, and staff may not even know of the expanded grounds adopted on November 1, 2023.

[4] Since the closure at FCI Dublin, we have received 95 accounts of people formerly incarcerated at FCI Dublin with claims of abuse and neglect that we are reviewing.

[5] *See, e.g.*, *United States v. Chavira*, No. 3:18-cr-4216-CAB, 2023 WL 3612389, at *1 (S.D. Cal. May 23, 2023).

[6] Letter from Mary Price and Shanna Rifkin to the Hon. Carlton Reeves at 3–4 (Oct. 17, 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/famm2.pdf; *see also* Letter from Mary Price and Shanna Rifkin to the Hon Carlton Reeves at 10-14 (Mar. 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf.

[7] *Id.* at 10.

We write now to shed light on those unintended consequences. Given the barriers survivors are encountering, we urge the Commission to: (1) revisit the "substantiation" requirement; and (2) broaden the definition of "sexual abuse." Each is discussed in turn.

a. The "substantiation" standard undermines survivors of abuse and is in tension with the First Step Act

When the Commission was considering adding sexual abuse as an ECR, the Department of Justice (DOJ) agreed that, in certain circumstances, individuals who are sexually abused in custody should be eligible for a RIS.[8] But the DOJ proposed a burden of proof on petitioners in sexual abuse cases – that the conduct must be substantiated by a "criminal conviction, an administrative finding of misconduct, or a finding or admission of liability in a civil case."[9] In written testimony from February 2023, we urged the Commission not to adopt this standard.[10] What we feared in 2023 is borne out today – the Department of Justice views the appropriateness of sentence reductions through the lens used by prosecutors rather than from the standpoint of the survivors.[11] And unfortunately, the DOJ's proposal is now included in the policy statement where it inhibits access to courts by deserving survivors.

The substantiation standard erroneously prioritizes government gatekeeping – by requiring convictions, or liability determinations – over the nature of the abuse or the experience of the survivor. This devalues the experience of the incarcerated person who is claiming to be a survivor of abuse. The letter submitted in this current amendment cycle by Meredith Esser and Alison Guernsey raises this point as well as several other issues with the substantiation standard. We agree with every point made in their letter.

We raise one additional concern – tethering an incarcerated person's claim of abuse to a conviction in a criminal case is directly in tension with the First Step Act. Under the substantiation standard, a survivor of abuse *must* prove, as a threshold matter, that the abuser was convicted in a criminal case (or found liable in an administrative or civil proceeding).[12] This barrier flies in the face of the First Step Act, which was deliberately designed to remove the chokehold that BOP had on RIS

[8] *See* Written Testimony from Jonathan Wroblewski at 5 (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-andmeetings/20230223-24/DOJ1.pdf.
[9] *Id.*
[10] *See* Written Testimony from Mary Price (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FAMM.pdf.
[11] *Id.*
[12] *See United States v. Left Hand*, No. 1:16-cr-189, 2024 U.S. Dist. LEXIS 25234, at *12 (D.N.D. Feb. 13, 2024) (observing that a defendant "must establish she was a victim of sexual abuse committed by a correctional officer. In order to do so, the sexual abuse must be established by a conviction in a criminal case . . .").

cases by allowing incarcerated individuals to petition the sentencing court for relief directly.[13] Congress intended to allow an individual to make their own case to the sentencing judge without DOJ's gatekeeping.[14] But unfortunately, (b)(4) has put the DOJ back in the gatekeeping role. By making an ECR determination dependent on a criminal conviction, the DOJ and BOP once again exercise full control. The government controls which BOP guards are indicted,[15] which survivors are identified as victims and which survivors are not,[16] the timing of the litigation, and more.

Consequently, a survivor's claim can warrant a judge's consideration for a RIS only if the government has substantiated that the abuse was investigated, prosecuted, and proven in a proceeding. There are, however, occasions when the government chooses to investigate one case against one victim and not another, or to indict one guard and not another. Those decisions may reflect choices about how to allocate scarce resources, for example, and have nothing whatsoever to do with whether an individual suffered abuse. These prosecutorial decisions do not necessarily implicate the veracity of the survivor's account. And this is precisely why the government should not control the viability of a person's RIS case. But the substantiation standard essentially collapses the fact-finding inquiry – prosecutorial discretion is now a proxy for a finding of abuse. We do not think that was intended. It was certainly not what Congress had in mind when it changed 18 U.S.C. § 3582(c) to "[i]ncrease[] the [u]se and [t]ransparency of Compassionate Release."[17]

Similarly, requiring an administrative finding by the Bureau of Prisons restores that agency to the gatekeeping role Congress deliberately ended. BOP investigations lack credibility and competency. On October 12, 2022, the Inspector General notified Colette Peters, the Director of BOP, of "serious concerns" with how BOP handles investigations of alleged misconduct by BOP

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[13] *See* First Step Act of 2018, Pub. L. No. 115-391 § 603(b); *see also* U.S. DEPT. OF JUST. OFF. OF THE INSP. GEN., I-2013-006, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 11 (2013), https://www.oversight.gov/sites/default/files/oig-reports/e1306.pdf.

[14] *See* NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 18 (2019) (stating the FSA intended to "[i]ncreas[e] the [u]se and [t]ransparency of [c]ompassionate [r]elease").

[15] *See Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the Subcomm. on Investigations, Comm. on Homeland Sec. & Gov't Affs*., 117th Cong. 26 at 17 (2022) (noting that as of 2022, 5 guards at FCI Dublin were indicted but at least 17 were under investigation for sexual misconduct); *see also* Lisa Fernandez, *25 Dublin prison employees under investigation for sex, drug, lying abuses,* KTVU FOX 2 (May 5, 2022), https://www.ktvu.com/news/25-dublin-prison-employees-under-investigation-for-sex-drug-lying-abuses.

[16] In some cases, the government is going so far as to say that survivor can only make out a claim of abuse if they are the named victim in the case, even though this appears nowhere in the Commission's policy statement. *See* ECF No. 243 Order Den. Def.'s Mot. to Reduce Sentence, *United States v. Castro*, 0:16-cr-60350-WPD (S.D. Fl. Apr. 19, 2024).

[17] *See* First Step Act of 2018, Pub. L. No. 115-391 § 603(b).

employees.[18] In December 2022, the Senate Permanent Subcommittee on Investigations also found failures in the government's processes for holding employees accountable for misconduct.[19]

And most recently, a federal judge took the extraordinary step of appointing a special master over FCI Dublin in light of the widespread sexual abuse. In deciding to impose a special master, Judge Yvonne Rogers observed that the BOP has "proceeded sluggishly with intentional disregard of the inmates' constitutional rights despite being fully apprised of the situation for years. The repeated installation of BOP leadership who fail to grasp and address the situation strains credulity."[20] Judge Rogers went on to say that, "inmates appeared to have no access to routine processes, such as the forms to file administrative grievances."[21] Shortly thereafter, BOP abruptly closed FCI Dublin because it could not ensure the safety of the people in custody at that facility.[22]

In addition to the issues raised above, the substantiation standard also sends the message to survivors that their stories and experiences are not credible on their own. This is particularly so given that in every other enumerated ECR, petitioners are permitted the opportunity to make their case to the sentencing court without having to submit specific evidence that is first approved by the government or a judicial entity. For example, in a medical case, the policy statment provides illustrative examples of what may constitute a terminal illness, but this list is not exhaustive. Critically, it does not require government pre-authorization of a medical diagnosis or medical mistreatment by BOP doctors, nor should it. But the sexual abuse standard stands in stark contrast. And this contrast has a clear message to survivors – their stories and efforts to document the heinous circumstances they have lived through are not enough.

To be sure, the policy statement does waive substantiation if there is undue delay or if the person is in imminent danger.[23] This was likely added, in part, to address concerns that the Commission had when, in the 2023 public hearings on this issue, the DOJ was unable to provide a timeline of how long it would take to adjudicate the accused guards.[24] But unfortunately, this "stopgap" has

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[18] *See* U.S. DEP'T OF JUST. OFF. OF INSPECTOR GEN., Management Advisory Memorandum, 23-001, Notification of Concerns Regarding the Federal Bureau of Prisons' (BOP) Treatment of Inmate Statements in Investigations of Alleged Misconduct by BOP Employees at 1 (Oct. 2022), https://oig.justice.gov/sites/default/files/reports/23-001.pdf.

[19] *See Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the Subcomm. on Investigations, Comm. on Homeland Sec. & Gov't Affs*., 117th Cong. 26 at 17 (2022).

[20] *See* ECF No. 222 Order Granting the Mot. for Class Certification at 1*, Cal. Coal. Women Prisons v. U.S. Bureau Prisons*, No. 4:23-cv-4155-YGR (N.D. Cal. Mar. 15, 2024).

[21] *Id.* at 9.

[22] *See generally* Reporting by Lisa Fernandez KTVU, FOX LOCAL NEWS, SAN FRANCISCO, https://www.ktvu.com/person/f/lisa-fernandez.

[23] USSG §1B1.13(b)(4).

[24] In fact, DOJ's inability to timely investigate and prosecute cases of abuse came to light in the civil class action case regarding FCI Dublin. According to Judge Rogers, "grievances of sexual misconduct can take months, if not years, to investigate and prosecute. Chief Reese, the head of [Office of Internal Affairs], noted in her testimony that OIA first received complaints of sexual abuse from FCI Dublin in 2019. Yet the government did not start prosecuting these cases, and requiring staff to leave FCI Dublin, until 2021." *See* ECF No. 222 Order Granting the Mot. for

not proven helpful. For starters, the policy statement does not define undue delay, which has led to different interpretations. Moreover, defense counsel and prosecutors are, once again, stuck arguing about the external process – the criminal proceeding for the guard – at the expense of the survivor. Take for example, the case of Shayla Left Hand.

Shayla Left Hand moved for a reduction to her sentence, asserting that she had been sexually abused during her time at FCI Dublin. Although the briefing in her case is sealed, the judge's order reveals that the issue in the case was not whether Ms. Left Hand had been sexually abused, but rather, whether the criminal case against the guard, former Officer Daryl Smith, had been unduly delayed. According to the court, "[i]t is fairly debatable whether [Smith's] criminal proceeding has been 'unduly delayed,' a phrase the Sentencing Guidelines do not define."[25] Ultimately, the court found that Ms. Left Hand had not established an ECR because "the corrections officer that sexually abused her has not been convicted. In so finding, the Court does not in any way dismiss the severity of Left Hand's allegations."[26] As evidenced by this example, the "undue delay" provision does not safeguard the ECR determination, even for someone who has established "severe" allegations of sexual abuse.

To be clear, as a criminal justice organization, we support a defendant's right to insist on trial. That includes all defendants. But trials undoubtedly take time and are subject to unpredictable scheduling issues, among other things. Officer Smith – at issue in Ms. Left Hand's case, was indicted in 2023 and his current trial date is set for March 2025. Intertwining survivors' rights with those of the abusers is fundamentally flawed. And it comes at the expense of the survivor. Officer Smith is out on bond, while many of his victims remain in custody with no opportunity to heal, because he has asserted his constitutional right to a trial.

b. *The definition of sexual abuse is underinclusive and creates perverse incentives for guards*

We also write to express concerns with the definition of sexual abuse in §1B1.13(b)(4). The Commission decided to define sexual abuse as involving a "sexual act" under 18 U.S.C. § 2246(2). This definition is under-inclusive and creates perverse incentives for guards to abuse people in custody in ways to limit relief for survivors.

Most of the (b)(4) cases have been filed under seal given the grievous and personal nature of the circumstances that need to be alleged. So we cannot offer a plethora of citations. However, we have worked on many of these cases, and seen that sexual abuse come in many forms. Sometimes the abuse is penetrative sexual conduct. But other times it includes gross stalking, forcing a person in custody to strip in front of guards before being permitted to use the bathroom, external groping of body parts, forcing someone in custody to watch a guard masturbate, being subjected to violent sexual language, and other horrific but not penetrative contact. Since the adoption of (b)(4), prosecutors have opposed RIS in these cases.

Class Certification at 27*, Cal. Coal. Women Prisons v. U.S. Bureau Prisons*, No. 4:23-cv-4155-YGR (N.D. Cal. Mar. 15, 2024).

[25] *See United States v. Left Hand*, No. 1:16-cr-189, 2024 U.S. Dist. LEXIS 25234, at *12 (D.N.D. Feb. 13, 2024).

[26] *Id.*

As an initial matter, sexual penetration of people in custody should not be the floor for what constitutes egregious sexual acts justifying a RIS, it should be the ceiling. In *United States v. Smith*, Ms. Smith moved for a reduction in sentence based on brutal abuse that she suffered during her time at FCI Dublin.[27] The government opposed Ms. Smith's RIS request. According to the government, although Ms. Smith suffered "disturbing and unacceptable" treatment in BOP custody, "her circumstances do not present an 'extraordinary and compelling reason' under the current policy statement. . . . because it did not involve . . . a sexual act."[28] The court nonetheless found Ms. Smith's case worthy of a RIS.

> Defendant was a victim of sexual abuse while serving her term of imprisonment. Here, Defendant suffered humiliating, degrading, and brutally offensive abuse on an ongoing basis by a federal correctional officer who was entrusted with her care. When the Court sentenced the Defendant, it did not contemplate that defendant would have to serve her sentence while being subject to such abuse.[29]

In addition to being underinclusive, the definition of sexual abuse in the policy statement creates perverse incentives for guards.

Take the case of Aimee Chavira. Ms. Chavira's case was filed before the new policy statement went into effect on November 1. The government agreed to not oppose Aimee's motion for a RIS. Aimee had been subjected to intense harassment by Office Daryl Smith:

> During a COVID quarantine, Aimee was alone in her cell and Officer Smith repeatedly locked her inside unless she removed items of clothing while he watched. One time, Officer Smith came into her cell, and when Aimee attempted to leave, Officer Smith groped her breast. In addition, during the months when Officer Smith conducted evening rounds in Aimee's unit, he would come by Aimee's cell when Aimee was using the toilet and stare at her. . . [Aimee] told [Officer Smith] to leave her alone and that she would report his abusive behavior. Officer Smith's response was, "Who are they going to believe: an inmate or a federal officer? You need cum for something to happen and you don't have that."[30]

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[27] *See* ECF No. 1185 Order Granting in Part Def.'s Mot. For Modification of Sentence, *United States v. Smith*, 5:10-cr-00009-VAP-12 (C.D. Cal, Feb. 12, 2024). Note, the briefing describing the abuse is sealed, but the court's order is public.
[28] *Id.*
[29] *Id.*
[30] *See* ECF No. 75-1 Mem. of P. & A. in Supp. of Mot.*, United States v. Chavira*, No. 3:18-cr-4216-CAB, (S.D. Cal. May 4, 2023).

This disgusting response by Officer Smith underscores the shortcomings of the definition of sexual abuse in the policy statement. The standard creates a perverse inventive for guards to perpetrate pernicious sexual abuse in ways that inoculate them from responsibility – and prevent their survivors from deserved recourse.

Ms. Chavira's case predated the adoption of (b)(4). The government did not oppose her request, and the judge granted her RIS motion. Other survivors, however, who filed after November 1 must contend with the policy statement's under-inclusive definition, facing challenges to abuse that is equally severe.

We commend the Commission for adopting the "victim of abuse" category. For the reasons above, we urge the Commission to revisit the substantiation requirement and the definition of sexual abuse.

2. Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2)

The Commission recently proposed to assess whether BOP is effective in meeting the purposes of sentencing.[31] FAMM encourages the Commission to engage in this worthy analysis.

The problems within BOP are well documented.[32] They include understaffing,[33] overcrowding,[34] denying individuals necessary medical care,[35] rampant sexual abuse in certain facilities,[36] and

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[31] *See generally* 28 U.S.C. §§ 994(o), (q).

[32] *See, e.g.*, Joe Davidson, *Senate Prison System Inquiry Reveals 'national disgrace,' Ossoff says*, WASHINGTON POST (Feb. 10, 2023), https://www.washingtonpost.com/politics/2023/02/10/jon-ossoff-bop-prison-abuse-hearings/.

[33] *See* Glenn Thrush, *Short on Staff, Prisons Enlist Teachers and Case Managers as Guards*, N.Y. TIMES (May 1, 2023), https://www.nytimes.com/2023/05/01/us/politics/prison-guards-teachers-staff.html; *see also* U.S. DEP'T OF JUST, OFF. OF INSPECTOR GEN., 23-054, CAPSTONE REVIEW OF THE FEDERAL BUREAU OF PRISONS' RESPONSE TO THE CORONAVIRUS DISEASE 2019 PANDEMIC at 44, Tbl. 3 (2023) (showing a 13% vacancy rate for all BOP employees and 21% vacancy rate for Correctional Officers, which are even higher than the rates during COVID-19), https://oig.justice.gov/reports/capstone-review-federal-bureau-prisons-response-coronavirus-disease-2019-pandemic.

[34] *See* U.S. DEP'T OF JUST., FY 2024 PERFORMANCE BUDGET, CONGRESSIONAL SUBMISSION, FEDERAL PRISON SYSTEM BUILDINGS AND FACILITIES at 2 ("The BOP faces challenges in managing the existing Federal inmate population and providing for inmates' care and safety in crowded conditions at higher security levels, as well as the safety of BOP staff and surrounding communities.), https://www.justice.gov/d9/2023-03/bop_bf_fy_2024_pb_narrative_omb_cleared_3.21.2023.pdf.

[35] *See* Devlin Barrett, *Judge Blasts Bureau of Prisons' Treatment of Dying Prisoner*, WASHINGTON POST (Oct. 14, 2022), https://www.washingtonpost.com/national-security/2022/10/14/prisons-contempt-dying-inmate/.

[36] *See, e.g.*, U.S. ATT'Y'S OFF. N.D. CAL., *Seventh and Eighth Federal Correctional Officers Charged as Part of Ongoing Federal Investigation into FCI Dublin* (Jul. 14, 2023),

refusing to act under its authority to seek release of individuals pursuant to 18 U.S.C. § 3582(c)(1)(A).

The Commission has a critical, yet largely unfilled, role in improving the experience of those in BOP and ensuring individuals are not serving more time than necessary. As Stephen Sady observed:

> Prisoners themselves are virtually voiceless regarding their conditions of confinement. Advocacy groups' suggestions can be administratively shrugged off. Litigation carried out by the few attorneys with the expertise to make their way through the procedural quagmire of administrative law face the limitless resources of a multi billion-dollar agency that takes advantage of every procedural obstacle. The Commission has unique power to offer insight and influence, given its institutional expertise and statutorily conferred authority.[37]

Below, we provide just two examples of ways by which the Commission can exert influence over the BOP.

Programming in prison helps ensure that sentences imposed "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[38] And yet, access to programming in federal prison remains a challenge.[39] As an initial matter, availability of programming, and the incentives for programming depend on an individual's PATTERN score and SPARC-13 assessment. For example, individuals with a High PATTERN score are unlikely to be able to use their programing for early release or early transfer to the community. The problems with PATTERN are now well documented.[40] PATTERN has been shown to overpredict recidivism for people of color, giving certain individuals a higher PATTERN score for reasons untethered to their likelihood to recidivate. In addition, the BOP's

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https://www.justice.gov/usao-ndca/pr/two-more-dublin-federal-correctional-officers-plead-guilty-sexually-abusing-multiple.

[37] *See* Stephen R. Sady, *Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes that Reduce Prison Time*, FEDERAL SENTENCING REPORTER, Vol. 35, No. 1 at 13 (Oct. 2022).

[38] 18 U.S.C. § 3553(a)(2)(D).

[39] *See* U.S. DEP'T OF JUST. OFF. OF ATT'Y GEN., FIRST STEP ACT ANN. REP. at 21–23 (Apr. 2023), https://www.ojp.gov/first-step-act-annual-report-april-2023.

[40] *See* Carrie Johnson, Flaws Plague a Tool Meant to Help Low-Risk Federal Prisoners Win Early Release, NPR (Jan 26., 2022), https://www.npr.org/2022/01/26/1075509175/justice-department-algorithm-first-step-act; *see also* Nat'l Inst. Of Just., *Predicting Recidivism: Continuing to Improve the Bureau of Prisons' Risk Assessment Tool, PATTERN* (Apr. 19, 2022) (recognizing, after many iterations, that there is still work to be done because "[r]esults demonstrate evidence of differential prediction across racial/ethnic groups . . . include[ing] overprediction of Black, Hispanic, and Asian males . . .").

risk and needs assessment, known as SPARC-13, which determines the appropriate programs for an individual, was not conducted on time, limiting some individuals' access to recidivism reducing programming.[41] Even though these problems with PATTERN and SPARC-13 are documented and well known, BOP will continue to rely on these systems to determine an individual's programming needs and eligibility to return to the community early.

The Department of Justice's report on the First Step Act celebrates an increased number of BOP programs available to people in custody.[42] The 2023 report on the First Step Act celebrates increased access to programming since 2022, but roughly a quarter of individuals are still not participating in First Step Act activities.[43] Moreover, the GAO recently found "BOP has some data on who participates in its programs and activities, but does not have a mechanism to monitor if it offers a sufficient amount. Without such a mechanism, BOP cannot ensure it is meeting the incarcerated population's needs."[44] The Commission should consider ways in which it can help encourage increased access to programing for individuals and enhance monitoring to ensure that individual needs are being met.

In his article, Sady recommends numerous ways the Commission can fulfill its responsibility to help ensure the BOP is advancing the purposes of sentencing.[45] We wanted to highlight one recommendation in particular. In a recent study, the Commission found a "significant reduction in the likelihood of recidivism" for people who completed the RDAP program.[46] And yet, a group of individuals who would otherwise benefit from this productive program are categorically excluded because the BOP has determined that a mere sentencing enhancement for possession of a weapon

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[41] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105139, BUREAU OF PRISONS SHOULD IMPROVE EFFORTS TO IMPLEMENT ITS RISK AND NEEDS ASSESSMENT SYSTEM at 18 (March 2023) ("[W]e found issues with BOP's ability to oversee whether risk and needs assessments are conducted on time. Specifically, BOP does not have readily-available, complete, and accurate data to determine if risk and needs assessments were conducted within the First Step Act required and BOP established timeframes. While BOP has plans to implement various mechanisms to monitor First Step Act requirements, BOP has not confirmed whether it will measure if assessments are conducted on time.") https://www.gao.gov/assets/gao-23-105139.pdf.
[42] *See* DEP'T OF JUST. OFF. OF ATT'Y GEN., FIRST STEP ACT ANN. REP. at 23–25 (June 2024), https://www.bop.gov/inmates/fsa/docs/first-step-act-annual-report-june-2024.pdf.
[43] *Id.*
[44] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105139, BUREAU OF PRISONS SHOULD IMPROVE EFFORTS TO IMPLEMENT ITS RISK AND NEEDS ASSESSMENT SYSTEM at 18 (March 2023), https://www.gao.gov/assets/gao-23-105139.pdf.
[45] *See* Stephen R. Sady, *Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes that Reduce Prison Time*, FEDERAL SENTENCING REPORTER, Vol. 35, No. 1 at 13 (Oct. 2022).
[46] *See* U.S. SENT'G COMM'N, RECIDIVISM & FEDERAL BUREAU OF PRISONS PROGRAMS, DRUG PROGRAM PARTICIPANTS RELEASED IN 2010 at 4 (May 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220517_Recidivism-BOP-Drugs.pdf.

is a disqualifying "crime of violence."[47] This is so even though the BOP has acknowledged that gun possessors are statutorily eligible for RDAP, but nonetheless exercised its discretion to disqualify individuals with a gun enhancement.[48] The Commission should use its authority to recommend that individuals with gun enhancements who are not otherwise statutorily disqualified be eligible for RDAP. Doing so will help reduce recidivism and ensure that a sentence meets the purposes of punishment while avoiding incarceration that is overly punitive, to the detriment of the individual and the system as a whole.

3. Promoting alternatives-to-incarceration programs and considering home confinement as a non-carceral sentence

FAMM supports the Commission's initiative to promote court-sponsored diversion and alternatives-to-incarceration programs. We believe that overincarceration is a systemic problem and one that disproportionately impacts communities of color. Identifying and strengthening feasible alternatives to incarceration that can protect community safety while reducing the prison population and lessening racial disparity is a goal the Commission should pursue. While the current guidelines encourage noncustodial sentences for some "first offenders," we believe that other population groups would greatly benefit from alternative sentencing. The experience from COVID-19 and CARES act is instructive.

FAMM urges the Commission to build on the success of the CARES Act to use non-carceral sentences for broader population groups. During the COVID-19 pandemic, Congress authorized the BOP to release certain groups of people in custody to home confinement. Even people with lengthy terms of imprisonment remaining on their sentences were transferred to home confinement. This was an experiment brought on by necessity given the public health emergency. But it was an experiment that proved successful and the lessons from this success should not be lost.

Among the over 13,000 people who were transferred to home confinement beginning in March 2020, only 22 individuals were rearrested for new offenses.[49] That is a recidivism rate of 0.17%. This illustrates the feasibility of using home confinement as a viable and safe alternative to custodial sentences. We encourage the Commission to study and consider the use of home confinement as an alternative to incarceration, building on this success.

4. Reconsider the weight of youthful offenses on adult criminal history calculations

Last year, the Commission proposed a priority to reconsider the impact of youthful offenses on criminal history scoring. FAMM applauded this initiative and provided a lengthy comment

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[47] *See* U.S. DEPT. OF JUST. FED. BUREAU OF PRISONS, Program Statement No. 5162.02 at 3 (July 24, 1995); *see also* 18 U.S.C. § 3632(d)(4)(A); 18 U.S.C. § 3624(g).
[48] 62 Fed. Reg. 53690-01 (Oct. 15, 1997).
[49] *See* Senator Cory A. Booker, *CARES Act Home Confinement, Three Years Later* at 4 (June 2023), https://www.booker.senate.gov/imo/media/doc/cares_act_home_confinement_policy_brief1.pdf.

supporting an option to eliminate youthful offenses from the adult criminal history calculation.[50] We articulated a number of reasons in support of our position – including racial disparity, unreliability of state convictions, state disparities in treatment of youthful offenses – and those reasons ring true today. We were disappointed that the Commission did not eliminate these offenses from the criminal history calculation. For all the reasons we articulated in 2023, we would once again urge the Commission to eliminate youthful offenses from the adult criminal history calculation.

5. Delink guidelines from mandatory minimums

Drug trafficking sentences, tied to statutory mandatory minimums, bear the lion's share of responsibility for mass incarceration in the federal system. Prior Commissions have attempted to limit the impact of mandatory minimums on guidelines for these offenses, and yet, drug sentences remain stubbornly long and more people serve such sentences than for any other category of conviction. One way to get at this problem is to decouple the guidelines from drug trafficking mandatory minimums.

Today, 64,574 people incarcerated in the federal Bureau of Prisons – 44.3 percent of the entire BOP prison population – are serving sentences for drug convictions.[51] Drug trafficking convictions accounted for nearly one-third of all cases sentenced under the guidelines in 2023.[52] In 2022, over 73 percent of cases subject to mandatory minimums were drug trafficking cases.[53]

It goes without saying that the vast majority of people convicted of drug trafficking are sentenced to prison terms.[54] The roughly 19,000 people sentenced for such crimes in 2023 are serving terms averaging 82 months.[55] Those sentences, nearly seven years long, are for the most part the product of departures and variances from the drug trafficking guidelines. Only one quarter of the 19,000 people sentenced for drug trafficking were sentenced within the calculated guideline range.[56] Departures lowered sentences for roughly 32 percent and judges granted variances in 7,800 cases or 41.1 percent of all trafficking cases.[57]

Former Commissions have acted to lower guideline sentences for drug trafficking crimes, most notably in 2014 when drug guidelines were reduced by two levels across the board, following a

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[50] *See* Mary Price & Shanna Rifkin Letter to Hon. Carlton J. Reeves (March 2023).
[51] *See* U.S. DEPT. OF JUST. FED. BUREAU OF PRISONS, *Inmate Statistics, Offenses*, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated July 6, 2024).
[52] *See* 2023 U.S. SENT'G COMM'N Q. DATA REP. at Fig. 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2023_Quarterly_Report_Final.pdf.
[53] *See* U.S. SENT'G COMM'N, QUICK FACTS, MANDATORY MINIMUM PENALTIES at 2 (2023) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY22.pdf.
[54] *See* 2023 U.S. SENT'G COMM'N Q. DATA REP. at Tbl. 7, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2023_Quarterly_Report_Final.pdf.
[55] *Id.* at Tbl. 6.
[56] *Id.* at Tbl. 10.
[57] *Id.*

similar reduction made in 2007 for crack cocaine guidelines.[58] The amendments limited the reduction to two levels so as to, in the Commission's words, "maintain consistency" with the corresponding statutory minimums.[59]

In light of the evolution of drug policy in recent years, and the unequivocal impact of the war on drugs on mass incarceration, we believe now is a good time to revisit the decision to anchor the drug guidelines with mandatory minimum penalties. Review is warranted in light of the Commission's longstanding criticisms of mandatory minimum sentences.[60] We also believe this review is called for under the Commission's duty to amend guidelines, periodically considering data and comments on their operation.[61]

The data are in: the drug guidelines do not provide judges with sentencing ranges that meet the purposes of punishment. As discussed above, guideline ranges for drug trafficking hover well above advisory guideline sentences.[62] Should the Commission act to bring the guidelines in line with practice, the operation of §5G1.1 in the case where a calculated guideline range still falls below the statutory minimum will maintain the consistency that § 994(b)(2) requires.[63]

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[58] *See* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES at 21–24 (Apr. 2014) (providing reasons for the reduction by two levels of drug trafficking offenses in 2014 and explaining that the reduction was unlikely to affect plea bargain rates), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments_0.pdf; *see also* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES at 70 (May 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20070501_RF_Amendments_0.pdf.

[59] *See* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 21(Apr. 2014) (citing 28 U.S.C. § 994(b)(1) (providing that each sentencing range must be "consistent with all pertinent provisions of title 18, United States Code″), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments_0.pdf; *see also* 28 U.S.C. § 994(a) (providing that the Commission shall promulgate guidelines and policy statements "consistent with all pertinent provisions of any Federal statute").

[60] *See, e.g.*, U.S. SENT'G COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM (Aug. 1991), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf; *see also* U.S. SENT'G COMM'N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM (2011), https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

[61] *See* 28 U.S.C. § 994(t).

[62] 2023 U.S. SENT'G COMM'N Q. DATA REP. at Fig. 10, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2023_Quarterly_Report_Final.pdf.

[63] *See* USSG §5G1.1(c)(2) (provides "In any [] case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence . . . is not less than any statutorily required minimum sentence").

Not only do the calculated guideline ranges routinely exceed the sentenced impose, also there is no statutory basis for anchoring the guidelines with the mandatory minimums to which they correspond.[64] When addressing mandatory minimums, the Commission has a variety of choices.

First, it can set the guidelines "so that the base offense level for a Criminal History Category I offender corresponds to the first guideline range on the sentencing table with a minimum guideline range *in excess of the mandatory minimum*."[65] This is what it did in 1987 for drug offenses with five- and 10-year mandatory minimums. At that time the quantity triggering the five-year mandatory minimum for crack cocaine – five to 49 grams – was assigned base offense level 24, which calls for a sentencing range of 51-63 months.[66]

Second, the Commission can calibrate the guideline so that it "*include[s] the mandatory minimum* at any point within the range," which it did, first for crack cocaine in 2007 and then for all drugs in 2014.[67]

Third, "the Commission may set the base offense level below the mandatory minimum and rely on specific offense characteristics and Chapter Three adjustments to reach the statutory mandatory minimum."[68] If, those adjustments and specific offense characteristics fail to reach the mandatory minimum, §5G1.1(b) ensures that the guidelines maintain consistency by inserting the mandatory minimum.[69] This is the method the Commission chose in 2004 with respect to child pornography possession and trafficking offenses, in response to the PROTECT Act.[70] The agency explained:

> After engaging in extensive analysis of its data, including a review of typical trafficking and receipt offenders, offense characteristics, and rates of below guideline sentences for these offenses, the Commission adopted the third, most lenient option of those typically used by the Commission, and selected base offense level 18 for possession offenders and base offense level 22 for trafficking and distribution offenders. The Commission's analysis revealed that a majority of offenders sentenced under §2G2.2 were subject to specific offense characteristics that increased their offense level. Specifically, the overwhelming

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[64] *See* U.S. SENT'G COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (Oct. 2009) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.
[65] *Id.* at 44 (emphasis in original).
[66] *Id.* at 44–45.
[67] *See* U.S.S.G §1B1.10(d) (listing Amendments 706 ("crack minus two") and 782 ("drugs minus two").
[68] *See* U.S. SENT'G COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES at 45 (Oct. 2009) (emphasis in original), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.
[69] *See* USSG §5G1.1(b) (stating that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence").
[70] *See* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES at 15–16 (May 2004), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20040430_RF_Amendments_0.pdf.

majority of these offenders received a 2-level enhancement for use of a computer (89.4%) and a 2-level enhancement for material involving a child under 12.[71]

Finally, the Commission could select a base offense level without regard to the mandatory minimum and, in a case in which the guideline calculation fails to reach the mandatory minimum, the mandatory minimum sentence would be applied through application of §5G1.1(b). However, the Commission has eschewed this approach fearing it would create sentencing "cliffs," and lead to unwarranted disparity.[72]

We encourage the Commission to revisit the decision to maintain the mandatory minimum within the calculated guideline range in these cases. It is clear from departure and variance practice that the current guidelines call for sentences in excess of those needed to meet the purposes of sentencing. It is equally apparent that our prisons hold too many drug trafficking defendants for too long. A straightforward way to both heed the feedback from judges and attack over-incarceration of people convicted of drug trafficking crimes would be to delink the guidelines from their corresponding mandatory minimums and lower them. Doing so would permit the Commission to fashion guideline ranges more consistent with current practice, help the Commission meet its obligation under § 994, and provide lower sentences to replace those that are still too lengthy. While sentencing cliffs might occur, the fact that potentially many people will receive sentences more aligned with the guidelines and judicial discretion, may outweigh the fact that some people will receive statutory mandated sentences. And, the Commission's actions could also be seen as a message to Congress from the agency and the judiciary that today's mandatory minimums are greater than necessary to achieve the purposes of punishment.

6. Study the trial penalty and take action to limit its impact on federal sentences

Last year, we welcomed the Commission's decision to study the delta between sentences imposed following trial and those imposed pursuant to a plea agreement. We also appreciated the invitation to FAMM and other organizations led by the National Association of Criminal Defense Lawyers (NACDL) to discuss our views on the trial penalty with Commission staff. We found that conversation rewarding and productive.

We look forward to the results of the Commission's study on the trial penalty. We write simply to encourage the Commission to carry over the priority to the coming year. We are certain the Commission's study will find that the trial penalty distorts the operation of the guidelines and results in unwarranted sentencing disparity. Maintaining the agency's focus on the practice may lead it to consider proposing guideline amendments that might mitigate some of the harms caused by the trial penalty or at least lessen the guidelines' unintended contributions to those harms.

For example, the Commission could critically examine the practice of including an obstruction of justice enhancement when defendants testify in the guilt phase.[73] The Commission could also

[71] U.S. SENT'G COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 46 (Oct. 2009), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.
[72] *Id.*
[73] *See* USSG §3C1.1.

explore the current guideline limitation on awarding an acceptance of responsibility adjustment after trial and a third level only on the government's motion.[74] The Commission might also embed in the guideline commentary a statement discouraging the imposition of the trial penalty and/or encouraging judges to take the impact of the trial penalty into consideration when sentencing defendants convicted by the jury. The Commission's admonition to the federal Bureau of Prisons in the update to P.S. §1B1.13, and the BOP's failure to heed it, were the sparks that triggered First Step Act reforms to 18 U.S.C. § 3582(c)(1)(A).[75]

We expect additional opportunities to amend guidelines to limit to some extent the impact of the trial penalty may become apparent when the Commission publishes its findings. In the meantime, we urge the Commission to carry over its focus on the trial penalty to this amendment cycle.

7. Reconsider the limitations on retroactivity in USSG §1B1.10

On December 11, 2007, the U.S. Sentencing Commission took an historic vote to make the two-level reduction to crack cocaine sentencing retroactive.[76] During that meeting, the Commission also unanimously amended USSG §1B1.10, to both add a public safety filter and ensure that judicial discretion with respect to retroactivity would be strictly limited. The amendment clarified that in determining the amended guideline range's retroactive application, except in very limited circumstances "the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range. . . ."[77]

At the meeting where the vote occurred, only Commissioner John Steer addressed this extraordinary limitation, imposed a few short years after the Supreme Court's decision in *Booker v. United States*, an opinion that had shaken guideline sentencing and its champions to its core. He explained:

> Important for me and many of us, I imagine, is that it makes public safety a central concern upon which the Court should focus in determining whether and by how much within the limits authorized by the Commission sentences may be reduced. And in light of the *Booker* case and [its] progeny, it does as much as reasonably . . . can be done by us to outline the

[74] *See* USSG §3E1.1; *see also id.* at cmt. n. 2.
[75] *See* Mary Price, *The Compassionate Release Clearinghouse, COVID-19, and the Future of Criminal Justice*, 35 ABA CRIMINAL JUSTICE (NO. 3) 51, 53 (2020) (noting that when Senators who queried the BOP about whether it had increased reduction in sentence motions in light of the Commission's urging learned that BOP had not, they introduced the bill amending § 3582(c)(1)(A) that was adopted as part of the First Step Act), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/fall/compassionate-release-clearinghouse-covid-19-future-criminal-justice/.
[76] U. S. SENT'G COMM'N, Transcript of Meeting on Retroactivity (Dec. 11, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20071211/20071211_Transcript.pdf.
[77] *See* USSG §1B1.10(b)(2)(A).

> special limited nature of this remedial procedure and the manner in which the Commission believes the authority may be exercised consistent with the Sentencing Reform Act.[78]

Commissioner Steer's oral statement is the only reason offered for adopting the limitation, which several years later easily survived a Supreme Court challenge.[79]

So focused was the criminal justice community on the imperative to make the crack reduction retroactive that only three of 33,000 commenters had even addressed the proposed change to §1B1.10.[80] In a pointedly direct observation, one of them reminded the Commission of the inherent competence of the courts to evaluate further reductions in light of 18 U.S.C. §3553(a) and added:

> Courts had no trouble apply § 1B1.10 without additional guidance when the drug guideline was amended to benefit non-Black defendants, and there is no reason to suspect they would have any now. To the contrary, in the wake of the Supreme Court's decision in *Rita*, the Commission should trust district courts to exercise their discretion in a manner that will serve the purposes of sentencing and, in the process, participate in the evolution of just sentencing policy.[81]

Whatever compelled the decision in 2009 – be they ongoing concerns about the impact of *Booker v. United States* and the continuing relevance of the guideline system[82] or fears that thousands of former crack prisoners would be released early to communities[83] – those concerns and others have

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[78] *See* U. S. SENT'G COMM'N, Transcript of Meeting on Retroactivity at 4 (Dec. 11, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20071211/20071211_Transcript.pdf.

[79] *Dillon v. U.S.*, 560 U.S. 817, 130 S.Ct. 3683, 177 L. Ed. 2d 271 (2010) (holding that *U.S. v. Booker*'s holding does not apply to § 3582(c)(2) proceedings and therefore does not require treating §1B1.10 as advisory).

[80] U.S. SENT'G COMM'N, Public Comment from November 1, 2007 (Nov. 2007), indicating only three commenters remarked on "Procedural Guidance," https://www.ussc.gov/policymaking/public-comment/public-comment-november-1-2007. Testifying at the Commission, Steve Chanenson also discussed limiting reductions so as to dampen any impact of Booker on §1B1.13 proceedings. *See* U.S. SENT'G COMM'N, Public Hearing on Retroactivity at 154-158 (Nov. 13, 2007), https://www.ussc.gov/sites/default/files/Transcript111307.pdf.

[81] Letter from Jon M. Sands to Hon. Ricardo Hinojosa, U.S. Sent'g Comm'n Chair at 10 (Oct. 31, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20071100/PC200711_003.pdf.

[82] *See,* e.g., U.S. SENT'G COMM'N, Transcript of Public Hearing at 105 (Feb. 15, 2005) (Commission Chair launched two days of hearings on the *Booker* decision by explaining that "[t]he Commission . . . feels strongly that there should be substantial weight given to the sentencing guidelines in imposing a sentence. The reason for that, as far as the Commission is concerned, is quite simple. The statute itself requires the Commission to have considered the factors in the Sentencing Reform Act in initially promulgating the guidelines as well as in the amendments to the guidelines. The promulgation and the amendment of the guidelines also has required by statute the approval of the United States Congress because anything that the Commission does gets sent to Congress and, unless they vote not to approve it, becomes law."), https://www.ussc.gov/sites/default/files/20050215-16_Hearing_Transcript.pdf.

[83] *See, e.g.*, Letter from Alice Fisher to Hon. Ricardo H. Hinojosa, U.S. Sent'g Comm'n Chair at 7 (Nov. 1, 2007) (predicting that retroactivity would return "serious and often violent offenders who are most likely to offend again" and pose a danger to public safety."),

long since been laid to rest. *Booker* is not retroactive and retroactivity recidivism rates correspond generally under those for full-term cohorts.[84] Judges now have deep experience applying §1B1.10 and in resentencing individuals in other contexts where they are authorized to exercise their discretion to determine the extent of and bases for further reductions.[85]

We urge the Commission, therefore, to reexamine whether the limitations placed on §1B1.10 still bear support and if not, revisit the rule limiting judicial discretion to recognize post-offense rehabilitation and other factors that could weigh in favor of a departure or variance for an individual granted retroactive relief under USSG §1B1.10.

8. Visit a prison

Inspired by the Commission's commitment to encouraging firsthand accounts of the impact of the agency's work on incarcerated people, we urge the commissioners and staff to visit, and hold a dialogue or listening session, in one or more federal prisons this amendment cycle.

Since 2019, FAMM has encouraged policymakers to tour facilities through our Visit a Prison program. In the past year alone, 110 federal and state policymakers and stakeholders in 15 states and the District of Columbia have visited correctional facilities and met with prison leadership, staff, and incarcerated people. Those trips generated insights and impressions that inform ongoing efforts to reform our justice system.

For example, Pennsylvania State Rep. Marla Brown (R-Lawrence) wrote last year, "[f]or many of us, prisons exist out of sight and out of mind. Even some of our legislators and prosecutors have never visited a jail [or] prison or spoken with incarcerated people to gain knowledge. I recently visited the State Correctional Institution-Albion in Erie County and spoke with some life-sentence inmates. It was an experience that changed me. We have a duty as state representatives to be sure every human being in this country is treated with dignity, despite their background."[86]

The people who staff federal prisons and those who live in them are sentencing and BOP experts. We believe engaging with them firsthand would greatly benefit the Commission's understanding of how the Commission's actions and BOP practices can combine to best meet the purposes of

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https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20071100/PC200711_001.pdf.

[84] U.S. SENT'G COMM'N, Recidivism Among Offenders Receiving Retroactive Sentence Reductions: the 2007 Crack Cocaine Amendment at 1-2 (May 2014), (finding no higher rates of recidivism by people who received retroactive relief than by similarly situated people had been released prior to retroactivity), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

[85] *See, e.g.*, *Concepcion v. U.S.*, 597 U.S. 481, 492–94, 142 S. Ct. 2389, 213 L.Ed. 2d 731 (2022) (discussing and endorsing the widespread practice of courts taking into account post-sentencing rehabilitation and changes in sentencing law when resentencing individuals).

[86] FAMM, *FAMM hosted Pennsylvania lawmakers for #VisitAPrison blitz during April's Second Chance Month*, https://famm.org/famm-hosted-pennsylvania-lawmakers-for-visitaprison-blitz-during-aprils-second-chance-month/ (last visited July 15, 2024).

sentencing. And, prison visits could help the Commission should it decide to explore programming in federal facilities, as we urge in Section 2 of this letter.

The Commission marked the 25th anniversary of the Sentencing Reform Act (SRA) by holding seven regional hearings in 2009 and 2010. The SRA turns 40 this year and one way to acknowledge that anniversary would be to do a different kind of regional meeting: ones to meet with and hear from people who are incarcerated pursuant to sentencing policies introduced by the Act.

We are happy to introduce the Commission to other lawmakers and policymakers who have made the trek to prison. You can hear from them firsthand about the benefits to their work of a visit inside.

9. Conclusion

FAMM thanks the Commission for considering our input on issues critical to federal sentencing. We also appreciate the agency's invitation to incarcerated individuals to write directly to the Commission. The Commission's commitment to hear from those whose lives your work touches is deeply appreciated. We look forward to the Commission's public hearings on these issues.

Sincerely,

Mary Price
General Counsel

Shanna Rifkin
Deputy General Counsel

fwd.us

July 15, 2024

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20008

Re: PROPOSED 2024-2025 PRIORITIES

Dear Judge Reeves:

FWD.us is a bipartisan advocacy organization that believes America's families, communities, and economy thrive when more individuals are able to achieve their full potential. To that end, FWD.us is committed to ending mass incarceration, eliminating racial disparities, expanding opportunities for people and families impacted by the criminal justice system, and pursuing data-driven approaches to advancing public safety.

We write today in response to the call for public comments on what the United States Sentencing Commission ("Commission") should prioritize during the 2024-2025 amendment cycle and beyond. The Commission's role and independence give it a unique opportunity and responsibility to take a long-term approach to safely reducing the federal prison population. Its stewardship of the Federal Sentencing Guidelines, in particular, give it a special obligation to act in accordance with the parsimony principle—that is, to impose the least restrictive punishment required to satisfy the purposes of sentencing.[1] As leaders in the field have written, "[a]ny liberty deprivation beyond that minimum is gratuitous and constitutes state cruelty. A parsimonious approach to justice therefore insists on the least restrictive intervention to achieve societal goals."[2]

With this principle in mind, we propose three categories of priorities for amendments:

- ***First, short-term priorities that can be adopted and implemented within the next amendment cycle to better align federal sentencing with current understandings of human behavior and the intended purposes of sentencing*** – These include eliminating the methamphetamine purity distinction, removing criminal history points for

[1] Jeremy Travis and Bruce Western, ed., Parsimony and Other Radical Ideas About Justice, p. 3-4 (2023). The goal of the criminal justice system under the principle of parsimony would be to impose "the least restrictive intervention to achieve societal goals."
[2] *Id.*

youthful convictions, reducing reliance on supervised release, and excluding "controlled substance offense" from the predicate offenses that enhance base offense levels for §2k2.1 firearm possession offenses.

- ***Second, broader, but still crucial, changes to the Guidelines that may require multiple years to complete*** – These include delinking drug weights from sentencing and lowering all base offense levels.

- ***Third, research that the Commission should undertake to inform policymakers and further its mission as a clearinghouse and information center for the collection, preparation, and dissemination of information on federal sentencing practices*** – Specifically, we urge the Commission to evaluate the impact of Attorney General Garland's 2022 sentencing memo, and to study inconsistencies and racial disparities in state-level convictions and their effect on federal sentencing. We additionally urge the Commission to take care with research methodology to ensure the results are objective and aligned with best data analysis practices across the criminal justice field.

We hope that these recommendations will assist the Commission in its mission to advance data-driven changes to federal sentencing.

I. Short-Term Priorities that Can Be Completed within the Next Amendment Cycle

A. Bring Methamphetamine Sentencing in Line with Current Knowledge

Under current practice, the Guidelines treat methamphetamine offenses differently based on the purity of the drug. The guidelines assign higher base offense levels under §2D1.1 for pure methamphetamine ("meth actual") and "meth ice" ("meth ice"), a form of methamphetamine that is at least 80% pure, than methamphetamine mixture, a mixture that contains any detectable amount of methamphetamine. The weight of methamphetamine mixture that determines the base offense level under the guidelines is ten times the quantity of meth actual or meth ice because the latter forms of the substance are considered to be more pure. This outdated sentencing disparity does not accurately reflect the current drug market where the purity of methamphetamine has increased drastically and is now similar across all three forms of the substance, therefore, **the Commission should eliminate the arbitrary purity distinction in the guidelines and apply the methamphetamine mixture base offense levels to all methamphetamine cases.**

When the penalty disparity for methamphetamine offenses was established in 1988,[3] trafficking a highly pure form of the drug was presumed to be an indicator of having higher involvement in the drug distribution chain. However, in the last two decades, purity has proven to be a weak marker of culpability in trafficking since the average purity of methamphetamine seized and tested by the Drug Enforcement Agency has consistently been over 90% between 2011 and 2019.[4] The Commission's recent study of people sentenced for trafficking methamphetamine in FY 2022 found no statistically significant difference in the purity of the drug and the person's role in the offense – the purity level was similar among people who were at the top of the drug distribution chain and people who had a very limited and low-level function in the chain.[5] As the data shows, purity is no longer an indication of increased involvement or culpability, and assigning higher base offense levels in the Guidelines for meth actual and meth ice is an inaccurate measure of a person's role in the offense.

Despite there no longer being any meaningful difference in the purity across the three forms of the substance, people who are sentenced for trafficking meth ice receive sentences that are on average 20 months longer than people sentenced for trafficking methamphetamine mixture.[6] Furthermore, the extremely lengthy sentences for methamphetamine offenses are outliers compared to sentences for other drug offenses in the federal court system and warrant revision. In FY 2022, the average imposed sentence for methamphetamine offenses was 30 months longer than the average for all other drug trafficking offenses. For example, the average imposed sentence for methamphetamine in FY 2022 was 91 months (7.5 years), compared to 65 months (5 years) for fentanyl.[7] These longer sentences do nothing to deter methamphetamine use or sale and simply add months in federal prison at great taxpayer expense, decreasing fairness and proportionality in the system without improving public safety. The purity distinction is likely driving the sentencing disparity between methamphetamine offenses and other drug offenses since people receive much longer sentences for trafficking meth ice than for methamphetamine mixture.

For the reasons highlighted above, we urge the Commission to eliminate the unnecessary methamphetamine purity distinction and apply the methamphetamine mixture base offense levels to all methamphetamine cases.

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[3] United States Sentencing Commission [hereinafter "U.S.S.C.], "Methamphetamine Final Report," p.8, November 1999, https://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/drugs/199911_Meth_Report.pdf

[4] U.S.S.C., "Methamphetamine Trafficking Offenses In The Federal Criminal Justice System," p. 7, June 2024, https://www.ussc.gov/research/research-reports/methamphetamine-trafficking-offenses-federal-criminal-justice-system

[5] *Id.*, p. 41

[6] *Id.,* p. 50

[7] *Id.,* p. 46

B. Revisit the Youthful Individuals Amendment

We thank the Commission for adopting a revised §5H1.1 (Age Policy Statement) addressing the relevance of age in sentencing in the last amendment cycle. Specifically naming youth at the time of offense as a factor that may warrant downward departure is an important and positive first step towards a fairer criminal justice system. To build on this positive development, **we urge the Commission to revisit and adopt the Youthful Individual Amendment Part A (Option 3) (calculating criminal history points for youthful convictions) from the same amendment cycle.**[8] Option 3 would eliminate criminal history points for all youth adjudications *and* adult convictions for offenses committed before a person turned 18. This proposed amendment to the Guidelines reflects both an up-to-date understanding of adolescent brain development and an acknowledgment of the arbitrariness and racial disparities that define our country's patchwork youth justice system.

Option 3 will help correct decades-long deficiencies in our youth justice system, at both the federal and state level. The Guidelines' current approach to assessing criminal history points for youthful convictions:

- Is inconsistent with the science of adolescent brain development and our understanding of young people's neurobiological maturity;[9]
- Perpetuates and exacerbates the arbitrariness and racial disparities that plague state-level youth justice systems;[10] and
- Does not advance public safety.[11]

In advancing the Youthful Individuals Amendment last amendment cycle, the Commission recognized that the Guidelines' current method of weighting youthful convictions does not further its mission of implementing data-driven sentencing policies. We urge the Commission to complete the work regarding making this critically needed amendment.

The Commission proposed three alternative approaches for the Youthful Individuals Amendment Part A. While Options 1 and 2 reduce criminal history points assessed for youthful offenses,

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[8] U.S.S.C., "Proposed Amendments to the Sentencing Guidelines," December 2023, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf.

[9] *See* National Institute of Mental Health, "The Teen Brain: 7 Things to Know," https://www.nimh.nih.gov/health/publications/the-teen-brain-7-things-to-know; *see also* Mariam Arain, et al., "Maturation of the Adolescent Brain," Neuropsychiatric Disease and Treatment, 2013, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/.

[10] Charles Puzzanchera, Sarah Hockenberry, and Melissa Sickmund, National Center for Juvenile Justice, "Youth and the Juvenile Justice System: 2022 National Report," 2022, https://ojjdp.ojp.gov/publications/2022-national-report.pdf.

[11] Richard Mendel, Sentencing Project, "Why Youth Incarceration Fails: An Updated Review of the Evidence," March 2023, https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/.

each attempts to parse convictions based on whether the person was prosecuted as an “adult” or as a “juvenile.” Our patchwork state youth justice systems, however, make such procedural distinctions untenable. More importantly, assessing any criminal history points for offenses committed before a person reaches neurobiological maturity is fundamentally incompatible with our understanding of young people’s diminished capacity.

For these reasons, FWD.us strongly urges the Commission to adopt Option 3, eliminating criminal history points for offenses committed before a person turned 18. Option 3 will better align the Guidelines with our understanding of adolescent brain development without compromising public safety.

C. Reduce Reliance on Supervised Release and Align Community Supervision with Best Practices

In 1984, when Congress enacted the Sentencing Reform Act and created the Guidelines, it also eliminated parole and instituted a system of supervised release. Unlike parole supervision, supervised release "does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court".[12] A term of supervised release is mandatory if required by the statute of conviction, such as for offenses involving domestic violence, kidnapping of a minor, drug trafficking, terrorism, and sex offenses.[13] Even if not required by statute, the court has the discretion to impose supervised release following incarceration.[14] In the Guidelines, the Commission recommends imposing supervised release with any sentence of imprisonment exceeding one year, even where supervision is not mandated by statute.[15] **We write to urge the Commission to revise §5D1.1(a)(2) to eliminate the recommendation of supervised release for all sentences exceeding one year.**[16] Additionally, to reduce the number of revocations that can result in re-incarceration, **we urge the Commission to amend policy statement § 7B1.3(a)(1) to remove the mandatory revocation language for Grade A and B violations.**

Supervised release is supposed to be reserved for those individuals who “need” it post release.[17] However, the Commission’s recommendation in §5D1.1(a)(2) runs counter to said purpose by recommending supervised release based on the sentence imposed instead of the

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[12] U.S.S.C., “Primer on Supervised Release,” p. 1, 2022, https://www.ussc.gov/sites/default/files/pdf/training/primers/2022_Primer_Supervised_Release.pdf
[13] *Id.*
[14] 18 U.S.C. § 3583(a).
[15] USSG §5D1.1(a)(2)
[16] The Commission previously considered this amendment in the Proposed Amendments to the Sentencing Guidelines p. 75-85 (Jan. 19, 2011), Option 1B. The Commission should also adopt Option 2B, eliminating minimum terms of supervised release for all felonies and misdemeanors, as well as lowering maximum terms of supervised release.
[17] Johnson v. United States, 529 U.S. 694, 709 (2000) (“Supervised release departed from the parole system it replaced by giving district courts the freedom to provide post-release supervision for those, and only those, who *needed* it.). emphasis added.

individualized characteristics of the person. Research shows that excessive supervision fuels mass incarceration and can increase the risk of recidivism by disrupting positive activities, counteracting its stated purpose of aiding rehabilitation.[18] While supervised release aims to "facilitate reentry into society,"[19] practice shows that it often hinders successful reentry by creating trip-ups that lead to re-incarceration. The longer the supervision, the more likely a person will violate a condition that lands them back in prison.[20] Additionally, the Administrative Office of the United States Courts Probation and Pretrial Services Office's 2016 report, "Overview of Probation and Supervised Release Conditions," explained that "excessive correctional intervention for low-risk defendants may increase the probability of recidivism by disrupting prosocial activities and exposing defendants to antisocial associates."[21] The report also notes that "good supervision is individualized. It is tailored to the risks, needs, and strengths presented by the individual defendant as determined by careful assessment of each case." [22]

The Commission's research shows near universal imposition of supervised release under §5D1.1(a)(2). During the five-year period from 2005 to 2009, 99.1% of people who met this guideline requirement were sentenced to a term of supervised release.[23] None of these individuals (117,021) were required by statute to serve a term of supervised release. Consequently, the federal supervised release population nearly tripled between 1995 and 2015.[24] Currently, the federal supervised release population stands at over 110,000 people, making up 90% percent of all people under federal supervision. The number of people on supervision burdens federal probation officers, costs taxpayers an estimated $500 million annually,[25] and ensures that those who require the most support are not getting their needs met.

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[18] The Pew Charitable Trusts, "Policy Reforms Can Strengthen Community Supervision: A Framework to Improve Probation and Parole," p. 29, April 2020. https://www.pewtrusts.org/-/media/assets/2020/04/policyreform_communitysupervision_report_final.pdf

[19] U.S.S.C., "Federal Probation and Supervised Release Violations," p. 7, July 2020, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf

[20] Supra FN 18, "Policy Reforms Can Strengthen Community Supervision: A Framework to Improve Probation and Parole," p. 32.

[21] Administrative Office of the United States Courts Probation and Pretrial Services Office, "Overview of Probation and Supervised Release Conditions," p. 10, November 2016, https://www.uscourts.gov/sites/default/files/overview_of_probation_and_supervised_release_conditions_0.pdf

[22] *Id.*, p. 6

[23] U.S.S.C., "Federal Offenders Sentenced to Supervised Release," p. 52, July 2010, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf

[24] The Pew Charitable Trusts, "Number of Offenders on Federal Supervised Release Hits All-Time High," January 2017, https://www.pewtrusts.org/-/media/assets/2017/01/number_of_offenders_on_federal_supervised_release_hits_alltime_high.pdf

[25] *See* Safer Supervision Coalition, https://safersupervision.com/. Although this budget is not published separately from other judiciary spending, a per year cost of $4,392 per person on supervision in FY2017 supports the high-level estimate produced by the coalition.

A blanket recommendation of supervised release does not align with the best practices outlined by those who carry out the supervision and researchers in the field.

Reducing supervised release revocations

To stem supervised release revocations which can lead to re-incarceration, we urge the Commission to remove the mandatory language for revocation of supervised release for Grade A and B violations from 7B1.3(a)(1) policy statement. The Commission's guidelines outline three classes of violations of supervised release conditions (Grades A, B, and C) in USSG § 7B1.1(a). Under these guidelines, the court "shall revoke" supervised release for Grade A or B violations and "may" do so for a Grade C violation.[26]

The Commission acknowledges that the mandatory language in this policy statement is non-binding on the court, unlike the truly mandatory grounds for revocation found in 18 U.S.C. § 3583(g).[27] Since Congress has specified circumstances where revocation and imprisonment are required, the Commission should not extend this mandate to Grade A and B violations which are otherwise not covered by the statute. Instead, the Commission should align its recommendations with the statutory framework for supervised release revocations, which mandates revocation only under the specific circumstances enumerated in the law.[28]

We urge the Commission to revise §5D1.1(a)(2) to refrain from recommending a term of supervision for any sentence of imprisonment exceeding one year and to remove the mandatory terms "the court shall revoke" supervised release from § 7B1.1 for Grade A and B violations, leaving intact the mandatory revocations specified in the statute.

D. Remove “Controlled Substance Offense” from the Predicate Offenses that Enhance Base Offense Levels for §2k2.1 Firearm Possession Offenses

Section 2K2.1 of the Guidelines governs the unlawful possession, transportation, or receipt of firearms or ammunition, where the person charged is a “prohibited person” as defined in 18 U.S.C. § 922(g) or § 922(n) or because of the firearm involved. This section includes eight different base offense levels, with the level determined by the person’s criminal history and the type and number of firearms involved. Specifically, a Base Level 12 offense increases to Base Level 20 if the individual has one prior conviction that is either a “crime of violence” or a “controlled substance offense” or to Base Level 22 if the person has two prior convictions that fit into either of those categories. For more serious types of firearms, a Base Level 14 crime increases to Base Level 22 or 26 if the person has one or two “violent” or “controlled substance”

[26] USSG §§ 7B1.3(a)(1), (2)
[27] U.S.S.C., “Federal Offenders Sentenced to Supervised Release,” p. 40, July 2010, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf
[28] See supra FN 18

prior convictions. **We strongly urge the Commission to strike "controlled substance offenses" from the type of predicates that enhance base offense levels under §2K2.1.**

A "controlled substance offense" is defined for these purposes as any felony offense under federal or state law involving "manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense."[29] It does not need to involve any firearm or any threat of harm to any person. Prior convictions, especially for drug offenses often result from flawed policies that warrant careful reevaluation. Over forty years ago, under the guise of a War on Drugs, the federal government enacted draconian penalties—lengthy sentences and mandatory minimums—in an attempt to curb drug use and sales. States across the country followed suit, marking the period with aggressive policing, prosecution, and imprisonment that created and reinforced racial disparities in the criminal justice system.

Controlled substance offenses are already factored into an individual's criminal history points. It is unnecessarily punitive and counterproductive to public safety to factor them in twice and is very likely driving racial disparities in punishment for weapons possession. In FY 2021, 56% of people sentenced in federal court for illegally possessing a firearm were Black, compared to 35% of all individuals sentenced to BOP custody.[30] The way in which drug laws target and punish Black people in particular is well-documented, and this outdated enhancement worsens those disparities.[31] Long sentences are an expensive and ineffective method of protecting public safety, and the parsimony principle suggests that where this type of double counting of criminal history is not substantially improving public safety, it should be discontinued. We urge the Commission to do so in this case and eliminate the use of controlled substance offenses as an enhancement to base levels.

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[29] *See* USSG §4B1.2

[30] U.S.S.C., "Quick Facts: Felon in Possession of a Firearm," https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY21.pdf and U.S.S.C., "Quick Facts: Individuals in the Federal Bureau of Prisons," https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_January2024.pdf

[31] *See* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, New York: New Press, 2010; The Human Rights Watch, "Targeting Blacks: Drug Law Enforcement and Race in the United States," May 2008, https://www.hrw.org/report/2008/05/05/targeting-blacks/drug-law-enforcement-and-race-united-states; United Nations High Commissioner for Human Rights, "Fight against world drug problem must address unjust impact on people of African descent, say UN rights experts," March 2019, https://www.ohchr.org/en/news/2019/03/fight-against-world-drug-problem-must-address-unjust-impact-people-african-descent-say?LangID=E&NewsID=24332

II. Broader Changes to the Guidelines that May Require Multiple Years to Complete

A. Delink Drug Weights from Sentencing

A 2012 study by the Urban Institute found that the increase in time served for drug offenses "was the single greatest contributor to growth in the federal prison population between 1998 and 2010."[32] Today, drug offenses are the single highest category of convictions for people incarcerated in federal prisons.[33] Drug quantity is a key driver in drug sentencing in the federal system but it is a failed approach in determining a person's role in a drug trafficking offense. **Therefore, we urge the Commission to revise the Guidelines to delink drug weight from sentencing.**

Congress established the framework of linking drug quantity with perceived culpability during the War on Drugs era with the Anti-Drug Abuse Act of 1986[34] and the Commission adopted this framework by using drug weight to determine the base offense level in the Guidelines.[35] As a result, drug weight acts as a proxy for a person's role in drug trafficking, where greater quantity is presumed to equate to greater culpability and hence, more punitive sentences. This approach to federal drug sentencing is a relic of the failed War on Drugs era that requires reexamination and amending. While there is much more to do to remedy the devastating and disparate consequences of the failed War on Drugs, aligning drug sentencing with a person's role in the offense and modern research about drug risks and harms would lead to more accuracy in sentencing decisions, without risking public safety.

The Commission's own prior study has shown drug quantity to be a poor indicator of culpability. In 2010, using a sample of drug cases from FY 2009, the Commission conducted a special coding analysis to assess the role performed by people convicted of drug offenses. This study determined that the weight of drugs was not closely connected to a person's role in the drug offense.[36] The Commission found that "as a result of the quantity of drugs involved in the offense, base offense levels that included or exceeded the five-year mandatory minimum penalty often applied to every function, even those that may not be considered functions

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[32] Kamala Mallik-Kane, Barbara Parthasarathy, and William Adams, "Examining Growth in the Federal Prison Population, 1998 to 2010," p.3, https://www.ojp.gov/pdffiles1/bjs/grants/239785.pdf

[33] U.S.S.C., "QuickFacts: Individuals in the Federal Bureau of Prisons," https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_January2024.pdf

[34] U.S.S.C., "2011 Report To The Congress: Mandatory Minimum Penalties In The Federal Criminal Justice System," Chapter Two, p. 24, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf

[35] *See* U.S.S.C., Amendment 782, Reason for Amendment (eff. Nov. 1, 2014), https://www.ussc.gov/guidelines/amendment/782#:~:text=Reason%20for%20Amendment%3A%20This%20amendment,Quantity%20Table%20in%20%C2%A72D1.

[36] U.S.S.C., "2011 Report To The Congress: Mandatory Minimum Penalties In The Federal Criminal Justice System," Chapter Eight, p. 169, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf

typically performed by "major" or "serious" drug [trafficking]."[37] Indeed, despite Congress's intention to identify and harshly punish people higher in the drug trafficking chain[38] by using drug quantity to determine sentences, in practice, it has led to people at all levels of the drug chain facing severe sentences that do not accurately reflect their role in the offense.

Moreover, data and experience have shown us that increased penalties do not deter drug use or trade.[39] In the Commission's assessment of the role performed by people convicted of drug offenses in both FY 2009 and FY 2016, people who performed roles of a "street-level dealer" or lower made up half of people convicted of federal drug crimes.[40] Research disputes the public safety benefit of incarcerating people this low in the drug trafficking chain given the fact incarcerating them will not reduce drug sales since they will be replaced by someone else.[41] Doling out lengthy sentences does not achieve the intended goal of deterring drug sales, but it will increase time spent in prison, separating families and destabilizing communities all while depleting taxpayer resources.

In light of the data demonstrating that drug quantity is not related to a person's involvement in the drug trafficking chain and research showing that increased penalties are not effective deterrents for drug crimes, we urge the Commission to delink drug weight from the calculation of sentences. We recommend the Commission advance evidence-based drug sentencing policies that accurately assess a person's role and the harms caused while also addressing the root causes of drug trafficking offenses, such as substance use disorders, and prioritizing treatment over incarceration.

B. Lower All Base Offense Levels

A growing body of research over the last twenty years has made clear that the marginal benefit of lengthier sentences is minimal at best—and counterproductive at worst. Traditionally, proponents of longer sentences have relied on three theoretical public safety justifications: general deterrence (preventing crime by instilling fear of punishment in the general population), specific deterrence (deterring an individual from committing further future crime through the

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[37] *Id.*

[38] *Id.,* p. 24 ("Floor statements delivered by members in support of the 1986 Act and a committee report on a predecessor bill suggest that Congress intended to create a two-tiered penalty structure for discrete categories of drug [trafficking]. Specifically, Congress intended to link the five-year mandatory minimum penalties to what some called "serious" [trafficking] and the ten year mandatory minimum penalties to "major" [trafficking].")

[39] The Pew Charitable Trusts, "More Imprisonment Does Not Reduce State Drug Problems," March 2018, https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems

[40] U.S.S.C., "Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System," p. 45, October 2017, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf

[41] Mark A.R. Kleiman, "Toward (More Nearly) Optimal Sentencing for Drug Offenders," Criminology & Public Policy 3, March 2006, https://doi.org/10.1111/j.1745-9133.2004.tb00051.x

imposition of punishment), and incapacitation (keeping people in custody to prevent them from committing offenses in the community).[42] Each of these rationales has been called into question by research on the real-world impacts of sentencing, as opposed to the theoretical impacts on which they are based.[43] **As the research evolves so must the Commission's approach, thus we urge the Commission to lower all base offense levels across the entire code.**

More than half of people in federal prison are serving sentences of 10 years or more[44] and moreover, unlike many states where people can earn time off their sentences through credits or parole consideration, in the determinate federal sentencing system, there are few opportunities for people to meaningfully shorten their sentences. A recent 2018 study using federal data estimated that a reduction of 7.5 months, or approximately two base levels across all guidelines, would save over 33,000 federal prison beds without increasing recidivism by any demonstrable amount.[45]

The Commission's own prior work provides real world examples of how this could be done safely and effectively. On April 10, 2014, the Commission voted unanimously to reduce the applicable sentencing guideline range for most federal drug trafficking offenses by two base levels, across all drug types. This amendment, "Drugs Minus Two," was subsequently applied retroactively. The Commission found no statistically significant difference in the recidivism rates of people who were released an estimated average of 37 months early through the retroactive application of the Drugs Minus Two Amendment (27.9%) and people who served their full sentences and were released prior to the amendment (30.5%).[46] Similarly, when the Commission lowered base levels for crack offenses prospectively and retroactively, the Commission found that the recidivism rate for people who received an average retroactive sentence reduction of approximately 20% was similar to the rate for people who had been released prior to the adoption of the Crack Minus Two Amendment. Indeed, as with the Drug Minus Two Amendment, the recidivism rate was actually lower (43.3%) for the retroactivity cohort than for the control group (47.8%).[47] Research across the field also shows that any

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[42] *See* Laura Bennett and Felicity Rose, Center for Just Journalism and FWD.us, "Deterrence and Incapacitation: A Quick Review of the Research," https://justjournalism.org/page/deterrence-and-incapacitation-a-quick-review-of-the-research.
[43] Damon Petrich, et al., "Custodial Sanctions and Reoffending: A Meta-Analytic Review," Crime and Justice, September 2021, https://doi.org/10.1086/715100
[44] U.S.S.C., "Quick Facts: Individuals in the Federal Bureau of Prisons," https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_January2024.pdf
[45] William Rhodes, et al., "Relationship Between Prison Length of Stay and Recidivism: A Study Using Regression Discontinuity and Instrumental Variables with Multiple Break Points," Criminology & Public Policy 17, August 2018, https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9133.12382
[46] U.S.S.C., "Retroactivity & Recidivism: The Drugs Minus Two Amendment," p.6, July 2020, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf. It is also worth noting that the study found that one-third of the recidivism, for both the study group and the control group, was attributable to court or supervision violations. *Id.*
[47] U.S.S.C., "Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment," p. 3, May 2014,

minimal, albeit contested, benefits of increased sentence lengths, and incarceration generally, are far outweighed by the harms to individuals, communities, and public safety as a whole.

We urge the Commission to consider reducing the base levels for all offenses by at least two levels, thus bringing federal sentencing more in line with the parsimony principle and current research on the harms of incarceration.

III. Research Recommendations

The Commission's data access and research staff are crucial resources in the field of federal policymaking. As such, the Commission must prioritize research that will inform their own efforts as well as policymaker efforts to improve federal sentencing.

A. Evaluate the Impact of Attorney Garland's Sentencing Memos on Charging Decisions, the Federal Prison Population, and Racial Disparities in Sentencing

To that end, we urge the Commission to prioritize an evaluation of the implementation of Attorney General Garland's sentencing memos. On December 16, 2022, AG Garland issued prosecutorial guidance for the nation's US Attorneys in two memos: one covering charging, pleas, and sentencing recommendations generally, and the other specific to drug cases.[48] The memos emphasize the need for individualized, case-by-case decision-making and the principle of proportionality and parsimony in charging and punishment. As of yet, no public evaluation of the impact of these memos on charging or sentencing decisions has been published. The Commission is well-placed to evaluate these impacts from a data perspective, including looking at the potential impacts on racial disparities, geographic disparities, and total prison sentences handed down before and after the memos were put in place.

In particular, the Attorney General's guidance suggested prosecutorial action that would treat powder and crack cocaine equivalently. As the Commission has documented, the disparity in treatment between powder and crack cocaine has been the driving force between some of the worst racial disparities in the federal system. Evaluating whether this guidance has effectively voided those disparities or whether further legislation is still needed would provide strong guidance to policymakers.

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https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf

[48] U.S. Department of Justice Office of the Attorney General, "Memorandum For All Federal Prosecutors: General Department Policies Regarding Charging, Pleas, and Sentencing," December 2022, https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_general_department_policies_regarding_charging_pleas_and_sentencing.pdf; U.S. Department of Justice Office of the Attorney General, "Memorandum For All Federal Prosecutors: Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases," December 2022, https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_additional_department_policies_regarding_charges_pleas_and_sentencing_in_drug_cases.pdf

B. Study Whether and How Inconsistencies and Racial Disparities in State-Level Convictions Perpetuate and Exacerbate Similar Disparities in Federal Sentencing

We also urge the Commission to undertake a comprehensive study of the Guidelines' reliance on state-level convictions in the calculation of criminal history points, particularly with regard to: 1) changes in state law, such as decriminalization, subsequent to a person's state conviction; 2) inconsistencies in the way similar conduct is criminalized and penalized among the states; and 3) racial disparities in state-level convictions and the role such disparities play in perpetuating racial disparities at the federal level.

First, we urge the Commission to investigate how reduced state sentences for previously criminalized offenses may affect the assignment of points under §4A1.1 of the Guidelines. This study would provide valuable insights into the potential consequences of state-level reforms on the determination of criminal history category and the appropriateness of upward or downward departures. By understanding the implications of evolving state laws, the Commission can identify any necessary adjustments or revisions to the Guidelines to ensure that they accurately reflect the most current consensus on how specific conduct should be addressed and punished. State penal laws are subject to change based on new data, the availability of alternatives to incarceration, and shifting political attitudes.[49] Incorporating state convictions into federal sentencing without considering subsequent changes in state law leads to disproportionately harsh penalties and exacerbates issues of fairness and justice. Where, for example, a state has determined that certain conduct (such as drug possession) should no longer be treated as a felony or decriminalized altogether, the Guidelines should reflect these evolving understandings in the way criminal history points are calculated.

State convictions are the engine that largely drive individuals' criminal history scores under the Guidelines. These state convictions, however, reflect the disparate, inconsistent, and fragmented way in which the criminal justice system is administered across the country: conduct that results in a non-criminal disposition or even pre-arraignment diversion in one jurisdiction may result in a felony conviction and prison time in another. For instance, a charge of simple possession of a controlled substance in New York City often results in an Adjournment in Contemplation of Dismissal (essentially, a deferred prosecution followed by a dismissal) or a noncriminal disorderly conduct conviction, while the same conduct may result in a felony conviction in another jurisdiction.

These discrepancies are, in turn, defined by the racial disparities that exist at every stage of the justice system across all local, state, and federal jurisdictions. Racial disparities in state convictions perpetuate the unequal justice system treatment and heavier burden of mass incarceration for Black people. As an example, despite making up about 14% of the population, 32% of state prison populations and 26% of people in state prisons for drug offenses are Black,

[49] Between 2014 and 2018, at least five states reclassified drug offenses from felonies to misdemeanors. *See* https://www.urban.org/sites/default/files/publication/99077/reclassified_state_drug_law_reforms_to_reduce_felony_convictions_and_increase_second_chances.pdf

despite long-standing evidence that white people use drugs at the same rate as Black people.[50] In another example, Black people are more likely to be charged under state "habitual offender" laws and an in-depth study of Minnesota's state prison system showed that criminal history factors were a substantial driver of disparities in imprisonment rates. Researchers in Florida found that race was a significant and substantial driver of the use of "habitual offender" enhancements.[51]

The allocation of criminal history points in the Guidelines must evolve to meet changes in state law to maintain their integrity and just application. By studying state-level disparities, the Commission can help ensure that federal sentences are fair, proportionate, and reflective of contemporary legal standards.

C. Additional Research Considerations

In addition, we encourage research into several of the larger priorities lifted above, namely better ways to organize drug sentencing whether by role or other factors that would allow the Commission to move away from the outdated emphasis on drug weight, and the overall impact of lowering all base offense levels on the federal prison population.

As the Commission continues to utilize its robust, individual-level data, there are some key considerations to take into account to ensure the results are objective and aligned with best data practices across the criminal justice field.

The majority of federal policymakers, judges, lawyers, and advocates who use Commission research are not experts in quantitative research methods. The Commission should strive to make its research as accessible to these key audiences as possible, while maintaining transparency and rigor. In the past, the Commission has been criticized for putting out research that uses flawed methodology, including using control groups that are not matched in important ways.[52] The lack of properly matched control groups makes the research findings questionable at best, but a lay reader would struggle to find any caveats in the way this research has been

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[50] United States Census Bureau, "Quick Facts United States," https://www.census.gov/quickfacts/fact/table/US/RHI225223#RHI225223; Bureau of Justice Statistics, "Prisoners in 2022,"November 2023, https://bjs.ojp.gov/library/publications/prisoners-2022-statistical-tables; Substance Abuse and Mental Health Services Administration, "Highlights by Race/Ethnicity for the 2022 National Survey on Drug Use and Health," https://www.samhsa.gov/data/sites/default/files/reports/rpt42731/2022-nsduh-race-eth-highlights.pdf

[51] Richard Frase, "What Explains Racial Disproportionality in Minnesota's Prison and Jail Populations," Crime and Justice 38, 2009, https://doi.org/10.1086/599199; Cyndy Caravelis, Ted Chiricos, and William Bales, "Race, Ethnicity, Threat, and the Designation of Career Offenders," Justice Quarterly 30, November 2011, https://doi.org/10.1080/07418825.2011.635597

[52] *See* Federal Public and Community Defenders, "Federal Defender Fact Sheet: Flawed U.S. Sentencing Commission Report Misstates Current Knowledge," June 2020, https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/useful_reports/incarceration_and_recidivism_factsheet.pdf and FWD.us Comment "Re: Adoption of the Youthful Individuals Amendment and Acquitted Conduct Amendment," Feb 22 2024.

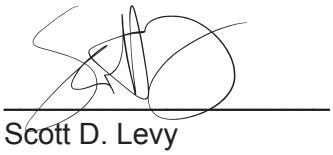
presented or understand its flaws. Less complex research design or more transparency about potential flaws with the design would help lay readers understand and use the research more appropriately.

In addition, the Commission should focus future recidivism analysis on new convictions, rather than new arrests. Arrests do not accurately measure criminal behavior. For instance, in FY 2022, federal law enforcement agencies made 96,857 arrests but only 60,490 people were charged with a crime in federal court. And many charges do not result in a conviction.[53] Using arrest as a proxy for criminal behavior overstates the recidivism rates of people on supervision or living in highly policed communities. Convictions, which rely on the judicial process to determine if criminal conduct truly occurred, is a far more appropriate measure of recidivism.

IV. Conclusion

We greatly appreciate your consideration of our recommended priorities for the next amendment and stand ready to support the Commission in its efforts to advance data-driven changes to the Guidelines.

Sincerely,



Scott D. Levy
Chief Policy Counsel
FWD.us

[53] Bureau of Justice Statistics, "Federal Justice Statistics, FY2022," January 2024, https://bjs.ojp.gov/document/fjs22.pdf

FIRST-NETWORK

Federal Inmates Requesting Sanctioned Treatment Network

#BeTheirVoice

Dear Members of the United States Sentencing Commission,

We, the members of FIRST-Network, with over 2,000 strong advocates, appreciate the opportunity to provide input on the Commission's policy priorities for the amendment cycle ending May 1, 2025. We commend the Commission's dedication to enhancing the federal criminal justice system and offer the following recommendations based on our collective experience and insight into the current realities of the system:

1. **Reduce Incarceration Costs by Expanding Early Release Programs (Ranked Highest Priority)** We urge the expansion of early release programs, especially for non-violent offenders. The success of initiatives like home confinement during the CARES Act highlights their effectiveness. By prioritizing early release options and home confinement, we can reduce costs and ease the burden on halfway houses. Focusing on early release options and home confinement should be a top priority, and any legislative adjustments to facilitate this would be greatly beneficial.

2. **Ensure Adherence to Existing Policies and Address System-Wide Inconsistencies Before Introducing New Ones (Drawing from Point 8)** While the Commission aims to develop new programs and policies, it is crucial first to ensure that existing policies are adhered to and enforced. Before introducing new policies, it's vital to ensure existing ones are enforced uniformly. Holding case managers, Correctional Officers, and staff accountable and addressing system-wide policy disparities will create a fairer environment for all.

3. **Prioritize Oversight and Accurate Data Collection (Drawing from Point 6)** Effective oversight and accurate data collection are paramount. The current data shared with the public is not an accurate representation of the true conditions and issues faced by inmates. We propose leveraging FIRST-Network's platform to gather unbiased data from federal facilities. Establishing an Oversight Task Force and an Ombudsman program will also ensure transparency and accountability.

4. **Reform Mandatory Minimum Sentences and Modify Eligibility** Reforming mandatory minimum sentences for non-violent offenses and modifying eligibility criteria for time off and program access are crucial steps. Uniformity and expanded eligibility will aid rehabilitation efforts and reduce overcrowding.

We believe these priorities will not only enhance the fairness and effectiveness of the federal criminal justice system but also ensure that it operates more humanely and efficiently. We are committed to supporting the Commission in these efforts and look forward to the positive changes these priorities can bring.

Sincerely,

Heather Pirtle

Heather Pirtle, President
Federal Inmates Requesting Sanctioned Treatment ("FIRST) Network
On behalf of 2k+ members of FIRST-Network

Re: (1) Assessing the degree **to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2) a**nd considering any appropriate responses including possible consideration of recommendations or amendments.

18 U.S.C. 3553(a)(2):

D: to provide the defendant with needed educational, vocational training, medical care, or other correctional treatment in the most effective manner;

To this end:

It is strongly recommended the commission develop a separate Federal Prison Advisory Group for specific issues raised within the federal justice community or the formation of a sub-committee under the authority of the existing USSC Practitioners Advisory Group related to federal prison issues. This group would also be a resource for the oversight ombudsman in the new oversight law which is expected to be signed by the president. This advisory group could bridge a gap between the BOP and sentencing commission for better communication.

The inability of practitioners, DOJ components and the broader federal justice community to better understand federal prison policy, culture and nuances inhibits effective legislation, policy development, rehabilitation, re-entry and inevitably public safety. It is evident by attending your annual seminars that attorneys, U.S. Probation Officers, stakeholders and Judges have a very limited understanding of our prison system. The brief and superficial presentation the BOP provides at the annual seminar is void of practice tips and the information the federal justice community needs to better represent their clients and constituents.

Justice Kennedy said it best when he stated:

"***The corrections system is one of the most overlooked, misunderstood institutions we have in our entire government," he said. He chastised the legal profession for being focused only on questions of guilt and innocence, and not what comes after. "We have no interest in corrections," he said. "Nobody looks at it***."

Such a group is within the charter of the **Practitioners Advisor Group sec. 4,** which gives the authorization to the Chair and Vice Chair to form committees. Although there is meaningful and somewhat seamless interaction and dialogue between most components of the Federal justice community, prison officials involvement and information is cursory and underrepresented given the importance to 18USC 3553(a)(2)(D): "***to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner***;" .

It is suggested this advisory group or committee be compiled of private practitioners, federal defenders, US Probation, the BOP Correctional Programs Administrator and federal stakeholders.

Specific BOP Practices that need addressing:

Training: The annual BOP presentation at the annual USSC conference should be longer and include more line staff from the correctional programs and re-entry affairs divisions who work in the trenches applying policy who can better disseminate practical practice tips rather than administrators and BOP lawyers who disseminate PR talking points and broad themes with limited technical application. It is apparent from attending numerous conferences that USPO"s, Judges and attorneys are often disappointed with the presentation and leave with questions either unaddressed or poorly answered. A more interactive plenary session should be constructed to include justice impacted people, federal defenders and advocates that can opine on their experiences and answer questions the BOP ordinarily addresses from more of a prosecutorial perspective and position of agency defensiveness.

Program Waiting lists: The BOP needs guidance on program delivery especially for people with the most needs. I work with a lot of US Penitentiary Lifers and I am starting to see waiting lists on a regular basis as far back to 2021. People with Life and people with parole eligibility are being passed over for programs given they have no release date and that practice is ill conceived. Courts are considering releasing people who have submitted post-conviction motions, but prosecutors are using the lack of programing as reasons for opposition. People with active CR release petitions, IRAA, Second Look and others with parole hearing dates/eligibility, should not be treated as if they have less of a programing need. Only active programs should be advertised in the First Step Act directory because many of the programs alleged to be offered "at all facilities" are simply not happening which paints a false narrative and causes impractical judicial recommendations.

Programs Review practices: The BOP needs to follow their own policy and conduct thorough and meaningful initial classification and program review meetings. Sliding a paper under a cell door for a signature does not foster productive treatment relationships for rehabilitation. The meetings are intended to have the attendance of a unit manager, case manager, counselor and education representative with computerized clinical treatment notes made by health services and psychology services staff. This process is absolutely broken by the rushed, hap-hazard way unit team meetings are conducted without the required team members present and the lack of undivided time people need with their unit teams and clinical staff to discuss all aspects of their correctional treatment plan. The failure to establish positive treatment relationships affects institutional security, staff/inmate safety and re-entry, all of which impact recidivism and community safety.

Classification practices: The agency needs to adhere to their rhetoric when it comes to placing people in "*the least restrictive environment*." Young offenders should receive "*lesser security*" management variables to keep them out of US Penitentiaries. Simple possession of child pornography offenders who voluntary surrender to a facility should be considered for a waiver for camp placement rather than placing them in secure FCI's where they are extorted, assaulted and threatened.

The BOP does not use the same definition for violence as the USSC and broader federal justice community and need to update Program Statement 5162.5, Categorization of Offenses and

5100.08 , Inmate Security Designation and Custody Classification : Most disturbing is the practice of the agency to assign violence points on acquitted conduct for priors and well as the instant offense. This over broad use of discretion not only places people in higher security environments than necessary, it can impact FSA time credits and other incentives.

Legal Communication practices: A standard seamless practice for attorney client communication be implemented nationwide because post-conviction motions such as compassionate release are hindered due to this lack of communication. There has been a methodical, policy (PCU Manual) and practice for federal inmates in Witness (WITSEC) Security Units in place for decades to communicate with their attorneys and agents. There should not be two different standards of legal access.

The commission should be concerned with and have impact on the BOP practices in classification and correctional treatment including issues such as:

Input on the development of FBOP policy: **Example**:

Crimes of violence. The BOP has its own agency policy and classification criteria for what is determined as a crime of violence for the instant offense as well as archaic practices in determining prior violence history that does not conform to commission practices. People who are sentenced by the court for crimes **NOT defined as violent** can be deemed violent by the BOP and denied early release benefits under 18 USC 3621(e) and other programs as well which directly impacts treatment programs to reduce recidivism. The classification system considers conduct despite the nature of the conviction which places offenders greater security environments than necessary.

Age discrimination: The BOP penalizes young adults (under age 25) by awarding them eight security points elevating their classification to place them with offenders with a greater criminal history which can almost ensure a greater criminal orientation and victimization when it comes to the US Penitentiary setting.

General communication: Such a group would provide feedback to the BOP from field practitioners on issues like the First Step Act, compassionate release, legal communication, gang management, threat assessment tools, restrictive housing unit programs and commission priorities and guideline changes which directly affect prison populations.

I respectfully request the USSC give prison issues the attention that is warranted by broadening their charter to include a diverse group of practitioners, justice impacted individuals and advocates void of academics and high-level prison administrators and BOP lawyers promoting agency propaganda.

Jack T. Donson, Executive Director (The Federal Prison Education and Reform Alliance)

www.bopera.org

July 9, 2024

United States Sentencing Commission

One Columbus Circle, N.E., Suite 2-500

Washington, D.C. 20002-8002

Attention: Public Affairs – Priorities Comment

Dear Judge Reeves and Members of the Sentencing Commission,

I am writing to you as the Program Coordinator of the Hinda Institute to help encourage rational strategies to prevent sex offenses.

About the Hinda Institute

For over 40 years, the Hinda Institute has been providing counseling, visitation, and support to currently and formerly detained members of our community and their families. Our mandate is to lower recidivism rates and ensure that those coming out of prison do not return. We provide nonjudgmental and caring support for innocent families; spouses, parents, and children affected by the criminal justice system.

- Hinda helps with job placement, housing, training, social support, therapy and spiritual guidance.
- Hinda visits detained citizens alone and forgotten within correctional institutions and those reentering society to rebuild their lives for good.
- Hinda supports victims and families, spouses, parents and children - the innocent collateral damage of crime.

We also provide support for clients dealing with the Sex offense registry; one of the fastest growing areas of incarceration. We provide a support group called Rebounders, reentry courses such as "Victim Survivor Offender; Where is Justice", casework which includes assistance finding employment and most importantly help with the difficult job of finding housing for those on the registry. We also simultaneously provide support for Victims and families, and children.

The expansion of the sex Offender Registry

I have personally worked for both National policing in Canada and with the Hinda Institute and see the problem from many perspectives. **We need real solutions.** Unfortunately, rhetoric, prejudice,

stereotypes and demonization has made it very difficult to both to actually stop/prevent the offense, protect our children from becoming offenders and ironically even protect victims.

The reasons sex offenses are expanding exponentially is due to:

1) **The expanded definitions of what constitutes a sex offense.**
   A sex offense can include anything from a young autistic teenager on the internet to an adult who is attracted to children, to teenagers dating. Seniors with dementia, 11-year-old children, the mentally ill, people peeing in parks can be charged with an offense. Sex offenses can include internet crimes, prostitution and dating between sexually mature teenagers. The spectrum is increasing large.
2) **The proliferation of use of the internet.**
   Many people don't realize the internet is trolled by police. It is very easy to slip into an illegal category when watching pornography. They don't realize that police place lures in the internet (entrapment) to catch offenders – encouraging people to cross state lines to meet potential partners sometimes whose age is at first ambiguous. No one has discussed the addictive nature of pornography and the potential dangers of cell phones.

The Impact

Once someone has committed a sex offense and are on the registry; their lives are essentially ruined forever irrespective of the age of the offender and the type of sex abuse. There are mandatory minimums for these offenses and in most cases the record of the offense can't be erased, sealed or expunged. These extreme repercussions have actually discouraged reporting particularly when the offense occurs within families and discourages people with addictions from seeking help. Most importantly, despite the low recidivism rate for sex offenses, people are not given the opportunity to rebuild their lives. If offenders have no housing or employment, they become homeless and can't report to parole creating further public safety issues. While there should be repercussions for sex offenses, the repercussions should match the crime including these unintended consequences.

Recommendations

1) Differentiate between types of sex offenses and the associated repercussions. For example, people with sex offenses on the internet could have restricted internet usage rather than 5 to 10 years of incarceration.
2) Consider the age and mental health of offenders and victims.

3) Create safe environments for treatment and family and addiction counseling. Most people who are offenders especially of children have previously been victims first. Break the cycle.
4) Have the courage to discuss the issue in schools. Teenagers are the most common victims and perpetrators of sex offenses; they need to know how to protect themselves. We need a new social dialogue on sexuality and respect.
5) Use evidence-based solutions. Irrationally restricting sex offender housing options and employment has been proven to have no effect on the crime rate. Once people are released they need to have access to housing and employment. After years with a clean record, records should be automatically sealed unless there is a justifiable reason to keep then open. One mistake doesn't mean a person needs to pay for the rest of their lives. Maximize the effectiveness of reporting requirements and mandatory counseling.
6) Parole officers are not only liable but also need to be held accountable. Parole conditions need to make sense. If somebody has a problem with a teenager doesn't mean s/he can't visit their grandmother. If the internet is monitored, former detainees should be able to use the internet to find work. People with sex offenses can do banking.
7) Only Police should keep registries. They should not be made public unless there is actually a public danger. It does not really stop crime and encourages irrational vigilantism. Newspapers and public searches for records and banks need to be held accountable as well.

I am happy to provide further information, research or experts for a panel discussion. Feel free to contact me.

Abigail Rabinowitz

Program Coordinator, Hinda Institute

[redacted]

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Avalon Betts-Gaston, Illinois Alliance for Reentry and Justice

Topics:

Policymaking Recommendations

Career Offender

Legislation

Miscellaneous Issues

Comments:

As the country with the world's largest incarceration rate yet without an equally proportionate crime and/or successful reunification rate, it is incumbent upon policymakers to begin to interrogate the commitment to current policy. This becomes acutely important when our country's persistent racial disparities in incarceration are also taken into consideration along with our inability to keep people safe while incarcerated (i.e., Covid-19 deaths, rampant sexual abuse, etc.). We can and must be better about these things by first understanding and articulating that a sentence being handed down is more than just the words on the paper. It is also a 2 to 1 reduction in that person's life expectancy, an exposure to wholly inadequate healthcare, emotional trauma for the entire family including an adverse childhood experience for that person's children, and if their gender is female, a certain risk of either being a daily witness to or victim of sexual, physical, and/or verbal assault. We must rid ourselves of the ineffective so-called "tough on crime" approach and instead become serious about crime and all harms that occur in communities. The data is in and is irrefutable. It is time that we move away from extreme sentences, life without parole, enhancements based on uncharged conduct and/or not supported by proof beyond a reasonable doubt, and our insatiable dependence on imprisonment, especially of Black, Brown, Indigenous, and poor people.

Submitted on: June 26, 2024

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July 15, 2024

Submitted electronically via USSC Public Comment Portal, comment.ussc.gov

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment.

Re: Proposed Priorities for Amendment Cycle (89 Fed. Reg. 48029; Doc. No. 2024-12244)

Dear Judge Reeves and Members of the Sentencing Commission:

On behalf of the International Fund for Animal Welfare (IFAW), I submit for your consideration the following comments regarding the Commission's policy priorities for the amendment cycle ending May 1, 2025.

In June 2024, more than 7,000 IFAW supporters signed onto the following statement concerning the importance of proper sentencing for wildlife crimes:

> *I am writing to express my concern about the global impacts of wildlife trafficking, and to urge the Commission to take them into account when considering future revisions to federal sentencing guidelines. Wildlife crime is often treated as less serious than other categories of crime despite harming communities and ecosystems around the world. Trafficking imperiled species and protected natural resources threatens biodiversity, animal wellbeing, public health and global security.*
>
> *The proliferation of online markets and social media has made it easier than ever for traffickers to connect with buyers. At the same time, the world is experiencing an extinction crisis, and safeguarding biodiversity is more important than ever. To meet these challenges, I urge the Commission to prioritize wildlife crime and work to ensure that sentencing guidelines meaningfully deter wildlife trafficking for the benefit of animals and people alike.*

The following comments incorporate and expand upon this statement.

Wildlife crime, the fourth largest transnational criminal activity—which, according to the U.S. Department of Homeland Security's (DHS), generates as much as $23 billion annually[1] and imposes far greater costs on communities and ecosystems—jeopardizes the survival of thousands of species globally and accelerates the collapse of biodiversity. The illegal trade in wildlife also causes tremendous suffering; countless animals die while being captured, transported, and kept in homes as exotic pets. This illicit trade also threatens human safety and can facilitate the spread of zoonotic diseases.

For decades, IFAW has worked to combat wildlife crime around the world, including by: building law enforcement capacity; strengthening state, national and international policies; engaging social media and e-commerce companies to disrupt online wildlife trafficking; and leading education and behavior change campaigns to address consumer demand for wildlife parts and products.

Last year alone, IFAW worked to strengthen wildlife law enforcement capacity by training or mentoring 770 key professionals—including customs and conservation authorities, cybercrime security officers, civil society organizations and digital forensics specialists—from more than 40 countries. By collaborating with and supporting wildlife officials, community leaders and private sector partners across continents, IFAW has advanced innovative programming to protect imperiled species from illicit trade globally.

Acknowledging the ever-expanding conservation impacts of digital media, IFAW has also worked to build and expand the work of the Coalition to End Wildlife Trafficking Online—which, since its launch in 2018, has more than doubled its membership. Between 2023 and 2024, thousands of technology company professionals were trained to detect and counter wildlife crime conducted through participating platforms, facilitating the removal of millions of posts and listings marketing illegal wildlife parts, products and even live animals.

Supporting and witnessing these critical advances in efforts to address wildlife crime globally, IFAW and anti-trafficking partners have noted that sentencing guidelines for certain conservation crimes[2]—which, for purposes of U.S. sentencing guidance, include wildlife trafficking and other violations of federal wildlife protections—seem somewhat misaligned with the seriousness of wildlife crime and the critical importance of effective deterrence.

IFAW does not propose specific revisions to the text of federal sentencing guidance here, but rather makes a broader request—that wildlife crime be treated with the same seriousness as parallel (and sometimes interconnected) offenses addressed in the Commission's guidelines. Nor do we put forward a blanket call for *harsher* sentences;[3] instead, we call for conservation and wildlife crime penalties to be guided by data-supported deterrence strategies.

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[1] *See, e.g.*, Homeland Security Investigations, Wildlife Trafficking, Wildlife Trafficking | Homeland Security (dhs.gov).

[2] *See generally* Sentencing Commission, 2023 Guidelines Manual Annotated §2Q2.1 (addressing offenses "involving fish, wildlife, and plants"), https://www.ussc.gov/guidelines/2023-guidelines-manual-annotated.

[3] The United Nations Office on Drugs and Crime (UNODC) acknowledges that harsher penalties—particularly in the context of custodial sentences—may have unintended consequences. *See* UNODC, World Wildlife Crime Report 2024, Wildlife2024_Final.pdf (unodc.org) (see discussion at p. 150); *see also* Conservation, wildlife crime, and tough-on-crime policies: Lessons from the criminological literature - ScienceDirect. The Office's policy

To that end, we urge the Commission to account for the following while considering guidance revisions in the context of wildlife crime:

- The severe—often irreversible—harms to species and ecosystems that are associated with wildlife trafficking and related criminal activity;
- The perception and status of wildlife trafficking as a relatively low-risk (penalties), high-reward (profit) criminal activity;
- The convergence between wildlife trafficking and other serious criminal activities and enterprises[4];
- The role of illicit wildlife trade in creating and proliferating substantial threats to human health and safety, including through the spread of zoonotic disease[5];
- The substantial animal cruelty often associated wildlife trafficking and related activities[6]; and
- The imbalance in penalties and sentences associated with trafficking in wildlife and trafficking in other categories of contraband of equal monetary value.[7]

We also ask that the Commission consider consulting wildlife crime experts in the course of the 2024-2025 revision process. The Commission's rules direct that it "shall conduct a public hearing on the proposed amendments, unless [it] determines that time does not permit a hearing or [] a hearing will not substantially assist the amendment process."[8] While we certainly understand the demanding nature of the Commission's work, as well as the relevant time constraints, we believe the present review process represents an important opportunity to engage specialists to determine the best sentencing options for the emergent and ever-expanding challenge of deterring and preventing wildlife trafficking and related crimes.[9]

Thank you for the opportunity to provide comments and for considering the above comments.

Sincerely,

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recommendations, which extend to development of financial penalties and carceral terms, account for this principle and should be considered as USSC reviews federal guidelines. *See* UNODC, Guide on Drafting Legislation to Combat Wildlife Crime, Wildlife_Crime_ebook.pdf (unodc.org).

[4] *See, e.g.*, *See* UNODC, World Wildlife Crime Report 2024; Wildlife Justice Commission, Convergence of wildlife crime with other forms of organised crime: A 2023 review, Crime-Convergence-Report-2023-spreads-V07.pdf (wildlifejustice.org).

[5] *See* UNODC, World Wildlife Crime Report 2024, Wildlife2024_Final.pdf (unodc.org) (see discussion at page 96).

[6] Recent updates direct that "extraordinary cruelty" be taken into consideration in animal fighting cases. *See* U.S. Sentencing Commission, Proposed Amendments to the Sentencing Guidelines: December 26, 2023, "Reader-Friendly" Version of Proposed Amendments to the Federal Sentencing Guidelines (ussc.gov).

[7] See, e.g., L.S. Stegman, Fighting Tooth and Nail: Deterring Wildlife Trafficking in the Era of Mass Extinction, 57 Am. Crim. L. Rev. 45, 50.

[8] U.S. Sentencing Commission Rules of Practice and Procedure, U.S. Sentencing Commission Rules of Practice and Procedure (ussc.gov).

[9] Consulting such authorities would be consistent with the Commission's past practice (albeit sporadic) of engaging experts and advocacy groups relevant to the issue. *See, e.g.*, Public Hearing Transcript, July 19, 2023, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230719/Transcript.pdf; Public Hearing Transcript, April 18, 2017, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20170418/transcript.pdf.

Carson Barylak, Campaigns Manager
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June 7, 2024

Submitted electronically via USSC Public Comment Portal, comment.ussc.gov

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment.

Re: Proposed Priorities for Amendment Cycle (89 Fed. Reg. 48029; Doc. No. 2024-12244)

Dear Judge Reeves and Members of the Sentencing Commission:

On behalf of more than 7,000 supporters across the United States, IFAW submits for your consideration the following statement regarding the Commission's policy priorities for the amendment cycle ending May 1, 2025.

> *I am writing to express my concern about the global impacts of wildlife trafficking, and to urge the Commission to take them into account when considering future revisions to federal sentencing guidelines. Wildlife crime is often treated as less serious than other categories of crime despite harming communities and ecosystems around the world. Trafficking imperiled species and protected natural resources threatens biodiversity, animal wellbeing, public health and global security.*
>
> *The proliferation of online markets and social media has made it easier than ever for traffickers to connect with buyers. At the same time, the world is experiencing an extinction crisis, and safeguarding biodiversity is more important than ever. To meet these challenges, I urge the Commission to prioritize wildlife crime and work to ensure that sentencing guidelines meaningfully deter wildlife trafficking for the benefit of animals and people alike.*

Sincerely,

First name	Last name	City	State
Janet	Heinle	Santa Monica	CA
Janet	Allison	Brighton	MI
Terry	Chacko	Little Rock	AR
Gary	Cronin	ALBUQUERQUE	NM
Donald	Cutty	Santa Barbara	CA
JoAnn	Filosa	westwood	NJ
Janet	Lansdown	WAYNESBURG	KY
Dusty	Locke	kountze	TX
Nancy	Stier	Parkville	MD
David	A	Minneapolis	MN
M	A	Evanston	IL
Jo	A Cole	Plainview	IL
Kathy	A Meier	OKAWVILLE	IL
Chelsea	A Norvell	Cowiche	WA
Jeanne	A Pascal	Monroe	WA
Kendall	A Sigmon	Omaha	NE
Deborah	A Tebet	Englewood	CO
KRIS	A YORK	Talent	OR
Lauren	A.	New York	NY
Elaine	Aarsand	Annapolis	MD
Amber	Abascal	San Antonio	TX
Johanna	Abate	SAN FRANCISCO	CA
Alison	Abbott	Spring	TX
Marie	Abbott	Chester	NH
Will	Abele	Roseville	CA
Jennifer	Abernathy	Ventura	CA
Lisa	Abernathy	Middletown	DE
Mike	Abler	Santa Cruz	CA
Ericka	Abrams	Aurora	CO
Jon	Abrams	New Rochelle	NY
Melissa	Abreu	Palmetto Bay	FL
Theresa	Acerro	Chula Vista	CA
Barbara	Achey	Union Dale PA	PA
Carole	Ackelson	Erie	PA
Andrea	Ackerman	Sidney	OH
Andrea	Ackerman	Englewood	CO
Andrea	Ackerman	Price	UT
Caryn	Ackerman	BRADENTON	FL
Joe	Ackerman	Ardmore	PA
Joe	Ackerman	High Point	NC
Joe	Ackerman	Twin Falls	ID
Joe	Ackerman	Minot	ND
Joe	Ackerman	Birmingham	AL

First name	Last name	City	State
Joe	Ackerman	Dodge City	KS
Joe	Ackerman	Philadelphia	PA
Joe	Ackerman	Mesa	AZ
Joe	Ackerman	Morrill	NE
Judith	Ackerman	Ny	NY
Marisol	Ackerman	Florence	AZ
Marisol	Ackerman	Norman	OK
Don	Acorn	VENICE	FL
Alberto	Acosta	Burbank	CA
Carlos	Acosta	Edwards	CO
Joe	Acosta	Gering	NE
Steven	Acosta	Los Angeles	CA
Deborah	Acquisti	Bloomfield Hills	MI
Lisa	Adair	Ojai	CA
Patricia	Adamo	Staten Island	NY
Barbara	Adams	Greensburg	PA
Brandi	Adams	Queen Creek	AZ
Charlotte	Adams	Wimberley	TX
Donna	Adams	Newton Highlands	MA
Jennifer	Adams	New Port Richey	FL
Jessica	Adams	Gainesville	GA
Kevin	Adams	Round Pond	ME
Lynn	Adams	Atlanta	GA
Penelope	Adams	Broomfield	CO
Wendy	Adams	Chandler	AZ
Julie	Adelson	San Pedro	CA
Sandi	Aden	Lincoln	NE
Andrea	Ader	Coventry	CT
Mary	Adkins	Fleming Island	FL
Steve	Adkins	Aurora	IL
Tammy	Adkins	Gretna	VA
Barbara	Adler	Ocal	FL
David	Adler	Henderson	NV
Iris J	Adler	Sierra Vista	AZ
Steve	Adler	CHARLTON	MA
Martha	Agan	Cape Elizabeth	ME
Ero	Aguirre	Woodbury	MN
Elsa	Aguirre	Altadena	CA
Gayle	A'Harrah	Doylestown	PA
heidi	ahlstrand	owatonna	MN
Jeanie	Ahrens	Lenoir	NC
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Sahar	Akhtar	Leesburg	VA

First name	Last name	City	State
Lorraine	Akiba	Honolulu	HI
bernardo	Alayza Mujica	Sioux city, IA	IA
Dawn	Albanese	Elk Grove Village	IL
Jordy	Albert	York	PA
Susan	Albert	Wyoming	PA
allison	Alberts	Kunkletown	PA
kathleen	albin	philpot	KY
Gary	Albright	Snohomish	WA
Del	Albury	Point Harbor	NC
amanda	alcamo	new hyde park	NY
kathy	alcott	South Portland	ME
Nelida	Aldecoa	Boynton Beach	FL
Mark	Alderman	Benton	AR
Chris	Aldrich	Worcester	MA
Janet	Aldrich	Glenview	IL
Jim	Aldrich	Tallahassee	FL
Sharon	Aldrich	Centerville	IN
Julie	Aldridge	Hanover	PA
Charles	Alexander	Cockeysville	MD
Gini	Alexander	Ferndale	WA
John	Alexander	Oceanside	CA
Natalie	Alexander	Kaneohe	HI
Ralph	Alexander	Whiting	IN
SHAWN	ALEXANDER	OLGA	WA
Glenn	Alexander	Lake Charles	LA
Cassie	Alford	Edmond	OK
Shannon	Ali	Wayne	NJ
Linda	Allan	Ponte Vedra	FL
David	Allara	State College	PA
lisa	allarde	Green Lane	PA
Shay	Allbee	Newbury	VT
Arianna	Allegro	Fairfax	VA
Cynthia	Allen	Lawrenceville	GA
Dana	Allen	Howell	MI
Herbert	Allen	Austin	TX
Nancy	Allen	Milwaukie	OR
Theresa	Allen	Forest	OH
Cat	Allen	NY	NY
Pat	Allgrove	N. Attleboro	MA
Connie	Allison	Geneva	NY
Kathy	Allison	Rockville	MD
michelle	allison	santamaria	CA
Paulette	Allison	Jefferson City	MO

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Delia	Almares	Honolulu	HI
Carolina	Alonso	Miami	FL
Peggy	Alpert	kensington	MD
Matthew	Alschuler	Warren	IL
Kim	Altana	Irvine	CA
Kenneth	Althiser	Cherry Valley	CA
Allen	Altman	Great Barrington	MA
Pamela	Alund	Spring Hill	TN
Claudia	Alvarado	Los Angeles	CA
Elizabeth	Alvarez	Winter Park	FL
Lynda	Alvarez	ARLINGTON	TX
Pamela	Alvesteffer	Fremont	MI
Arnold	Aman	Denver	CO
Gloria	Aman	Holly Ridge	NC
Marianne	Amann	Port Orange	FL
Francene	Amari-Faulkner	Nahant	MA
Joseph	Ambat	Flushing	NY
Betsy	Amber	Exton	PA
michael	amescua	los angeles	CA
Sarah	Amico	Studio City	CA
Nilofar	Amier	Tarzana	CA
Nushin	Amirhosseini	Matawan	NJ
Cara	Ammon	Chicago	IL
Melissa	Amos	Sharpsville	IN
Della	Amparan	Lucerne valley	CA
Mariam	Andalibi	Andover	NJ
Gwendolyn	Andary	HALF MOON BAY	CA
Barbara	Anders	Watsonville	CA
Julie	Anders	Prescott	AZ
Kathryn	Anders	Athens	GA
Judi	Andersen	Phoenixville	PA
CARO	ANDERSON	Mountain Home	AR
Carol Lynn	Anderson	Greensboro	NC
Elaine	Anderson	Chino Hills	CA
Gena	Anderson	Glendale	AZ
Jacqueline	Anderson	Hatboro	PA
Joe	Anderson	Charleston	WV
Joel	Anderson	Spanish Fork	UT
Judith	Anderson	Tacoma	WA
Judith	Anderson	San Luis Obispo	CA
Katherine	Anderson	Northglenn	CO
Kyle	Anderson	Yardley	PA

First name	Last name	City	State
Mark and Ashley	Anderson	Bellaire	TX
Martha	Anderson	Albuquerque	NM
Mary	Anderson	Hemet	CA
Matthew	Anderson	Ballston Lake	NY
Maureen	Anderson	West Palm Beach	FL
Meredith	Anderson	Orwell	VT
Robin	Anderson	Grants Pass	OR
Sheila	Anderson	Amherst	MA
Tara	Anderson	Tempe	AZ
Tom	Anderson	Silver Springs	FL
Jennifer	Anderson	Fort Collins	CO
Emalee	Andre	The Villages	FL
Leticia	Andreas	Crockett	CA
Barbara	Andrew	Princeton	NJ
Jessica	Andrews	Tucson	AZ
Nancy	Andrews	Tucson	AZ
Penelope	Andrews	Hermon	ME
Eileen	Andric	Lisbon	OH
dk	anestos	nitro	WV
JL	Angell	Rescue	CA
Marjorie	Angelo	Palm Coast	FL
Billy	Angus	Hamilton	MT
Sabi	Anirudh	Bronx	NY
Brenda	Anna	Riverdale Park	MD
Pat	Annoni	Midvale	UT
gina	anson	boise	ID
Elisse	Antczak	Cheektowaga	NY
Christina	Anthes	Adin	CA
Annette	Anthony	Cleveland	OH
Judith	Antin	Los Angeles	CA
Stephen	Appell	Brooklyn	NY
Jason	Aquilina	Brisbane	QLD
Tracey	Aquino	VIRGINIA BEACH	VA
Mike	Arago	San Francisco	CA
Bonnie	Arbuckle	RIVERBANK	CA
CARLOS	ARCE	COVINGTON	GA
Dawn	Archibald-Corby	Halifax	MA
Gary Wolf	Ardito	East Haven	CT
Eileen	Arena	Salem	NJ
Barbara	Ares	Glen Burnie	MD
Sylvana R	Arguello	Miami	FL
Hector	Arias	Albuquerque	NM

First name	Last name	City	State
Marilyn	Arionus	Casper	WY
Marilyn	Arionus	Casper	WY
Judith	Arisman	Gloucester	MA
Fran	Armato	Coram	NY
Michelle	Armstrong	Newark	DE
A	Armstrong	Gilberts	IL
Charles	Arnold	Manchester	NH
Deborah	Arnold	Clermont	FL
FLORENCE	ARNOLD	Kershaw	SC
Kathleen	Arnold	Sumner	TX
Anne Wishart	Arnold-Ratliff	Cynthiana	KY
Carol	Arnquist	Oak Brook	IL
Oneida	Arosarena	Huntingdon Valley	PA
Crystal	Arp	Columbia	SC
susan	arpin	Katonah	NY
Karen	Arrington	Gainesville	FL
Elizabeth	Arsenault	Cary	NC
Cheryl	Arthur	Charlottesville	VA
Kelly	Arthurs	New York	NY
Thomas	Artle	Incline Village	NV
cara	artman	Saint Louis	MO
Jody	Artur	Deal Island	MD
Cheryl	Arvio	Chicago	IL
Sandra	Arzola	San Antonio	TX
Craig	Asbury	Guthrie	OK
Kevin	Ascher	Mount Kisco	NY
Sandra	Aseltine	Bremerton	WA
Sharon	Ash	Bala Cynwyd	PA
Elizabeth	Ashby	New York	NY
Audrey	Ashford	Miami	FL
Barb	Ashley	Benton Harbor	MI
Debra	Ashton	Montville	NJ
Pam	Ashton	Huntley	IL
Pamela	Askew	Dallas	TX
sam	asseff	colo spgs	CO
Marjorie	Asturias	Fruita	CO
Fe	Atienza	Newfoundland	PA
Ed	Atkins	Boulder Creek	CA
Taren	Atkins	Tucson	AZ
Nicole	Atkinson	West Palm Beach	FL
Dana	Atnip	Ferndale	MI
Jim	Atols	Schaumburg	IL
CHARLENE	ATTAYI	HOUSTON	TX

First name	Last name	City	State
J La Rue	Atterbury	San Antonio	TX
Bee	Attkisson	Arlington	VA
Dawn	Atwater	Ft. Lauderdale	FL
Kathy	Aub	Boca Raton	FL
John	Aubel	Islip	NY
Rebecca	Audet	New Castle	NH
Christine	Aurilia	Sayreville	NJ
Candi	Ausman	Fremont	CA
Diana	Avery	Colorado Springs	CO
Julio	Aviles	Los Angeles	CA
Cheryl	Avis	Litchfield	ME
Andrea	Avni	Vashon	WA
Eileen	Awsiukiewicz	Rocky Hill	CT
Phyllis	Axt	Battle Ground	WA
Bob	Ayers	Marana	AZ
Kara	Ayik	Merced	CA
Barbara	Ayotte	Marshfield	MA
Peter	Ayres	Naperville	IL
Adarsh	Ayyar	scottsdale	AZ
Breeze	Azrael	Abbot	ME
Joseph	Azzarello	Lake Linden	MI
r	b	glasgow	VA
S	B	Ny	NY
Shanna	B	Glennville	GA
V	B	Hartsdale	NY
Susan	Babbitt	Philadelphia	PA
Miles	Babcock	MORGAN HILL	CA
Katherine	Babiak	Port Tobacco	MD
Barbara	Babin	Denver	CO
April	Babo	Bridgewater	NJ
Gregory	Babo	Roselle	NJ
Patti	Babore	Las Vegas	NV
Ka	Baca	St Louis	MO
Jules	Bach	Sarasota	FL
Pamela	Bacon	Lexington	NC
Mirela	Bacria	Spanish Fort	AL
Ben	Badger	Ogden	UT
Kimberly	Badger	Carmel	NY
Rocio	Badger	Virginia Beach	VA
Lorraine	Badiali	Huntley	IL
Marjorie	Baehmann	Gunter	TX
THOMAS	BAER	Greensburg	PA
joanna	bagatta	neptune	NJ

First name	Last name	City	State
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Barbara	Bailey	Tucson	AZ
Cynthia	Bailey	COLUMBUS	GA
Janice	Bailey	New York	NY
Jill	Bailey	Bethesda	MD
Lynne	Bailey	Huntington	WV
Norma	Bailey	MT shasta	CA
Stephen	Bailey	Vancouver	WA
Susan	Bailey	Urbana	IL
Vanessa	Bailey	Novi	MI
Jean	Bails	Saint Clair Shores	MI
Jennifer	Bair	Sacramento	CA
chris	baird	new york	NY
Ryan	Baka	Minneapolis	MN
Bruce	Baker	Juneau	AK
Cruz	Baker	Schertz	TX
Darlene	Baker	Austin	TX
Jennifer	Baker	Pine City	MN
Ken	Baker	Shelby Township	MI
Lynn	Baker	Westchester	IL
Mary Sue	Baker	Sarasota	FL
Megan	Baker	Thornton	CO
Olga	Baker	Valrico	FL
William	Baker	Mineral Wells	TX
Karl	Baker	Ozone Park	NY
Susan	Balaban	Wilmette	IL
Kathleen	Balcom	Camarillo	CA
Valerie	Baldino	New Port Richey	FL
Catherine	Baldwin	Savannah	GA
Venita	Baldwin	El Dorado Hills	CA
Elliott	Bales	Laramie	WY
Victoria	Balewitz	Cincinnati	OH
Joan	Balfour	Delray Beach	FL
Maria	Balicka	Kenmore	WA
Sue	Balk	Monroe	MI
Zilia	Balkansky-Selles	Bloomington	IN
Charlotta	Ball	Hillsboro	OR
Vera	Balog	Houston	TX
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sandy	Banks	Playa Del Rey	CA

First name	Last name	City	State
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Fred	Barger	Miami	FL
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Linda	Barker	Roanoke	VA
Richard	Barker	Beaverton	OR
Melissa	Barnard	Central Square	NY
Katherine	Barnash	CHICAGO	IL
Ann	Barnes	Russell	PA
E	Barnes	Geneva	FL
Karen	Barnes	Frederick	MD
Melinda	Barnett	Lawrence	KS
Terri	Barnett	Metairie	LA
Ann	Baron	Nesconset	NY
Lisa	Barr	Batesville	MS
Lindsey	Barrett	South Bend	IN
Lisa	Barrett	Beloit	WI
Lorraine	Barrie	Kihei	HI
Janice	Barrilleaux	Sacramento	CA
Brittany	Barringer	DERBY	NY
Shirley	Barron	Greenland	NH
Dana	Barry	Devens	MA
Marina	Barry	New York	NY
robert	BARSE	lakewood	WA
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Rebecca	Bartlett	Anacortes	WA
Vanessa	Bartley	Huntsville	AL
Joyce	Bartner	Randolph	NJ
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James	Barton	Albany	OR
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Mozelle	Bashen	Reston	VA
Diane	Basile	Huntington Station	NY
Barbara	Basler	Indianapolis	IN

First name	Last name	City	State
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Rhonda	Bast	Racine	WI
Diane	Bastian	Liberty	PA
Roger	Batchelder	San Diego	CA
James	Bates	Seattle	WA
Lori	Bates	Oxnard	CA
Gina	Bates	Apple Creek	OH
Jewell	Batway	Apache Junction	AZ
Henning	Bauer	San Francisco, CA 94132, USA	CA
pf	bauer	staten island	NY
Joni	Baugh	Baton Rouge	LA
KAREN	BAUM	Palestine	TX
Miriam	Baum	Alta Loma	CA
Diana	Bauman	Mount Vernon	WA
Jennifer	Bauman	Northfield	NJ
Charles W	Baumann	Geneva	IL
Melvin	Bautista	St. Michaels	AZ
Susan	Baxter	NY	NY
Taban	Bayat	Westlake village	CA
Edward	Bayer	Deerfield	IL
Anna	Bayles	Ferndale	MI
Elizabeth	Bbroll	Arnold	CA
Bonnie	Beach	Montrose	CO
Nicole	Beachem	Burlington	WI
Eric	Beam	Brooklyn	NY
heidi jo	bean	Corona	CA
Judd	Bean	Riverview	FL
David	Beane	Standish	ME
Beverly	Beatham	Berlin	MI
Catherine	Beauchamp	Pasadena	CA
Joe	Beauchamp	Woodbury	NJ
Melissa	Beaudet	Crystal Lake	IL
Richard	Beaulieu	Woodland	CA
Kathleen	beaver	Forney	TX
Dana L	Beck	Tulsa	OK
Mary	Beck	Victoria	TX
Tammy	Beck	HILLSBORO	IL
Janice	Becker	Tarrytown	NY
Jessica	Becker	Stoughton	MA
SHARI	BECKER	west hills	CA
Suzanne	Becket	Cupertino	CA

First name	Last name	City	State
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Lisa	Bedker-Madsen	Arlington	WA
David	Beech	Woodstock	GA
Tina	Beedle	Milton	FL
Tina	Beedle	Milton	FL
Clara	Beeler	Logansport	IN
Julie	Beer	Palo Alto	CA
Cathy	Beers	Lewistown	PA
Jack	Beers	Lewistown	PA
Linda	Beers	Avon	CT
Pamela	Behan	FORT COLLINS	CO
Susan	Beil	Camarillo	CA
Ann	Bein	Los Angeles	CA
Pat	Belair	SPOKANE Valley	WA
Brandy	Belandres	San Diego	CA
Lester	Belanger	Brant	MI
mike	belanger	White/ caucasian	VT
Tonya	Belcher	Mundelein	IL
Karen	Beldon	Fort Lauderdale	FL
Steven	Belfield	Niagara Falls	NY
Laura	Belgiorno	Grafton	WI
Bobby	BELKNAP	Frankfort	MI
Bonnie	Bell	Temecula	CA
Frances	Bell	St Paul	MN
Kathleen	Bell	winter garden	FL
Sheila	Bell	Sparks	NV
William F	Bell	Bushkill	PA
Helen	Bellandi	Dacula	GA
Lydia	Bellevue	Brooklyn	NY
D	Bello	Washington	DC
Debbie	Bellucci	Wilbraham	MA
Dina	Belmir	Southbridge	MA
Daniel	Benador	San Diego	CA
Dahlia	Benaroya	Flushing	NY
Hilarey	Benda	Sherman Oaks	CA
Georganne	Bendall	Camden	ME
Nancy	Bendig	Laguna Woods	CA
Stephanie	Benedetto	Harrisburg	PA
Derek	Benedict	Lynnwood	WA
Paula	Beneke	Anchorage	AK
Karen	Benge	Ontario	CA
Albert	Benjamin	Jackson	MI
James	Benko	Woodbridge	NJ

First name	Last name	City	State
Patricia	Benner	Minneapolis	MN
Allison	Bennett	San Jose	CA
Anne	Bennett	Spokane	WA
charles	bennett	Palm Desert	CA
Katherine	Bennett	Herndon	VA
Katie	Bennett	North Augusta	SC
Tristan	Bennett	Austin	TX
Maris	Bennett	Antioch	CA
Kathy	Benshoof	Milwaukee	WI
Madeline	Benson	Lenexa	KS
Madeline	Benson	Lenexa	KS
Rob	Bentley	Cave Creek	AZ
Annette	Benton	Pittsburg	CA
Kimberly	Bentz	Farmington Hills	MI
Larry	Benvenuti	Marathon	FL
BettyAnn	Benware	Albany	NY
Diana	Berardino	New York	NY
myra	berario	castaic	CA
Julie	Berberi	St. Charles	IL
Ja	Bered	Bethesda	MD
Ann	Beres	Bethel Park	PA
Nick	Berezansky	Ridgewood	NJ
Crystal	Berg	WHITING	IN
miriam	berg	Berkeley	CA
Rachel	Berg	New York,NY 10036-6301	NY
Samuel	Berg	Newberg	OR
Jaye	Bergen	Palo Alto	CA
Trent	Berger	Clifton	VA
brad	bergeron	Nashua	NH
Sandra	Bergman	Puyallup	WA
Caroline	Bering	Mountain View	CA
Cheryl	Berkey	San Diego	CA
Nicole	Berkheimer	Knoxville	TN
Henry	Berkowitz	Sabinsville	PA
Suzy	Berkowitz	Loxahatchee	FL
Rebecca	Berlant	Brooklyn	NY
Jean	Berman	WEST PALM BEACH	FL
Siegrid	Berman	Washington	NJ
Steve	Berman	Berkeley	CA
Marie	Bernache	Houston	TX
Eduardo	Bernal	PRINCETON	TX

First name	Last name	City	State
June	Bernal	Glendale	CA
Daniel	Bernazani	Annapolis	MD
Ann	Berndt	Belmont	MA
Kris	Berner	Ft hunter	NY
Kathryn	Bernhardt	Spring	TX
Linda	Bernhardt	Talent	OR
Rosemary	Bernier	Norfolk	MA
beth	berniker	Hamilton	NJ
Abbie	Bernstein	West Hollywood	CA
Joan	Bernstein	Moorestown	NJ
Maxine	Bernstein	Nyack	NY
Erin	Berry	Jacksonville	FL
Kelly	Berry	San Rafael	CA
Leigh	Berry	Orlando	FL
Patricia	Berry	SEDONA	AZ
Sandra	Berry	Lumberton	NC
Sherry	Berry	Ventura	CA
Terry	Berry	Livermore	ME
Michael	Bertrams	Oroville	CA
Suzanne	Besaw	Milford	CT
Denise	Bessermin	Columbia	TN
Larraine	Best	NY	NY
Larraine	Best	NY	NY
Sandra	Betner	roxbury	CT
Samantha	BeuMaher	Santee	CA
Teresa	Beutel	Congers	NY
Aaron	Beversdorf	Greensboro	NC
Sheila	Bex	Mitchell	IN
Lisa	Bey	Stevens Point	WI
Monica	Beyer	Brooklyn	NY
Rama	Bharadwaj	Port Washington	WI
Michelle	Bhimani	Bellingham	WA
Margaret	Biase	East Norwalk	CT
Alice	Bidasha	Lincoln	CA
Belinda	Biddle	Loveland	CO
Sallie	Bieber	Richmond heights	MO
Edward	Bielaus	rockville	MD
Pamela	Bielma	Ritzville	WA
Mike	Bieniek	Minneapolis	MN
susannah	biggs	columbia city	IN
Kandice	Bilisoly	Colorado Springs	CO
Benjamin	Billhardt	Fontana	CA
David	Billingham	Chicago	IL

First name	Last name	City	State
Derek	Binelli	Linden	NJ
Rita Blue	Bingham	Amherst	NY
Carla	Birkenstock	Port Charlotte	FL
Alan	Birmingham	Newark	OH
Gail	Birney	Palm Coast	FL
Mer	Bis	Dallas	TX
Don	Bishop	Murrieta	CA
Jamie	Bishop	Edina	MN
CATHY	BISIANI	Ridgewood	NY
George	Bittner	Cleveland	NY
Stewart	Bixler	Rye	CO
Cindy	Black	Seattle	WA
Diane	Black	Santa Monica	CA
Hugh	Black	West Linn	OR
Jim	Black	Wilmington	DE
Sheila	Blackburn	Villa Rica	GA
Randa	BLACKWELL	Baltimore	MD
Zandra	Blair	Washington	DC
Linda	Blais	Reading	VT
Janet	Blake	New Paltz	NY
Carmen	Blakely	Lutz	FL
Stephen	Blakely	Lutz	FL
Robin	Blakesley	Canandaigua	NY
Ann	Blanchard	Rolling Meadows	IL
donna	bland	BRICK	NJ
mark	Blandford	Amarillo	TX
Cricket	Blanton	Melbourne	FL
Jeffery	Blanton	Cherryville	NC
Brad	Blaseck	Valencia	CA
Resa	Blatman	Somerville	MA
Gail	Blatt	Alexandria	VA
Toby	Blauwasser	Niwot	CO
Kae	Blecha	Quincy	IL
Christine	Bleckler	st louis	MO
Waunda	Blizzeard	ALTURAS	CA
R	Bloom	Massapequa Park	NY
Vivian	Blow	Monroe	LA
Michela Ippolita Piccarda	Blower	Hamburg	NY
David	Bly	Ithaca	NY
Cynthia	Bobko	Hawthorne	CA
JACKIE`	BOCCHINO	staten island	NY
Ketra	Bock	Rio Rancho	NM

First name	Last name	City	State
LYNNE	BOCK	WAUKESHA	WI
Alida	Bockino	Moscow	ID
Patricia	Bode	Santa Rosa	CA
Trina	Bodine	Cloverdale	CA
Christine	Bodner	West Lafayette	IN
Jill	Boekell	Charlottesville	VA
Gayle	Boesky	Bronx	NY
Larry	Bogatz	Carbondale	CO
Matthew	Boguske	Lowville	NY
Rae	Bogusky	Stratford	CT
Stephen	Bohac	Twain Harte	CA
Barbara	Bohannon	Ft Lauderdale	FL
Ruth	Boice	Shamong	NJ
Doug	Boisvert	Blaine	MN
Karin	Boixo	Las Vegas	NV
Desi	Bolanos	Ridgewood	NY
Richard	Bold	Vista	CA
Linda	Bolduan	LAKE OSWEGO	OR
Debra	Boles	Weston	FL
Judtih	Boles	Vancouver	WA
Stephen	Boletchek	Apex	NC
Debra	Bolog	Potomac	MD
Randall	Boltz	San diego	CA
MaryAnn	Bomarito	Marina	CA
R. Duncan	Bond	Langley	WA
Kristen	Boniello	Nutley	NJ
Carol	Bonifatto	Las Vegas	NV
Denise	Bonk	Philadelphia	PA
Jill	Bonkowske	Morganton	NC
Paula	Bonnell	Cave Creek	AZ
Tracey	Bonner	Arlington	TX
chris	bonnewitz	broken arrow	OK
CarolQ	Bontempo	Jefferson City	MO
Deborah	Boomhower	Colonie	NY
Elisabeth	Boone	St. Louis	MO
Anne	Booth	PETERBROUGH	NH
Brenda	Booth	Norfolk	VA
Michelle	Borad	Newport beach	CA
Hollie	Borden	Redding	CA
Sue	Borden	Elmhurst	IL
John	Borland	Williams	OR
Courtney	Borley	Luxemburg	WI
Shabi	Bormand	Woodland Hills	CA

First name	Last name	City	State
Judy	Born	Brighton	CO
Faye	Borquez	Lakewood	CO
April	Borzotta	Clinton	NJ
Mary	Bost	Hempstead	NY
Bart	Botkin	Crown Point	IN
Melissa	Bottoms	Emporia	VA
Michele	Bouchard	Waterville	ME
victoria	boucher	Hyattsville	MD
Lyn	Boudreau	Manitou Springs	CO
Roger	Boudreau	Wakefield	RI
STACY	BOUILLAND	BOCA RATON	FL
Christine	Bound	Phoenix	AZ
George	Bourlotos	Flanders	NJ
Karen	Bourque	Fairlee	VT
Barbara	Bouyet	THOUSAND OAKS	CA
JOSEPH	Bove	Cliffside Pk	NJ
Sally	Bowden	New York	NY
APRILL	BOWEN	WINTER HAVEN	FL
Diana	Bowen	South China	ME
S. G.	Bower	Tempe	AZ
Angela	Bowers	Norfolk	VA
Cindy	Bowers	Seattle	WA
Diana	Bowers	Atlanta	GA
Vincent	Bowers	Ocala	FL
Mike	Bowie	Gloucester	MA
Phala	Bowles	Roanoke	VA
Kat	Bowley	Roswell	GA
Beth	Bowling	Pottsboro	TX
Annita	Bowman	Ontario	OR
Candy	Bowman	Placerville	CA
Denna	Bowman	Louisville	KY
Gerald	Bowman	Richmond	VA
Wendy	Bowman	Lacey	WA
Laura	Boyajian	Phoenix	AZ
Cheryl	Boyce	Prosper	TX
Carol	Boyd	Escondido	CA
stacey	boyd	aurora	CO
David	Boyer	Omaha	NE
John	Boyer	Bronson	FL
Alyson	Boyer Rode	durham	NC
Lisa	Boynton	Annapolis	MD
Eileen	Bozulich	Torrance	CA
Tiana	Brachel	Cartersville	GA

First name	Last name	City	State
robynn	brackenbush	independence	OH
Kathleen	Brad	Macungie	PA
Al	Bradley	Chicago	IL
Ann	Bradley	Hamilton Square	NJ
Barbara	Bradley	Brewster	MA
Kathy	Bradley	Lugoff	SC
Marla	Bradley	Hanover	MA
Marya	Bradley	Rose Valley	PA
Carol Ann	Brady	Valley Forge	PA
Jessica	Brady	Wayne	NJ
Fran	Braglia	Elmwood Park	IL
Stephanie	Brake	Jamestown	NY
Jenny	Bramlette	Bridgeport	AL
Judith	Brand	Land O Lakes	FL
Anita	Brandariz	NYC	NY
JS	Brandenburger	Vancouver	WA
Michael	Brandes	Fort Lee	NJ
Susan	Brandes	Tucson	AZ
Deborah	Brandle	SANTA FE	NM
Jennifer	Brandon	Lexington	NC
Linda	Brandon	St louis	MO
Alex	Brandt	Elkins Park	PA
Ann	Brannan	Lizella	GA
Kelly	Brannigan	Oceanside	CA
Marnee	Brant	Fargo	ND
Karen	BRATKOVIC	Des Plaines	IL
Joan	Bratkowsky	Bayside	NY
Ronda	Bratton	Cleburne	TX
Michael	Braude	Menlo Park	CA
Eleanor	Bravo	Corrales	NM
Lisa	Brazinsky	Poway	CA
Christine	Brazzell	Louisville	KY
Enid	Breakstone	Manchester	CT
carol	breault	penacook	NH
Jacob	Breedlove	Portland	OR
Barbara J	Breen	Trail Creek	IN
Denise	Brennan	Auburn Hills	MI
NATHAN	BRENNER	La Jolla	CA
Nancy and Robert	BRESLIN	Asheville Nc	NC
Colette	Breton	Middletown	CT
Amanda	Brewer	ORRUM	NC
Steve	Breyman	Rockville	MD

First name	Last name	City	State
Julie	Brickell	Anaheim	CA
Dennis	Bricker	IOWA CITY	IA
Linda	Bridges	Athens	IL
Douglas	Briggs	Vienna	VA
Maure	Briggs	Vernon Rockville	CT
Sierra	Bright	Dover	MA
Diane	Brine	GROTON	MA
Helen	Briner	Chicago	IL
Suzanne	Bring	Philadelphia	PA
Marian	Brischle	Burton	WA
Jordan	Briskin	Palo Alto	CA
Mary	Britton	Tucson	AZ
Devin	Brizendine	Springfield	IL
Cathy	Brnak	Kenosha	WI
Jean	Brodnax	Jessup	MD
Fred	Brodsky	Fort Lauderdale	FL
Jane	Broendel	Washington	DC
Elizabeth	Broll	Arnold	CA
Peter	Bromer	Miami	FL
Renee	Bromley	Westville	IN
jonette	bronson	telluride	CO
Kim	Brookbank	Bremerton	WA
Mark	Brooker	Chicago	IL
Aspen	Brooks	DENVER	CO
Carol	Brooks	Middleburg Heights	OH
Dr John	Brooks	Tate	GA
esther	brooks	largo	FL
Michele	Brooks	Indianapolid	IN
Melissa	Brooks	Antelope	CA
Heather	Brophy	Santa Barbara	CA
S.	Brophy	Auburn	CA
Janice	Brose	Rockville	MD
Carol	Brotman	North Kingstown	RI
Kim	Brower	Asheboro	NC
Damon	Brown	Los Angeles	CA
Denise	Brown	River Vale	NJ
Edith	Brown	Irving	TX
Gabriella	Brown	Chicago	IL
Jacquelyn	Brown	Saint Paul	MN
Jennifer	Brown	Lubbock	TX
Jennifer	Brown	Virden	IL
Johanna	Brown	Canal Winchester	OH
John	Brown	San Diego	CA

First name	Last name	City	State
Julianne	Brown	Lancaster	KY
Margaret	Brown	Calabash	NC
Marie	Brown	Baldwin	NY
Mary Beth	Brown	Saint Louis	MO
Meg	Brown	New Cuyama	CA
Valerie	brown	Crownsville	MD
Becky	Brown	Cleveland	GA
Daniel	Brown	Hershey	PA
Jill	Brown	Midland	MI
Kristen	Brown	Rochester	NY
Marjorie	Browning	Benson	AZ
Barbara	Bruce	Johnstown	PA
Judy	Bruce	Wasaga Beach	ON
Debra	Bruegge	West Chester	OH
Catherine	Bruington	Riverside	CA
Cheryl	Brumbaugh-Cayford	Elgin	IL
George	Brumwell	Burien	WA
Cathy	Brunick	Virginia Beach, VA 23454, USA	VA
Nan	Brunskill	Liberty Twp	OH
Elizabeth	Brunt	Eugene	OR
JULIETTE	BRUSH-HOOVER	SEATTLE	WA
Eugene	Brusin	Quincy	MA
Thomas	Brustman	Walnut Creek	CA
Jamie	Bryan	Brooklyn	NY
Melissa	Bryan	Onalaska	WI
Karol	Bryan	Lake Worth	FL
Elizabeth	Bryant	MERIDIAN	ID
Emily	Bryant	Los Alamitos	CA
Frank J	Bryant	E Islip	NY
Sheryl	Bryant	Largo	FL
Renny	Bryden	Largo	FL
Brandon	Bryn	Annandale	VA
J'Nell	Bryson	Charlotte	NC
Stephanie	Bubier	Winthrop	ME
Theresa	Bucher	Tarzana	CA
Linda	Buckingham	Sterling	CO
Kylie	Buckland	San Marcos	CA
Deb	Buckler	Monroeville	PA
Maureen	Buckley	Brockton	MA
Cynthia	Buczkowske	Willow Springs	IL
THOMAS	BUDD	Eugene	OR
Ilene	Budin	New York	NY

First name	Last name	City	State
Joan	Budington	South Wales	NY
Patricia	Budka	Washington	DC
Tiffany	Buell	Cudahy	WI
Michelle	Buerger	Middleton	WI
Monika	Buffamonti	Buffalo	NY
Diane	Bugliarelli	Carmel	NY
kay	buhler	Yoakum	TX
Shannon	Bulger	Piscataway	NJ
Beverly	Bullock	New York	NY
Diann	Bullock	Southbridge	VA
Tammy	Bullock	Ramona	CA
Mark	Bumgarner	Homer Glen	IL
Sharon	Bunch	Piedmont	CA
Georgeta	Burca	Kennesaw	GA
Mark	Burcham	Grove city	OH
Rev. Max	Burg	Chicago	IL
Deborah	Burge	Garden Valley	CA
Nadine	Burge	Winthrop Harbor	IL
Michael	Burger	Croydon	PA
Nancy	Burger	Salem	NH
Wolfgang	Burger	Haverhill	MA
Barbara	Burgess	Hanover	PA
Lisa	Burgo	Ventura	CA
Cindy	Burke	Central City	IA
Dana	Burke	Frankfort	IL
FRANK	Burke	Los Angeles	CA
Steven	Burke	Jacksonville	FL
Diane	Burket	Palmyra	VA
Bruce	Burkey	Effingham	IL
Kathryn	Burkhart	New Holland	PA
Carl	Burks	New York	NY
Daryl	Burleson	Las Vegas	NV
Candace	Burlingame	Glendale	RI
d	burn	spring city	PA
George	Burnash	Rancho Cordova	CA
Charlie	Burns	Norwalk	CT
JL	Burns	Osawatomie	KS
Ken	Burns	Stamford	CT
Leslie	Burpo	Eugene	OR
tammy	burr	elmhurst	IL
Kristopher	Burrell	Bronx	NY
Kenneth	Burritt	Schenectady	NY
Karen	Burroughs	Winter Springs	FL

First name	Last name	City	State
David	Burtis	Calistoga	CA
Dianna	Burton	Amarillo	TX
Patricia	Burton	Gaithersburg	MD
Vincent	Bury	Brooklyn	NY
Chris	Busby	Watertown	TN
Chris	Bush	Sheboygan	WI
Claire	Bush	Austin	TX
Elizabeth	Bush	Bristol	CT
Ricky	Bush	Wheat Ridge	CO
Sarah	Bush	West Dover	VT
M	Bushman	Corning	CA
Shaun	Butch	West Hollywood	CA
Garrett	Butler	Medford	MN
Lindsey	Butler	Oak Park	IL
Rebecca	Butler	Pittsburgh	PA
Sam	Butler	Los Angeles	CA
patricia	butterfield	shelburne falls	MA
Christie	Button	Shawnee	KS
Pat	Button	Albuquerque	NM
Dean	Butts	Rosholt	WI
Renee	Butz	Mill Creek	WA
Julie	Buxton	Roanoke	VA
Raquel	Buxton	Houston	TX
Karen	Byrd	Everett	WA
Nick	Byrne	Valhalla	NY
Leslie	Byrnes	Albuquerque	NM
Lynn	Bywaters	Glastonbury	CT
D	C	Charleston	SC
G	C	Roanoke	VA
Nikki	C	Hingham	MA
Laurence	Cable	Redwood City	CA
Jill	Cacciabando	St. Louis	MO
Judy	Cacioppo	Bessemer	AL
Renee	Cady	Wharton	NJ
Rose	Caffarelli	Philadelphia	PA
Beth	Caffrey	Fresno	CA
David	Cagle	Jacksonville	FL
Brandon	Cahoon	Roswell	GA
Aurora	Caiano	Elizabeth	NJ
Jody	Caicco	Vancouver	WA
Tamara	Cain	Sacramento	CA
Lucille	Calabro	Boca Raton	FL
Joanne	Calash	Lake Worth	FL

First name	Last name	City	State
Linda	Calbreath	Chico	CA
Edye	Calderon	Midland	TX
Anne	Caldwell	Gurnee	IL
Jill	Caldwell	Golden	CO
Kaci	Caldwell	Omaha	NE
Becky	Calhoun	Reno	NV
Ellen	Callahan	Gorham	ME
Jeanette	Callahan	San Antonio	TX
Mary	Callison	Bend	OR
Tracy	Callow	HELOTES	TX
Helen	Cameron	Berkeley	CA
John	Cameron	Dublin	CA
Donn	Cammarata	Catonsville	MD
Leslie	Camp	las vegas	NV
Carole	Campbell	New Albany	OH
Donna	Campbell	Orland Park	IL
James	Campbell	Ridgway	CO
Kay	Campbell	Bellaire	TX
Koral	Campbell	Houston	TX
Linda	Campbell	Emmaus	PA
maureen	campbell	Loxahatchee	FL
Anjonette	Campos	WALNUT CREEK	CA
Britta	Campton	Dublin	OH
Luana	Canale	Jamaica Plain	MA
Nora	Canales	Las Vegas	NV
Dorian	Canalizo	Trinity	FL
Kathleen	Canavan	Scarborough	ME
Jackie	Candela	Godfrey	IL
Elaina	Caner	Costa Mesa	CA
Juan	Canet	Oceanside	CA
Kerry	Canfield	Portland	OR
Lorene	Cangiano	Agua Dulce	CA
AM	Cannon	Hurst	TX
Stacey	Cannon	Salisbury	NC
Dene	Canon	Santa Fe	NM
Sarah	Cansler	Corinne	UT
Gary	Cantara	Reno	NV
Linda	Canter	SPRINGFIELD, IL	IL
Ken	Canty	Dudley	MA
lyn	cap	greatneck	NY
R.	CAP	New York	NY
Lendsay	Cape	Dacono	CO
Jay	Caplan	Whately	MA

First name	Last name	City	State
sandra	capone	Hudson	OH
Lisa Saaf	Capozza	Ann Arbor	MI
Elsa	Caquias	Ocala	FL
Christopher	Carbone	gibbsboro	NJ
Vicki	Carbone	Jackson	TN
Geraldine	Card	EXETER	CA
Sylvia	Cardella	Hydesville	CA
Roger	Cardillo	Bayonne	NJ
Diane	Cardona	Cutler Bay	FL
Tania	Cardoso	Brockton	MA
Christine	Caredda	Rego Park	NY
Janet	Carey	Wylie	TX
Madalynn	Carey	San Antonio	TX
Sheryl	Carey	Palm Harbor	FL
Anne	Carey-Colorado	New Windsor	NY
Michelle	Carfagno	Twisp	WA
Paula	Cargile	Brunswick	GA
Renee	Cariglia	Reno	NV
CATHY	CARLETON	HadleyHADLEY	NY
Nancy	Carleton	San Antonio	TX
Sam	Carlile	Bartlett	TN
Peggy	Carlisle	St. Johnsbury	VT
Craig	Carlson	OLYMPIA	WA
Leslie	Carlson	Tucson	AZ
Peggy	Carlson	Pinckney	MI
Alicia	Carlton	St George	UT
Karen	Carmichael	Bonita Springs	FL
Diane	Carmona	Live Oak	TX
Karyn	Carnes	Modesto	CA
Michael	Carney	Runnemede	NJ
Tracy	Carney	Cape Coral	FL
carolyn	carolyn i giles	Corvallis	OR
Cynthia	Caron	Alhambra	CA
Lily	Caron	Palmetto Bay	FL
Rebecca	Caron	Taos	NM
Danny	Carpaneto	Saint James	NY
Ed	Carpenter	El Paso	TX
Patricia	Carpenter	Jacu	IL
Robert	Carpenter	Green Cove springs	FL
Amy	Carpenter	Charlotte	NC
alexandra	carr	jersey city	NJ
Denise	Carr	Chadds Ford	PA
Wendy	Carranza	Chicago	IL

First name	Last name	City	State
Steven	Carrell	Kansas City	MO
Dennis	Carrig	Somers Point	NJ
Dee	Carroll	Dallas	TX
Felicia	Carroll	Olympia	WA
Jackie	Carroll	Paso Robles	CA
Kathleen	Carroll	Windsor Mill	MD
Nedra	Carroll	Midvale	UT
Sally	Carroll	Roseburg	OR
Suellen	Carroll	Garden Valley	CA
Calesse	Carter	Seguin	TX
Krystal	Carter	Belle Chasse	LA
Marian	Carter	Elkton	OR
Rebekah Watson	Carter	Southampton	NJ
Georgia	Carver	Rancho	CA
Paul	Carver	Rancho Cordova	CA
Joan L	Casale	Goodyear	AZ
JACKIE	CASANO	Las Vegas	NV
Evelyn	Case	Somers	NY
joyce	case	Geneva	IL
Karen	Casey	Waterbury	CT
Kathy	Casey	Dracut	MA
Gina	Cashier	Lafayette	NY
Rita	Cashion	DeSoto	IL
Gina	Casoli	Southaven	MS
Chris	Casper	Stevens Point	WI
GLENN	CASSEL	Wyandotte	MI
Phyllis	Cassella	Newington	CT
Susie	Cassens	Fort Pierce	FL
James	Castaldi	PALMDALE	CA
Michele	Castano	Concord	CA
Sheryl	castellanos	Madison	WI
Victor	castellanos	Madison	WI
Susan	Castelli-Hill	Melville	NY
Gonzalo	Castillo	West Sacramento	CA
Judy	Castillo	Kyle	TX
Patricia	Castine	Egg Harbor City	NJ
Danielle	Castle	Freeport	IL
Gloria	Castle	Aliso Viejo	CA
Teresa	Castner	Mazama	WA
Connie	Castro	Coral Springs	FL
ELIZABETH	CASTRO	Winterport, ME 04496	ME
Katherine	Castro	Kearny	NJ

First name	Last name	City	State
Somdra	Catarraso	Elmhurst	NY
Susan	Cates	Durham	NC
Melissa	Cathcart	Minneapolis	MN
Mary	Cato	Arlington	TX
Cheryl	Catron	Sunnyvale	CA
Abby	Causey	Kokomo	IN
Ani	Cavada	Miami	FL
Paula	Cavagnaro	Livermore	CA
TIM	CAVALE	NYC	NY
Carrie	Cavalino	Tampa	FL
Lenny	Cavallaro	Methuen	MA
Lieren	Cavanaugh	Edgewood	WA
Edward	Cavasian	Palo Alto	CA
Frank	Cavoto	Evanston	IL
Suzan	Caylen	Weatherford	TX
Dechenne	Cecil	Sheridan	WY
MARGARET	CECONI	Houston	TX
Eli	Celli	Chapel Hill	NC
Marie	Cepkauskas	Eastham	MA
Holly	Cerretani	Boulder	CO
Dana	Cervantes	Huntington Beach	CA
Isabel	Cervera	Salisbury	NC
Cindy	Cetrulo	Naples	FL
Lisa	Chadwick	Detroit	MI
Michael	Chaffee	Union	KY
Marlene	Chamberlain	Springfield	NH
Claire	Chambers	Oakdale	CA
Fredricka	Chambers	Louisville	KY
John	Chambers	Carthage	MO
Patricia	Chambers	Winsted	CT
T.	Chandler	Dallas	TX
Kangmin	Chang	SAN FRANCISCO	CA
willow	chang	honolulu	HI
Beth	Chao	Lawrence	KS
Babbie	Chapman	Woodstock	GA
Valerie	Charbonneau	Putnam	CT
Faith	Charity	Burlington	VT
Linda	Charles	Byron	NY
Elizabeth	Charlton	Yarmouth Port	MA
Cindy	Charnetski	Shavertown	PA
Mary	Chartrain	Glendale	CA
Ken	Chasin	Charlottesville	VA
Pamela	Chattergoon	Columbus	OH

First name	Last name	City	State
Sherry	Chauvin	Waltham	MA
Ruth	CHAVE	Hackensack	NJ
Salissa	Chavez	San Tan Valley	AZ
Ernie	Chavez	Washington	NJ
J R	Checchia	Arroyo Seco	NM
J	Cherr	NY	NY
Lisa	Cherrier	Douglas	MA
Michael	Chesen	Weston	FL
Antonia	Chianis	Blue Jay	CA
Richard	Chiger	Monticello, NY	NY
Sherry	Childress	Watauga	TX
Carrie	CHILSON	WILLIAMSBURG	VA
Ellen	Chilson	Burlington	WI
Maria	Chimowitz	Rochester	NY
Andrea	Chin	Redmond	WA
Pat	Ching	Palm Springs	CA
Laura	Chinofsky	SOUTHAMPTON	PA
John	Chipman	Oak Ridge	NC
Cathy	Chirichells	Ridgewoof	NY
Andrea	Chisari	Mims	FL
Veroune	Chittiim	Selma	OR
Susanna	Chivian	Cambridge	MA
Tim	Chlopowicz	Cary	NC
Mark	Chmielewski	East Granby	CT
AJ	Cho	San Leandro	CA
Janie	Chodosh	Santa Fe	NM
Stella	Choe	Gilbert	AZ
Valerie	Choinski	Frederick	MD
Alex	Christensen	Webster Groves	MO
carol	christensen	north bellmore	NY
Diane	Christensen	Lynnwood	WA
Amy	Christenson	Templeton	MA
Janet	Christian	Beavercreek	OH
Mary	Christian	Roscoe	IL
Bill	Christie	Tucson	AZ
Roxanne	Christie	Oswego	NY
jimmy	christopher	Irving	TX
Ann-Marie	Christopher	Pittsburgh	PA
Mary	Christy	Tonawanda	NY
Teresita	Chua	San Francisco	CA
KATIKA	CHUON	Atlantic Beach	FL
Janelle	Church	Yelm	WA
Mary C	Church	Middleburg	FL

First name	Last name	City	State
Susan	Ciaramella	Sylmar	CA
Dawn	Cieplensky	New York	NY
Thomas	Cierech	Ringwood	NJ
Maryrose	Cimino	Plano	TX
Stefan	Ciosici	Bradenton	FL
madeline	ciresi	West Warwick	RI
ALAN	CITRON	Bluffton	SC
renee	cizauskas	Los Gatos	CA
bob	clark	Grants Pass	OR
Emily	Clark	Alameda	CA
Erika	Clark	Pawcatuck	CT
Judy	Clark	Albuquerque	NM
Kathleen	Clark	Dripping Springs	TX
Kathy	Clark	medway	MA
Linda	Clark	Folsom	CA
Maxine	Clark	Bonney Lake	WA
Michele	Clark	Chapel Hill	NC
Natalie	Clark	Little Rock	AR
Nichole	Clark	Lake in the Hills	IL
Sandra	Clark	Erie	PA
Steve	Clark	South Chatham	MA
Sueanne	Clark	Wanship	UT
Jude	Clark Warnisher	Los Osos	CA
Karl	Clarke	Georgetown	ME
Lorraine	Clarke	Pooler	GA
Martha	Class	Houston	TX
Janice	Classen	Hutchinson	KS
Teresa	Claude	Omaha	NE
Chris	Clayborne	Hopewell	VA
Ad	Clayton	Oceanside	CA
Angela	Clayton	Oceanside	CA
Dawn	Clayton	Sidney	OH
Susan	Clayton	Pittsboro	NC
Sarada	Cleary	OCEANSIDE	CA
Erin	Cleere	Burlington	VT
Bernard	Clegg	Driftwood	TX
Kay	Clement	plymouth	MI
Melissa	Clements	St. Louis	MO
Jill	Cleveland	Delavan	WI
Patricia	Cleveland	Eugene	OR
Amanda	Clever	Chillicothe	OH
Jennifer	Cline	Glendale	AZ
Kathleen	Cline	Davis	CA

First name	Last name	City	State
Carol	Clinton	Ventura	CA
Jarrett	Cloud	Stanhope	NJ
Whitney	Cloud	Hawley	TX
Kimberly	Clow	Homestead	FL
Tania	Coambs	Champaign	IL
Margaret	Cobb	Archer	FL
Annalee	Cobbett	Durham	NC
Casey	Cochran	North Reading	MA
Rosanne	Cochran	San Diego	CA
Lauren Adasiak	Cocilova	Rochester	NY
William	Cody	Charlotte	NC
John	Coffey	Shortsville	NY
Jennifer	Coffin	Bradenton	FL
Bea	Cohen	Desert Hot Springs	CA
CARLOS	COHEN	HACKENSACK	NJ
Charles	Cohen	Huntsville	AL
Frederica	Cohen	Akron	OH
Gail	Cohen	Des Plaines	IL
Harriet	Cohen	New York	NY
Jennie	Cohen	Pasadena	CA
Justin	Cohen	NEW YORK	NY
LESLIE	COHEN	EGG HARBOR CITY	NJ
Marilyn	Cohen	Portland	OR
naomi	cohen	Albrightsville	PA
Shari	Cohen	Scottsdale	AZ
Tova	Cohen	Brooklyn	NY
Wayne	Cohen	Plainville	MA
Tina	Colafranceschi	Whitethorn	CA
GINA	COLANGELO	San Mateo	CA
Edwin	Colberg	San Juan	PR
Lesley	Colberg	Cottage Grove	OR
Gayle	Colburn	New Haven	CT
Dori	Cole	Wheaton	IL
Ulana	Cole	Salem	OR
Barbara	Cole	Mason	OH
Nina	Coleman	GREENVILLE	GA
Donna	Coleman	middletown	CT
Karen	Coll	Pittsburgh	PA
Michelle	Collar	North Attleboro	MA
Diane	Collier	Fraser	CO
JANET	COLLIER	SPRING CITY	TN
David	Colliins	Louisville	KY

First name	Last name	City	State
Barbara	Collins	Troy	NH
Belinda	Collins	Largo	FL
Emory	Collins	Pineville	NC
Heidi	Collins	Lakeside	CA
Jerry	COLLINS	Carson	CA
Kelly	Collins	Santa Rosa	CA
Deborah	Collodel	Malibu	CA
Lisa	Collon	Seymour	CT
Evelyn	Coltman	Waynesville	NC
Cammy	Colton	Overland Park	KS
Marie	Colvin	Kennewick	WA
Catharine	Colwell	Ormond Beach	FL
Jacqueline	Colyer	Oxford	PA
Debi	Combs	Decatur	GA
Dr. Dorothy	Comeau	Topanga	CA
Richard	Comito	Oakland	CA
Sabrina	Commisso	Pittsford	NY
Jim	Compton	Denver	CO
L	Compton	Orlando	FL
Carmen	Comstock	Hemet	CA
Vira	Confectioner	Sunol	CA
DENNIS	CONKLIN	GENOA	OH
april	connolly	Braintree	MA
Paul	connolly	Braintree	MA
Roz	Connor	Pueblo	CO
Dana E	Connors	Irvine	CA
Jennifer	Connors	Fairfax Station	VA
Becky	Connors	Galesburg	IL
Marilyn	Conrad	Worcester	MA
Kate	Considine	Oxnard	CA
Leda	Contis-Papassotiriou	Berkeley	CA
Ann	Conway	Homestead	FL
Joyce	Coogan	Littleton	CO
Courtney	Cook	Sonora	CA
Deborah	Cook	Rolla	MO
Lee	Cook	Decatur	GA
Steven	Cook	Seminole	FL
Jeannine	Cook	Roseburg	OR
Joyce	Coombs	CORRYTON	TN
Lisa	Coombs	Murrieta	CA
Patricia	Cooney	St. Petersburg	FL
Betty	Cooper	Ellettsville	IN
Charlene	Cooper	Poestenkill	NY

First name	Last name	City	State
David	Cooper	RIO RANCHO	NM
James	Cooper	Astoria	NY
James	Cooper	Granville	OH
John	Cooper	Lewisburg	PA
Lisa	Cooper	Birmingham	AL
Thomas	Cope	Medina	OH
Olga	Coplan	Forest Hills	NY
Dave	Copper	Staunton	VA
Heide	Coppotelli	Cedar Mountain	NC
Debra	Corbett	New Albany	IN
Nina	Corbin	Little Rock	AR
Dawn	Corby	Halifax	MA
KRIS	CORDOVA	LOMA LINDA	CA
Elizabeth	Cori-Jones	Gainesville	FL
Ann-Marie	Corkett	richmond hill, ny	NY
Jared	Cornelia	Wilmington	DE
Wendy	Cornell	Honeoye Falls	NY
Ana	Coro	Hollywood	FL
Catherine	Correia	Tucson	AZ
M Cecilia	Correia	Elizabeth	NJ
M Rute	Correia	Elizabeth	NJ
Ruth	Correia	Elizabeth	NJ
Christian	Corridon	Tacoma	WA
Ellen	Corrigan	St. Paul	MN
Jennifer	Corrigan	Las Vegas	NV
Theresa	Corrigan	Sacramento	CA
Elza	Corrill	Cincinnati	OH
Federico	Cortes	Palm Springs	CA
Natalie	Cortez	Sacramento	CA
L.	Cory	Davenport	FL
Diane	Costa	Palm Coast	FL
Lynn	Costa	Warwick	RI
Sandra	Costa	Texas	TX
Cathy	Costello	St. Paul	MN
Cathy (Mary Catherine)	Costello	St. Paul	MN
Sally	Costello	Abington	MA
Sherry	Costello	Brooklyn	NY
Barbara	Costides	Milton	GA
John	Cota	Bristol	RI
David	Cotner	Ventura	CA
Christine	Cotton	Ellsworth	ME
Sandra	Couch	Naperville	IL

First name	Last name	City	State
Laureen	Coughlin	Olmsted Twp	OH
William	Coulter	Bellflower	CA
charles	countryman	Geneva	OH
Vera	Cousins	Burr Ridge	IL
Betsy	Cousins-Coleman	Leonia	NJ
Kathryn	Coutcher	Belleview	FL
Sandi	Covell	Daly City	CA
Barbara	Covelli	Tinley Park	IL
Sue	Covello	Middleway	WV
Robin	Covino	Milford	CT
Christina	Cowan	Burke	VA
Deborah	Cox	Goochland	VA
Edythe	Cox	Braintree	MA
Lisa	Cox	Jupiter	FL
Meredith	Cox	Cerritos	CA
Rachel	Cox	Oakland	IL
Margaret	Coyne	Dunlap	TN
Ann	Coz	Nashville	TN
Summer	Crabtree	Jacksonville	FL
Robin	Craft	Plain City	OH
Kristin	Crage	Yonkers	NY
Pamela	Craig	Hackettstown	NJ
joseph	cralle	Pittsburgh	PA
Chris	Cram	Mcarthur	OH
Paulette	Crammond	Honolulu	HI
AnaLisa	Crandall	Adkins	TX
Jolinda	Crane	Euclid	OH
Madeline	Crane	Milwaukee	WI
Marcella	Crane	Phoenix	AZ
STEPHEN	CRANE	Paige	TX
Steven	Crase	Antioch	CA
Jason	Crawford	Lancaster	PA
Stacy	Crawford	Durango	CO
Tracy	Crawford	Mt Pleasant	MI
Jean	Crawford	Santa Fe	NM
Victoria	Crawford	Rockville	MD
Lynn	Craycroft	Apex	NC
Brenda	Crazy Bull	Kuna	ID
Jessica	Cresseveur	New Albany	IN
Valerie	Crews	Columbus	OH
Nancy	Crider	Woodbury	CT
Noel	Crim	Sun City West	AZ
Paula	Crist	Downingtown	PA

First name	Last name	City	State
Daniela	Cristan	Mastic Beach	NY
Judith	Critzer	Bryant Pond	ME
Scott	Crockett	Florence	OR
Susan	Cromwell	Portland	ME
Robert	Crone	Kailua	HI
Linda	Cronin	Rochester	NY
Susan	Cronin Parano	San Francisco	CA
Ronny	Crooks	Huntersville	NC
Kathleen	Crosbie	Manchester	NJ
Lori	Cross	Texarkana	TX
Russ	Cross	Ladoga	IN
Eric	Crouch	Ames	IA
J. Reyna	Crow	Ontonagon	MI
Michael	Crowden	Harrisonville	MO
Peggy	Crowl	Trinity	TX
Marty	Crowley	Port Townsend	WA
jesse	Croxton	Venice	CA
Elizabeth	Cruickshank	Clearwater	FL
Anna	Cruikshank	Springfield	OH
Jonathan	Cruise	Rolesville	NC
Leuise	Crumble	Chicago	IL
Kevin	Crupi	Marquette	MI
Allen	Crutcher	Ashland	OR
Henry	Cruz	South Lake Tahoe	CA
Valerie	Cruz	Kunkletown	PA
Oscar	Cuellar	Houston	TX
Stephanie	Cuellar	Sunnyside	NY
Shane	Culgan	New York	NY
Debra	Culwell	Gresham	OR
sally	cumine	Greeley	CO
Patricia	Cummings	Clawson	MI
Suzann	Cummings	Fern Park	FL
tanya	cummins	Chuluota	FL
Judy	Cundy	Spokane	WA
Grace	Cunningham	Camarillo	CA
Jennifer	Cunningham	Bolingbrook	IL
Deb	Cunningham	Golden	CO
Michelle	Cupp	Harrisburg	PA
Debra	Curci	Toms River	NJ
Ruth	Curcio-McFalls	Rutherfordton	NC
Bechi	Currier	Howell	NJ
Marcia	Curry	Alamo	TX
Timothy	Curry	Greensburg	KY

First name	Last name	City	State
Margaret	Curtin	Hyde Park	MA
Cathy	Curtis	Buffalo	MN
Helen	Curtis	Spokane	WA
Leslie	Curtis	Franklin	WI
Cynthia	Curtis	Garland	TX
francie	curtiss	Los Altos	CA
Patty	Curtner	Olathe	KS
Cheryl	Cusella	W Delray Bch	FL
Wendy	Cushing	Buffalo	NY
Margaret	Cuskley	Fresh Meadows	NY
Jacqueline Cuthbertson	Cuthbertson	Charlotte	NC
Dawn	Cvitkovich	port richey	FL
Stephanie	Cybulski	Cheektowaga	NY
Amy	Cyr	Tolland	CT
Roberta R	Czarnecki	Everett	WA
Gino	Czaster	Tonawanda	NY
Magdalena	Czech	Kew Gardens	NY
Romona	Czichos-Slaughter	Hollister	CA
Tara	D	Nashville	TN
Polly	D Pitsker	Huntington Beach	CA
Chris	Dacus	BELL BUCKLE	TN
As	Dad	Jersey City	NJ
Deepak	Dadlani	Miami	FL
Orysia	Dagney	Philadelphia	PA
Helen	Dagostino	Norfolk	VA
Dr. Elizabeth	Dahl	Cook	MN
Deborah	Dahlgren	East Hartford	CT
Jill	Dahlman	Rancho Cordova	CA
Debra	Daigneault	Warwick	RI
Terry	Dailey	Mammoth Spring	AR
Laura	Daily	Aurora	CO
Sandy	Dalcais	Woodside	NY
Elaine	Daley	Jamaica Plain	MA
Suzann	Daley	Shoreline	WA
Lukas	Dalfelt	Troy	NY
Eric	Dallin	Gulfport	MS
Dustin	Dalman	Cortez	CO
skott	daltonic	Oakland	CA
Christian	Daman	Sterling Heights	MI
Sandra	Dambrosio	Hughestown	PA
Matt	Damon	Kansas City	MO
Diane	Danby	Longmont	CO

First name	Last name	City	State
judith	danford	tallahassee	FL
Anjan	Dani	Houston	TX
Jodi	Daniels	Maylene	AL
Lisa	Daniels	Oak Point	TX
Patricia	Daniels	Manassas	VA
Sarah A	Danielson	Tucson	AZ
Ron	Danklefs	Hyde Park	MA
elinor	Dankner	barnstable	MA
Gina	Danna	Plano	TX
Jen	Danner	Nazareth	PA
Janice	Dannhauser	Kansas City	MO
Mary Jo	Danton	Bethesda	MD
Susan	Dapkus	Durham	CT
Paulina	Daquiz	Irvine	CA
Marianne	Daransky-Kanter	Van Nuys	CA
Eileen	Darcy	New York	NY
Denise	Dardarian	LOS ANGELES	CA
Jessica	Dardarian	Folsom	CA
Cheryl	Dare	Memphis	TN
Tracey	Dare	Miami	FL
Rose	D'Argenio	Kearny	NJ
Barbara	Darling	North Weymouth	MA
Carrie	Darling	Phoenix	AZ
Cindi	Darling	Fairfax	CA
Sandy	Daron	SPRING	TX
Elizabeth	Darovic	Monterey	CA
Cathy	Darracott	Freeland	WA
Kari	Darvill-Coate	Bothell	WA
CD	DASH	SOUTH BEND	IN
Rock	Dash	Sag	CA
Rhonda	Daudistel	Southport	NC
Susan	Davenport	HOUSTON	TX
Merrill	DAVID	State College	PA
Terri	David	Venice	FL
Jill	Davidson	Fairfax Station	VA
Pat	Davidson	Portland	OR
Lynne	Davies	San Francisco	CA
Steven	Davies	Kirkwood	MO
Christina	Davis	Spanaway	WA
Elizabeth	Davis	Kettering	OH
Heather	Davis	Beaverton	OR
Jerry	Davis	Merced	CA
Judy	Davis	Dexter City	OH

First name	Last name	City	State
Miranda	Davis	Theodore	AL
Ryan	Davis	Burbank	CA
S	Davis	Bristol	CT
Timothy	Davis	Garden Grove	CA
Ward	Davis	Belle Isle	FL
Cheri	Davis	Sarasota	FL
Connie	Davis	Pine	CO
Kathleen	Davis	Bethel pk	PA
Eileen	Dawson	Durango	CO
James	Dawson	Davis	CA
Lynda	Dawson	PUEBLO WEST	CO
Sylvia	De Baca	San Dimas	CA
Lennette	De Forest	Durango	CO
Mariah	de Forest	Camas	WA
Brandy	De LaCrosse	Auburn	WA
Danielle	De Litta	The Woodlands	TX
Elizabeth	de Padova	Morris Plains	NJ
anastasia	de simone	albuquerque	NM
Francisco	De Tavira	New York	NY
Linda	Deal	Montgomery	AL
Cindi	Dean	Rye	NY
Sarah	Dean	Washington	DC
Shelagh	Dean	Tewksbury	MA
Carol	Dearborn	Lakemont	GA
Dawn	Dearden	Alexandria	VA
Therese	DeBing	Pacific Grove	CA
Natalie	DeBoer	Henrico	VA
Yves	DeCargouet	Lucerne	CA
Stephen	DeCesare	Johnston	RI
Scott	Deckman	Darlington	MD
Greg	DeCowsky	Rock Hall	MD
Diana	Dee	Valley Glen, CA	CA
Dee	Dee Fremont	Oceanside	CA
Monica	Defelice	Salisbury	MD
Paula	DeFelice	Richmond	CA
Jean	Deferbrache	Davenport	FL
Grace	DeFillipo	Linden	NJ
Anthony	DeFusco	Cumberland	RI
Jennifer	DeGerolamo	Barrington	NJ
James	DeGiovanni	Huntington	NY
Leland	Degolier	Rapid City	SD
Jamie	DeGrazio	Malvern	PA
Tisha	Dehart	Lexington	KY

First name	Last name	City	State
Jeff	Deischer	Aurora	CO
Mitzi	Deitch	Langhorne	PA
Annette	Dekanich	Maryville	TN
Charles	Deknatel	Jamaica Plain	MA
Bianca	deLeon	Fort Pierce	FL
Gladys	Delgadillo	San Diego	CA
Nyla	Delgado	Orlando	FL
Cathy	Delia	Cape Coral	FL
Tony	DeLia	Deerfield Beach	FL
Donna	Delin	Lombard	IL
Victoria	DellaValle	Aston	PA
Susan	DelMedico	San Jose	CA
Karen	Delmonico	Cocoa	FL
Yvonne Del Rossi	Delrossi	Slc	UT
Theresa	DeLuca	Melrose	MA
Dana	DeMaio	Bunnell	FL
Carolyn	Demers	Alburgh	VT
Mindy	Deming	Minneapolis	MN
Margaret	DeMott	Sacramento	CA
Sheila	Dempsey	Bronx	NY
Tracy	Dempsey	West Haven	CT
SUZANNE R	DENAULT	NEW BEDFORD	MA
Laurie	Denis	Salem	MA
Robert	Denk	Snohomish	WA
Debra	Denker	SANTA FE	NM
Kelly	Denney	Jupiter	FL
Sandra	Denninger	Bourne	MA
Gudrun	Dennis	Gainesville	FL
Joan	Dennis	Greenport	NY
V.	DePergola	Oakland	NJ
Jess	DePew	Lebanon	OR
Frank	DePinto	Panama City	FL
Cindy	DePrimo	Raritan	NJ
Deborah	Derby	East Stroudsburg	PA
Lesly	Derbyshire	Los Angeles	CA
Christina	DeRespiris	New Rochelle	NY
Linda	Derks	Clackamas	OR
Louise	Dernehl	Mequon	WI
Patricia	Derrough	Mills River	NC
John	Dervin	Apopka	FL
Apsara	Desai	Sunnyside	NY
Jai	Desai	Shawnee	KS

First name	Last name	City	State
Catherine	DeSalvo	Upland	CA
Victoria	DeSarno	Fairfield	CT
Susan	Deschenes	Fernley	NV
Sheryl	DeSilva	Las Vegas	NV
Judy	Desreuisseau	Gill	MA
Caroline	DeStefano	Boston	MA
Peggy	Detmers	Rapid City	SD
Paula Marie	Deubel	Sterling Heights	MI
Robin	Devaney	Middletown	PA
Sandy	Devenport	Scottsdale	AZ
Cheryl	Devens	LONGVIEW	TX
Connie	Devine	Yerington	NV
Christy	Devlin	Ashburn	VA
Anthony	DeVoto	Oak Ridge	NJ
Myra	Dewhurst	Nokomis	FL
Susan	DeWitt	Largo	FL
Lucy	DeWolf	Lexington	MA
Owanza	di Mdina	Lakewood Ranch	FL
Frank	Di Stefano	Los Osos	CA
Stephen	Diamond	Old Lyme	CT
Miriam	Diaz	Murdock	FL
Nadia	Diaz Garibay	Midland	TX
Rebekah	Diballa	Florence	KY
Jean	Dibble	Clermont	FL
Dawn	DiBlasi	Fairfield	ME
Jeanine	Dichristofano	Palos Hills	IL
paul	dicioccio	Wethersfield	CT
Marie	Dickenson	Hayes	VA
susan	dickerson	clinton	MD
laura	dickey	Boonton	NJ
Samuel	Dickey	Youngstown	OH
Judith and Daniel	Dickinson	Bath	MI
Ursula	Dicks	Easton	MD
Mary	Dickson	Dayton	NV
Mari	Dickson Jung	OCONOMOWOC	WI
Linda	DiDomenico	Mesquite	NV
Teresita	Diegor	Plainsboro	NJ
grace	diemand	cataumet	MA
B. Thomas	Diener	Albuquerque	NM
Mary Ann	Diercks	Minneapolis	MN
Gina	Diggs	Sugar Grove	NC
valerie	dilger	Chicago	IL

First name	Last name	City	State
Diane	Dillabough	New Hartford	NY
Christi	Dillon	Mooresville	NC
Sandy	Dillon	Kailua Kona	HI
Shannon	Dilts	Richmond	KY
Joseph	DiMaggio	Baltimore	MD
Penny	DiMartino	Richmond	VA
Rocco	Dimeo	Highlands	NJ
Sandra	Dimmick	Westcliffe	CO
Tabby	Dimock	LeRoy	MI
Sue	DiMoia	Levittown	PA
Christine	DiNapoli	North Merrick	NY
Charles	Dineen	Lawton	MI
Patricia	DiPaolo	Jamestown	RI
Carrie	DiPirro	Evergreen	CO
Mark	Dirnberger	Arlington	TX
Patricia	Dishman	Nashville	TN
Michelle	Diss	Shelby Twp	MI
Christian	Dittmar	Milford	PA
Judy	Ditton	Bethesda	MD
Angie	Dixon	Clinton	WA
Lori	Dixon	Northridge	CA
Sheila	Dixon	Concord	CA
Mary	Doane	Watsonville	CA
Donna	Dobbins	Bend	OR
Sofia	Dober	Elk Grove Village	IL
Dobi	Dobroslawa	Estero	FL
Deborah	Dobson	Hendersonville	NC
Patricia	Dobson	Woodland Park	CO
Kathleen	Doctor	Kittanning	PA
Kathrin	Dodds	Mission	TX
Kathryn	Dodds	Brick	NJ
Scott	Dodson	Indianapolis	IN
Adrienne	Doherty	Lake Forest	IL
Meaghan	Doherty	Bend	OR
Randolph	Dolan	Benicia	CA
Merelyn	Dolins	Maplewood	NJ
Sheri	Dollin	Franktown	CO
Judy	Dolmatch	Florence	OR
Alexander	Dolowitz	Salt Lake City	UT
Mary	Dome	Cape Fair	MO
Buena	Dominguez	Grand Blanc	MI
Ellen	Domke	Chicago	IL
Marilyn	Domke	Evanston	IL

First name	Last name	City	State
Denise	Donahue	Philadelphia	PA
mellisa	donaldson	Chattaroy	WA
Susan	Donaldson	Boulder	CO
Andrea	Donelson	Waterford	MI
Anthony	Donnici	Liberty	MO
Deanna	Donofrio	Brooklyn	NY
Jeanine	DOnofrio-Bess	Mount Dora	FL
Virginia	Donohue	Hudson Falls	NY
Elaine	Donovan	Cedar Rapids	IA
Margaret	Donovan	New York	NY
Jill	Dosik	Frisco	TX
Dr. Willa	Doswell	Harrison City	PA
Carol	Dotson	Portland	OR
Carol	Dotson	Portland	OR
Lisha	Doucet	Wellington	CO
Barbara	Doucette	Denver	CO
Emmah	Doucette	Fryeburg	ME
John	Doucette	Providence	RI
Ly	Doug	Troy	MI
Sarah	Dougan	Lebanon	NJ
Bethany	Douglas	Cincinnati	OH
Dianne	Douglas	Phoenix	AZ
Amy	Douglass	Chandler	AZ
barb	douma	greenbank	WA
Audrey	Dove	Harrisonburg	VA
Stephanie	Dowell	Mount Airy	NC
Alice	Downie	Marshall	VA
S	Downing	Henderson	NV
april	doyle	conway	SC
Amy	Dozier	Rocky Point	NY
Susan	Drago	Hamburg	NY
Elizabeth	Dragovich	Upper Chichester	PA
Pamela	Draper	Bandera	TX
sheila	draughon	st augustine	FL
Heather-Heth	Drees	Grand Forks	ND
frances	drescher	wallingford	CT
Janet	Drew	Suffolk	VA
Laurel	Drew	philadelphia	PA
Louis	Drew	Cedar Park, TX 78613	TX
J.	Driscoll	Batavia	IL
Brenda	Driscoll	Pottstown	PA
Andrea	Dronen	Lindstrom	MN

First name	Last name	City	State
Cliff	Drought	Norfolk	VA
Noreen	Drozd	Streamwood	IL
Carol	Drozdyk	Ballston Spa	NY
Victoria	Druding	Egg Harbor Township	NJ
David	Druding	Fayetteville	AR
Lyn	du Mont	golden	CO
Martin	Du Plessis	Springfield	MA
Eleuthera Paulina	du Pont-Passigli	Alstead	NH
Isabelle	Du Soleil	Los Angeles	CA
Amy	Dubey	Berkeley Heights	NJ
Michael	Dubin	Lino lakes	MN
Joan	Dubis	Boston	MA
Gregory	Dubreuil	Freeport	FL
Andreas	Dudda	San Clemente	CA
Diana	Duffy	East Tawas	MI
Jennifer	Duffy	Ave Maria	FL
Patty	Duffy	Canal Winchester	OH
Jean	Dufresne	Kansas City	MO
Glenda	Dugan	Walnut Creek	CA
Linda	Duke	Belleville	IL
Martha	Duke	Richardson	TX
Robert	Dulgarian	Somerville	MA
Robin	Dumler	Berlin	MD
kimberly	dunbar	Rocklin	CA
Miriam	Dunbar	Mancos	CO
Daibra	Duncan	ELK	WA
Denice	Duncan	WHITNEY POINT	NY
Denny	Duncan	Lincoln City	OR
Jennifer	Duncan	Matthews	NC
John	Dunkum	Missoula	MT
Thomas	Dunlap	Latrobe	PA
Brian	Dunn	Henrico	VA
Connie	Dunn	Lebanon	IL
John	Dunn	Morristown	NJ
Karen	Dunn	Marietta	GA
Robbin	Dunn	Farmington	CT
Patricia	Dunne	VA Beach	VA
Eileen	Duppstadt	La Porte	TX
Cindy	Dupray	Escondido	CA
Jerald	Dupree	Newburyport	MA
Matthew	Duprey	Montclair	NJ

First name	Last name	City	State
Brooke	Duquette	Dorchester	NH
Rebekah	Duran	Tucson	AZ
Lisa	Durling	Royal Oak	MI
Melanie	Durso	Jersey City	NJ
Cindy M.	Dutka	Philadelphia	PA
Janice	Dutka	North Olmsted	OH
Coralee	Dutra	LODI	CA
Stephen	Dutschke	Louisville	KY
Monica	Dutton	Milan	IN
Ruth	DuValle	Live Oak	TX
Robert	Duy	Columbia	IL
Alan	Dwillis	Lathrop	CA
Ausra	Dwyer	Indio	CA
Sandra	Dykstra	Blair	NE
Daria	Dzura	Chicago	IL
Shirley	E Graves	Lake Tapps	WA
Dianne	E Lang	Toms River	NJ
Angela	E Peters	Arlington Heights	IL
Sally	Eadie	Longwood	FL
Cheryl	Eames	Sun City	AZ
Monica	Earle	LAFAYETTE	IN
Daniel	Eassey	Ormond Beach	FL
Christopher	East	Tacoma	WA
Katja	Eastland	Brea	CA
jennifer	eastley	Charlestown	NH
Anne	Eastman	Houston	TX
Missy	Eaton	NYC	NY
Paula	Eaton	Kansas City	MO
Terry	Eaton	Brush Prairie	WA
Monica	Ebben	Olympia	WA
regan	ebert	Chicago	IL
Denise	Echauri	Beaverton	OR
jennie	echo	egg harbor twp	NJ
Karin	Eckelmeyer	Portola Valley	CA
Joan	Eckert	San Jose	CA
Janine	Eckhart	LEHIGHTON	PA
Sabrina	Eckles	Lubbock	TX
Susan	Eckstein	Stanhope	NJ
Donald	Eddinger	CANANDAIGUA	NY
Elaine	Edell	Thousand Oaks	CA
Courtney	Eder	Woodland Hills	CA
Renee	Eder	Moscow	ID
Dominique	Edmondson	Upper Marlboro	MD

First name	Last name	City	State
Lynn	Edward	San Pedro	CA
Ann	Edwards	Thornton	CO
Caryl McIntire	Edwards	Harrison	ME
Donna	Edwards	New Tazewell	TN
Judith	Edwards	Laa Mesa	CA
Julie	Edwards	Independence	MO
Mary	Edwards	Rutherfordton,	NC
Monique	Edwards	Tucson	AZ
Stephanie	Edwards	Lake Forest Park	WA
Debbie	Efron	Manalapan	NJ
Tara	Egger	Ojai	CA
Laura	Ego	Portsmouth	NH
F. R.	Eguren	Redondo Beach	CA
Noah	Ehler	Carnation	WA
Rachel	Ehrenreich	Gulf Breeze	FL
Gordon	Ehrman	Greenbrae	CA
Ingrid	Eichenbaum	Lahaina	HI
Michael	Eichenholtz	Richmond	CA
Jaymie	Eichorn	Greensboro	NC
Elizabeth	Eide	Minneapolis	MN
Linda	Eidelberg	CHARLOTTE	NC
Patricia	Eidenschink	Glendale Heights	IL
susan	eirich	Driggs	ID
Paul	Eisenberg	Baltimore	MD
Diane	Eisenhower	Vero Beach	FL
Katie	El Koraichi	chicago	IL
Lisa	Elderton	Bayville	NJ
Christine	Elie	Littleton	MA
Red	Elisa Mendoza	North Miami	FL
Elizabeth	Elkins	DERWOOD	MD
James	Eller	Sun River	MT
Will	Eller	Culpeper	VA
Arthur	Ellerd	San Pedro	CA
Amanda	Elliott	Houston	TX
AnnaLea	Elliott	Richmond	VA
June	Elliott	200 Pineview Rpad	SC
Bonnie	Ellis	Westborough	MA
Shelia	Ellis	North Wilkesboro	NC
Margery	Ellison	GOODYEAR	AZ
Erin	Ellrod	Bethel Park	PA
Barbara	Ells	Kailua Kona	HI
Mari	Elvi	Forest City	NC
regina	embry	gainesville	FL

First name	Last name	City	State
Judith	Embry	Florida	MA
Jennifer	Emerle-Sifuentes	Hockessin	DE
Eve	Emerson	Spokane	WA
Jan	Emerson	New York	NY
Margaret	Emerson	Philadelphia	PA
Lise	Emond	Riviera Beach	FL
Carol	Emrick	Denver	CO
Madelyn	Endress	Katy	TX
Marilyn	Eng	Diamond Bar	CA
Gordon	Engel	Green Bay	WI
F.R.	Engelhardt	New York	NY
erin	enger	New Hope	MN
Lisa	England	Norristown	PA
Ruann	England	Walnut Creek	CA
I.	Engle	Village of Tularosa	NM
Klaudia	Englund	Anacortes	WA
Richard	Enloe	Santa Barbara	CA
Pamela	Enos	Farmington	NY
Dianne	Ensign	Portland	OR
Mary Catherine	Epatko	Herndon	VA
Antonino	Erba	Dubuque	IA
Sybil	Erden	Pomerene	AZ
Donette	Erdmann	Sheboygan	WI
Leland R.	Erickson	Yreka	CA
Michael	Erickson	Minneapolis	MN
Kelly	Erikson	Owings Mills	MD
Cathie	Ernst	Scottsdale	AZ
Liz	Erpelding-Garratt	St. Augustine	FL
Andy	Ersfeld	Hailey	ID
Shawn	Esher	Lititz	PA
Jennifer	Eskridge-Hart	Chicago	IL
Randall	Esperas	Bend	OR
Patricia	Espinosa	Richmond Hill	NY
Debra	Espinoza	El Paso	TX
Susan	Espinoza	Saint Paul	MN
Bernadette	Espinoza	Cortez	CO
Lisette	Espinoza	Amesbury	MA
Jeanne	Esposito	Amherst	MA
Susan	Esposito	Staten Island	NY
Dan	Esposito	Manhattan Beach	CA
Holly	Essig	Eugene	OR
K Elizabeth	Estep	Mount Jackson	VA
Gregory	Esteve	Lake Wales	FL

First name	Last name	City	State
nicolas	estevez	bronx	NY
Karen	Estok	Manalapan	NJ
Katie	Etchison	Fishers	IN
banjo	ettinger	Yonkers	NY
Jim	Etzel	Hackensack	MN
Bee	Evans	Oak Harbor	WA
Brandy	Evans	Midland	NC
Brenda	Evans	Sapulpa	OK
Elise	Evans	Bradenton	FL
Erin	Evans	Washington	DC
Joyce	Evans	Orlando	FL
Julie	Evans	Denver	CO
Kimberly	Evans	Asheville	NC
Stephen	Evans	Paramus	NJ
Lisa	Evenson	Manitowoc	WI
John	Everett	Grass Valley	CA
Maria	Everett	Elkton	MD
Allison	Everitt	Salem	OR
Kellie	Evilsizer	Austin	TX
Dana	Ewing	Lafayette	CA
Jill	Exter	DuPont	PA
Ellen	Extract	New York	NY
E	F	Glassboro	NJ
Ingrid	Faber	Bloomington	IN
Megan	Faber	Denver	CO
Anke	Fachmann	San Francisco	CA
catherine	Fadden	Lowell	MA
Dirk	Faegre	Belfast	ME
Stephen	Faes	Kalaheo	HI
Alicia	Fagerman	Schaumburg	IL
CHERYL	FAHLMAN	Gaithersburg Montgom	MD
Carol	Fahy	Kaneohe	HI
Judy	Fairless	Warren	NJ
Nancy	Fairman	Madison	WI
Tobias	Fairman	Glendora	CA
Martha	Falkenberg	Woodside	CA
Deborah	Fallender	Santa Monica	CA
Thomas W	Faltash	Royal Palm Beach	FL
Valerie	Fannin	Chico	CA
Susan	Fanning	Toms River	NJ
Marie	Fannin-Laird	Paradise	CA
Gail	Farina	Los Angeles	CA

First name	Last name	City	State
Stephanie	Farinelli	Austin	TX
Joyce	Farley	Bellmore	NY
Sheila	Farmer	{"CITY":"Mount Joy"	PA
Sheila	Farmer	Mount Joy	PA
Priscilla	Farnsworth	Ridgewood	NJ
Linda	Farrell	Minneapolis	MN
Connie	Farren	ST PETE BEACH	FL
Janice E.	Farry-Menke	Cambria	CA
Carol	Faulkner	EASTON	PA
Jessica	Favorite	San Diego	CA
Moira	Fay	Hope	RI
Rori	Fay	Boston	MA
Lynn	Fayard	Seneca	SC
Nanch	Fay-Muzar	Columbus	IN
Norma	Feagin	Austin	TX
Darcy	Featherstone	Garden Valley	ID
Karen	Fedorov	Bealeton	VA
Catherine	Fee	Union	NJ
Laurel	Fee	Daytona Beach	FL
Hildy	Feen	Madison	WI
Marilyn	Fehrmann	Albuquerque	NM
Steffanie	Feichter	Villa Park	IL
Doreen	Feingersch	Coral Springs	FL
dory	feldmann	Miami	FL
stephan	feldstein	purchase	NY
Renee	Feliciano	Walton Hills	OH
Lauren	Felicione	Whitestone	NY
Amanda	Felt	Covina	CA
Lauren	Fenenbock	El Paso	TX
Charlene	Ferguson	Otho, Iowa	IA
Jocelyn	Ferguson	Mesa	AZ
Lorna	Ferguson	East Millinocket	ME
Christine	Fergusson	Galesburg	IL
marcia	fernandez	Seminole	FL
Barbara	Ferneyhough	Millwood	VA
Mary	Ferramosca	Alexandria	VA
Marge	Ferrance	Iselin	NJ
Jeffrey	Ferrand	Dallas	TX
Alexia	Ferranti-Neilson	Tucson, AZ	AZ
Robert	Ferrara	Cheyenne	WY
Tina	Ferrato	Kilauea	HI
Corinne	Ferre	Kodiak	AK

First name	Last name	City	State
Judith	Ferrell	Elkhart	IN
JOANN	FERRETTI	BROOKLYN	NY
Connie	Ferris	Fresno	CA
Donald	Ferry	Aurora	KS
Andrea	Fetsko	Rocky River	OH
Sharon	Fetter	Puyallup	WA
Robert H.	Feuchter	Jamaica Estates	NY
Jo-Ann	Ficker-Camacho	Bronx	NY
Rachel	Fickey	Palestine	TX
Paula	Fidelman	Ft Myers	FL
Cindi	Field	Ogden	UT
David	Field	Santa Cruz	CA
Ronald	Field	Alexandria	VA
Amy	Fife	Virginia Beach	VA
JAMES	FIFE	GREENVILLE	SC
SAMANTHA	FIFE	GREENVILLE	SC
Shannon	Fife	Vian	OK
Johnny	Fifles	Jackson	WY
Linda	Fighera	Rhinebeck	NY
James	Figueroa	Anaheim	CA
Joyce	Filauri	Coraopolis	PA
Thomas	Filip	Moorpark	CA
Gail	Findley	Las Vegas	NV
Donna	Fine	Tucson	AZ
Allyson	Finkel	Rancho Santa Margarita	CA
Mary	Finkelstein	Austin	TX
NEIL	FINNEGAN	POUGHKEEPSIE	NY
Nancy Jean	Finney	SMYRNA	TN
Courtney	Fiore	Phoenix	MD
Lynne	Firestone	Evanston	IL
Kellyann	Firmstone	Northampton	PA
Sara	Fisch	Scottsdale	AZ
William	Fischer	Forked River	NJ
Donna Marie	Fischetto	Boca Raton	FL
Larry	Fish	Moreno Valley	CA
Freya	Fisher	Vancouver	WA
Keith	Fisher	Willow Grove	PA
Kenneth	Fisher	Coeur D Alene	ID
Joelle	Fishkin	Burke	VA
Julie	Fissinger	Brooklyn	NY
Lee	Fister	Allentown	PA
lisa	Fitch	oakland	CA

First name	Last name	City	State
Pat	Fitz	Colorado Springs	CO
Tyler	Fitzgerald	Vista	CA
Bronwyn	Fitzgerald	Brookings	OR
Marianne	Fix	Trenton	MI
Cathy	Flanagan	Bethpage	NY
Marshall	Flanigan	Fort Myers	FL
Irwin	Flashman	RESTON	VA
Sandra	Flaskerud	Sandy	OR
Dottie	Fleischman	Rancho Santa Fe	CA
Penny	Fleischman	BUSHNELL	FL
Mary Ann	Fleming	Manhattan	KS
Nancy	Fleming	Lake Oswego	OR
Carol	Flertcher	Ann Arbor	MI
Elaine	Fletcher	Tucson	AZ
Ken	Fletcher	Albany	OR
Rhonda	Fletcher	Spring	TX
Krystal	Fletcher-Burroughs	Palm Harbor	FL
Kathy	Flocco-McMaster	Absecon	NJ
Danise	Flood	Janesville	IA
Susan Elvira	Floran-Bernier	Boulder	CO
Mare	Florentino	St. Louis	MO
Anthony	Flores	Fort Myers	FL
Gilbert	Flores	Phoenix	AZ
Heather	Florian	CHIPPEWA FLS	WI
Kathryn	Florio	Dunedin	FL
Bobbie	Flowers	New York	NY
Debra	Floyd	Maxwelton	WV
susie	floyd	conway	AR
Dianne	Flynn	FOrt Collins	CO
Samantha	Flynn	Raleigh	NC
Jerise	Fogel	New York	NY
Kathleen	Foldy	Mount Pleasant	WI
Kim	Foley	Norwalk	CT
Lisa	Foley	Plano	TX
Stephan	Foley	Ojai	CA
Sue	Foley	BARRINGTON	IL
Susan	Foley	Westfield	MA
Joseph	Folino Gallo	Coraopolis	PA
Rose	Folino Gallo	Coraopolis	PA
Eileen	Fonferko	North Port	FL
Yesenia	Fonseca	Whittier	CA
Chip	Fontaine	Framingham	MA
Gloria	Fooks	Saint Clair	MO

First name	Last name	City	State
Susie	Foot	Mckinleyville	CA
Georgia	Forbes	Clio	MI
Ian	Forbes	Bonita Springs	FL
J. Dana	Forbes	Carbondale	IL
Sylvia	Ford	Lakewood	WA
Benjamin	Fordham	Candler	NC
L Palmer	Foret	Washington	DC
Ann	Forget	Arlington	MA
fay	forman	new york	NY
Janet	Forman	New York	NY
Kathy	Forney	Stillwater	OK
Bonnie	Forry	Harrisburg	PA
elizabeth	forshee	warren	RI
Brigitte	Forster	Mount Clemens	MI
Mimi	Forsyth	Santa Fe	NM
Linda	Fortin	Naalehu	HI
Ann	Fortune	Cape Elizabeth	ME
Wendy	Fossa	Essex	MA
Sandy	Fossee	Grosse Pointe Shores	MI
Beverly	Foster	Wayne	PA
Genette	Foster	Pasadena	CA
lorraine	foster	portland	OR
Pearl	Foster	Milwaukee	WI
Linda	Foster	Oak Grove	MO
Jerrilyn	Foster-Julian	Huntington Station	NY
Janet	Fotos	Hollis	NH
David	Foulger	Apple Valley	CA
Nicole	Fountain	Lincoln	CA
Patricia	Fouse	Fallston	MD
Donna	Fouste	Henderson	NV
Joan	Fouty	Polson	MT
Ashley	Fowler	Seattle	WA
Betsy	Fowler	Washington	DC
Elizabeth	Fowler	Roseburg	OR
Chris	Fox	Woodinville	WA
Ellen	Fox	New York	NY
Kathryn	Fox	Salem	OR
Michelle	Fox	Downey	CA
Sharon	Fraas	Stoneham	MA
Allison	Fradkin	Northbrook	IL
Tom	France	Fort Spring	WV
Diane	Francello	Colorado Springs	CO
Irena	Franchi	Sunny Isles Beach	FL

First name	Last name	City	State
Susan	Francis	Hancock	NH
Linda	Francisco	Oak Park	MI
Babara	Franck	PHILADELPHIA	PA
Faith	Franck	Las Vegas	NV
Abby	Frank	Jamaica	NY
Dave	Frank	Ankeny	IA
Rebecca	Frank	Malaga	WA
Janice	Frankel	Chicago	IL
Linda	Frankel	Kensington	CA
Linda	Frankel	Hurst	TX
Karen	Franklin	Mesa	AZ
KC	Franklin	Boise	ID
Courtney	Franklin	Park City	KS
Katie	Franks	Bellingham	WA
Irene	Franzis	York	PA
Forest	Frasieur	Benicia	CA
Linley	Fray	Phoenix	AZ
Michele	Frazee	Russell	KS
CECILIA	FRAZIER	Colorado Springs	CO
Christine	Frazier	Raleigh	NC
Maggie	Frazier	Windsor	NY
Karen	Frederick	Cleveland	TN
Kathy	Frederick	Glen Allen	VA
Janice	Fredericks	Wayne	NJ
WENDY	FREEDMAN	West Bloomfield Township	MI
Susan	Freel	New York	NY
Amy	Freeman	Bedford	NH
Beth Jane	Freeman	Wantagh	NY
Gregory	Freeman	Pearce	AZ
Edwina	Frei	MASHPEE	MA
Angelica	Freitag	Alexandria	VA
Nina	French	Portland	OR
Paula	French	Warwick	RI
Brenda	Frey	West Seneca	NY
Lionel	Friedberg	Woodland Hills	CA
Margaret	Friedenbach	Savanna	IL
Tracey	Fried-Kasofsky	LUTHERVILLE TIMONIUM	MD
Henry	Friedman	Palm Beach Gardens	FL
Tara	Friedman	Charlottesville	VA
Wendy	Friedman	Chicago	IL
Melinda	Friedman	Boca Raton	FL

First name	Last name	City	State
Melissa	Friedman	Somerdale	NJ
Friend	Friend	Santa	CA
Suzane	Frisselli	ORLANDO	FL
Bonnie	Fritz	Chicago	IL
Shane	Fritz	Stayton	OR
Jeff	Fromberg	Los angeles	CA
Allen	Fromowitz	Smyrna	DE
Tom	Frost	Quincy	IL
Pamela	Fruth	Monona	WI
Judith	Fry	Wellsboro	PA
Josh	Frye	Thornton	CO
Lisa	Frye	Charlotte	NC
Kenneth	Fugate	Peoria	IL
Peggy	Fugate	Oxford	OH
Margaret	Fularczyk	Surprise	AZ
Glenn	Fuller	Laurel	MD
HAROLD	FULLER	SALOME	AZ
Venita	Fuller	Driftwood	TX
Evan	Fulmer	Merrimack	NH
Judith	Fulton	Baltimore	MD
Lyle	Funderburk	Portland	OR
Laura	Fung	Kent City	MI
chad	fuqua	houston	TX
Sven	Furberg	Accord	NY
midori	furutate	New York	NY
Carol	Fusco	Berkeley	CA
Jonathan	Futch	Tesuque	NM
c	g	san diego	CA
Carol	G	Columbus	OH
Jane	G	Edina	MN
Jo	G	Grand Forks	ND
Josh	G	Grand Forks	ND
Juanita	G	Hauppauge	NY
Maria	Gabrielle	Santa Fe	NM
DiAnne	Gabris	Yacolt	WA
Jacquie	Gadaleta	Woodcliff Lake	NJ
SHARON	GADBERRY	San Francisco	CA
Frederick	Gage	Jefferson City	MO
William	Gagliani	Oak Creek	WI
Naomi	Gaia	Alexandria	VA
David	Gaines	Richmond	VA
Julie	Gaines	Delafield	WI
Nora	Gaines	New York	NY

First name	Last name	City	State
Jack	Gajda	North Arlington	NJ
SUSAN	GALANTE	Fuquay-Varina	NC
Catena	Galipo	Cleveland	OH
Julie	Gallagher	Reisterstown	MD
Robin	Gallagher	Highland	NY
Sean	Gallagher	Brooklyn	NY
Susan	Gallagher	Neskowin	OR
Nina	Gallardo	Colton	CA
Rodolfo	Gallardo	Euless	TX
Michael	Gallert	Mount Juliet	TN
Barbara	Galligan	Highland Village	TX
Sheryl	Galligan	Bloomfield Hills	MI
Richard	Gallo	SANTA CRUZ	CA
giovanna	gallottini	salt springs	FL
Patricia	Gallup	Kirtland	OH
lynne	galton	marietta	GA
Brenda	Gamache	Seymour	TN
Pepper	Gamroth	Sequim	WA
Azar	Garayev	Wheeling	IL
Julie	Garber	Landing	NJ
Kathe	Garbrick	Manhattan	KS
Beverly	Garcia	Norman	OK
Cindy	Garcia	West Valley	UT
Elie	Garcia	Longmont	CO
Gloria	Garcia	Long Beach	CA
Leah	Garcia	Albuquerque	NM
Leticia	Garcia	Scottsdale	AZ
Manny	Garcia	Denver	CO
Sandra	Garcia	Newark	NJ
Victoria	Garcia	Orlando	FL
Kristie	Garcia	Columbia	MD
Rosemarie	Garczynnski	Beaver Dam	WI
Lorraine	Gardner	Bakersfield	CA
Shanna	Gardner	Jacksonville	FL
Kim	Gardner	Watertown	NY
Tina	Gardner	Berthoud	CO
Diane	Gargiulo	Utica	NY
T	Gargiulo	New York	NY
Twila	Garletts	Havertown	PA
Rod	Garner	Birmingham	AL
Marissa	Garone-Rizzo	Palm Beach Gardens	FL
marsha	garrett	Julian	NC
ramara	garrett	Bluffton	SC

First name	Last name	City	State
Seronica	Garrett	Orlando	FL
Wendy	Garrett	Charlottesville	VA
Barb	Garrison	Knoxville	TN
Esther	Garvett	Miami	FL
Lawrence	Garwin	Palo Alto	CA
Regina	Gary	Santa Clara	CA
Wiley	Gary Jr	MARION	TX
Rosie	Garza	Brownsville	TX
Cindi	Gaskin	The Villages	FL
Bob	Gaskins	Westchester	IL
suzanne	gaspar	zion	IL
Joseph	Gasparovic Jr	HARRISBURG	PA
Marna	Gasperino	Las Cruces	NM
Heather	Gaston	Virginia Beach	VA
Patricia	Gateley	Wichita	KS
Angelita	Gates	Independence	OR
Liz	Gato	Palm Bay	FL
lawrence	gauci	Newport,	KY
Louis	gauci	Newport,	KY
Lenore	Gaudet	Northfield	MA
henry	gaudsmith	New York	NY
Regina	Gavlick	Hastings on Hudson	NY
Dorothy	Gaylord	Punta Gorda	FL
Patricia	Geary	Clayton	CA
Jillian	Gebert	Amityville	NY
Margaret	Gebhard	Milwaukee	WI
Charlie	Gedi	Dallas	TX
Karen	Gee	Bountiful	UT
TIMOTHY	GEHRKE	Dayton	OH
Becky	Geiser	Medford	WI
Ned	Gelband	Boca Raton	FL
John	Geldmeier	Riesel	TX
Karen	Gelman	San Antonio	TX
Lloyd	Gelwan	New York	NY
Christine	Genco	New York	NY
Derek	Gendvil	Las Vegas	NV
Michael	Genovese	Newton	NC
Michael	Genovese	Newton	NC
Donna	Gensler	Pittsburgh	PA
Joyce Ann	Gentile	Islip	NY
Mika	Gentili-Lloyd	Granville	NY
Rita	Gentry	Santa Fe	NM
John	George	Columbus	OH

First name	Last name	City	State
Richard	George	Columbia	MD
Sharon	George	prescott	AZ
JENNIFER	GEORGIEFF	YORBA LINDA	CA
Vera	Georgieff	South San Francisco	CA
Hera	Gerber	Saint Louis	MO
Barbara	Gerhart	Glendale	AZ
Penelope	Gerlach	Wichita	KS
Marion	Gerlind	Oakland	CA
Bonnie	German	Rochester Hills	MI
Katherine	Germano-Kowalczyk	East Hampton	CT
Robert	Gerosa	New Fairfield	CT
Marion	Gerrish	Kalispell	MT
Liliane	Gersh	Berlin, Germany	CO
Mary	Gershanoff	Lincoln	MA
Shana	Gerwens	Land O Lakes	FL
Erika	Gesue	New York	NY
Mehri	Ghaderi	Washington	DC
Lisa	Gherardi	Los Gatos	CA
Jere	Gibber	Alexandria	VA
Pamela	Gibberman	Panorama City	CA
Amy	Gibson	Norwich	OH
Duane	Gibson	Vail	AZ
Jody	Gibson	Des Moines	IA
Scott	Gibson	Saint Albans	WV
Terri	Gibson	Kansas City	MO
Alexandra	Gierlachowski	South Wayne	WI
Mark	Giese	Racine	WI
Rebecca	Giese	San Diego	CA
Millie	Giesecke	Scarborough	ME
Paula	Giesing	HERMOSA BEACH	CA
Elizabeth	Gifford	Watertown	MA
James	Gifford	Marshfield	MA
Tracy	Gilbert	Rialto	CA
Linda	Gilbert	Manchester	CT
Susan	Gilcreast	Derry	NH
Debra	Giles	Peebles	OH
Kristy	Giles	Clackamas	OR
Gary	Gill	Everett	WA
Kathleen	Gill	Pittsford	NY
LouAnne	Gilleland	New York	NY
Matthew	Gillespie	Redondo Beach	CA
Nanette	Gilligan	Kingston	NY
Pat	Gilliland	Denver	CO

First name	Last name	City	State
Mary	Gillman	Alexandria	VA
meg	gilman	Portsmouth	NH
Richard	Gilman	Kalamazoo	MI
Joyce	Gilmore	Kutztown	PA
Sondra	Gilmore	gardnerville	NV
Susan	Gilmore	West Hartford	CT
Lori	Gilpin	Danielson	CT
Rev. Kathlyn	Gilpin	Bradenton	FL
Andrea	Giolli	West Linn	OR
HAROLYN	GIORDANO	ELMIRA	NY
Janice	Giordano	East Haven	CT
Michele	Gitomer	Encino	CA
Ricky	Gitt	New York	NY
Susan	Glad-Anderson	Madison	WI
Patricia	Glander	Silver Spring	MD
Clarice	Glandon	Long Lake	NY
Paula	Glaser	Pico Rivera	CA
Janet	Glaudel	Long Beach	NY
MaryAnne	Glazar	Oakland	CA
Roberta	Glaze	Medina	OH
Ann Helene	Gleason	Jacksonville	FL
Michalle	Gleason	Portland	OR
Harriet	Gleaton	Bartlesville	OK
Laura	Glenn	OVERLAND PARK	KS
Ingeborg	Glier	North Las Vegas	NV
Desiree	Glinden	Williamsburg	VA
Stephen	Gliva	Evanston	IL
Diana	Glixman	St. Louis	MO
CL	Glogau	Durham	NC
Connie	Glorioso	Sellersville	PA
Laura	Glover	Nokesville	VA
Robert	Glover	Fresno	CA
Irene	Gnemi	Newburg	MO
Anna	Goble	Boerne	TX
Nadine	Godwin	New York	NY
Michelle	Goedert	Oakdale	MN
William	Goell	Oconomowoc	WI
Carol	Goerke	Tempe	AZ
Lisa	Goetz	Houston	TX
Mary	Goetz	East haven Ct	CT
Karyn	Gold	Pembroke Pines	FL
Nancy	Goldberg	Los Angeles	CA
Adele	Goldberg	Delray Beach	FL

First name	Last name	City	State
Paul	Goldberg	Delray Beach	FL
John	Golding	Oakland	CA
Dori	Goldman	Chicago	IL
Fatima	Goldman	Brooklyn	NY
Louise Angela	Goldman	Fanwood	NJ
Debbie	Goldman	Woodbury	NY
Stacy	Goldschen	Gurnee	IL
de	goldsmith	portland	OR
Linda	Goldstein	Santa Rosa	CA
Lisa	Goldwyn	Hopkonton	MA
Deborah	Golembiewski	Cheektowaga	NY
Joe	Goltz	Monroe	WI
Karina	Golumbic	Los Angeles	CA
Sharyl	Golway	Santa Rosa	CA
Eleanor	Gomez	Cloverdale	CA
jocelyn	gomez	Sherman Oaks	CA
Maria	Gomez	Brooklyn	NY
MARIA	GOMEZ	Vienna	VA
Mary	Gomez	Dallas	TX
Stephanie	Gomez	Orland Park	IL
Nina	Gondos	anchorage	AK
Daisy	Gonzalez	Basking Ridge	NJ
Demetria	Gonzalez	Miami	FL
Margarita	Gonzalez	Sylmar	CA
Theresa	Gonzalez	Los Gatos	CA
Yazmin	Gonzalez	Bellflower	CA
Linda	Gonzalez	Lake worth	FL
rick	gooch	FEDERAL WAY	WA
Susan	Good	Hyde Park	MA
Eva	Goode	Columbus	OH
Emma	Goode-DeBlanc	Spring	TX
LaVonne	Goodell	Anoka	MN
Joan	Goodfellow	Wilmington	DE
Elaine	Goodman	Lake Worth	FL
Mark	Goodman	Dallas	TX
Christine	Goodstein	Los Angeles	CA
Karen	Goodstein	Milwaukee	WI
mattie	goodwin	Shreveport	LA
Alta	Goolsby	Adamsville	AL
Martha	Gorak	Katy	TX
Tammy	Gordin	Lynnwood	WA
Amanda	Gordon	Sanford	FL
Anne	Gordon	North Kingstown	RI

First name	Last name	City	State
Hazel	Gordon	Longmont	CO
Jeffrey	Gordon	Morgantown	WV
Lucia	Gordon	Allston	MA
Diane	Gordon Sacchetti	Prides crossing	MA
Lynne	Gordon-Watson	New York	NY
Dara	Gorelick	Van Nuys	CA
Anne Marie	Gorman	Hamilton	NJ
Jennifer	Gorman	Shoreline	WA
Mary	Gorman	Union City	CA
Anne Marie	Gornan	Hamilton	NJ
Eugene	Gorrin	Union	NJ
Ted	Gorski	Madisonville	KY
Margaret	Goscilo	Columbus	OH
Deidre	Gotjen	Phoenix	AZ
Ziva	Gottesman	San Diego	CA
Mark	Gotvald	PLEASANT HILL	CA
Gerald	Gouge	Athens	GA
SANDY	GOULART	San Jose	CA
Franklin	Gould	Towson	MD
Janet	Gould	Woodland Park	CO
Michelle	Gould	St. Petersburg	FL
Kathy	Govreau	Morongo Valley	CA
Coleen	Gowans	Astoria	NY
Jaimie	Gowatsky	Lyndhurst	NJ
Christine	Grabar	Tulsa	OK
Katarina	Grabowsky	Castro Valley	CA
Catherine	Grady	Springfield	MO
Linda	Grady	Springvale	ME
Andrea	Graff	San Francisco	CA
Wabda	Graff	Canby	OR
MARY	GRAFFEO	Greenvale	NY
Amanda	Graham	Albuquerque	NM
Angela	Graham	Garland	TX
Charlie	Graham	Hillsboro	OR
Nikki	Graham	Nokomis	FL
Sharon	Graham	Lafayette Hill	PA
Tyler	Graham	Harrisburg	PA
Constance	Graham	Hingham	MA
Rosemary	Graham-Gardner	Manhattan Beach	CA
Linda	Granato	Philadelphia	PA
Paula	Grande	New York	NY
LB	Grandle	Minneapolis	MN
Susan	Granfield	Longmeadow	MA

First name	Last name	City	State
George	Granillo	Monroe	GA
Fred	Granlund	North Hollywood	CA
gabrielle	Granofsky	Brooksville	FL
Lynette	Grant	Casper	WY
Tiffany	Grant	Hampton	GA
Lori	Grass	Grafton	WI
peter	grassl	Englewood	FL
Mark	Grassman	Evansville	IN
elizabeth	grasso	Boston	MA
J	Grause	Cave Spring	VA
Ann	Graves	San Leandro	CA
michelle	graves	farmington	MO
Kathy	Graves	Lubbock	TX
JACKIE	Gray	CARRBORO	NC
Karen	Gray	MIDLOTHIAN	VA
Lorraine	Gray	Roslindale	MA
Laura	Grayson	St. Paul	MN
Patricia	Green	Chicago	IL
SUSAN	GREEN	Avon	CT
Janice	Greenberg	Walnut Creek	CA
Karen	Greenberg	Brookline	MA
kelsey	greene	plantation	FL
Margaret	Greene	Orlando	FL
Cheryl	Greenfield	Freehold	NJ
Ellen	Greenwald	Johns creek	GA
Barbara	Greenwood	Walnut Creek	CA
Dale	Greer	Seattle	WA
Jamie	Greer	West Orange	NJ
Alison	Gregor	High Falls	NY
Joanne	Gregory	towson	MD
Pamylle	Greinke	Peconic	NY
Mark Hayduke	Grenard	Phoenix, Yuck, Sprawl	AZ
Suzanne	Grenier	Jamaica Plain	MA
Brian	Griefer	OLDSMAR, FL	FL
Jean	Grieve	Denver	CO
kathy	grieves	peoria	AZ
Amanda	Griffin	Marriottsville	MD
Denise	Griffin	Mobile	AL
Holly	Griffin	Bryan	TX
Nancy	Griffin-Bonnaire	Warrenton	VA
Patricia	Griffis	Snellville	GA
Glenda	Griffith	Cambria cal	CA

First name	Last name	City	State
Sunny	Griffith	Port Orange	FL
Leslie	Griggd	Fairless Hills	PA
Maria	Grigoriadis	Melrose	MA
Cindy	Grimes	Graniteville	VT
Mary	Grindeland	SUNNYVALE	CA
Deanka	Grisham	Jonesboro	GA
Pam	Groce	Lewisville	NC
Diane	Grohn	Morris Plains	NJ
Rita	Grolitzer	New York	NY
Rita	Grolitzer	NY	NY
Vanessa	Grosko	Deerfield	IL
Kurt	Gross	San Diego	CA
Steve	Gross	La Mesa	CA
Rebecca	Grossenbacher	San Diego	CA
Jennifer K.	Grossman	Livingston Manor	NY
Stacy	Grossman	Columbus	OH
Patricia	Grossmann	Ashton-Sandy Spring	MD
Lois	Grossshans	Pasadena	CA
Leigh	Grosvenor	Holly Hill	FL
Shel	Grove	Washington	DC
Steve	Groze	Youngsville	LA
Amanda	Groziak	Denver	CO
Steven	Gruber	Mechanicsville	VA
Linda	Gruenberg	Selinsgrove	PA
Barbara	Grutter	Grand Rapids	MI
Durr	Gruver	Vacaville	CA
Linds	Gruver	Irvine	CA
Thomas A	Guaraldi	Houston	TX
Mary	Guard	Friday Harbor	WA
Donna	Guarino	PortSt lucie	FL
Michael	Guckian	Galveston	TX
Reda	Gudaityte	San Diego	CA
Diane	Gudatis	Great Falls	MT
Randy	Gudvangen	Harrison	OH
Debra	Guendelsberger	Fort Garland	CO
Rafael	Guerra	Lithia Springs	GA
Robert and Diane	Guethlen	Yarmouth Port	MA
Richard	Guevara	Plover	WI
Ashli	Guglielmo	Mooresville	NC
Oliver	Guichard	Partlow	VA
Richard	Guier	New York	NY
Robert	Guignard	Tempe	AZ

First name	Last name	City	State
Heather	Guillen	San Jose	CA
Valerie	Guinan	Bend	OR
Cynthi	Guise	Milton	MA
Kathleen	Gulledge	Spokane Valley	WA
Mary	Gullet	Floral city	FL
Melodi	Gulsen	Fullerton	CA
Theresa	Gunday	Warminster	PA
Brent	Gunderson	Green Bay	WI
John	Gunn	Naples	FL
Lisa Marie	Gurrera	New York	NY
Judith	Gurule	Dickinson	TX
MIchael	Gurwitz	Silver Spring	MD
Stella	Gusman	Los Angeles	CA
Fawn	Gustafson	Coupeville	WA
kelsey	gustafson	Rush city	MN
Karen	Gutchess	Madison	ME
Elizabeth	Guthrie	Webster	NY
Randy	Guthrie	Snohomish	WA
Grace	Gutierrez	Buckeye	AZ
Josh	Guy	Grand Ledge	MI
Charlotte	Guzzo	Cleveland	OH
Perry	Gx	Tustin	CA
A	H	Big Bear City	CA
erin	h	toronto	ON
kay	h	madison	WI
Norma	H Hanson	asheville	NC
Joshua	H.	CROWN POINT	IN
Shelby	H.	Franklin	TN
William	Haaf	kennett square	PA
Donna	Haag	Macomb	MI
Nancy	Haarmann	Geneva	FL
Glenda	Haase	Mount Tabor	NJ
Katie	Haber	Austin	TX
sara	habis	marrero	LA
Linda	Habuda	Youngstown	OH
Bonnie	Hackett	S Berwick	ME
Kwna	Hacobs	Reno	NV
James	Hadcroft	Falmouth	MA
Melissa	Haddad	Los Angeles	CA
Cindy	Hadlock	Anderson	SC
Judith	Hagadorn	White Pigeon	MI
Janet	Hagemann	Morgan Hill	CA
Marie	Hagerty	Yardley	PA

First name	Last name	City	State
Debbie	Hagstrom	Ocala	FL
Lorna Jean	Hagstrom	Deland	FL
Brenda	Haig	Long Beach	CA
Jessica	Haines	Lake City	SC
Karey	Haj	Phoenix	AZ
Michele	Halbeisen	Dale City	VA
Adele	Halbreich	Lunenburg	MA
Mike	Halegua	Joliet	IL
Terrell	Haley	Indian Springs Village	AL
Carol	Hall	Fairfax	VA
Carol	Hall	Mathews	VA
Derinda	Hall	Utica	NY
Ellen	Hall	Pacifica	CA
Holly	Hall	Temecula	CA
Kim	Hall	Mokena	IL
Michael	Hall	Babcock Ranch	FL
Stacie	Hall	Oregon City	OR
Sue	Hall	Castro Valley	CA
Victoria	hall	Hamilton	MT
Wendy	Hall	Buena Vista	CO
WM	HALL	mokena	IL
Margie	Halladin	San Rafael	CA
Tom	Hallaran	Myrtle beach	SC
Joan	Hallaren	Portland	ME
Vikki	Hallen	GRANVILLE|	TN
Deb	Halliday	Sandy Creek	NY
Sue	Halligan	Oak Park Heights	MN
Nikki	Halper	Burbank	IL
Kelly	Haluda	Indianapolis	IN
Susan	Halversen	Tucson	AZ
Debbie	Haman	Richland Center	WI
Robert	Hamann	Petersburg	IL
Alexander	Hamilton	Dekalb	IL
Bryan	Hamilton	NORTH MIAMI	FL
Christopher	Hamilton	Berkeley	CA
James Hamilton	Hamilton	Palos Verdes Estaes	CA
Linda	Hamilton	La Marque	TX
patricia	Hammel	Branford	CT
Kimberly	Hammond	Portland	OR
Marcella	Hammond	Madison	WI
Sue	Hammond	Martinez	CA
Lyn	HAMPER	Benton	KY

First name	Last name	City	State
Susan	Hampton	El Cerrito	CA
Richard	Han	Ann Arbor	MI
Hunter	Hancock	Blanding	UT
Sharon	Handa	san francisco	CA
Marilyn	Hands	Brooklyn	NY
Laura	Hanks	Portland	OR
Tammy	Hanners	Cape Girardeau	MO
Jay	Hannon	Ferndale	MI
Susan	Hanon	Tumacacori	AZ
A G	Hansen	Crestwood	IL
Jeff	Hansen	Mammoth Lakes	CA
Lucy	Hansen	Tipton	IA
Renee	Hansen	Clearwater	FL
Sherry	Hansen	Ann Arbor	MI
Brenda	Hansen	Ottawa	IL
Ashley	Hanshaw	Fort Edward	NY
Barbara	Hanson	Tucson	AZ
Katrina	Hanson	Alamogordo	NM
Martha	Hanson	Wynnewood, PA	PA
Ryan	Hanson	New Orleans	LA
Susan	Hapka	Placitas	NM
Donna	Hapner	Stafford	VA
Patricia	Harden	Pasadena	TX
Kate	Harder	Glen Ellyn	IL
Leslie	Hardie	Burlington	NC
Jane	Hardiman	New York	NY
Carolyn	Harding	Boonton	NJ
Malisa	Harding-DeOchoa	Pasco	WA
Jan Carolyn	Hardy	Anchorage	AK
Stephanie	Hardy	Springfield	VA
Mary Ann	Hardziej	Pleasant Ridge	MI
Pamela	Hare	Colden	NY
Judy	Harju	Mount Prospect	IL
David	Harlan	New Orleans	LA
Kimberly	Harman	Independence	MO
Suzanne	Harmes	Huber Heights	OH
Joanne	Harmon	Newcastle	CA
Laima	Harmon	Burlington	VT
Susan	Harmon	Bellingham	WA
Joy	Harnish	Shelton	WA
Barbara	Harper	Castroville, USA	CA
Barbara	Harper	Castroville	CA
Catherine	Harper	Port Angeles	WA

First name	Last name	City	State
Marilynn	Harper	Media	PA
Peggy	Harper	Gainesville	FL
Cindy	Harrelson	Georgetown	TX
Susan	Harrie	Grand Forks	ND
Dan	Harrigan	Kennesaw	GA
Frances	Harriman	Chepachet	RI
Rita	Harrington	Laredo	TX
D.	Harris	Tulsa	OK
Debra	Harris	Skokie	IL
Freya	Harris	Atlanta	GA
J.M.	Harris	Tulsa	OK
Jenna	Harris	Evergreen	CO
Judith	Harris	OKMULGEE	OK
Judy	Harris	Richmond	TX
JULIE	HARRIS	Kansas City	MO
Kimberley	Harris	Leesburg	VA
Missy	Harris	Nashville	TN
Nikki	Harris	Skiatook	OK
Susan	Harris	Boncarbo	CO
X	Harris	Delmar	NY
Alta	Harrison	Ypsilanti	MI
Cary	Harrison	Provo	UT
Ester	Harrison	Austin	TX
Nancy	Harrison	Colorado Springs	CO
Paige	Harrison	New York	NY
Patricia	Harrison	Harvey	LA
Leslie	Harrop	Half moon bay	CA
Merry	Harsh	Silver City	NM
C	Hart	Bethlehem	PA
Connie	Hart	Hulbert	MI
Donna	Hart	Fredericksburg	VA
Nancy	Harter	Lahaina	HI
Rosina	Harter	Mooresville	MO
Paula	Hartgraves	Tucson	AZ
Julia	Hartman	Alexander	NC
Erfin	Hartojo	Walnut	CA
Florence	Harty	White Salmon	WA
Randee	Hartz	slingerlands	NY
Connie	Harvey	Bethlehem	PA
Robert	Haslag	Nixa	MO
Melanie	Hassel	Richmond	CA
Ellen	Hassett	Virginia Beach	VA
Debbie	Hatcher	Greensboro	NC

First name	Last name	City	State
P.	Hatfield	Laredo	TX
Melissa	Hathaway	Portland	OR
Samantha	Hathaway	Wilsonville	OR
Maryon & Merlen	Hatter	Trinidad	CO
Brian	Hattery	Alexandria	VA
Barclay	Hauber	Pollock	ID
Catherine	Haug	Bigfork	MT
Douglas	Hauge	Maple Grove	MN
Pamela	Haun	Cooper City	FL
Cynthia	Hautzinger	Prairie View	IL
Kathy	Haverkamp	Geneva	NY
Hugh	Havlik	Port Charlotte	FL
Luba	Havraniak	Winston Salem	NC
A J	Hawkins	Richmond	VA
Betty	Hawkins	Green Valley	AZ
Savannah	Hawkins	Chicago	IL
Jack	Hawks	San Diego	CA
Deborah	Hawley	Windsor	CO
Maureen	Hawley	Aurora	CO
Pat	Hawthorn	Abrams	WI
Jasmine	Hawthrone	Citrus Heights	CA
Nancy	Hayden	Spokane	WA
Jon	Hayenga	Stewartville	MN
Brenda	Hayes	Westminster	MA
Dianne	Hayes	Houston	TX
Laura	Hayes	Fort Piecre	FL
Lindsay	Hayes	San Francisco	CA
RANDOLPH	HAYES	Rock Hill	SC
Doris	Hayes	Newport	NC
Rose	Hayet	Deerfield Beach	FL
Helen	Hays	Walnut Creek	CA
P.	Hays	Maitland	FL
Makenzi	Headden	Danville	VA
Linda	Headley	Cross City	FL
Shauna	Healey	Lincoln	NE
Jean	Heaps	Hattiesburg	MS
Amber	Heard	Santee	CA
Donna	Heath	BRASHER FALLS, NY	NY
Susan	Heath	Albany	OR
Renelle	Hebert	Woburn	MA
Theresa	Hebron	Fredericksburg	VA

First name	Last name	City	State
Sima	Hecht	Doral	FL
Kerry	Heck	Pequannock	NJ
Nancy	Heck	Santa Maria	CA
Carla	Hedden	Walhalla	SC
Brianna	Hedge	Knoxville	TN
Andrea	Hedgecock	Buffalo	NY
Larry	Hedrick	Hot Springs National Park	AR
Phil	Heeding	Eugene	OR
Judith	Heffron	La Verne	CA
Sharon	Hefke	San Francisco	CA
Sandi	Hefty	Cocoa Beach	FL
Elizabeth	Hegarty	Brooklyn	NY
Angie	Heide	Portland	OR
Harry	Heiden	Belgium	WI
Kristina	Heiks	Todd	NC
Christi	Heilbronner	San Antonio	TX
Phillip	Heilers	Blakeslee	PA
Joanne	Heiling	Maple grove	MN
Jessica	Heilman	NORTHFIELD	MN
Kay	Heineman	Round Rock	TX
Paul	Heinricher	Melbourne Bch	FL
Charles	Heinrichs	Yreka	CA
Jill	Heins	Warsaw	MO
Stacey	Heinz	Hanover Park	IL
Kelly	Heiser	Vallejo	CA
L.	Helaudais	Newton	NJ
Diane	Hellman	San Clemente	CA
Cynthia	Hellmuth	Benicia	CA
DONNA	HELLYAR	SPRINGFIELD	MA
Laurice	Helmer	Monroe	CT
Amy	Helton	Indianapolis	IN
Mark	Hemenway	Charlotte	NC
Rachel	Hemmer	Hayward	CA
R R	Hempstead	Pulaski	TN
tamara	hendershot	el portal	FL
mary	henderson	Uncasville	CT
Michael	Henderson	Huntington Beach	CA
Nicole	Henderson	Maple Shade	NJ
PEG	HENDERSON MILLS	ANDERSON	SC
Donald	Hendon	Lake Villa	IL
Marie	Hendon	Lake Villa	IL
Ruth	Hendricks	Portland	OR

First name	Last name	City	State
WHITNEY	HENDRIX	INDIAN TRAIL	NC
Charlene	Henley	San Jose	CA
Chip	Henneman	Holladay	UT
Ellison	Hennessy	New York	NY
Peter	Hennessy	Arcata	CA
Peter	Hennessy	Arcata	CA
Rachel	Henning	Indianola	IA
Charmaine	Henriques	Madison	MS
wendy	henry	Manchester	NH
Lana	Henson	Oklahoma City	OK
Jill	Herbers	New York	NY
Jan	Herbert	Windsor	CA
Michael	Herbert	Florence	OR
Janet	Herbruck	San Diego	CA
Margaret	Hergenrother	Kingston	MA
Kellee	Herington	Parrish	FL
Adriane	Herman	Cape elizabeth	ME
candice	herman	LB	NY
Tim	Herman	Hershey	PA
MariLynn	Herman	Mandan	ND
Birgit	Hermann	San Francisco	CA
Ailsa	Hermann-awu	Waltham	MA
Kate	Hermann-Wu	Waltham	MA
Johanna	Hermanson	Manassas	VA
Linda	Hermanson	San Diego	CA
Gina	Hernandez	Braithwaite	LA
Ms. Maria Celia	Hernandez	Boston	MA
Tanya	Hernandez	Wildwood	FL
Estella	Hernandez	San Antonio	TX
Juan	Hernandez Garibay	El Paso	TX
Robin	Hero	Jackson	MS
Lynne	Herrli	Spring Green	WI
Yolanda	Hershey	Aurora	OH
Marcie	Hershman	Brookline	MA
Amanda	Heske	Junction	TX
Donna	Hess	Butternut	WI
Jeff	Hess	Boulder	CO
Karl	Hess	SMYRNA	TN
Kathleen	Hess	Norwood	OH
Sharon	Hesse	Berryville	VA
diane	hestich	Colton	CA
Karen	Heuler	New York	NY
Suzanne	Hewey	San Diego	CA

First name	Last name	City	State
Carol	Hewitt	Signal Hill	CA
janese	hexon	Pittsburgh	PA
E	Heyman	Castle Rock	CO
Susan	Heytler	Marshall	VA
Elyse	Hickey	Carbondale	IL
Mary	Hickey	Wooster	OH
Mary	Hicklin	Lakeside	CA
Barbara	Hickman	Austin	TX
Karolyn	Hickman	MILLS RIVER	NC
Lacey	Hicks	Fremont	CA
Michael	Hieda	LAGUNA HILLS	CA
Lindi	Higgins	Brewster	MA
Sarah	High	Parkland	FL
Dianna	Hightower	Ashland	OH
Lindsey	Hightower	Wichita	KS
Lis	Hil	Holbrook	NY
Pamela	Hilbert	Norfolk	VA
Alice	Hildebrand	Brooklin	ME
Irene	Hilgers	Davis	CA
Bobbi	Hill	Venice	FL
Debra	Hill	Canton	GA
Kathryn	Hill	Knoxville	TN
Paul	Hill	Lagrange Township, Illinois, United States	IL
SHARON	HILL	Salisbury	MD
Karyn	Hilliard	Irving	TX
Teresa	Himelhoch	Mcminnville	OR
Eileen	Himes	Waltham	MA
Sameerah	Hingoo	Coral Springs	FL
Pamela	HINRICHS	Highlands Ranch	CO
Michael	Hinshaw	Inkster	MI
Willie	Hinze	Winston Salem	NC
Danielle	Hipworth	Orlando	FL
Sharon	Hirth	Margate	NJ
Eleanor	Hiteshew	Weeki Wachee	FL
Teri	Hitt	San Pedro	CA
Rose	Hix	Clinton	TN
Bernadette	Hlavac	Orevfield	PA
William	hmirak	Centreville	VA
lynn	hoang	fullerton	CA
Pat Smith	Hoare	Bagley	IA
Matt	Hoarn	Winona	MN
Cynthia	Hobgood	PENSACOLA	FL

First name	Last name	City	State
mindy	Hoburg	Rocklin	CA
Barbara	Hoch	Dedham	MA
Michelle	Hochstein	Los Angeles	CA
Diana	Hocking	Rochester Hills	MI
Zora	Hocking	Santa Rosa	CA
Christina	Hodge	Eagleville	CA
Connie	Hodges	IRVING	TX
Paula	Hodges	Coeur D Alene	ID
Sherri	Hodges	Phoenix	AZ
D.K.	Hodges Hull	Silver Spring	MD
Rick	Hodorowich	Lafayette	CO
Marilyn	Hoff	Arroyo Hondo	NM
John	Hoffman	Whittier	CA
Roberta	Hoffman	Freedom	NY
Tara	Hoffman	Wellsville	PA
Deborah	Hoffmann	Buffalo	NY
Michelle	Hofmann	Portland	OR
Avis Jean	Hofstad	Princeton	NJ
LUANN	HOGAN	Fargo	ND
Ellen	Hogarty	Kent	OH
Felicity	Hohenshelt	Jacksonville	FL
Nichole	Holden	Marshalltown	IA
Sarah	Holder	Benicia	CA
Terry	Holder	Santee	CA
Julie	Holguin	Los Angeles	CA
Lucy	Holifield	Chicago	IL
Lori	Holl Ekholm	Minneapolis	MN
John	Holland	College Park	MD
Roger	Hollander	Tarzana	CA
Bob	Hollie	Orl	FL
Kimberly	Hollis	WINTER	WI
Philip	Hollman	Ingleside	TX
Dempsey	Holloway	Savannah	GA
Spencer	Holloway	Los Angeles	CA
Julie	Holly	Luling	TX
Mary Ann	Holly	Levittown	NY
Timothy	Holly	Levittown	NY
Mary	Holm	Sun City West	AZ
Vicki	Holman-Bryant	Kenosha	WI
Tracy	Holmberg	Willow	AK
Carolyn	Holmes	Chicago	IL
Jennifer	Holmes	Milwaukee	WI
Matthew	Holmes	Hummelstown	PA

First name	Last name	City	State
REG	HOLMES	CENTENNIAL	CO
Lisa	Holt	Chatham	MA
Lawrence	Holtzman	Miami	FL
Jessica	Holy	WOODBRIDGE	VA
Ellen	Homsey	Hockessin	DE
Jordan	Hon	Auburn	ME
Mike	Honda	Santa Ana	CA
Linda	Honeysett	Healdsburg	CA
Celeste	Hong	Los Angeles	CA
Lisa	Hood	Little Elm	TX
Ruth	Hood	Augusta	GA
Thomas	Hooper	Tampa	FL
James	Hoots	Winston Salem	NC
Doug	Hoover	Denison	TX
Margaret	Hope	Loveland	CO
Amy	Hopkins	Guilford	CT
Natasha	Hopkins	Black Jack	MO
Patricia	Hopkins	Colorado Springs	CO
winifred	hopkins	fullerton	CA
Judith	Hoppe	duanesburg	NY
Lisa	Horkley	Waynesboro	VA
Susan	Horlick	Tallahassee	FL
Steven	Hornbeck	Albany	NY
Joseph	Horne	Orlando	FL
Kathy	Horne	East Brunswick	NJ
Steven	Horneffer	Casselberry	FL
Betty	Horton	Myrtle Beach	SC
Martin	Horwitz	San Francisco	CA
Denise	Hosta	Fort myers	FL
Tara	Hottenstein	Gulfport	FL
Rhonda	Hottman	Reseda	CA
Amy	Houbre	Plymouth	MA
Robyn	Houp	Carrollton	GA
michael	house	Phoenix	AZ
Dorothy	Houseman	Vancouver	WA
Osalyn	Houser	Albany	OR
Sally	Houston	Apollo Beach	FL
Elizabeth	Howard	Melrose	FL
John	Howard	Brookings	OR
Linda	Howard	Belen	NM
Moira	Howard	Park City	UT
Patricia	Howard	Monticello	MN
Eleanor	Howard	Langley	WA

First name	Last name	City	State
James	Howe	Sherborn	MA
Janet	Howe	Torrance Los Angeles County	CA
Tonia	Howe	Rochelle	IL
Beth	Howell	Burke	VA
Cynthia	Howell	Sterling	VA
Valerie	Howell	Plano	TX
Wendy	Howes	Dallas	TX
Linda	Howie	West Hills	CA
Kathleen	Howren	Punta Gorda	FL
beverly	HRADISKY	Chicago	IL
Donna	Hreha	Pt. Jefferson Sta.	NY
Winston	Huang	West Des Moines	IA
Karla	Huard	South Barre	MA
Loba	Hubbard	Lake Worth	FL
Robert	Huber	Oakland	CA
Wendy	Huber	Leesburg	VA
Becky	Hudak	Youngstown	OH
Rebecca	Hudak	Boardman	OH
Laura	Huddlestone	Seattle	WA
Aaron	Hudson	WESTMINSTER	CO
Averill	Huff	Biddeford	ME
Molly	Huff	Boulder	CO
Leslie	Huffman	Irvine	CA
Diane	Hughes	Schenectady	NY
Kimberly	Hughes	Clarence	NY
Eric	Hui	New York	NY
Patrick	Huie	Sharpsburg	GA
Cynthia	Hull	Gallup	NM
Lise	Hull	Bandon	OR
Bonnie	Hume	Cambridge Springs	PA
Ken	Humke	Portland	OR
Bente	Humphrey	Orlando	FL
Saroyan	Humphrey	San Francisco	CA
Lauren	Humphries	Holly Springs	NC
Maureen	Hung	Palm Bay	FL
Cindy	Hungenberg	La Salle	CO
Craig	Hunkins	Waukesha	WI
JOAN	HUNT	Edmonds	WA
Martha	Hunt	Twentynine Palms	CA
Alice	Hunt	Sierra Vista	AZ
Jennifer	Hunter	Minneapolis	MN
Kylara	Hunter	Donna	TX

First name	Last name	City	State
Nancy	Hunter	Gold River	CA
Patricia W	Hunter	GREENSBURG	PA
Lauren	Huot	Daytona Beach	FL
lisa	hurley	Cape Coral	FL
Emily	Hurn	Belchertown	MA
Dannielle	Hurst	Springfield	MO
Michael	Husar	Scottsdale	AZ
jason	husby	minneapolis	MN
Garrett	Hutcheson	Universal City	TX
Katherine	Hutchins	Phoenix	AZ
RENEE	HUTCHINS	Pleasant Hill	CA
Melissa	Hutchinson	Pacific Grove	CA
Stanley	Hutchison	Rio Vista	TX
Scott	Hutter	Tallahassee	FL
Linda	Hutto	Grand Island	FL
Donna	Hutton	Casa Grande	AZ
Teal	Hyatt	Helper	UT
roberta	hydu	indianapolis	IN
Judyth	Hyll	Eugene	OR
Kela	Hytrek	Omaha	NE
Lorraine	I Evans-Wilson	Hilton Head Island	SC
Tania	I Redlich	San Jose	CA
Noa	Iacob	Ann Arbor	MI
Pat	Iacobucci	Montgomery	TX
Vicky	Iafrati	Pittsford	NY
Laura	Iannucci-Evans	San Antonio	TX
Heidi	Ihloff	Plainfield	CT
Sweet	Image	Belmont	NH
Wendy	Imber	Wellington	FL
Arlene	Imbriacco	Edison	NJ
Frank A.	Imbriacco	Edison	NJ
Rachel	Imholte	Minnetonka	MN
Kristen	Ingalls	Richmond	CA
Donna	Ingenito	Mount joy	PA
Slav	Inger	West Bloomfield	MI
Cindy	Ingersoll	Muir	MI
S.	Ingram	Hollister	MO
Linda	Inness	Philadelphia	TN
LouAnne	Insprucker	La Canada	CA
Bridget	Irons	Philadelphia	PA
Sharon	Irwin	Talala	OK
Marian	Isaac	Modesto	CA
Gregory	Isaacs	Syracuse	NE

First name	Last name	City	State
Peter	Ismail	KAILUA KONA	HI
Jennifer	Ivers	FORTY FORT	PA
Susan	Iverson	Liberty Township	OH
Jan	Ivey	Happy Valley	OR
J	IWASAKI	Walnut	CA
Laurie	Izzo	North Haven	CT
Kathleen	Jacecko	Redondo Beach	CA
Amelia	Jackson	Chapel Hill	NC
Cathy	Jackson	Madison	IN
Cheryl	Jackson	Versailles	KY
Claire	Jackson	Citrus Springs	FL
Maria	Jackson	Mamaroneck	NY
Mary Elizabeth	Jackson	Winston-Salem	NC
richard	jackson	shelburne	VT
Susan	Jackson	Weston Lakes	TX
Aaron	Jaco	Gobles	MI
Ronald	Jacob	San Jose	CA
Shannon	Jacobs	dorothy	NJ
Christine	Jacobs	Chicago	IL
Mari	Jacobson	Manhattan Beach	CA
Robert	Jacobson	Brooklyn	NY
Robin	Jacobson	New York	NY
Ruth	Jacobson	Gages Lake	IL
Karen	Jacques	Sacramento	CA
Nancy C	Jacques	Tucson	AZ
Andrea	Jaeger	Santa Rosa Beach	FL
Patrick	Jaeger	Safety Harbor	FL
Brenda	Jaenicke	monticello	IN
Yasmine	Jaffri	Center Line	MI
Gina	Jager	Fremont	CA
Ellen	Jahos	Alstead	NH
Lisa	Jaime	Los Angeles	CA
Jennifer	Jake	Camarillo	CA
Jessica	Jakubanis	Albuquerque	NM
Kate	Jamal	Wilmington	DE
Judith	James	Naples	FL
Karen	James	Tarpon Springs	FL
Linda	James	The Woodlands	TX
Patricia	James	Falls Church	VA
Phil	James	Bloomington	IN
Stacy	James	Paola	KS
Tom	James	Grand Haven	MI
Anthony	Jammal	Roseville	CA

First name	Last name	City	State
Robert	Janke	Cincinnati	OH
Beverly	Janowitz-Price	Phoenix	AZ
Hillie	Janssen	LADERA RANCH	CA
Matthew	Janusauskas	Bourbonnais	IL
Gayle	Janzen	Seattle	WA
Stan	Janzick	Bronx	NY
Stan	Janzick	Bronx	NY
Richard	Jaretsky	Clifton	NJ
Astrid	Jarvis	Douglaston	NY
CK Nuetzie	Jasiorkowski	Reno	NV
Christine	Jassak	Chicago	IL
Virginia	Jastromb	Northampton	MA
Nigel	Jay	Irvine	CA
Anne	Jeffers	Raymond	NE
Edith	Jeffrey	New York	NY
Mary	Jeffrey	Woodinville	WA
Lisa	Jefko	Roscoe	IL
john	jenicek	san antonio	TX
Charlene	Jenkins	Abingdon	MD
Christine	Jenkins	Carpinteria	CA
Eugenie	Jenkins	BALTIMORE	MD
Linda	Jennings	Fort Myers	FL
nancy	jennings	cedar rapids	IA
Shelby	Jennings	Silver Springs	FL
Travis	Jennings	PASADENA	TX
Debbie	Jensen	Surprise	AZ
Kathy	Jenson	Hilton Head Island	SC
Darynne	Jessler	Livingston	MT
Rachel	Jett	Port Orange	FL
Elizabeth	Jewell	Upper Darby	PA
Peggy	Jewell	Madison	NC
Annette	Jewell-Ceder	Ham Lake	MN
ivonne	jimenez	North Chicago	IL
Surim	Jin	Winter Haven	FL
Lori	Jirak	JULIAN	CA
Charlotte	Johansen	HIGH WYCOMBE	WA
Mark	Johns	Omaha	NE
Mary Lee	Johns	Houston	TX
Mark	Johnsen	Lyon Twp	MI
Alice	Johnson	sacramento	CA
Allan	Johnson	MILTON	FL
Chad	Johnson	Sylmar	CA
Courtney	Johnson	Silver Spring	MD

First name	Last name	City	State
DONNA E	JOHNSON	MORAINE	OH
Gail f	Johnson	Blue Bell	PA
GEORGE D	JOHNSON	MORAINE	OH
Heather	Johnson	Lynn Haven	FL
Heidi	Johnson	LAYTON	UT
Justin	Johnson	Hayward	CA
Karen	Johnson	Whittier	CA
Karon	Johnson	Bend	OR
Liz	Johnson	albany	CA
Lynne	Johnson	Hohenwald	TN
Mary	Johnson	Montgomery	AL
Mary	Johnson	Edgewater	FL
MATTHEW	JOHNSON	ST PAUL	MN
Michael O.	Johnson	Ruther Glen	VA
MIchele	Johnson	Yorktown Heights	NY
Nancy	Johnson	Port Orchard	WA
Patti	Johnson	Perkasie	PA
Paula	Johnson	Murrells Inlet	SC
Robert	Johnson	El Segundo	CA
Sharon	Johnson	Southport	CT
THOMAS	JOHNSON	Blowing Rock	NC
Vicki	Johnson	Kansas City	MO
William	Johnson	Sarasota	FL
Ana	Johnston	Green Cove Springs	FL
Prof. Lloyd	Johnston	Pinckney	MI
Kellie	Johnston	North Richland Hills	TX
Steven	Johnstone	Hollywood	MD
Renita	Jolley	Boulder	CO
Anna	Jon es	Pittstown	NJ
Alfred	Jonas	Biscayne Park	FL
Alden	Jones	Spokane	WA
Ally	Jones	Brooklyn	NY
Angela	Jones	Lees Summit	MO
Anna	Jones	Pittstown	NJ
Diane	Jones	Temple	PA
Donna	Jones	Herndon	VA
Henry	Jones	Warwick	RI
Jan	Jones	El Cerrito	CA
Jane	Jones	Milton Freewater	OR
Jen	Jones	Yarmouth Port	MA
Jennifer	Jones	Portsmouth	OH
Linda	Jones	Fall River	MA
Marilyn	Jones	Littleton	CO

First name	Last name	City	State
Rev. Allan B.	Jones	Santa Rosa	CA
Ronald	Jones	Plymouth	MI
Roslyn	Jones	North Palm Springs	CA
Stephanie	Jones	Oklahoma City	OK
Stephanie	Jones	Boynton Beach	FL
Tony	Jones	Carbondale	IL
Zareth	jones	Savannah	GA
Jo	Jones	Clearwater	FL
Mary	Jonik	Denver	CO
Sandra	Joos	Portland	OR
S.	Jordan	Deerfield Beach	FL
SUSAN	JORDAN	Cardiff	CA
Julia	Jorgensen	McAllen	TX
Barbara	Joseph	Batavia	OH
Christine	Joseph	Edison	NJ
Vicki	Joseph	Chicago	IL
Ryan	Joyce	Aspinwall	PA
Marguerite	Juliusson	Chicago	IL
Calvin	Jung	BURBANK	CA
Diana	Jung	Vancouver	WA
Michelle	Jung Janus	Chicago	IL
Judith	Junior	Kansas City	MO
Eileen	Juric	Raleigh	NC
Donna	Juriga	HARPURSVILLE	NY
Nancy	Jurisevic	Oak Brook	IL
Barbra	K	Philadelphia	PA
Kathryn	K	Northbrook	IL
keith	kaback	Tucson	AZ
laura	kabernagel	Fallston	MD
Sabena	Kachwalla	Pompano Beach	FL
Sandy	Kadish	Atlanta	GA
Rosalie	Kadlubowski	Marinette	WI
Norma	Kafer	Phoenix	AZ
Marilyn	Kagan	Providence	RI
Angela	Kahan	Boca Raton	FL
Peter	Kahigian	Haverhill	MA
joseph	kaleel	senewaing	MI
Lindsey	Kalfsbeek	Antioch	CA
Burt	Kallman	TORRANCE	CA
Elissa	Kallsen	Sioux Falls	SD
Astra	Kalodukas	Homestead	FL
N	Kaluza	El Sobrante	CA
meha	kamdar	Wheaton	IL

First name	Last name	City	State
Laura	Kamenitz	New Orleans	LA
Marcia	Kaminski	Buffalo	NY
Lance	Kammerud	Blanchardville	WI
Julie	Kamrath	Spirit Lake	IA
Julie	Kamrath	Spirit Lake	IA
Stephanie	Kana	Glendale, AZ, US	AZ
Brooke	Kane	McLean	VA
Caitilin	Kane	Dell Rapids	SD
Christine	Kane	Lehighton	PA
Misti	Kane	Pittsburgh	PA
Pamela	Kane	Bedminster	NJ
Polly	Kanganis	East Setauket	NY
Shannon	Kanner	Pamplin	VA
sharon	kantanen	LA JOLLA	CA
Robert	Kanter	Van Nuys	CA
Adam	Kaplan	Laguna Beach	CA
andrew	kaplan	palmbay	FL
Joan	Kaplan	Altadena	CA
Richard	Karel	Baltimore	MD
Michael	Karmazin Jr	Kenner	LA
diane	karsch	Somers	NY
etta	karth	pepeekeo	HI
Argiro	Kasapis	Norton	OH
Batsheva	Kasdan	Los Angeles	CA
Kari	Kashickey-DiMasso	Largo	FL
Karen	Kassabian	East Brunswick	NJ
Kenneth	Kast	Santa Fe	NM
Ruth	Kastner	Gloversville	NY
Linda	Kateeb	Orland Hills	IL
Melanie	Kathan	Midway	UT
Tracey	Katsouros	waldorf	MD
Ruth	Katz	Babbitt	MN
Jeffrey	Kaufman	Battle Ground	WA
Murray	Kaufman	Irvine	CA
Suzanne	Kause	Pittsburgh	PA
Richard	Kavey	Cazenovia	NY
James	Kawamura	Fontana	CA
Karen	Kawszan	Spring	TX
Kristen	Kay	Pine	CO
Kristen	Kay	Hickory	NC
Lorraine	Kay	Lexington	MA
S.	Kay	Tijeras	NM
valerie	kaye	Northville	NY

First name	Last name	City	State
Trina	Keafer	Mesa	AZ
Evelyn	Kean	Pittsburgh	PA
Stephanie	Keane	Dublin	NH
Laura	Kearney	Antioch	IL
Barbara	Keefer	Marmora	NJ
Eileen	Keeffe	New York	NY
Terry	Keenan	Huntsville	UT
Sara	Keesling	Chesterfield	VA
A	kehas	Bow	NH
Ann	Kehl	Genoa City	WI
Linda	Keiffer	Manheim	PA
Darr	Keiger	Miami	FL
Lisa	Keim	Oak Lawn	IL
Ed	Keith	Vancouver	WA
Lindsay	Keith	West Bridgewater	MA
Mary	Keithler	Englewood	CO
Marcia	Kellam	Pensacola	FL
Amanda	Keller	Terre Haute	IN
Drew	Keller	Kennesaw	GA
Sharon	Keller	Ocala	FL
Sophia	Keller	Seattle	WA
Stacey	Keller	Westlake village	CA
John	Kellermeyer	Columbus	OH
Elizabeth	Kelley	Newport News	VA
Kathleen	Kelley	Brooksville	FL
Steven G.	Kellman	Shavano Park	TX
Kevin	Kelly	New York	NY
Maria	Kelly	Ashland	OR
Michelle	Kelly	SEATTLE	WA
Miscella	Kelly	Grand Rapids	MI
Sue	Kelso-Haines	Hood River	OR
Donna	Kemp	Chico	CA
Andrea	Kendall	Athens	GA
Kendra	Kendrick	Racine	WI
Arthur	Kendy	New York	NY
Colleen	Kennedy	Kearney	MO
Colleen	Kennedy	New York	NY
Karen	Kennedy	Lombard	IL
T	Kennedy	Billings	MT
Catherine	Kennedy	Omaha	NE
Kate	Kenner	Guilford	VT
Christine	Kenny	Ocranside	NY
Patricia	Kenny	Vancouver	WA

First name	Last name	City	State
Joseph	Kenosky	Mount Pocono	PA
Kim	Kensler-Prager	Toledo, OH 43614	OH
Natalie	Kent	Murrells Inlet	SC
Holly	Kent	Glenview	IL
Meredith	Kent-Berman	New York	NY
Heidi	Kerko	New Canaan	CT
Laurie	Kerr	BATTLE GROUND	WA
Tara	Kerr	Fayetteville	NC
Paula	Kerrebijn	Hayward	CA
Valorie	Kerschke	Sterling Heights	MI
Carol	Kessler	Ossining	NY
Steven	Kessler	Harrison	NY
Thomas	Kessler	Bath	ME
Melvin	Kestner	New Bern	NC
Sharon	Ketcherside	Lincoln	CA
Katherine	Kettlety	Downingtown	PA
Alice	Keyes	Cresco	PA
Jeannie	Keyes	Renton	WA
Dr. Mha Atma	Khalsa	Los Angeles	CA
Leonora	Kham	Saint Louis	MO
Melkon Marco	Khanlian	La Crescenta	CA
Victor	Khayat	Reston	VA
Rubi	Khilnani	San Mateo	CA
Sheila	Khilnani	San Mateo	CA
Amy	Kiba	Vancouver	WA
Amy	Kibble	Acworth	GA
Lori Beth	Kidd	Fort Myers	FL
RANDALL	KIDO	Mililani	HI
Joy	Kidwell	Boise	ID
Deborah	Kieffer	Colorado Springs	CO
Terri	Kierski	Spring Valley	IL
Jon	Kiesling	Saint Louis	MO
Carolyn	Kilborn	Annapolis	MD
Ann	Kilby	Bayside	CA
Susan Riker	Kilgore	Oneonta, NY	NY
Caitlin	Killian	Chester	NJ
Rebecca	Kilpatrick	Fairborn	OH
Alice	Kilpatrick	San Antonio	TX
Robin	Kilrain	Sun City West	AZ
Sarah	Kim	Santa Clara	CA
Rob	Kimberlin	Takoma Park	MD
Gaia	Kimberly	Co Spgs	CO
Rebecca	Kimsey	Sublimity	OR

First name	Last name	City	State
Sharon	Kinard	Effort	PA
Gregory	Kindrat	Windham	NH
christen	king	dallas	TX
Dr.Tammy	King	Gardner	MA
Fawn	King	Litchfield	ME
kathleen	king	Madison	WI
Martha	King	Auburn	NY
Megan	king	LAWRENCE TOWNSHIP	NJ
Melissa	King	St. Petersburg	FL
Michael	King	Staunton	VA
Tammy	King	Gardner	MA
Linda	Kingk	Bethesda	MD
Danelle	Kinion	Panama City Beach	FL
TIMOTHY	Kinkead	SAN DIEGO	CA
Song	Kinnamon	Indian Trail	NC
Mary	Kinninger	Truth or Consequences	NM
Janis	Kinslow	Aston	PA
Sherry	Kirby	Kenosha	WI
Karen	Kirchdoerfer	Orefield	PA
John	Kirchner	Fort Wayne	IN
Gale	Kirk	Newport Beach	CA
Anne	Kirkwood	Bradenton	FL
Cynthia	Kirschling	Aurora	IL
Karen	Kirschling	SF	CA
Karen	Kirtland	Riverside	CA
Kathleen	Kiselewich	Baltimore	MD
Allison	Kiser	Camp Hill	PA
Morgan	Kiser	Standish	ME
Cathryn	Kissinger	New Concord	OH
Cindy	Kissler	Milwaukee	WI
Andrew	Kistler	North Olmsted	OH
Michele	Kitt	Virginia Beach	VA
Wendy	Kitzmann	FOREST LAKE	MN
Maria	Kjaerulff	Gig Harbor	WA
Suzanne	kKueger-koplin	livermore	CO
Naomi	Klass	Bethel	NY
Laura	Klatt	Jupiter	FL
Tracey	Kleber	Shillington	PA
Linda	Klein	El Segundo	CA
Philip	Klein	Fort Lauderdale	FL
Renee	Klein	MdR	CA

First name	Last name	City	State
Janet	Klein	Fremont	CA
Mary	Kleinbach	Mertztown	PA
Nancy	Kleinrok	Studio City	CA
Edwina	Klemm	Houston	TX
Serena	Klempin	Cold Spring	NY
Nancy	Klepek	Arlington Heights	IL
Melvina	Kleverova Zilliox	Milwaukee	WI
Socorro	Klingman	Anaheim Hills	CA
Ben	Kloepper	St. Louis	MO
Vicky	Kloth	Savanna	IL
Cathy	Klug	Waterford	WI
rhoda	kluge	Falls Church	VA
Mark	Klugiewicz	Jamestown	TN
Mark	Klugiewicz	Jamestown	TN
Holly	Kluhsman	Hurley	WI
Kris	Kluth	Onalaska	WI
Dennis	Knaack	Bronx	NY
Angela	Knable	Flanders	NJ
Doris	Knapp	Star	ID
Doris	Knapp	Star	ID
Virginia	Knapp	Inver Grove	MN
Helen	Knauer	West Allis	WI
Jill	knecht	Canfield	OH
Lulu	Knight	Carol Stream	IL
Lori	Knight-Whitehouse	Kingston	NY
Karin	Knobel	Glastonbury	CT
Tammy	Knoll	Sioux City	IA
Rosemary	Knopff	Roseville	MN
James	Knott	Rankin	PA
Lorelette	Knowles	Everett	WA
Elena	Knox	Volcano	CA
Sarah	Knudsen	Winthrop	WA
Lilly	Knuth	Garden City	NY
Keri	Knuthson	PARADISE	CA
Lisa	Koehl	Ormond Beach	FL
Brad	Koehler	Mount Laurel	NJ
Sally	Koester	Cincinnati	OH
Michelle	Kofler	South Deerfield	MA
Lauren	Kofsky	Minnetonka	MN
Isabella	Kolar	College Park	MD
joyce	kolasa	Springville	CA
MJ	Kolb	Portland	OR
Patricia	Kolchins	Calabasas	CA

First name	Last name	City	State
Anna	Kolovou	Woodside	NY
Josh	Konheim Heffron	Nyc	NY
Gail and Rick	Konopacki	Madison	WI
Daniel	Kooiman	Fort Lauderdale	FL
Tracy	Koppel	Chicago	IL
Barbara	Korasek	Matteson	IL
ED	KORDAS	CHESTERFIELD	MI
Mark	Koritz	Atlanta	GA
Kelly	Korkes	Saint Cloud	FL
Jeff	Korner	South Lyon	MI
Laurel	Kornfeld	Highland Park	NJ
David	Kornreich	Syracuse	NY
Marsha	Korotyk	Forest hills	NY
Lucy	Korth	ADA	MI
Kathy	Kosinski	Goleta	CA
Aleks	Kosowicz	Abrams	WI
Jess	Kost	Miami-Dade	FL
Joseph	Kostenko	UNIVERSITY PLACE	WA
Linda	Kotthoff	SAINT LOUIS	MO
Nadine	Kouba	Saint Louis	MO
Jennifer	Koval	Fair Oaks Ranch	TX
Nicholas	Kovalcik	Bozeman	MT
Ron	Kovatis	Sea Isle City	NJ
Jennifer	Kovencz	Ithaca	NY
Jo	Kowalski	Northville	MI
Maureen	Koziol	Addison	IL
Jen	Kraemer	Lake Bluff	IL
James	Krafcik	Chesterfield	MO
Theresa	Krakauskas	Long Branch	NJ
Cathy	Kramek	St. George Island	FL
Maru	Kramer	Wake Forest	NC
Diane	Krassenstein	Phila	PA
Diane	Krassenstein	Phila	PA
Al	Krause	NYC	NY
Karen	Kravcov Malcolm	Scottsdale	AZ
Jean	Kravitz	Mission Viejo	CA
Alyssa	Krawczyk	Newington, CT	CT
Pamela	Krch	Grand Junction	CO
Ericka	Kreager	Wausau	WI
Kirk F	Krebs	Albion	NY
Georgia	Kresta	Blanchard	LA
gerald	kretmar	St. Louis	MO

First name	Last name	City	State
Sherry	Krider	Oreland	PA
Juli	Kring	Houston	TX
Lucille	Kring	Anaheim	CA
Padma	Krishnan	Superior	CO
Catherine	Kroeger	Hudson	MA
Corbett	Kroehler	Orlando	FL
Sherrie	Kroemer	DENVER	CO
Stephen	Krokowski	West Memphis	AR
Valerie	Kromas	Seattle	WA
Coleen	Krostal	Lindenhurst	IL
Barbara J	Krout	Ithaca	NY
Jon	Krueger	Jackson	MI
Michelle	Krueger	Merrillville	IN
Catherine	Krug	Hendersonville	NC
Ilana	Krug	Idlewylde	MD
Suzanne	Kruger	Harper's ferry	WV
Cyndee	Kruggel	Colorado Spgs	CO
Kaleta	Krull	Austin	TX
K	Krupinski	Cocoa Beach	FL
Keith	Krupinski	Kansas City	MO
Sarah	Ksiazek	Dallas	TX
Francine	Kubrin	Los Angeles	CA
rebecca	kuc	lexington	KY
Lori	Kuebler	Roseburg	OR
Mike	Kuhlenbeck	Des Moines	IA
Ethel	Kuhn	Virginia Beach	VA
Mary	Kulish	Aylett	VA
Claudette	Kulkarni	Pittsburgh	PA
Robin	Kulkarni	Victoria	MN
Jeff	Kulp	Raleigh	NC
Shankar	Kumar	New York	NY
Laurie	Kuntz	Mountain Home	ID
Steven	Kuntzman	Kalamazoo	MI
Cheri	Kunz	Woodinville	WA
Daniel	Kuperus	Portland	OR
Tatiana	Kurakin	Silver City	NM
Katrin	KURIGER	Waterloo	IA
Diane	Kurland	Fair Lawn	NJ
Lyne	Kurokawa	Cooper City	FL
Shawn	Kurtz	Reading	PA
Daniel	Kurz	Monroe	NJ
Dr. Edward	Kush	Water Mill	NY
Sharon	Kushner	Colorado Springs	CO

First name	Last name	City	State
Jeff	Kutach	Victoria	TX
Lanny	Kutakoff	Dedham	MA
Paulette	Kuziola	Butler	TN
Janys	Kuznier	Vernon	NJ
Robert	Kvaas	Goleta	CA
Beth	Kwapis	Centennial	CA
Susan	Kyle	Largo	FL
Sandra	Kyles	Myrtle Beach	SC
candace	L	Raleigh	NC
L	L	Howell	MI
M	L	Cambridge	MA
M	L	R	WY
Sara	L	Philadelphia	PA
T	L	Chicago	IL
Kristin	L.	Buffalo	NY
Alison	La Barge	Carol Stream	IL
Suzanne	La Burt	Greenwood Lake	NY
Louise	Labbe	Lafayette	LA
Cindy	LaBella	Sherman Oaks	CA
Kathy	Labnriola	Berkeley	CA
Jeff	Labudda	park falls	WI
Susan	Lacey	Rochester	MA
Edward	Lach	BALTIMORE	MD
Luke	Lach	South San Francisco	CA
Denise	LaChance	Winnetka	CA
Monika	Laendle	Glorieta	NM
Suzanne	LaFontaine	Fort Smith	AR
Louise	LaFrancis	Lisle	IL
Laurie	LaGoe	Alexandria	VA
Jacques	Lahaie	Alpharetta	GA
Joyce	Lahna	Hastings	FL
amy	laine	charlestown	MA
Donna	Lainoff	St Louis	MO
Kathy	Laird	OP	KS
Diane	LaMagdeleine	Countryside	IL
Leticia	LaMagna	Brooklyn	NY
Elena	Lamb	Levittown	NY
Penny	Lambert	Newport	MI
Kathi	Lamm	Sherwood	OR
Lois	Lamonica	Suffern	NY
Neenah	Lancaster-Riemer	Ocala	FL
Jack	Lancellotta	W. Warwick	RI
deborah	lancman	la mesa	CA

First name	Last name	City	State
Geraldine	Lanctot	Kerrville	TX
Brooke	Landau	New York	NY
Doug	Landau	SAINT PETERSBURG	FL
Clint	Landeen	Canby	OR
Suzanne	Landers	SAN MARCOS	CA
Mary	Landrum	Franklin	KY
Maureen	Landry	Wilmington	MA
Araceli	Lane	Harwinton	CT
FRANCINE	LANE	Amagansett	NY
Laurie	Lane	Rancho Santa Fe	CA
Melissa	Lane	Newburyport	MA
Paul	Lane	BRAINTREE	MA
Tamara	Lane-Wilson	Bowie	MD
Cheryl	Laney	COKATO	MN
Kelly	Lang	San Francisco	CA
Liana	Lang	White Haven	PA
Therese	Lang	Woodridge	IL
Eileen	Langan	Auburn	CA
Carolyn	Lange	Saylorsburg	PA
Chris	Lange	Fountain	CO
Sally	Langer	Sarasota	FL
John	Langevin	Colorado Springs	CO
Mike	Lanka	Maricopa	AZ
Cathy	Lankford	Phoenix	AZ
Lindsey	Lanpher	Brooklyn	NY
Yvette	Lantz	Myrtle Beach	SC
Jean	Lapham	East Weymouth	MA
Sharron	laplante MD	Tolland	CT
Michele	LaPorte	Lakeland	FL
Rebecca	Lara	Las Vegas	NV
Leslie	Laraway	Boise	ID
Venetia	Large	Altadena	CA
Nikki	Larkins	Los Angeles	CA
Laura	LaRocca	Burbank	CA
Ady	Larsen	San Francisco	CA
Carolena	Larsen	Colorado Springs	CO
Nadine	Larsen	San Juan Capistrano	CA
Charles	Larson	West long branch	NJ
Cliff	Larson	Meridian	ID
Stacey	Larson	Highlands Ranch	CO
R Dene	Larson Jr	San Francisco	CA
Dona	LaSchiava	Green Valley	AZ

First name	Last name	City	State
April	Lasiter	Fort Smith	AR
Matthew	Lasky	Woodbridge	NJ
Barbara	Lasley	Denver	CO
Daniel	Lassiter	Tonawanda	NY
First	Last	Towson	MD
Pat	LaStrapes	Houston	TX
Nancy	Latner	Dallas	TX
Chris	Latt	Portland	OR
David	Lauder	OAK BROOK	IL
Patricia	Lauer	Signal Hill	CA
Marilyn	Lauer	Kenosha	WI
Jillana	Laufer	Studio City	CA
Cynthia	Laughlin	Lynchburg	VA
charlotte	laughon	hoschton	GA
Gerolynn	Laukevicz	New Milford	CT
Patricia	Laurel-Lewis	Los Angeles	CA
Michele	Lauren	Monument	CO
Edward	Laurson	Denver	CO
Charlene	Lauzon	Lynnwood	WA
Gerri	Lavelle	Charlottesville	VA
April	Laverty	Lewiston	ME
Tanya	Lavoie	Lewis Center	OH
Petro	Lavris	Scarborough	ME
Fred	Lavy	Harrisonburg	VA
Diana	Law	Des Moines	WA
Sandy	Lawler	Merrimack	NH
Kathy	Lawless	Harleysville	PA
Ashley	Lawrence	Little Rock	AR
Hunter	Lawrence	Cincinnati	OH
Melissa	Lawrence	Blue Island	IL
Michael	Lawrence	Verona	PA
Happy	Laymon	Prosperity	SC
Allister	Layne	Conyers	GA
Bob	Layton	Portland	OR
Teresa	Layton	Hooper	UT
Josette	Le Beau	Neptune	NJ
Barbara	Leake	Los Angeles	CA
Geralyn	Leannah	Sheboygan	WI
Margaret	Leao-Evans	Scottsdale	AZ
Jan	Leath	Glendale	CA
Alan	Leavitt	Chicago	IL
Donna	Leavitt	Toms River	NJ
Jane	Leavitt	Seattle	WA

First name	Last name	City	State
Lauren	LeBlanc	Oxford	CT
Laraine	Lebron	Utica	NY
Becky	Lechner	Binghamton	NY
Anna	Lee	Brooklyn	NY
Dawn	Lee	Louisville	KY
Dyan	Lee	St Louis	MO
Hannah	Lee	Madison	WI
Harvey S.	Lee	Arlington	MA
Jann	Lee	Walnut Creek	CA
madeline	Lee	Boyce	LA
Michelle	Lee	Covington	GA
RONALD	LEE	SAINT PAUL	MN
Steven	Lee	Springfield	MO
SUSAN	LEE	Luray	VA
Claudia	Leff	Mamaroneck	NY
Jay	Lefkowitz	Valley Glen	CA
Susan	Lefler	Hilham	TN
Patty	Lehr	Roxboro	NC
Carol	Leibenson	New York	NY
Karen	Leifker	NINE MILE FLS	WA
Becki	Leigh	New York	NY
Jacqueline	Leikam	Hays	KS
Miriam	Leiseroff	San Jose	CA
Mary Ann	Leitch	Philadelphia	PA
Joni L	Leithe	St. Paul	MN
J.	Leithwood	Aurora	ON
J.	Leithwood	Aurora	ON
Nancy	Leiting	Lemont	IL
(Miss) Lora	Leland	Portland	ME
Sue	Lelly	Columbia	MO
Monica	Lemkowitz	New York	NY
Donna	Lemongello	Davis	CA
B. R.	Lemonik	Mahopac	NY
Melissa	Lemons	WILMINGTON	DE
Denise	Lenardson	Sunland	CA
Joseph	Lendvai	Bath	ME
Blake	Lenoir	Chicago	IL
Patricia	Lenzo	Franklin,	NC
Marilyn	Leon	Tampa	FL
Mary A	Leon	San Antonio	TX
John	Leonard	Pittsburgh	PA
Virginia	Leonard	Rockford	MN
Evelyn	Leone	Seattle	WA

First name	Last name	City	State
Deanna	Leon-Guerrero	Honolulu	HI
Bob	Leppo	Shell Beach	CA
Melissa	Lerch	ALLISON PARK	PA
Lucas	Lerose	Black Canyon City	AZ
Diane	Lesser	North Augusta	SC
Mary	Lester	Hemlock	NY
Regina	Lester	Mullins	SC
Elizabeth	LeSueur	Cheyenne	WY
Wendy	Leung	San Francisco	CA
Steven	Leutner	Arlington	VA
b	leved	Baltimore	MD
Annette	LeVee	Evanston	IL
Chris	Leverich	Playa del Rey	CA
Karen	Levi	Potomac	MD
cathy elizabeth	levin	bayonne	NJ
chuck	levin	Easthampton	MA
Eileen	Levin	Hopkins	MN
Julie	Levin	New York	NY
Shaun	Levin	West Palm Beach	FL
Alan D	Levine	New York	NY
Gilda	Levinson	Coral Springs	FL
Lacey	Levitt	San Diego	CA
Michael	Lewandowski	Fuquay Varina	NC
Kalliopie	Lewellyn-Moon	Essex	MD
Diana	Lewis	Summit	WI
Donna	Lewis	Bonne Terre	MO
Kaneisha	Lewis	Fort Worth	TX
Kristin	Lewis	Stafford	TX
Norman	Lewis	WESTON	FL
Shawn	Lewis	Bloomiongton	IN
Susanne	Lewis	McDonald	PA
Sylvia	Lewis Gunning	Thousand Oaks	CA
Maria	Lewytzkyj-Milligan	Sebastopol	CA
Karen	Leyva	Vista	CA
Jole	Lheureux	Macomb Twp	MI
Dominic	Libby	Milton	NH
Debra	Lichstein	Agoura Hills	CA
Gary	Lichtenberg	Temple Terrace	FL
s	liddell	Brisbane	QLD
Gregory	Light	PLATTSBURGH	NY
Robin	Lightner	Kingsport	TN
Teresa	Ligorelli	Wellington	FL
Mary	Liguori	Philadelphia	PA

First name	Last name	City	State
Nancy Enz	Lill	Spokane	WA
Donald	Lilly	Orlando	FL
Fernessia	Lilly	Utica	NY
Paul	Lima	Palm City	FL
cher	limle	Menasha	WI
Stephanie	Limpert	Saint Paul	MN
Kathy	Linale	Napa	CA
Karen	Linam	Merced	CA
Sarah	Lincoln	North Ferrisburgh	VT
A	Lindemann	Norfolk	VA
Nancy	Linder	Hiram	GA
Pamela	Lindquist	Bayonne	NJ
Sarah	Lindsey	Charlotte	NC
Virgene	Link-New	Anacortes	WA
Alan	Linn	Hickory	NC
Treva	Linnean	Lebanon	OH
Alan	Linville	Louisville	KY
Francine	Lipka	Keansburg	NJ
Dorothy	Lippincott	Lloyd Harbor	NY
Carol	Lipsky	New York	NY
Jacquelyn	Lipson	West Orange	NJ
Julissa	Lirio	Miami	FL
Ellen	Little	Studio City	CA
Judith	Little	McKInleyville	CA
Florence	Litton	Valley Center	CA
Lora	Livergood	Village Of Lakewood	IL
Maria	Livers	Cleveland	OH
Michele	Livesay	Fall City	WA
JOHN B.	LIZAK	Northampton	PA
Pamela	Llewellyn	Berkeley	CA
Kim	Lloyd	Tampa	FL
Stephaney	Lloyd	South Pasadena	CA
Kent	Lobato	Colorado Springs	CO
Eric	Lobbins	Port St Lucie	FL
Gina	LoBiondo	Havertown	PA
Joanne	LoBuono	Westwood	NJ
C S	Lockwood	Wheaton	IL
Laurie	Loeb	Carbondale	CO
Stacy	Loeb	New York	NY
Cathy	loewenstein	Babylon	NY
Toni	Logan	Marble Falls	TX
Donna	Logan	Erie	PA
R.	LoGiudice	B'klyn	NY

First name	Last name	City	State
arline	lohli	trinity	FL
Gayle	Lomas	Holland	MI
Lois	Lommel	Richmond	VA
Jacqueline	Lomonoco	East Greenbush	NY
Sheena	Lonecke	Windham	NY
James	Long	Denver	CO
Laura	Long	Cedar Creek	TX
Melissa	Long	Nashville	TN
Richard	Long	Warwick	RI
Sarah	Long	Manassas	VA
Tiffani	Long	Lemoyne	PA
Maria Louise Morandi	Long Zwicker	Lake Worth	FL
Jordan	Longever	Dorchester	MA
Deborah	Longino	New York	NY
Elaine	Longo	Ft. Lauderdale	FL
Nancy	Longoria	Houston	TX
Camille	Loo	Scottsdale	AZ
Alice	Looby	Zephyrhills	FL
Susan	Loomis	Renton	WA
Ed	Loosli	Cathlamet	WA
Kathy	Lopes	Mine Hill Township	NJ
IRENE	LOPEZ	San Diego	CA
Josefina	Lopez	Kent	WA
Julio	Lopez	SALIDA	CA
Susie	Lopez	El Paso	TX
M	Lopez	Yonkers	NY
Iliana	Lopez Millan	Union City	NJ
Herbert	Lord	Columbia	SC
Patrice	Lord	Davis	CA
Catherine	Loren	Ridgecrest	CA
Jude	Lotz	Burbank	CA
Lisa	LOUCKS	Dahlonega	GA
Ko	Louis	Erie	CO
Kathleen	Lovan	Pensacola	FL
Jennifer	Love	Ashford	AL
Claudia	Lovejoy	Hayden Lake	ID
Jim	Loveland	St Petersburg	FL
Carole	Loveless-Mathews	Dunwoody	GA
Marlene	Lovewell	Lancaster	CA
Barry	Lovinger	YorbaLinda	CA
Amanda	Lowe	Boise	ID
Arlene	Lowe	Crown Point	IN

First name	Last name	City	State
Chris	Lowe	Columbia	MD
susan	lowe	sebastian	FL
Brandon	Lowentrout	Westminster	CA
Margaret	Lowery	McFaddin	TX
Jennifer	Lowrey	Glen Mills	PA
Tracey	Loyd	Everett	WA
Kristina	Lozon	Glendale	AZ
Holly	Luban	Atascadero	CA
Diana	Lubin	La Mesa	CA
Rega	Lubin	Rindge	NH
Marcella	Lubomski	Tarentum	PA
Sandra	Lubrano	Marlton	NJ
Caroline	Lucas	Lexington	MA
Laurie	Lucas	Jackson	OH
steve	lucas	austin	TX
Deborah	Luciano	Stoneham	MA
Maury	Luck	TOOELE	UT
Barbara	Luhmann	New Milford	NJ
Karen	Lull	Claremont	CA
Patricia	Lull	Superior	WI
L	Lum	Rancho Cucamonga	CA
Nevaeh	Lumiere	Akron	OH
Elizabeth	LUNA	DETROIT	MI
Cindi	Lund	Lopez Island	WA
Jimmie	Lunsford	San Diego	CA
Jackie	Lunz	Cockeysville	MD
Jamie	Lurtz	Las Vegas	NV
Jonathan	Lusty	Taylorsville	UT
Michelle	Lute	Pena Blanca	NM
Jennifer	Luther	Brookfield	WI
Heather	Lutz	New Smyrna Beach	FL
WANZA	LUTZ	DEWEY	IL
Brian	Lyczynski	Mishawaka	IN
Linda F	Lyke	Los Angeles	CA
Diane	Lynch	Summit	NJ
Laura	Lynch	Meriden	CT
Maureen	Lynch	Clifton springs	NY
Rachel	Lynch	Paris	MO
W	Lynch	Los Angeles	CA
Pam	Lynn	Oak Ridge	NJ
Sandy	Lynn	St Louis	MO
MARSHA	LYON	San Diego	CA
Maya	Lyon	Tacoma	WA

First name	Last name	City	State
Carol	Lyon	Alexandria	VA
margaret	lyons	lynbrook	NY
Pamela	Lyons	Lexington	MA
Elena	M	Naples	FL
Megan	M	Woodridge	IL
Roberta	M Brunelle	Vineyard Haven	MA
marilyn M	m forbes	Galisteo	NM
Isaiah	M Laitinen	Pulaski	WI
Christine	M Piekarski	Canton	MA
Lillian	M Spiess	EAST QUOGUE	NY
Anne	M Stewart	WALNUT CREEK	CA
MARCIA	M TOTH	North Miami Beach, FL	FL
Trina	M.Keafer	Phoenix	AZ
Edward	Macan	Eureka	CA
Bill	Macartney	Reno	NV
Bill	Macartney	Reno	NV
Wendy	MacAuley	Montclair	NJ
Tristan	MacAvery	Syracuse	NY
Kirsty	MacCalman	Tucson	AZ
Kirsty	MacCalman	Tucson	AZ
Christian	MacCready	Cardington	OH
Mark	MacDonald	Seattle	WA
Susan	MacDuff	Mineral	VA
Pat	Mace	Spotsylvania	VA
Jo	Macek	Millington	MI
Candace	MacEwen	San Jose	CA
Marie	Maciel	Bridgewater	NJ
Arlene	Macintosh	Weston	FL
Joe	Mack	Woodlyn	PA
Elizabeth	MacKelvie	Appleton	WI
Elizabeth	Mackey	Oneonta	NY
Gerald	Mackey	Gainesboro	TN
Alan	MacLamroc	Smyrna	GA
Pamela	MacLaren	Hayward	CA
Amber	MacLaren	New port richey	FL
Lauren	MacLise	New York	NY
Deirdre	MacNeil	Pinehurst	NC
Loretta	Madarang	Cotati	CA
Barbara	Maddalena	Teaneck	NJ
Barbara	Maddalena	TEANECK	NJ
Justin	Maddox	Lake Stevens	WA
Wanda	Maddux	Monmouth	OR

First name	Last name	City	State
Mileaha	Madel	Wilmington	DE
H	Madelans	Aberdeen	NC
Jill	Madsen	Colorado Springs	CO
Patricia	Maffeo	Knoxville	TN
Marie Christina	Magalas	Yonkers	NY
Pamela	Magathan	Los Angeles	CA
John	Magee	Guyton	GA
Kathy	Magne	Saint Paul	MN
Mario	Magpale	Palmdale	CA
Pat	Magrath	Huntington Beach	CA
Mary	Maguire	Whitehall	PA
Dena	Maguire Young	Dahlonega	GA
Sarah	Magwire	Cottrellville	MI
linda	magyar	cleveland	OH
Mary Ann	Mahaffie	Torrance	CA
Debbie	Mahder	Battle Ground	WA
John	Mahoney	North Reading	MA
Rita	Mahoney	Lawrence	KS
Kathryn	Mahoney	Los Angeles	CA
Cheryl	Maibusch	Spofford	NH
Sally	Maish	Roseburg	OR
Michelle	Maisto	Florence	NJ
Laura	Maitra	Watsonville CA	CA
Eugene	Majerowicz	View Park	CA
Tajie	Major	Palos Verdes estates	CA
Joyce	Majors	Wolcott	VT
Mark	Majors	Wolcott	VT
Monica	Majors	Boca Raton	FL
Judith	Make	Rumford	RI
Arax	Maksoudian	San Dimas	CA
Roberta	Malanowski	Irving	TX
Cindy	Maldonado	Brandenburg	KY
Vaida	Maleckaite	PHOENIX	AZ
Susan	Malhiot	Moreno Valley	CA
joseph	malina	North Las Vegas	NV
Judi	Malinish	New Franklin	OH
Doreen	Mallard-Lavin	Malverne	NY
ann	mallow	Glenview	IL
Heather	Mallow	Scarsdale	NY
Cynthia L	Malloy	Parkersburg	WV
William	Malmros	Ballston Spa	NY
Kate	Maloney	Lansdowne	PA
Sandrine	Mamigonian	Tehachapi	CA

First name	Last name	City	State
Jon.	Mamula	Winter Park	FL
Sherrie	Mancera	Torrance	CA
Bernee	Mancuso	Elyria	OH
pete	mandeville	Spokane	WA
Rosemary	Manesis	Potomac	MD
Stephanie	Manesis	Fargo	ND
GALE	MANGINI	WESTOVER, MD	MD
Laura	Mani	Mill Valley	CA
Anne	Mankin	Atlanta	GA
Heather	Mann	Spotsylvania	VA
james	mann	Bronx	NY
Jeff	MANN	Pulaski	VA
Colleen	Manning	Houston	TX
Ross	Mannino	Nutley	NJ
Susan	Mannix Remacle	Canaan	NH
Cynthia	Manos	ATLANTA	GA
Fae	Mansfield	Naples	FL
Amber	Manske	San Antonio	TX
Joni	Manson	Westerville	OH
RAED	MANSOUR	Chicago	IL
Dee	Manz	Hamilton	OH
Lisa	Manz	Hamilton	OH
CHERIE	MANZANO	ERIE	PA
Kathleen	Mapelsden	Green Valley	AZ
Marian	Marchese	Penn Valley	PA
Sherrie	Marchi	Palatine	IL
Sharon	Marchisello	Peachtree City	GA
Ann	Marckesano	Reston	VA
Martin	Marcus	San Diego	CA
Vivian	Marek	l	MD
Chris	Mariani	Yucaipa	CA
Jonathan	Mariante	Wilmington	NC
Lin	Marie	Newport	OR
Maria	Mariorenzi	Cranston	RI
Peter	Mark	Woodstock	IL
Catherine	Markham	Monticello	MN
Michael	Markham	Matthews	NC
Dorryann	Markham	Lakeway	TX
Paul	Markillie	Grand Blanc	MI
Jane	Markley	Festus	MO
Shannon	Markley	Shoreline	WA
Tina	Markowe	Los Angeles	CA
Kathleen	Markowitz	Henrico	VA

First name	Last name	City	State
Darlene	Marley	West Palm Beach, FL 33407	FL
Ruth	Marlowe	Allison Park	PA
Marielle	Marne	Phoenix	AZ
Barbie	Marquet	Key Largo	FL
Mary	Marquis	Fosston	MN
Betty	Marr	Roanoke	VA
Autumn	Marr	Davis	CA
Jennifer	Marriott	Ft Lauderdale	FL
Robert	Marriott	Fort Lauderdale	FL
John	Marro	Chicago	IL
Cynthia	Marrs	Junction City	OR
Joe	Marsala	JBER	AK
Joe	Marsala Jr	JBER	AK
Diane	Marsalis	Pine Ridge	SD
Sandy	Marschner	Worcester	MA
Joan Peterson	Marsden	IRVINE	CA
Tiffany	Marsh	Midway	KY
Anita	Marshall	St. Petersburg	FL
Dorrine	Marshall	Irvine CA 92620	CA
Nancy	Marshall	Portland	OR
Rick	Marshall	Manchester, NH	NH
Shannon	Marshall	Baltimore	MD
Terry	Marshall	Clint	TX
Chelsey	Marsing	Santa Monica	CA
Karen	Martellaro	Kansas City	KS
MERNA	MARTIAN	Naples	FL
Bonita	Martin	RANSOMVILLE	NY
Jayne	Martin	Tulsa	OK
juan	martin	rosario	santa
Julie	Martin	Bovey	MN
Karla	Martin	Tempe	AZ
kathryn	martin	massillon	OH
Kay	Martin	Canonsburg	PA
Ken	Martin	Newtown	CT
Leslie	Martin	Patchogue	NY
Lisa	Martin	PSL	FL
lynn	martin	Fern. Beach	FL
Michael	Martin	Kendallville	IN
Patricia	Martin	Houston	TX
Rand	Martin	Denison	TX
Stacey	Martin	Coloma	MI
Susan	Martin	Leesburg	VA

First name	Last name	City	State
Jennifer	Martin	Lewiston	ME
Robert	Martin III	Fountain Hills	AZ
C.	Martinez	San Diego	CA
linda	martinez	Los Angeles	CA
Lorraine	Martinez	Indian Mound	TN
Valentina	Martinez	Scottsbluff	NE
Joseph	Martinez	Riviera Beach	FL
Ana-Paula	Martins-Fernandes	North Andover	MA
M	Masek	Danville	CA
Catherine	Masiello	Watertown	MA
Geraldine	Maslanka	Sag Harbor	NY
Linda	Maslanko	Mays Landing	NJ
Brenda	Mason	Phoenix	AZ
Kathy	Mason	Sebewaing	MI
Shirley	Mason	Hayes	VA
susan	mason	Lake Worth	FL
Jolene	Mason	Brimfield	MA
Marie	Massa	Los Angeles	CA
K	Massel	Chicago	IL
Carolyn	Massey	Quincy	IL
Angela	Mastaloudis	Holladay	UT
Dolores	Mastenbrook	VANCOUVER	WA
Jeffery and Pamela	Mastin	Deep Gap	NC
Donald	Mastrapasqua	Antioch	CA
Paulina	Mastryukov	Bryn Mawr	PA
Phil	Mata	IL - Plainfield	IL
Gwen	Mataisz	Pitkin	CO
lynn	matarelli	Southlake	TX
robin	mater	Milford	PA
Barbara	Mathes	Rio Rico	AZ
Hedda	Matheson	Valentine	NE
Janie	Mathews	Mobile	AL
Susan	Mathews	Beaufort	SC
Holger	Mathews	Seattle	WA
Valarie	Matinjussi	Bellingham	WA
Samantha	Matson	Waterford	PA
Dominique	Matthews	Awendaw	SC
Donald	Matthews	Pflugerville	TX
Kayla	Matthews	St. Louis	MO
Lindy	Matthews	Anacortes	WA
Sherry	Matthews	Dittmer	MO
Gregory	Mattice	Toledo	OH

First name	Last name	City	State
Lynne	Mattingly	Coleman	TX
Michele	Mattingly	El Cajon	CA
Vicki	Mattison	Titusville	FL
Jean	Mattke	Arvada	CO
Dana	Mattocks	Dearborn	MI
Tamara	Matz	Los Angeles	CA
Karen	Mauldin	Falls Church	VA
Chris	Mauriello	Dana Point	CA
Frances	Maurino	Ocala	FL
Jennifer	Maurizzio	Narrowsburg	NY
Casee	Maxfield	Los Angeles	CA
Eva	Maxwell	Fruita	CO
mindy	maxwell	rockport	MA
V. A.	Maxwell	Spokane	WA
Miranda	Maxwell	Port Townsend	WA
ANGELA	MAY	Newberg	OR
Tara	May	Powell	WY
Susan	Mayer	San Diego	CA
Katherine	Maynard	Pacific Palisades	CA
Molly	Maynard	Blue Mounds	WI
Al	Maze	Plymouth	MA
Stacey	Mazza	Myakka city	FL
Anne	Mazzone	Easton	CT
Anne	Mazzone	Easton	CT
Kyle	McAdam	Gilmanton	NH
Carol	McArdell	El Jebel	CO
Dan	McAtee	Pine	CO
Mary	McAuliffe	Los Angeles	CA
Elaine	MCCABE	Wyoming	PA
Janet	McCalister	Winston Salem	NC
Anthea	McCallister	Great Court	SC
Barbara	McCane	Chesapeake	VA
Victoriaa	McCann	orlando	FL
Angel	McCarter	Albuquerque	NM
Teresa	McCartney	Glen Allen	VA
Beverly	McCauley	Elmira	NY
Sharon	McChancy	Benton	PA
Becky	McClain	Hudson	FL
janet	mcclain	cardiff	CA
Tina	McClain	BECKLEY	WV
Harriet	McCleary	Minneapolis	MN
Susie	McCleary	Chandler	AZ
Donette	McClellend	Hampton	VA

First name	Last name	City	State
Eileen	McCloskey	Newtown	PA
Rennes	McCloud	Missouri City	TX
Judy	McClung	Weaverville	NC
Andrea	McClure	Chicago	IL
Bea	McClure	Georgetown	TX
Elizabeth	McClure	Tipp City	OH
Susan	McClure	Bozeman	MT
Kevin	McCluskey	Pittsburgh	PA
Kevin	McCollough	Bourbon	IN
Shel	Mccollum	Gasport	NY
Timothy	McCollum	Tollhouse	CA
Barbara	McCombs	Lake Charles	LA
Kimberly	McConkey	Anchorage	AK
Kimberly	McCool	Aliquippa	PA
Mary	McCormick	Indianapolis	IN
Joan	McCormick	Milwaukee	WI
Nancy	Mccormick	Fresno	CA
Susan	McCorry	Santa Monica	CA
Eileen	McCorry	Pittsboro	NC
Sharon	McCort	Barnesville	OH
Amy	McCoy	Shelburne Falls	MA
Janet	Mccracken	Mint Hill	NC
Marta	McCracken	Anchorage	AK
Deborah	McCreary	Grand Rapids	MI
Ned	Mccrink	Dana Point	CA
Laura	McCrory	Ashburn	VA
Nicole	McCrystal	Duxbury	MA
Maureen	McCullough	Brooklyn Center	MN
Sherry	McCullough	Trenton	MI
Nancy	McCullough	Drexel Hill	PA
Michael	McCurdy	Fort Wayne	IN
Maureen	Mccurrie-Gibson	Chicago	IL
Susan	McCutchan	Oakland	CA
Meghan	McCutcheon	White Salmon	WA
Shereen	McDade	Los Angeles	CA
Jennifer	McDaid	Lostine	OR
Paul	McDaniel	Albuquerque	NM
mark	mcdermott	east rochester	NY
Marley	McDermott	Floral Park	NY
Andrea	McDonald	woodlands	AL
Barbara	McDonald	Saint Paul	MN
Emily	McDonald	Scranton	PA
Maureen	Mcdonald	Desert hot springs	CA

First name	Last name	City	State
Melissa	McDonald	atlanta	GA
Mary Ann	McDonald	Sacramento	CA
Mary	McDonough	Otisville	NY
Joan	McDougall	New York	NY
Kelley	Mcdowell	Rocklin	CA
Maria	McEachern	Somerville	MA
Modell	McEntire	San Bernardino	CA
Robin	Mcfall	Hermitage	PA
Marc	McFarland	SEATTLE	WA
Marisa	McFarlane	San Francisco	CA
Sean	McFeeley	Barrington	NJ
Louise	McGannon	Mitchell	SD
Dennis	McGee	Chicago	IL
Sarah	McGee	Killen	AL
Lynn	McGee	San Jose	CA
Kent	McGill	Lakeview	NC
Nicola	Mcgillicuddy	Redondo Beach	CA
Martin and Sharon	McGladdery	Farmington Hills	MI
Scott	McGlashan	San Francisco	CA
Judith	McGovern	Quakertown	PA
Katie	Mcgowan	Silverado	CA
Susan	Mcgrath	Tucson	AZ
Renee	McGrath	Saco	ME
Jacqueline	McGrath Curtis	Waterbury	CT
Jo Ann	McGreevy	Hackensack	NJ
Pamela	McGregor	Millersville	MD
Marilyn	McGrover	Franklin Square	NY
Ellie	McGuire	Bethlehem	PA
William	McGunagle	Spokane	WA
Cynthia	McHale	Naperville	IL
Kathleen	McHendry	Belchertown	MA
Katharine	McHenry	ALEXANDRIA	VA
Nancy	McIntyre	Grant	AL
Joshua	McKain	Scituate	MA
Caephren	McKenna	Oakland	CA
Marci	McKenna	Latham	NY
Don	McKenzie	Cincinnati	OH
Judy	McKinney	Holiday Island	AR
Laura	McKinnon	New york	NY
Kathleen	McLane	Woodbridge	VA
Tracy	McLarnon	Arcata	CA
Rohana	McLaughlin	San Anselmo	CA

First name	Last name	City	State
Susan	McLaughlin	Foothill Ranch	CA
Nancy	McLaughlin	Naples	FL
Kennetrh	McLean	Rosedale	NY
Carol	McLeod	Houston	TX
Joy	McMahan	Thousand Oaks	CA
Elizabeth	McMahon	Raleigh	NC
Caryn	Mcmain	Phoenix	AZ
Debbie and Bill	McMannis	Asheville	NC
Melisa	McMannis	Hutchinson	KS
Rosalie	McMenamin	Chicago	IL
Colleen	McMullen	Carson City	NV
Colleen	McMullen	Carson City	NV
Patricia	McNabb	Battle Ground	WA
Tracy	McNabb	Phoenix	AZ
Dianna	McNair	Rancho Cucamonga	CA
Sue	McNally	Andover	NJ
Catherine	McNamara	Orlando	FL
Barbara	McNeese	Lexington	KY
Laura	McNeil	Greenwood	IN
Cheryl	Mcpheron	Mayo	FL
Susan	McSwain	Shipman	VA
Jonathan	McVey	WHITE PLAINS	NY
Elaine	McWhorter	Washoe Valley	NV
Kathryn A	McWilliams	Colorado Springs	CO
David	Meade	Apollo	PA
Tina	Meadows	Villa Park	IL
John	Meagher	Raleigh	NC
Carron	Meaney	Boulder	CO
Kristi L.	Meccia	SAN MARCOS	TX
Shannon	Meckley	Carbondale	CO
Linda	Medeiros	Medford	OR
Jessie	Medina	Palmdale	CA
Kathleen	Medina	Lenox	MA
Barry	Medlin	Cartersville	GA
Nellie	Medlin	Holly Springs	MS
ELLIE	MEEHAN	Vero Beach	FL
Anne	Meenan	Sparks	MD
Michelle	Meighan	Spokane	WA
Margaret	Meinert	Lexington	SC
Lily	Mejia	Hemet	CA
Betty	Melcher	Lago Vista	TX
Renee	Melchiorre	SWANNANOA	NC
Michele	Meli	Brooklyn	NY

First name	Last name	City	State
Marc	Melinkoff	Becket	MA
Susan	MELLEN	Morristown	NJ
Lisa	Mellinger	Scotts Mills	OR
Annette	Mello	Boulder Creek	CA
Boris	Melnik	NEWTOWN	PA
Elizabeth	Melo	Orlando	FL
David	Melton	Dinuba	CA
Jonathan	Melusky	Shoreline	WA
Barb	Melzer	Cincinnati	OH
Rolanda	Mendelle	Topanga	CA
Cal	Mendelsohn	Nanuet, NY	NY
Javier	Mendez	Honolulu	HI
Sonia	Mendez	Whittier	CA
Shelly	Mendoza	Longview	WA
Tony	Menechella	Frankfort	KY
Elizabeth	Meni	Vienna	VA
Shirley	Mercado	Concord	CA
Judith	Mercer	Roseburg	OR
Rachelle	Meredith	Issaquah	WA
Robyn	Mericle	CHICAGO	IL
Melanie	Merriken	Jarrettsville	MD
Rebecca	Merrill	Auburn	AL
William	Merry	Oklahoma City	OK
John	Messer	Brutus	MI
Joseph	Messer	Chicago	IL
Lisa	Messinger	Port Townsend	WA
Karen	Mester-Chae	Frederick	MD
Elizabeth	Metcalf	Roswell	GA
John	Metcalf	Fitchburg	MA
Adrienne	Metter	Santa Barbara	CA
Alison	Mettler	Arroyo Grande	CA
Gretchen	Metz	P O Box 284 Olympia WA 98507	WA
Carol	Metzger	Wisconsin Rapids	WI
Carol	Metzger	Kents Store	VA
james	meyer	portland	OR
Tanya	Meyer	Woodland	CA
Twyla	Meyer	Pomona	CA
Diane	Meyer	Vadnais Heights	MN
Susan	Meyerholz	Greenport	NY
Sarah	Meyers	Howell	MI
Chip	Meyers	Zellwood	FL
Rosi	Meza-Steel	Washington	DC

First name	Last name	City	State
Kim	Miceli	Newark	OH
Lois	Michael Vincent	South Yarmouth	MA
Elizabeth	Michels	Tyler	TX
Marilyn	Mick	San Antonio	TX
Angela	Mickel	Myrtle Beach	SC
Patti	Mickelsen	Kailua-Kona	HI
Desiree	Middleton	Dania Beach	FL
Sherri	Midkiff	Salt Rock	WV
Pedro	Mier	Jackson Heights	NY
Ehren	Mierau	Alamo	CA
Norbert	Mietus	Toccoa	GA
mindy	Migdal-Seguin	Cutler Bay	FL
Barbara	Mihalas	Fayetteville	NY
Karen	Mikus	Mesa	AZ
GEORGE	MILAS	BELMONT	MA
Russell	Milazzo	Albuquerque	NM
Pete	Miles	Colonia	NJ
Regina	Milione	Plymouth Meeting	PA
Steven	Millan	Las Vegas	NV
Linda	Millar	Palatine	IL
M	Millar	Martinsburg	WV
AIMEE	MILLENSIFER	Denver	CO
Aimee	Miller	Freeport	TX
Ann	Miller	San Jose	CA
Anthony	Miller	Yonkers	NY
arry L.	Miller	Akron	OH
Brad	Miller	Topeka	KS
Brenda	Miller	Gallatin	TN
Carol	Miller	Hampton	IA
cheryl	miller	west orange	NJ
CRICKETT	MILLER	Augusta	MO
David	Miller	Jamaica Plain	MA
Dennis	Miller	Falkville	AL
Dennis	Miller	Falkville	AL
Elliott	Miller	lake placid	FL
Heidi	Miller	North Hills	CA
Jennifer	Miller	Lake Station	IN
Jerrilyn	Miller	Valley Village	CA
Lynn	Miller	Albany	NY
Lynn	Miller	Albany	NY
Mary	Miller	Delray Beach	FL
Melissa	Miller	Eastpointe	MI
Melissa	Miller	W. Covina	CA

First name	Last name	City	State
Meredith	Miller	Delray Beach	FL
Mike	Miller	Marylhurst	OR
nancy	miller	Frederick	CO
Pamela	Miller	Tolar	TX
Rory	Miller	Philadelphia	PA
Shirley	Miller	Shawnee	OK
TINA	MILLER	Philmont	NY
Victoria	Miller	Encino	CA
Paula	Miller	West Jefferson	OH
Lisa	Miller Masslich	Golden	CO
Ann-Ingrid	Millikan	Harrington Park	NJ
Irene	Millius	Newark	DE
Adam	Mills	Asheville	NC
Carol	Mills	Granger	IN
Marlene	Mills	Santa Barbara	CA
Janis	Millu	Franklin	PA
Janis	Millu	Franklin	PA
Nikolaos	Milonas	Westwood	MA
Karen	Milstein	Santa Fe	NM
Constance	Minerovic	Northfield	OH
Cheryl	Minieri	Byfield	MA
Susan	Minifie	Rhinelander	WI
Emma	Miniscalco	Washington	DC
Marcia	Minsky	Cincinnati	OH
Lorraine	Minto	Georgetown	FL
Barbara	Mintz	Encinitas	CA
Jessica	Miracola	Brooklyn	NY
Rob	Miraglia	Bayville	NY
Kathleen	Mireault	Quincy	MA
Marita	Mirzatuny	Austin	TX
Robert	Mis	East Hartford	CT
Jolie	Misek	Lacey	WA
Patricia	Misiolek	Lincoln Park	MI
Jill	Mistretta	San Francisco	CA
Jim	Mital	Moscow	ID
Eiko	Mitani	Albany	CA
Rob	Mitch	Arvada	CO
Chantel	Mitchell	New York	NY
Chery.	Mitchell	Spokane	WA
Desiree	Mitchell	San Francisco	CA
Jean	Mitchell	Commerce Township	MI
Josette	Mitchell	Lutherville-Timonium	MD

First name	Last name	City	State
Len	MItchell	Highland Park	NJ
Mariah	Mitchell	Winston Salem	NC
Mindy	Mitchell	Augusta	MI
Stephen	Mitchell	Newark	NY
Steven	Mitchell	ST PETERSBURG	FL
Beverly	Mitchell	Boise	ID
Jessica	Mitchell-Shihabi	Antelope	CA
Willard	Mittelman	Athens	GA
Lynn	Mittelstadt	Eskridge	KS
Audrey	Mittleberg	Las Vegas	NV
Leslie	Mix	Kirkland	WA
Candace	Mix, MSN, RN	Blawnox	PA
Candace	Mix, MSN, RN	Pittsburgh	PA
Lana	Miyagawa	Chicago	IL
Jane	Moad	Santa Rosa	CA
Henry	Mobley	Norfolk	VA
Susan	Mobley	Alliance	OH
Barbara-Jean	Mobley - Bush	Winston Salem	NC
Heather	Mock	Baton Rouge	LA
Deb	Moens	Evergreen	CO
Andy	Moffatt	Doylestown	PA
Joe	Mogel	Worcester	MA
Kathleen	Mohning	Franklin	TN
Jay	Mohr	Seattle	WA
Helen	Moissant	Central Point	OR
Anna	Molina	St Louis	MO
Nelson	Molina	Buena Park	CA
Dennis	Moll	Hialeah	FL
Nancy	Mollenauer	Raleigh	NC
Melissa	Moncavage	Rockville	MD
Michelle	Mondragon	Altamonte Springs	FL
Jacquelyn	Monette	Grove City	OH
Christine M.C.	Money	Long Valley	NJ
Thomas	Monforte	Indian Trail	NC
john	monsuer	wilkes barre	PA
Monica	Montalvo	Chandler	AZ
Linda	Montayne	Highland	IL
Geraldy	Monteiro	Fort Worth	TX
dawn	monteith	richmond	CA
Kathy	Monteleone	Lake Elsinoe	CA
Lisa	Monteleone	Flanders	NJ
Sofia	Montemayor-Thomas	Lincoln	MA
F Michael	Montgomery	Santa Rosa	CA

First name	Last name	City	State
Leah	Montgomery	College Station	TX
Susan	Montgomery	Johns Island	SC
RANDOLPH	MONTI	Andover	NH
Peggy	Moody	Gwinn	MI
Lori	Moog	Bridgewater	NJ
Bob	Mooney	Fayetteville	GA
Elizabeth	Mooney	Portsmouth	NH
Marina	Mooney	Gouldsboro	ME
Alice	Moore	Rindge	NH
Angie	Moore	Springfield	MO
Carol	Moore	Beaverton	OR
Cinzia	Moore	Battle Creek	MI
Dana	Moore	New York	NY
Deanna	Moore	Montezuma	IA
Eluzabeth K	Moore	Chapel Hill	NC
Joelene	Moore	North Richland Hills	TX
Karen	Moore	Chelmsford	MA
Karen	Moore	Acton	MA
Lorna	Moore	Santa Barbara	CA
Neva	Moore	Leonia	NJ
R	Moore	Bellevue	WA
Roberta	Moore	Littleton	CO
Trois	Moore	Goffstown	NH
Chris	Moore	Denver	CO
Ally	Mora	Panama City	FL
Phoebe	Morad	Braintree	MA
Sandra	Morales	Kingston	WA
John	Moran	Salem	OR
Judy	Moran	PANAMA CITY, FL	FL
Elsa	Morcelo-Encarnacion	College Point	NY
JoAnn	Mordenti	Orlando	FL
mary	more	flourtown	PA
Will	Morel	Brooklyn	NY
Christine	Moreno	Oakland Park	FL
Mr. Angel	Moreno	N Plainfield	NJ
Shannon	Moreton	Coweta	OK
Janine	Morgan	Eden Prairie	MN
Linda	Morgan	Rockford	IL
Melinda	Morgan	Thornton	IL
Nancy	Morgan	Los Angeles	CA
Paula	Morgan	Winter Springs	FL
Robin	morgan	Phoenix	AZ
Julie	Morgan	Kansas City	MO

First name	Last name	City	State
Sheryl	Moriarty	Saint Charles	MO
Carla	Morin	Peoria	AZ
Elan	Morin	Springfield	OR
Leanne	Morin	Kailua	HI
Dennis	Morley	Old Bridge	NJ
Kelly	Mormann	Elmer	NJ
Gerri	Morringello	Leland	NC
Deirdre	Morris	Medford	MA
Desda	Morris	Petaluma, Ca	CA
Kevin	Morris	Jacks Creek	TN
Kimberly	Morris	Fairmont	WV
Mary	Morris	Laurel	MD
Michele	Morris	Fort Wayne	IN
T	Morris	Henrico	VA
Barb	Morrison	Clearwater	FL
Denise	Morrison	The Villages	FL
Dianne	Morrison	San Rafael	CA
Douglas	Morrison	Key Largo	FL
James	Morrison	Willow Grove	PA
Jerene	Morrison	Paulden	AZ
joanJ	morrison	Nassau	NY
Tonya	Morrison	Normandy	TN
Cindy	Morrison	Corpus Christi	TX
Kimberly	Morrow	Annapolis	MD
Ellen	Morton	Seabrook	SC
Lugene	Morton-Quinn	New Prt Rchy	FL
Josephine	Mosco	HAMDEN	CT
George	Moseley	Denton	TX
Rich	Moser	Santa Barbara	CA
Kay	Moses	Eaton	OH
David	Moss	Claremore	OK
Paul	Moss	White Bear Lake	MN
Elizabeth	Mostov	New York	NY
Marcie	Mott	Chattanooga	TN
Denise	Motta	St Louis	MO
Thomas	Moulton	Astoria	NY
Karole	Moyed	Dallas	TX
Sandy	Moyer	Urbana	IL
Janet	Moyles	Englewood	CO
Joane	Mozgo	Raleigh	NC
Gail	Mroczek	Palm Coast	FL
Sue	Mstisa	Hardeeville	SC
Teresa	Mucha	Buffalo	NY

First name	Last name	City	State
Phoenix	Muchowski	Ramsey	MN
Kerstin	Mueller	Prescott	AZ
Michael	Mueller	Freeland	MI
Tara	Mueller	El Cerrito	CA
Lindsay	Mugglestone	Berkeley	CA
Leon	Muhudinov	Fair Lawn	NJ
James	Mulcare	Clarkston	WA
t	mullarkey	st george	UT
K	Mullen	Orlando	FL
Janis	Mullen	Asheville	NC
Judi	Mullenger	Herndon	VA
Doris	Muller	West Peoria	IL
Linda	Muller	Louisville	KY
Sheldon	Muller	Aurora	CO
Susan	Muller	Vero Beach	FL
Sherri	Mullinnix	Douglas	WY
Rita	Mullis	Charlotte	NC
Sharon	Mulvihill	Caldwell	NJ
Joseph	Mundaca	Parker	CO
Susan	Munday	Albuquerque	NM
Diane	Munley	Brick	NJ
George	Munoz	Stockton	CA
Margarita	Munoz	Hillside	NJ
Rebecca	Muradian	San Rafael	CA
Gail	Murchison	Festus	MO
Irene	Murdock	Las Vegas	NV
Lauren	Murdock	Santa Barbara	CA
Cassie A.	Murphy	Templeton	CA
cynthia	murphy	pensacola	FL
Jennifer	Murphy	Morristown	NJ
Jim	Murphy	Havertown	PA
Kristen	Murphy	Schenectady	NY
Mary	Murphy	Clayton	NC
Mary Lu	Murphy	Pacifica	CA
Meg	Murphy	Greeley	CO
Pamela	Murphy	Atlanta	GA
Susan	Murphy	Gilbert	AZ
William	Murphy	Hayden	ID
Amber	Murphy	Farmington	MN
Liz	Murphy	Austin	TX
Kelly	Murphy-Kennerson	Enfield	CT
Cookie	Murphy-Pettee	Gypsum	CO
Janet	Murr	Naperville	IL

First name	Last name	City	State
Janet	Murray	Philadelphia	PA
KIM	MURRAY	N Bethesda	MD
Kristen	Murray	Glenville	NY
Lauren	Murray	Pepperell	MA
Margaret	Murray	Brooklyn	NY
Maria	Murray	Townville	SC
Marilee	Murray	Anthem	AK
Phil	Murray	Loveland	CO
Stacey	Murrow	Edgewood	MD
Jacqueline	Murtha	HACKETTSTOWN	NJ
Dalal	Musa	Falls Church	VA
Todd	Musto	Fallbrook	CA
Maria	Mutter	livonia	MI
Linda	Myatt	Milton	IA
Carol	Myers	Oceanside	NY
Lora	Myers	Dillsburg	PA
Lora	Myers	Dillsburg	PA
Mary	Myers	Lewisville	NC
Veronica	Myers Fuqua	Abbeville	AL
Denise	N	cardiff	CA
Dipali	N	West Windsor	NJ
Kyle	N	Muskego	WI
Kyle	N	Muskego	WI
Marcus	N	Las Vegas	NV
Ma	Na	Pasadena	CA
Amanda	Nace	Anchorage	AK
Jane	Nachazel-Ruck	Los Angeles	CA
Lois	Nackerud	CEDAR CITY	UT
robin	nadel	branford	CT
Richard	Nadler	Boynton Beach Florida	FL
Nikki	Nafziger	Seattle	WA
Clinton	Nagel	Bozeman	MT
Desiree	Nagyfy	DEER PARK	WA
Soumya	Naidu	Santa Monica	CA
Eric	Naji	Cypress	TX
Midori	Nakayama	San Francisco	CA
S.	Nam	New York	NY
A	NAP	FREEEHOLD	NJ
ELAINE	NAPODA	williamsburg	VA
Amelia	Narigon	St Paul	MN
Larry	Narlock	Grants Pass	OR
Raquel	Narvios	San Francisco	CA

First name	Last name	City	State
Tem	Narvios	San Francisco	CA
Gida	Naser	Vacaville	CA
Gida	Naser	Vacaville	CA
Sy	Nashiro	Honolulu	HI
Sharon	Nasholds	Wake Forest	NC
Maria	Nasif	Tucson	AZ
Sheila	Nason	Magalia	CA
Christine	Nassikas	Bethesda	MD
Christine	Nastri	Hamden	CT
Lisa	Nathan	Phoenix	AZ
Astrid	Nava	Lomita	CA
Gloria	Navan	Lawrenceville	GA
Barbara	Navarro	Magnolia	TX
Nelou	Nazifi	Fair Oaks	CA
Maria	Nazzaro	Portland	OR
Patricia	Nazzaro	Union	KY
E.	Neal	Hilliard	OH
Georgette	Neale	West Sacramento	CA
Maryellen	Nealon	Albuquerque	NM
Carol	Nealy	Monson	MA
Kathe	Nearhood	Grand Island	NE
Lyria	Necessary	Pioneertown	CA
Elizabeth	Nedeff	Renton	WA
Leonard	Neering	Clifton	NJ
Rosemary	Neff	Carnation	WA
Nancy	Neibloom	Nesconset	NY
Janet	Neihart	Hibbing	MN
Anne	Nelson	Woodstock	NY
Brett	Nelson	Wimauma	FL
carrie	nelson	Minneapolis	MN
Cecelia	Nelson	Orange City	FL
Dawn	Nelson	Florence	OR
Donna	Nelson	Shingle Springs	CA
J Gary	Nelson	Payson	AZ
JOYCE	NELSON	COCONUT GROVE	FL
Lynn	Nelson	Atlantic Beach	FL
Michael	Nelson	Westwood	NJ
Steve	Nelson	Albuquerque	NM
Annette	Nelson	Bronx	NY
CLARENCE F.	NELSON, Jr.	Virginia Beach	VA
kim	nero	costa mesa	CA
Chris	Ness	new york	NY
Gina	Ness	Eureka	CA

First name	Last name	City	State
George	Neste	High point	NC
Lisa	Neste	High Point	NC
Stephanie	Neumann	Spring Branch	TX
Paula	Neville	Rochester	NY
Stuart	Newberg	Austin	TX
deborah	newbold	n canton	OH
Eric	Newman	Bronx	NY
Kathy	Newman	San Antonio	TX
Paige	Newman	Charleston	SC
Jane	Newmark	Brookside	NJ
Susan	Newquest	Houston	TX
LouAnn	Newton	Eagle Mountain	UT
Won	Ng	Dix Hills	NY
Guy	Nguyen	Costa Mesa	CA
Loan	Nguyen	Murrieta	CA
K	Nich	Levittown	PA
Eric	Nichandros	Castro Valley	CA
Jill	Nicholas	Penfield	NY
Beverly	Nichols	Las Vegas	NV
Jan	Nicholson	Lakeview	MI
John H	Nickey	Hanover, PA	PA
Alisha	Nickols	Stockton	CA
Sharon	Nicodemus	Sacramento	CA
Chris	Nicosia	Dunedin	FL
Janalee	Niderost	Kaysville	UT
Jan	NIEHOFF	St. Louis	MO
Christina	Nielsen	San Jose	CA
LESSLI	NIELSEN	Fairfax	VA
Nathan	Nielsen	Placitas	NM
Marilyn	Niere	Kansas City	MO
Jana Mariposa	Niernberger Muhar	Santa Rosa, CA	CA
Patrick	Niese	Batesville	IN
Dixie	Nihsen	Shelby	IA
Juli	Nimitz	West Chester	OH
Tadashi	Nitasaka	Glen Ellen	CA
Jennifer	Nitz	Missoula	MT
Theresa	Nix	O Fallon	IL
Tom	Nizinski	Chicago	IL
Ken	Noble	Sun City	AZ
Robert	Nobrega	Johnston	RI
Darrell	Noel	New York Mills	NY
Lyette	Noel	Wesley Chapel	FL
Tammy	Nogles	Bryn Mawr	PA

First name	Last name	City	State
Gail	Nolan	Evergreen	CO
Chris	Nolasco	Lynnwood	WA
James	Noordyk	San Diego	CA
Rich	Nordmann	Cromwell	CT
Douglas	Norris	Bay Village	OH
James	Norris	Saint Louis	MO
S.	Norris	New York	NY
Victoria	Norris	Home	FL
Jenny	North	Kerhonkson	NY
Laura	North	Bronxville	NY
patsy	north	montgmery	AL
Susannah	Northart	Santa Ana	CA
Mary	Norville	Baker	FL
spring	nothelfer	saginaw	MI
Holly	Nottingham	Moody	MO
Christine	Novak	Oceanport	NJ
Marsha	Novita	Kissimmee	FL
Pamela	Novotny	Duluth	MN
Diane	Nowak	Cottonwood	AZ
Margaret	Nowicki	Lambertville	MI
Ann	Nowicki`	Eugene	OR
Chris	Noyes	Hillsdale	NJ
Donna	Noyes	Huntington	NY
Carol L	Nugent	Hillsboro	OR
Nanci	Nugent	Scottsville	NY
Tom	Nulty Jr	Laguna Hills	CA
Sandra	Nunes	Revere	MA
Stephanie	Nunez	Van Nuys	CA
Adriana	Nunez	Miami	FL
Max	Nupen	Irvine	CA
Michael	Nush	Bensalem	PA
Mary	Nuss	Coos Bay	OR
Andrea	Nutley	Hot Springs Village	AR
Laurie	Nye	Los Angeles	CA
warren	nystrom	Pgh	PA
David	O Schalchlin	SHERWOOD	AR
Any	Oâ€™Donnell	Schenectady	NY
Abigail	Oâ€™Neill	Durham	NC
Margaret	Oâ€™Rourke	Depoe Bay	OR
Suzanne	Oakes	Noblesville	IN
Judy	Oates	Great Barrington	MA
Peggy	Oba	Kansas City	MO
Cio	Oberion	Floral Park	NY

First name	Last name	City	State
Rebecca	Oberlin	Anoka	MN
Alexander	Obersht	Yarmouth Port	MA
Della	Oberst	Winston-Salem	NC
Gina	Obrien	Bastrop	TX
Victoria	Obrien	Ridgewood	NY
Ronda	O'Bryant	Lake Mary	FL
Alfredo	Ocasio	Old Bridge	NJ
Ozean Chris	Ocean	Arvada	CO
Evelyn	Och	Pittsburgh	PA
Sherry	Ochoa-Rounkles	Fontana	CA
Charles	Ochs	East Bridgewater	MA
B	OConnell	Lewisburg	WV
Carole	O'Connell	Newport	VT
Kathleen	O'Connell	Indianapolis	IN
Aimi	OConnor	Sterling	VA
Shari	OConnor	Tampa	FL
John	Oda	San Francisco	CA
Martha	Oddie	South Daytona	FL
Megan	Odle	Waverly	TN
J	Odonnell	Seattle	WA
Jillian	O'Donohoe	Wayne	NJ
Jessica	O'Dougherty	Hopatcong	NJ
Frances	Oelbaum	The Bronx	NY
Claire	Oesterreich	Esperance	NY
James	OFlaherty	Grapevine	TX
Edith	Ogella	Santa Barbara	CA
Darlene	O'Grady	Monroe	WA
Peter	O'Hara	Jupiter	FL
Richard	Ohlendorf	Lakewood Ranch	FL
Eleanor	Ohnemus	Norfork	AR
Josie	Ohnemus	Norfork	AR
Rocky	Ohnemus	Norfork	AR
sofia	okolowicz	temecula	CA
Dmitri	Okorokov	Venice	FL
Laurie	Okuno	Los Gatos	CA
Martha	Olavarrieta	Elizabeth	NJ
Debra	Oldfield	West Haverstraw	NY
doris	oldham	dallas	TX
Carrie	Olds	Clinton	IL
Susan	Olive	Niles	OH
Philip	Oliver	Bryant	AR
Charles	Oliveri	Oaklyn	NJ
Karol	Olkowski	Buffalo	NY

First name	Last name	City	State
Earl	Oller	Burbank	CA
Stacey	Olphin	DALLASTOWN	PA
Carole	Olson	Marysville	WA
Kaylie	Olson	Colfax	WI
Linda	Olson	Duluth	MN
Victoria	Olson	Oakland Park	FL
Larry	Olson	Warren	MI
Krister	Olsson	Los Angeles	CA
Victoria	Oltarsh	Nyack	NY
Diane	Oltarzewski	Belfast	ME
Colleen and Joe	OMeara	Minneapolis	MN
Alison	ONeil	Pembroke Pines	FL
Linda	ONeill	Midlothian	VA
Marion	O'Neill	Upperville	VA
Sheila	O'Neill	Poughkeepsie	NY
Lory	Ono	Kaneohe	HI
Lory	Ono	Kaneohe	HI
Linda	Orcutt	LANGHORNE	PA
Deborah	ORear	Knoxville	TN
Linda	Orel	Sharon	MA
Kate	Orenic	Sarasota	FL
Joy	Oriole	Germantown	MD
Joseph	Orlando	Las Vegas	NV
Michael	Orleski	Shavertown	PA
Sam	Orlich	Milwaukee	WI
Angel	Orona	Alhambra	CA
Kevin	O'Rourke	Camden	NY
Susan	O'Rourke	St. Petersburg	FL
Carla	Orr	Woodburn	OR
ANNA	ORTEGA	Long Beach	CA
Anne	Orticerio	Pascoag	RI
Dan	Ortiz	San Carlos	CA
David	Ortiz	Franklin	WI
Ellen	Osborne	Pleasant Garden	NC
Jessie	Osborne	Oceanside	CA
Martin	Osborne	Coconut Creek	FL
Robert	Osborne	Show Low	AZ
Shane	oShea	Humble	TX
Linda	OSINSKI	Naperville	IL
Isabelle	Osman	EASTON	MD
Libby	Osnes	Lake Stevens	WA
John	Ostaszewski	Monroe	CT
Theo	Ostler	Houston	TX

First name	Last name	City	State
Jerry	Ostling	La Puente	CA
Mary	Ostrowski	Lynn	MA
Judi	Oswald	Malabar	FL
Gail	Otis	Cohasset	MA
Joe	OToole	Chicago	IL
Geri	Ott	Matlacha	FL
Tabitha	Ottiwell	Charleston	SC
Deborah	Otto Sunderman	Belton	SC
Ashley	Ouellette	Biddeford	ME
Georgia	Ouellette	Norwalk	CT
Janeyce	Ouellette	San Francisco	CA
Tracy	Ouellette	Bow	WA
Tracy	Ouellette	Bow	WA
Jeanne	Out	Ewing	NJ
Joyce	Overton	Rowlett	TX
D	Owen	Lake Villa	IL
Mary	Owen	Brunswick	ME
Diane	Owens	Mesquite	NV
Jason	Owens	Denver	CO
Rhonda	Oxley	Capitola	CA
I	P	San Pedro	CA
Luisa	P	Miami beach	FL
Patricia	P	Covington	LA
S	P	Del Mar	CA
Wendy	P.	PCB	FL
Mark	PAc	Clifton	VA
Melanie	Pac	Berlin	CT
Mary	Pace	Vancouver	WA
Rosemarie	Pace	Middle Village	NY
Steve	Pace	Cherry Valley	CA
Carol	Pacelli	Phoenix	AZ
Julianne	Pach	Buffalo	NY
Regina	Packard	Catskill	NY
Patti	Packer	Scotia	NY
Melodie Howard	Padgett	Florence	KY
Audrey	Paek	Charlestown	MA
Robert	Page	Dansville	NY
Czora	Pagsolingan	Gresham	OR
Trisha	Pahmeier	Vista	CA
Tim	Paich	Loveladies	NJ
Beth	Painter	Tampa	FL
Rosa	Palacios	Chicago	IL
Terilyn	Palanca	Savannah	GA

First name	Last name	City	State
Paul	Palla	Greencastle	PA
Michelle	Palladine	Palm Springs	CA
Kitty	Pallesen	Sky Valley	CA
pamela	palmateer	Merrillville	IN
cheryl	palmer	meridian	ID
Cyndi	Palmer	Overland Park	KS
Dave	Palmer	Plymouth	MI
Faye	Palmer	Delavan	WI
Judy	Palmer	Tonasket	WA
Kevin	Palmer	Elk River	MN
Susan	Palmer	Modesto	CA
Kristin	Palmer	Auburndale	MA
Charlotte	Palmer Lekakos	Chevy Chase	MD
Sara	Palmitessa	St Paul	MN
Maria	Palucho	Falls Church	VA
Grace	Pan	San Jose	CA
Gerri	Paniccia	N Fort Myers	FL
Christine	Pantaleo	rumney	NH
Lisanne	Panter	Lake Worth	FL
Donna	Panza	grass valley	CA
Carole	Papapietro	Port Jefferson	NY
Grigor	Papoyan	Burbank	CA
Betty	Pappas	Allentown	PA
Janice	Pappas	Ann Arbor	MI
robin	pappas	pocono manor	PA
Theresa	Paradis	Alta	WY
Sean	Pardee	Laguna Woods	CA
Barbara	Pareira	Pinecredt	FL
Al	Paris	San Diego	CA
Brandon	Parker	Riverside	CA
Christine	Parker	Kent	WA
CRAIG	PARKER	FORT WORTH	TX
Elaine	Parker	Berkeley	CA
Evelyn	Parker	Orlando	FL
Jeff	Parker	Santa Monica	CA
Katie	Parker	Pottsville	AR
Nicole	Parker	Twin Falls	ID
Brian	Parkinson	Commerce City	CO
William	Parkinson	LAKE STEVENS	WA
Antoine	Parmentier	Upper black eddy	PA
Jerry	Parrillo	Manchester Township	NJ
Nancy	Parris	Mt Prospect	IL

First name	Last name	City	State
Robert	Parris	Coarsegold	CA
Brad	Parsa	Simi Valley	CA
sue	parsell	ann arbor	MI
Lydia	Parsley	Portland	OR
Barbara	Parsons	Platteville	WI
CHRISTOPHER	PARSONS	Los Angeles	CA
Richard	Paschel	Flushing	NY
Marsha	Pascoe	Morgan Hill	CA
Eric	Pash	Indiana	PA
Nancy	Paskowitz	Oakland	CA
Gary	Pasqua	Hobe Sound	FL
John	Pasqua	Escondido	CA
nathan	pate	Paoli	IN
Mandy	Patel	Scottsdale	AZ
Sarosh	Patel	Sunnyvale	CA
Suzanne	Paterson	Carnation	WA
Lynn	Patra	Redding	CA
High	Patricia	Interlachen	FL
Debra	Patsel	Stockholm	NJ
Robin	Patten	Del City	OK
Katherine	Patterson	Fort Bragg	CA
Linda	Patterson	Burlington	VT
Marilyn	Patterson	Naples	FL
Pam	Patterson	Miami	FL
Dick	Patti	Burlington	MA
Mary J	Pattison	Fort Myers	FL
Della	Patton	MARION	OH
Melodie	Patton	Boise	ID
Joyce	Patton	Lindon	UT
Shannon	Patty	Riverside	CA
Lian	Pau	Frederick	MD
nancy	pauken	watsonville	CA
Sherri	Paul	Apex	NC
Sharon	Pauley	Columbia	MO
Paz	Paulsen-Sacks	Norristown	PA
Morgan	Paulus	Chicago	IL
Wayne	Pauplis	Cumberland	RI
Cathy	Pavlovich	San Diego	CA
Victoria	Pawlick	Williamson	NY
G.	Paxton	Manhattan New York	NY
Geneine	Payne	Canton	GA
L E	Payne	Epsom	NH
Jan	Payne	Jackson	MI

First name	Last name	City	State
Nancy	Pearlmutter	Miami	FL
Dina	Pearl-Thomas	Bellingham	WA
Juliet	Pearson	Grass Valley	CA
Caryl	Pearson	Morro Bay	CA
Pippa	Pearthree	Lumberville	PA
Joan	Peaslee	Richmond	VA
Jim	Pech	Madison	WI
Donna	Pechalonis	Duxbury	MA
Pamela	Peck	Watsonville	CA
Nancy	Peckinpaugh	Bradenton	FL
Donalee	Peden Wesley	Marcellus	NY
Patricia	Pedigo	Anacortes	WA
Chris	Pedone	Golden	CO
Donna	Pedroza	Alameda	CA
Raena	Peele	Chicago	IL
Liane	Pei	NYC	NY
Steve	Peishel	LEWIS CENTER	OH
Maddox	Pellegrino	mays landing	NJ
Barbara	Peloquin	Evanston	IL
Donna	Pemberton	Cocoa	FL
Sara	Pemberton	Blacksburg	SC
Deanna	Pena	Houston	TX
Gregory	Penchoen	Roy	WA
Connie	Pennell	Greensburg	PA
Michael	Pennell	Lenoir	NC
RE	Penney	Laguna Beach	CA
Greg	Pennington	San Francisco	CA
Julie	Pennington	Westminster	MD
Maristela	Penterichr	Goleta	CA
Toni	Penton	Snohomish	WA
Julia	Perchak	Green Oaks	IL
Orlando	Perdomo	Alexandria	VA
Cindy	Perez	Lakewood	CO
Marcus	Perez	LAWRENCE	MA
Margarita	Perez	Sylmar	CA
Rosadelle	Perez	Jersey City	NJ
Cindy	Perger	Flagstaff	AZ
Aggie	Perilli	Lancaster	PA
Jana	Perinchief	Sacramento	CA
Nancy	Perkinson	Coos Bay	OR
Nancy	Perlaza	Georgetown	TX
Justina	Pernette	Lake Forest	CA
Brandon	Perras	Providence	RI

First name	Last name	City	State
Catherine	Perry	Stuart	FL
David	Perry	Palo Alto	CA
James	Perry	Hurst	TX
Jennifer	Perry	Asheville	NC
Sue	Perry	Asheville	NC
Kim	Persse	Skaneateles	NY
Rita	Pesini	North Wales	PA
Jan	Pessano	Winnabow	NC
Madeleine	Pestiaux	Lake Elsinore	CA
Judith	Peter	Port Charlotte	FL
Michael	Peterman	Parker	CO
Lydia	Peters	Cave Spring	GA
Michael	Peters	Dallas	TX
Pamela	Peters	Lancaster	PA
Sheryl	Peters	Scotts Valley	CA
Susan	Peters	Dewitt	MI
Valerie	Peters	Bethlehem	PA
Alice	Petersen	Toledo	OH
Nancy	Petersen	Tucson	AZ
Nancy	Petersen	Claremont	CA
Elizabeth	Peterson	Cortlandt Manor	NY
Janet	Peterson	Troy	MI
Karen	Peterson	Northbrook	IL
Kim	Peterson	Arlington Heights	IL
Marji	Peterson	OR Medford	OR
Mona	Peterson	Mitchell	SD
Rachel	Peterson	La Jolla	CA
Richard	Peterson	Northbrook	IL
Sotiria	Peterson	Saint Paul	MN
Susan	Peterson	HOUGHTON	MI
Tony	Peterson	Indianapolis	IN
Bethanie	Petitpas	Tewksbury	MA
Dana	Petre-Miller	Keizer	OR
Kimberly	Petri	Silver City	NM
Cindy	Petrie	GREENEVILLE	TN
Diane-Michele	Petrillo	Hamden	CT
Patricia	Petro	islip	NY
Carolyn	Petroske	Superior	WI
Dennis	Petrow	White Oak	PA
Vincent	Petta	Ocala	FL
Gina	Petty	Lexington	KY
Conley	Peyton	New London	NH
Nezka	Pfeifer	Saint Louis	MO

First name	Last name	City	State
Richard	Pfeiffer	Buffalo	NY
William	Pfeiffer	West Roxbury	MA
Marie	Pfierman	cincinnati	OH
Jennifer	Phelps	Rhododendron	OR
TAMI	PHELPS	Redding	CA
Justin	Philipps	Newark	OH
Theresa	Philips	New York	NY
Lori	Philipsen	Appleton	WI
Jerri-Ann	Phillips	Bastrop	TX
Linda	Phillips	Nellysford	VA
Brandi	Phillips	Santa Clarita	CA
Janice	Phillips	Chappell Hill	TX
Jean	Phillips-Calapai	MILFORD	MA
Leia	Phillips-Sprague	Fayetteville	NC
Mindy	Phypers	Tucson	AZ
COLETTE	Piacentini	SANTA BARBARA	CA
C	Piaget	Indian Wells	CA
Regina	Piantedosi	Attleboro	MA
Michelle	Piazza	Spring Hill	FL
Lisa	Piazza-Vera	Ozone Park	NY
Nathalie	Picard	Pittsburgh	PA
Maryann	Piccione	North Haven	CT
Kristen	Piccolo	Bayville	NY
Jennifer	Piche	Centennial	CO
JOANN	PICHIARELLO	Manchester	NJ
Betty	Pierce	West Mifflin	PA
Tanya	Pierce	Eustis	FL
Bridget	Pieroni	Gaithersburg	MD
Gatha	Pierucki	Burr Oak	MI
Heather	Pighetti	Westfield	MA
Louise	Pillai	Copake	NY
Monte	Pilling	Helper	UT
Hal	Pillinger	Port Chester	NY
Callie	Pillow	Mount Vernon	OH
Shawna	Pilsl	Shawnee	KS
Cory	Pinckard	Tigard	OR
Joslyn	Pine	Port Washington	NY
Annalee	Pineda	San Francisco	CA
Maryetta	Pinn	Bealeton	VA
Maryetta	Pinn	Bealeton	VA
Yolanda	Pinto	west Richland	WA
D	Pires	Herndon	VA
D	Pires	Herndon	VA

First name	Last name	City	State
Cheryl	Pirl	Lowell	IN
Claudia	Pisani	Clio	MI
Barbara	Pitingolo	Depew	NY
Emily	Pitner	Washington	PA
Stacey	Pitsch-Stumpf	La Crosse	WI
Teresa	Pitts	Glen Alpine	NC
Joan	Pixler	Hopkins	MN
Barbara	Pixley	Grayslake	IL
Melissa	Plante	Coconut Grove	FL
Karen	Plessinger	Dayton	OH
Malinda	Plog	Scottsbluff	NE
Scott	Ploger	Idaho Falls	ID
Ron	Plumb	Georgetown	KY
Jackie	Pluska	Grayslake	IL
Sandra	Pocholec	Veneta	OR
Patricia	Podlesak	Horton	MI
Sharon	Poessel	Tucson	AZ
barbara	poland	La Crescenta	CA
Bonnie	Poland	Canton	GA
Alice	Polesky	SAN FRANCISCO	CA
Lee	Politis	Charlottesville	VA
Crystal	Polk	Springfield	VA
J	Polland	Chevy chase	MD
Victoria	Ponce	Fort Mill	SC
susan	ponchot	Sunrise	FL
Troy	Ponton	Pittsburgh	PA
Patricia	Poole	Lake Isabella	MI
Lynn	Pooley	Lakewood	OH
BRIAN	POPE	Los Angeles	CA
Paul	Popiel	Norwood	PA
Maureen	Porcelli	North Bergen	NJ
Nancy Porcino	Porcino	Commack	NY
Francis	Porfilio	Staten Island	NY
Joseph	Porporino	Oswego	NY
Barbara	Porter	Salida	CO
Linda	Porter	Bristol	PA
Nanci	Porter	La Jolla	CA
NM	Porter	Ypsilanti	MI
Sharon	PORTER	Paradise	CA
Theresa	Portilla	Gallatin	TN
Angel	Portillo	Pasadena	CA
Sandra	Portis	Birch Run	MI
KEITH	PORTKA	Cheswick	PA

First name	Last name	City	State
Jude	Post	Nyc	NY
Sara	Post	Girard	OH
Rus	Postel	San Rafael	CA
Oxana	Postnaya	Windermere	FL
Nicole	Poston	Canton	OH
John	Poteraske	Darien	IL
Stephanie	Potgieter	Grosse pointe Park	MI
Kimberly	Potts	Gallatin	TN
Roxanne	Potvin	Columbia Heights	MN
Diane	Powell	Jacksonville	IL
Margaret	Powell	Great barrington	MA
john	powers	middleton	WI
Anuradha	Prakash	San Jose	CA
Wendy	Pratt	Redondo Beach	CA
Georgia	Pratt	KC	MO
Diana	Praus	Menands	NY
Eileen	Prefontaine	Hopkinton	MA
Carl	Prellwitz	Newmarket	NH
Nancy	Prendergast	Sandwich	MA
Melissa A	Prescott	Massena	NY
Nicole	Prescott	Deerfield Beach	FL
Doris	Presgraves	Kearneysville	WV
Amanda	Preston	Severn	MD
Apryl	Preston	Melbourne	FL
Cynthia	Preston	Gilbert	AZ
Laura	Prestridge	Memphis	TN
Ginnie	Preuss	Bridgeport	CT
Allen	Price	Cranston	RI
Cheri	Price	Racine	WI
Stacey	Pride	ROCKLEDGE	FL
Rosalie	Prieto	Bakersfield	CA
Tammi	Priggins	Willowick	OH
Linda	Pringle	Independence	MO
Patra	Pringle	Saint Louis	MO
Susan	Printy	Litchfield	CT
Karen	Procter	Anchorage	AK
Peter	Prodanovich	Sioux Falls	SD
Linda	Proetta	keansburg	NJ
Camala	Projansky	Brooklyn	NY
Micaela	Pronio	Oakland	CA
Catharine	Pronzini	DANVILLE	CA
Ralph	Protano	Wurtsboro	NY
Mike	Proto	Whitinsville	MA

First name	Last name	City	State
Jenny	Prottas	Greenwich	CT
sue	provenzano	MONROE	WI
Karen	Prowda	Vestal	NY
Ann	Pryich	Mount Vernon	WA
Brian	Prylon	West Bloomfield	MI
Ron	Przybycien	Carmel Hamlet	NY
Brenda	Psaras	East Moriches	NY
Robert	Puca	Brooklyn	NY
Carol	Puchyr	Kearny	NJ
Savannah	Pulcini	Delray Beach	FL
Rev. Sher	Pullen	Columbus	OH
Seth	Pullen	Wayne	NJ
Robin	Pulliam	Columbia	TN
Bill	Purdue	Nyack	NY
Patricia	Purdy	Mission Viejo	CA
Barbara	Purvis	Riverside	CA
Taylor	Purvis	Natick	MA
quinten	putnam	South Colton	NY
Theresa	Putnam	Colorado Springs	CO
Sreve	Putrich	SPRINGFIELD	IL
S.	Pyrs	Edgewood	NM
Susie	Q	Leesburg	VA
Barbara	Quay	Colonial Heights	VA
Leslie	Quenell	Lopez Island	WA
Sue	Quigley	Seattle	WA
Sara Jane	Quinby	Pueblo	CO
Marilyn	Quindo	Escondido	CA
Diane	Quinlivan	Thornton	CO
Charlie and Diana	Quinn	Livingston	NJ
Cris	Quinn	Annandale	VA
Desiree	Quintanilla	Springfield	MO
Maurice	Quirin	Lexington	KY
A	R	Duluth	GA
Adam	R	Dorchester	MA
C	R	San Jose	CA
Chris	R	Dallas	TX
Joe	R	Denver	CO
Susan	R	Milford	NE
Ira	Rabois	SPENCER	NY
Lindsey	Raczka	Mashpee	MA
Donna	Rader	Palm Bay	FL
Etha	Radford	Tucson	AZ

First name	Last name	City	State
Irene	Radke	Mooresville	NC
JESSICA	RAE	Prospect	CT
Judie	Rae	Nevada City	CA
Marie Elaina	Rago	Northampton	PA
Michael	Rahaman	Chicago	IL
Maura	Rahman	Brick	NJ
Marylyn	Raia	Houston	TX
Karen	Raia	New York	NY
Ann	Rainey	Athens	GA
Maya	Rainey	Fairbanks	AK
Rachel	Rakaczky	Sparks	NV
Tamara	Rakow	ROSEMOUNT	MN
Elizabeth	Raleigh	Pennsville	NJ
Anil	Ralhan	Springboro	OH
Darcy	Ralston	San Antonio	TX
Karen	Ramacher	Sedona	AZ
Rebecca	Ramage	Sandy	OR
Hank	RamÃrez	San Diego	CA
Kim	Ramert	Okoboji	IA
Gaby	Ramirez	Chula Vista	CA
Alison	Ramos	Kerrville	TX
Rick	Ramos	Highland Park	IL
corinne	ramsey	helena	AL
Patrick	Ramsey	Albuquerque	NM
Laura	Ramundo	Garnerville	NY
Carolyn	Rand	Roseville	CA
Kay	Randall	Moorhead	MN
Prabh Pal Singh	Randhawa	Palmdale	CA
Doug	Randolph	Woodland Park	CO
Gretchen	Randolph	Haines	AK
Leonard	Rangel	Corona	CA
Louise	Rangel	Santa Paula	CA
Christine	Ranney	Oakland	CA
Randy k	Rannow	Boise	ID
Darlene	Raper	Clemmons	NC
Lisa	Raphaela	Aiken	SC
Susan	Rapp	Verona	NJ
Tiffany	Rapplean	Westminster	CO
Cynthia	Ratliff	Santa Cruz	CA
Rosalind	Ratliff	San Jose	CA
Donna	Rauch	North Highlands	CA
David	Rawlings	Naples	FL
Laura	Rawlins	Seattle	WA

First name	Last name	City	State
Bobby	Ray	Lexington	KY
Jamey	Ray	Richmond	TX
Jennifer	Ray	Lexington	KY
Laura	Ray	Alexandria	VA
Marianne	Ray	Ontario	CA
Catherine	Raymond	Penn Valley	PA
Elizabeth	Re	Fairfield	CT
Darin	Read	Los Angeles	CA
Jeff	Reagan	Charlestown	MA
Peter	Reagel	Burien	WA
Amanda	Real	Rockford	IL
Shane	Reardon	Concord	CA
william	reavis	Kernersville	NC
Angel	Recchia	Philadelphia	PA
Irene	Recker	San Diego	CA
Amy	Redfeather	Santa Cruz	CA
Maryellen	Redish	Palm Springs	CA
Kimberly	Reece	Atlantic Beach	FL
Andrea	Reed	Austin	TX
Claudia	Reed	Bokeelia	FL
Heather	Reed	Topeka	KS
Lynn	Reed	Moyock	NC
Deborah	Reek	OREM	UT
Marian	Rees	Jacksonville	FL
Melissa	Rees	Spokane Valley	WA
Cathleen	Reese	Hamilton	MT
Joe	Reese	Little Rock	AR
Le	Reeves	Mokena	IL
Geoff	Regalado	Burbank	CA
Hamilton	Regen	Croton On Hudson	NY
Shelley	Regina	South Bend	IN
Jon	Regitsky	MARIETTA	GA
sandra	reguera	Pembroke Pines	FL
Regina	Reich	RHINELANDER	WI
Robyn	Reichert	Lake Worth	FL
Michele	Reid	Battle Creek	MI
Dr. Stephen	Reidel	Benton City	WA
Kathleen	Reifke	Pottstown	PA
Jamie	Reifman	Chicago	IL
ALICIA	REILLY	Vienna	VA
Andrew	Reilly	Ashland	OR
Gloria	Reilly	Southampton	NY
James	Reilly	Mebane	NC

First name	Last name	City	State
Jeffrey	Rein	Tucson	AZ
Rose	Reina Rosenbaum	Hillsborough	NJ
regina	reinecker	Reinholds	PA
Kay	Reinfried	Lititz	PA
Jennifer	Reinish	Santa Barbara	CA
Tracy	Reis	Pasadena	CA
Elaine	Reise	Cocoa Beach	FL
gail	reissen	Saint Louis	MO
Janna	Remington	Trinidad	CO
George	Remscrm	Brooklyn	NY
Linda	Remy	Belvedere	CA
Richard and Kim	Rendigs	Falmouth	MA
Robert	Renfro	Denver	CO
Pam	Rensch	St Helens	OR
Debra	Ressler	Norwalk	CT
robert	ressler	lutz	FL
Michael	Reszka	Holland	NY
Karin	Rettig	Hemet	CA
Bonnie	Reukauf	Payette	ID
t	rex	bessemer	AL
Madeline	Rex-Lear	Arlington	TX
Irma	Rey	Miami	FL
John	Reyes	Yonkers	NY
Vita	Reyes	Slidell	LA
Cary	Reynolds	Chandler	AZ
Grace	Reynolds	Fort Wayne	IN
Michele	Reynolds	Oak Park	MI
Nora	Rhan	Evansville	IN
Anne	Rhatican	Manassas	VA
Robyn	Rhoades	New York	NY
Jo	Rhoades	Lexington	SC
Janet	Rhodes	Temecula	CA
Mary	Rhodes	Gaithersburg	MD
Roy	Rhue	Gainesville	FL
Lorraine	Ricci	Cranston	RI
Laura	Ricci	Brooklyn	NY
Anthony	Ricciardi	Atlanta	GA
BEVERLY	RICE	CHARLOTTE	NC
James	Rice	Middlebury	CT
Michelle	Rice	Olmsted Twp	OH
Susan	Rice	Portland	OR
Theresa	Rice	Orlando	FL

First name	Last name	City	State
Christopher	Richards	Sewell	NJ
JAY	RICHARDS	Bend	OR
Linda M	Richards	Erie	CO
Aleda	Richardson	West Des Moines	IA
Erin	Richardson	Swanton	OH
Gail	Richardson	Stone Mountain	GA
Gail and John	Richardson	Bozeman	MT
Heather	Richardson	Mulberry Grove	IL
Leslie	Richardson	Kyle	TX
Ralph	Richardson	Dronfield	WA
Lauren	Richie	PL GROVE	AL
Ron and Dorene	Richman	West Orange	NJ
Kim	Richmeier	San Ramon	CA
Linda	Ricks	Beaufort	NC
thomas	ricobene	Chicago	IL
Judith	Riddell	Urbana	IL
Lynette	Ridder	Concord	CA
Keri	Riddle	Osceola	IA
Patty	Ridenour	Oakwood	OH
Nancy	Ridley	Lisbon	ME
Patricia	Ridley	N Bethesda	MD
Robbie	Rieder	Tucson	AZ
Michael	Riegert	Medford	WI
Linda	Riego	Dover	DE
Cheryl	Rigby	Ashland	MA
Deborah	Riggs	Glendale	AZ
ALISON	RILEY	Philadelphia	PA
Jessica	Riley	Oshkosh	WI
Kelly	Riley	Hatfield	PA
Patricia	Rimestad	DELTONA	FL
Roseli	Rinaldo	SPRING	TX
Charles	Rinear	West Deptford	NJ
Wendy	Rinehart	Matthews	NC
Suzi	Rines Toth	Duxbury	MA
Barbara	Ring	Hampton Bays	NY
Stephen	Ring	Hampton Bays	NY
Judy	Ringenson	Portlabd	OR
David	Ringle	Macungie	PA
Ronald	Ringler	Lake Elsinore	CA
Nancy	Rittenhouse	Winter Haven	FL
Susan	Ritter	Sun City	AZ
Cecilia	Rivas	hermitage	TN
Mary	Rivas	Riverton	NJ

First name	Last name	City	State
Teresa	Rivas	Riverton	NJ
Janice	Rivelli	Chicago	IL
Carol	Rivera	Green Bay	WI
Debbie	Rivera	Moreno Valley	CA
Joyce	Rivera	Mullica Hill	NJ
Nahid	Rizvi	Hampton	VA
Tricia	Rizzi	Massapequa	NY
Barbara	Rizzo	Seal Rock	OR
Cina	Roan	Quinlan	TX
Christine	Roane	Springfield	MA
Patrice	Roarty	Maitland	FL
Dean	Robb	Plainfield	NJ
ANDREW	ROBBINS	Ny	NY
Jessica	Robbins	New Orleans	LA
Tasha	Robbins	Amherst	MA
Pat	Roberson	Duncanville	TX
Rob	Roberto	SANTEE	CA
EARL	ROBERTS	San Antonio	TX
Gail	Roberts	Key West	FL
Jeannie	Roberts	Madison	WI
Jim	roberts	Ashland	OR
Patrice	Roberts	Salem	OR
Susan	Roberts	Albuquerque	NM
Paula Kay	Roberts-Lindauer	Santa Rosa	CA
Ann	Robertson	Boise	ID
Julie	Robertson	Mt Olive	IL
Renee	Robertson	MARQUETTE	MI
Donna	Robidoux	WOONSOCKET	RI
B.	Robinson	NEWNAN	GA
beatrice	robinson	Oklahoma City	OK
Eric	Robinson	Memphis	TN
Janet	Robinson	Jacksonville	FL
Jimmie	Robinson	Pensacola	FL
Judith	Robinson	Hollywood	FL
Kathy	Robinson	Gladstone	OR
Sherry	Robinson	SHIPMAN	VA
Dameta	Robinson	Wisconsin Rapids	WI
Helen	Robinson	Kissimmee	FL
Christine	Robinson Coon	Colorado Springs	CO
Barbara	Robles	Santa Barbara	CA
Candace	Rocha	Los Angeles	CA
Silvia	Rocha	Azusa	CA
Kath	Roche	Harrison	AR

First name	Last name	City	State
Ingrid	Rochester	Elbert	CO
Misty	Rocker	Greensburg	PA
Jodi	Rodar	Pelham	MA
Marya	Roddis	Chama	NM
Carmen	Rodriguez	Madison Heights	MI
Carmen	Rodriguez	Union City	CA
Robert	Rodriguez	Glasgow	MT
Robert	Rodriguez	Summerville	SC
Robert	Rodriguez	Sioux Falls	SD
Vanessa	Rodriguez	Hendersonville	NC
Julie	Roedel	Kirkwood	MO
Sabine	Roehr	High Falls	NY
Janet	Roemer	Richfield	MN
Allyson	Rogers	Blue Bell	PA
Celeste	Rogers	Kapolei	HI
Jim	Rogers	Woodstock	GA
Sherry	Rogers	Wilmington	DE
Mary	Rogge	Lincoln	NE
stephen	rohl	hockessin	DE
Gerard	Rohlf	Pittsburgh	PA
Diane	Rohn	McLean	VA
Rich	Rokicki	Cedar springs	MI
Theresa	Rolla	Savoy	IL
Jack	Rollens	Simi Valley	CA
Rusty	Rollings	Cleveland	GA
Jennifer	Romans	Libertyville	IL
Monica	Romero	Pacific Grove	CA
Tony	Romero	New York	NY
Samantha	Rominger	Atlanta	GA
Alexandra	Romito	Staten Island	NY
Roland	Romo	Tucson	AZ
Irene	Roos	Lakeside	CA
Shelly	Root	Dearborn Heights	MI
LISA	rosa	imperial	CA
Chari	Rosales	Naperville	IL
Chris	Rose	Petaluma	CA
Diann	Rose	San Francisco	CA
Jay	Rose	Woodbridge	VA
Rebecca	Rose	Las Cruces	NM
Virginia	Rose	Rainier	OR
Jane	Rosen	New York	NY
Ken	Rosen	Beverly Hills	CA
gj	rosenberg	New York	NY

First name	Last name	City	State
Pauline	Rosenberg	Philadelphia	PA
Steven	Rosenberg	El Paso	TX
Joy	Rosenberry Chase	Madison	WI
Carrie	Rosenblatt	Bronx	NY
Jodi	Rosenbloom	Studio City	CA
Sheldon	Rosenblum	Little Neck NY	NY
David	Rosenfeld	Brooklyn	NY
Mimi	Rosenfeld	Brooklyn	NY
Barbara	Rosenkotter	Deer Harbor	WA
Merle	Rosenzweig	Ann Arbor	MI
Randal	Roska	Cocoa Beach	FL
Ann Marie	Ross	Fall River	MA
Bruce	Ross	Katy	TX
Jean	Ross	Minneapolis	MN
Kathy	Ross	Mount Prospect	IL
Lori	Ross	Oakhurst	NJ
Sue	Ross	Mansfield	OH
Jennifer	Rosser	Sellersville	PA
Greta	Rossi	Stroudsburg	PA
Linda	Rossin	Lake Hopatcong	NJ
Michelle	Rossman	Big flats	NY
M	Rossner	Summit	NJ
Kristina	Rost-Mangan	Dayton	OH
Beverley	Roth	Jensen Beach	FL
Michael	Roth	Camp Hill	PA
Shannon	Roth	Harrisonburg	VA
Cheryl	Rothberg	Ardsley	NY
Sebastian	Rothschild	Tupelo	MS
Janet	Rountree	Suffolk	VA
Frank	Rouse	Colton	OR
Jamie	Roussel	Beverly Hills	FL
Connie	Roux	Savoy	IL
Bernice	Rowe	Milford	VA
Irene	Rowe	Vancouver	WA
Laurie	Rowe	Delmar	NY
Debasri	Roy	Nashua	NH
Gerry	Roy	Sunnyvale	CA
Rina	Rubenstein	Los Angeles	CA
Tina	Rubenstein	New York	NY
Jaryn	Rubin	San Francisco	CA
Lisa	Rubin-Horton	Sun City Center	FL
Lois	Ruble	San Marcos	CA
Lyn	Ruby	Washington	DC

First name	Last name	City	State
Kenneth	Ruby	Salem	NH
Katy	Ruckdeschel	Merion Station	PA
Kathleen	Rude	Glenview	IL
C	Ruder	Newark	DE
Heather	Rudin	Lancaster	CA
john	rudish	Canton	OH
Stacia	Rudisill	Homosassa	FL
JoEllen	Rudolph	Petoskey	MI
Rachel	Ruebner	Independence	MO
Michael	Rueli	HONOLULU	HI
Wendy	Ruggeri	Naugatuck	CT
Margaret	Ruhl	Collegeville	PA
Anne	Ruhr	Columbia	MO
Nancy	Ruiz	Round Rock	TX
Kathleen	Ruiz	Seaside	OR
Kare	Ruland	Suches	GA
Nicholas	Rulli	Los Angeles	CA
Gale	Rullmann	Youngsville	NC
Cecilia (CeCe)	Rund	Reisterstown	MD
Karen	Runk	North Smithfield	RI
Kim	Runyon	Dedham	MA
cathy	rupp	pittsburgh	PA
Christine	Rupp	Kennerdell	PA
Nancy	Rupp	Glen Burnie	MD
Robin	Rupp	Bloomington	IN
Ruth	Rusch	Fayetteville	AR
Sharon	Rusk	Carmel	IN
Sue	Russ	Hillsville	VA
Candace	Russell	Phoenix	AZ
Gina	Russell	Yukon	OK
Maria	Russell	LAS VEGAS	NV
Marilynn	Russell	Santa Rosa	CA
Mary	Russell	Dallas	TX
valney	russell	burtonsville	MD
Ileana	Russinyol-Rozo	Miami	FL
Denise	Russo	Rio Vista	CA
Kerri	Russo	Stewartsville	NJ
dawn	rutigliano	Tampa, Fl 33626	FL
Dawn	Rutkowski	North fort Myers	FL
Ronald	Rutzky	HOMEWOOD	IL
Dave	Ruud	Portland	OR
Carolyn	Ryan	St. Louis	MO
Ellen	Ryan	Medford	MA

First name	Last name	City	State
Emmet	Ryan	Floral Park	NY
K	Ryan	Brooklyn	NY
Therese	Ryan	Palmdale	CA
Tim	Ryan	Capistrano Beach	CA
William	Ryan	Tacoma	WA
Sandra	Rye	Brighton	MI
Kevin	Ryle	Wilmington	MA
Lynette	Rynders	Strasburg	CO
Michael	Rynes	Naperville	IL
Sharon	Rzentkowski	Greendale	WI
Dee	S	Huntington Beach	CA
Dr	S	Medina	WA
H	S	Orlando	FL
JulieAnn	S	San Luis Obispo	CA
P	S	Los Angeles	CA
Steve	S	Washington	DC
Jessica	Saart	Stow	MA
Valentina	Saavedra	Seattle	WA
Patricia	Sabengsy	OFallon	IL
Diane	Sadowski	Pittsburgh	PA
Rosanne	Saenz-Fissore	San Ramon	CA
Hallie	Saferin	Hilliard	OH
Cristina	Saffer	Windsor	CA
carol	Sage	Phoenix	AZ
Carolyn	Saiia	Florence	OR
Catherine	Saint-Clair	Stuart	FL
Catherine	Saint-Clair	Stuart	FL
Barbara	Saj	New York	NY
Lynn	Sajdak	Mableton	GA
Karen	Salama	New york	NY
Bonnie	Salatti	Denver	CO
Bonnie	Salatti	Denver (DEN)	CO
Antonia	Salaz	Grand Junction	CO
Alicia	Salazar	Los Angeles	CA
Lisa	Salazar	Shasta Lake	CA
Marilyn	Salazar	Charter Twp of Clinton	MI
Michael	Saldutti	Savannah	AZ
Dalia	Salgado	Los Angeles	CA
Jane	Salgado	Bellerose	NY
Alicia	Salland	Weston	FL
Tina	Sallee	Louisville	KY
Max	Salt	Coventry	RI

First name	Last name	City	State
Luis	Salvat	Eustis	FL
Amanda	Salvner	Ann Arbor	MI
Rhonda	Salyer	St. AUGUSTINE	FL
Jackie	Samallo	Walnut	CA
Christian	Samito	Boston	MA
Cece	Samp	Schiller Park	IL
Cynthia	Sampson	Asheville	NC
Elizabeth	Sams	Louisburg NC	NC
Lewis	Sams	new york	NY
Deborah	San Gabriel	Lynn	MA
Sean	San JosÃ©	San Francisco	CA
Velma	Sanabria	Oakland Gardens	NY
Lorraine	Sanchez	New York	NY
Michaela	Sanchez	St Augustine	FL
Rebecca	Sanchez	Las Vegas	NV
Virginia	Sanchez	Gilbert	AZ
Patricia	Sanchez	So Plainfield	NJ
Sylvia	Sanchez	Loma Linda	CA
Bat World	Sanctuary	Weatherford	TX
Norman	Sandel	Beacon Falls	CT
Valerie	Sanderson	Thompson	IA
Florence	Sandok	Viroqua	WI
Deb	Sands	DeForest	WI
Janice	Sanecki	Royal Oak	MI
Trish	Sanford	Hobbs	NM
Ellen	Sansone	Northbrook	IL
Genevieve	Santalucia	Philadelphia	PA
Susan	Santilli	Westbury	NY
Saskia	Santos	Columbia	SC
Kim	Santos	Greensboro	NC
Aldana	Santto	Oneonta	NY
Michelle	Santy	Moss Beach	CA
Zachary	Sapienza	Carrsville	KY
Natasha	Saravanja	SF	CA
AnnMarie	Sardineer	Trafford	PA
Michelle	Sarnoski	Lakewood	WA
Carole	Sartenaer	El Cerrito	CA
Randi	Saslow	New Haven	CT
Dawn	Sass	Belleville	WI
pele	saubers	algodones	NM
Pamela	Saulter	Perris	CA
Alexandra	Saunders	DANVILLE	CA
Irene	Saurwein	Los Osos	CA

First name	Last name	City	State
Tamar	Sautter	San Antonio	TX
Linda	Savage	San Leandro	CA
Lori	Savage	Wyandotte	MI
Kitty	Savage	Tillson	NY
Heather	Savino	East Haven	CT
Jennifer	Sawyer	Wellesley	MA
Matthew	Saxe	Crystal	MN
Heather	Sayles	Liverpool	NY
Geraldine	Sbragia	Petaluma	CA
Cindy	Scannell	Middlebury	CT
Nick	Scarim	Hennepin	IL
Sarah	Schaaf	Dublin	OH
Laura	Schaap	Davis	CA
Lori	Schabow	Shiocton	WI
Timothy	Schacht	Grosse Pointe Park	MI
Amelia	Schachter	Firestone	CO
Bob/Linda	Schadewitz	Canby	OR
Bob-Linda	Schadewitz	Canby	OR
Millie	Schaefer	Monroe	NY
Michael	Schaeffer	Grinnell	IA
Suzanne	Schaem	New York	NY
Claudia	Schaer	New York	NY
Helen	Schafer	White Hse Sta	NJ
Fred	Schaider	Houston	TX
Sarah	Schamberger	Sarasota	FL
Marsha	Schaub	Naples	FL
clifford	schauble	Newark	DE
Elizabeth	Schauer	Tucson	AZ
Christy	Schauf	Vallejo	CA
Arielle	Schechter	Chapel Hill	NC
Ginger	Schedler	Fresno	CA
Stanley	Scheller	Denver	CO
Carolin	Schellhorn	Ardmore	PA
Gabby	Schelthoff	Lisle	IL
Gwenn	Schemer	Wellington	FL
Eileen	Schenck	Las Vegas	NV
Janice	Schenfisch	Cypress	CA
Tricia	Schenk	BROWN DEER	WI
Judy	Scher	Eugene	OR
Andrea	Scheri	Bandera	TX
Elaine	Schermer	Nicholasville	KY
Carol	Scherpenisse	Spring Lake	MI
Marguerite	Scheyer	Potsdam	NY

First name	Last name	City	State
Judith	Schierling	San Jose	CA
Mollie	Schierman	Plymouth	MN
Nanette B	Schieron	Marshfield Hills	MA
Lloyd	Schiffelbian	Virginia Beach	VA
Gabrielle	Schiller	Toronto	ON
Paulette	Schindele	San Marcos	CA
DANIEL	SCHLAGMAN	EAST MEADOW	NY
Rosemary	Schlesinger	Henderson	NV
Heather	Schlichter	Woodland Hills	CA
Barbara	Schlitz	Belmont	CA
Derek	Schmeh	Westminster	CO
Alyssa	Schmidt	Norwich	CT
Denise	Schmidt	Dillon	CO
Gabriele	Schmidt	Glendale	NY
Roger	Schmidt	Lincoln	NE
Christie	Schmidt	Aliso viejo	CA
Lana	Schmitt	Machesney Park	IL
Tim	Schmitt	Arlington	VA
Walter	Schmitt	Machesney Park	IL
Jane	Schnee	Sebastian	FL
Colleen	Schneider	Saint Michael	MN
Danielle	Schneider	Pickens	SC
Mona	Schneider	Corvallis	OR
N	Schneider	Baltimore	MD
Gail	Schnell	Cleveland	OH
Tamra	Schnitman	Calabasas	CA
Andrea	Schnitzler	East Stroudsburg, PA 18302	PA
Brittany	Schnitzler	Gibsonton	FL
David	Schnitzler	East Stroudsburg	PA
D	Schoech	Arlington	TX
Chris	Scholl	Neptune City	NJ
Roberta	Schonemann	West Lafayette	IN
Terry and Ramona	Schoonover	CAPITAN	NM
Samantha	Schou	Bastrop	TX
Tara	Schrier	Wake Forest	NC
Mark	Schroeder	Spring Grove	MN
Hilary	Schuddekopf	Mechanicville	NY
Lynda	Schuh	Silver City	NM
Shani	Schulman	Ozone Park	NY
Cindy	Schultz	Seaford	NY
Richard	Schultz	Bartow	FL

First name	Last name	City	State
sherry	schultz	Philadelphia	PA
Ellen	Schultz	Red Bank	NJ
Tim	Schultz	Plano	TX
Amy	Schumacher	Dayton	OH
Arthur	Schurr	New York	NY
Loree	Schuster	Philadelphia	PA
Terry	Schuster	Raleigh	NC
Tracey	Schuster	Los Angeles	CA
Theresa	Schwacke	Freeland	WA
Adam	Schwartz	Harriman	NY
Kelly	Schwartz	ARLINGTON	VA
Marge	Schwartz	Santa Barbara	CA
Richard	Schwartz	Berkeley	CA
Tamar	Schwartz	SUNNYSIDE	NY
becca	schwartz	Goshen	NY
Jeff	Schwefel	Allston	MA
Kristen	Schweitzer	Manhattan	KS
Dena	Schwimmer	Los Angeles	CA
Jean	Schwinberg	Seattle	WA
Laura	Schwind	Rochester	MI
Jeff	Sciarro	Greenville	SC
Jen	Scibetta	Cheektowaga	NY
Terry	Sciple	Atlanta	GA
Jane	Scopelite	Newtown	PA
Jason	Scorse	aptos	CA
Amy	Scott	Dunmore	WV
Bennie	Scott	Flippin	AR
Carole	Scott	Saint Louis	MO
Jennifer	Scott	Fort Myers	FL
John	Scott	Lexington	KY
Kari Lorraine	Scott	San Diego	CA
Megan	Scott	Mesquite	TX
Saron	Scott	Bentonville	AR
Sean	Scott	Warrior	AL
Anthony	Scrimenti	Albany	NY
Donna	Seabloom	ELK RIVER	MN
ALAN	SEAGER	WOODSTOCK	NY
Thomasina	Seah	Cary	IL
Christina	Searfoss	Pittston Twp	PA
Susan	Searle	Slidell	LA
Marsha	Seas	Brookings	SD
Star	Seastone	Loveland	CO
Joseph	Sebastian	Sacramento, CA	CA

First name	Last name	City	State
Ann	Seccombe	Grand Junction	CO
Sarah	Sederstrom	Stillwater	MN
Ljubica	Sefer-Stefancic	New York	NY
Joshua	Seff	Lexington	KY
Ellen	Segal	La Crescenta	CA
Kim	Seger	Kittanning	PA
Stacey	Seibold	CAMPBELL	CA
Elaine	Seitz	Great Neck	NY
laura	seitz	bozeman	MT
Kanwaldeep	Sekhon	Gates	NY
Brenda	Seldin	Livingston Manor	NY
Jo	Self	Birmingham	AL
Winke	Self	La Jolla	CA
Tonyia	Selfe	Daniels	WV
Greg	Sells	Austin	TX
Donna	Selquist	Argyle	TX
Elizabeth	Seltzer	Media	PA
Nina	Selvaggi	Manassas	VA
Cary	Semit	Herkimer	NY
Pamela	Semos	Omaha	NE
Jani	Sena	Helena	MT
Joe	Senderovich	San Tan Valley	AZ
Evelyn	Senesman	Mount Airy	MD
Bob	Senko	Cape Coral	FL
Michael	Senn	Delano	MN
Sara	Serabian	Essex	VT
Kiara	Serafin	Minneapolis	MN
Sandra	Serafin	Albuquerque	NM
Sonya	Serna	Phoenix	AZ
Elliott	Sernel	Palm Springs	CA
Camille	Serotini	Bonita Springs	FL
EVELYN	SERRANO	Cape Coral	FL
Maria	Serritella	HOUSTON	TX
andy	sessa	Brooklyn	NY
Mark	Setterberg	Houston	TX
Michelle	Sewald	Denver	CO
Kathleen	Sewright	Winter Springs	FL
Carol	Seymour	Gansevoort	NY
Diane	Shackman	Omaha	NE
Karen	Shadbar	Crestwood	IL
Diane	Shafer	High Ridge	MO
Kay	Shafer	Winslow	ME
Mary	Shafer	Wheat Ridge	CO

First name	Last name	City	State
Roberta	Shafer	Willoughby	OH
Terri	Shaffer	Blacklick	OH
Kevin	Shafinia	Gardner	KS
barbara	shalaew	ocala	FL
Steve	Shalaew	ocala	FL
Harriet	Shalat	Forest Hills	NY
Elsy	Shallman	Loxahatchee	FL
Harriet	Shamblin	Tuscaloosa	AL
Margaret	Shamonsky	Prescott	AZ
Sandra	Shaner	Wood River	IL
Richard	Shannahan	Lutherville	MD
Jodi	Shannon	Mineral Wells	TX
Alice	Shao	Middle Village	NY
Denise	Shapiro	Selden	NY
ellene	shapiro	Highland Park	IL
Martha	Sharkin	Lakewood	OH
Schitiz	Sharma	Fakiragram	Assam
Gloria	Sharp	South Bend	IN
Karen	Shatz	Scarsdale	NY
Michael	Shaver	Elyria	OH
Jennifer	Shea	Ewing	NJ
Maureen	Sheahan	Southfield	MI
Lucinda	Sheaks	Hialeah	FL
Pam	Sheeler	Loveland	CO
Matthew	Sheffield	Bloomington	IN
ReBecca	Shekoski	Sussex	WI
Arthur	Sheldon	Duluth	GA
Charles	Shelly	Albuquerque	NM
Bea	Shemberg	Hollywood	FL
Monika	Shepherd	Brighton	MA
Colleen	Sheppard	Nashville	TN
Debra	Sheppard	Yuba City	CA
Donna	Sherer	Oakland Park	FL
Lisa	Sherman	East Concord	NY
Sandra	Sherman	Hopkinton	NH
Trisha	Sherman	Moosup	CT
Peggy	Sherwood	Luling	LA
Susan	Sherwood Nulman	Johnston	RI
Vivian	Shevitz	Royal Oak	MI
Lauren	Sheytanian	Burlington	MA
Ethan	Shields	Lewisburg	WV
Jamie	Shields	Rainier	OR
Victoria	Shih	Plano	TX

First name	Last name	City	State
Jan	Shillito	Portage	MI
Michon	Shinn	Slidell	LA
Noreen	Shinn	Sterling	VA
Carol	shinnerling	Manchester Township	NJ
Elaine	Shipman	San Antonio	TX
Margarita	Shircel	Glendale	AZ
Rachel	Shirley	Harpers Ferry	WV
Kerrie	Shisila	Parma	OH
Jeffrey	Shivar	Berwyn	IL
Judy	Shively	San Diego	CA
Karen	Sholette	The villagee	FL
Clare	Shomer	Los Angeles	CA
Emma	Shook	University Hts	OH
Philip	Shook	Tempe	AZ
Robin	Shore	Nashua	NH
Kathy	Shores	Tempe	AZ
Kimberly	Short	Chandler	AZ
Andi	Shotwell	Wheat Ridge	CO
Alyson	Shotz	brooklyn	NY
Enviro	Show	Florence	MA
Joni & Danny	Shreves	Las Vegas	NV
Holly	Shull Vogel	Vashon	WA
Jerry	Shuper	Sacramento	CA
Tamara	Shurling	Guyton	GA
Sarah	Siddiq	Lorton	VA
Angie	Sieb	Merrillville	IN
Lia	Siebern	Lees Summit	MO
PAUL	SIEGEL	Mt. Pleasant	SC
Stefanie	Siegel	BROOKLYN	NY
Alexander	Siegfried	Richmond	VA
Suzy	Siegmann	Temple Terrace	FL
Lisa	Siegrist	Annandale	VA
Denise	Siele	Boca Raton	FL
Lori	Siemian	Ballston Lake	NY
Lynda	Sierra	Santa Cruz	CA
Selena	Sifontes	Concord	NC
D.G.	Sifuentes	Mammoth Lakes	CA
Aemie	Sigler	Millersburg	OH
Robert	Sila	Rialto	CA
Robert	Sila	Rialto	CA
JOAN	SILACO	QUEENS VILLAGE	NY
Lois	Silberstein	pensacola	FL

First name	Last name	City	State
olivia	silensky	LOS ANGELES	CA
Deb	Silke	Newburyport	MA
Rebecca	Sillasen	Columbus	OH
Melissa	Silva	SOMERVILLE, MA	MA
Jean	Silvasy	Tavares	FL
Amanda	Silver	Hedgesville	WV
ayn	silverman	new york	NY
Barbara	Silverman	Buffalo Grove	IL
Kevin	Silvey	Seminole	FL
John	Simanton	Spokane	WA
Sandra	Simenson	Minneapolis	MN
Gee	Simmons	Meriden	CT
KAREN	SIMMONS	BRYANTVILLE	MA
Shelia	Simmons	Austin	TX
Jeff	Simon	South Bend	IN
Jill	Simon	New York	NY
Susanne	Simon	Bogota	NJ
Tia	Simon	Gorham	ME
Louise	Simone	Washington	DC
Jill	Simpson	Florence	OR
Susan	Simpson	Oscoda	MI
Catherine	Sims	Knightdale	NC
Kate	Sims	Wichita	KS
Iris	Sinai	marlboro	NJ
Jean	Sinclair	Covington	GA
Linda	Singer	Huntsville	AL
David J.	Singer, MD, FACS	ASPEN	CO
Mark	Singleton	Salem	OR
Atharva	Sinha	Ellicott City	MD
Tamira	Sinicropi	Amsterdam	NY
Christine	Sirias	Alhambra	CA
Dana	Sisso	Royal Oak	MI
Janis	Sitton	Alhambra	IL
elizabeth	Skelton	New Albany	IN
Julie	Skelton	Belleville	MI
Ernetta	Skerlec	Lakewood	WA
Amanda	Skerski	Marina Del Rey	CA
Jacqueline	Skill	Lahaina	HI
Richard	Skinner	Tucson	AZ
Richard	Skinner	Tucson	AZ
Gwendolyn	Skipper	Springfield	MO
Laurence	Skirvin	Villa Rica	GA
Mary	Skirving	Franklin	TN

First name	Last name	City	State
Christianna	Skoczek	Kittery Point	ME
Linda	Skonberg	Sutherlin	OR
Gloria	Skouge	Shoreline	WA
LIDA	SKRZYPCZAK	Washington	DC
Carla	Skuce	Raleigh	NC
Paul	Skufis	Tecumseh	MI
Natalie	Skwarek	Orchard Park	NY
Debbie	Slack	Lynchburg	VA
Donna Marie	Slack	Loveland	CO
Paul	Slack	Cutler Bay	FL
Betty	Slater	Johns Creek	GA
Emily	Slayton	Port Chester	NY
Janine	Sledz	Colorado Springs	CO
Stephen	Slivinsky	Brewster	NY
elaine	sloan	nyc	NY
Linda	Sloan	Sandusky	OH
RICKY	SLOAN	Springhill	FL
Lindsey	Slocum	Lafayette	CO
Cynthia	Slomin	Jackson	NJ
victoria	slowek	YarmouthPort	MA
Matt	Smar	Lansing	MI
Stephanie	Smedley	Linkwood	MD
Jeanine	Smegal	Brooklyn Park	MN
C. M.	Smiley	Bloomington,	MN
Angie	Smith	Arlington	VA
Beverly	Smith	Grand rapids	MI
Brenda	Smith	Westmoreland	NH
Candace	Smith	Colorado Springs	CO
Christine	Smith	Martinsville	IL
Cris	Smith	Los Angeles	CA
Donna	Smith	Havertown	PA
Donna	Smith	Havertown	PA
Gayle	Smith	Carmel	CA
James	Smith	Simpsonville	KY
Janis	Smith	Holtsville	NY
Jason	Smith	Knoxville	TN
Jennifer	Smith	Chicago	IL
Jessica	Smith	Naples	FL
Jill	Smith	Mesa	AZ
Judith	Smith	Oakland	CA
Kellie	Smith	Deering	NH
Kelly	Smith	Derry	PA
Kevin	Smith	Largo	FL

First name	Last name	City	State
Kim	Smith	Beverly	WV
Kristin	Smith	Omaha	NE
Leslie	Smith	San Marcos	TX
Linda	Smith	Orange Park	FL
Linda	Smith	Easton	PA
Lisa	Smith	Olathe	KS
Lisa	Smith	Sarah	MS
Margaret	Smith	Binghamton	NY
Mary	Smith	Little Falls	MN
Michael	Smith	Harrisburg	IL
Priscilla	smith	BROOKLINE	MA
Priscilla	Smith	Brookline	MA
Ray	Smith	Houston	TX
robert	smith	Clackamas	OR
S	Smith	Sound Beach	NY
Sandra	Smith	Knoxville	TN
Steph	Smith	New Castle	PA
Tanya	Smith	Eureka Springs	AR
Taylor	Smith	Crisfield	MD
Terrie	Smith	Spring Valley	CA
Vicki	Smith	Blairsville	GA
Zachary	Smith	Langhorne	PA
Deanna	Smith	Scottsdale	AZ
Jaszmene	Smith	Bridgeton	NJ
Sata	Smith	Harvey	LA
Suzannah	Smith	Franklin	TN
Jasmine	Smith-Gillen	Weymouth	MA
Linda	Smyth	Enfield	CT
Kathy	Smythe	Lafayette	TN
Heather	Snead	Denver	CO
Nadine	Snedeker	Wilkes-Barre	PA
Valarie	Snell	Greensboro	NC
Dade	Snellgrove	Pasadena	MD
Dade	Snellgrove	Annapolis	MD
Sandra	Snider	AURORA	CO
Kathy	Sniezek	Dunstable	MA
Donna	Snow	Olympia	WA
Jennie	Snurpus	Evansville	IN
Andrea	Snyder	Hickory	NC
Sharon	Snyder	St. Joseph	MO
Sandra	Sobanski	Brooklyn	NY
ALLA	SOBEL	NEW YORK	NY
Bridget	Soeder	Fairview Park	OH

First name	Last name	City	State
Mark	Soenksen	De Witt	IA
Piero	Soligo	Baton Rouge	LA
Phyllis	Solimeno	Centereach	NY
Damalia	Solis	San Antonio	TX
HILDA	SOLIS	orange	CA
ALISSA	SOLLITTO	Endicott	NY
Linda	Solomon	Bellaire	MI
Tina	Solomon	Alvin	TX
Stacey	Solum	Sarasota	FL
Lisa	Somerville	Albany	NY
Karen	Sommer	Smith River	CA
Devorah	Soodak	Philadelphia	PA
Cyndi	Sood-Parker	Castro Valley	CA
Doris	Soraci	Patterson	NY
Barbara	Sorgeler	Millsboro	DE
Andrew	Sorokowski	Sonoma	CA
James	Sorrells	Minneola	FL
Valerie	Sotrop	Clearwater	FL
Irene	Souder-Coyle	Lansdale	PA
Clayton	Soule	Zephyrhills	FL
Roger	Southward	Placitas	NM
Todd	Southworth	Waterloo	IA
Carol	Souva	Sanford	MI
Janet	Souza	Novato	CA
Madeleine	Souza	Fall River	MA
Ohmar	Sowle	Moraga	CA
Pamela	Spacek	Downers Grove	IL
Rose Mary	Spadaccini	Punta Gorda	FL
Tiffany	Spahn	Portland	OR
Madeline	Spain	Miami	FL
Diane	Sparks	Mansfield	TX
Whtiney	Sparks	Rohnert Park	CA
Pamela	Speagle	Louisville	KY
Laurie	Spear	Northbrook	IL
James	Spearman	Jasper	GA
Vicki	Spears	Centralia	IL
L	Spears	Tonawanda	NY
Scott	Species	Seattle	WA
Christy	Spector, Environmental Scientist	Sparks	NV
Cheryl	Speer	Camas	WA
Susan	Spelman	CANAAN	NY
Nina	Spelter	Madison	WI

First name	Last name	City	State
Stephanie	Speltz	Lawler	IA
Carol	Spencer	El Cerrito	CA
Caroline	Spencer	Dallas	TX
Catherine	Spencer	Colorado Springs, CO 80907, USA	CO
D R	Spencer	San Diego	CA
Joe	Spencer	Gilbert	AZ
Martha	Spencer	Brevard	NC
Deborah	Spencer	Billerica	MA
Ilya	Speranza	Brooklyn	NY
Will	Speros	Brooklyn	NY
Anne	Spesick	Cool	CA
Elizabeth	Spiegl	Brooklyn	NY
Margaret	Spier	New York	NY
Cheryl	Spinelli	Nutley	NJ
Jane	Spini	Arcata	CA
Louis	Spirito	Malibu, California	CA
Danielle	Spitz	Kamuela	HI
Timothy	Spong	Houston	DE
Nicole	Sprader	Waukesha	WI
Karen	Spradlin	Jacksonville	AL
Marvelous	Spraggins	Clifton	VA
Dale	Sprenkel	Locust Hill	VA
Douglas	Spring	Wilbraham	MA
Michael	Springthorpe	Burbank	CA
Kathrina	Spyridakis	Waterford Township	MI
Pattie	Squiqui	Sun city	AZ
Michelle	Sramkoski	Burton	MI
Christopher	St John	Aurora	CO
Brenda	St. James	Flint	MI
Clayton	St. John	Colorado Springs	CO
Kathryn	St. John	Boulder Creek	CA
Julie	St.John	Billings	MT
Karen	Stacey	Chicago	IL
George	Staff	Georgetown	TX
Gregory	Stahl	San Antonio	TX
Virginia	Stainton	Boulder	OR
Bill	Staley	Sterling	VA
Condra	Staley	Taylorsville	NC
Megan	Stalker	Twin Lakes	WI
terry	stallcup	Coppell	TX
Nancy	Stamm	Fort Pierce	FL
La Vaughn	Standridge	Aurora	CO

First name	Last name	City	State
Pamela	Stange	Baxter	MN
Linda	Stanier-Triponi	Williamsburg	VA
clyde	stanley	Minden	LA
Deborah	Stanley	ATHENS	GA
Karen	Stansbury	Washington Depot	CT
Sarah	Stansill	Montreat	NC
Kathleen	Stanton	Mora	NM
Irene	Stark	Plantation	FL
Linda	Stark	Streamwood	IL
Lozz	Starseed	Seattle	WA
Shelly	Stauring	Arkport	NY
Fern	Stearney	Tarrytown	NY
Cathy	Steed	Henrico	VA
Bunni	Steele	Ely	NV
Ceitha	Steele	Springfield	IL
Jenifer	Steele	Berkeley	CA
Lisa	Steele	Roseville	CA
Mary	Steele	Laguna Niguel	AL
Michelle	Steele	Austin	TX
Sara	Steelman	Indiana	PA
courtney	stefano	washingtonville	NY
Maricke	Steff Le Gars	Katy	TX
Alison	Steffen	St Petersburg	FL
Wayne	Steffes	Redding	CA
Cathy	Stegman	Cincinnati	OH
Ewa	Stein	Port Charlotte	FL
Rob	Stein	Brea	CA
Cindy	Stein	Prescott Valley	AZ
Sharon	Steinbacher	SOUTH WILLIAMSPORT	PA
Judith	Steiner	Copley	OH
Salllye	Steiner Bowyer	Soquel	CA
Leslie	Steinert	Warren	NJ
Josh	Steinmetz	Prescott	AZ
Jim	Steitz	St. Louis	MO
Michael	Stella	Key West	FL
Christina	Stemwell	Saint Francis	WI
Fran	Stenberg	Wheaton	IL
Gwendolyn Gail	Stenersen	Pembroke	ON
Leigh	Stephens	Cleveland	GA
Mary	Stephens	Onemo	VA
kathleen	steranka	ellicott city	MD
Claire	Sterling	Bloomfield	NJ

First name	Last name	City	State
Jeffrey	Sterling	Cleveland Hts	OH
Shelley	Sterrett	Santa Monica	CA
Madeline	Stetser	Cape may court house	NJ
Barbara	Stevens	Austin	TX
Denise	Stevens	East jordan	MI
Elaine	Stevens	Madison	WI
James	Stevens	Wichita Falls	TX
Laurie	Stevens	Union Grove	WI
Melody	Stevens	Aiken	SC
PATRICIA	STEVENS	Fort Howard	MD
David	Stevens	Indianapolis	IN
Nan	Stevenson	St Paul	MN
Christine	Stewart	Escondido	CA
Karen	Stewart	Meridian	ID
Katherine S	Stewart	San Diego	CA
Louise	Stewart	Norcross	GA
Natalie	Stewart	MCMINNVILLE	TN
Robert	Stewart	New York	NY
Sarah	Stewart	Watertown	MA
Shannon	Stewart	Sykesville	MD
Susan	Stewart	Henrico	VA
Tammi	Stewart	Comanche	TX
Laura	Stice	Eugene	OR
Greg	Stidham	Salida	CO
Paula	Stierli	Waipahu	HI
Pet	Stigall	Littleton	CO
Amy	Stiles	Crown Point	IN
Pamela	Still	Lake Oswego	OR
CHARMAINE	STILLWELL	Minneapolis	MN
Lyda	Stillwell	Kalamazoo	MI
Christina	Stimmel	San Bruno	CA
Lisa	Stimpson	Brooklyn	NY
phyllis	Stites	Colorado Springs	CO
Janette	Stodola	Prior Lake	MN
Sandra	Stofan	Garland	TX
Mary	Stoffregen	Oldenburg	IN
Delia	Stokell	Hernando Beach	FL
Cynthia	Stokes	Kettle Falls	WA
Diana	Stokes	Rocklin	CA
Jackie	Stolfi	Massapequa Park	NY
Darby	Stone	Harvest	AL
karen	stone	wilmington	DE

First name	Last name	City	State
Michael	Stone	Erlanger	KY
Russell	Stone	San Jose	CA
Stephanie	Stone	New York	NY
Susanna	Stone	Middle Island	NY
William	Stone	Austin	TX
Regina	Stone	Plainsboro	NJ
HARRY	STONEMAN	Conneaut	OH
Nicki	Stoneman	Painesville	OH
Cynthia	Stoner	Bartlett	IL
Martha	Stopa	Denver	CO
Maryann	Stork	Fairbury	IL
Molly	Storke	Honeoye Falls	NY
Adrian	Storm	Fallbrook	CA
Skylar	Storm	Berlin	NJ
Deborah	Story	Neptune beach	FL
Alyss	Stout	Valencia	CA
Barbara-Jean	Stout	Blue Island	IL
Catherine J	Stout	Egg Harbor City	NJ
Diane	Stovall	Comanche	TX
W. Andrew	Stover	Chambersburg	PA
Jocelyn	Stowell	Tallahassee	FL
Michelle	Strabley	South Bend	IN
Faith	Strailey	Quincy	CA
Darren	Strain	Brookhaven	PA
Kris	Strate	Fairview	UT
Ann	Stratten	La Mesa	CA
Tricia	Straub	Columbia	MO
Lori	Strausser	Racine	WI
Brenda	Street	Downey	CA
Stephanie	Streicher	West Allis	WI
Ryan	Strempke-Durgin	Cedar Rapids	IA
Jeanne	Stribley	E Harwich	MA
Nancy	Strickland	Lompoc	CA
Rebecca	Stringer	Columbus	OH
Pat	Stringfield	Longview	TX
Pat	Stringfield	Longview	TX
Roni	Strompf	Boca Raton	FL
Heather	Strope	Jefferson City	MO
Martha	Strother	Little Rock	AR
Thomas	Strubbe	Alvin	TX
Dan	Struble	LIVINGSTON	MT
M.	Struble	Philadelphia, PA	PA
Paula	Strumph	Staten Island	NY

First name	Last name	City	State
Nancy	Strzepek	Norridge	IL
AL	Stu	Loveland	CO
Fiona	Stuart	St Thomas	Virgin Islands
k	stuhr	gretna	NE
ELIZABETH	STUMP	ALPHARETTA	GA
Laurie	Sturgis	Girard	PA
angelo	sturino	harwood heights	IL
Jude	Stuyvenberg	Kimberly	WI
Sabrina	Suardini	Gwinn	MI
Joseph	suarez	Canton	MI
Renae	Suberg	Canyon Lake	TX
Tessa	Sucher	West Des Moines	IA
Everett	Suchland	Darlington	SC
michael	suchorsky	Andes	NY
Laurie	Sudol	Clarkdale	AZ
kathy	sugarman	Henderson	NV
Kimberley	Suh	Suwanee	GA
Karen	Suit	FALLING WTRS	WV
Joe	Sullivan	Parlin	NJ
Kathryn	Sullivan	Huntsville	AL
Mary	Sullivan	Eastham	MA
Mary	Sullivan	Huntington Beach	CA
Theresa	Sullivan	poulsbo	WA
Lisa	Sullivan	Fenton	MO
Margo	Sullivan	Newport	RI
Helen	Sullivant	Pleasanton	CA
Kaytee	Sumida	san diego	CA
Pat	Summers	Louisville	KY
Tracy	Sumter	Columbia	SC
Rina	Sunar	Lititz	PA
Bryon	Sundberg	Durham	NC
Felicia	Sunderland	Bonita Springs	FL
liz	sundquist	pleasant hill	IA
Guru	Suryanarayana	None	CA
Christine	Susi	Chardon	OH
H.M.	Sustaita	Eugene	OR
Laura	Sutherland	Dallas	TX
Sonja	Sutherland	McPherson	KS
Bruce	Sutton	BOTTINEAU	ND
Kathy	Sutton	PINE	CO
David	Sutton	Mahomet	IL
Bonnie	Svec	Rockville Montgomery	MD

First name	Last name	City	State
Kate	Swain	Cumming	GA
Carrie	Swank	Sinking Spring	PA
Dallas	Swank	Monroe	WA
Dolores	Swann	Dearborn Hts.	MI
Anne	Swanson	Campbell	CA
Roberta	Swanson	Hamilton	MI
Robin	Swanson	Honolulu	HI
Marsha	Swartz	Lakewood	NJ
Judy	Sweatland	Volcano	HI
Kimberly	Swedberg	Port Orchard	WA
ca	sweeney	fairfield	CA
Robert	Sweezy	Fremont	CA
Michaelann	Swik	Pocahontas	AR
Suzanne	Swinconos	Janesville	WI
David	Swire	Simi Valley	CA
Maureen	Swiss	Hopatcong	NJ
Richard	Swope	Palmetto Bay	FL
Robin	Swope	Fairfax Station	VA
Tracy	Swope	Palmetto Bay	FL
Mushtaq	Syed	Santa Clara	CA
Bill	Sykes	Beacon	NY
CS	Symington	Austin	TX
Peter	Syre	Abington	PA
Gail	Szafir	Troy	NH
Ann	T	Martinsville	NJ
L	T	Menomonee falls	WI
N	T	Cadiz	KY
Dennis	Tackett	Virginia Beach	VA
Rebecca	Taddei	Livingston	TX
Peter	Tafuri	Fleetville	PA
Carol	Taggart	Menlo Park San Mateo Coun	CA
Sandra	Taggart	Brooklyn	NY
Barbara	Tait	Shorewood	IL
Trina	Takahashi	Brentwood	CA
Chris	Talbot-Heindl	Denver	CO
Val	Talento	Albuquerque	NM
Michelle	Talhami	Fox Point	WI
Jessica	Taliaferro	Palm Bay	FL
Adriana	Tamayo RN BSN BA CCRN ALUMNUS PHN	San Diego	CA
Lisa	Tamborello	Windsor Locks	CT
Hiedi	Tan	Knoxville	TN

First name	Last name	City	State
singgih	tan	san jose	CA
Vicky	Tang	Bayside	NY
Naomi	Taniguchi	West Hills	CA
Kelly	Tanous	Turner	ME
Shari	Tarbet	Albuquerque	NM
Alexander	Tashian	Ann Arbor	MI
Lynda	Tatara	LAKE WORTH	FL
Nancy	Tate	Bethlehem	PA
Andrea	Taylor	New York	NY
Brigitte	Taylor	Fairfax	VA
Carol	Taylor	Ojai	CA
Carol	Taylor	Houston	TX
Christine	Taylor	Sierra Madre	CA
Clara	Taylor	San Francisco	CA
De'Asia	Taylor	Raleigh	NC
Donald	Taylor	Fair Oaks	CA
Elizabeth	Taylor	Brewster	MA
Guy	Taylor	Livonia	MI
Guy	Taylor	Livonia	MI
James	Taylor	Clarksville	TN
Jennifer	Taylor	Winder	GA
Krista	Taylor	Aurora	CO
Laura	Taylor	San Jose	NM
Lisa	Taylor	Olympia	WA
Lynn	Taylor	Barrington	RI
Merideth	Taylor	Lexington Park	MD
Muriel	Taylor	santa fe	NM
Sally	Taylor	Midland	TX
Susan	Taylor	THOUSAND OAKS	CA
Sylvia	Taylor	Ithaca	NY
Vicky	Taylor	Kirkland	WA
Walter	Taylor	San Jose	CA
Karla	Taylor	Olympia	WA
Lisa	Taylor	Fort Myers	FL
Annette	Tchelka	West Haven	CT
Scott	Tecza	Elizabeth	NJ
Renee	Tedder	Washington	MI
Terry	Tedesco	Tucson	AZ
Robert	Tedone	Las Vegas	NV
Cornelia	Teed	Bellingham	WA
Loren	Tefoe	Moriah	NY
carl	tegethoff	siletz	OR
Paula	Teixeira	Santee	CA

First name	Last name	City	State
Katira	Tejeda	McKinney	TX
Bonnie	Templeton	Loveland	CO
Tracy	Templin	Isle	MN
Debbie	Tenenbaum	Berkeley	CA
Bianca	Tenneriello	Jackson	NJ
Lauren	Teresa	Howard Beach	NY
Doreen	Terletzky	Clifton	NJ
Walter	Terrell	THE VILLLAGES	FL
Kristen	Tesch	New Orleans	LA
Cher	Teslevich	Jeannette	PA
jacqueline	tessman	Benton Harbor	MI
Barbara	Tetro	Staten Island	NY
Christina	Teunissen	Cave Creek	AZ
Frank	Thacker	Ironton	OH
Gary	Thaler	Revere	MA
Reynold	Tharp	Urbana	IL
Margaret	Thayer	Bothell	WA
Victoria	Theis	Johnson City	TN
Donna	Thelander	Kailua Kona	HI
Deborah	Theodossis	Hendersonville	NC
Pamela	Thinesen	Anoka	MN
Susan	Thing	Tucson	AZ
Rita	Thio	Walnut	CA
Aileen	Thomas	LAKE OSWEGO	OR
Andre	Thomas	Chicago	IL
Donna	Thomas	Plainfield	VT
Ela	Thomas	Brooklyn	NY
Janie	Thomas	Eugene	OR
John	Thomas	Saint Louis	MO
Laura	Thomas	Oxnard	CA
Michael	Thomas	Woodruff	WI
Patricia	Thomas	Linden	PA
Sally	Thomas	Saint Louis	MO
Trisha	Thomas	Annapolis	MD
Tucker	Thomas	Ewing, NJ	NJ
Barbara	Thomas-Kruse	Peoria	AZ
ERIC	THOMIS	Eastham	MA
Lisa	Thompsen	Petaluma	CA
Brenda	Thompson	La Mesa	CA
Cindy	Thompson	Long Beach	MS
Donna	Thompson	Ronda	NC
E	Thompson	Santa Fe	NM
Jean	Thompson	Kennebunk	ME

First name	Last name	City	State
John	Thompson	Sarasota	FL
Lori	Thompson	Phoenix	AZ
Mary	Thompson	Portland	OR
Mary	Thompson	Lynchburg	VA
Peter	Thompson	Syracuse	NY
Susan	Thompson	NORRISTOWN, PA	PA
Thor	Thompson	Seattle	WA
Tom	Thompson	Yuma	AZ
Astrid	Thomsen	Farmersville	TX
Kathi	Thonet	Pittstown	NJ
Lisa	Thoreson	ELMHURST	IL
Bianka	Thormann	Bloomington	IL
Lisa	Thorn	New Brighton	PA
Merrie	Thornburg	Attica	IN
Merrie	Thornburg	Attica	IN
Mary	Thornton	Fort Worth	TX
Alec	Thorp	Yorktown Heights	NY
Samuel	Thorpe	Woodstock	NY
Thomas	Thorpe	Jeffersonville	IN
Susan	Thurairatnam	N. Olmsted	OH
Scott	Thurman	DULUTH	GA
Lisa	Tichenor	Asheville	NC
Lisa	Tichenor	Sarasota	FL
Lisa	Tichenor	Santa Rosa	CA
Marion	Tidwell	Merrillville	IN
Leslie	Tierney	Paramus	NJ
Todd	Tihen	Bristol	RI
Donna	Tilden	Goose Creek	SC
Maggie	Tiley	Wenatchee	WA
Rachael	Tilley	Melbourne	VIC
Barbara	Tillman	North Bergen	NJ
Patricia	Tillman	Somerville	AL
Matia	Timofeeva	Bloomfield	NJ
Kelly	Timon	Corpus Christi	TX
Jessalyn	Timson	Baltimore	MD
Priscilla	Tine	Kingston Springs	TN
Tina	Tine	Kingston Springs	TN
Ronnie	Tiner	Twentynine Palms	CA
Janice	Tinkham	Glouster	OH
Tricia	Tinling	Scottsville	NY
Holly	Tippett	Washington	DC
Deb	Tirone	New York	NY
Jerrilynne	Titsworth	Sarasota	FL

First name	Last name	City	State
Joseph	Tiu	Elgin	IL
Erh-yen	To	Sacramento	CA
Mary	Tober	Lancaster	NY
Christopher	Tobias	Pittsburgh	PA
Kym	Tobin	Saco	ME
Angela	Tocci	Westtown	PA
Sandra	Todd	Vancouver	WA
Michael	Tolaydo	Washington	DC
Barbara	Toledo	Miami	FL
Marianne	Tolken	Woodstock	VT
Margaret	Tollner	Lakewood	CA
Nita	Tomaszewski	Pahoa	HI
Jodie	Tomko	NEW PARIS	PA
Curtis	Tomlin	Chattanooga	TN
robert w	tomlinson	Friendswood	TX
Andy	Tomsky	Escondido	CA
Russ	Tonelli	Wausau	WI
Deborah	Topley	Apex	NC
Krista	Topp	Endicott, NY	NY
Deborah	Toppings	NEWPORT	TN
Andreia	Torain	Philadelphia	PA
Mimi	Torchin	New York	NY
Michael	Torosian	Fredericksburg	VA
Lupe	Torre	Saint Petersburg	FL
Felipe O.	Torre	Litchfield Park	AZ
Ava	Torre-Bueno	San Diego	CA
Carleen	Torrence	Las Vegas	NV
Erika	TOTH	RENO	NV
MARCIA	TOTH	North Miami Beach	FL
Sara	Toudouze	San Antonio	TX
Deborah	Towey	Chaska	MN
Donna	Towne	Meridian	ID
Erline	Towner	Milford	NH
Peyton	Townes	Carmel	IN
Peter	Townsend	Ashland	MA
Elisa	Townshend	Denver	CO
Glenn	Tozier	Kennebunk	ME
Karen	Trainor	Ventura	CA
Michelle	Trajanovska	Clayton	NC
Louise	Tramontano	Leland	NC
Dat	Tran	Upper Darby	PA
Sheila	Tran	Eagan	MN
Sheila	Tran	Eagan	MN

First name	Last name	City	State
Francine	Traniello	Middleboro	MA
SUSAN	TRANTULES	FAYETTEVILLE	PA
Jean	Trapani	Nokomis	FL
Jules	Trapp	Alexandria	VA
Stephanie	Trasoff	Ferndale	WA
Patty	Traube	Centereach	NY
Norman	Traum	Boulder	CO
Gail	Travers	The Colony	TX
Kara	Travers	Emerson	NJ
Connie	Trea	Winston	GA
Nancy	Treffry	Aromas	CA
Dora	Trevino	New Braunfels	TX
Graciela	Trevisan	San Francisco	CA
TIA	TRIPLETT	Los Angeles	CA
Susan	Tripoli	Boca Raton	FL
Nina	Tristani	Washington	DC
Denise	Trizinsky	Silverado	CA
Silvana	Tropea	Forest Hills	NY
Tracy S	Troth	Pearl	MS
Jaye	Trottier	BEDFORD	NH
Stephen	Troyanovich	Florence	NJ
Caroline	Trumbull	Ann Arbor	MI
Mark	Trumbull	Boulder	CO
Justin	Truong	San Francisco	CA
Jackie	Tryggeseth	North Freedom	WI
Denay	Trykowski	Whitewater	WI
Lonni	Trykowski	Carmel	CA
Barbara	Trypaluk	Saratoga Springs	NY
Linda	Tsang	Walnut creek	CA
Demetra	Tsantes	poughkeepsie	NY
Kathy	Tscheiner	Cincinnati	OH
Mandy	Tshibangu	Devon	PA
Nancy	Tucher	Foristell	MO
Linda	Tucker	Mansfield	OH
Denise	Tuite	Brooklyn	NY
Baysan	Tulu	Holland	MI
Christopher	Tumolo	Danielson	CT
P. W. H.	Tung	Freedom	NH
Jean	Tunstall	Clifton	VA
Meredith	Tupper	Olney	MD
Elizabeth	Turcotte	West Haven	CT
Jaime	Turgeon	Fredericksburg	VA
Jeremy	Turk	Springfield	MO

First name	Last name	City	State
Denise	Turner	Wilder	ID
James	Turner	Merritt Island	FL
Julie	Turner	Mobridge, SD	SD
Kathleen	Turner	Saint Louis	MO
Robert	Turner	Seattle	WA
Marilyn	Tursi	Wappingers Falls	NY
Katharine	Tussing	Buffalo	NY
Margaret Guilfoy	Tyler	Saint Louis	MO
Alice	Tym	Mcdonsld	TN
Shannon	Tymkiw	California	CA
Robert	Uecker	Fort Wayne	IN
Nicole	Uhing	Des Moines	IA
Brenda	Uhler	Landisburg	PA
daniel	uiterwyk	st petersburg	FL
Grace	Ukoha	Holts Summit	MO
Michelle	Ulacia	West Palm Beach	FL
Patricia	Ulick	Granada Hills	CA
Stacie	Umetsu	Huntington Beach	CA
Dennis	Underwood	Tacoma	WA
Jessica	Underwood	Gastonia	NC
Jillian	Unger	Sacramento	CA
Susan	Upchurch	San Diego	CA
Deborah and David	Upchurch	Indianapolis	IN
Charlie	Updegraph	Garfield	NJ
Diana	Uselding	Carol Stream	IL
Kimberley	Usher-Duve	Bedias	TX
Steven	Uyenishi	Seattle	WA
Lori	Vaccaro	Bronx	NY
Terry	Vaccaro	N Plainfield	NJ
TANYA	VACEK	Castelton	VA
Sylvia	Vairo	Santa Cruz	CA
Jonathan	Vajda	Harrisburg	PA
Antonio	Valdez	Anaheim	CA
Albert	Valencia	Irvine	CA
Donna	Valente	Newington	CT
Maria	Valentine	Westminster	CO
Kim	Valentine	Carson	CA
Katie	Valli	Boca Raton	FL
Michael	Van	Walls	MS
Anne M.	Van Alstyne	Redondo Beach	CA
Emily	Van Alyne	West Richland	WA

First name	Last name	City	State
Wendy	Van De Sompele	Vashon	WA
Vanessa	Van Doorne	New Braunfels	TX
nina	van duyne	flemington	NJ
Shana	Van Meter	Irvine	CA
Mark	Van Ornum	Oakhurst	CA
Colette	Van Os	Westminster	CO
Robin	Van Schaick	Lake Hopatcong	NJ
mari	vanantwerp	cincinnati	OH
Wim	Vand	Carrboro	NC
Joanne	Vander Heyden	Frankfort	IL
Chris	VanDerhoof	Martinsburg	WV
Zoe	Vandermeer	West Hartford	CT
Amber	VanderMolen-Harraman	Grand Rapids	MI
Joseph	VanderPluym	Carrollton	TX
Mary	Vanderweyst	Hot Springs Village	AR
Patricia	Vandetta	Vancouver	WA
Patti	Vandetta	Vancouver	WA
Pamela	Vangiessen	Houston	TX
Patricia	VanSise	Portland	OR
John	Varga	Rancho Mirage	CA
victoria	Varnals	OCEANSIDE	CA
Natasha	Varner	Santa Cruz	CA
Sandra	Varvel	El Paso	TX
Melissa	Vasconcellos	Ventura	CA
Heather	Vasquez	Denver	CO
Nelly	Vasquez	Madrid	Madrid
Sophia	Vassilakidis	Houston	TX
Stephane	Vattuone	Greenacres	FL
alison	vaught	Dayton	OH
Scott	Vayo	Boston	MA
Kimberly	Vaz	WESLEY CHAPEL	FL
Diane	Veith	Columbus	WI
Aldo	Velasquez	Hollywood	FL
Shannon	Velazquez	Captain Cook	HI
John	Velner	Adrian	MI
Kris	Venkat	Houston	TX
Gloria	Venta	Granada hills	CA
gigi	vento	Florham Park	NJ
Laura	Vera	Dickinson	TX
Cat	Vergara	Albuquerque	NM
Jennifer	VerHelst	Holland	MI
Doris	Verkamp	Charleston	IL

First name	Last name	City	State
Shellie	Vermeer	Laguna Hills	CA
Diane	Verna	Alta	WY
Kim	Vernon	Dallas	TX
Margaret	Vernon	Fonda	NY
Joyce	Viafore	Providence	RI
Jamila	Viandier	Stafford Springs	CT
Michelle	Vicat	Stuart	FL
Pete And Janine	Vichi	Post Falls	ID
Tania	Vichot	Homestead	FL
Jason	Vick	Decatur	GA
Marigny	Vigneau	San Diego	CA
Carlos	Villal	Brownfield	ME
Veronica	Villano	St Petersburg	FL
Juan	Villasenor	LIVE OAK	CA
Kiel	Villeneuve	Yelm	WA
Joel	Vincent	New York	NY
Tammi	Vinci	Rochester	NY
Patricia	Vineski	South Colton	NY
Jerald	Vinikoff	Mechanicville	NY
Tara	Virnick	Aliso Viejo	CA
Amy	Virostko	Cleveland	OH
Carlene	Visperas	Concord	CA
Korine	Vitiello	Lunenburg	MA
Mary Ann	Viveros	MAYFIELD HTS	OH
Lindsay	Vivian	North Hollywood	CA
Nick	Vivian	New York	NY
Kelly	Vlasis	Fort Collins	CO
Anca	Vlasopolos	Centerville	MA
Janice	Vlcek	Mount Prospect	IL
Linda	Voci	REDMOND	OR
Linda	Voci	Redmond	OR
Donna	Voepel	Wentzville	MO
jim	voet	oxford	oh
Linda	Vogel	Franktown	CO
Steven	Vogel	Falls Church	VA
Michelle	Vogelsang	Houston	TX
Susan	Vogt	Fairbanks	AK
Terry	Vollmer	Saint Louis	MO
Anne	Voloshin	West Haven	CT
Leonid	Volovnik	Plano	TX
FG and EG	Voltz	Boulder City	NV
Judith	Von	Mount Pleasant	SC
Katherine	Von Rodeck	Toms River	NJ

First name	Last name	City	State
Michael	von Sacher-Masoch	Everett	WA
Susan	von Schmacht	Watsonville	CA
Annika	Vonbartheld	Reno	NV
Annika	Vonbartheld	Reno	NV
eric	voorhies	kapaa	HI
Kathleen	Vorce	Boxborough	MA
Theodore	Voth	Madison	WI
Jane	Vovk	Round Rock	TX
Nora	Vralsted-Thomas	Medical Lake	WA
Tung	Vu	Salem	OR
Richard	Vultaggio	Valdese	NC
ma	w	Lubbock	TX
Carolyn J	Wacaser	Lakewood	CO
Dave	Wachsman	New Smyrna Beach	FL
David	Wachsman	Sycaway	NY
Laura	Wachtel	Sebastopol	CA
Jeffrey	Wade	Milford	ME
Linda	Wadenpfuhl	Huntsville	TX
Lalit	Wadhwa	Chandler	AZ
Regina	Wadkins	Twin Lake	MI
Carol	Wagner	Albany	OR
Ellen	Wagner	Vero Beach	FL
Peggy	Wagner	Clearwater	FL
Mary	Wahl	Hemet	CA
Richard	Waide	Billings	MT
Ann	Wakefield	Silver Spring	MD
Andrew	Walcher	Medford	MA
Aloysius	Wald	Columbus	OH
Jennifer	Waldo Gaffney	Las Vegas	NV
Brad	Walker	Poplar Grove	IL
Carol	Walker	Winthrop	MA
Christopher	Walker	Benton	AR
David	Walker	Sun City West	AZ
Iva	Walker	Garrettsvill	OH
John	Walker	Port Tobacco	MD
Kelly	Walker	Gloversville	NY
Mary Anne	Walker	Castle Rock	CO
Scott	Walker	Greensboro	NC
William	Walker	Jacksonville	FL
ALLISON	WALLACE	SANTA ROSA	CA
Diane	Wallace	Kernersville	NC
Michael	Wallace	Sarasota	FL
Pam	Wallace	Greeneville	TN

First name	Last name	City	State
Patrice	Wallace	Santa Cruz	CA
Starla	Wallace	Peoria	IL
V Robert	Wallace	Amelia Court House	VA
Ronald	Wallenberg	Mankato	MN
Janet	Wallet-Ortiz	Silver City	NM
Joshua	Wallman	New York	NY
Jane	Walmsley	DENVER	PA
Marce	Walsh	Houston	TX
marni	walsh	Jackson	WY
patricia	walsh	port st lucie	FL
Bob	Walters	New York	NY
Cathy	Walters	Elgin	MN
Ernie	Walters	Union City Ca	CA
Jane	Walters	Madison	WI
Karen	Waltman	Hendersonville	NC
Chrisitne	Walton	Cecil	PA
Sandra	Walton	Elkland	MO
Stefne	Walton	Denver	CO
Stella	Walton	Riverside	CA
Mark	Waltzer	Marlton	NJ
Kathy	Wang	St Petersburg	FL
Rebecca	Wang	Alhambra	CA
Lauren	Wantz	Miamisburg	OH
Gini	Ward	WACO	TX
Matthew	Ward	Portland	OR
Michelle	Ward	Burlington	VT
Terrence	Ward	Midlothian	IL
Lisa	Warden	Salem	VA
Melissa	Warfield	Farmington	MN
Diane	Warneck	Burlington	VT
Barbara	Warner	Lebanon	KY
Barbara	Warner	Spring Valley	CA
Carolyn	Warner	St Petersburg	FL
David	Warner	Richmond	VA
Jake	Warner	Buffalo	NY
Sally	Warner	Califon	NJ
Melody	Warner	Ojai	CA
Brett	Warning	Lake Bluff	IL
GRADY	WARREN	lawrenceburg	TN
JILL	WARREN	N BLOOMFIELD	OH
Gopal	Warrier	Dublin	OH
jason	warrington	Evergreen park	IL
Linda	Warshauer	Millbrae	CA

First name	Last name	City	State
Tom	Warzeka	East Providence	RI
LINDA	WASHEK	BELEN	NM
Karla	Washington	Carlisle	PA
Debbie	Watanabe	San Luis Obispo	CA
Hiroe	Watanabe	Galveston	TX
Beverly	Waters	Scott	AR
Jennifer	Waters	Tempe	AZ
Rebecca	Watford	Pismo Beach	CA
Anita	Watkins	Oakland	CA
burnett	watkins	san diego	CA
James	Watkins	Knox	IN
KATHRYN	WATKINS	Damascus	MD
Catherine	Watson	Flagler Beach	FL
Paulina	Watson	Venice	FL
Richard	Watson	Long Beach	CA
Sandra	Watson	Cincinnati	OH
Travis	Watson	COMPTON	CA
Dena	Watts	Leicester	NC
Elizabeth	Watts	Boynton Beach	FL
Harriet	Watts	HOUSTON	TX
William	Watts	Athens	GA
Valerie	Watts	Evergreen	CO
Diana	Weatherby	Silver Spring	MD
Marilyn	Weatherford	Surprise	AZ
Monique	Weatherspoon	Clinton	MD
Linda	Weaver	Ringgold	GA
Natasha	Weaver	Oceanside	CA
Susan	Weaver	Elma	WA
gary	webb	Salem	OR
Trish	Webb	Palm Springs	CA
Taylor	Webber	st. louis	MO
Ahnna	Weber	Stoughton	WI
Jeanine	Weber	Grand Rapids	MI
Nicole	Weber	Pasadena	MD
Marilyn	Webert	Saint Charles	MO
Richard	Webert	ST CHARLES	MO
Catherine	Webster	Pine	AZ
Joseph	Webster	Decatur	IL
Judith	Wecker	WEST PALM BCH	FL
Tamara	Wecker	Portland	OR
Cassie	Weddle	Naperville	IL
Carol-Anne	Weed	Boulder City	NV
Lori	Weekly	Hartville	OH

First name	Last name	City	State
Evan	Weger	Glenwood Springs	CO
Marie	Weglarz	Lake Bluff	IL
Karen	Wegner	Helena	MT
charles	weicht	wentzville	MO
Kurt and Karen	Weidner	Commerce	GA
Sandra	Weikel	Roswell	NM
Eric	Weil	Bayside	NY
Krystal	Weilage	Butte	MT
Sherry	Weiland	Hudson	MA
Jessica	Weinberg	Mechanicsville	VA
Rita	Weinreb	Dana Point	CA
Bob	Weinstein	Monongahela	PA
Ruth	Weinstein	Metairie	LA
Jonathan	Weinstock	Berkeley	CA
Marie	Weis	Fox Island	WA
Jeffrey	Weisel	Pepperell	MA
Lynne	Weiske	LA	CA
Jodi	Weiskott	Phoenix	AZ
b	weisl	shep	KY
bm	weisl	shepherdsville	KS
Milt	Weisman	New Smyrna Beach	FL
Natalie	Weisman	Walnut Creek	CA
Helene Christina	Weiss	Whitehouse Station	NJ
Randi	Weiss	Ambler	PA
Diane	WeissBradley	Crown Point	IN
Donna	Weistrop	Flagstaff	AZ
Russell	Weisz	Santa Cruz	CA
Joanna	Welch	Eureka	CA
Lisa	Welch-Sweeney	THOMASVILLE	PA
Wendy	Weldon	Delray Beach	FL
Deborah	Wellington	Auburn	NY
lasha	wells	st Pete	FL
Marcia	Wells	Fort Collins	CO
Ruth	Wells	Charlotte	NC
Traci	Wells	Mason	TX
Susan	Welsford	Norton Shores	MI
Alexandra	Welsko	St. Louis	MO
David	Wendt	Walnut Creek	CA
Eloise	Wendt	Rochester	NY
Randy	Wenthold	Menahga	MN
Joseph	Wenzel	Lake Elmo	MN
Marcus	Werner Hed	Milan	NY
ellen	wertheim	rockaway	NY

First name	Last name	City	State
John and Robbie	Wertin	PAYSON, AZ	AZ
Joseph	Werzinski	New Hope	PA
Nora	Wesley	Oxford	MI
Sharon	Wesoky	Meadville	PA
Constance	Wessel	Sonora	CA
Alice	West	Portland	OR
Alice	West	Grand Marais	MN
Carrie	west	Muncie	IN
Dennis	West	Yachats	OR
Joan	West	P	TX
Lynda	West	Falls Church	VA
Debra	Westom	Portland	OR
Desiree	Weston	Prescott	AZ
Jill	Wettersten	Oberlin	OH
Glen	Wetzel	Surprise	AZ
Jill	Whalen	Houston	TX
Cleve	Wheeler	Lakesite	TN
Dorothy	Wheeler	Tucson	AZ
Gail	Wheeler	Erie	PA
Gene	Wheeler	Darrington	WA
Mark	Wheeler	Portland	OR
Maureen	Wheeler	Silver Spring	MD
Suzanne	Wheeler	Montgomery Village	MD
tara	wheeler	Oakton	VA
Theresa	Wheeler	New York	NY
Vicki	Wheeler	Deshler	OH
Maria	Whelan	Arlington Heights	IL
Aimee	White	New York	NY
jim	White	Clearwater	FL
Michael	White	Los Angeles	CA
Nancy	White	Spokane Valley	WA
Wendy	White	Horton	MI
Yvonne	White	Kinmundy	IL
John	White	Lexington	MA
Kirsten	White	Albany	NY
Carole	Whitehead	Memphis	TN
Thea	Whitehead	Wasilla	AK
Carol	Whitehurst	Nyack	NY
Jenee	Whitener	Garland	TX
kathleen	whitesell	New Orleans	LA
Jane	Whiteside	Minneapolis	MN
Ree	Whitford	Napa	CA
Linda	Whitley	San Mateo	CA

First name	Last name	City	State
Beatriz	Whitman	Lincoln	CA
Denise	Whitney	Erie	PA
Mary	Whobrey	Sturgeon	MO
Barbara	Whyman	Ventura	CA
Jean	Wiant	Glenolden	PA
Kim	Wick	Buxton	OR
Kenneth	Wideman	Cape Coral	FL
DARIS	WIEBE	Ulysses	KS
Theresa	Wiecezak	New Hyde Park	NY
Mark	Wiedenhoeft	milwaukee	WI
Mark	Wieferich	Weidman	MI
Camille	Wiegert	Blaine	WA
Ruth Ann	Wiesenthal-Gold	Palm Bay	FL
Kathy	Wiesneski	Merrill	WI
Connie	Wigen	Sacramento	CA
Shonni	Wiggins	Rocky mount	NC
Phyllis	Wight	Missoula	MT
Richard	Wightman	Arcadia	CA
Joan	Wikler	Portland	OR
Melissa	Wilander	Effort	PA
Stewart	Wilber	San Francisco	CA
Susan	Wilcenski	Quogue	NY
David R	Wilcox	Chicago	IL
LeAnne	Wilcox	Fargo	ND
Mary Katherine	Wilcox	Charlotte	NC
Jenny	Wilder	Apple valley	CA
Kathi	Wilder	Florence	KY
Kimberly	Wiley	Rochester	NY
Janice	Wilfing	Port Angeles	WA
Stella	Wilfinger	Hazel Park	MI
Jane	Wilken	Santa Fe	NM
Mariela	Wilkes	Mount Angel	OR
KELLY	WILKIE	Sacramento	CA
Richard	Wilkins	Winter Park	FL
Dorothy	Wilkinson	Hollywood	CA
L.L.	Wilkinson	Taos	NM
Laurel	Wilkinson	Orem	UT
Lynn	Wilkinson	Port St Lucie	FL
Jennifer	Will	Bend	OR
Kerry	Willhoft	Redford	MI
C	Williams	Waco	TX
Carla	Williams	Cottage Grove	OR
Carla	Williams	Cottage Grove	OR

First name	Last name	City	State
Cassandra	Williams	BRAWLEY	CA
Christina	Williams	Arnoldsville	GA
Cynthia	Williams	Woodbine	MD
Diane	Williams	Edmond	OK
Duane	Williams	Union City	PA
Karen	Williams	KANSAS CITY	MO
Kevin	Williams	Saint Louis	MO
Laurie	Williams	Port Washington	NY
mary	williams	massillon	OH
Pamela	Williams	Sebring	FL
Ramona	Williams	Danville	CA
Sandee	Williams	Union City	PA
Sheri	Williams	Independence	MO
Stacy	Williams	PINE	CO
Taffy	Williams	Tuckahoe	NY
Tara	Williams	Hazle Township	PA
DEMILO	WILLIAMS	COLUMBUS	GA
Weldon	Williams	Owasso	OK
Clyde	Williams II	Portland	OR
Diana	Williamson	Rhododendron	OR
Kathryn	Williamson	Trenton	NJ
Patricia	Williamson	Mount Arlington	NJ
Trina	Williquette	Spring	TX
Allan R	Willis	Pike	NH
shan	willson	nyc	NY
Dianne	Wilson	Port Saint Lucie	FL
Donna	Wilson	San Jose	CA
Garth	Wilson	Columbus	OH
Gloria	Wilson	Auburn	MA
Judith	Wilson	Slater	WY
Judith	Wilson	Wheatland	WY
Leah	Wilson	Saint Charles	MO
Leigh	Wilson	Raleigh	NC
Rose Marie	Wilson	Uniondale	NY
Tina	Wilson	Pahrump	NV
Liz	Wilton	hollywood	FL
Stacey	Wiltrout	Clermont	FL
Deborah	Wimbish	Hilliard	OH
Helen	Win	Richmond	CA
Dallas	Windham	Fort Worth	TX
Ken	Windrum	Van Nuys	CA
Mike	Winget	Longmont	CO
Betty	Winholtz	Morro Bay	CA

First name	Last name	City	State
Anne	Winicki	Watersound	FL
Barbara	Winkler	Lancaster	SC
Chad	Winkler	Wilmington	DE
Diane	Winkler	Jasper	IN
Barbara	Winner	Arnold	MD
Lisa	Winningham	Los Gatos	CA
karen	winnubst	Cedar Hill	TX
Colette	Winslow	WESTMINSTER	CO
Blake	Winter	Walker	MI
Bonnie	Winter	Shrewsbury	PA
Kathy	Winterburn	Littleton	CO
Liz	Winterhawk	Mt Shasta	CA
Jayne	Winters	South China	ME
patricia	winters	Canton	MI
Shawn	Winters	new york	NY
Greg	Winton	Moreno Valley	CA
Marie	Wiorski	Chicago	IL
Karl	Wirtenberger	Buffalo	NY
Judith and Joseph	Wisboro	Worcester	MA
Anita	Wisch	Valencia	CA
Anita	Wisch	Santa Clarita	CA
Ann	Wiseman	Mansfield	IL
Cara	Wisenbaker	Colorado Springs	CO
Wendy	Wish	Winter Park	FL
Heather	Wisner	Portland	OR
Lynn	Wisniewski	Bowling Green	OH
Janis	Wital	New York	NY
Claris	Withrow	Melbourne	FL
Stephanie	Witkoski	Davie	FL
Rachel	Witmeyer	San Jose	CA
LUCAS	WITT	111 SE 1st ST. BATTLE GROUND WA 98604-8347 United States	WA
Jane	Witte	Willow Street	PA
Dale	Witter	Reidsville	NC
bethany	witthuhn	north royalton	OH
Phillip	Wochner	Shaker Heights	OH
Marzena	Wodowski	Columbiaville	MI
Pamela	Wohlman	TACOMA	WA
Alan	Wojtalik	Baltimore	MD
Nikki	Wojtalik	Parkville	MD
Robert	Woleben	Portage	MI

First name	Last name	City	State
Amy	Wolfberg	Los Angeles	CA
Amy	Wolfberg	Los Angeles	CA
Charles	Wolfe	Sylmar	CA
Jacqueline	Wolfe	Calumet	MI
Jonathan	Wolfe	Phoenix	AZ
Karin	Wolfe	Bonita Springs	FL
Terry	Wolfe	Morgantown	WV
Wendy	Wolfe	Norwich	VT
Miriam	Wolff	brooklyn	NY
Karen	Wolverton	Holland	PA
Karen	Wonders	Sanford	NC
Perry	Wong	KENT	WA
Arleen	Wood	East Tawas	MI
Barb	Wood	Wells	ME
Dale	Wood	Fairhope	AL
George	Wood	Ukiah	CA
June	Wood	Columbus	GA
Nara	Wood	Leonard	TX
Peter	Wood	Silver Spring	MD
LK	WOODRUFF	Sharpsburg	GA
April	Woods	Anchorage	AK
Erika	Woods	Glen Allen	VA
NANCY	WOODS	Fort Worth	TX
NATHANIEL	WOODS	TUCSON	AZ
Rocquelle	Woods	Huntsville	AL
Teresa	Woods	Wesley Chapel	FL
Tina	Woods	Florence	AL
R	Woodson	Vicksbug	MS
Marti	Woodward	Elk Grove	CA
Warren	Woodward	Sedona	AZ
Phillip	Woolever	Tucson	AZ
Nancy	Woolley	Stoughton	MA
Jennifer	Woolridge	Marion	VA
SUSAN	WOOSTER	Delmar	NY
Cathy	Wootan	Cleveland	OH
Krysta	Workman	Durham	NC
Gail	Worrell	Portland	OR
Wendy	Worth	NEW ALBANY	OH
Gary	Wrasse	Colorado Springs	CO
Charles	Wright	Ypsilanti	MI
Debra	Wright	Bisbee	AZ
jolanta	wright	Orlando	FL
Karen	Wright	Framingham	MA

First name	Last name	City	State
Katherine	Wright	Milford	MI
Kathy	Wright	ABERDEEN	NC
Loraine	Wright	Lansing	MI
Trigg	Wright	Klein	TX
Kathy	Wright	Aberdeen	NC
Rhonda D.	Wright MD	Brookhaven	GA
Blake	Wu	Lafayette	CA
Janet	Wu	Boston	MA
Nicolle	Wuchek	Milford	CT
Lisa	Wuerker	Glenwood Springs	CO
Kristina	Wunder	Topanga	CA
Sharon	Wushensky	Kennett Square	PA
Aimee	Wyatt	Ojai	CA
Steven	Wychor	Salem	MA
Eleanor	Wyckoff	Las Cruces	NM
Rosalie S	Wyman	Hanover	NH
Candice	Wymer	Seattle	WA
Julia	Xeros	Garland	TX
Paula	Xiomara Lopez	Victorville	CA
Mark	Yackley	Los Angeles	CA
Haig	Yacoubian	Prescott Municipal Airport, 2020 Clubhouse Dr, Prescott, Arizona 86301, United States	AZ
Michelle	Yakel	Monroeville	PA
natasha	yakovleva	Largo	FL
Jennifer	Yamamoto	Manhattan Beach	CA
Keiko	Yanagihara	Mercer Island	WA
Camila	Yanez	Tucson	AZ
Leilah	Yanez	Tampa	FL
Anita	Yankova	Rockville	MD
Eleanor	Yasgur	Teaneck	NJ
Joan	Yater	Alexandria	VA
Cindy	Yates	Tempe	AZ
Eric	Yates	Holbrook	NY
Renee'	Yates	San Francisco	CA
C.	YEE	Sacramento	CA
Wendy	Yellen	Santa Fe	NM
Jean	Yelvington	Franklin	TN
J	Yeo	Torrance	CA
Elizabeth	Yerkes	Summit	NJ
Iris Patty	Yermak	Wilmington	DE
Erin	Yip	San Franicsco	CA

First name	Last name	City	State
Sarah	Yonder	Sanford	MI
PEGGY	YORK	Portland	ME
Sondra	York	Plano	TX
Chantal	Young	Rootstown	OH
Colleen	Young	Rayle	GA
Diane	Young	Franklin	ME
KellyAnn	Young	Saint Cloud	FL
Roberta	Young	White Plains	NY
Sarah	Young	Lansdowne	PA
Su-Tana	Young	Melbourne	FL
Barbara	Youngquist	Evanston	IL
Roberta	Youngquist	Ferndale	WA
Mary	Yount	Weymouth	MA
Katie	Yu	Ladera Ranch	CA
Shari	Yudenfreund-Sujka MD	Winter Park	FL
Y	Z	University Place	WA
Mary	Zack	Worthington	OH
gary	zahler	north c anton	OH
Mary	zahler	north c anton	OH
CATHERINE	ZAHORSKY	Bridgeport	CT
Kathryn	Zande	Myrtle Beach	SC
Marya	Zanders	Centerville	IA
mary	zane	Lincoln Park	NJ
Cortney	Zaret	Chicago	IL
Paul	Zaro	Rockingham	NC
Alexandra	Zarzycka	Brooklyn	NY
Mary	Zaumeyer	Cape Canaveral	FL
Cassie	Zavodny	Gainesville	GA
molly	zbojniewicz	Manhattan Beach (Los Ange	CA
gisela	zech	boise	ID
Matt	Zedler	Taylors	SC
Sandy	Zelasko	Valley Center	CA
Vickie	Zelasko	Portsmouth	VA
jess	zelnik	los angeles	CA
Tina	Zenko	Chicago	IL
Pamela Dannacher	Zepeda	Davenport, Iowa	IA
Anne	Zepernick	readsboro	VT
Mark	Zera	Milwaukee	WI
Barbara and Joe	Ziemian	Fort Myers	FL
Joelle	Ziemian	Washington	DC
R.	Zierikzee	San Francisco	CA

First name	Last name	City	State
Guy	Zigfrid	Houston	TX
Christopher	Zimmerman	Lakeside Park	KY
Jerome	Zimmerman	WARWICK	NY
Paulette	Zimmerman	Saint Louis	MO
Kathleen	Zimmerman	Langhorne	PA
Cynthia	Zimmermann	Lynnwood	WA
Carol	Zimring	Encino	CA
Amy	Zink	Oakland	CA
Andrea	Zinn	Brooklyn	NY
Lori	Zinn	Hawley	PA
Faith	Zipper	Dresher	PA
Lynn	Zoch	Christiansburg	VA
KarenSue	Zoeller	Boerne	TX
Yvonne	Zola	Tallahassee	FL
Loretta	Zoldak	Dallas	TX
Michael	Zomber	Los Angeles	CA
sandy	zouzaneas	dover	NH
Nancy	Zucchino	Saratoga Springs	NY
Sandy	Zumwalt	Springfield	MO
Arleen	Zuniga	Guerneville	CA
Joshua	Zwolenik	Stockton	CA

July 15, 2024

The Honorable Carlton W. Reeves
Chair
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

RE: Justice Action Network Comment on Proposed Policy Priorities for the Amendment Cycle Ending May 1, 2025

Dear Chair Reeves and Members of the Commission:

We write in response to your request for public comment on the U.S. Sentencing Commission's priorities in the amendment cycle ending May 1, 2025. We appreciate the opportunity to comment on the Commission's priorities.

The Justice Action Network (JAN) is the nation's largest bipartisan organization dedicated to criminal justice reform. We believe in a strategic, data-driven approach to changing hearts, minds, and laws for a smarter, fairer, more efficient, and more effective justice system. JAN brings policymakers, stakeholders, and advocates from across the political spectrum together to advance strong, bipartisan criminal justice reform efforts at both state and federal levels.

Previously, we wrote to the Commission in support of amendments to the Sentencing Guidelines regarding criminal history of youthful offenders and consideration of acquitted conduct, and we were pleased that the Commission acted to limit the consideration of both youth offender criminal history and prior acquitted conduct when sentencing for new offenses. Today, we write to urge the Commission to go a step further and fully prohibit the consideration of acquitted conduct, except when it may be so compelling as to contribute to the reduction of a sentence.

In addition, we urge the Commission to prioritize research in two areas. First, the Commission should resume the regular publication of reports on the federal supervised release population. The Commission's most recent report in this regard, "Federal Probation and Supervised Release Violations," was published in July 2020. This report showed important data on the year-over-year trends, geographic distribution of supervision violations, demographics of offenders, offense types, and more. In June 2023, the Commission published a primer on supervised release that provided, "general overview of the statutes, guidelines, and case law related to supervised release." However, this primer did not provide data on the federal supervision population. The publication of data on supervision characteristics and trends benefits

policymakers and the public, and we urge the Commission to publish updated reports at least every two years.

Second, we urge the Commission to consider changing the primary metric used to measure recidivism in its reports. Recidivism can be measured in a variety of ways, including arrest, adjudication, conviction, and incarceration. While the Commission has collected data on multiple measures and published it in several reports, the Commission uses arrest as the primary measure. In the Commission's 2022 report titled, "Length of Incarceration and Recidivism," the Commission stated that:

> Rearrest is the most common measure of recidivism used by federal agencies in recent recidivism studies. Federal agencies are using rearrest as the primary measure because it is a more reliable measure than reconviction or reincarceration due to the incomplete nature of disposition data. Criminal records often fail to include information pertaining to reconviction or reincarceration because jurisdictions inconsistently report them. The records compiled for this study reflect this inconsistency. For example, records for 44.1 percent of rearrest charges had no associated disposition information.

While rearrest datasets may be more complete, rearrests do not necessarily mean a crime has been committed. This holds true even if accounting for technical violations of supervision terms, where an offender may be arrested and reincarcerated for a condition such as failing a drug test. In the Commission's 2022 report, for example, we cannot assume that the 44.1 percent of rearrest records that did not have associated disposition information resulted in a technical violation or a reconviction, and we therefore don't have a full picture of the public safety result.

Recidivism reduction programming in the Federal Bureau of Prisons and multiple state systems aim to increase public safety by reducing the risk an offender will commit a crime when released into the community. Further, the First Step Act of 2018, which the FBOP continues to implement, contained several new programs aimed at reducing recidivism. Measuring the success of these programs based on rearrest is not a valid measure of whether or not they are working, since the final arbiter of whether a crime has been committed, a guilty verdict in court, is not captured in the data. The Commission should work with district courts and the Probation and Pretrial Services Office to determine why there are inconsistencies in the reporting of reconviction and reincarceration data, and should work with these stakeholders on ways to increase this reporting.

Finally, the Justice Action Network is part of a large coalition of criminal justice organizations filing comments today, including conservative, progressive, law enforcement, and civil rights groups. We agree with the recommendations submitted by several of these organizations, including: FAMM, FWD.us, Due Process Institute, and Right on Crime. These organizations have conducted detailed analyses of the Sentencing Guidelines and the comments they have submitted today are very worthy of your consideration.

Thank you for considering these comments. If you have any questions, please do not hesitate to contact me.

Sincerely,

JC Hendrickson
Director of Federal Affairs
Justice Action Network

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Justice that Restores

Topics:

Policymaking Recommendations

Legislation

Comments:

Dear Judge Reeves:
Over fifty years ago, the United States embarked on the path to mass incarceration. To ensure that our country does not experience another fifty years of mass incarceration's harms, I urge you to take bold steps to decrease incarceration.

Lower Federal Sentences
In 1980, federal prisons held 25,000 people; now, over 158,000 people are incarcerated for federal crimes. Longer sentences have been a major driver of this growth. But longer sentences do not prevent crime – instead, they fracture families and impoverish communities. I urge the Commission to lower recommended sentence ranges to downsize the federal prison population.

Decrease Racial Disparities
Racial disparities are pervasive within the federal criminal legal system. Black men are dramatically overrepresented within federal prisons and receive sentences that are 13% longer than white men. Hispanic men receive sentences 11% longer than white men. The Commission should continue to study and work to reduce racial disparities in federal sentencing.

Reduce Life Without Parole Sentences
Life without parole sentences are inhumane and unnecessary to protect public safety. Currently the Guidelines recommend that all level 43 base offenses receive a sentence of life without parole, regardless of whether the individual has any prior criminal history. The Commission should amend the Guidelines to give judges more discretion, especially for those with no or little criminal history.

Reform Drug Sentences
Federal drug sentences have significantly contributed to mass incarceration. The Sentencing Guideline's current focus on the quantity and purity of drugs involved in an offense – rather than

an individual's actual responsibility, history, and capacity for rehabilitation – results in inappropriate sentences. I urge the Commission to work towards ending the War on Drugs by adopting more rational drug sentencing policies.

Thank you for this opportunity to suggest priorities for the Commission.

Sincerely,
Justice that Restores

Submitted on: June 26, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

The Last Prisoner Project ("LPP") submits the following comments to the United States Sentencing Commission ("the Commission" or "USSC) in response to the Commission's request for comment on possible policy priorities for the 2024-2025 amendment cycle.

LPP commends the Commission for taking steps to better reflect the current legal and policy landscape surrounding cannabis activity in the United States, and specifically the recent amendment #821 C, which allows for a downward departure to a criminal history score for a prior cannabis possession conviction. We would like to take this opportunity to urge the Commission to further amend the sentencing guidelines to exclude prior cannabis possession offenses from criminal history scores entirely, so that they are not used to increase criminal sentences for subsequent offenses.

We also want to thank the Commission for clarifying via Amendment #814 that retroactive changes to law can be considered as extraordinary and compelling factors for a sentence reduction motion under section 3582(c)(1)(A) in the case of an "unusually long sentence". Given the widespread and significant changes to the legality and public perception of cannabis, we would, however, ask that the Commission not limit the use of a retroactive change in law to individuals serving at least ten years of imprisonment.

We also would like to address the Commission's oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, we urge the Commission to conduct a complete review and revision of the Tables.

Sentencing Guidelines Should Reflect Current Notions of Criminality

In your 2023 publication "Weighing the Impact of Simple Possession of Marijuana" the Commission noted the shifting sentiment towards cannabis at both the state and federal level and the Commission again noted these changes in law when promulgating amendment #821 Part C. Today, 24 states and the District of Columbia have fully legalized cannabis for adult-use while only three states have no public cannabis access program.[1] These state-legal marketplaces generate billions of dollars not just in sales, but also in tax revenue for these jurisdictions, all while cannabis remains federally illegal and the criminal status of cannabis continues to lead to hundreds of thousands of arrests each year.[2] [3]

Now, the federal government is poised to reclassify cannabis–following the Health and Human Services Department's recommendation in late 2023, the Drug Enforcement Administration (DEA) recently announced its decision to reschedule cannabis to Schedule III.[4] This move demonstrates the federal government's shifting policy approach to cannabis as a less harmful substance with medicinal benefits.

In conjunction with prospective changes to cannabis laws, local, state and federal political leaders are increasingly taking concrete action to mitigate the past harms caused by decades of cannabis prohibition. In October of 2022, President Biden pardoned all federal simple marijuana possession offenses and formally encouraged state governors to do the same, an action he expanded upon in late 2023.[5] Officials have followed suit, as evidenced by former Oregon Governor Kate Brown pardoning over 45,000 individuals with marijuana convictions and Connecticut Governor Ned Lamont announcing the automatic clearing of over 44,000 cannabis

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[1] *See* National Conference of State Legislatures Report, *State Medical Cannabis Laws* (2024), https://www.ncsl.org/health/state-medical-cannabis-laws.
[2] Marijuana Policy Project. *Cannabis Tax Revenue in States that Regulate Cannabis for Adult Use.* (Jul. 12, 2024) https://www. mpp.org/issues/legalization/cannabis-tax-revenue-states-regulate-cannabis-adult-use/.
[3] *See* Jessica Schulberg, *At Least A Quarter Of A Million People Were Arrested For Weed Last Year, FBI Says,* Huffington Post, (Oct. 18, 2023), https://www.huffpost.com/entry/police-make-quarter-of-a-million-weed-arrests_n_65304ea4e4b03b213b087ddd.
[4] Alicia Wallace et al. CNN. *Justice Dept Plans to Reschedule Marijuana as a Lower-risk Drug.* April 30, 2024. https://www.cnn.com/2024/04/30/economy/dea-marijuana-rescheduling/index.html
[5] *See* Michael D. Shear and Zolan Kanno-Youngs, *Biden Pardons Thousands Convicted of Marijuana Possession Under Federal Law*, The New York Times (Oct. 6, 2022), https://www.nytimes.com/2022/10/06/us/politics/biden-marijuana-pardon.html

records.[67] City officials in places like New Orleans and Birmingham have also taken steps to pardon municipal marijuana possession offenses.[8] These actions signify that, beyond the shifting legal landscape for cannabis use, public perception of cannabis has also changed. The vast majority of Americans, including the sitting President, no longer feel that cannabis use is something that should be criminalized.[9]

We have changed our approach to criminalizing cannabis, and thus, the US Sentencing Guidelines must be adjusted to reflect this current climate. Continuing to punish individuals for an activity that is legal for a majority of Americans does not comport with our country's shared values of justice and fairness. It is only fitting that *any* marijuana offense, including but not limited to simple possession, should be eliminated from consideration as a factor in calculating an individual's criminal history score for sentencing purposes.

Removing Marijuana Offenses from Criminal History Scores will Result in More Equitable Sentencing

When one considers the well-documented racial disparities found in the enforcement of cannabis laws, it is clear that excluding marijuana offenses from criminal history scores will also result in a more equitable approach to sentencing.

In 2013, a report from the American Civil Liberties Union found that, despite virtually indistinguishable rates of cannabis consumption amongst racial groups, Black residents of the United States were 3.73 times as likely to be arrested for marijuana possession than their white counterparts.[10] A 2020 follow-up to the ACLU report found that, despite several states legalizing

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[6] *See* Whitney Woodworth, *Oregon Gov. Kate Brown pardons 45K for marijuana crimes* Statesman Journal (Nov. 21, 2022), https://www.statesmanjournal.com/story/news/local/2022/11/21/oregon-gov-brown-pardons-45k-for-marijuana-crimes-convictions-erases-millions-dollars-fines/69668394007/.

[7] *See* Press Release, Ned Lamont, Governor, State of Connecticut, *Governor Lamont Announces Thousands of Low-Level Cannabis Possession Convictions To Be Cleared for Connecticut Residents Other Record Erasures Under Connecticut's Clean Slate Law Expected To Begin in the Second Half of 2023* (Dec. 6, 2022), https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2022/12-2022/Governor-Lamont-Announces-Thousands-of-Low-Level-Cannabis-Possession-Convictions-To-Be-Cleared.

[8] WBRC Staff, *Birmingham Mayor Randall Woodfin to pardon some closed marijuana convictions*, WBRC News (Apr. 20, 2022), https://www.wbrc.com/2022/04/20/birmingham-mayor-randall-woodfin-pardon-some-closed-marijuana-convictions/ ; *Also see* Jessica Williams, *New Orleans just pardoned thousands of people who were cited for marijuana possession*, NOLA News (Aug. 5, 2021),https://www.nola.com/news/article_4a192e80-f61e-11eb-ba76-6f04bd87e3dd.html?mode=comments.

[9] A 2024 Pew Research poll found that 88% of U.S. adults say marijuana should be legal for medical or recreational use.. *See Most Americans Favor Legalizing Marijuana for Medical, Recreational Use,* Pew Research Center (Mar. 26, 2024), https://www.pewresearch.org/politics/2024/03/26/most-americans-favor-legalizing-marijuana-for-medical-recreational-use/.

[10] *See* American Civil Liberties Union Report, *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS* (2013), https://www.aclu.org/wp-content/uploads/legal-documents/1114413-mj-report-rfs-rel1.pdf.

or decriminalizing cannabis, these racial disparities remained essentially unchanged.[11] Data indicates that these racial disparities appear to persist in conviction rates and sentencing.[12]

As sentencing guidelines are meant to be considered objectively and reflect an accurate prediction of an individual's criminality, removing marijuana convictions from individuals' criminal history scores would be a step toward creating a more equitable sentencing process. In addition, excluding marijuana convictions from consideration altogether is also in line with the current administration's position on the criminality of cannabis use. As President Biden stated, "sending people to prison for possessing marijuana has upended too many lives and incarcerated people for conduct that many states no longer prohibit."[13] If permanently enacted, this proposed amendment would help alleviate, or at the very least not further exacerbate, the racial disparities in our criminal legal system.

It's also worth noting that the availability of avenues through which individuals can clear marijuana possession offenses from their records is highly dependent on the jurisdiction in which the offense took place. As noted above, many executive offices (whether it be the president, state governors, or mayors) have pardoned all simple marijuana possession offenses. In some jurisdictions, like Oregon, that pardon results in automatic record clearance. However, in most jurisdictions, pardoned offenses still appear on an individual's criminal record, perpetuating barriers to employment, housing, and educational opportunities (to name just a few of the collateral consequences accompanying even a low-level marijuana conviction).

Although several states have established methods for individuals to expunge or remove previous marijuana-related convictions, disparities still exist among those who can access this relief successfully. Clearing one's record can be overwhelming, especially for individuals lacking a legal background, technical knowledge, or easy access to criminal records and court filings. Eligible individuals with language barriers or illiteracy also struggle to clear their records. Consequently, race and socioeconomic status often determine who can overcome these difficulties and access record clearing and expungement. Unfortunately, most eligible individuals do not complete these record-clearing processes.[14]

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[11] *See* American Civil Liberties Union Report, A Tale of Two Countries: Racially Targeted Assets in the Era of Marijuana Reform (2020),
https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform.

[12] A 2021 analysis of federal prison population estimated that 60% of approximately 3,016 individuals serving time in federal prison for marijuana offenses were of Hispanic descent, and over the past five years, 67% of individuals receiving prison sentences for marijuana offenses were Hispanic. Recidiviz Report, Ending Federal Prison Sentences for Marijuana Offenses (2021),
https://assets.website-files.com/5e7ff048d75a9b3c5df52463/61abf4d36aefde8dec64a000_FED_SRA_final_12.2.21.pdf.

[13] *See* White House Briefing Room, *Statement from President Biden on Marijuana Reform* (2022),
https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/#:~:text=As%20I%20often%20said%20during,many%20states%20no%20longer%20prohibit.

[14] *See* Prescott, J.J. and Starr, Sonja B., *Expungement of Criminal Convictions: An Empirical Study* (March 16, 2019). Harvard Law Review, Vol. 133, No. 8, pp. 2460-555 (June 2020), : https://ssrn.com/abstract=3353620 or

This disparity in accessing record-clearing mechanisms for marijuana offenses is yet another inequality present in the Commission's current guidelines, which include marijuana possession offenses in criminal history scores. It's unfair that those who, for the reasons named above, could not clear their records successfully are subject to harsher sentencing ranges.

A Marijuana Conviction is Not a Valid Predictor of Future Criminality

The US Sentencing Guidelines Manual states that a "defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."[15] The manual goes on to note that because "[r]epeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation," an individual's criminal history must be considered during the sentencing phase "[t]o protect the public from further crimes of the…defendant."[16]

In the case of a simple marijuana possession offense, however, there is little correlation between cannabis use and criminality. According to a national study of recidivism, individuals convicted of drug offenses have significantly lower recidivism rates than those convicted of violent or property-related crimes.[17] Additionally, a 2020 report authored by the Commission found that individuals convicted of marijuana-related offenses have one of the lowest rates of recidivism when compared to other drug offenses.[18] In one of the few available studies on recidivism rates for individuals where drug possession (as opposed to trafficking) was their primary offense, the rate of recidivism was incredibly low as compared to national averages.[19]

In short, as there is no evidence that marijuana possession convictions are valid predictors of future criminal behavior (and thus do not endanger public safety), they should be excluded from individuals' criminal history score calculations.

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http://dx.doi.org/10.2139/ssrn.3353620 (finding that among those legally eligible for expungement, just 6.5% obtain it within five years of eligibility).

[15] U.S.S.C. Guidelines, Guidelines Manual, §4A1.1 (Nov. 2021).

[16] *Id.*

[17] *See* United States Department of Justice: Office of Justice Programs, Bureau of Justice Statistics Report, SPECIAL REPORT: 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014) 14 (2018), https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf.

[18] *See* U.S.S.C. Report, Retroactivity & Recidivism: The Drugs Minus Two Amendment (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf.

[19] *Compare with* The Urban Institute, *Assessing the Impact of Utah's Reclassification of Drug Possession Justice Reinvestment Initiative* (2020), https://www.urban.org/sites/default/files/publication/102273/assessing-the-impact-of-utahs-reclassification-of-drug-possession_0.pdf (finding that reconviction and imprisonment rates in the 12 months following release from prison averaged 2.3 percent with a finding from the National Institute of Justice that 44% of individuals released from prison will reoffend within the first year of release; *Also see* United States Department of Justice: National Institute of Justice Report, Measuring Recidivism (2008), https://nij.ojp.gov/topics/articles/measuring-recidivism.

Changes to Laws and Attitudes Surrounding Cannabis Also Warrant an Amendment to the Commission's Compassionate Release Policy Statement

In promulgating Amendment #814 the Commission described the circumstances in which an intervening change in the law can qualify as an extraordinary and compelling factor warranting compassionate release. The Commission clarified that such changes to the law may be considered if an applicant otherwise meets the factors warranting a sentence reduction or that such a change on its own could constitute an extraordinary and compelling factor if the case involves an "unusually long sentence" and the applicant has served at least ten years of a term of imprisonment.

As the Commission noted in its Amendment: "One of the expressed purposes of section 3582(c)(1)(A) when it was enacted in 1984 was to provide a narrow avenue for judicial relief from unusually long sentences. Having abolished parole in the interest of certainty in sentencing, Congress recognized the need for such judicial authority."[20] Thus, compassionate release serves a critical function in providing relief where it is clear that the length of a term of imprisonment does not comport with modern laws and attitudes surrounding the criminal activity at hand.

As described above, we now face a situation where thousands of federal prisoners remain incarcerated for activity that has been broadly legalized at the state level and that many are now profiting from. Our federal government has now also changed its stance on the dangerousness of cannabis and has acknowledged that cannabis has medicinal benefits. Given these circumstances, an individual serving a nine-year sentence for a controlling cannabis offense can credibly argue that their sentence is "unusually long" for the offense they are sentenced under. While cannabis may represent the offense that has seen the most pronounced change to its legal status in recent history, it is an all too common occurrence in American history that our beliefs, sentiments, and even scientific consensus evolve faster than our laws and their associated criminal penalties.[21] As the remaining mechanism for relief for federal prisoners incarcerated under unjust laws, the compassionate release factors should be applied broadly enough not to exclude individuals whose sentences are unjust and excessive, but may not meet the ten year requirement, even if no other compassionate release factors apply.

Changes to Drug Laws More Broadly Warrant a Reevaluation of the Drug Quantity and Drug Conversion Tables

While over fifty years of ongoing political and educational messaging demonizing drug use and stigmatizing drug users has failed to realize a drug-free world, the underlying racial and social

[20] U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines, 89 Fed. Reg. 36853 (May 3, 2024).
[21] Anti-miscegenation and anti-sodomy laws were once commonplace and only in the last decade did the Supreme Court finally acknowledge the settled science that juvenile brain development means youths should be constitutionally different from adults for sentencing purposes.

motivations have succeeded. Since its inception, the drug war has been overwhelmingly enforced in BIPOC communities, especially low-income ones,[22] causing the country's inflated prison population to be disproportionately comprised of Black, Latino, and Indigenous people.[23] It has led to lengthy terms of imprisonment for relatively low-level offenses and for those with little to no criminal history[24], which perpetuates cycles of trauma and violence. The same conditions have fueled and perpetuated violence internationally and in inner-city neighborhoods nationwide,[25] and have led to increases in concentration, adulteration, and toxicity of the substances themselves.

An increasingly multi-partisan coalition is calling for change. In 2017, the USSC published a report describing, in part, how drug-related mandatory minimum penalties have been "applied more broadly than Congress may have anticipated."[26] Such non-discretionary sentencing fails to promote public health. Instead, it has the effect of incarcerating people for longer amounts of time than the evidence shows deters further criminal activity.[27]

While reversing and mending the harms of the war on drugs will take effort from people across the government and political spectrum, one way to shift policy in a more humane direction–and in alignment with contemporary evidence–is to go to one of the current roots of the problem: drug sentencing. The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and harms

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[22] *See*, Colleen Walsh, *Solving Racial Disparities in Policing*, Feb. 23, 2021, https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing/; *see also*, ACLU DC, *Racial Disparities in Stops by the DC Metropolitan Police Department*, June 16, 2020, https://urldefense.com/v3/__https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf__;!!Phyt6w!M3tbrIzizSTS6KMjsaPASYXWMFeEA1fkh6tY9rjOLLeAtcunXEj6k0DAkg0%24)

[23] "The incarceration boom fundamentally altered the transition to adulthood for several generations of [B]lack men and, to a lesser but still significant extent, [B]lack women and Latino men and women. By the turn of the 21st century, [B]lack men born in the 1960s were more likely to have gone to prison than to have completed college or military service." (Vera, *American History, Race, and Prison*, https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison)

[24] *Id*.

[25] Heather Ann Thompson explained in a 2015 interview with Nursing Clio that "intensive incarceration has emptied communities of their elders, their parents, their grandparents, and their children now, through the juvenile justice system. It has made them even poorer because there are no jobs. It has basically created an environment where violence can flourish . . . Should we be surprised that violence is a problem when we make an economy illegal, and make it the only economy that is available because there are no factories?" (Nursing Clio, *An Interview with Historian Heather Ann Thompson (Part 2)*, Nov. 5, 2015, https://nursingclio.org/2015/11/05/an-interview-with-historian-heather-ann-thompson-part-2/#:~:text=What%20we%20start%20to%20see,environment%20where%20violence%20can%20flourish)

[26] USSC, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System*, Oct. 2017, at 6. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf

[27] National Institute of Justice. *Five Things About Deterrence*. May 2016. https://www.ojp.gov/pdffiles1/nij/247350.pdf

would lead to more accuracy in sentencing decisions, which would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

Given that the Tables presently translate quantities of various illegal drugs into their marijuana-equivalent quantities for the purpose of determining relative harm, it would be appropriate to utilize the multi-agency review already happening with cannabis to review and update the tables. Additional research about other historically stigmatized substances should also inform this review. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, and again granted two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019.[28] In 2024, the FDA extended the same status to an LSD formula for the treatment of generalized anxiety disorder.[29] The FDA is also reviewing a new drug application for MDMA-assisted therapy[30], for which they will likely have a decision by August 2024.

Meanwhile, there has been growing bipartisan support to fund clinical trials exploring the use of psychedelics[31] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[32] For instance, in the 2024 National Defense Authorization Act, the Department of Defense authorized funding a study on psychedelics for the treatment of PTSD in military members.[33] In March 2024, the Department of Veterans Affairs passed a budget allocating $20 million for clinical trials for MDMA and psilocybin.[34] The National Institutes of Health has also opened funding opportunities for studying psychedelic-assisted therapy for chronic pain in older adults.[35] This shift in the evidence base, and concurrent changes in federal policy, reflects an increasing willingness and mandate to reevaluate long-held assumptions about controlled substances, paving the way for more drug policies driven by data rather than dogma.

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[28] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[29] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[30] *Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD*, February 9, 2024, https://news.lykospbc.com/2024-02-09-Lykos-Therapeutics-Announces-FDA-Acceptance-and-Priority-Review-of-New-Drug-Application-for-MDMA-Assisted-Therapy-for-PTSD

[31] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[32] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

[33] Herrington, *Biden Signs Defense Spending Bill Funding Psychedelic Research* Forbes.

[34] Curtis, *VA-funded psychedelic therapy trials for PTSD could save lives, veteran organization says* Fox 13 News

[35] *See e.g., Safety and Early Efficacy Studies of Psychedelic-Assisted Therapy for Chronic Pain in Older Adults (UG3/UH3 Clinical Trial Required) NOFO*

Alongside the evidence and government agencies, recent polls have found an overwhelming majority of American voters are also eager for a new approach to drug laws and responses to drug-related offenses.[36] Over 60% support ending the War on Drugs; "eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services"; repealing mandatory minimum sentences for drug crimes; and commuting, or reducing, the sentences of people incarcerated for drugs.[37] Representing one of "the few truly bipartisan issues in American politics," the "breadth and depth of support for change suggests that there are few issues for which the nation's laws so misrepresent the preferences of the American people as for drugs."[38]

Despite these widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables remain based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors.[39] Congress[40] and this Commission[41] have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine. For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the drug or other substance," potentially positive "pharmacological effect[s],"[42] and likelihood of misuse and dependence[43].

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[36] ACLU. *Poll Results on American Attitudes Toward War on Drugs*. June 9, 2021. https://www.aclu.org/documents/poll-results-american-attitudes-toward-war-drugs

[37] *Id.*

[38] *Id.*

[39] Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021).

[40] Aris Folley, *Congress Set to Tackle Crack, Powder Cocaine Sentencing Disparity Before Year's End*, December 18, 2022, https://thehill.com/business/3778680-congress-set-to-tackle-crack-powder-cocaine-sentencing-disparity-before-years-end/

[41] *Change In Federal Cocaine Sentencing Policy Recommended Findings To Be Submitted To Congress*, April 5, 2002, https://www.ussc.gov/about/news/press-releases/april-5-2002

[42] United States Drug Enforcement Administration. *The Controlled Substances Act*. https://www.dea.gov/drug-information/csa

[43] Any inquiry should take into account ways harm reduction approaches, public education, and proven methods of avoiding harm and use among minors can reduce the likelihood of misuses and dependence. Revising the Tables would likely lead to a reduction in resources spent on enforcement, prosecution, and punishment. Those resources could then be reinvested to bolster effective harm reduction and public education efforts. (*See*, Counsel of State Governments, Justice Reinvestment Initiative, https://csgjusticecenter.org/projects/justice-reinvestment/#:~:text=Justice%20Reinvestment%20is%20a%20data,Justice%20Reinvestment)

Last Prisoner Project and countless other organizations across the political spectrum and around the country are coming together to organize and inform the USSC and the general public about the importance of this issue. The United States is long overdue for sentencing reform, and the urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Conclusion

Like all components of criminal sentencing, criminal history score calculations should be proportionate to the offense and no greater than necessary to further the goal of public safety. Additionally, sentencing guidelines should be equitable and structured in a way that works to reduce racial disparities. By removing prior cannabis offenses from criminal history scores and allowing for changes to cannabis laws to be used as the sole basis for an extraordinary and compelling justification for release under 3582(c)(1)(A) the Commission can better achieve its goals of sentencing policies that align with fairness and justice.

In addition, we encourage the Commission to commit to conducting a reevaluation of the drug quantity and drug conversion tables more broadly given the available scientific and medical data. We appreciate the opportunity to comment on this request and thank the Commission for its time and consideration.

LAW ENFORCEMENT ACTION PARTNERSHIP
ADVANCING JUSTICE AND PUBLIC SAFETY SOLUTIONS

Date: July 3, 2024

Re: Public Affairs – Priorities Comment

To: United States Sentencing Commission

Dear United States Sentencing Commissioners,

My name is Lieutenant Diane Goldstein (Ret.), and I am submitting this comment letter on behalf of the Law Enforcement Action Partnership (LEAP). LEAP is a nonprofit group of police, prosecutors, judges, and other criminal justice professionals who speak from firsthand experience. Our mission is to make communities safer by focusing law enforcement resources on the greatest threats to public safety, promoting alternatives to arrest and incarceration, addressing the root causes of crime, and working toward healing police-community relations. I am writing today concerning the United States Sentencing Commission's (USSC) oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, we urge the Commission to conduct a complete review and revision of the Tables.

For over half a century, the United States' drug policy has ripped families and communities apart while failing to achieve its stated purpose of realizing a drug-free world. Richard Nixon announced the War on Drugs in 1971 and, in doing so, perpetuated an ongoing rhetoric and myth of Black criminality. Ronald Reagan and his successors in the '90s escalated the impact of this policy by prioritizing punishment over treatment, thereby causing a significant increase in the incarcerated population, especially for nonviolent drug offenses.

While more than fifty years of ongoing political and educational messaging demonizing drug use and stigmatizing drug users has failed to realize a drug-free world, the underlying racial and social motivations have succeeded. Since its inception, the drug war has been overwhelmingly enforced in BIPOC communities, especially low-income ones, causing the country's inflated prison population to be disproportionately comprised of Black, Latino, and Indigenous people. It has led to

lengthy terms of imprisonment for relatively low-level offenses and for those with little to no criminal history, which perpetuates cycles of trauma and violence. The same conditions have fueled and perpetuated violence internationally and in inner-city neighborhoods nationwide, and have led to increases in concentration, adulteration, and toxicity of the substances themselves.

LEAP joins the increasingly multi-partisan coalition calling for change. In 2017, the USSC published a report describing, in part, how drug-related mandatory minimum penalties have been applied more broadly than Congress may have anticipated. Such non-discretionary sentencing fails to promote public health, or make communities safer. Instead, it has the effect of incarcerating people for longer amounts of time than the evidence shows deters further criminal activity - at the taxpayer's expense.

Reversing and mending the harms of the War on Drugs will take effort from people across the government and political spectrum. One way to shift policy in a more humane direction - and in alignment with contemporary evidence - is to go to one of the current roots of the problem: drug sentencing. The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and harms would lead to more accuracy in sentencing decisions. This would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

This is not only a significant opportunity but a timely one. Drug offenses make up the largest portion of the federal docket. In April 2024, following the Health and Human Services Department's recommendation, the Drug Enforcement Administration (DEA) announced its decision to reschedule cannabis to Schedule III. Given that the Tables presently translate quantities of various illegal drugs into their marijuana-equivalent quantities for the purpose of determining relative harm, it would be appropriate to utilize the multi-agency review already happening with cannabis to review and update the Tables.

Additional research about other historically stigmatized substances should also inform this review. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, and again granted two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019. In 2024, the FDA extended the same status to an LSD formula for the treatment of generalized anxiety disorder. The FDA is also reviewing a new drug application for MDMA-assisted therapy, for which they will likely have a decision by August 2024.

Meanwhile, there has been growing bipartisan support to fund clinical trials exploring the use of psychedelics to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans. For instance, in the 2024 National Defense Authorization Act, the Department of Defense authorized funding a study on psychedelics for the treatment of PTSD in military members. In March 2024, the Department of Veterans Affairs passed a budget allocating $20 million for clinical trials for MDMA and psilocybin. The National Institutes of Health has also opened funding opportunities for studying

psychedelic-assisted therapy for chronic pain in older adults. This shift in the evidence base, and concurrent changes in federal policy, reflects an increasing willingness and mandate to reevaluate long-held assumptions about controlled substances, paving the way for more drug policies driven by data rather than dogma.

Alongside the evidence and government agencies, recent polls have found an overwhelming majority of American voters are also eager for a new approach to drug laws and responses to drug-related offenses. Over 60% support ending the War on Drugs; eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services; repealing mandatory minimum sentences for drug crimes; and commuting, or reducing, the sentences of people incarcerated for drugs. Representing one of "the few truly bipartisan issues in American politics," the "breadth and depth of support for change suggests that there are few issues for which the nation's laws so misrepresent the preferences of the American people as for drugs."

Despite these widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables remain based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. Congress and this Commission have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine. For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the drug or other substance," potentially positive "pharmacological effect[s]," and likelihood of misuse and dependence.

The Law Enforcement Action Partnership and countless other organizations across the political spectrum and around the country are coming together to organize and inform the USSC and the general public about the importance of this issue. The United States is long overdue for sentencing reform, and the urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Thank you for the opportunity to submit these comments urging a complete review and revision of the Drug Quantity and Drug Conversion Tables.

Sincerely,

Lieutenant Diane Goldstein (Ret.)
Executive Director, Law Enforcement Action Partnership

Legal Services for Prisoners with Children
44000 Market Street, Oakland 94608

7/1/2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Paul Briley, and I am submitting this comment letter on behalf of the Legal Services for Prisoners with Children (LSPC). LSPC organizes communities impacted by the criminal justice system and advocates to release incarcerated people, restore human and civil rights, and to reunify families and communities. We build public awareness of structural racism in policing, the courts, and prison system and we advance racial and gender justice in all our work. I am writing today concerning the United States Sentencing Commission's (USSC) oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, we urge the Commission to conduct a complete review and revision of the Tables.

For over half a century, the United States' drug policy has ripped families and communities apart while failing to achieve its stated purpose of realizing a drug-free world. Richard Nixon announced the War on Drugs in 1971 and, in doing so, perpetuated an ongoing rhetoric and myth of Black criminality[1]. Ronald Raegan escalated the impact of this policy by prioritizing punishment over treatment, thereby causing a significant increase in the incarcerated population, especially for nonviolent drug offenses.

While over fifty years of ongoing political and educational messaging demonizing drug use and stigmatizing drug users has failed to realize a drug-free world, the underlying racial and social motivations have succeeded. Since its inception, the drug war has been

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[1] …, Nixon's Assistant for Domestic Affairs, said: "You want to know what this [war on drugs] was really all about? …nistration] . . . had two enemies: the antiwar left and [B]lack people . . . We knew we couldn't make it illegal to …he war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then …d heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did." (Equal Justice Initiative. *Nixon Adviser Admits War on Drugs Was Designed to Criminalize Black People*. March 25, 2016. https://eji.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/)

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overwhelmingly enforced in BIPOC communities, especially low-income ones,[2] causing the country's inflated prison population to be disproportionately comprised of Black, Latino, and Indigenous people.[3] It has led to lengthy terms of imprisonment for relatively low-level offenses and for those with little to no criminal history[4], which perpetuates cycles of trauma and violence. The same conditions have fueled and perpetuated violence internationally and in inner-city neighborhoods nationwide,[5] and have led to increases in concentration, adulteration, and toxicity of the substances themselves.

An increasingly multi-partisan coalition is calling for change. In 2017, the USSC published a report describing, in part, how drug-related mandatory minimum penalties have been "applied more broadly than Congress may have anticipated."[6] Such non-discretionary sentencing fails to promote public health. Instead, it has the effect of incarcerating people for longer amounts of time than the evidence shows deters further criminal activity[7] - at the taxpayer's expense.

While reversing and mending the harms of the war on drugs will take effort from people across the government and political spectrum, one way to shift policy in a more humane direction - and in alignment with contemporary evidence - is to go to one of the current roots of the problem: drug sentencing. The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and harms would lead to more accuracy in sentencing decisions, which would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

This is not only a significant opportunity[8] but a timely one. In April 2024, following the Health and Human Services Department's recommendation, the Drug Enforcement Administration (DEA) announced its decision to reschedule cannabis to Schedule III.[9] Given that the Tables presently translate quantities of

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[2] *See*, Colleen Walsh, *Solving Racial Disparities in Policing*, Feb. 23, 2021, https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing/; *see also*, ACLU DC, *Racial Disparities in Stops by the DC Metropolitan Police Department*, June 16, 2020, https://urldefense.com/v3/__https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf__;!!Phyt6w!M3tbrIzizSTS6KMjsaPASYXWMFeEA1fkh6tY9rjOLLeAtcunXEj6k0DAkg0%24)

[3] "The incarceration boom fundamentally altered the transition to adulthood for several generations of [B]lack men and, to a lesser but still significant extent, [B]lack women and Latino men and women. By the turn of the 21st century, [B]lack men born in the 1960s were more likely to have gone to prison than to have completed college or military service." (Vera, *American History, Race, and Prison*, https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison)

[4] *Id*.

[5] Heather Ann Thompson explained in a 2015 interview with Nursing Clio that "intensive incarceration has emptied communities of their elders, their parents, their grandparents, and their children now, through the juvenile justice system. It has made them even poorer because there are no jobs. It has basically created an environment where violence can flourish . . . Should we be surprised that violence is a problem when we make an economy illegal, and make it the only economy that is available because there are no factories?" (Nursing Clio, *An Interview with Historian Heather Ann Thompson (Part 2)*, Nov. 5, 2015, https://nursingclio.org/2015/11/05/an-interview-with-historian-heather-ann-thompson-part-2/#:~:text=What%20we%20start%20to%20see,environment%20where%20violence%20can%20flourish)

[6] USSC, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System*, Oct. 2017, at 6. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf

[7] National Institute of Justice. *Five Things About Deterrence*. May 2016. https://www.ojp.gov/pdffiles1/nij/247350.pdf

[8] Drug offenses make up the largest portion of the federal docket. (*See*, Fiscal Year 2021 Overview of Federal Criminal Cases. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf)

[9] Alicia Wallace et al. CNN. *Justice Dept Plans to Reschedule Marijuana as a Lower-risk Drug.* April 30, 2024. https://www.cnn.com/2024/04/30/economy/dea-marijuana-rescheduling/index.html

various illegal drugs into their marijuana-equivalent quantities for the purpose of determining relative harm, it would be appropriate to utilize the multi-agency review already happening with cannabis to review and update the tables.

Additional research about other historically stigmatized substances should also inform this review. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, and again granted two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019.[10] In 2024, the FDA extended the same status to an LSD formula for the treatment of generalized anxiety disorder.[11] The FDA is also reviewing a new drug application for MDMA-assisted therapy[12], for which they will likely have a decision by August 2024.

Meanwhile, there has been growing bipartisan support to fund clinical trials exploring the use of psychedelics[13] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[14] For instance, in the 2024 National Defense Authorization Act, the Department of Defense authorized funding a study on psychedelics for the treatment of PTSD in military members.[15] In March 2024, the Department of Veterans Affairs passed a budget allocating $20 million for clinical trials for MDMA and psilocybin.[16] The National Institutes of Health has also opened funding opportunities for studying psychedelic-assisted therapy for chronic pain in older adults.[17] This shift in the evidence base, and concurrent changes in federal policy, reflects an increasing willingness and mandate to reevaluate long-held assumptions about controlled substances, paving the way for more drug policies driven by data rather than dogma.

Alongside the evidence and government agencies, recent polls have found an overwhelming majority of American voters are also eager for a new approach to drug laws and responses to drug-related offenses.[18] Over 60% support ending the War on Drugs; "eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services"; repealing mandatory minimum sentences for drug crimes; and commuting, or reducing, the sentences of people incarcerated for [redacted]

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[10] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[11] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[12] *Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD*, February 9, 2024, https://news.lykospbc.com/2024-02-09-Lykos-Therapeutics-Announces-FDA-Acceptance-and-Priority-Review-of-New-Drug-Application-for-MDMA-Assisted-Therapy-for-PTSD

[13] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[14] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

[15] Herrington, *Biden Signs Defense Spending Bill Funding Psychedelic Research* Forbes.

[16] Curtis, *VA-funded psychedelic therapy trials for PTSD could save lives, veteran organization says* Fox 13 News

[17] *See e.g., Safety and Early Efficacy Studies of Psychedelic-Assisted Therapy for Chronic Pain in Older Adults (UG3/UH3 Clinical Trial Required) NOFO*

[18] ACLU. *Poll Results on American Attitudes Toward War on Drugs*. June 9, 2021. https://www.aclu.org/documents/poll-results-american-attitudes-toward-war-drugs

drugs.[19] Representing one of "the few truly bipartisan issues in American politics," the "breadth and depth of support for change suggests that there are few issues for which the nation's laws so misrepresent the preferences of the American people as for drugs."[20]

Despite these widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables remain based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors.[21] Congress[22] and this Commission[23] have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine. For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the drug or other substance," potentially positive "pharmacological effect[s],"[24] and likelihood of misuse and dependence[25].

LSPC and countless other organizations across the political spectrum and around the country are coming together to organize and inform the USSC and the general public about the importance of this issue. The United States is long overdue for sentencing reform, and the urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Sincerely,
Paul Briley

Executive director - Legal Services for Prisoners with Children
[redacted]

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[19] *Id.*
[20] *Id.*
[21] Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021).
[22] Aris Folley, *Congress Set to Tackle Crack, Powder Cocaine Sentencing Disparity Before Year's End*, December 18, 2022, https://thehill.com/business/3778680-congress-set-to-tackle-crack-powder-cocaine-sentencing-disparity-before-years-end/
[23] *Change In Federal Cocaine Sentencing Policy Recommended Findings To Be Submitted To Congress*, April 5, 2002, https://www.ussc.gov/about/news/press-releases/april-5-2002
[24] United States Drug Enforcement Administration. *The Controlled Substances Act*. https://www.dea.gov/drug-information/csa
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MEDICAL JUSTICE ALLIANCE

The Honorable Carlton W. Reeves
Chair United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Public Comment to the U.S. Sentencing Commission

Dear Judge Reeves:

I. Introduction

On behalf of the Medical Justice Alliance (MJA), we thank you for providing us with the opportunity to comment on possible priority areas to help the Commission fulfill its mission to make the federal criminal legal system fairer and more just. MJA is a national network of physicians, clinicians, and healthcare professionals who volunteer their time and medical expertise to protect the constitutional right to medical care for all people incarcerated. MJA's volunteer network includes over 400 medical professionals who practice in 24 different medical specialties. To date, MJA volunteers have reviewed more than 550 cases on behalf of individuals in federal and state carceral facilities across 42 states and territories. MJA primarily recruits, trains, and mentors physician volunteers who provide pro bono medical record review and written/oral testimony on behalf of incarcerated individuals.

Approximately 40 percent of MJA's cases involve people petitioning the Bureau of Prisons (BOP) and the federal district courts for compassionate release based on their declining health, chronic medical conditions, need for more advanced specialty care, and/or physical limitations or disabilities. Cases in which MJA physician volunteers are involved are more than four times more likely to achieve compassionate release than the national average. But, based on MJA's experience and partnerships with legal organizations around the country, we know there are a large number of people who qualify, yet are not released by the courts based on a lack of information regarding their medical conditions. MJA cases are also often the outliers in terms of positive outcomes because the clients have the benefit of record review and testimony from an independent physician outside of the BOP system. In the course of our evaluation of hundreds of thousands of pages of prison medical records, we have also observed a concerning pattern where people incarcerated in BOP facilities are not receiving medical treatment in line with the applicable standard of care. As such, we respectfully recommend the following priority areas for the amendment cycle ending May 1, 2025.

II. Clarify and/or Expand Compassionate Release Criteria under 18 U.S.C. § 3582(C)(1)(A)

We applaud the successful efforts of the last few years to amend *Section 1B1.13 - Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)* to include additional grounds for relief that should affirmatively allow more individuals to qualify for compassionate release so they can access community-based medical treatments, as well as mitigate illness and death in the event of a future deadly infectious disease outbreak. However, in our experience, we believe the guidelines as currently written would benefit from clarifying language and/or expanded eligibility to ensure they are being used as intended by incarcerated individuals, attorneys, the BOP, and courts. We also recommend forming an advisory/working group made up of relevant stakeholders, including community-based physicians, to analyze the available data since the 2023 amendments went into effect in order to evaluate whether the amendments are being effectively implemented to allow for the release of those who qualify, and to help determine where changes or clarifications to the guidelines may be necessary.

From a medical standpoint, we make the following recommendations for changes to the guidelines:

1. Section 1B1.13(b)(1)(B)(iii) requires that the defendant is "experiencing deteriorating physical or mental health because of the aging process." As physicians, we have struggled to interpret what "because of the aging process" requires in this context and, in our medical opinion, this additional finding is unnecessary. For example, if an individual in their 40s or 50s has chronic illnesses such as diabetes, hypertension, kidney disease, etc. that are leading to deteriorating health and limiting the ability for self-care, it is both difficult and irrelevant from a medical perspective to try to determine whether or not that is "because of the aging process." We recommend eliminating the requirement that the deteriorating physical or mental health be "because of the aging process."

2. Section 1B1.13(b)(1)(B) requires that the medical qualifications in (i), (ii), or (iii) must be found to "substantially diminish[] the ability of the defendant to provide self-care within the environment of a correctional facility." This provision would benefit from the addition of the type of specific criteria used in hospitals and other medical facilities to determine functional status. Thus, we recommend adding, "such that the defendant needs assistance with one or more prison activities of daily living (ADLs)." While basic ADLs include bathing, dressing, eating, toileting, and mobility,[1] prison ADLs (PADLs) are defined more expansively, and have been found to include "hearing orders from staff, dropping to the floor for alarms, standing for head counts, and getting to and from the

[1] https://pubmed.ncbi.nlm.nih.gov/29261878/

dining hall."[2] We recommend including both the basic ADLs and PADLs as criteria under the guidelines.

3. Section 1B1.13(b)(1)(C) requires, in part, that "the defendant is suffering from a medical condition that requires long-term or specialized medical care that is not being provided." In a number of cases MJA has reviewed, including multiple examples listed in Section III below, the defendant has not been timely provided with appropriate diagnostic testing or specialty evaluations, despite multiple reports of symptoms indicating serious medical conditions that have been ignored for months or years. Without a diagnosis from a treating physician, defendants have no clear way of proving eligibility under this provision. We recommend expanding the language to include "suffering from a medical condition that requires long-term or specialized medical care, or a suspected medical condition that requires diagnostic testing or specialty evaluation, that is not being timely provided."

4. Section 1B1.13(b)(2) requires, in part, that the defendant is at least 65 years old and is experiencing a serious deterioration in physical or mental health because of the aging process. We recommend two changes to this provision. First, we recommend amending the requirement that the defendant be at least 65 years old to 50 years old. A robust body of research and scientific studies indicates that incarcerated adults experience what is known as accelerated aging, or "the process in which exposure to incarceration speeds up biological aging."[3] As a result, they have higher prevalences of all geriatric conditions as compared to non-incarcerated individuals. While 65 and older may generally capture the geriatric population outside of carceral facilities, researchers and policymakers, including the Office of the Inspector General at the U.S. Department of Justice, identify 50 years or older as the threshold for research and reports on the aging prison population.[4] Second, for these reasons and the reasons stated in Paragraph 2 above, we also recommend removing the requirement here that the deterioration in health be "because of the aging process."

III. Evaluate whether the BOP is providing appropriate medical care

In our review of hundreds of individuals' medical records, a large percentage of cases indicate that people incarcerated in BOP facilities are not receiving medical treatment in line with the applicable standard of care. We request that you prioritize determining whether the BOP is providing needed medical care in the most effective manner, one of the purposes of sentencing as set forth in 18 U.S.C. 3553(a)(2)(D), and consider any appropriate responsive measures, including additional oversight/monitoring of the BOP's provision of medical care, systemic

[2] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10134032/
[3] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10129364/
[4] https://oig.justice.gov/reports/2015/e1505.pdf

policy changes to improve the quality of care, and amendments to the sentencing guidelines in addition to those we recommended above. Of particular concern, we have seen courts deny compassionate release requests on the unsubstantiated understanding that ordering the BOP to provide better care or transferring the individual to a BOP medical facility will better address the individual's concerns. We strongly believe that a comprehensive evaluation and report on the BOP's ability to deliver healthcare, including preventative healthcare, will help courts make better-informed sentencing decisions.

To provide some examples that illustrate our concerns:

- A MJA client in his early 50s was experiencing serious symptoms including chronic dysphagia, rectal bleeding, cough with bloody sputum, adenoid and tonsillar enlargement, high cholesterol, and chronic pain, He had multiple recommendations for further evaluation of his symptoms by specialists, but despite those recommendations had not been provided the necessary procedures or treatment. Given the inability of the facility to follow the recommendations of the gastroenterologist (in alignment with multiple national standards of care), a MJA physician requested consideration of reduced sentencing in order to allow him to receive better access to health care for the management of his condition.

- A MJA client in his late 50s has a history of recurrent high-grade stage 4 prostate cancer, osteoporosis, small fiber neuropathy, and spinal stenosis. After the client was noted to have an elevated prostate-specific antigen (PSA) level, he was not provided with any diagnostic testing for two years. Once he did receive his biopsy, he was diagnosed with very high-risk prostate cancer and provided with chemotherapy, but a MJA physician found his treatment has been interrupted multiple times and his cancer spread to his lymph nodes. The physician also found that there was a delay in obtaining an MRI to determine if the cancer had spread to his spinal cord.

- A MJA client has kidney disease, chronic pain, and high blood pressure, among other conditions. A MJA physician found that the BOP treated his pain with long-term use of high doses of ibuprofen, despite well-established scientific literature that this raises the risk of kidney damage, particularly in patients with high blood pressure. This continued to happen even after the MJA physician wrote to the BOP facility with his concerns and recommended safer options that could alleviate his pain with minimal risk to his kidneys. The MJA physician also found that the facility fell short of established national guidelines for the management of high blood pressure, even after the physician raised concerns multiple years ago, including failing to measure the client's blood pressure for a year and failing to treat his high blood pressure in accordance with recommended treatments for high blood pressure in kidney disease.

- A MJA client in his early 60s had many serious medical conditions, including a stroke, type 2 diabetes, and untreated cancer. Signs of his cancer, which MJA's physician volunteer found was likely advanced cancer after reviewing the medical records, were ignored by the BOP during his compassionate release proceedings. The client ultimately died before the Court could rule on his case.

- A MJA client in his early 50s showed clear signs of kidney disease, but a nephrology consult, which is the standard of care, was not provided until he required emergency admission to an outside hospital for kidney failure. The client was granted compassionate release by the Court after a MJA physician volunteer provided written testimony based on a review of his medical records. Before being granted release, the client had to have urgent heart surgery and was placed on dialysis.

- A MJA client in her early 50s has a history of rheumatoid arthritis and was prescribed long-term, high-dose steroids that a MJA physician found were not the recommended treatment for her arthritis and could lead to serious complications. She was also diagnosed with Hepatitis C but the prison did not monitor her liver damage or offer treatment, despite clear national guidelines and the fact that the immunosuppressive drugs she was taking can severely exacerbate Hepatitis C.

- A MJA client in his early 60s has chronic kidney disease, kidney stones, hypertension, and pre-diabetes. A MJA physician found that his chronic medical conditions have not consistently been managed in the prison system. Most concerningly, he has had large gaps in his care from kidney specialists. The MJA physician recommended compassionate release in order to prevent the further progression of his diseases, which were likely to progress as the client aged and without proper management.

- A MJA client in his late 70s has numerous chronic medical conditions, including type 2 diabetes, hypertension, peripheral neuropathy, vascular disease, and liver disease. A MJA physician found that his uncontrolled type 2 diabetes was not being treated in accordance with clear and well-recognized standards of care and involved an unnecessarily complex regimen for a geriatric patient who cannot readily access his medications and does not have access to a medically appropriate diet. Due to his uncontrolled diabetes, he developed end stage peripheral neuropathy and is no longer able to safely walk to receive his medication three times a day.

- A MJA client with hepatitis C virus (HCV) was hospitalized for an inflamed gallbladder and acute hepatitis and found to have decreased liver function and high viral load. This hospital referred him for HCV treatment and a follow up with a liver specialist within

three weeks, yet an MJA physician found he had not received any follow up appointments or antiviral medications to cure his HCV. Instead, medical staff when he returned to the BOP facility mistakenly documented that he did not have an active HCV infection, which the MJA physician brought to their attention through an advocacy letter.

- A MJA client in his early 40s has several serious medical conditions, including blood clots in his leg that required multiple surgeries, and coronary artery disease complicated by systolic heart failure. A MJA physician found that, after he was sentenced, several important medications were discontinued by the BOP that were essential to preventing further heart attacks, strokes, and worsening of his peripheral artery disease, and that he was not receiving the standard of care and recommended treatments for his condition. This increased his risk of permanent, irreversible damage to his leg, including the risk of amputation and death, as well as the risk for heart failure.

- A MJA client in his early 60s notified his doctors of unusual swelling for over 7 years before he began to experience symptoms highly concerning for cancer, including fatigue, night sweats, and profound unexplained weight loss. Even after initial imaging raised concerns for metastatic disease, his biopsy was delayed before he was ultimately diagnosed with advanced Hodgkin's lymphoma, and then his treatment was further delayed. In the interim, he sustained significant damage to his kidneys.

- A MJA client in his early 40s has gastroparesis complicated by frequent nausea and vomiting and type 2 diabetes requiring insulin complicated by diabetic retinopathy. A MJA physician found that despite many episodes of nausea and vomiting so severe that it led to tears in his esophagus and vomiting up blood, he did not receive any diagnostic testing for more a year and a half, Even after his diagnosis, he was not provided with the standard of care to treat his condition, including being regularly seen by a gastroenterologist to manage his treatment.

Please reach out to MJA at [redacted] if we can help provide any additional information or assistance in any way. Our physician volunteers would welcome the opportunity to work with you on clarifying and expanding the medical criteria for compassionate release, developing educational materials and trainings for courts and BOP staff, and further evaluating the BOP's ability to provide appropriate medical care.

Sincerely,
Dr. Mark Fenig, MD, MPH[5]

[5] Dr. Fenig has a Masters of Public Health from Yale University and a Medical Degree from the Sackler School of Medicine. He completed an emergency medicine residency at Emory University School of Medicine. He currently works at Stony Brook University and Montefiore Medical Center departments of emergency medicine, and is an assistant professor of emergency medicine in New York.

Executive Director, Medical Justice Alliance

Dr. William Weber, MD, MPH[6]
Medical Director, Medical Justice Alliance

[6] Dr. Weber graduated from Northwestern Feinberg School of Medicine and completed a Masters Degree in Public Health at Northwestern Graduate School. He completed an emergency medicine residency and fellowship at the University of Chicago. He is an assistant professor of emergency medicine at the Rush University Medical Center in Chicago.

July 15, 2024

TO: U.S. Sentencing Commission

FROM: Pamela Bailey
Co-Founder and Executive Director

RE: Proposed 2024-25 USSC Priorities

More Than Our Crimes is the only advocacy organization that directly represents the more than 155,000 individuals housed in federal prisons. We collect in-depth personal narratives, study "change points" during incarceration and conduct ongoing polling among our more than 2,000 network members to gather opinions and insights into the carceral experience.

We welcome the opportunity to suggest priorities for your consideration during the upcoming amendment-development cycle.

During the last cycle, the commission voted to bring its sentencing guidelines into conformance with the large body of science now available into the development of the human brain. It voted to advise judges that a downward adjustment in sentencing "may be warranted in cases in which the defendant was youthful [defined as age 25 or younger] at the time of the instant offense or any prior offenses."

In making that change, the commission acknowledged that it has a "statutory duty to establish sentencing policies that reflect "advancement in knowledge of human behavior."

More Than Our Crimes believes that this duty extends to individuals already in prison due to crimes they committed as youths. Many members of the More Than Our Crimes network are serving decades-long sentences (up to and including life without parole) due to acts they committed while their brains were still developing. They deserve to be given a "second look."

Thus, we propose that the commission add age at commission of their instant crime to the bases for compassionate release, when combined with factors such as:

- **Length of incarceration**. The Model Penal Code recommends a judicial review after 10 years for those who committed their instant crimes when under the age of 18, and after 15 years for those who were older – a timeframe that corresponds with what criminological research has found to be the duration of most "criminal careers." Both the Charles Colson Task Force on Federal Corrections and a task force of the Council on Criminal Justice have endorsed these recommendations.
- **Track record during incarceration**. Note that while factors such completion of productive programming and lack of serious violations should be considered as evidence of rehabilitation, it must be taken into consideration that these individuals essentially grew up in a highly abnormal and violent environment – from which many thought they'd never exit. To literally survive in a dog-eat-dog environment, most adapt by

conforming until they mature and develop the strength of character (a process not always facilitated by federal prison) to set and follow their own standards. Thus, we believe the five years prior to application for compassionate release be given the most weight, and that such track records be evaluated on a case-by-case basis by a professional with significant correctional experience.

Note that we do *not* mention the nature of the charge as a factor that should be considered during decision-making. We do not believe that individuals who committed violent crimes should be given any less consideration, both because the limitations of a developing brain apply to all crime categories and because experience supports it. A 2018 research study published in the Justice Policy Journal looked at length of incarceration, age upon release and type of crime. It found that contrary to other reports that focused on single factors, type of crime was not related to recidivism. Likewise, the study found a significantly reduced risk of recidivism among individuals 45 and older than among their younger counterparts.

Thus, we hope you will encourage judges to recognize the inherent inequity of past draconian sentences imposed on youthful offenders and use the compassionate release process to offer a bit of retractive justice.

Multidisciplinary Association for Psychedelic Studies
3141 Stevens Creek Blvd, #40563
San Jose, CA 95117

July 9, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

I'm Rick Doblin, PhD. (Public Policy, Kennedy School of Government, Harvard University, 2001). I am submitting this comment letter on behalf of the Multidisciplinary Association for Psychedelic Studies (MAPS), a non-profit organization I founded in 1986 primarily to develop MDMA-assisted therapy into an FDA-approved treatment available by prescription. I am currently the President of MAPS. In 2001, I testified before the United States Sentencing Commission (USSC) regarding the drug sentencing guidelines for MDMA at a time of unscientific hysteria over supposed MDMA neurotoxicity.[1] Today, the penalties for MDMA are more severe than the penalties for cocaine, and the neurotoxicity fears have been disproven.

I am writing today concerning the USSC's drug sentencing guidelines and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, I join the voices of organizations across the country to urge the Commission to conduct a complete review and revision of the Tables, and suggest beginning by completing the review of MDMA that was started in 2017, but never completed due to changes in USSC priorities and quorum.

For over half a century, the United States' drug policy has ripped families and communities apart while failing to achieve its stated purpose of realizing a drug-free world. Richard Nixon announced the War on Drugs in 1971 and, in doing so, perpetuated an ongoing rhetoric and myth of Black criminality[2]. Ronald Reagan escalated the impact of this policy by prioritizing

[1] *See*, USSC Public Hearing March 19 - 20, 2001 (March 2001), https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-march-19-20-2001

[2] John Ehrlichman, Nixon's Assistant for Domestic Affairs, said: "You want to know what this [war on drugs] was really all about? The Nixon [Administration] . . . had two enemies: the antiwar left and [B]lack people . . . We knew

punishment over treatment, thereby causing a significant increase in the incarcerated population, especially for nonviolent drug offenses.

Over fifty years of ongoing political and educational messaging demonizing drug use and stigmatizing drug users has failed to realize a drug-free world, but the underlying racial and social motivations have succeeded. Since its inception, the drug war has been overwhelmingly enforced in non-white communities, especially low-income ones,[3] causing the country's inflated prison population to be disproportionately comprised of Black, Latino, and Indigenous people.[4] It has led to lengthy terms of imprisonment for relatively low-level offenses and for those with little to no criminal history[5], which perpetuates cycles of trauma and violence. The same conditions have fueled and perpetuated violence internationally and in inner-city neighborhoods nationwide,[6] and have led to increases in concentration, adulteration, and toxicity of the substances themselves.

An increasingly multi-partisan coalition is calling for change. In 2017, the USSC published a report describing, in part, how drug-related mandatory minimum penalties have been "applied more broadly than Congress may have anticipated."[7] Such non-discretionary sentencing has had

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we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did." (Equal Justice Initiative. *Nixon Adviser Admits War on Drugs Was Designed to Criminalize Black People*. March 25, 2016. https://eji.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/)

[3] *See*, Colleen Walsh, *Solving Racial Disparities in Policing*, Feb. 23, 2021, https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing/; *see also*, ACLU DC, *Racial Disparities in Stops by the DC Metropolitan Police Department*, June 16, 2020, https://urldefense.com/v3/__https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf__;!!Phyt6w!M3tbrIzizSTS6KMjsaPASYXWMFeEA1fkh6tY9rjOLLeAtcunXEj6k0DAkg0%24)

[4] "The incarceration boom fundamentally altered the transition to adulthood for several generations of [B]lack men and, to a lesser but still significant extent, [B]lack women and Latino men and women. By the turn of the 21st century, [B]lack men born in the 1960s were more likely to have gone to prison than to have completed college or military service." (Vera, *American History, Race, and Prison*, https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison)

[5] *Id*.

[6] Heather Ann Thompson explained in a 2015 interview with Nursing Clio that "intensive incarceration has emptied communities of their elders, their parents, their grandparents, and their children now, through the juvenile justice system. It has made them even poorer because there are no jobs. It has basically created an environment where violence can flourish . . . Should we be surprised that violence is a problem when we make an economy illegal, and make it the only economy that is available because there are no factories?" (Nursing Clio, *An Interview with Historian Heather Ann Thompson (Part 2)*, Nov. 5, 2015, https://nursingclio.org/2015/11/05/an-interview-with-historian-heather-ann-thompson-part-2/#:~:text=What%20we%20start%20to%20see,environment%20where%20violence%20can%20flourish)

[7] USSC, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System*, Oct. 2017, at 6. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf

the effect of incarcerating people for longer amounts of time than the evidence shows deters further criminal activity[8] - at the taxpayer's expense.

The USSC should conduct a multi-year study to revise the Tables

Reversing and mending the harms of the war on drugs will require effort from across the government and political spectrum, and the USSC is uniquely positioned to shift one of the foundational roots of the problem: drug sentencing. The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and harms would lead to more humane and more accurate outcomes, alleviating some of the socioeconomic harms of the drug war and saving public funds, without risking public safety.

This is not only a significant opportunity[9] but a timely one. In April 2024, following the Health and Human Services Department's recommendation, the Drug Enforcement Administration (DEA) announced its decision to reschedule cannabis to Schedule III.[10] Given that the Tables presently translate quantities of various illegal drugs into their marijuana-equivalent quantities for the purpose of determining relative harm, it would be appropriate to utilize the multi-agency review already happening with cannabis to review and update the tables.

Additional research about other historically stigmatized substances should also inform this review. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, and again granted two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019.[11] In 2024, the FDA extended the same status to an LSD formula for the treatment of generalized

[8] National Institute of Justice. *Five Things About Deterrence*. May 2016. https://www.ojp.gov/pdffiles1/nij/247350.pdf

[9] Drug offenses make up the largest portion of the federal docket. (*See*, Fiscal Year 2021 Overview of Federal Criminal Cases. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf)

[10] Alicia Wallace et al. CNN. *Justice Dept Plans to Reschedule Marijuana as a Lower-risk Drug.* April 30, 2024. https://www.cnn.com/2024/04/30/economy/dea-marijuana-rescheduling/index.html

[11] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

anxiety disorder.[12] The FDA is also reviewing a new drug application for MDMA-assisted therapy[13], for which they will likely have a decision by August 2024 (*see below*, for more information on this Commission's historical treatment of MDMA).

Meanwhile, there has been growing bipartisan support to fund clinical trials exploring the use of psychedelics[14] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[15] For instance, in the 2024 National Defense Authorization Act, the Department of Defense authorized funding a study on psychedelics for the treatment of post-traumatic stress disorder (PTSD) in military members.[16] In March 2024, the Department of Veterans Affairs passed a budget allocating $20 million for clinical trials for MDMA and psilocybin.[17] The National Institutes of Health has also opened funding opportunities for studying psychedelic-assisted therapy for chronic pain in older adults.[18] This shift in the evidence base, and concurrent changes in federal policy, reflects an increasing willingness and mandate to reevaluate long-held assumptions about controlled substances, paving the way for more drug policies driven by data rather than dogma.

Alongside the evidence and government agencies, recent polls have found an overwhelming majority of American voters are also eager for a new approach to drug laws and responses to drug-related offenses.[19] Over 60% support ending the War on Drugs; "eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services"; repealing mandatory minimum sentences for drug crimes; and commuting, or reducing, the sentences of people incarcerated for drugs.[20] Representing one of "the few truly

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[12] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[13] *Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD*, February 9, 2024, https://news.lykospbc.com/2024-02-09-Lykos-Therapeutics-Announces-FDA-Acceptance-and-Priority-Review-of-New-Drug-Application-for-MDMA-Assisted-Therapy-for-PTSD

[14] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[15] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

[16] Herrington, *Biden Signs Defense Spending Bill Funding Psychedelic Research* Forbes.

[17] Curtis, *VA-funded psychedelic therapy trials for PTSD could save lives, veteran organization says* Fox 13 News

[18] *See e.g., Safety and Early Efficacy Studies of Psychedelic-Assisted Therapy for Chronic Pain in Older Adults (UG3/UH3 Clinical Trial Required) NOFO*

[19] ACLU. *Poll Results on American Attitudes Toward War on Drugs*. June 9, 2021. https://www.aclu.org/documents/poll-results-american-attitudes-toward-war-drugs

[20] *Id.*

bipartisan issues in American politics," the "breadth and depth of support for change suggests that there are few issues for which the nation's laws so misrepresent the preferences of the American people as for drugs."[21]

Despite these widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables continue to be based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors.[22] Congress[23] and this Commission[24] have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine.

Begin the review of the Tables by re-evaluating MDMA

Like crack cocaine, the Tables have also irrationally allocated harsh penalties for MDMA. In 2001, in response to Congress's directive in the Ecstasy Anti-Proliferation Act, the Sentencing Commission increased penalties for MDMA by updating the DCT to treat one gram of MDMA as the equivalent of 500 grams of marijuana.[25] In its report to Congress explaining its reasoning,[26] the Commission relied on incomplete science and a misguided understanding of MDMA's social harms.[27] Even during the Commission's 2001 deliberations on MDMA sentencing, several scientists opposed a 1:500 ratio, arguing that a 1:10 ratio—even lower than the pre-2001 ratio—would be most reasonable.[28]

In the more than two decades since 2001, it has become even clearer the Commission relied on incomplete, and sometimes incorrect, data. For example, George Ricaurte, a key source of the Commission's data on MDMA toxicity, was forced to retract an MDMA toxicity study after it

[21] *Id.*
[22] Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021).
[23] Aris Folley, *Congress Set to Tackle Crack, Powder Cocaine Sentencing Disparity Before Year's End*, December 18, 2022, https://thehill.com/business/3778680-congress-set-to-tackle-crack-powder-cocaine-sentencing-disparity-before-years-end/
[24] *Change In Federal Cocaine Sentencing Policy Recommended Findings To Be Submitted To Congress*, April 5, 2002, https://www.ussc.gov/about/news/press-releases/april-5-2002
[25] USSG App. C, amend. 621 (2001).
[26] U.S. Sentencing Comm'n, *MDMA Drug Offenses: Explanation of Recent Guideline Amendments* (2001).
[27] See, e.g., Alyssa C. Hennig, *An Examination of Federal Sentencing Guidelines' Treatment of MDMA ("Ecstasy")*, 1 Belmont L. Rev. 267, 286 (2014).
[28] Fed'n of Am. Scientists, *Comment on the Proposed Changes to MDMA ("Ecstasy") Penalties 2* (Mar. 9, 2001), https:// www.ussc.gov/sites/default/files/pdf/amendment-process/ public-comment/200103/200103_PCpt8.pdf.

was found that he had used methamphetamine instead of MDMA.[29] At the same time, clinical studies, including those sponsored by MAPS, have shown evidence MDMA is both generally safe and potentially beneficial for mental-health treatments, including for post-traumatic stress disorder (PTSD).[30]

For years scientists, legal scholars, judges, public defenders, and activists have called out the faulty science and urged the Commission to reexamine its decision. This has included testimony from the ACLU[31] and the Federal Defenders.[32] Judicial decisions have also tasked the Commission with reexamining its MDMA guidelines.[33] In 2016, the Commission finally resolved to review the guidelines for MDMA, along with those for synthetic cannabinoids and synthetic cathinones, by conducting a multiyear study.[34] In 2017, the Commission asked for public comment on the 1:500 DCT ratio for MDMA, and on what ratio to set for a synthetic cathinone called methylone, given its similarity to MDMA.[35] Many of the same groups advocating for a reexamination of the guidelines responded to the request. The Federal Defenders again submitted testimony in support of a less punitive ratio.[36] I submitted testimony outlining in great detail the flaws in the original 2001 data and the results of research since then, writing that "the totality of evidence we have available, which is significantly more than there was when the [Commission] came to its first conclusion . . . strongly indicates that the sentencing guidelines are extremely disproportionate and in fact unrelated to MDMA's actual risks."[37]

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[29] Donald G. McNeil, Jr., *Research on Ecstasy Is Clouded by Errors*, N.Y. Times (Dec. 2, 2003), https://www.nytimes.com/2003/ 12/02/science/research-on-ecstasy-is-clouded-by-errors. html.
[30] See, e.g., Jennifer M. Mitchell et al., *MDMA-Assisted Therapy for Severe PTSD: A Randomized, Double-Blind, Placebo-Controlled Phase 3 Study*, 27 Nature Med. 1025 (2021).
[31] ACLU, *Comments on Proposed Amendments to Sentencing Guidelines*, Policy Statements, and Commentary 1 (Mar. 19, 2012), ussc.gov/sites/default/files/pdf/amendment-process/ public-comment/20120329/ACLU%20Comments%20to%20 USSC%20on%20BZP%20MDMA%20and%20Immigration% 203-19-12s.pdf.
[32] Fed. Pub. & Cmty. Defs., *Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2014* (July 15, 2013), https://www.fd.org/sites/default/files/ criminal_defense_topics/essential_topics/sentencing_ resources/defender_recommendations/defender-comment-on-usscs-notice-of-proposed-priorities-for-amendment-cycle- ending-may-1-2014.pdf.
[33] See, e.g., U.S. v. McCarthy, 2011 WL 1991146 (S.D.N.Y. May 19, 2011); *U.S. v. Trung Dinh Phan*, Case No. CR10-27-RSM (W.D. Wash. May 3, 2011).
[34] U.S. Sentencing Comm'n, *Final Priorities for Amendment Cycle*, 81 Fed. Reg. 58004, 58005 (Aug. 24, 2016).
[35] U.S. Sentencing Comm'n, *Sentencing Guidelines for United States Courts*, 82 Fed. Reg. 28382, 28383–84 (June 21, 2017).
[36] Fed. Def. Sent'g Guidelines Comm., *Public Comment on MDMA/Methylone/Synthetic Cathinones* (Aug. 7, 2017), https://www.fd.org/sites/default/files/criminal_defense_ topics/essential_topics/sentencing_resources/defender_recommendations/defender_comments_on_mdma.methylone .synthetic_cathinones_aug_2017.pdf.
[37] Rick Doblin, *Testimony to the U.S Sentencing Commission Re: MDMA* (Mar. 15, 2017), https://maps.org/ wp-content/uploads/2020/07/RDoblin-MDMA-USSC- Statement-MDMA.pdf.

In 2018, when amending the guidelines in response to its multi-year study, the Commission excluded any mention of MDMA from its amendments or its reasoning.[38] In fact, it set a 1:380 ratio for all synthetic cathinones, including methylone, without any reference to its prior call for comments on the relationship between MDMA and methylone.[39] Since then, the Commission has not indicated any further movement on the issue of MDMA's DCT entry.

Bring the Tables in line with modern science

For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the drug or other substance," potentially positive "pharmacological effect[s],"[40] and likelihood of misuse and dependence[41].

MAPS and countless other organizations across the political spectrum and around the country are coming together to organize and inform the USSC and the general public about the importance of this issue. The United States is long overdue for sentencing reform, and the urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Sincerely,
Rick Doblin, Ph.D.
Founder & President, MAPS

[38] USSG App. C, amend. 807 (2018).
[39] *Id*.
[40] United States Drug Enforcement Administration. *The Controlled Substances Act*. https://www.dea.gov/drug-information/csa
[41] Any inquiry should take into account ways harm reduction approaches, public education, and proven methods of avoiding harm and use among minors can reduce the likelihood of misuses and dependence. Revising the Tables would likely lead to a reduction in resources spent on enforcement, prosecution, and punishment. Those resources could then be reinvested to bolster effective harm reduction and public education efforts. (*See*, Counsel of State Governments, *Justice Reinvestment Initiative*, https://csgjusticecenter.org/projects/justice-reinvestment/#:~:text=Justice%20Reinvestment%20is%20a%20data,Justice%20Reinvestment)

MUSLIM LEGAL FUND
of America

JUSTICE | COURAGE | EXCELLENCE | ACCOUNTABILITY |COMMUNITY
To advance equality and justice for American Muslim organizations and individuals
by promoting legal compliance and protecting their rights in matters concerning national
security law.

July 15, 2024

Honorable Judge Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Comment on U.S.S.C. Proposed Priorities and Recommendation for New Priority and Associated Research Agenda re the Terrorism Enhancement (§ 3A1.4) for Amendment Cycle Ending 2024-2025

Dear Judge Reeves,

The Muslim Legal Fund of America (MLFA) is a 501(c)(3) non-profit legal organization dedicated to defending civil rights and liberties in national security cases through federal litigation. MLFA has a federal criminal defense department that represents clients in federal courtrooms across the country in national security cases (often material support of terrorism offenses, obstruction of justice, false statements in a terrorism investigation, distribution of bomb-making instructions online and others). These cases are selected for the unique constitutional issues they present, including prosecutorial overreach and discriminatory application and enforcement of federal law and the Sentencing Guidelines.

MLFA welcomes the Commission's intention to focus on furthering the Commission's statutory purposes and missions as set forth in the Sentencing Reform Act, including:

- Establishing "sentencing policies and practices that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities." 28 U.S.C. § 991(b)(1)(B).
- Measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.
- Requesting such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law. 28 U.S.C. § 995(a)(8).
- Serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices. 28 U.S.C. § 995(a)(12)(A).
- Making "recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be

necessary and advisable to carry out an effective, humane and rational sentencing policy." 28 U.S.C. § 995(a)(20).
- Holding "hearings and calling witnesses that might assist the Commission in the exercise of its powers or duties." 28 U.S.C. § 995(a)(21).

In response to the Commission's request for comment on what work it should prioritize this amendment cycle, and for recommendations on specific avenues of research and policymaking that would serve to fulfill the above goals, MLFA respectfully submits the following comments and proposals regarding research and amendment of the Terrorism Enhancement (U.S.S.G. § 3A1.4).

First, we submit comment regarding: the impact of the Terrorism Enhancement; its intended versus actual application; lack of empirical evidentiary basis; its undermining of the purposes of sentencing and the objective factors under 18 U.S.C. § 3553(a); and its discriminatory application and resulting disparate sentencing.

The Terrorism Enhancement (§ 3A1.4) is:

- the most severe sentencing guideline in use (second only to the genocide/crimes against humanity guideline, § 3A1.5, which is not in use);

- the Enhancement's arbitrary automatic designation as a career offender strips away any effective consideration of the 18 U.S.C. § 3553(a) factors and results in unwarranted sentence disparities for similarly situated defendants;

- it is a victim-related adjustment that is largely applied to defendants whose crimes had no victims (at its inception the Commission anticipated it would be rarely used, but it is applied in numerous cases annually, including 100% of material support cases which include attempt and conspiracy offenses conducted entirely online in sting operations with FBI agents);

- it lacks any evidentiary basis to support its draconian treatment of Muslims convicted of terrorism-related offenses— recent data suggests that defendants who receive the enhancement have one of the lowest recidivism rates, which rebuts the unsubstantiated assumption of their inability to be rehabilitated;

- of significant concern is that the Terrorism Enhancement is discriminatorily applied largely only to Muslims convicted of crimes "calculated to influence or affect the conduct of government." But the Enhancement is rarely sought for non-Muslim[1] and White individuals and was found inapplicable where it has been sought.

[1] Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L. J. 1520, 1560 (2017), https://digitalcommons.law.yale.edu/ylj/vol126/iss5/5.

Second, MLFA proposes an interim immediate amendment to the Terrorism Enhancement to curb its most discriminatory and harmful applications and limit the Enhancement to what was originally intended by the Commission. Third, MLFA recommends a research agenda for the Commission to study the Enhancement. After conducting the proposed research, MLFA recommends significantly reforming the Terrorism Enhancement by removing the automatic designation of Category VI criminal offender score, removing the mandatory offense level minimum of 32, and including an application note that explains the Enhancement is to be used only in cases of actual violence with identifiable victims.

Specifically, MLFA proposes:

- While conducting appropriate data collection, analysis, and research on the use of the Terrorism Enhancement (§ 3A1.4), amend the use of the Terrorism Enhancement to limit its application to the rare case of actual terrorism with identifiable victims, as originally intended. Currently § 3A1.4 is applied in almost every single material support of terrorism case, including attempts and conspiracies largely driven through FBI sting operations online with minors and young, first-time offender, non-violent adults.

- A comprehensive research agenda for the Commission to collect and analyze data that is easily identifiable and available. The goals of this agenda should be to study the use and impact of the Terrorism Enhancement as compared to its originally intended application; collect data on the recidivism rate of various terrorism-related offenders and their actual criminal history score; study the lack of evidentiary basis for the Terrorism Enhancement's arbitrary career offender designation and its hindrance in effectively meeting the purposes of sentencing under 18 U.S.C. § 3553(a); collect and analyze data on the race, religion, and ethnicity of those whom the Terrorism Enhancement is applied to, and those whose conduct would qualify for the enhancement as currently applied but have not received it, in order to assess if the enhancement is being applied discriminatorily.

- Conduct hearings and call witnesses from relevant organizations, defendants, families, community leaders, etc. to understand the disproportionate impact and negative consequences of the enhancement.

This new proposed priority also addresses the Commission's following proposed priorities:

- Continued study and reform of the career offender guidelines (Prior Priority)
- Continued reform of the Guidelines' treatment of youthful offenders (Prior Priority)
- Further study and reform of the sentencing differences due to the trial penalty (Prior Priority)
- Continued study regarding recidivism (Prior Priority)
- Consideration of other miscellaneous issues brought to the Commission's attention (Priority #4)

I. COMMENT REGARDING TERRORISM ENHANCEMENT AND PROPOSED PRIORITIES

A. The impact of the Terrorism Enhancement (§ 3A1.4) – an arbitrary auto-designation as a career offender and a 12-point increase to at least level 32.

Terrorism-related offenses have been aggressively prosecuted in the United States since 9/11. The leading statute in the anti-terror push is the material support statute, 18 U.S.C. § 2339B, which punishes knowingly providing material support or resources to a designated foreign terrorist organization ("FTO") or attempting or conspiring to do so. The government frequently uses the material support statute because convictions under the law do not require that the defendant engaged in terrorism, aided or abetted terrorism, or conspired to commit terrorism. This endlessly broad statute, along with many others (false statements, and obstruction of justice)[2], has resulted in unjust convictions and unjustifiably lengthy sentences.

The statutory maximum of a § 2339B conviction is 20 years. The sentences prescribed for material support independently reflect Congress's intent to deter and punish terrorism-related crimes. If the offense results in the death of any person, the required prison sentence is any term of years or for life. The guideline for material support offenses, USSG § 2M5.3, carries a base offense level of 26. If the offense involved dangerous weapons, firearms, explosives, funds to purchase any of those items, or funds or other support believing they will be used to commit a violent act, 2 levels are added.[3] Assuming a Criminal History Category I and an offense level of 26, the advisory guideline range is 63 to 78 months; at offense level 28, the advisory guideline range is 78 to 97 months.

But these sentencing ranges are rarely ever the advisory guidelines ranges for individuals convicted under the material support statutes. The Terrorism Enhancement then, on top of the sentencing in § 2339B (and other statutes), increases the sentence for individuals convicted of "a federal crime of terrorism," i.e., crimes "calculated to influence or affect the conduct of government." *See* U.S.S.G § 3A1.4 (adopting the definition of "Federal Crime of Terrorism" in 18 U.S.C. § 2332b(g)(5)). This adds 12 more levels to the offense level, or increases the level to 32, whichever is higher. And regardless of the individual's actual criminal history, the enhancement assigns them to Criminal History Category VI, usually reserved for career offenders. *See United States v. Segura-Del Real*, 83 F.3d 275, 277 (9th Cir. 1996) ("Defendants are placed in category VI because they are the most intractable of all defendants."). The Terrorism Enhancement is the reason that individuals convicted of terrorism-related conduct, no matter how minor, receive abnormally long criminal sentences.

After applying the Terrorism Enhancement, the minimum possible Guidelines range for any offense is 210 to 262 months—that is, 17.5 to 21.8 years.[4] But more typically, the

[2] For example, 18 U.S.C. § 2339A, 18 U.S.C. § 2339C, but the Terrorism Enhancement is also applied to false statements (1001(a)), obstruction of justice, and other conduct that does not warrant the extreme treatment of the Terrorism Enhancement.

[3] § 2M5.3(b)

[4] U.S. SENT'G GUIDELINES MANUAL § 2X1.1(b), 406-07 tbl. (U.S. SENT'G COMM'N 2023).

enhancement leads to a recommended sentence of thirty years to life or the statutory maximum, whichever is less. The result: it can put a criminal defendant away for thirty years to life for a crime that would otherwise result in a sentence of around five years.[5] In an internal analysis of each report on national defense-related federal offenders, the average increase of sentence length when applying the Terrorism Enhancement is approximately an additional 10.2 years.[6] This is regardless of any mitigating or aggravating factors, non-violence of the crime, the youth and rehabilitative capacity of the defendant, or any of the other factors or purposes of sentencing.

B. The Terrorism Enhancement does not consider, and actually undermines, the objective factors required under 18 U.S.C. § 3553(a).

Courts are required to consider seven factors in developing an appropriate sentence, including the nature of the offense and the characteristics of the defendant. § 3553(a)(1). The Terrorism Enhancement violates 28 U.S.C. § 991(b)(1)(A) and 991(b)(1)(B)—and undermines 18 U.S.C. § 3553(a)—as its express language and application suggests the Commission does not advise courts to follow the § 3553(a) factors for terrorism-related cases. In fact, none of the § 3553(a) factors are encompassed within or referenced by the enhancement at all. Instead, the Terrorism Enhancement automatically increases the level of the offense and the Criminal History Category, neither of which are based on an evaluation of the defendant's conduct or characteristics or the need for the sentence imposed. *See* 18 U.S.C. § 3553(a).

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[5] *Id.*

[6] More research, separated by offense type, violent or non-violent, race, and religion is necessary to see the disparate impact on young, non-violent, Muslim, first-time offenders, but the available data demonstrates at least an average 10-year increase in offenses where the Terrorism Enhancement is applied.

In FY 2013 the average sentence for a national defense offender without the Terrorism Enhancement was 94 months, with it it was 208 months, with a difference of 114 months between the two averages. In FY 2017 the average sentence for a national defense offender without the Terrorism Enhancement was 66 months, with it, it was 176 months, a difference of 110 months. In FY 2018 the average sentence for a national defense offender without the Terrorism Enhancement was 60 months, whereas with the Enhancement, it was 181 months, with a difference of 121 months between the two averages. In Fiscal Year 2021 the average sentence for a national defense offender without the Terrorism Enhancement was 40 months, whereas with the Enhancement, it was 134 months, with a difference of 94 months between the two averages. In Fiscal Year 2022 the average sentence for a national defense offender without the Terrorism Enhancement was 47 months, whereas with the Enhancement, it was 188 months, with a difference of 141 months between the two averages. After averaging the differences of the averages, the ultimate average difference between a sentence with and without the Terrorism Enhancement is estimated at 122.14 months or about 10.19 years. *See United States Sentencing Commission Quick Facts on National Defense Offenders Fiscal Year 2013* (July 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_National_Defense.pdf; *See United States Sentencing Commission Quick Facts on national Defense Offenders Fiscal Year 2017* (July 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY17.pdf; *See United States Sentencing Commission Quick Facts on National Defense Offenders Fiscal Year 2020* (July 2021), https://www.ussc.gov/research/quick-facts/national-defense#:~:text=(July%202023)%20In%20fiscal%20year,13.2%25%20since%20fiscal%20year%202018; *See United States Sentencing Commission Quick Facts on National Defense Offenders Fiscal Year 2021* (July 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY20.pdf; *See United States Sentencing Commission Quick Facts on National Defense Offenders Fiscal Year 2022* (July 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY21.pdf

In the context of a material support offense under 18 U.S.C. § 2339A or § 2339B, the Terrorism Enhancement would not direct a court to consider objective factors, such as the amount or kind of support given, whether the support was choate or inchoate, the defendant's actual role in the terrorist activity, or the extent of harm caused by the defendant's support. Rather, the Enhancement hinges on a single question: was "the offense a felony that involved, or was intended to promote, a federal crime of terrorism," with "federal crime of terrorism" defined as an offense calculated to influence or affect the conduct of government. U.S.S.G. § 3A1.4(a); 18 U.S.C. § 2332b(g)(5). If the court finds, by a preponderance of the evidence, that the defendant attempted to provide material support to a terrorist or terrorist organization, then the Guidelines oblige the sentencing court to apply the Terrorism Enhancement with no adjustment for mitigating or aggravating conduct. *See United States v. Awan*, 607 F.3d 306, 317 (2nd Cir. 2010) (citing 18 U.S.C. § 2332(b)(g)(5)(A)).

In reality, the type of criminal conduct subject to the Enhancement varies significantly: from planning and participating in a terrorist attack that kills many people (i.e. what would likely be accompanied by life in prison to capital punishment), to making false statements to law enforcement officials (i.e. punishable by a maximum five-year prison sentence). *See e.g., United States v. Benkahla*, 530 F.3d 300, 304, 307 (4th Cir. 2008) (applying the Terrorism Enhancement, the defendant's sentence for perjury was increased from approximately three years to 10-12 years, or up to four times the normal length for perjury). This variance in conduct is not accounted for in the Terrorism Enhancement and the resulting Guidelines range is thus often inconsistent with the statutes criminalizing and punishing the conduct. *Id.*[7]

Moreover, the Terrorism Enhancement directly contradicts the language of the material support statutes, which acknowledge that there are different levels of support requiring different punishments. For example, while § 2339A permits a maximum sentence of fifteen years, if death results from the support provided, the maximum sentence increases to life. Likewise, under § 2339C, if a defendant provides financial support with the intent or knowledge that the funds will be used in an act of terrorism, the maximum sentence is twenty years. But if someone only conceals, rather than provides, financial support, the maximum is just ten years. By contrast, the minimum recommended sentence under the Terrorism Enhancement is 17.5 years, *regardless of*

[7] A concerning trend that has emerged in national security prosecutions are cases brought after lengthy FBI sting operations conducted entirely online against minor, or young adult, Muslim teenagers— several with autism, who are then charged with attempted provision of material support based on statements they made to online covert agents agreeing to travel abroad to join a terrorist organization etc. These are speech crimes, non-violent, no victims, and instead of involving the family where there are concerns about online radicalization, FBI online agents take on the role of radicalizing these vulnerable young individuals. The Terrorism Enhancement then uniquely exposes these first-time, non-violent offenders to unwarranted lengthy sentences that lack any evidentiary basis. *See* Murtaza Hussain, *Undercover FBI Agents Helped Autistic Teen Plan Trip to Join ISIS*, THE INTERCEPT (Jan. 10, 2024, 3:37:00 PM), https://theintercept.com/2024/01/10/fbi-sting-isis-autistic-teen/; *see also* Austen Erblat, *Castle Rock teen with mental health issues arrested, accused of trying to join ISIS*, CBS News Colorado (July 19, 2023, 4:31:00 AM), https://www.cbsnews.com/colorado/news/castle-rock-teen-mental-health-issues-arrested-accused-trying-join-isis/; *see also* Murtaza Hussain, *The FBI Groomed a 16 year-old with "Brain Development Issues" to Become a Terrorist*, The Intercept (June 15, 2023, 9:01:00 AM), https://theintercept.com/2023/06/15/fbi-undercover-isis-teenager-terrorist/

the type of material support provided.[8] While the material support statutes' variation in sentencing shows that Congress intended for sentences to be "proportional to the culpability of the conduct, to the injury that can be directly attributed to a defendant's actions, and to the nature of the organization's actions," the Terrorism Enhancement treats an individual who provides any type of material support as harshly as the terrorist who himself commits violent acts.[9,10]

These concerns were shared with the Commission in 1997 when it sought public comment on codifying the emergency amendment that implemented § 3A1.4 to the Antiterrorism and Effective Death Penalty Act of 1996. In response, the American Bar Association Criminal Justice Section's Committee submitted a comment noting, "…we remain uncomfortable with U.S.S.G.§ 3A1.4 … because we see it as violative of the basic structure of the guidelines. We believe that the existing provisions in Chapter Two and Chapter Four, coupled with the ability to depart for relevant offense and offender characteristics, should be sufficient to address these clearly more serious crimes of terrorism. Further, in the absence of data and/or other evidence speaking to the inadequacy of the current provisions and mechanisms, we cannot support the establishment of a mandatory minimum of 210 months for all such crimes committed by all offenders (including those with no criminal history points)."[11] Those concerns have been born out in the uniquely harsh, disparate, and inequitable sentencing of these cases.

C. The Terrorism Enhancement Functions as a Mandatory Minimum in Terrorism-Related Cases and is Presumed Necessary and Reasonable.

Although the Guidelines were deemed advisory in *Booker*, because sentencing courts are required to consider them and must provide a sufficient justification for departing from them, they largely continue to act as mandatory.[12] *See Rita v. United States*, 551 U.S. 338, 366 (2007) (Stevens, J., concurring) ("I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in Booker."). Perhaps nowhere is this more evident than with the Terrorism Enhancement. Sentencing courts start from a place of little experience with terrorism-related cases, like the district judge noted in *United*

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[8] U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2023) 406-07 tbl.

[9] James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51, 100, 116 (2010).

[10] Attachment 1 is a table demonstrating the wide ranging sentences for similar types of offenders subject to the Terrorism Enhancement. The result is disparate and dissimilar sentencing for similar offenses.

[11] *See* American Bar Association Criminal Justice Section's Committee on the United States Sentencing Guidelines, Public Comment on March 1997 United States Sentencing Commission Proposed Amendment 5 (March 1, 1997), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/199703/199703_PCpt7.pdf.

[12] *See* United States Sentencing Commission, *Federal Sentencing: The Basics*, 3 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf ("[T]he average sentence imposed for all cases has closely tracked the average guideline range—both before and after *Booker*.").

States v. Said Azzam Rahim (N.D. Tex. 2019).[13] They rely on the Terrorism Enhancement in the Guidelines based on the assumption that the Commission, with superior knowledge and data, must have created the Terrorism Enhancement for some logical and substantiated reason. *See Gall v. United States*, 552 U.S. 38, 46 (2007) (explaining that the Guidelines are the "product of careful study based on extensive empirical evidence"). While this assumption is inaccurate,[14] terrorism defendants then receive severe punishments that, when reviewed by an appellate court, are given a "presumption of reasonableness." *See Rita*, 551 U.S. at 347.

In other words, because the sentences are within the Guidelines range, appeals courts typically defer. It seems that the only time appellate courts have stepped in is to overturn sentences as too lenient when district judges vary downward from the Guidelines range created by the Terrorism Enhancement.[15] *See United States v. Ressam,* 679 F.3d 1069 (9th Cir. 2012); *id*. at 1106 (Schroeder, J., dissenting) ("The majority's implicit assumption that terrorism is different . . . flies in the face of the Congressionally sanctioned structure of sentencing that applies to terrorism as well as all other kinds of federal criminal offenses."); *United States v. Jayyousi*, 657 F.3d 1085, 1117 (11th Cir. 2011) (vacating sentence which varied downward from Guidelines range and remanding with instructions to increase sentence into range of 360 months to life). Thus, to call the Terrorism Enhancement "advisory" is to ignore reality—that no matter the route taken, we end up right back at applying the Terrorism Enhancement's automatic offense level and Criminal History Category increases without regard for the defendant's conduct or characteristics.

As this Commission has noted in other cases, mandatory minimums are counterproductive and inconsistent with the guideline system. The Terrorism Enhancement's mandatory minimum offense level of 32 and mandatory Criminal History Category VI violates the Commission's purposes and missions to: establish policies that assure meeting the purposes of sentencing, provide certainty and fairness, and avoid unwarranted sentencing disparities. 28 U.S.C. 991(b)(1)(A)-(b)(1)(C). The Guidelines are set up so that chapters two and three address the offense conduct; and Chapter Four captures the defendant's criminal history. Under the Terrorism Enhancement, every defendant has the same Criminal History Category, which renders Chapter Four meaningless and has resulted in unwarranted disparity between defendants with a serious criminal record and defendants with little to no criminal record.

D. The Sentencing Commission's Analysis and Recommended Reforms of the Career Offender Guideline Should be Applied to the Terrorism Enhancement.

Chapter Four of the Guidelines classifies defendants by Criminal History Category based on their number of past offenses because, according to the Commission, courts should impose a sentence that will "protect the public from further crimes of the defendant" (18 U.S.C. § 3553(a)), and "repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation."

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[13] *United States v. Said Azzam Rahim*, 3:17-cr-00169 (N.D. Tex. 2019), Doc. 180, Transcript of Sentencing Hearing, 69 ("Mr. Rahim, we don't see many cases like this here. We might do maybe one case a year for the various courts . . .").

[14] *See* discussion *infra* Section I. E.

[15] *See* Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 525 (2014). *See also* Said, *supra* note 8, at 525-27.

18 U.S.C. § 4A1.1, Introductory Comment. "Prior convictions . . . serve under the Guidelines to place the defendant in one of six 'criminal history' categories; the greater the number of prior convictions, the higher the category. . . . the Guidelines seek to punish those who exhibit a pattern of 'criminal conduct.'" *Nichols v. United States*, 511 U.S. 738, 751 (1994) (Souter, J., concurring). In other words, the Criminal History Category is intended to increase sentences for "career offenders."

The Sentencing Commission has studied the career offender guideline (§ 4B1.1) which implements a Congressional directive instructing the Commission to set the guideline range for offenders with specified instant and prior convictions at or near the statutory maximum. A defendant qualifies as a career offender if (1) the defendant was at least eighteen years old at the time he or she committed the instant offense of conviction; (2) the instant offense is a felony that is a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[16]

In its analysis, the Sentencing Commission explored concerns that the career offender guideline does not meaningfully distinguish among career offenders. That same concern applies to the Terrorism Enhancement. The career offender portion of the Terrorism Enhancement is significantly more problematic than section 4B1.1 because it is applied to first-time, non-violent offenders regularly. Section 4B1.1, at least requires a present felony, as well as two prior felonies that were either a *crime of violence* or for a controlled substance offense.

Importantly, the Commission found clear differences between offenders who had drug trafficking only offenses, violent only offenses, and mixed offenses. The Commission found that "career offenders who have committed *a violent instant offense or a violent prior offense generally have a more serious and extensive criminal history, recidivate at a higher rate* than drug trafficking only career offenders, and are more likely to commit another violent offense in the future."[17]

Based on its findings, the Sentencing Commission concluded that the career offender directive is best focused on those offenders who have committed *at least one "crime of violence."* The Commission recommended that "Congress amend the directive to reflect this principle by no longer including those who currently qualify as career offenders based solely on drug trafficking offenses" and noted that such "reforms would help ensure that federal sentences better account for the severity of the offenders' prior records, protect the public, and avoid undue severity for certain less culpable offenders."[18]

[16] United States Sentencing Commission, *Guidelines Manual*, § 4B1.1 (Nov. 2023).

[17] U.S. SENT'G COMM'N, REPORT TO CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 26 (2016).

[18] *Id.* at 3.

The same findings apply to the Terrorism Enhancement, which *pretends* that first-time offenders are career offenders.[19] There is no evidentiary basis for the harsh impact of the enhancement.[20] In fact the evidence in the aftermath of these prosecutions reveals what the Commission has already learned about "career offenders"—that past crimes of violence are better indicators of recidivism, and non-violence indicates a much lower risk of recidivism. Below, MLFA requests that the Commission recommend a similar amendment to Congress regarding the terrorism enhancement as it begins a recommended research agenda that can inform a more complete amendment and reform of § 3A1.4 in the future.

[19] None of the other "Victim-Related Adjustments" result in an automatic Criminal History Category increase. *See* U.S.S.G §§ 3A1.1-3.

[20] Note that these defendants are also disqualified from consideration as zero-point offenders. The Commission stated that establishing § 4C1.1, Adjustment for Certain Zero-Point Offenders, "was informed by its studies of recidivism among federal offenders," among other extensive data analyses of offenders relating to their criminal histories. However, none of these studies or reports on recidivism establish an empirically proven basis for predicting that terrorism-related defendants are of higher likelihood to reoffend. In fact, the vast majority of these offenders are first-time offenders, and the vast majority of Muslim first-time offenders are non-violent—both traits the Commission have found correlate to the lowest likelihood for recidivism. *See Recidivism of Federal Offenders Released in 2010* (Released 2010, Updated Feb. 10, 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220210_Recidivism-Violence.pdf; ; *See also Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf; *See also Recidivism and the "First Offender"* (May 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf; *See also A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104_Recidivism_Salient_Factor_Computation.pdf; *See also Recidivism Among Federal Offenders: A Comprehensive Overview* (March 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf; *See also United States Sentencing Commission Report to Congress: Career Offender Sentencing Enhancements* (August 2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf; *See also The Past Predicts the Future: Criminal History and the Recidivism of Federal Offenders* (Mar. 9, 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-CH.pdf; *See also Recidivism Among Federal Offends Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* (Mar. 28, 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf; *See also The Criminal History of Federal Offenders* (May 17, 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180517_criminal-history.pdf; *See also Recidivism Among Federal Violent Offenders* (Jun. 21, 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf; *See also Length of Incarceration and Recidivism* (April 29, 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220621_Recidivsm-SentLength.pdf; *See also An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* (July 11, 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf

E. The Empirical Evidence Does not Support Treating and Sentencing First-Time Terrorism Offenders like Career Offenders.

According to the Commission, "the guidelines represent an approach that begins with, and builds upon, empirical data." U.S.S.G. Part A Introduction and Authority (2023) at 5.[21] Indeed, the Supreme Court has repeatedly claimed that the reason courts should and do look to the Guidelines in imposing fair sentences is because the Commission develops the Guidelines by using empirical data. *See Rita*, 551 U.S. at 349 (outlining the "empirical approach" that the Sentencing Commission used to structure the Sentencing Guidelines); *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007) (The Commission "has the capacity courts lack to 'base its determinations on empirical data and national experience. . . .'"). Despite this imperative, there was little empirical data on terrorism sentences when the Commission promulgated the Terrorism Enhancement in 1994.[22]

In nearly thirty years since the inception of the most extreme enhancement in the Guidelines, the Commission has not collected or studied the data to assess if any evidentiary basis exists to support its broad application, or whether it has resulted in unwarranted sentence disparities. Instead, the Terrorism Enhancement was created on the unsubstantiated assumption that terrorism defendants, no matter their individual situation, were so different from other defendants that an extreme increase in Criminal History Category was necessary across the board.[23] At the time, neither Congress nor the Commission could have envisioned how a group like ISIS would use the internet to ensnare individuals online into making verbal statements of support, offers of online financial support, or discussions about traveling abroad etc., thereby exposing first-time non-violent offenders to statutory maximum sentences.

Moreover, the evidence since 1994 strongly discredits the logic of the Terrorism Enhancement's blanket increase in Criminal History Category, particularly where the defendant is a first-time offender. According to the Commission, individuals with no criminal record have the lowest rate of recidivism.[24] One study cited by the Commission in 2004 determined that 93.2% of

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[21] The United States Sentencing Commission maintains a "mission of implementing data-driven sentencing policies." *Amendment 821 to the United States Sentencing Guidelines* (Nov. 1, 2023), https://www.ussc.gov/guidelines/amendment/821

[22] *See Brown*, *supra* note 2, at 547.

[23] The belief that defendants in terrorism-related cases cannot be rehabilitated because of how serious their conduct is presumably sourced in the outrage and rhetoric that officials of the United States government have used in reference to them. When President Bush signed the infamous Patriot Act of 2001 into law, he remarked that terrorists could not "be reasoned with" because they "have no conscience." *Bush Signs Anti-Terrorism Legislation*, Wash. Post. (Oct. 25, 2001), https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushtext_102601.html. Courts have echoed these unsubstantiated claims. *See United States v. Segura-Del Real*, 83 F.3d 275, 277 (9th Cir. 1996) ("Defendants are placed in category VI because they are the most intractable of all defendants.").
See also Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 Yale L.J. 1520, 1537 (2017); *See also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1214, 1303.

[24] *See* Sameer Ahmed, *Is History Repeating Itself: Sentencing Young American Muslims in the War on Terror*, 126 Yale L. J. (2017), https:// digitalcommons.law.yale.edu/ylj/vol126/iss5/5.

first-time offenders did not reoffend.[25] Based on this evidence, for non-terrorism defendants without a criminal history, courts regularly impose sentences below the advisory Guidelines range because they recognize that a lesser prison sentence is nonetheless a significant punishment and deterrent for someone who has never experienced prison.[26] There is *no evidence* however, that terrorism-related defendants are an exception, or reoffend at higher rates. To the contrary, the available data shows that individuals convicted of terrorism-related offenses do not reoffend at higher rates than those convicted of other crimes. Scott Shane, Beyond Guantánamo, a Web of Prisons for Terrorism Inmates, N.Y. TIMES (Dec. 10, 2011), https://www.nytimes.com/2011/12/11/us/beyond-guantanamo-bay-a-web-of-federal-prisons.html.

Of more than 300 prisoners who had completed terrorism sentences since 2001 (up to 2011), "Justice Department officials and outside experts could identify only a handful of cases in which released inmates had been rearrested, a rate of relapse far below that for most federal inmates . . ." *Id.* Thus, "it appears extraordinarily rare for the federal prison inmates with past terrorist ties to plot violence after their release." *Id.* Because the Terrorism Enhancement automatically increases a defendant's Criminal History Category to VI, the fact that the defendant is a first-time offender with a low likelihood of recidivism is not only ignored but actually erased.

Courts scrutinizing this issue agree that the complete lack of evidence is a weak basis for the Terrorism Enhancement. Senior Judge George O'Toole, Jr., presiding over *United States v. Mehanna*, Transcript of Disposition, No. 09-10017-GAO (D. Mass. 2012), criticized the mandatory Criminal History Category VI as "too blunt an instrument to have any genuine analytical value" and "fundamentally at odds with the design of the Guidelines" because it "imputes a fiction into the calculus." *Mehanna*, Sentencing Transcript (Doc. 480) at 8-9. Moreover, the Court in *United States v. Jumaev* refused to apply the enhancement because it "is not backed by any empirical evidence" and because "treating all 'terrorists' alike is impermissible under our sentencing paradigm." 2018 WL 3490886, *10, CR 12-0033 JLK (D. Colo. July 18, 2018). And the Judge Charles R. Breyer explained in *United States v. Alhaggagi:*

> [T]he enhancement's treatment of criminal history-automatically assigning to all terrorism defendants a criminal history category of VI is inappropriate based on the seriousness of the crime, inappropriate based on assumptions about recidivism, and inappropriate as to this Defendant, warranting a downward departure.

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[25] *Recidivism and the "First Offender,"* U.S. SENT'G COMM'N 26 (May 2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/20040 5_Recidivism_First_Offender.pdf [http://perma.cc/MLD8-RQU8].

[26] *See, e.g.*, *United States v. Willis*, 479 F. Supp. 2d 927, 937 (E.D. Wis. 2007) (varying downwards because the "sentence provided a substantial punishment for someone . . . who had never before been to jail and who engaged in no violence").

2019 U.S. Dist. LEXIS 37889, 2019 WL 1102991 at *16 (N.D. Cal. March 8, 2019). There, Judge Breyer noted that "criminal history category has nothing to do with how serious the crime is" and that there was no "evidence [that he was aware of] to show that the criminal history category should be increased to Level VI because of the seriousness of the crime". He concluded that §3A1.4(b) "[made] literally no sense." *United States v. Alhaggagi,* Sent. Tr. 3:17, No. 146, at 119-120; *see also United States v. Khan*, No. 4:15-cr-00263, Judgment at Doc. 126 (S. D. Tex. July 2, 2018), rev'd and remanded, 938 F. 3d 713 (5th Cir. 2019), resentenced (sentencing the defendant to 18 months because he had no criminal history and terminated his plans).[27]

Courts applying the Terrorism Enhancement, on the other hand, conspicuously fail to cite any evidence to justify imposing the Guidelines' harsh sentences in terrorism-related cases.[28] They seek to justify its steep increase by arguing, with no evidence, that "terrorists[,] [even those] with no prior criminal behavior[,] are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." *Jayyousi*, 657 F.3d at 1117; see also *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003). This belief, "that terrorism is different, maybe even exceptional" is premised on "a type of visceral outrage at all conduct linked to terrorists that can taint the individualized and careful process that is supposed to go into a criminal sentencing" and, despite the lack of evidence, is used to "justif[y] a departure from the normal standards."[29] Not only is this belief unsupported, its resultant sentencing enhancement also causes harm to the Muslim American community.[30]

F. Discriminatory Application of the Terrorism Enhancement to Muslim Individuals and Court Refusal to Apply the Enhancement to Non-Muslim, White Offenders where Applicable.

While the Terrorism Enhancement is written for broad application, it has been largely applied only to Muslim defendants, or offenses involving Muslim organizations.[31] The Terrorism Enhancement is intended to dramatically increase the punishment of offenses that were "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." This can apply to the list of enumerated statutes in § 3A1.4, but Application Note 4 to § 3A1.4 also allows for an upward departure—equivalent to what would result if the

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[27] *United States v. Khan* (S.D. Tex. 2019) (initial Court did not apply the Terrorism Enhancement to Khan's sentence), rev'd, 5th Cir. (2021). The government appealed a second time, the Fifth Circuit reversed and remanded again, the original judge was recused, and the new sentencing judge sentenced the defendant to 12 years.

[28] McLoughlin, *supra* note 6, at 112-15.

[29] Said, *supra* note 8, at 521.

[30] Ahmed, *supra* note 15, at 1556. "These [similar] negative effects include (1) increasing discrimination by reinforcing stereotypes of African Americans and Muslims as inherently dangerous, (2) furthering distrust of law enforcement among African Americans and Muslims, . . . and (3) failing to effectively rehabilitate drug and terrorism offenders and reintegrate them into society." *Id*.

[31] Trevor Aaronson & Margot Williams, *Trial and Terror*, THE INTERCEPT (last updated June 14, 2023), Trial and Terror (theintercept.com). This online database spotlights 992 terrorism-related prosecutions by the Department of Justice. Of these 992, only ~95 cases are against non-Muslim offenders/non-Muslim organizations.

enhancement was applied—for any other offense that "was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." The upward departure can also apply to any of the enumerated statutes where the terrorist motive was to intimidate or coerce a civilian population, rather than influence the conduct of government.

Many of the January 6th convictions were based on a clear and established intent to "influence or affect the conduct of government by intimidation or coercion, or retaliation," and would thus qualify for application of the Terrorism Enhancement or the upward departure it provides for in Application Note 4.

On January 6, 2021, a mob of President Donald Trump's supporters went to the U.S. Capitol, attempting to interfere with the certification of electoral votes from the 2020 presidential election. The rioters assaulted the Capitol police force, and looted and invaded the complex for several hours. They destroyed property and sent members of Congress and their staff into hiding in offices and bunkers. More than 100 members of law enforcement were injured.[32]

The Justice Department however has only sought the Terrorism Enhancement in a couple of the over 900 prosecutions.[33] Courts have not applied the enhancement to any of the January 6th rioters. The lack of sentencing enhancements sought for January 6th domestic extremists, however, is not an isolated case but rather a continuing disparity.

In September 2023, the University of Maryland's National Consortium for the Study of Terrorism and Responses to Terrorism (START) published research finding that sentencing enhancements were disproportionately applied to international terrorism cases, resulting in sentencing disparities between international and domestic terrorism defendants.[34] Despite the Terrorism Enhancement not requiring a transnational element to the crime, researchers found that that the Terrorism Enhancement was sought in approximately 60% of international terrorism cases; similar sentencing penalties were sought only in 15.4% of domestic terrorism cases.

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[32] History.com Editors, *U.S. Capitol Riot*, HISTORY.COM (last updated Dec. 20, 2022), https://www.history.com/this-day-in-history/january-6-capitol-riot.

[33] *United States v. Reffitt*, (D.D.C. 2022) Case number: 1:21-cr-00032 (tried to storm the Capitol while armed with a gun. The judge refused to apply the Terrorism Enhancement and sentenced Reffitt to just over 7 years*.); United States v. McCaughe*y, III et al (D.D.C. 2023), Case number: 1:21-cr-00040
(Judd launched a lit object at a tightly packed tunnel of law enforcement and the mob in an attempt to clear a path for rioters. The judge did not apply the Terrorism Enhancement, sentenced to 32 months.).
See also Josh Gerstein, *Why DOJ is Avoiding Domestic Terrorism Sentences for Jan. 6 Defendants*, POLITICO (Jan. 4, 2022, 4:30 AM), https://www.politico.com/news/2022/01/04/doj-domestic-terrorism-sentences-jan-6-526407.

[34] Michael A. Jensen et al., *Prosecuting Terror in the Homeland: An Assessment of Sentencing Disparities in United States Federal Terrorism Cases* (2023), https://www.start.umd.edu/sites/default/files/publications/local_attachments/Prosecuting%20Terror%20in%20the%20Homeland%20Research%20Brief.pdf (START's findings come from an analysis of 344 federal terrorism prosecutions—118 international terrorism cases and 226 domestic terrorism cases—between 2014 and 2019; "Cases were classified as international terrorism if the defendants had links to, or were acting in support of, terrorist groups and movements whose bases of operations and primary activities are located outside of the territorial boundaries of the United States…Cases were classified as domestic terrorism if the defendants had links to, or were acting on behalf of, groups or other movements that operate primarily within the territorial jurisdictions of the United States.")

The discriminatory application of the Terrorism Enhancement to mostly Muslims, or offenses involving Muslim organizations, has long been established. From the available data it is also clear that Muslims are disproportionately prosecuted for attempt or conspiracy to provide material support to a foreign terrorist organization, often as the result of a sting operation; and the Terrorism Enhancement has been applied in almost 100% of material support cases.[35] Thus, in the face of the government's refusal to seek the enhancement against white, non-Muslims, and courts' refusals to apply the enhancement to white, non-Muslims whose conduct clearly warrants its application, the enhancement is now on its face discriminatory on the basis of religion.

The Sentencing Commission's tracking and reported data does not show this clear discrimination, however. The Commission only tracks race as commonly tracked in the U.S. Census. There is no category for Arab, Iranian, or Southwest Asian. More than 80% of individuals of Middle Eastern, Southwest Asian, or North African (Egypt, Morocco etc.) background, select themselves as "White."[36] Indeed, the Sentencing Commission indicates that the Terrorism Enhancement is applied to 50% "white" individuals. This is inaccurate and results in an erasure of the discriminatory impact of the Enhancement on those of Southwest Asian, Arab, and North African descent.

The Commission also does not track religion. As a result, there is currently no data from the Sentencing Commission that would alert a clearly discriminatory application of the Terrorism Enhancement to Muslim Americans or other resulting unwarranted sentencing disparities. For the reasons discussed above, religion, race/ethnicity, and violent/non-violent conduct, should be clearly tracked for this enhancement and analyzed in the context of discriminatory application.

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[35] *United States Sentencing Commission Fiscal Year 2023 Guideline Application Frequencies Chapter 3 Adjustments* (April 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2023/Ch3_Guideline_FY23.pdf

[36] Sarah Parvini & Ellis Simani, *Are Arabs and Iranians white? Census says yes, but many disagree*, LOS ANGELES TIMES (March 28, 2019), https://www.latimes.com/projects/la-me-census-middle-east-north-africa-race/. ; *See also* Abboud, Sarah et al. "The Contested Whiteness of Arab Identity in the United States: Implications for Health Disparities Research." *American journal of public health* vol. 109,11 (2019): 1580-1583. (Discussion on how "Arab classification as White leads to their cultural invisibility and perpetuates a cycle of undocumented health disparities.")

II. PROPOSED PRIORITIES, AMENDMENTS, AND RESEARCH AGENDA RE TERRORISM ENHANCEMENT

Based on the above, MLFA makes the following **five recommendations**:

1. Prioritize Data Collection, Research, and Amendment of Terrorism Enhancement to Bring it in Line with the Commission's Stated Missions and the Purposes of Sentencing.

Make amending, researching, studying, and reforming the Terrorism Enhancement (§ 3A1.4) a priority in light of unwarranted sentence disparities, new studies of the career offender guidelines, lack of empirical evidentiary basis for the enhancement, and the stated purposes and missions of the Commission.

2. Implement an Interim Application Note Limiting Application of the Terrorism Victim-Related Adjustment to Crimes with Identifiable Victims.

In the interim, as an injunctive measure based on the significant data presented here and the lack of any empirical evidentiary basis to support the enhancement, MLFA respectfully recommends that the Commission implement an Application Note to the § 3A1.4 (and any other amendments necessary to ensure consistency) that requires that as a victim-related adjustment the enhancement is "only applied in cases in which there are identifiable victim persons." Attempts and conspiracies, false statements, obstruction offenses, and other offenses that do not involve actual violence (and thus no identifiable person victim) should be excluded from application of the Enhancement. Such an amendment is more in line with the original intention of the Terrorism Enhancement as a "victim-related adjustment".

3. Proposed Research Agenda and Data Collection on the Terrorism Enhancement.

MLFA proposes the following research priorities to assist the Commission in fulfilling its stated purposes and missions:

A. Comprehensive Data Collection for Terrorism-Related Offenses

While there is evidence of the discriminatory application of Terrorism Enhancement and the resulting unwarranted disparities, it needs to be analyzed through empirical evidence. Unfortunately, a comprehensive database of terrorism-related offenses and sentencing does not currently exist.

The University of Maryland's 2023 study was the first of its kind to analyze disparities in international and domestic terrorism sentencing; however, the study does not approach whether sentencing disparities manifest along the lines of religion or race as well. Without comprehensive data and analysis, potential sentencing discrimination and disparities may stay hidden.

In addition to demographic characteristics, there is also a need for improved data collection regarding offense characteristics, such as whether a terrorism offense was a victimless crime, was violent, etc.

The Sentencing Commission is in a unique position to gather this information through obtaining the Presentence Investigation Reports (PSRs) of defendants involved in terrorism-related cases by requesting them from each United States Attorney's Office.

Accordingly, we propose that the Sentencing Commission prioritize improving data collection and transparency by tracking the following variables for all terrorism-related offenses including specifically non-violent terrorism related offenses since 1994:

- Whether an offense involved domestic or international terrorism
- Type of charge (e.g., material support of a foreign terrorism organization, obstruction of justice, false statements in a terrorism investigation, etc.)
- Sentencing enhancements sought by the government
- Sentencing enhancements received by the defendant
- Whether the offense had a victim or was a victimless crime
- Whether the offense was violent
- Whether defendant went to trial or pled guilty
- Criminal history of the defendant prior to any enhancements
- Racial identification for the defendant accounting for the fact that those of Arab, North African, and Southwest Asian descent self-select as "White" for racial identification because of a lack of other options when collecting racial data
- Religious identification of the defendant

B. Transparency and Improved Accessibility of Terrorism-Related Offense Data

MLFA commends the United States Sentencing Commission's dedication to providing public access to sentencing data via helpful online tools and reports. MLFA makes the following suggestions to increase accessibility of national security sentencing data:

- The United States Sentencing Commission's interactive data analyzer provides information regarding federal sentencing, including the number of defendants sentenced over time under a particular guideline. There is no data for offenses sentenced under the Terrorism Enhancement (U.S.S.G. § 3A1.4(a)). Incorporating this information will increase public accessibility to data regarding national security offenses.

- The United States Sentencing Commission publishes annual factsheets on National Defense offenses, including descriptive statistics. Currently, these factsheets, when reporting on the race of offenders, do not account for those of Arab, North African, and Southwest Asian descent who often self-select as "white" for racial identification because of a lack of other options.

- These factsheets also do not report on religion. Updating the descriptive statistics in these factsheets to include these variables will improve public access to relevant information

regarding terrorism offenses. We recommend that they also begin categorizing whether the offense was violent or non-violent (an essential factor for career offender guideline and recidivism rates).

C. Recidivism Studies for Terrorism Defendants

As discussed above, there is no empirical evidence to support the Terrorism Enhancement and the data that exists demonstrates that contrary to the idea that terrorism-related defendants are different, and intractably incapable of rehabilitation, they have some of the lowest recidivism rates. The Commission should study the recidivism rates of those convicted of terrorism-related crimes, similar to the recidivism study for career offenders published by the Commission in 2016,[37] in order to gather empirical evidence on whether there is any evidentiary justification for the Terrorism Enhancement.

D. Examination and Comparison of Sentences Disposed of Through Trial Versus Plea where the Terrorism Enhancement was Sought

The Commission previously proposed prioritizing further examination and comparison of sentences imposed in cases disposed of through trial versus plea. The trial penalty in terrorism-related offenses is extraordinary because of the Terrorism Enhancement. The broad applicability of the Enhancement, and its severe impact, mean that defendants feel enormous pressure to plead guilty with a cap on the potential sentence, rather than facing a statutory maximum recommend sentence after trial because of the enhancement. The Enhancement is also used as a "bargaining chip to strong-arm a desired result" and "prosecutors sometimes seek the Terrorism Enhancement against a formerly cooperative defendant if they default on a cooperation agreement. Rather than determining 'who is and who is not…a terrorist, the enhancement's practical utility is often reduced to that of a tool used to punish a lack of cooperation."[38]

Given that many of these offenders are non-violent, first-time offenders, the impact of the trial penalty in these cases is particularly harmful to the defendants and their communities. The Commission should include a comparison of sentences imposed in terrorism-related cases that went to trial versus plead guilty.

4. Recommended Hearings and Witnesses to Assist the Commission re Terrorism Enhancement

MLFA recommends that the Commission host hearings to better understand the disproportionate impact of the Terrorism Enhancement. Invited witnesses to these hearing should include stakeholders and leaders, including, but not limited to: defendants impacted by the Terrorism Enhancement, their families, Muslim community leaders, and organizations involved

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[37] U.S. SENT'G COMM'N, REPORT TO CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS (2016) https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

[38] Madeline Johl, *Activism or Domestic Terrorism? How the Terrorism Enhancement Is Used to Punish Acts of Political Protest*, 50 FORDHAM URB. L.J. 465 (2023).

in and familiar with terrorism cases like MLFA[39] (such as the Coalition for Civil Freedoms, Federal Defenders, especially those in New York, and the National Security Committee at the NACDL).

5. Revision and Amendment of the Terrorism Enhancement Based on Results of Data Collection and Research

After conducting the proposed research, MLFA recommends significantly reforming the Terrorism Enhancement pursuant to 28 U.S.C. § 994(o) and 28 U.S.C. § 994(p), by submitting the following amendments to Congress:

a. The automatic designation of Category VI criminal offender score should be removed, along with the mandatory offense level minimum of 32. The Commission should also make permanent the proposed interim Application Note that explains the enhancement is to be used only in cases of actual violence with identifiable victim persons.

b. The Commission should recommend that the 12 level increase be removed as statutory elements and other enhancements already adequately account for specific types of conduct. The arbitrary 12 level increase ignores these measures, and undoes the purposes of 18 U.S.C. § 3553(a).

c. Application Note 1 to § 3A1.4, states that a "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5), which in turn defines a "federal crime of terrorism" as "an offense that (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and (B) is a violation of [the enumerated statutes]."

d. The Commission should recommend that this definition be amended to reduce the list of enumerated offenses to include only offenses which do not already incorporate provisions for aggravating conduct.

e. The Commission should also recommend that any amended Terrorism Enhancement should only apply to conduct in which there was at least one identifiable victim person,[40] and that the defendant specifically intended to himself "influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." The specific intent requirement of the

[39] MLFA's Federal Criminal Defense Department has specialized in defending against national security prosecutions of non-violent Muslim defendants for over 20 years and has significant experience, knowledge, and insight into the use and impact of the Terrorism Enhancement.

[40] Many of the attempted provision of material support convictions state there were no victims of the offense in the PSR.

Terrorism Enhancement is the source of a circuit split among various circuits.[41] Conduct in support of a foreign terrorist organization that is indirect and unconnected to any specifically known terrorist activities should not be included (i.e. an online agreement to travel to live in the territory of an FTO, or sending donations for food, clothing, other types of aid to an FTO, providing contact information for travel to the FTO, etc.).

III. CONCLUSION

In conclusion, MLFA hopes that these issues regarding the Terrorism Enhancement and sentencing of young, Muslim, first-time offenders are studied and reformed through amendment proposals in the coming amendment cycle. We look forward to submitting additional comments on such proposals and are available to assist the Commission as it may require.

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[41] *See United States v. Amer Sinan Alhaggagi*, 978 F.3d 693 (9th Cir. 2020).

TABLE 1[42]

Table 1: Illustrating Sentencing Disparities within Terrorism Enhancement Cases						
NAME CASE #	**LOCATION**	**CHARGE**	**SENTENCE**	**AGE**	**CRIM HIST CATEGORY** [43] [44]	**VICTIM (Y/N)**[45]
ADAM DANDACH 8:14-CR-00109	C.D. California	Attempt to provide material support to ISIS 2339(A), false statement on passport application 1542	**15 years, gov. rec. 20 years**	19	I	N
ARMIN HARCEVIC 4:2015-CR-00049	E.D. Missouri	Conspiracy and providing material support to ISIS 2339(A)	**5.5 years**	36	I	N
ASHER ABID KHAN 4:15-CR-00263	S.D. Texas	Material support to ISIS 23339(A) and 2339(B)	**12 years, gov. rec. 20 years**	20	I	N
GEORGIANNA GIAMPIETRO 2:19-CR-00013	M.D. Tennessee	Concealment of material support and resources to ISIS 2339(C)	**5.5 years**	37	I	N

[42] This table is representative of the wide variance and disparities of material offense sentences subject to the Terrorism Enhancement. The Terrorism Enhancement applies to other offenses as well; this table selects specifically for material offense sentences where the Terrorism Enhancement was applied for the sake of comparison.

[43] This column indicates each defendant's Criminal History Category *before* their Category is elevated to Category VI as per the Terrorism Enhancement.

[44] Note that most defendants listed with Criminal History Category I would be listed as Category 0 in the present-day due to the implementation of Amendment 821 that created §4C1.1 Adjustment for Zero Point Offenders, effective November 1, 2023. Additionally, all defendants who received the Terrorism Enhancement are disqualified from being listed as zero-point offenders, under §4C1.1(a)(2).

[45] This column indicates whether the government alleged there was a victim in the defendant's case. However, PSRs that would identify if there were any victims are sealed, therefore this column reflects our best review of the public record.

Table 1: Illustrating Sentencing Disparities within Terrorism Enhancement Cases						
NAME CASE #	**LOCATION**	**CHARGE**	**SENTENCE**	**AGE**	**CRIM HIST CATEGORY** [43] [44]	**VICTIM (Y/N)**[45]
MOHAMAD HAMMOUD 3:00-CR-00147	W.D. North Carolina	Illegal Entry 1325, Fraud of Visa 1546, Trafficking of cigarettes 2342, money laundering 1956, Produced a counterfeit device 1029(A), providing material support to Hezbollah 2339(A)	**155 years**[46] [47]	37	I	N
JASMINKA RAMIC 4:2015-CR-00049	E.D. Missouri	Conspiracy to commit offenses against the U.S. (371)	**3 years**	51	I	N
JOSEPH HASSAN FARROKH 1:16-CR-00020	E.D. Virginia	Attempting to provide material support to ISIS 2339(B)	**8.5 years**	28	II	N
MEHIDA MEDY SALKICEVIC 4:2015-CR-00049	E.D. Missouri	Conspiracy to provide material support to ISIS 2339(A)	**6.5 years**	39	I	N
MICHAEL TODD WOLFE 1:14-CR-00213	W.D. Texas	Attempt to provide material support ISIS 2339(B)	**6.75 years**	23	II or III[48]	N
MOHAMMED HAMZAH KHAN 1:14-CR-00564	N.D. Illinois	Attempt to provide material support to ISIS 2339(B)	**3.3 years**	18	I	N

[46] Before application of the Terrorism Enhancement, Mohamad Hammoud's recommended sentence was calculated by the Sentencing Guidelines to be 9 to11 years.

[47] In 2014, Mohamad Hammoud was resentenced to 30 years in prison.
[48] Wolfe's criminal history category is estimated based on public records.

Table 1: Illustrating Sentencing Disparities within Terrorism Enhancement Cases						
NAME CASE #	**LOCATION**	**CHARGE**	**SENTENCE**	**AGE**	**CRIM HIST CATEGORY** [43] [44]	**VICTIM (Y/N)**[45]
MUHAMMAD DAKHLALLA & JAELYN YOUNG 1:15-CR-00098	N.D. Mississippi	Conspiracy to provide material support to ISIS 2339(B)	**8 years** and **12 years**	22 19	I I	N N
NICHOLAS MICHAEL TEAUSANT 2:14-CR-00087	E.D. California	Attempting to provide material support to ISIS 2339(B)	**12 years, gov. rec. 9 years**	19	I	N
SAID RAHIM 3:17-CR-00169	N.D. Texas	Conspiracy and attempt to provide material support to ISIS 2339(B), false statement 1001	**30 years**	42	I	N
SAMANTHA ELHASSANI 2:19-CR-00159	N.D. Indiana	Concealment of financing terrorism 2339C(c)	**6.5 years**	35	I	N
SAYFULLO SAIPOV 1:17-CR-00722	S.D. New York	8 counts 18 USC 1959(a)(1), 7 counts 18 USC 1959(A)(3), 9 counts 18 USC 1959(a)(5), 1 count 2339B, 1 count 33(a), 34	**Life imprisonment**	34	I	Y
SEDINA UNKIC HODZIC 4:2015-CR-00049	E.D. Missouri	Conspiracy to provide material support to ISIS 2339(A)	**4 years**	41	I	N
SHANNON CONLEY 1:14-CR-00163	D. Colorado	Conspiracy to provide material support to ISIS 2339(B)	**5 years**	19	I	N
SHELTON BELL 3:13-CR-00141	M.D. Florida	Conspiracy and attempt to provide material support to ISIS 2339(A)	**20 years**	21	II	N
SULTANE SALIM	N.D. Ohio	Concealment of financing	**5 years**	43	I	N

Table 1: Illustrating Sentencing Disparities within Terrorism Enhancement Cases						
NAME CASE #	**LOCATION**	**CHARGE**	**SENTENCE**	**AGE**	**CRIM HIST CATEGORY** [43] [44]	**VICTIM (Y/N)**[45]
3:18-CR-00186		terrorism 2339C(c)				
RAHATUL ASHIKIM KHAN 1:14-CR-00212	W.D. Texas	Conspiracy to provide material support to ISIS 2339(A)	**10 years**	24	I	N
RAMIZ HODZIC 4:2015-CR-00049	E.D. Missouri	Conspiracy and material support to ISIS 2339(A)	**8 years**	47	I	N
ASIA SIDDIQUI 1:15-CR-00213	E.D. New York	Teaching and distributing information pertaining to the making and use of an explosive, destructive device, and weapon of mass destruction 842(p)(2)(A) and 844(a)(2)	**15 years**	31	I	N
JASON FONG 8:20-CR-00146	C.D. California	Making false statements involving International Terrorism 1001(a)(2)	**4 years**	26	I	N[49]
HUMZAH MASHKOOR 1:24-CR-00018	Colorado	Attempt to provide material support to ISIS 2339(B)	**TBD**[50]	18	I	TBD

[49] There is no identifiable victim, but the PSR stated the victim in this case was "societal interest."

[50] Humzah Mashkoor's case is currently scheduled for trial, but the purpose of his case's presence in the table is to indicate how young he was at the time of the alleged offense. In fact, he was arrested only ten days after his eighteenth birthday, after being repeatedly approached by four separate online Undercover Informants acting in a Covert Capacity. Additionally, his alleged conduct was victimless and nonviolent, but once the Terrorism Enhancement applies, it exposes him to a recommended statutory maximum sentence of 20 years.

Table 1: Illustrating Sentencing Disparities within Terrorism Enhancement Cases						
NAME CASE #	**LOCATION**	**CHARGE**	**SENTENCE**	**AGE**	**CRIM HIST CATEGORY** [43] [44]	**VICTIM (Y/N)**[45]
DAVIN DANIEL MEYER 1:23-CR-00349	Colorado	Attempt to provide material support to ISIS 2339(B)	**TBD**[51]	18	I	TBD
MATEO VENTURA 1:23-CR-10271	Massachusetts	Concealing terrorist financing 2339(C)(c)(2)(A)	**TBD**[52]	18	I	TBD
MOHAMED FATHY SULIMAN	N.D. Florida	Providing material support to al-Qaeda	**3 years**	33	I	N

[51] Davin Daniel Meyers' case is currently pre-trial. The purpose of his case's listing in Table 1 is to indicate the significance of his age at the time of the alleged conduct. In fact, he was approached by two Confidential Informants the day after his eighteenth birthday. Additionally, his alleged conduct was victimless and nonviolent, but once the Terrorism Enhancement applies, it exposes him to a recommended statutory maximum sentence of 20 years.

[52] Mateo Ventura's case is currently pre-trial. However, his alleged conduct was victimless and nonviolent, but if the Terrorism Enhancement applies, it exposes him to a recommended statutory maximum sentence of 20 years.

July 15, 2024

Honorable Judge Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Comments to the US Sentencing Commission on Proposed 2024-2025 Priorities

Dear Judge Reeves:

The National Association of Criminal Defense Lawyers (NACDL), with its diverse membership of 10,000 spanning state, federal, and military practice, wishes to express its views on preferred Commission priorities. We concur with other advocates and stakeholders that current sentences are excessively long, and certain sentencing factors disproportionately affect racial minorities within the criminal legal system. Whatever issues the Commission determines to prioritize, these flaws should be foremost in considering potential amendments.

Priority 1: Address the Trial Penalty. We appreciate the Commission's research into the impact of the Sentencing Guidelines on the trial penalty, an issue that has raised concerns among NACDL and several other groups. As the Commission is aware, NACDL's own extensive research comparing sentences imposed after trials with sentences imposed after guilty pleas, which used Sentencing Commission data, showed that for most primary offense categories, the average trial sentence in the federal system is three times higher than a plea sentence for the same crime.[1]

Furthermore, this trial penalty is a major contributor to the dearth of criminal trials in the federal system. The Commission's statistics show that less than 3% of convictions result from trials.[2] A

[1] NACDL, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It (2018), https://www.nacdl.org/TrialPenaltyReport.
[2] U.S. Sent'g Comm'n, 2023 Sourcebook of Federal Sentencing Statistics, at tbl. 11 (2023). Figures have been very similar in other recent years. *See* U.S. Sentencing Comm'n, 2022 Annual Report and Sourcebook of Federal Sentencing Statistics, at tbl. 11 (showing that 97.5% of federal criminal convictions in fiscal year 2022 were the result of guilty pleas); U.S. Sentencing Comm'n, 2021 Annual Report and Sourcebook of Federal Sentencing Statistics, at tbl. 11, (showing that 98.3% of federal criminal convictions in fiscal year 2021 were the result of guilty pleas).

broad coalition committed to fighting the trial penalty has formed comprised of defense lawyers, prosecutors, academics, and advocacy groups from across the political spectrum.[3]

We very much appreciated the Commission's willingness to arrange a meeting with research staff recently to discuss research avenues on this important issue. We encourage the Commission to publish a comprehensive and public report in an alacritous manner.

While we assume that this research may be the impetus for the consideration of possible future Guideline amendments to address the trial penalty, we also urge the Commission to consider some incremental, but important amendments that clearly do impact the constitutional right to trial. First, the Acceptance of Responsibility Guideline, § 3E1.1(b), should be amended to authorize courts to award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial. Second, the Obstruction of Justice Guideline, § 3C1.1, should be amended to clarify that this adjustment should not be assessed solely for the act of an accused testifying in her or his defense. Like the right to trial, the right to testify in one's own defense is also constitutionally protected. While Application Note 2 states that the "provision is not intended to punish a defendant for the exercise of a constitutional right," clarification that this includes the right to testify in one's own defense would be welcome. Finally, we laud the Commission's action to limit the use of acquitted conduct as relevant conduct in sentencing.

In short, we encourage the Commission to consider amendments to these Guidelines that clearly disincentivize the exercise of the right to trial and impose a penalty on those few in the system who do exercise that right. We also urge the Commission to complete its much needed research on this issue and utilize those analyses and conclusions as a possible basis for other amendments to ameliorate the trial penalty.

Priority 2: Revisit the Fraud Guidelines. The current guideline disproportionately emphasizes loss amount, with increasing weight given to larger loss frauds. In November 2014, the American Bar Association's Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes proposed an alternative framework. This so-called "shadow guidelines" significantly reduces the focus on loss amount while emphasizing a defendant's culpability. The fraud guidelines are one area where the guidelines overemphasize quantitative over qualitative factors, with drug trafficking being another. A structural review of the fraud guidelines could pave the way for changes in other areas.

Priority 3: Revisit the Drug Guidelines. The Sentencing Commission - as a necessary extension of its long-standing opposition to mandatory minimum sentencing - must reassess the drug sentencing guidelines. Aside from unnecessary deference to Congress, the reason for erecting imprisonment levels above the mandatory minimum floors was to create a smooth continuum of punishments. But by focusing almost exclusively on this objective, the drug guidelines inflict inordinately severe punishment and also produce disparate sentencing outcomes. To accommodate but not compound the mandatory minimum statutes, the

[3] *See* End the Trial Penalty, https://www.endthetrialpenalty.org/who-we-are.

Commission should consider scrapping the quantity distinctions that do not directly correspond to the mandatory minimum levels. Alternatively, the Commission could independently establish guideline ranges and encourage greater reliance on culpability factors other than drug quantity.

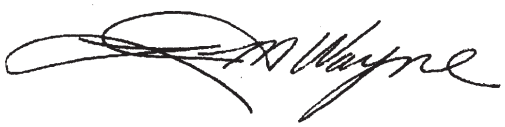
Priority 3: Expand Alternatives to Incarceration. We propose systemic changes to the guidelines to facilitate and encourage non-custodial sentences. This includes a presumption of probation for first-time, non-violent offenders, offense-level reductions for first-time offenders, and either the elimination of the zones in the Sentencing Table or a significant expansion of Zones A, B, and C. In some districts, expanding Zone B (and Zone C) may be the only way judges will begin to sentence people to probation or split sentences. Conversely, in some districts, judges rely on being in Zone D to refuse probation in cases where it is appropriate.

Priority 4: Refine the "Sophisticated Means" Specific Offense Characteristic. In our high-tech world, the term "sophisticated means" has become meaningless and is often automatically applied to computer or financial crimes. We propose either eliminating this specific offense characteristic or providing a clearer definition.

Priority 5: Narrow the Managerial Role Adjustment. It is crucial to reassess the application of the managerial role enhancement, which is applied too frequently and inconsistently. This enhancement often targets individuals whose roles may not be managerial or supervisory in nature, leading to disproportionately severe sentences. The broad interpretation of what constitutes a "managerial" role can encompass individuals who merely have a marginal level of influence or control over others involved in the crime. Furthermore, there is a significant disparity in its application across different jurisdictions.

While we welcome discussions on major structural changes to the guidelines, we propose a more incremental approach to reform. The Commission is not starting from scratch and attempts to revisit the guidelines from a "first principles" approach could potentially backfire. However, we believe there is a smart, gradual way to initiate the simplification process, starting particularly with the overemphasis on quantifiable factors, such as loss and drug weight, over factors that more accurately reflect culpability.

Respectfully Submitted,



Michael P. Heiskell
President, NACDL

Lisa M. Wayne
Executive Director, NACDL

Public Comment - 2024-2025 Proposed Priorities

Submitter:

The National Council for Incarcerated and Formerly Incarcerated Women and Girls

Topics:

Policymaking Recommendations

Miscellaneous Issues

Comments:

The new guidelines for Compassionate Release that went into effect in November 2023 state explicitly that a person may receive a reduction in sentence due to the "death or incapacitation of the caregiver of the defendant's minor child caregiver. . . ." §1B1.13(b)(3)(A). The only eligibility requirement is that the caregiver is not able to continue in that role. In contrast, eligibility for a reduction in sentence to care for an incapacitated spouse or parent requires that the incarcerated person be the only candidate available to perform those duties. §1B1.13(b)(3)(B)-(C). The eligibility criteria are thus different for minor children and other close relatives.

In spite of the clear delineation in the Guidelines, 74 judges denied compassionate release because there was another caretaker available for the movant's minor children. U.S. Sentencing Commission, Compassionate Release Data Report, FY 2024, 2nd Quarter at Table 11. The clear language and intent of the provision does not support this interpretation. The purpose of the Guideline was to mitigate the damage that mass incarceration has had on families. The 3553(a) analysis will allow judges to make sure that people who present a danger to the community will remain incarcerated. There is no reason to accept this reading of the Guidelines.

The Commission should clarify that its guidelines mean what they say: if a caregiver of a minor child is incapacitated, the incarcerated parent of that child has satisfied the "extraordinary and compelling" requirement.

Submitted on: July 15, 2024

NATIONAL
DISABILITY RIGHTS
NETWORK
Protection & Advocacy for Individuals with Disabilities

July 15, 2024

The Honorable Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs – Priorities Comment

Subject: Disability lens on sentencing

Dear Judge Reeves,

I write to you from the National Disability Rights Network, the national membership, training and technical assistance body for 57 state and territorial protection and advocacy and client assistance agencies, which together make up the nation's largest provider of legal advocacy services for people with disabilities.

Individuals with disabilities are immensely overrepresented in criminal and correctional systems. The 2016 report from the Bureau of Justice Statistics estimates that 38% of federal and state inmates have a disability, with the most common disabilities being cognitive disabilities (24% of inmates) followed by ambulatory (12% of inmates) and visual (11% of inmates) disabilities. Historically, the Annual Reports published by the U.S. Sentencing Commission from 2019-2023 do not mention the terms "disabled" or "disability." We welcome the opportunity to collaborate with you in your mandate.

The National Disability Rights Network urges the Commission to incorporate the following initiatives into its priorities for 2024-2025:

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The Sentencing Commission must prioritize research into the prevalence and nature of disabilities in the criminal justice system.

There is a need for new, regular and sustained research into the prevalence and experiences of people with disabilities as criminal defendants given that the Bureau of Justice has not published a report on disabilities in prisons since 2016. Moreover, the existing data fails to provide a clear picture. First, the BJS report likely understates the prevalence of disabilities among inmates. The study involved interviews with inmates who voluntarily reported whether they had a disability in response to a series of questions. However, these interviews did not involve scientifically validated assessments, which can identify disabilities of which an inmate may not be aware or which an inmate may not wish to disclose. Second, the BJS report fails to provide a nuanced understanding of the nature of disabilities among inmates. The study created classifications of disabilities based on six characteristics (hearing, vision, ambulatory, cognitive, self-care, and independent living), with additional options to indicate an attention deficit disorder, a learning disability, and whether an inmate ever attended special education classes. However, these classifications do not accurately capture the full range of disabilities or distinguish between the many kinds of disabilities.

Furthermore, these numbers count only people resident in correctional facilities, and do not provide a full picture of the ways in which people with disabilities are criminalized and the sanctions to which they are subject, nor does it capture the effectiveness of diversion programs or other alternatives to incarceration for this population.

The Commission's research should address these methodological flaws to collect comprehensive data on individuals with disabilities in the correctional system. The concept of disability encompasses a variety of physical, psychological, and intellectual/developmental conditions, which range from sensory and mobility impairments to intellectual and developmental disabilities, mental health conditions, chronic disease and traumatic brain injuries, and includes some manifestations of substance use disorder. Many disabilities manifest as a diverse spectrum rather than a binary category. Therefore, future research must incorporate thorough evaluations that can accurately capture the varied manifestations of disabilities among inmates.

The Sentencing Commission must prioritize the revision of sentencing guidelines and the furtherance of alternatives to incarceration for individuals with disabilities.

Individuals with disabilities are especially susceptible to inappropriate criminalization. The behaviors that law enforcement officers are trained to identify as signs of criminal conduct can overlap with manifestations of disability. Disabilities can involve difficulties with following commands, answering questions, maintaining focus, moving quickly or remaining sedentary. Disabilities can also cause symptoms such as trembling, stimming, agitation, or slurring. These behaviors may be misinterpreted as signs of guilt, resistance, or intoxication. Furthermore, disabilities can manifest in conduct that diverges from societally accepted standards of behavior, leading to misconceptions about criminal culpability and ultimately to inappropriate conviction and sentencing.

Incarceration is often an ineffective and inefficient means of managing individuals with disabilities. Incarcerated individuals with disabilities are frequently punished without receiving the support and resources necessary to manage the challenges associated with their disabilities, and may end up serving longer sentences than non-disabled people when they are not accommodated by programs designed to facilitate rehabilitation and early release. They are also vulnerable to abuse and neglect, as highlighted by the Senate Judiciary Committee's hearing in February 2024 on deaths and dangerous conditions in federal prisons. In light of the challenges people with disabilities face in availing themselves of available programming, the goals of sentencing should shift from punishment to reintegration in ways that take account of the specific needs of individuals with disabilities.

The Commission should reform sentencing guidelines to better account for an individual's disability in mitigating their culpability and penalty. The guidelines should reflect current knowledge of the impacts of disabilities on human development and behavior, including special consideration of circumstances related to disabilities in the criteria for early release. These efforts should highlight the disproportionate impacts of sentencing on individuals with disabilities by analyzing factors such as the demographics of people with disabilities, the nature of their offences, the length and type of the sentence, the likelihood of accommodation and of early release, and the recidivism outcomes after release that are complicated by the need for disability-specific programs and support.

Moreover, the Commission should promote prevention, diversion, and rehabilitation programs as alternatives to incarceration for individuals with disabilities. Such programs should address the unique needs of their participants and should support the re-integration of participants into community life. These efforts should include the assessment of such programs' implementation and effectiveness in order to identify successful models.

The Sentencing Commission must prioritize collaboration with disability rights advocates.

Finally, the Commission should convene a working group consisting of disability rights advocates, which must include the perspectives of criminalized people with disabilities, to aid in developing and implementing policies informed by the perspectives of those with lived experience. The Commission should also partner with these advocates to provide resources and training that educate courts, police agencies, and correctional agencies on recognizing and accommodating the needs of individuals with disabilities. We stand ready to assist you in these efforts.

The National Disability Rights Network appreciates the U.S. Sentencing Commission's willingness to include our perspective on its priorities for 2024-2025. These proposals only represent the first steps on the path towards a society in which all individuals with disabilities can live with dignity and autonomy in their communities. We hope that this outreach marks the start of a longer process of engaging with disability rights advocates to advance reform within the criminal justice system.

Yours sincerely,

Rebecca Shaeffer

Staff Attorney, Criminal Systems and Institutions, National Disability Rights Network

National Organization for the Reform of Marijuana Laws
1420 K St. NW Suite 350
Washington, DC 20005

July 15, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Morgan Fox, and I am submitting this comment letter on behalf of the National Organization for the Reform of Marijuana Laws (NORML). I am writing today concerning the United States Sentencing Commission's (USSC) oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, we urge the Commission to conduct a complete review and revision of the Tables.

For over half a century, the United States' drug policy has ripped families and communities apart while failing to achieve its stated purpose of realizing a drug-free world. Richard Nixon announced the War on Drugs in 1971 and, in doing so, perpetuated an ongoing rhetoric and myth of Black criminality[1]. Ronald Reagan escalated the impact of this policy by prioritizing punishment over treatment, thereby causing a significant increase in the incarcerated population, especially for nonviolent drug offenses.

While over fifty years of ongoing political and educational messaging demonizing drug use and stigmatizing drug users has failed to realize a drug-free world, the underlying racial and social motivations have succeeded. Since its inception, the drug war has been overwhelmingly enforced in BIPOC communities, especially low-income ones,[2] causing the country's inflated prison

[1] John Ehrlichman, Nixon's Assistant for Domestic Affairs, said: "You want to know what this [war on drugs] was really all about? The Nixon [Administration] . . . had two enemies: the antiwar left and [B]lack people . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did." (Equal Justice Initiative. *Nixon Adviser Admits War on Drugs Was Designed to Criminalize Black People*. March 25, 2016. https://eji.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/)

[2] *See*, Colleen Walsh, *Solving Racial Disparities in Policing*, Feb. 23, 2021, https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing/; *see also*, ACLU DC, *Racial Disparities in Stops by the DC Metropolitan Police Department*, June 16, 2020,

population to be disproportionately comprised of Black, Latino, and Indigenous people.[3] It has led to lengthy terms of imprisonment for relatively low-level offenses and for those with little to no criminal history[4], which perpetuates cycles of trauma and violence. The same conditions have fueled and perpetuated violence internationally and in inner-city neighborhoods nationwide,[5] and have led to increases in concentration, adulteration, and toxicity of the substances themselves.

An increasingly multi-partisan coalition is calling for change. In 2017, the USSC published a report describing, in part, how drug-related mandatory minimum penalties have been "applied more broadly than Congress may have anticipated."[6] Such non-discretionary sentencing fails to promote public health. Instead, it has the effect of incarcerating people for longer amounts of time than the evidence shows deters further criminal activity[7] - at the taxpayer's expense.

While reversing and mending the harms of the war on drugs will take effort from people across the government and political spectrum, one way to shift policy in a more humane direction - and in alignment with contemporary evidence - is to go to one of the current roots of the problem: drug sentencing. The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and harms would lead to more accuracy in sentencing decisions, which would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

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https://urldefense.com/v3/__https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf__;!!Phyt6w!M3tbrIzizSTS6KMjsaPASYXWMFeEA1fkh6tY9rjOLLeAtcunXEj6k0DAkg0%24)

[3] "The incarceration boom fundamentally altered the transition to adulthood for several generations of [B]lack men and, to a lesser but still significant extent, [B]lack women and Latino men and women. By the turn of the 21st century, [B]lack men born in the 1960s were more likely to have gone to prison than to have completed college or military service." (Vera, *American History, Race, and Prison*, https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison)

[4] *Id*.

[5] Heather Ann Thompson explained in a 2015 interview with Nursing Clio that "intensive incarceration has emptied communities of their elders, their parents, their grandparents, and their children now, through the juvenile justice system. It has made them even poorer because there are no jobs. It has basically created an environment where violence can flourish . . . Should we be surprised that violence is a problem when we make an economy illegal, and make it the only economy that is available because there are no factories?" (Nursing Clio, *An Interview with Historian Heather Ann Thompson (Part 2)*, Nov. 5, 2015, https://nursingclio.org/2015/11/05/an-interview-with-historian-heather-ann-thompson-part-2/#:~:text=What%20we%20start%20to%20see,environment%20where%20violence%20can%20flourish)

[6] USSC, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System*, Oct. 2017, at 6. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf

[7] National Institute of Justice. *Five Things About Deterrence*. May 2016. https://www.ojp.gov/pdffiles1/nij/247350.pdf

This is not only a significant opportunity[8] but a timely one. In April 2024, following the Health and Human Services Department's recommendation, the Drug Enforcement Administration (DEA) announced its decision to reschedule cannabis to Schedule III.[9] Given that the Tables presently translate quantities of various illegal drugs into their marijuana-equivalent quantities for the purpose of determining relative harm, it would be appropriate to utilize the multi-agency review already happening with cannabis to review and update the tables.

Additional research about other historically stigmatized substances should also inform this review. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, and again granted two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019.[10] In 2024, the FDA extended the same status to an LSD formula for the treatment of generalized anxiety disorder.[11] The FDA is also reviewing a new drug application for MDMA-assisted therapy[12], for which they will likely have a decision by August 2024.

Meanwhile, there has been growing bipartisan support to fund clinical trials exploring the use of psychedelics[13] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[14] For instance, in the 2024 National Defense Authorization Act, the Department of Defense authorized funding a study on psychedelics for the treatment of PTSD in military members.[15] In March 2024, the Department of Veterans Affairs passed a budget allocating $20 million for clinical trials for MDMA and psilocybin.[16] The National Institutes of Health has also opened funding opportunities for studying

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[8] Drug offenses make up the largest portion of the federal docket. (*See*, Fiscal Year 2021 Overview of Federal Criminal Cases. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf)

[9] Alicia Wallace et al. CNN. *Justice Dept Plans to Reschedule Marijuana as a Lower-risk Drug.* April 30, 2024. https://www.cnn.com/2024/04/30/economy/dea-marijuana-rescheduling/index.html

[10] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[11] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[12] *Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD*, February 9, 2024, https://news.lykospbc.com/2024-02-09-Lykos-Therapeutics-Announces-FDA-Acceptance-and-Priority-Review-of-New-Drug-Application-for-MDMA-Assisted-Therapy-for-PTSD

[13] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[14] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

[15] Herrington, *Biden Signs Defense Spending Bill Funding Psychedelic Research* Forbes.

[16] Curtis, *VA-funded psychedelic therapy trials for PTSD could save lives, veteran organization says* Fox 13 News

psychedelic-assisted therapy for chronic pain in older adults.[17] This shift in the evidence base, and concurrent changes in federal policy, reflects an increasing willingness and mandate to reevaluate long-held assumptions about controlled substances, paving the way for more drug policies driven by data rather than dogma.

Alongside the evidence and government agencies, recent polls have found an overwhelming majority of American voters are also eager for a new approach to drug laws and responses to drug-related offenses.[18] Over 60% support ending the War on Drugs; "eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services"; repealing mandatory minimum sentences for drug crimes; and commuting, or reducing, the sentences of people incarcerated for drugs.[19] Representing one of "the few truly bipartisan issues in American politics," the "breadth and depth of support for change suggests that there are few issues for which the nation's laws so misrepresent the preferences of the American people as for drugs."[20]

Despite these widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables remain based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors.[21] Congress[22] and this Commission[23] have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine. For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the drug or other substance," potentially positive "pharmacological effect[s],"[24] and likelihood of misuse and dependence[25].

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[17] *See e.g., Safety and Early Efficacy Studies of Psychedelic-Assisted Therapy for Chronic Pain in Older Adults (UG3/UH3 Clinical Trial Required) NOFO*

[18] ACLU. *Poll Results on American Attitudes Toward War on Drugs*. June 9, 2021. https://www.aclu.org/documents/poll-results-american-attitudes-toward-war-drugs

[19] *Id.*

[20] *Id.*

[21] Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021).

[22] Aris Folley, *Congress Set to Tackle Crack, Powder Cocaine Sentencing Disparity Before Year's End*, December 18, 2022, https://thehill.com/business/3778680-congress-set-to-tackle-crack-powder-cocaine-sentencing-disparity-before-years-end/

[23] *Change In Federal Cocaine Sentencing Policy Recommended Findings To Be Submitted To Congress*, April 5, 2002, https://www.ussc.gov/about/news/press-releases/april-5-2002

[24] United States Drug Enforcement Administration. *The Controlled Substances Act*. https://www.dea.gov/drug-information/csa

[25] Any inquiry should take into account ways harm reduction approaches, public education, and proven methods of avoiding harm and use among minors can reduce the likelihood of misuses and dependence. Revising the Tables

NORML and countless other organizations across the political spectrum and around the country are coming together to organize and inform the USSC and the general public about the importance of this issue. The United States is long overdue for sentencing reform, and the urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Sincerely,
Morgan Fox
Political Director, National
Organization for the Reform of
Marijuana Laws (NORML)

would likely lead to a reduction in resources spent on enforcement, prosecution, and punishment. Those resources could then be reinvested to bolster effective harm reduction and public education efforts. (*See*, Counsel of State Governments, Justice Reinvestment Initiative, https://csgjusticecenter.org/projects/justice-reinvestment/#:~:text=Justice%20Reinvestment%20is%20a%20data,Justice%20Reinvestment)

Plea Bargaining Institute

Research – Collaboration – Reform
www.pleabargaininginstitute.com

July 15, 2024
The Honorable Carlton W. Reeves
Chair, United States Sentencing Commission
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Washington, DC 20002-8002

Attention: Public Affairs – Priorities Comment

Via Online Submission (https://comment.ussc.gov/apex/r/ussc_apex/publiccomment/home)

Subject: Establishment of an Academics Standing Advisory Group

Dear Judge Reeves,

Thank you for the United States Sentencing Commission's request for comment on potential priorities or initiatives for the new amendment cycle. I write as the Founding Director of the Plea Bargaining Institute and the past Co-Chair of the American Bar Association Plea Bargain Task Force to propose the creation of a new academics standing advisory group to serve as a resource for the Commission and the Commission staff related to data collection, analysis, and dissemination.

The Plea Bargaining Institute was established to provide a global intellectual home for researchers, practitioners, policymakers, and advocacy groups to share knowledge and promote collaboration related to plea bargaining and its role in criminal processes. The Institute's priorities include (1) creating opportunities for academics to identify new areas in need of research and (2) assisting in the identification and development of new data collections to inform that research. The Commission has been a leading force in the collection and dissemination of data at the federal level. This data has been vital to the work of many researchers in the criminal law space. As noted in Principle 13 from the ABA Plea Bargain Task Force Report, however, researchers working to learn more about the plea bargaining system and the behavior of actors within this system are impeded by a lack of data collection in this particular area. *See* ABA CJS 2023 Plea Bargain Task Force Report (Feb. 22, 2023).

As noted in the call for comment from the Commission, the collection, analysis, and dissemination of data related to federal sentencing, including plea bargaining, is an important aspect of the Commission's work. The Commission's statutory purposes and missions as set forth in the Sentencing Reform Act include:

Plea
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Institute

- Establishing "sentencing policies and practices for the Federal criminal justice system that . . . reflect, to the extent practicable, advancement of knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. 991(b)(1)(C).

- Requesting "such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law." 28 U.S.C. 995(a)(8).

- "[S]erving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices." 28 U.S.C. 995(a)(12)(A).

The Commission currently has four standing advisory groups. These groups assist the Commission in carrying out the Commission's statutory responsibilities by, among other things, providing their views on Commission activities, proposing priorities, disseminating information, and performing related functions. The Plea Bargaining Institute proposes the Commission consider the creation of a fifth standing advisory group comprised of academics from various fields of study. The creation of an academics advisory group could serve as a resource for the Commission with regard to not only the further development, analysis, and dissemination of plea bargaining data, but also sentencing data more generally. For example, such an advisory group could be comprised of academics from various fields of study, such as law, psychology, economics, and criminology. This would allow those representing various research fields to share information regarding the types of sentencing data their field utilizes in its research and provide insights regarding what additional sentencing data collection might be of assistance in their fields. Further, such an advisory group could serve as a resource in considering how data is collected, analyzed, and disseminated by the Commission. Such an advisory group could also assist the Commission and the Commission staff in identifying existing research from various fields of study that may be informative related to the Commission's work. Finally, an academics advisory group would create an ongoing dialogue between the research community and the Commission to help ensure that academics are aware of areas in need of further scholarly attention and areas where further scholarly development would be of assistance to the Commission.

As an entity whose mission includes the creation of opportunities for collaboration and dialogue, the identification and communication to the academy of areas in need of further research, and the development of additional resources, including data collections, for such research, the Plea Bargaining Institute would be pleased to assist in the creation of an academics standing advisory group should the Commission be interested in this proposal. Please let us know if we can be of any assistance in this regard.

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Institute

Thank you once again for the opportunity to provide comment on this matter.

Sincerely,

Lucian E. Dervan
[redacted]

Founding Director
Plea Bargaining Institute

Professor of Law
Director of Criminal Justice Studies
Belmont University College of Law

PRISON FELLOWSHIP

Seek justice. Love mercy. Restore hope.

Honorable Carlton W. Reeves
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C 20002-8002

July 11, 2024

Dear Chair Reeves and Members of the Sentencing Commission,

Prison Fellowship® is the nation's largest Christian nonprofit serving prisoners, former prisoners, and their families, and a leading advocate for criminal justice reform. For nearly 50 years, Prison Fellowship has shared hope and purpose with men and women in prison. We welcome the opportunity to provide recommendations regarding policy priorities for the next year and applaud the U.S. Sentencing Commission (hereafter "Commission") for its intention to establish practices that provide fairness in sentencing and focus on rehabilitation.

The Importance of Programming

At Prison Fellowship, we believe that access and participation in effective programming while incarcerated is critical when considering progress toward rehabilitative goals. The Prison Fellowship Academy program, particularly the Tier 2 intensive model where participants develop a renewed mindset and transformed behavior that leads to personal responsibility and hope, is a prime example of a faith-based program. It builds communities and creates opportunities for men and women to practice and develop values that transform them and others into good citizens. The Prison Fellowship Academy currently operates in 208 prisons in 43 states. Studies from The Texas Department of Criminal Justice, Baylor University, and the Minnesota Department of Corrections document that the more intensive versions of Prison Fellowship's Academy curriculum led to substantial improvements in post-release outcomes.[1] In fact, those completing our in-prison programs show a more than 60% reduction in reincarceration. While these results are specific to our program, other research shows that overall prison programs positively impact in-prison conduct, recidivism, and post-release employment.[2]

To that end, the First Step Act was intended to help increase program offerings in federal prisons, including through partnerships with community and faith-based organizations. However, the evidence of such expansion is limited at best.[3] The process for rigorous review of external in-prison programs' evidence, a process not required by the statute, has unfortunately effectively served as a blockade to otherwise beneficial programming.

[1] Executive Administrative Services, *Evaluation of Offenders Released in Fiscal Year 2013 That Completed Rehabilitation Tier Programs*, Texas Department of Criminal Justice (Oct. 2017); Bryon Johnson & David Larson, *The InnerChange Freedom Initiative: A Preliminary Evaluation of a Faith-Based Prison Program*, Baylor University (2008), https://www.baylor.edu/content/services/document.php/25903.pdf; Grant Duwe, *Can Faith-Based Correctional Programs Work?: An Outcome Evaluation of the InnerChange Freedom Initiative in Minnesota*, National Institute of Health (2013), https://www.ncbi.nlm.nih.gov/pubmed/22436731.
[2] Lois M. Daivs, *Higher Education Programs in Prison: What We know Now and What We Should Focus on Going Forward*, RAND (Aug. 2019), https://www.rand.org/pubs/perspectives/PE342.html; Robert Bozick, et. al., *Does Providing Inmates with Education Improve Post-release Outcomes?*, RAND (July 2018), https://www.rand.org/pubs/external_publications/EP67650.html.
[3] FIRST STEP ACT of 2018, S. 756, 115th Cong. § 102(5)(A) (2018).

We recommend that the Commission assess current program offerings within the Bureau of Prisons, including but not limited to the level of participation, expansion of programming since the passage of the FIRST Step Act, and any qualifying factors for the accrual of earned time credits.

Reports on Federal Supervision

As of June 2021, over 110,000 individuals were on federal supervised release.[4] According to a 2017 Pew report, the number of individuals "on federal supervised release nearly tripled between 1995 and 2015" and the amount of time sentenced for supervision increased by 12%.[5] Supervised release is critical for helping former federal prisoners successfully leave crime behind and pursue a law-abiding and flourishing life that reflects their God-given potential. Many individuals benefit from the support and accountability this structure provides, especially in the first few months after incarceration. However, when supervised release is imposed unnecessarily or for an excessive period, an overburdened federal community corrections system prevents individuals from fully reintegrating into their communities.[6]

Up-to-date data reports are necessary for understanding the state of federal supervision, yet the last report from the Sentencing Commission on this topic was published in July 2020.[7] We urge the Commission to provide updated reports to ensure federal supervision remains effective, fair, and responsive to the needs of both those under supervision and the broader community. Relevant data allows policymakers to make decisions based on accurate information, ensuring that reforms address current issues, and promote transparency and fosters public trust by providing a clear picture of how the federal supervision system operates.

Visiting Those in Prison

We must not forget our brothers and sisters behind bars, and we encourage commissioners to take advantage of opportunities to visit prisons and meet with staff and incarcerated individuals. Visiting those in prison is essential to establish accountability and transparency within the correctional system. Visits can provide commissioners with a direct view of prison conditions, helping them to gain valuable insights into the real-world impact of current guidelines.

At Prison Fellowship, we have the honor of constantly facilitating visits to prisons for lawmakers, partners, donors, and many others, where they see first-hand the transformative nature of our in-prison programs. Remembering and visiting those in prison fosters a more humane and just system. By hearing from prison staff and incarcerated individuals directly, commissioners can more accurately assess the adequacy of facilities, the treatment of prisoners, and the effectiveness of rehabilitation programs. Furthermore, commissioner presence signals dedication to upholding the rights of those within the correctional system and may help drive meaningful change. We urge the Commission to prioritize visiting a prison within the next year.

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[4] Safer Supervision Act of 2023, S. 2681, 118th Cong. (2023).
[5] Pew, *Number of Offenders on Federal Supervised Release Hits All-Time High*, The Pew Charitable Trusts (Jan. 2017), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/01/number-of-offenders-on-federal-supervised-release-hits-all-time-high.
[6] Pew, *Max Out: The Rise in Prison Inmates Released Without Supervision*, The Pew Charitable Trusts (June 2014), https://www.pewtrusts.org/en/research-and-analysis/reports/2014/06/04/max-out.(Research indicates that individuals released to community supervision have better public safety outcomes, such as lower recidivism rates, compared to those who serve their entire sentence in prison and therefore are released without supervision.)
[7] USSC, *Federal Probation and Supervised Release Violations*, United States Sentencing Commission (July 2020), https://www.ussc.gov/research/research-publications/federal-probation-and-supervised-release-violations.

Conclusion

We commend the steps already taken by this Commission to provide certainty and fairness in sentencing. Every human being is created in God's image, with inherent dignity and value. Our justice system must reflect this belief by ensuring that all individuals are treated with fairness and respect. Supporting prison programming, providing updated data, and visiting those in prison can help not only uphold the principles of justice but also foster a society that values rehabilitation and redemption.

Sincerely,

Heather Rice-Minus
President & CEO
Prison Fellowship

From: PrisonHealthJusticeInitiative
To: Public Affairs
Subject: [External] Re: Research Paper Inquiry
Date: Friday, June 21, 2024 10:44:58 PM

Hello United States Sentencing Commission,

We hope you are doing well! Regarding our prior email, we wanted to specify further what we felt was lacking within the modern day incarceration system. The treatment of prisoners continues to be unfair within present-day settings, despite them continuing to be humans. The denial of basic amendments and healthcare are perpetuated with such a criminal justice system and we need to fix this corrupt and broken institution. Specifically, we are hoping to tackle the problem of solitary confinement. Solitary confinement has been proven to be associated with many mental health challenges and constrict the rights of many prisoners who are already left with little to no voice within prisons. Additionally, solitary confinement, as a punishment, can be targeted against certain demographics, further infringing upon rights that prisoners should continue to have due to the basic and simple fact that they are still human. We continue to be inspired by your work and are in shock of the injustice that has been plaguing our nation. As such, we hope that you would be interested in either giving us stories about solitary confinement that you have gained through your work or providing statistics on the usage of solitary confinement.

Best,
PHJI

On Tue, Jun 18, 2024 at 6:42 PM PrisonHealthJusticeInitiative <[redacted]> wrote:

> Dear United States Sentencing Commission,
>
> We are Prison Health Justice Initiative, otherwise known as PHJI and founded by Advait Gattu and Tanay Satrasala, based in Montgomery, New Jersey. Recently, we came across Bryan Stevenson's *Just Mercy*, learning about the situations of many of these prisoners within prisons just like yours. Specifically, we were greatly interested in the treatment of these prisoners as we were inspired by the horrendous nature that continues to perpetuate society as seen within the Buck v. Bell court case. As such, we were hoping that your prison would be able to provide any information regarding healthcare administration, statistics on the demographics of your inmates, or any other information or stories about your inmates that you are willing to share. Anything would be greatly appreciated and we hope to receive information soon.
>
> Best,
>
> Prison Health Justice Initiative

PUBLICCITIZEN

1600 20th Street, NW • Washington, D.C. 20009 • 202/588-1000 • www.citizen.org

July 15, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Affairs – Priorities Comment

Via email

To the U.S. Sentencing Commission:

Public Citizen applauds the U.S. Sentencing Commission's work setting guidelines and providing data that helps ensure a fact-based perspective on sentencing decisions. As a consumer group dedicated to combatting corporate misconduct, we are particularly interested in the Commission's work with regards to Organizational Offenders (a category we refer to somewhat more colloquially as corporate criminals). The public's understanding of corporate crime in large part is thanks in large part to the data the Commission tracks and provides, and for that we are grateful.

Tracking corporate crime is difficult. The Commission's annual reports are currently among the best data available for understanding trends in federal corporate crime prosecutions in the U.S. However, because the U.S. Department of Justice routinely resolves many criminal investigations of corporate misconduct through pretrial diversion – deferred and non-prosecution agreements, or what we refer to collectively as leniency agreements – the picture of corporate crime provided by Commission reports is, unfortunately, incomplete.

The U.S. Sentencing Commission recognized the incomplete picture provided in its annual reports in its 2022 report on organizational sentencing guidelines.[1] The report

[1] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf

notes, "Because criminal prosecutions resulting in a sentencing are only one method by which an organization's violations of the law can be addressed by the authorities, Commission sentencing data cannot fully measure the prevalence of corporate crime."[2] In a footnote, the report notes that private third parties, such as the law firm Gibson Dunn, provide supplementary information to provide a fuller picture of the federal government's effort to enforce the law when corporations commit crimes. Public Citizen also publishes annual reports[3] that combine the Commission's data with third-party sources, such as the Violation Tracker[4] project of Good Jobs First and the Duke University/University of Virginia Corporate Prosecution Registry,[5] to facilitate public understanding of corporate crime and enforcement.

In response to the Commission's request for comments from the public on future policy priorities, Public Citizen proposes that the Commission provide a more complete picture of corporate crime enforcement as it is carried out by federal law enforcement by including criminal cases against corporate offenders that are resolved through pretrial diversion.

Adding the criminal cases that are resolved through deferred prosecution agreements, non-prosecution agreements, and other resolutions involving organizations that violate the law would significantly enhance the Commission's reports. The key enhancement for the public interest would be to allow for increased understanding and scrutiny of how the federal government enforces criminal law against the largest corporations, which historically have routinely received leniency deals for serious offenses that resulted in harms that were far more widespread than offenses committed by smaller corporations.

The Commission's data shows that in 2023, about 76% of the corporations the Department of Justice prosecuted had only 50 employees or less, while only about 12% had 1,000 employees or more. The data also shows that this is the continuation of a longstanding trend – about 70% of the 4,946 corporations the federal government prosecuted between

[2] Ibid 12 https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf
[3] For the most recent, see https://www.citizen.org/article/enforcement-uptick-corporate-prosecutions-report-2023/
[4] https://violationtracker.goodjobsfirst.org/
[5] https://corporate-prosecution-registry.com/

1992 and 2021 were small businesses with fewer than 50 employees, while only about 6% employed 1,000 or more.

The inverse is true as well – leniency deals that allow corporate defendants to escape prosecution tend to benefit bigger corporations. Most corporate offenders that receive leniency agreements from the Department of Justice are large multinationals.[6] Of the 14 corporations that received leniency deals in 2023, the majority (10, or 71%) had at least 5,000 employees or more. The largest, ABB,[7] has over 100,000. The leniency deal it received follows multiple prior criminal enforcement actions against the corporation over similar misconduct.

While adding organizations that resolve criminal investigations through pretrial diversion would be a significant public interest enhancement to the Commission's work, the relatively small number of cases against these large corporations means that it is an enhancement that would be unlikely to be excessively burdensome. Over the past 25 years, the largest number of these leniency deals were offered in fiscal year 2015, when there were 73, largely because of the Justice Department's Swiss Bank Program.[8] This is in part because of how few criminal investigations against corporate misconduct the Justice Department brings. In fiscal year 2023, there were just 14.

We understand that in requesting that data on organizational pretrial diversion agreements be included in the Commission's reports and analysis, we are requesting that the Commission treat organizations differently from individual offenders. But organizations – especially the largest corporations – *are* different, and they are already treated differently. Our request is for a small enhancement that would make a big difference.

As long as the DOJ continues to overemphasize offering the carrot of leniency to corporate criminals to encourage cooperation, these agreements are likely to continue to be overused, especially in resolving criminal cases against the largest corporations. The current approach risks rewarding systemically criminogenic corporations for

[6] https://www.citizen.org/article/soft-on-corporate-crime-deferred-and-non-prosecution-repeat-offender-report/
[7] https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case
[8] https://www.justice.gov/tax/swiss-bank-program

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scapegoating supposed bad apple employees when effective criminal enforcement often requires systemic corporate discipline and court supervision.

To deter corporate crime, the DOJ should charge both culpable individuals and offending corporations. But as long as the DOJ continues to over-rely on agreements that frequently enable the biggest corporations to avoid prosecution and its consequences, the small number of big corporations that disproportionately benefit from these deals should not escape the scrutiny of the Commission's analysis.

We thank the Commission again for its ongoing reports and provision of data that are the gold standard for corporate crime enforcement, and hope you find our suggestion to be useful and constructive. Should you wish to discuss our comment any further, we would be more than happy to continue the conversation.

Sincerely,

Robert Weissman
Co-President

Rick Claypool
Research Director, President's Office

Public Citizen
1600 20th St NW
Washington, DC 20009

RAND Justice Policy

JAMES ANDERSON, JD
DIRECTOR

4570 FIFTH AVENUE, STE. 600
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TEL 412.683.2300 X 4677
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June 5, 2024

The Honorable Carlton W. Reeves
United States Sentencing Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Your Honor,

I am the Director of the RAND Justice Policy Program and the author of an empirical study of the effect of the Guidelines on inter-judge sentencing disparity.[1] I appreciate the Commission's invitation to suggest priorities for the future work of the Commission. I write to make two points, the first an observation and the second an offer.

First, the Guidelines were created at a very different time. Crime was near all-time highs. Modern causal methods in the social sciences were in their infancy. Collectively, lawyers, judges, and other researchers then knew much less about the effect (or lack of effect) of criminal sentencing on a host of outcomes that are relevant to the Commission's charge: reoffending, re-entry, and crime victims to name just a few. To the Commission's credit, it has published excellent research on selected topics and has not hesitated to make changes to the Guidelines when warranted. That said, changes to the Guidelines made over the past forty years by the Commission have been relatively modest and incremental. The Guidelines today are still largely based on sentencing patterns and wisdom from the 1980s.

I respectfully propose that a wholesale reevaluation of the Guidelines in light of what we have learned over the last forty years is in order. There is a significant corpus of research evidence on which such a re-evaluation could rest and that could further the Commission's goals. Such an evaluation could examine the research evidence for particular categories of conduct and offenders to create a Guidelines that is based on our current knowledge. This should be a nuanced analysis that looks at what we have learned about specific offenses and types of offenders and would likely result in both decreased and increased sentences. Such a project could be undertaken by the Commission alone, or with the assistance of an organization like RAND, the American Law Institute, or another think-tank.

Second, quite apart from whether the Commission is interested in such an ambitious project, I wanted to offer RAND's assistance in whatever capacity is necessary to aid the Commission's goals. As you probably know, RAND has considerable research capacities and a long history of aiding federal agencies including the Department of Justice and the Administrative Office of the US Courts. We'd be happy to discuss whatever made sense at your convenience.

Regards,

James Anderson

[1] J. Anderson et al., Measuring Interjudge Sentencing Disparity: Before and after the Federal Sentencing Guidelines, 42 J. Law & Econ. 271 (1999).

recidiviz

United States Sentencing Commission
One Columbus Circle N.E., Suite 2-500
Washington, D.C. 20002-8002

July 12, 2024

Re: Public Comment around Proposed 2024-2025 Priorities

Dear Chairman Reeves,

Thank you very much for the opportunity to submit comments on the United States Sentencing Commission (the "Commission") Proposed 2024-2025 Priorities. I represent Recidiviz, a 501(c)(3) organization that works with state departments of corrections across the country to analyze and make their data, including their sentencing data, actionable. Our technology helps agencies integrate data that is currently fragmented in siloed databases to produce an end-to-end, user-centric vision of how people move through corrections systems and how various inputs affect people's ultimate outcomes. Across our 17 partner states, our intelligent assistant has helped identify and refer over 44,000 people qualified for early release or community entry programs and has saved states 10,000 hours of paperwork. We believe that we could have a similar impact on the federal system.

Given the importance of its mission, it is imperative that the Commission use all data at its disposal—its own data and its partner agencies' data—to set priorities and make strategic decisions. The Commission sits at the intersection of each of the three branches of government, and it has an overarching responsibility to ensure that: (a) the sentences imposed on criminal defendants are just, transparent, and proportional; and (b) the nation's criminal justice policy is effective and efficient. Our technology can help the Commission measure "the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing,"[1] by leveraging criminal justice data to understand what's working within the system and what's not via:

1. **Performing Data Analytics around Sentencing:** Recidiviz has worked with state sentencing commissions, including the Missouri Sentencing Advisory Commission and the Arkansas Sentencing Commission, to help leadership understand data around sentencing patterns. Recidiviz provides data analysis on regional variations in sentencing patterns, how sentencing patterns have changed over time, as well as adherence to

[1] 28 U.S.C. 991(b)(2).

sentencing guidelines. Recidiviz can also perform analysis to understand and visualize how sentencing type impacts an individual's short- and long-term outcomes, including recidivism rates.

2. **Supporting First Step Act Implementation:** Across our 17 partner states, Recidiviz works to help corrections agencies implement new and existing laws and understand their impact. Our intelligent assistant for corrections staff identifies people who are eligible for opportunities (like home confinement, early discharge etc.), surfaces the people to the relevant stakeholder, and automates paperwork to effectuate transfers. Specifically, Recidiviz could help the Commission and the Bureau of Prisons (BOP) with First Step Act implementation, ensuring that incarcerated individuals are receiving the maximum earned time credits possible, and that those credits are being properly used to secure timely release. As part of implementation support, Recidiviz could also monitor the impact of the First Step Act, looking at distribution of credits and early release to highlight any geographic or demographic disparities and other relevant trends.

3. **Understanding In-Facility Programming:** Recidiviz has worked with its state partners to understand the current provisions of in-facility programming and opportunities to improve efficiency in programming to reduce waitlists and increase access. Similarly, Recidiviz can work with the Commission and BOP to understand the current state of programming across BOP facilities, identify bottlenecks, and surface opportunities to help people move through the system more quickly (e.g., ensuring everyone has access to recidivism reduction programming eligible for earned time credits under the First Step Act).

4. **Analyzing Supervision Outcomes, Including Outliers:** Recidiviz gives states visibility into outcomes related to community supervision, including identifying outlying districts, units, and officers who have outcomes much better or much worse than the state average. Recidiviz can help answer questions around what leads to success, particularly across a system as broad and varied as the federal system. For example, Recidiviz can investigate whether the availability of services close to home correlates with success, or how lengths of supervision sentences correlate with ultimate outcomes. Recidiviz can also analyze how outcomes on key metrics (e.g., employment rate, absconsions, and revocations) vary by district and by individual officer, to identify regions that are highly successful. Such insights have enabled Recidiviz partner agencies to replicate and scale successful models.

We appreciate the opportunity to comment on the Commission's Proposed 2024-2025 Priorities and look forward to hearing more from you.

Thank you for your time and consideration,

Molly Cohen

/s/

Recidiviz
Senior Partnerships Manager
1322 Webster Ave. Suite 402
Oakland, CA 94612
[redacted]

/Submitted Electronically/

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Rio Grande Valley Families and Friends of Murdered Children

Topics:

Research Recommendations

Policymaking Recommendations

Miscellaneous Issues

Comments:

To create a fairer, more just sentencing system, I suggest focusing on several key areas highlighted by the tragic case of Julio Cesar Villarreal. This case underscores the need for robust measures to address repeat offenders, provide better support for victims' families, and ensure effective sentencing that protects communities.

1. Strengthening Responses to Repeat Offenders:
Avalos had over 30 arrests spanning nearly 15 years, including serious offenses like assault on a public servant and making terroristic threats. Despite these prior incidents, he remained a threat to his neighborhood. It's essential to revise the Guidelines to impose stricter penalties for habitual offenders and ensure that repeat offenses are met with escalating consequences to prevent further harm.

2. Enhancing Victim and Community Safety:
The community was repeatedly tormented by Avalos' behavior. Revising the Guidelines to include enhanced protective measures for communities affected by violent offenders is crucial. This could involve increased monitoring of high-risk individuals and more rigorous enforcement of restraining orders and probation conditions.

3. Improving Support for Victims' Families:
Julio Cesar Villarreal's family, including his pregnant wife and young children, faced immense trauma and loss. Developing policies that provide comprehensive support for victims' families, such as financial assistance, counseling services, and ongoing legal support, would ensure that they are not left to navigate their grief and challenges alone.

4. Implementing Effective Rehabilitation Programs:
Avalos' case shows that existing probation and rehabilitation programs failed to curb his violent

behavior. Revising the Guidelines to include mandatory participation in more intensive rehabilitation and mental health programs for offenders, particularly those with a history of violence, could prevent future tragedies.

5. Encouraging Community Involvement in Sentencing:
The neighbors' testimonies played a crucial role in illustrating Avalos' threat to the community. Encouraging greater community involvement in the sentencing process, such as impact statements and community advisory boards, can provide valuable insights and help tailor sentencing to address local concerns effectively.

Research Recommendations:

Strengthening Responses to Repeat Offenders: Revising the Guidelines to impose stricter penalties for habitual offenders and ensuring that repeat offenses are met with escalating consequences to prevent further harm.
Implementing Effective Rehabilitation Programs: Revising the Guidelines to include mandatory participation in more intensive rehabilitation and mental health programs for offenders, particularly those with a history of violence.
Policymaking Recommendations:

Enhancing Victim and Community Safety: Revising the Guidelines to include enhanced protective measures for communities affected by violent offenders, such as increased monitoring and stricter enforcement of restraining orders and probation conditions.
Improving Support for Victims' Families: Developing policies that provide comprehensive support for victims' families, such as financial assistance, counseling services, and ongoing legal support.
Miscellaneous Issues:

Encouraging Community Involvement in Sentencing: Encouraging greater community involvement in the sentencing process through impact statements and community advisory boards to provide valuable insights and tailor sentencing to address local concerns effectively.

Submitted on: July 3, 2024

Sacred Plant Alliance, Inc.
P.O. Box 904
Occidental, CA 95465

July 15, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

I am Allison Hoots, an attorney and also President of Sacred Plant Alliance, Inc. (SPA), a non-profit association of churches defending the right to religious exercise through sincere, safe, and ethical ceremonial use of sacraments in the United States. Sacred Plant Alliance is committed to its tax-exempt purpose of the collective goals of its members, including: its members' advancement of religion, education, elimination of prejudice and discrimination, and defending the rights secured by law of broader sacramental communities.

As an association of churches, we are called to fight against injustice as part of our religious duties to protect our own and other communities. With respect to the Controlled Substances Act (the CSA) many of these sacred substances are often subjected to prohibition because of religious history and, consequently, increases discrimination despite safe and sacramental traditional relationships based on sincere religious beliefs.

On behalf of SPA, I am writing to express deep concerns with the premise and actual failure in furthering the government's interest in its application of the Controlled Substances Act, and in this case, I am highlighting an opportunity to make a course correction in the context of the United States Sentencing Commission's (USSC) oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). SPA urges the USSC to conduct a complete review and revision of the Tables.

It is undisputed that the War on Drugs was substantially, if not entirely, fueled by politics and discrimination—against minorities, people of color, Indigenous people, low-income communities, foreign demographics, and people of non-Judeo Christian religious persuasion.[1] The object was to criminalize what was otherwise not criminal. In effect, there was a horrific injustice wielded by the government against those it was meant to protect.[2]

Ultimately, the establishment, application, and interpretation of the CSA has caused more harm than it has prevented: it has manifested in a violent form of inequality, poverty, and disparity. It has led to lengthy terms of imprisonment for relatively low-level offenses and for those with little to no criminal history[3] based on inconsequential concepts of weight and use, and has created an underground market and opportunity for criminal enterprises that increased trauma and violence and increased the likelihood of unregulated supplies with dangerous concentration, adulteration, and toxicity of the controlled substances.

There is a nobility to acknowledging an error and making an effort to repair. The USSC itself published a report in 2017 providing that drug-related mandatory minimum penalties are "applied more broadly than Congress may have anticipated."[4] And criminalization only perpetuates criminal activity out of desperation and for survival once marked as a criminal and disenfranchised by the government meant to promote public health. There is no penitence nor rehabilitation by irrationally increasing the sentences related to for drug-related crimes.[5]

The Drug Quantity and Drug Conversion Tables have a significant weight that must be acknowledged, borne, and corrected. The USSC has the ability to make a significant shift, where both federal and state decisions regarding drug sentencing relies on these Tables. Where there is

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[1] John Ehrlichman, Nixon's Assistant for Domestic Affairs, said: "You want to know what this [war on drugs] was really all about? The Nixon [Administration] . . . had two enemies: the antiwar left and [B]lack people . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did." (Equal Justice Initiative. *Nixon Adviser Admits War on Drugs Was Designed to Criminalize Black People*. March 25, 2016. https://eji.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/)

[2] "The incarceration boom fundamentally altered the transition to adulthood for several generations of [B]lack men and, to a lesser but still significant extent, [B]lack women and Latino men and women. By the turn of the 21st century, [B]lack men born in the 1960s were more likely to have gone to prison than to have completed college or military service." (Vera, *American History, Race, and Prison*, https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison)

[3] *Id*.

[4] USSC, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System*, Oct. 2017, at 6. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf

[5] National Institute of Justice. *Five Things About Deterrence*. May 2016. https://www.ojp.gov/pdffiles1/nij/247350.pdf

evidence that the Tables do not achieve any improvement to crime rates, individual and community health, or the economy, it is crucial that USSC take this timely opportunity to revise the Tables.

In April 2024, following the Health and Human Services Department's recommendation, the Drug Enforcement Administration (DEA) announced its decision to reschedule cannabis, a sacrament that people of color have traditional religious relationships with and for whom there is spiritual significance as well as demonstrable safe and beneficial effect, to Schedule III.[6] It is clear that cannabis must be a subject of the review and revision within the Tables.

In May 2024, the U.S. Government Accountability Office (GAO) filed a Report to Congressional Committees titled "Drug Control: DEA Should Improve its Religious Exemptions Petition Process for Psilocybin (Mushrooms) and Other Controlled Substances" (herein after, the GAO Report).[7] The GAO predicated the need for the GAO Report on the petition process guidelines established by the Drug Enforcement Agency (DEA) for a petitioner's religious-based exemption from the CSA by noting,

> Historically, psilocybin has been used in Indigenous cultures for spiritual ceremonies. Some states have taken steps to legalize the adult use of psilocybin or establish programs to study psilocybin for therapeutic applications.

The GAO concluded that,

> Providing clearer guidance on the information that petitioners should provide to address the relevant factors in DEA's determination of religious sincerity and the standard DEA will use to assess religious sincerity, better clarifying its exemption petition process timeframes to petitioners, and establishing a process to provide regular updates to petitioners on the status of its reviews will help ensure that petitions include the information *DEA needs to appropriately adjudicate Religious Freedom Restoration Act rights*.
>
> (Emphasis added.)

The willful dismissal of the safe and non-harmful uses of controlled substances is clearly behind the U.S. Government. There are ceaseless clinical trials and research regarding medical treatments with psychedelics[8] for a variety of mental and physical indications, particularly with

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[6] Alicia Wallace et al. CNN. *Justice Dept Plans to Reschedule Marijuana as a Lower-risk Drug.* April 30, 2024. https://www.cnn.com/2024/04/30/economy/dea-marijuana-rescheduling/index.html

[7] Drug Control: DEA Should Improve Its Religious Exemptions Petition Process for Psilocybin (Mushrooms) and Other Controlled Substances. GAO-24-106630. Published: May 30, 2024. Publicly Released: May 30, 2024. https://www.gao.gov/products/gao-24-106630

[8] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

respect to our population of veterans.[9] The evidentiary proof is both causing and as a result of public perception where "drugs" are now seen as vehicles for healing, transformation, and spiritual experience despite the shadow of stigma from the specter of the CSA.

There is a majority of American voters eager for reformation of prohibition and senseless drug-related crimes.[10] Over 60% support ending the War on Drugs; "eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services"; repealing mandatory minimum sentences for drug crimes; and commuting, or reducing, the sentences of people incarcerated for drugs.[11] Representing one of "the few truly bipartisan issues in American politics," the "breadth and depth of support for change suggests that there are few issues for which the nation's laws so misrepresent the preferences of the American people as for drugs."[12]

Consequently, the Tables remain outdated and disproportionate. There is no rational relation to the actual risks posed by each substance and amounts and, instead, brazenly create harms like the illicit drug market, unnecessary criminality, and other injuries to communities.[13]

Where the U.S. Government, including Congress[14] and USSC[15], does not dispute that the Tables create an imbalance in the criminal system due to discriminatory beliefs, such as in the context of crack versus powder cocaine, the USSC must revise the Tables to align with its own statutory obligations under the CSA[16] and failure of the Tables to achieve the government's interest in protecting its citizens and, instead, the drug sentencing guidance in the Tables actually cause the likelihood of misuse and dependence.[17]

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[9] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

[10] ACLU. *Poll Results on American Attitudes Toward War on Drugs*. June 9, 2021. https://www.aclu.org/documents/poll-results-american-attitudes-toward-war-drugs

[11] *Id.*

[12] *Id.*

[13] Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021).

[14] Aris Folley, *Congress Set to Tackle Crack, Powder Cocaine Sentencing Disparity Before Year's End*, December 18, 2022, https://thehill.com/business/3778680-congress-set-to-tackle-crack-powder-cocaine-sentencing-disparity-before-years-end/

[15] *Change In Federal Cocaine Sentencing Policy Recommended Findings To Be Submitted To Congress*, April 5, 2002, https://www.ussc.gov/about/news/press-releases/april-5-2002

[16] United States Drug Enforcement Administration. *The Controlled Substances Act*. https://www.dea.gov/drug-information/csa

[17] Any inquiry should take into account ways harm reduction approaches, public education, and proven methods of avoiding harm and use among minors can reduce the likelihood of misuses and dependence. Revising the Tables would likely lead to a reduction in resources spent on enforcement, prosecution, and punishment. Those resources could then be reinvested to bolster effective harm reduction and public education efforts. (*See*, Counsel of State

SPA mourns the irreparable wrongs caused by the prejudice, discrimination, and criminality established by the CSA, including the framing of safe, sincere, and ethical religious exercise with controlled substances as criminal activity. SPA is aligned with organizations across the political, religious, and cultural spectrum to organize and inform the USSC and citizens of the United States about the importance of this issue and harmful impacts of the CSA and the Tables as currently written and applied.

We ask that you take to heart the urgency and gravity of matter and use this opportunity to review and revise the Tables by commencing an evidence-based inquiry in consideration of the rights and health of the individuals that the United States government, including the USSC, is compelled by law to protect.

With gratitude,

Allison M. Hoots, Esq.
President
Sacred Plant Alliance, Inc.

Governments, Justice Reinvestment Initiative, https://csgjusticecenter.org/projects/justice-reinvestment/#:~:text=Justice%20Reinvestment%20is%20a%20data,Justice%20Reinvestment)

Fighting Exclusions and Disqualifications for zero Criminal History Internet Convictions with Knowledge and Solutions

The Honorable Carlton F. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Dear Judge Reeves and Esteemed Commissioners:

We would like to introduce Team FED CHICKS, (**F**ighting **E**xclusions and **D**isqualifications for zero **C**riminal **H**istory **I**nternet **C**onvictions with **K**nowledge and **S**olutions). We are a small, but dedicated team of justice-impacted family members who love and support spouses, partners, children, parents, and siblings who have zero criminal history and are currently in federal custody for non-contact internet-based sex offense convictions. We are nonpartisan, nondenominational, and we do not excuse sexual abuse of any kind. We believe the population we advocate for, which has the lowest documented same crime recidivism rates of any conviction, has been mischaracterized, over-sentenced, does not benefit from long sentences, is consistently and successfully rehabilitated far more than other populations, and that our families suffer more far-reaching collateral consequences than the families members for other convictions.

We believe that internet use has become a large part of our social lives, including dating and "hook ups." (https://www.pewresearch.org/short-reads/2023/02/02/key-findings-about-online-dating-in-the-u-s/) With the rapid adoption of artificial intelligence (AI) by people of all ages, but particularly by the young, in addition to the sheer addictive nature of technology that, if prevention programs and alternatives to incarceration and effective mental health treatment for trauma and abuse are not adopted for first time non-contact internet offenses, we will lose an entire generation of zero criminal history juveniles and emerging adults to mass incarceration. (73% of teenagers have already viewed adult pornography with the average age of viewing beginning at age 12. (https://enough.org/stats-youth-and-porn) https://www.psychologytoday.com/us/blog/raising-kind-kids/202305/new-report-finds-most-teens-watch-online-pornography). The current arrest, prosecution, and incarceration of people of all ages with no other criminal history for non-contact sex offenses has already resulted in a huge loss of productivity and talent, impoverished families, and led to an increase in the cost of social programs. The Commission's own recently released report, "Educational Levels of Federally Sentenced Individuals" states "Sentenced individuals with an undergraduate or graduate degree were convicted more often for economic or sex offenses than sentenced

persons with less education." (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231218_Education.pdf)

Team Fed Chicks welcomes the opportunity the United States Sentencing Commission (the Commission) has given us to comment on its 2024-2025 proposed priorities as well as to offer suggestions for hearings, advisory groups, and other ways the Commission can better serve us and our incarcerated loved ones. We relish the opportunity to share our "big picture" issues with the Commission, and while we believe you will listen, we have seen how Congress and the Department of Justice have turned a deaf ear to the collateral consequences suffered by the tens of thousands of family members of people who have been or are currently in federal custody for non-contact internet sex offenses, and the millions of families who are impacted at the state and local levels; families whose only crime is loving and supporting a person in custody for a non-contact sex offense, and as is often the case, simply by being related to one. However, we are determined to provide you with the information you seek and to persist until we see much needed reform.

Our first "big picture issue" is the failure of Congress to keep the public and the children it claims to want to protect "safe." Although 96% of incarcerated people in federal custody will return to the community, people with zero criminal history convicted of non-contact internet sex offenses are regularly and intentionally excluded or "carved out" of rehabilitation programs and sentencing reforms, although this is a population with the lowest documented same conviction recidivism rates. Non-contact, non-commercial internet convictions like possession, receipt, and non-commercial distribution are "thought crimes" with same offense re-arrest and recidivism rates documented in (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220210_Recidivism-Violence.pdf P. 25 Figure 11 Most Serious Offense at Re-arrest for Violent and Non-Violent Federal Offenders Released in 2010 as which as 0.5 violent and 0.7% non-violent, respectively). Other Commission research states the sexual recidivism is 4.3% for non-production child pornography convictions (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/rg_child-pornography-non-production.pdf). These convictions have been classified as violent and deserve reevaluation and reclassification as non-violent to allow participation in alternatives to incarceration, pre-trial diversion and, for those who are incarcerated, participation in rehabilitation programs. This includes early release credits, whose purpose is to end mass incarceration, such as through the First Step Act, which has documented low recidivism rates.

The recent 2 point reduction for people with zero criminal history, effective 1 February 2024, applies to convictions with far higher recidivism rates than those with non-contact internet sex offense convictions (thought crimes) of people with zero criminal history and arrests, yet the latter are excluded from participation and programming credits in nearly all rehabilitation programs. Treating this population, with its vanishingly small recidivism rate, differently than any other conviction group for "public safety" does not make the public, communities, or children safer.

To end the hosting and distribution of CSAM (Child Sexual Abuse Material), and further damage to child victims, close down these sites when they are discovered instead of allowing the DOJ and FBI to take them over and use the material to entrap people and continue the victimization. If Congress wants to keep the public safe and stop the victimization of children, it should rethink bills like The STOP CSAM Act which gives big political donor social media companies a pass. There are people now in federal custody that received CSAM as part of a "gigafile" with adult pornography and didn't "knowingly" possess CSAM. The bill language reads "Holding online platforms accountable for knowingly hosting, storing, promoting, or facilitating CSAM. The STOP CSAM Act should enable legal recourse against online platforms that knowingly engage in certain activities relating to CSAM. However, the bill includes a specific definition for "knowingly" and provides defenses to online platforms in certain instances. What social media is going to admit it "knowingly" hosts CSAM sites? If Congress is really committed to seeing CSAM sites disappear permanently, prosecute and incarcerate Mark Zuckerberg, CEO of Meta, for hosting and distribution of CSAM. (https://www.wsj.com/articles/instagram-vast-pedophile-network-4ab7189).

Prosecute the people who physically victimize these children. Prosecute the sex traffickers and commercial producers. Prosecute the people who profit from the abuse of these children. Provide a safe way to obtain confidential, non-stigmatizing treatment, prevention, and mental health programs for viewers of CSAM. A majority of viewers are victims of grooming or sexual harm themselves, have neuropsychiatric conditions, are on the autism spectrum, suffer from PTSD, Traumatic Brain Injuries (TBI), or have an internet addiction and other maladies.

Our second "big picture issue" is that the federal government spends billions of dollars on research and programs, yet Congress and the Department of Justice (DOJ) ignore the federal research studies it funds with our tax dollars, resulting in Congress's failure to legislate according to facts and empirical evidence. The DOJ's failure to take into consideration the federal government's own empirical evidence and 25 years of Metadata, now publicly available, which documents how astoundingly low the recidivism rates for people with zero criminal history are who have been convicted of non-contact internet sex offenses, is unconscionable.(https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10666491/). While the Commission's own studies are presented professionally and objectively in a format which enables the reader to clearly see the true data and statistics, Congress seems to prefer the "twististics" of the Bureau of Justice Statistics (BJS) and the DOJ SMART office, which sprinkle their own biased, unproven opinions throughout their reports, thus obfuscating the factual statistics. However, the data itself vindicates our claim.

Our third big picture issue falls under (2) Establishing ''sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities.'' 28 U.S.C. 991(b)(1)(B).

The sentencing disparities are enormous. They vary by circuit and by individual judge. It is not unusual to see longer sentences for receipt, possession, sharing of illegal internet images, and internet stings imposed on people with zero criminal history, and non-violent, non-contact offenses, than for Espionage, Terrorism, Murder, and Rape. One only has to peruse the Department of Justice Press releases to see the sentencing discrepancies. Our team has compiled

hundreds of these examples, too many to provide in a letter. However, we are happy to provide numerous examples upon request.

Our fourth "big picture issue" falls under: (3) Establishing ''sentencing policies and practices for the Federal criminal justice system that . . . reflect, to the extent practicable, advancement of knowledge of human behavior as it relates to the criminal justice process.'' 28 U.S.C. 991(b)(1)(C).

During the March 2024 public hearings, the Commission wisely included experts to address the pressing issue of emerging adult offenders (those between18-25), and its need for data-driven empirical evidence to ensure rational sentencing laws for this population. Experts testified how the brain is still developing until the age of 25, and laws need to acknowledge this fact during computation of sentences. The Youthful Individual Amendment agrees a downward departure may be relevant in cases involving these emerging adults.

In addition to esteemed scientists who testified before you, the American Academy of Pediatrics, in their State of the Art Review, on "Teenagers, Sexting, and the Law" 2018, opined "the human brain is not fully mature until age 25 years or older, especially areas of the prefrontal cortex (dealing with judgement) and the limbic system (dealing with impulsiveness)". Further, the American Bar Association, in its 2024 feature article, "Emerging Adult Justice: America's Recent Attempts to apply Research to Politics and Practices" notes the American Academy of Pediatrics raised their age limit of care to 21, noting that "21 is an arbitrary demarcation line for adolescence because there is increasing evidence that brain development has not reliably reached adult levels of functioning until well into the third decade of life". While we do not permit people under 21 to purchase alcohol or marijuana, the justice system considers this population of teenagers to be adults at 18, as evidenced by males mandated to register for Selective Service Registration. Emerging adults represent a disproportionate number of individuals entering the criminal justice system. While they make up only 10% of the population, they account for nearly 20% of those imprisoned nationally.

It is *imperative* that judicial discretion be given to these individuals in sexual offenses as well as other crimes, and politics not interfere with rational, fact-based reasoning. Those with sex offense convictions related to non-contact and internet-based offenses must be included in this amendment. We are at a sociological turning point, with an entire generation of young adults who have grown up with a cell phone since elementary school, and who have an intense curiosity of the world around them. Given the immaturity of their brains, they are increasingly making inappropriate internet choices. They visit websites with unsuitable images or request sexually-explicit photos/videos from those they are in a relationship with, and although they are not sexual predators or offenders in the traditional sense, they are then categorized as such for a lifetime. Tens of thousands of lives forever ruined due to engaging in what is natural for children and young adults: exploration.

The American Academy of Pediatrics review article previously mentioned summarizes the frequency of teen sexting (sending or receiving a photo/video) as frequently as 15-38%. These are astonishing figures! The incidence rate has increased as adolescents age. All things on the internet are readily available to them and, given their still-developing capacity for reasoning and judgement, they are increasingly being incarcerated for possession and distribution (sharing) offenses. Romeo and Juliet offenses have resulted in nightmarish sentences as well, often resulting in convictions for production of child pornography. The Child Pornography Production Statute has been hijacked to include emerging adults in relationships with those below the age of 18, condemning these individuals to a life on the sexual offender registry when their intent is entirely different from those who produce child pornography for profit, or producers who distribute images among offender sites. These are entirely different populations; however, judges are not given discretion due to mandatory minimums and these sentencing inequities must be addressed. While people under 18 can marry, a person who requests a nude photo/video of the person they are in a relationship with can be prosecuted for production of child pornography. You can have sex with or marry someone under the age of 18, but not ask for a nude photo?

Some states are beginning to construct Emerging Adult Bills (e.g. Washington State) and others will hopefully follow suit, but for those in the federal system, a national understanding and action is needed, giving judges the ability and discretion to make individualized decisions and rational sentences based upon the science and facts of each case.

Our team also welcomes the opportunity to respond to the following

(6) Requesting ‘‘such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law.’’ 28 U.S.C. 995(a)(8).

Our team finds the Commission’s research extremely helpful. The public does not see a true picture of the make-up of people incarcerated in the Bureau of Prisons (BOP). The Commission’s recent report on the Education Level of Federal Prisoners was informative and eye-opening.

We would like to see the Commission publish reports on the security levels of people incarcerated for “violent” convictions broken down by individual offense, such as the security levels of people convicted of drug offenses, murder, sexual assault, commercial production, non-commercial production, human trafficking, sex trafficking, and possession, receipt, non-commercial distribution (sharing), and commercial distribution, enticement, and other sex offenses.

We would like to see research, such as the Commission’s Quick Facts reports, for Enticement and Internet Stings.

Our team would also like to see other DOJ agencies like BJS and the DOJ SMART office present unbiased statistics in the same objective manner as the Commission, to let the public

digest and interpret the research, and allow the public to form their own opinions, instead of being told what to think, and without attempting to make certain convictions sound worse than they are without proof. We want to see objective research studies presented objectively.

(8) Devising and conducting ‘‘seminars and workshops providing continuing studies for persons engaged in the sentencing field’’ and ‘‘training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process.’’ 28 U.S.C. 995(a)(17)–(18).

The Washington Lawyers Committee (civil rights group)
SaferSociety.org. provides excellent continuing education workshops

Our team would also like to see the Commission conduct seminars on topics such as alternatives to incarceration, restorative justice, and pretrial diversion options to sentencing professionals.

We would also like to see mandatory mental health training required for anyone involved in the criminal justice system or federal prison system.

(10) Holding ‘‘hearings and call[in] witnesses that might assist the Commission in the exercise of its powers or duties.’’ 28 U.S.C. 995(a)(21).

We are requesting that the Commission invite the following experts to attend hearings.

- Mark Mahoney, Esq. National Expert on Neuro-divergent (ASD) young adults and the justice system, particularly related to child pornography charges. https://www.harringtonmahoney.com › autism-defense-attorney
- Decriminalize Developmental Disabilities https://dthree.org/
- Stop It Now https://www.stopitnow.org/

Thank you, Judge Reeves and Commissioners, for providing the opportunity for our team and the public to provide commentary for the 2024-2025 proposed priorities, and to share our honest concerns with you. Team FED CHICKS knows the Commission takes the time to listen, that you hear us, and we value the Commissions’ representation of truth and justice.

Sincerely,

Team FED CHICKS

Team Fed CHICKS
Fighting **E**xclusions and **D**isqualifications for zero
Criminal **H**istory **I**nternet **C**onvictions with **K**nowledge and **S**olutions
[redacted]

The Hood Exchange
1074 Astor Ave SW
Atlanta, GA 30310

June 17, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Sia Henry, and I am submitting this comment letter on behalf of the Hood Exchange. The Hood Exchange is introducing formerly-incarcerated Black populations to international travel, creating opportunities for them to connect with the African diaspora, learn about their history, begin to heal from racism and trauma, and develop plans to grow personally and professionally. I am writing today concerning the United States Sentencing Commission's (USSC) oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, we urge the Commission to conduct a complete review and revision of the Tables.

For over half a century, the United States' drug policy has ripped families and communities apart while failing to achieve its stated purpose of realizing a drug-free world. Richard Nixon announced the War on Drugs in 1971 and, in doing so, perpetuated an ongoing rhetoric and myth of Black criminality[1]. Ronald Raegan escalated the impact of this policy by prioritizing punishment over treatment, thereby causing a significant increase in the incarcerated population, especially for nonviolent drug offenses.

While over fifty years of ongoing political and educational messaging demonizing drug use and stigmatizing drug users has failed to realize a drug-free world, the underlying racial and social

[1] John Ehrlichman, Nixon's Assistant for Domestic Affairs, said: "You want to know what this [war on drugs] was really all about? The Nixon [Administration] . . . had two enemies: the antiwar left and [B]lack people . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did." (Equal Justice Initiative. *Nixon Adviser Admits War on Drugs Was Designed to Criminalize Black People*. March 25, 2016. https://eji.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/)

motivations have succeeded. Since its inception, the drug war has been overwhelmingly enforced in BIPOC communities, especially low-income ones,[2] causing the country's inflated prison population to be disproportionately comprised of Black, Latino, and Indigenous people.[3] It has led to lengthy terms of imprisonment for relatively low-level offenses and for those with little to no criminal history[4], which perpetuates cycles of trauma and violence. The same conditions have fueled and perpetuated violence internationally and in inner-city neighborhoods nationwide,[5] and have led to increases in concentration, adulteration, and toxicity of the substances themselves.

An increasingly multi-partisan coalition is calling for change. In 2017, the USSC published a report describing, in part, how drug-related mandatory minimum penalties have been "applied more broadly than Congress may have anticipated."[6] Such non-discretionary sentencing fails to promote public health. Instead, it has the effect of incarcerating people for longer amounts of time than the evidence shows deters further criminal activity[7] - at the taxpayer's expense.

While reversing and mending the harms of the war on drugs will take effort from people across the government and political spectrum, one way to shift policy in a more humane direction - and in alignment with contemporary evidence - is to go to one of the current roots of the problem: drug sentencing. The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and

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[2] *See*, Colleen Walsh, *Solving Racial Disparities in Policing*, Feb. 23, 2021, https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing/; *see also*, ACLU DC, *Racial Disparities in Stops by the DC Metropolitan Police Department*, June 16, 2020, https://urldefense.com/v3/__https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf__;!!Phyt6w!M3tbrIzizSTS6KMjsaPASYXWMFeEA1fkh6tY9rjOLLeAtcunXEj6k0DAkg0%24)

[3] "The incarceration boom fundamentally altered the transition to adulthood for several generations of [B]lack men and, to a lesser but still significant extent, [B]lack women and Latino men and women. By the turn of the 21st century, [B]lack men born in the 1960s were more likely to have gone to prison than to have completed college or military service." (Vera, *American History, Race, and Prison*, https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison)

[4] *Id*.

[5] Heather Ann Thompson explained in a 2015 interview with Nursing Clio that "intensive incarceration has emptied communities of their elders, their parents, their grandparents, and their children now, through the juvenile justice system. It has made them even poorer because there are no jobs. It has basically created an environment where violence can flourish . . . Should we be surprised that violence is a problem when we make an economy illegal, and make it the only economy that is available because there are no factories?" (Nursing Clio, *An Interview with Historian Heather Ann Thompson (Part 2)*, Nov. 5, 2015, https://nursingclio.org/2015/11/05/an-interview-with-historian-heather-ann-thompson-part-2/#:~:text=What%20we%20start%20to%20see,environment%20where%20violence%20can%20flourish)

[6] USSC, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System*, Oct. 2017, at 6. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf

[7] National Institute of Justice. *Five Things About Deterrence*. May 2016. https://www.ojp.gov/pdffiles1/nij/247350.pdf

harms would lead to more accuracy in sentencing decisions, which would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

This is not only a significant opportunity[8] but a timely one. In April 2024, following the Health and Human Services Department's recommendation, the Drug Enforcement Administration (DEA) announced its decision to reschedule cannabis to Schedule III.[9] Given that the Tables presently translate quantities of various illegal drugs into their marijuana-equivalent quantities for the purpose of determining relative harm, it would be appropriate to utilize the multi-agency review already happening with cannabis to review and update the tables.

Additional research about other historically stigmatized substances should also inform this review. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, and again granted two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019.[10] In 2024, the FDA extended the same status to an LSD formula for the treatment of generalized anxiety disorder.[11] The FDA is also reviewing a new drug application for MDMA-assisted therapy[12], for which they will likely have a decision by August 2024.

Meanwhile, there has been growing bipartisan support to fund clinical trials exploring the use of psychedelics[13] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[14] For instance, in the 2024 National Defense Authorization Act, the Department of Defense authorized funding a study on psychedelics for the treatment of

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[8] Drug offenses make up the largest portion of the federal docket. (*See*, Fiscal Year 2021 Overview of Federal Criminal Cases. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf)

[9] Alicia Wallace et al. CNN. *Justice Dept Plans to Reschedule Marijuana as a Lower-risk Drug.* April 30, 2024. https://www.cnn.com/2024/04/30/economy/dea-marijuana-rescheduling/index.html

[10] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[11] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[12] *Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD*, February 9, 2024, https://news.lykospbc.com/2024-02-09-Lykos-Therapeutics-Announces-FDA-Acceptance-and-Priority-Review-of-New-Drug-Application-for-MDMA-Assisted-Therapy-for-PTSD

[13] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[14] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

PTSD in military members.[15] In March 2024, the Department of Veterans Affairs passed a budget allocating $20 million for clinical trials for MDMA and psilocybin.[16] The National Institutes of Health has also opened funding opportunities for studying psychedelic-assisted therapy for chronic pain in older adults.[17] This shift in the evidence base, and concurrent changes in federal policy, reflects an increasing willingness and mandate to reevaluate long-held assumptions about controlled substances, paving the way for more drug policies driven by data rather than dogma.

Alongside the evidence and government agencies, recent polls have found an overwhelming majority of American voters are also eager for a new approach to drug laws and responses to drug-related offenses.[18] Over 60% support ending the War on Drugs; "eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services"; repealing mandatory minimum sentences for drug crimes; and commuting, or reducing, the sentences of people incarcerated for drugs.[19] Representing one of "the few truly bipartisan issues in American politics," the "breadth and depth of support for change suggests that there are few issues for which the nation's laws so misrepresent the preferences of the American people as for drugs."[20]

Despite these widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables remain based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors.[21] Congress[22] and this Commission[23] have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine. For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious

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[15] Herrington, *Biden Signs Defense Spending Bill Funding Psychedelic Research* Forbes.
[16] Curtis, *VA-funded psychedelic therapy trials for PTSD could save lives, veteran organization says* Fox 13 News
[17] *See e.g., Safety and Early Efficacy Studies of Psychedelic-Assisted Therapy for Chronic Pain in Older Adults (UG3/UH3 Clinical Trial Required) NOFO*
[18] ACLU. *Poll Results on American Attitudes Toward War on Drugs*. June 9, 2021. https://www.aclu.org/documents/poll-results-american-attitudes-toward-war-drugs
[19] *Id.*
[20] *Id.*
[21] Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021).
[22] Aris Folley, *Congress Set to Tackle Crack, Powder Cocaine Sentencing Disparity Before Year's End*, December 18, 2022, https://thehill.com/business/3778680-congress-set-to-tackle-crack-powder-cocaine-sentencing-disparity-before-years-end/
[23] *Change In Federal Cocaine Sentencing Policy Recommended Findings To Be Submitted To Congress*, April 5, 2002, https://www.ussc.gov/about/news/press-releases/april-5-2002

need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the drug or other substance," potentially positive "pharmacological effect[s],"[24] and likelihood of misuse and dependence[25].

The United States is long overdue for sentencing reform, and the urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Sincerely,

Sia Henry
Executive Director, the Hood Exchange

[24] United States Drug Enforcement Administration. *The Controlled Substances Act*. https://www.dea.gov/drug-information/csa

[25] Any inquiry should take into account ways harm reduction approaches, public education, and proven methods of avoiding harm and use among minors can reduce the likelihood of misuses and dependence. Revising the Tables would likely lead to a reduction in resources spent on enforcement, prosecution, and punishment. Those resources could then be reinvested to bolster effective harm reduction and public education efforts. (*See*, Counsel of State Governments, Justice Reinvestment Initiative, https://csgjusticecenter.org/projects/justice-reinvestment/#:~:text=Justice%20Reinvestment%20is%20a%20data,Justice%20Reinvestment)

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July 15, 2024

The Honorable Carlton Reeves, Chair
United States Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: Request for Public Comment on Proposed 2024 Amendments to Sentencing Guidelines (89 FR 48029)

Dear Judge Reeves,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 240 national organizations to promote and protect the civil and human rights of all persons in the United States, we write to provide comments on possible priorities for the U.S. Sentencing Commission's ("Commission") 2024-2025 amendment cycle ending May 1, 2025. We applaud the Commission for specifically asking for input on how it can make the federal sentencing system fairer and more just from a civil rights perspective. The Leadership Conference believes in public safety that respects the dignity and human rights of all people. This requires policies with upfront investments in non-carceral social supports and community-based programs, instead of policies that continue investment in overcriminalization, overincarceration, and excessive sentencing practices.

Currently, the United States leads the world in imprisoning or supervising nearly 5.5 million people, imprisoning people at a higher rate than any other nation.[1] As of 2022, 700 of every 100,000 adults in the United States were behind bars.[2] This number is due to the status quo of criminalization in this country, in tandem with the egregiously long sentences imposed on people who are convicted of crimes.[3] In 2019, nearly one in five of people in the prison system had served at least 10 years in prison, with 56 percent of the population serving a sentence of 10 years or longer.[4] Additionally, Black people make up 14 percent of the U.S. population, but in 2019 made up 46 percent of the prison population who had already served

[1] "Correctional Populations in the United States, 2022-Statistics Table." *Bureau of Justice Statistics*. May 2024. https://bjs.ojp.gov/document/cpus22st_sum.pdf; "States of Incarceration: The Global Context 2024." *Prison Policy Initiative*. June 2024. https://www.prisonpolicy.org/global/2024.html.
[2] "Correctional Populations in the United States, 2022-Statistics Table," *supra* note 1.
[3] "How Many People Are Spending Over A Decade in Prison?" *The Sentencing Project*. Sep. 2022. https://www.sentencingproject.org/app/uploads/2022/10/How-Many-People-Are-Spending-Over-a-Decade-in-Prison.pdf
[4] Ibid.

The Leadership Conference

at least 10 years.[5] The criminal legal system is rife with racial disparities. In state prisons, Black people are five times more likely to be incarcerated than White people.[6] Additionally, Black men receive sentences 13.4 percent longer, and Hispanic men receive sentences 11.2 percent longer, than White men. Similarly, Hispanic women receive sentences 27.8 percent longer than White women. Overall, people of color make up 39 percent of the U.S. population,[7] but are greatly overrepresented in prisons, making up nearly 70 percent of the prison population.[8] It is clear that current sentencing practices perpetuate racial and ethnic disparities that take place at the front end of the criminal legal system.

Current sentencing practices prioritize excessive punishment and retribution over proportional, equitable, and fair punishment. There are many overarching sentencing policies and practices that must be extensively reformed in our lifetime. However, our comment focuses on the specific areas we believe the Commission should prioritize in the 2024-2025 amendment cycle in order to improve the fairness and proportionality in the sentencing guidelines; promote individualized review of specific offense conduct; be inclusive of people who have been directly impacted by the sentencing guidelines promulgated by the Commission; and mitigate excessively punitive provisions that have promoted racial disparities in sentencing and sustained the extremely high number of individuals in the federal penal system.

I. Ban the use of uncharged and dismissed conduct

We commend the Commission for limiting the use of acquitted conduct.[9] The Commission should extend this limitation to uncharged and dismissed conduct, eliminating the consideration of this conduct as relevant conduct under USSG § 1B1.3. The relevant conduct rule allows "relevant conduct"—or actions defendants performed in preparation of the offense, during the offense, or after in order to avoid detection of the offense for which they have been convicted—to be used to determine the guideline range.[10] Relevant conduct can be behavior the defendant counseled, commanded, induced, procured, or willfully caused.[11] Furthermore, under a "real offense" approach, relevant conduct can include acts for which charges were filed but where there was ultimately no finding of guilt or charges were never filed. Therefore, judges are able to consider "uncharged" and "dismissed" conduct when determining certain

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[5] Ibid. *See also* Wang, Leah. "Updated charts show the magnitude of prison and jail racial disparities, pretrial populations, correctional control, and more." *Prison Policy Initiative.* April 1, 2024. https://www.prisonpolicy.org/blog/2024/04/01/updated-charts/ ("the national incarceration rate of Black people is six times the rate of white people and more than twice the rate in every single state").
[6] Nellis, Ashley. "The Color of Justice: Racial and Ethnic Disparity in State Prisons *The Sentencing Project*, Oct. 13 2021. https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/
[7] Jones, Nicholas, et al.," 2020 Census Illuminates Racial and Ethnic Composition of the Country." *United States Census Bureau*. Aug. 12, 2021. https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html.
[8] Nellis, Ashley. "Mass Incarceration Trends." *The Sentencing Project*. May 21, 2024. https://www.sentencingproject.org/reports/mass-incarceration-trends/.
[9] "Amendments to the Sentencing Guidelines." *U.S. Sentencing Comm'n.* April 30, 2004. https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202405_Amendments.pdf.
[10] U.S. Sentencing Guidelines Manual § 1B1.3 (2024).
[11] "U.S. Sentencing Guidelines: Annotated 2023, Chapter 1." *United States Sentencing Comm'n.* https://www.ussc.gov/guidelines/2023-guidelines-manual/annotated-2023-chapter-1.

base offense levels, specific offense characteristics, cross references, and adjustments, in the calculation of a sentence for a crime or crimes for which a defendant was actually convicted.[12]

The consideration of uncharged and dismissed conduct in sentencing decisions is a practice that is neither fair or just. Without notice or a greater burden of proof, defendants can be punished with a separate or greater crime(s) during sentencing.[13] Factoring uncharged and dismissed conduct into sentencing decisions results in harsher penalties and longer sentences[14] for actions the prosecution has not proven that a defendant committed. To be clear, one should not be punished for conduct that has not been proven beyond a reasonable doubt. Though the consideration of uncharged and dismissed conduct has been permitted by the courts, the practice raises serious constitutional concerns and undermines the judicial process. The Fifth Amendment of the U.S. Constitution prohibits the deprivation of life, liberty, or property without due process of law.[15] The use of uncharged and dismissed conduct, where a judge can base sentencing on a standard of preponderance of the evidence, inhibits true due process. As a jury never deliberated on the criminal charge(s) and made a decision on guilt beyond a reasonable doubt, the use of this conduct in sentencing is inherently violative of the Fifth Amendment. Furthermore, while the Supreme Court has ruled that the preponderance-of-the-evidence standard at sentencing satisfies due process,[16] uncharged and dismissed sentencing is at odds with the fundamental fairness that is also guaranteed by the due process clause. The practice undermines the trust in the legal system — a trust that is necessary for the system to function.

II. Eliminate the double counting of criminal history, especially for drug and firearm offenses.

The Commission should prioritize eliminating the practice of double counting criminal histories in sentencing determinations. Under USSG § 4A1.1, judges are able to consider the criminal record of defendants to determine their sentence. Defendants are assigned to one of six criminal history categories based on the content of their past misconduct.[17] The justification for considering criminal history in sentencing is to protect the public from the likelihood of recidivism and criminal behavior, through harsher and longer sentences for the individual.[18] However, this approach does not acknowledge the systemic bias and injustice that comes with considering criminal histories in sentence calculation.

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[12] Ibid.
[13] Hoy, Christine E. "Uncharged Conduct and Disproportionate Impact: Amending the Guidelines to Protect Due Process Interests at Sentencing." *Seton Hall Journal of Legislation and Public Policy*. Vol. 48: Iss. 3, Article 11. 2024. https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1979&context=shlj.
[14] Ibid. ("Using uncharged conduct, a potential imprisonment term of two to eight months can be increased to 84 to 105 months (about nine years). In other words, a sentence of less than a year can be increased to seven, almost nine years, based on conduct a person was never arrested for, charged with, pleaded guilty to, or convicted of by a jury beyond a reasonable doubt, so long as the sentence does not exceed the otherwise applicable statutory maximum. Worse yet, prosecutors could still charge someone for this uncharged conduct, and the Double Jeopardy Clause would not prohibit it").
[15] U.S. CONST. amend. V.
[16] McMillan v. Pennsylvania, 477 U.S. 79 (1986).
[17] "Primer on Criminal History 2023." *United States Sentencing Comm'n.* https://www.ussc.gov/sites/default/files/pdf/training/primers/2023_Primer_Criminal_History.pdf.
[18] "U.S. Sentencing Guidelines: Annotated 2023, Chapter 4." *United States Sentencing Comm'n.* https://www.ussc.gov/guidelines/2023-guidelines-manual/annotated-2023-chapter-4.

Utilizing criminal history in sentencing has a disparate impact on Black and Brown people, who tend to have more contact with the criminal legal system.[19] Thus. they are more likely to receive additional points for criminal history, resulting in Black and Brown men having longer prison sentences than their White counterparts.[20] This practice of considering criminal history in sentencing of new offenses highlights the ways in which people with criminal convictions can be disadvantaged well beyond the completion of their sentence(s).

People with these convictions are further disadvantaged when their criminal history is "double counted" toward the sentencing for a current offense. Double counting occurs when an enhancement is applied in the adjustments section of the guidelines for conduct already accounted for in the defendant's criminal history.[21] In those situations, a judge is considering the offense the defendant is being sentenced for, a prior conviction(s), and that same prior conviction(s) as an adjustment that can increase the sentence level. This type of calculation makes disproportionate and excessive sentences more likely. The guidelines have explicitly prohibited double counting in certain situations, but some firearm and drug charges still permit double counting. Double counting only adds to the problem of mass incarceration in this country.

III. Eliminate the consideration of juvenile offenses

The Commission should prioritize eliminating the consideration of juvenile offenses in sentencing. USSG §4A1.2(d) 18 U.S.C.A permits an individual's criminal history to include juvenile adjudications and adult criminal convictions a defendant received when under the age of eighteen. The points added to the defendant's overall criminal history score are determined by the duration of the sentence(s). Like all criminal history considered in sentencing, the justification for lengthening the sentence of a current offense because of a prior juvenile conviction is to protect the public from the likelihood of recidivism and criminal behavior through a harsher and longer sentence.[22]

In their comments on the Commission's proposed 2024 amendments to the Guidelines, the Juvenile Law Center, the Sentencing Project, and others presented a thorough overview of why it is imperative that the Commission remove all consideration of youthful offenses from the criminal history score.[23] The comment cites the reasoning behind this demand as including "(1) the purpose of the Guidelines, (2) the

[19] "Racial and Ethnic Disparities in the Criminal Justice System." *National Conference of State Legislatures*. May 24, 2022. https://www.ncsl.org/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-criminal-justice-system.
[20] *See* "2023 Demographic Differences in Federal Sentencing." *United States Sentencing Comm'n.* https://www.ussc.gov/research/research-reports/2023-demographic-differences-federal-sentencing.
[21] Swearingen, Gary. "Proportionality and Punishment: Double Counting under the Federal Sentencing Guidelines." 68 Wash. L. Rev. 715. 1993. https://digitalcommons.law.uw.edu/wlr/vol68/iss3/7.
[22] "U.S. Sentencing Guidelines: Annotated 2023, Chapter 4," *supra* note 18.
[23] Juvenile Law Center, The Sentencing Project, The Gault Center, National Youth Justice Network, and Citizens for Juvenile Justice. "Comment on Proposed 2024 Amendments." *The Sentencing Project*. Feb. 22, 2024. https://www.sentencingproject.org/app/uploads/2024/03/2024.02.22-Ltr-Comments-to-Sent-Guidelines-Amends-FINAL.pdf.

unique history, purpose, and practice of the juvenile justice system, (3) racial disparities in the adjudication and sentencing of youth, (4) the impact of juvenile records laws, and (5) disparities in laws governing how and when youth are transferred for prosecution and sentencing in adult court."[24] Overall, the juvenile system purports to prioritize rehabilitation and responding to a child's needs over punishment,[25] and therefore it is contrary to the purpose of the juvenile system to then increase adult sentences based on the sentences a defendant received when they were under the age of eighteen.

Similar to all criminal history, factoring juvenile offenses into an individual's criminal history for the purposes of sentencing creates deep racial disparities. Black, Brown, and Indigenous children are disproportionately represented at every stage of the juvenile system, with Black youth being 4.4 times and Indigenous youth being 3.2 times as likely to be incarcerated in comparison to their White counterparts.[26] Due to a number of factors, including overpolicing,[27] Black, Brown, and Indigenous children have a higher likelihood of being involved in the juvenile system,[28] and are more likely to attend schools where the investment in police presence creates a school-to-prison pipeline.[29]

IV. Make changes to supervised release.

We urge the Commission to help promote equity in supervised release and probation. Under 28 U.S.C. § 994(a)(3), the Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release.[30] Under 28 U.S.C. § 994(a)(2)(B), the Commission can create general policy statements on the conditions of probation and supervised release. Probation and supervised release are both forms of supervision that allow people with criminal convictions to reenter society earlier or to carry out their sentence in society in lieu of incarceration, but both are also forms of carceral control that can result in reincarceration. Supervised release can be beneficial when it leads to a decrease in the incarcerated population. However, it can be harmful when judges rely on community supervision, advertently "net widening" and placing people on supervision who could receive a lesser form of punishment, or causing people to remain in the criminal legal system for longer periods of time.[31] The longer someone is on supervision, the longer they are at risk of incarceration due to a violation. Currently, fewer than half of people on community supervision complete their sentence, with about 56

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[24] Ibid.
[25] Ibid.
[26] Rovner, Josh. "Youth Justice by the Numbers." *The Sentencing Project*. May 16, 2023. https://www.sentencingproject.org/policy-brief/youth-justice-by-the-numbers/.
[27] Ghandnoosh, Nazgol, & Barry, Celeste. "One in Five: Disparities in Crime and Policing." *The Sentencing Project.* Nov 2, 2023. https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing/.
[28] "Racial and Ethnic Disparity in Juvenile Justice Processing." *Office of Juvenile Justice and Delinquency Prevention*. March 2022. https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity.
[29] Bacher-Hicks, Andrew, et al. "Proving the School-to-Prison Pipeline: Stricter Middle Schools Raise the Risk of Adult Arrest." 21 Educ. Next. Pgs. 52-57. 2021. https://www.educationnext.org/proving-school-to-prison-pipeline-stricter-middle-schools-raise-risk-of-adult-arrests/.
[30] "U.S. Sentencing Guidelines: Annotated 2023, Chapter 4." *United States Sentencing Comm'n.* https://www.ussc.gov/guidelines/2023-guidelines-manual/annotated-2023-chapter-7.
[31] Wang, Leah. "Punishment Beyond Prisons 2023: Incarceration and Supervision by State." *Prison Policy Initiative*. May 2023. https://www.prisonpolicy.org/reports/correctionalcontrol2023.html.

percent of people having their supervision revoked.[32] An estimated 3.7 million adults in the United State are under community supervision and at risk of incarceration.[33]

The terms of probation and supervised release can be severely restrictive due to their onerous requirements, including requirements on meeting with probation and parole officers, detailing comings and goings and other life changes, paying steep fines and fees, and others.[34] Staying in compliance with all of these conditions is difficult and necessitates financial, mental, and community support that may be in short supply. Additionally, the community supervision system is not free of disparities by any means. Black people are overrepresented in the system at 30 percent of the population, and are more likely to have their probation revoked than similarly-situated White and Hispanic people.[35] These statistics demonstrate the harms perpetuated by the onerous community supervision system.

The time has come to dramatically rein in this system of mass supervision and free people from the control of the carceral state. One way to improve community supervision is by limiting the possibility of revocation and minimizing the possibility of reincarceration. The Commission should seek to set clearer and fairer criteria for reincarceration due to a violation of probation or supervision conditions and eliminate reincarceration for technical violations of supervision conditions. For example, the Commission could write a policy statement on supervision that advises supervisors not to seek incarceration for behaviors that are legal, but impermissible under supervision, or that advises supervisors not to seek revocation over minor offenses.

V. Create a directly impacted persons advisory group.

It is imperative that the opinions and knowledge of directly impacted people are centered when system reforms are being considered. Under 28 U.S.C. § 994(o), the Commission must consult with "authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system" as part of its periodic review and revision of the guidelines.[36] Currently, the Commission is advised by practitioner, probation officer, tribal issue, and victims advisory groups. These groups are recognized as authorities on the criminal legal system and provide counsel, observations, feedback, and other guidance from their perspective to help the commission carry out its statutory responsibilities. In this spirit, the Commission should also establish a standing advisory group consisting of people who have been directly impacted by the criminal legal system, as they, too, are authorities on the system. People who have been sentenced or who have a loved one who has been sentenced have a special insight into the unfairness and inequities in the system, and play an essential role when considering the impacts of the Commission's work on defendants.

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[32] Ibid.
[33] Ibid.
[34] "Revoked: How Probation and Parole Feed Mass Incarceration in the United States." *American Civil Liberties Union & Human Rights Watch*. July 31, 2020. https://www.aclu.org/publications/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states.
[35] "Punishment Beyond Prisons," *supra* note 31.
[36] 28 U.S.C. § 994(o).

The Leadership Conference

VI. Conduct periodic visits of federal correctional facilities.

The Commission should prioritize conducting periodic visits to correctional facilities to improve its knowledge and better inform its decisions. Under 28 U.S.C. 994(o), the Commission is required to review and revise sentencing guidelines "in consideration of comments and data coming to its attention."[37] Additionally, 28 U.S.C. 994(q) requires the Commission and the Bureau of Prisons to provide recommendations "concerning maximum utilization of resources to deal effectively with the Federal prison population" including "the modernization of existing facilities."[38] To better inform these recommendations and to collect data firsthand, the Commission should consider making regular site visits to federal correctional facilities. The authority that creates guidelines on sentencing policies and practices should have a firsthand idea of the facilities that an individual is sent to when they are sentenced according to the guidelines. Periodic facility visits would improve the Commission's knowledge of correctional facilities and properly inform the Commission as it seeks to carry out its statutorily required responsibilities.

Conclusion

There are numerous areas in which the Commission could make sentencing fairer and ameliorate biases and injustices in our criminal legal system. There is a long road ahead to fully eradicate racial and other disparities within the system, but the changes mentioned in this comment present the Commission with several opportunities to correct these injustices and strive towards a more equitable system. Please direct any questions about these comments to Chloé White, senior counsel, justice, at [redacted]

Sincerely,

Jesselyn McCurdy
Executive Vice President of Government Affairs

[37] Ibid.
[38] 28 U.S.C. § 994(q).

THE SENTENCING PROJECT

July 15, 2024

United States Sentencing Commission
One Columbus Circle NE, Suite 2-500
Washington, DC 200002-8002
Attention: Public Affairs—Proposed Amendments.

Re: Potential Priorities, 2024-2025 Amendment Cycle, Sentencing Guidelines for United States Courts, U.S. Sentencing Commission

Dear Chairman Reeves:

The Sentencing Project appreciates this opportunity to propose priorities for the amendment cycle ending May 1, 2025. The Sentencing Project advocates for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice. We are eager to be a resource as you work to create just, equitable sentencing policies.

Across all potential priorities, we urge the Commission to address disproportionate and excessive sentencing. Research shows "a very weak relationship between higher incarceration rates and lower crime rates."[1] The toll of mass incarcerations on communities, however, is clear. It tears apart families, creates lasting trauma, harms the health of individuals and communities, and deepens poverty.[2] And those harms are disproportionately borne by Black, Latino, and Native American communities.

Meanwhile, Bureau of Prisons facilities are plagued by disrepair, abuse, and corruption.[3] In 1980, federal prisons held 25,000 people, now they hold over 158,000.[4] Lowering base offense levels wherever possible is necessary to improve abysmal conditions in federal prisons, preserve scarce funds for effective public safety interventions, and to interrupt generational cycles of over-incarceration and trauma.

The need for change is urgent. We applaud the Commission's work thus far to improve federal sentencing practices and we urge you to continue to build on that progress.

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[1] Stemen, D. (2017). *The Prison Paradox: More Incarceration Will Not Make Us Safer*. Vera Inst. of Justice.
[2] Travis, J., Western, B., & Redburn, S. (2014). *The growth of incarceration in the United States*. National Academy of Sciences.
[3] *See* DOJ Office of the Inspector General (2024). *Inspection of the Federal Bureau of Prisons' Federal Correctional Institution Sheridan*; Levin, Sam (April 15, 2024). *US federal women's prison plagued by rampant staff sexual abuse to close*. The Guardian.
[4] Federal Bureau of Prisons (2023). *Statistics*.

1. Adopt evidence-based drug policies

We urge the Commission to take steps toward more rational drug policies by delinking the drug quantity table at §2D1.1 from statutory mandatory minimums. The Commission originally derived the initial Drug Quantity Table (DQT) by linking the offense levels for drug crimes to the stiff mandatory minimum penalties in the Anti-Drug Abuse Act of 1986 ("ADAA"), setting base offense levels slightly above the ADAA's mandatory minimums to incentivize guilty pleas.[5] In the ADAA, Congress imposed high mandatory minimums for increased drug quantities based on the theory that quantity was an effective proxy for greater criminal responsibility in drug trafficking enterprises.[6] Quantity thresholds for mandatory minimums were not rooted in research, but rather were "hastily chosen in the heat of partisan debate and based on demonstrably mistaken assumptions."[7] In turn the harsh mandatory minimums of the ADAA and the Guidelines significantly contributed to the explosive growth of incarceration in the United States in the late 1980's and 1990's.[8] While the Commission has modified drug sentencing guidelines ranges via retroactive amendments, the DQT remains linked to statutory quantity thresholds. In turn, the Guidelines continue to result in excess sentences for low-level individuals involved in the drug trade.[9]

As the Federal Defender Sentencing Guidelines Committee's May 2023 letter to the Commission discusses in detail, the DQT's reliance on statutory quantity threshold has been criticized by practitioners, the bench, and academics.[10] Indeed, the majority of judges who responded to the Commission's 2010 judicial survey believed the guidelines should be delinked from statutory mandatory minimums.[11] We urge the Commission to redesign §2D1.1 by delinking the drug guidelines from the quantity-based mandatory minimum penalties of the ADAA, and focusing instead on a person's role in the offense and the harms caused by the individual.

Furthermore, we urge the Commission to take an immediate step toward more rational drug sentencing by eliminating the "Methamphetamine (Actual)" and "Ice" guidelines. Offenses

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[5] *See* United States Sentencing Commission, App. C. Amend. 782, Reason for Amendment (eff. Nov. 1, 2014) ("When Congress passed the [ADAA], the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities."); see also *Kimbrough v. United States*, 552 U.S. 85, 96–97, 109.

[6] United States Sentencing Commission. Special Report to the Congress: Cocaine and Federal Sentencing Policy 148, at 119 (1995) (quoting 132 Cong. Rec. S. 14,300 (Sept. 30, 1986)).

[7] Statement of James Skuthan Before the U.S. Sent'g Comm'n, Washington, D.C., at 7 (Mar. 17, 2011) ("Skuthan Statement") (citing *Mandatory Minimum Sentencing Laws – The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong., 1st Sess., at 166, 169–70 (June 26, 2007) (statement of Eric Sterling)).

[8] Nellis, A. (2024). *How Mandatory Minimums Perpetuate Mass Incarceration and What to Do About It*. The Sentencing Project.

[9] For example, the Commission found in 2010 that "base offense levels that included or exceeded the five-year mandatory minimum penalty often applied to every function, even those that may not be considered functions typically performed by 'major' or 'serious' drug traffickers." United States Sentencing Commission (2011). *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*.

[10] Federal Defenders Sentencing Guidelines Committee (May 24, 2023). *2023 Annual Letter to the United States Sentencing Commission*.

[11] United States Sentencing Commission. *Results of Survey of United States District Judges January 2010 through March 2010*. Tbl. 3 (2010).

involving "methamphetamine (actual)" (pure methamphetamine) and offenses involving "Ice" (a mixture or substance of at least 80 percent purity) are punished ten times more severely than methamphetamine that either has not been tested or is treated as a "mixture" or "substance" containing methamphetamine.[12] Methamphetamine is the only drug punished more harshly based on purity. Meanwhile, the Commission's recent research shows a uniformly high-level of methamphetamine purity across the United States – as such, the purity of methamphetamine in a given offense has no relationship to an individual's culpability.[13] In turn, whether an individual faces a higher sentence based on purity turns on the testing practices of the given district, which vary widely and arbitrarily, not culpability.[14]

Given that methamphetamine has been the predominant drug in the federal caseload since fiscal year 2014 and comprises almost half of all drug trafficking offenses in federal dockets, the impact of the "methamphetamine (actual)" and "Ice" guidelines is profound.[15] The Commission found that in fiscal year 2022, "individuals sentenced for trafficking methamphetamine received average sentences of 91 months, the longest among all persons sentenced for a federal drug trafficking offense."[16] And that "methamphetamine trafficking was more severely sentenced than crack cocaine (70 months), heroin (66 months), or fentanyl trafficking (65 months)."[17] By eliminating the clear arbitrariness of the "methamphetamine (actual)" and "Ice" Guidelines, the Commission could take a valuable step towards both improving proportionality and increasing the rationality of drug sentencing.

2. Revisit the impact of youthful offenses on criminal history scores

We urge the Commission to return to the issue of the impact of youthful offenses on criminal history scores. As The Sentencing Project discussed in greater detail in our March 2024 joint comment with the Juvenile Law Center, The Gault Center, the National Youth Justice Network, and Citizens for Juvenile Justice, the consideration of offenses committed under 18 years of age in criminal history scores injects substantial arbitrariness and opportunity for bias into federal sentencing, contrary to the purpose of the Guidelines.[18] We urge the Commission to exclude consideration of all offenses committed prior to age 18 from criminal history scores to advance equity and consistency in sentencing.

3. Revisit Policy Statement §1B1.13 regarding victims of abuse

As The Sentencing Project articulated in our March 2023 comment to the Commission on proposed amendments to the reduction in sentence policy statement, we are gravely concerned

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[12] *See* United State Sentencing Guidelines §2D1.1(c).
[13] United States Sentencing Commission (June 2024). *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System*.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Juvenile Law Center, et al. (2024). *Comments Of Juvenile Law Center, The Sentencing Project, The Gault Center, National Youth Justice Network, & Citizens For Juvenile Justice to U.S. Sentencing Commission Proposed Amendment 2 Regarding Youthful Individuals*.

with the prevalence of sexual abuse within Bureau of Prisons facilities.[19] We urge the Commission to amend Policy Statement §1B1.13 to afford relief to all survivors. The amendments to the reduction in sentence policy statement following that comment still exclude many survivors from accessing relief.

Most notably, the policy statement requires that misconduct be established by a finding in a civil, criminal, or administrative proceeding, unless those proceedings are unduly delayed or the individual is facing imminent danger. As we noted in our 2023 comment, the sentencing judge considering the individual's application for relief is well-equipped to determine the merit of the individual's claim of abuse. To rely on a conviction fails to reflect the reality that the Department has a poor history of investigating and prosecuting such claims. It would also threaten the safety of incarcerated victims, who would face potential retaliation and further abuse while awaiting trial.

Furthermore, Policy Statement §1B1.13's requirement of a "sexual act" as defined by 18 U.S. Code § 2246, with its requirement of genital or anal contact, remains too narrow.[20] It excludes, for instance, the victims of the guard at FCI Dublin who forced two women to "strip naked for him during rounds and took photos, and stored a 'large volume of sexually graphic photographs' on his BOP issued cell phone.[21] We continue to urge the Commission to adopt the standard for victims of abuse recommended by the Federal Defenders:

> VICTIM OF ABUSE —The defendant was a victim of sexual or physical abuse in prison, where such abuse resulted in serious bodily injury or where it was perpetrated by a prison employee, contractor, or volunteer.

4. Reduce life sentences

Additionally, we urge the Commission to amend the guidelines with regard to Base Level 43 offenses, especially for those with little or no criminal history. Under the Commission's sentencing table an individual's recommended sentence is determined – in most circumstances – by calculating the offense's "base offense level" based on its severity and the individual's criminal history category. With one exception, for each base offense level the recommended sentencing range rises with an individual's criminal history category. For offenses with a base level of 43, however, a life sentence is recommended regardless of whether an individual has a criminal history. Base level 43 offenses can include a wide array of conduct. §2A1.1 (First Degree Murder), §2D1.1(a)(1) (Unlawful Manufacturing, Importing, Exporting or Trafficking), and §2M1.1(a)(1) (Treason) all specifically establish a base offense level of 43. Other offenses, including nonviolent drug offenses, may be aggravated to a base level of 43 based on an individual's perceived role in the offense and other factors.

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[19] Fettig, A. (2023). *Comment regarding Proposed 2022-2023 Amendments and Issues for Comment, Amendment 1, Sentencing Guidelines for United States Courts, U.S. Sentencing Commission*. The Sentencing Project.

[20] 18 U.S. Code § 2246.

[21] *Statement of Erica Zunkel Clinical Professor of Law and Associate Director, University of Chicago Law School's Federal Criminal Justice Clinic* (2022), Before the United States Sentencing Commission Public Hearing on Compassionate Release.

Jason Hernandez is a powerful example of the need to reform the sentencing ranges for Base Level 43 offenses. At 21 years old, he was sentenced life without parole plus 320 years for drug-related offenses that were committed mostly in his teens.[22] As he articulated in his 2018 comment to the Commission, the guidelines depart from international and domestic sentencing norms by mandating a life sentence in some circumstances even for non-violent offenses where an individual has no prior criminal history.[23] The manifest injustice of his sentence and his rehabilitation resulted in a commutation from President Obama, resulting in his release in 2015, and a recent full pardon from President Biden.[24]

Recommending life for all base level 43 offenses is inconsistent with a wealth of evidence that makes clear that extreme sentences – including sentences to life and death – are not necessary to protect public safety.[25] The vast majority of individuals age out of crime.[26] Individuals with little or no criminal history are also less likely to recidivate.[27] As such, we recommend that the Commission amend the guidelines to remove the recommendation that all offenses with a base level of 43 result in life sentences and institute sentencing ranges for such offenses, especially for those with little to no criminal history.

5. Research the trial penalty

Additionally, we urge the Commission to scrutinize the impact of the trial penalty on federal sentences. The 'trial penalty' refers to the substantial difference between the sentence offered in a plea offer prior to trial versus the sentence an individual receives after trial. Within the context of federal mandatory minimums and enhancements, the trial penalty is often so severe that less than 3% of individuals charged with federal offenses exercise their sixth amendment right to a trial.[28]

We urge the Commission to research the trial penalty, specifically factors including the impact of mandatory minimums and sentencing enhancements, racial disparities, the role of charge bargaining in creating the trial penalty, the role of stacked versus concurrent sentences, and the rate of downward departures or variances for individuals who plead guilty versus those who go to trial. We particularly urge the Commission to study the impact of the trial penalty on those serving long sentences including whether high statutory maximums impact the scale of the trial

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[22] Oversight Hearing on Clemency and the Office of the Pardon Attorney (May 19, 2022). *Testimony of Jason Hernandez*. House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security.
[23] Hernandez, J. (2018). *Comment to the U.S. Sentencing Commission that a policy statement be implemented advising that offense level 43's recommendation of life without parole be reduced to 360 months - life without parole for offenders with a criminal history category I and II who are convicted of a nonviolent crime*.
[24] Panicker, J. (April 30, 2024). *'I just can't believe it,' McKinney man receives long-awaited full presidential pardon*. WFAA.
[25] Nellis, A. (2021). *No end in sight: America's enduring reliance on life sentences*. The Sentencing Project.
[26] Farrington, D. (1986). "Age and crime." In Michael Tonry and Norval Morris (eds.), *Crime and Justice: An Annual Review of Research*. Vol. 7. Chicago, Ill.: University of Chicago Press; Piquero, A., Jennings, W., and Barnes, J. (2012). Violence in criminal careers: A review of the literature from a developmental lifecourse perspective. *Aggression and Violent Behavior*. Vol 17 (3): 171-179.
[27] U.S. Sentencing Commission (2016). *Recidivism among federal offenders: A comprehensive overview*.
[28] Gramlich, J. (2023). *Fewer than 1% of federal criminal defendants were acquitted in 2022*. Pew Research Center.

penalty.[29]

6. Research the impact of the §3553(a) sentencing factors on sentences

We urge the Commission to explore the impact of each §3553(a) sentencing factor on sentences. In *Booker*, the Supreme Court held that sentencing judges must consider Guidelines ranges but may also "tailor the sentence in light of other statutory concerns as well," such as the §3553(a) sentencing factors.[30] The Commission, however, has yet to fully study the impact of the §3553(a) sentencing factors on individual sentences. The weight the sentencing judges accord to each factor is particularly deserving of scrutiny given evolving evidence. For example, what weight do sentencing courts give to factor §3553(a)(2)(B), the need for the sentence to afford "adequate deterrence to criminal conduct," and is that weight consistent with existing evidence on the impact that sentence lengths have on deterrence? Or to what extent do judges consider the need to "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner" under §3553(a)(2)(C) and is that consideration consistent with actually available care and programming in the Bureau of Prisons? We particularly urge the Commission to study the extent to which these factors influence the most extreme sentences of 20+ years, 40+ years, and life. A greater understanding of the effect of the §3553(a) factors on federal sentencing, established via a judicial survey or other means, will shed valuable light on opportunities for evidence-based reform.

7. Research the impact of criminal histories on sentence lengths and racial disparities

We urge the Commission to explore the impact that criminal histories have on sentence lengths and racial disparities in sentences across a range of common offense types. At the state level, researchers found that Pennsylvania's guidelines recommends "sometimes months or years more prison time" based on criminal histories and that criminal histories account for half of the racially disparate sentencing recommendations for the same offense in Kansas and Minnesota.[31] Given the significant role that criminal history scores play in federal sentencing, we urge the Commission to examine the extent to which they contribute to sentence severity and racial disparities.

8. Collect and share data regarding "old law" individuals

Individuals convicted of offenses prior to the November 1, 1987 effective date of the Sentencing Guidelines (often referred to as "old law prisoners") are a small and highly vulnerable population within federal prisons who should be subject to research and monitoring by the U.S. Sentencing Commission. Currently, the U.S. Parole Commission is charged with annually reporting to Congress the number of parole-eligible "old law" individuals in federal prisons. No agency,

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[29] Specifically, we encourage the Commission to study the impact of the trial penalty on those serving 20-40 year, 40+ year, and life sentences, as distinct groups.

[30] *United States v. Booker,* 543 U.S. 220 (2005).

[31] Hester, R. (2018). Prior record and recidivism risk. *American Journal of Criminal Justice, 44*, 353-375. https://doi.org/10.1007/s12103-018-9460-8; Frase et. al. (2015), see note 24; Uggen, C., & Schwendeman, H. (2022). *Minnesota Sentencing Guidelines Commission Neutrality Review*. University of Minnesota; Nelson, M., Feineh, S., & Mapolski, M. (2023). *A new paradigm for sentencing in the United States*. Vera Institute of Justice.

however, is responsible for regularly reporting on the number of non-parole eligible "old law" individuals. The result is persistent failures to accurately account for the total number of "old law" individuals in federal custody.[32] These failures are particularly concerning given that "old law" individuals, by virtue of when they were incarcerated, are some of the most elderly and ill individuals in federal prisons.[33] Furthermore, "old law" individuals were accidentally excluded from the First Step Act, so even the most medically fragile or severely disabled individuals have no path home via compassionate release.[34]

While "old law" individuals were not sentenced under the Guidelines, collecting data on their population within federal prisons and their recidivism rates in the community is still well within the Commission's mandate to "advise and assist Congress and the executive branch in the development of effective and efficient crime policy" and "collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public."[35] The population of "old law" individuals is also small – likely a few hundred individuals at most – therefore monitoring would not impose a significant burden on the Commission. We urge the Commission to prevent this highly vulnerable population from continuing to fall through the cracks.

9. Seek feedback from currently and formerly incarcerated individuals

We applaud the Commission's efforts thus far to make the Guidelines comment process accessible to incarcerated individuals, including creating the ability to comment via Trulincs. We urge the Commission to take further steps to gather feedback from those most deeply impacted by the Guidelines: currently and formerly incarcerated individuals and their loved ones. The Commission should follow the example of a growing number of legislators and elected leaders and regularly visit federal prisons to speak directly with currently incarcerated individuals and observe the conditions within the Bureau of Prisons.

We also urge the Commission to convene listening sessions with formerly incarcerated individuals, including those sentenced to 20+ year, 40+ year, and life sentences. We encourage the Commission to consider how to formalize regular input from directly-impacted individuals and their loved ones, whether via an advisory committee or another model. A growing number of state sentencing commissions include formerly-incarcerated commissioners.[36] The Commission

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[32] For example, the BOP appears to have overreported the number of non-parolable old law individuals to the Congressional Budget Office by a factor of 10 in 2022, resulting in an incorrect estimate of the potential impact of the COVID-19 Safer Detention. Congressional Budget Office (2022). COVID-19 Safer Detention Act (reporting that there are 2300 old law individuals in federal prisons). Likewise, in 2022, the Parole Commission suddenly increased the number of "old law" individuals that they reported as in custody after discovering accounting errors. Johnson, C. (March 18, 2022). *Senior citizens serving federal sentences have fallen through the cracks*. NPR.

[33] Weisselberg, Charles D.; Evans, L. (2022). *Saving the People Congress Forgot: It Is Time to Abolish the U.S. Parole Commission and Consider All "Old Law" Federal Prisoners for Release.* Federal Sentencing Reporter.

[34] *Id.*

[35] United States Sentencing Commission (accessed July 10, 2024). *Mission*.

[36] Formerly incarcerated individuals are currently serving on, at minimum, the District of Columbia Sentencing Commission, the Washington State Sentencing Guidelines Commission, and the Minnesota Sentencing Guidelines Commission. *See* Pusatory, M. (Feb. 7, 2024). *DC Council appoints returning citizen to Sentencing Commission*.

should learn from this model and explore how to ensure that the voices of those who have felt the full impact of the Guidelines are central to discussions of Guideline revisions.

Thank you for this opportunity to speak and we look forward to opportunities for continued feedback and collaboration. Please reach out to Liz Komar, Sentencing Reform Counsel, at [redacted] with any questions.

Sincerely,

Kara Gotsch
Executive Director
The Sentencing Project

WUSA9; Notice of Appointment to Public Member - Convicted and Discharged from a Felony-Level Sentence Minnesota Sentencing Guidelines Commission for Timothy Morin (Sept. 1, 2023). State of Minnesota Executive Department. O'Conner, K. (May 22, 2024). *From life sentence to law degree: the redemption of Jeremiah Bourgeois*. KXLY.

TZEDEK
ASSOCIATION

Save A Life, Save A World

By the Grace of G-d

July 15, 2024

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Tzedek Association Comment on the Commission's Proposed 2024-25 Policy Priorities

Dear Judge Reeves and Members of the Commission,

Tzedek Association welcomes the opportunity to comment on the Commission's proposed priorities for the cycle ending May 1, 2025. Tzedek is a nonprofit humanitarian organization that focuses on criminal justice reform, religious liberty, and humanitarian cases around the globe. Tzedek is committed to championing the civil rights of those mistreated by the criminal justice system, empowering individuals to be productive citizens and aiding the less fortunate. Tzedek seeks a society that values compassion and fairness.

In recent years, Tzedek has championed ground-breaking reforms such as the First Step Act and the provisions in the CARES Act, which allowed for home-confinement for incarcerated individuals vulnerable to COVID-19 based on CDC criteria, as well as other measures to ensure that the criminal justice system embraces fundamental core values that reflect a belief in the unbounded human capacity for atonement and redemption. Both the First Step Act and the CARES Act stemmed from efforts initiated by Tzedek. They reflect Tzedek's view that a criminal justice system worthy of our nation must temper the need for punishment with compassion and must be informed by empirical evidence rather than reflexive

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and arbitrary policies and mechanisms that ignore that innate human capacity for growth and change.

Introductory Comment Regarding the Current Priority Cycle

Tzedek commends the Commission for noting that this cycle coincides with the 40th anniversary of the Sentencing Reform Act of 1984 (SRA) and for its expressed intent to focus on furthering the array of statutory purposes and missions set forth in the Act, including the various responsibilities entrusted to the Commission by such statutes as 28 U.S.C. § 991, 28 U.S.C. § 995, and 18 U.S.C. § 3553. Tzedek construes this expression of intent as signifying that the Commission is interested in broad, if not bold, thinking and input that challenges the status quo, especially those areas in which federal sentencing practices can be considerably improved and corrected. Indeed, the criminal justice system today requires radical change, a complete paradigm shift. This cycle presents a critical opportunity to correct fundamental flaws that have plagued federal sentencing practices for the decades since the enactment of the SRA. If not now, when?

Although the federal prison population shrank somewhat over the last decade, especially during the peak of COVID-19, this 40th anniversary of the SRA presents an auspicious occasion to reflect upon and address the vast expansion of the federal prison population since its enactment. It defies logic that the United States is the "Land of the Free" and yet the nation incarcerates more people both per capita and quantitatively than any other country in the planet. Taking away a person's freedom is government's greatest power short of warfare; it should be exercised with a lot more care and restraint than it is today.

Tzedek urges the Commission to particularly note the relative scarcity of non-custodial sentences, the lack of empirical data showing that specific prior criminal adjudication is predictive of recidivism, and the irrefutable scientific evidence that has emerged concerning age and brain development. This evidence shows that even for more serious offenses, young people mature and age out of antisocial behavior and establishes the efficacy of diversionary programs to address the underlying pathologies that lead to criminal behavior as viable alternatives to lengthy incarceration. It is equally important to note the extraordinary increase in the elderly population, a result of irrationally long sentences that fail to account for the undeniable evidence that, for the most part, the continued incarceration of the elderly is an extremely costly endeavor with de minimis public safety benefits due to the low recidivism risk.

This anniversary is also an appropriate opportunity to recognize the established fact that minorities tend to endure disproportionate harshness under the sentencing process that has evolved since the enactment of the SRA.

Given that context, Tzedek encourages the Commission to use this cycle to initiate bold and transformative action to rectify fundamental flaws in the sentencing process and ensure that the latest scientific and empirical data is reflected in sentencing policy. Tzedek notes that even in an era of unprecedented ideological division, criminal justice policy reform has drawn interest and support from across the ideological and political spectrum. Many important national criminal justice reforms, including the most significant recent federal criminal justice reform legislation, the First Step Act, enjoyed broad bipartisan support, precisely because of an emerging consensus about the limits and harms of overly harsh, inflexible, and excessively punitive approaches to sentencing.

The Commission should approach this cycle armed with empirical data that shows that modifying harsh and rigid sentencing practices decreases recidivism and crime, and thereby contributes to public safety and heartened by the fact that there is broad ideological support for sound criminal justice reform. And it should do so recognizing that purging irrational disparities, which disproportionately burdens marginalized communities and fosters universal distrust, if not outright disdain for the criminal justice system, is a worthy goal.

A Menu of Proposed Priorities to Combat Excessive Harshness and Unwarranted Disparity

From Tzedek's perspective, an unfortunate legacy of the SRA has been 1) the proliferation of excessively punitive sentences and 2) systemic disparities that manifest themselves in various phases of the criminal justice process. With respect to sentencing, both these overarching problems are exacerbated by the current version of the United States Sentencing Guidelines (U.S.S.G.).

It is important to recognize that the flaws that Tzedek urges the Commission to address are intricate and interconnected. There are many contributing factors to these two foundational problems and thus there are many steps necessary to correct them. Tzedek also recognizes that the Commission and the U.S.S.G. can only go so far in addressing a criminal justice system that reflects a fundamental shift to ever increasing prosecutorial domination of sentencing outcomes at the expense of judicial discretion. The adoption of mandatory minimum sentences, the fact that charging decisions and plea offers are opaque and largely beyond the reach of the

judiciary, and that the most ubiquitous and powerful vehicle to moderate sentences (a downward departure for "substantial assistance") is solely within the control of the prosecution are matters largely beyond the power of the Commission to rectify. Additionally, well-established principles of federal conspiracy law and a growing tendency of Congress to enact criminal statutes without due regard for traditional notions of *mens rea* are similarly beyond the Commission's reach.

Nevertheless, there are many steps that the Commission can take to ameliorate many of the most egregious outcomes that arise from these trends. And, of course, to the extent that the Commission recognizes that certain laws contribute to unwarranted harshness and disparity, the Commission can and should exercise its authority pursuant to 28 U.S.C. § 994(w)(3) to recommend legislative reform.

To provide important context for the proposed priorities described below, it is useful to define what Tzedek references when it refers to "unnecessary harshness" and "systemic disparities."

The SRA establishes this benchmark for the imposition of sentence: "The Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a). The Act then goes on to direct the court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1) and four distinct objectives of a sentence. 18 U.S.C. § 3553(a)(2)(A)-(D).

Tzedek joins the increasing array of stakeholders and observers who believe that sentences that far exceed what is necessary are routinely imposed, without appropriate regard for empirical data that shows that overly punitive sentencing is unnecessarily detrimental and destructive to individuals, families, and communities, and fails to promote public safety. Excessive harshness arises at various points in the sentencing process prescribed by the Application Instructions set forth in U.S.S.G. § 1B1.1. The proposals below are intended to address unwarranted severity in the calculation of base offense level, which in many cases rely upon false and misleading benchmarks to assess the severity of the crime, the application of adjustments related to acceptance of responsibility and obstruction of justice, the determination of criminal history, eligibility for various sentencing options, and misapplication and underutilization of U.S.S.G. departures.

Tzedek defines "systemic disparity" as a broad concept that not only embraces concerns that excessively harsh sentences tend to impact racial and ethnic

minorities more than others, but also includes irrational distinctions that overstate a person's criminal responsibility both individually and in relation to others whose criminal conduct is more severe – even in the same or a related case - but results in lesser punishment. These irrational distinctions arise from many factors, including inadequate consideration of criminal intent (*mens rea*), the use of arbitrary benchmarks to assess severity of the crime, unchecked prosecutorial charge and relevant conduct manipulation, the institutionalization of a "trial penalty," and a systemic failure to adequately consider mitigating factors.

The following menu of proposals seeks to address both excessive harshness and disparity, recognizing that these two outcomes are often inextricably interwoven in the application of the U.S.S.G. In some cases, the proposals overlap and in some cases, they are mutually exclusive. Tzedek's objective is to provide the Commission with an array of suggestions for its consideration. While some of the suggestions are quite specific, where the proposed revision clearly addresses a specific problem, others are presented more generally with the expectation that if the Commissions deems the proposal worthy of consideration, it will invite more specific input as the cycle unfolds.

Reformulate Base Offense Level Calculation for Theft and Drug Offenses

The single greatest driver of excessive harshness and disparity in federal sentencing derives from the formulaic approach to base offense level calculation. Driven by the application of arbitrary adjustments based on external factors that often bear no relation to an individual's true culpability, the U.S.S.G. establish presumptive sentences that are disproportionately harsh and overly excessive.[1] In particular, the use of the loss table for economic offenses in U.S.S.G. § 2B1.1 and the Drug Quantity Table under U.S.S.G. § 2D1.1 should be replaced. Tzedek believes that the current focus on quantification serves as an unreliable and unjust proxy for individual culpability and factors set forth in 18 U.S.C. § 3553(a), which a court should consider in imposing sentence.

[1] For example, sentences that are in essence a life sentence for nonviolent offenses are unacceptable. *See United States v. Rubashkin*, where a presidential commutation was granted to a man in his fifties who was sentenced to 27 years for fraud, a sentence "which many have called excessive in light of its disparity with sentences imposed for similar crimes." https://trumpwhitehouse.archives.gov/briefings-statements/president-trump-commutes-sentence-sholom-rubashkin/

By now the stories of individuals whose criminality is vastly overstated through the application of these provisions are well-established and are surely recognized by the Commission. Whether it is the individual who is recruited to participate in a narcotics conspiracy, with absolutely no knowledge of the quantities involved, or the mid-level bookkeeper, whose false entries contribute to a fraud whose scope is beyond her knowledge, the draconian presumptive sentences can be wholly excessive and disproportionate. It is time for the Commission to look at alternative approaches.

While in previous cycles Tzedek has proposed a revision of the loss table to rein in overly harsh sentencing,[2] a better approach is to identify key factors which a judge may consider in determining an individual's culpability. In the area of fraud, this approach is endorsed by the Task Force on the Reform of Federal Sentencing of Economic Crimes created by the *Criminal* Justice Section of the American Bar Association.[3] While the ABA proposal retains some consideration for loss value, it substantially shifts the emphasis to consideration of other factors reflecting individual culpability, an approach that is far more likely to result in a reasonable and proportionate sentence. And notably, to the extent that "loss" remains a relevant factor, the ABA proposal significantly adjusts the loss table to address the fact that the loss values in the current Guideline established years ago are poorly calibrated.

Tzedek similarly urges the Commission to formulate a completely revised culpability-focused approach to the determination of the base offense level for drug offenses. Given the pervasive statutory mandatory minimums that apply to many drug offenses, there is virtually no justification for the mechanistic application of the Drug Quantify Table to enhance the base level, rather than a more individualized assessment of culpability. The Commission should completely end the practice of determining the base level for drug offenses through a reference to the weight of the drugs and replace it with a guideline that directs the court to look at an array of factors to assess individual culpability. In combination with the next proposal, this would establish a regime in which any sentence for a nonviolent

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[2] *See* Tzedek Association, Public Comment to the U.S. Sentencing Commission's Request for Comment on Proposed Priorities for Amendment Cycle 2023-2024 (August 1, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=195

[3] *See* A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes (November 10, 2014), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf

controlled substance offense that did not carry a statutory minimum would be capped at 5 years, absent a substantial criminal history.

Establish Presumptive Maximum Sentences

As noted above, 18 U.S.C. § 3553(a) provides that a "court shall impose a sentence sufficient, but not greater than necessary," to comply with the purposes of sentencing set forth in the Act. Despite this statutory directive to avoid excessive sentences, the severity of federal sentences has increased dramatically since the advent of the SRA. In 1986, the year before the U.S. Sentencing Guidelines became effective, only just over half of all federal sentences included some term of imprisonment;[4] in Fiscal Year 2023, according to Commission data, 92.4 percent of all federal sentences included a prison term.[5] And the prison sentences are too long. Countless commentaries, reports and studies advancing a wide array of reform proposals support the proposition that the U.S. incarcerates too many people for too long, despite increasing evidence that overly harsh sentencing has disparate impact on some populations and no corresponding public safety benefits.[6]

A range of factors contribute to undue sentence severity in the federal system because the U.S.S.G. are suffused with a vast array of often overlapping and severe enhancements, some of which are specifically addressed in this submission, but all of which contribute to disproportionately harsh sentences, especially for those who exercise the right to trial. Tzedek proposes that for most criminal conduct, especially when committed by those with either no substantial or minimal history of prior criminal conduct, the Commission should promulgate presumptive maximum sentences. Judges would retain the authority to sentence above these presumptive sentencing caps provided specific reasons for doing so can be

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[4] Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, *Federal Offenses and Offenders Federal Sentencing in Transition, 1986-90* (June 1992), https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf.

[5] U.S. Sentencing Comm'n, *2023 Annual Report and Sourcebook of Federal Sentencing Statistics*, Figure 6. https://www.ussc.gov/research/sourcebook-2023.

[6] *See*, e.g., Council on Criminal Justice Task Force, *How Long is Long Enough?*, March 2023, https://counciloncj.foleon.com/tfls/long-sentences-final-report/ (defining "long sentences" as prison sentences of 10 years or more); Vera Institute of Justice, *A New Paradigm for Sentencing in the United States*, February, 2023, https://www.vera.org/downloads/publications/Vera-Sentencing-Report-2023.pdf; *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, UMKC Law Review, Vol. 87:1, 2018, also available at The Sentencing Project, https://www.sentencingproject.org/reports/long-term-sentences-time-to-reconsider-the-scale-of-punishment/.

articulated based on factors that should be tied to the specific individual and the specific conduct which is the subject of the conviction.

Tzedek proposes a two-tier cap approach:

Category 1: 15-year presumptive maximum for all federal crimes other than acts of terrorism, treason, murder, rape, or any crime of violence if the defendant was previously convicted of any prior state or federal felony.

Category 2: 5-year presumptive maximum if the defendant is not convicted of a crime of violence, has no substantial criminal history, and makes efforts to ameliorate the harm caused by the criminal conduct, such as through restitution or community service, or takes other steps to reduce recidivism risk, such as successful completion of treatment, counseling and/or participation in a restorative justice program.

As necessary to effectuate these presumptive maximum categories, Tzedek urges the Commission to propose an advisory list of aggravating factors that may provide the basis for a court to be authorized to impose a sentence longer than the presumptive maximum and that the Commission recommend that Congress amend 18 U.S.C. § 3553 to provide the necessary statutory authority to implement the presumptive maximum sentence construct, notwithstanding other preexisting statutes.

Offense Level 43 Reform

Tzedek supports a specific reform to Base Offense Level calculation in the sentencing table to amend the U.S.S.G. to remove the recommendation that a base level of 43 should necessarily result in a life sentence. A defendant can get to that base level because of the severity of the conduct (e.g. First Degree Murder, Unlawful Manufacturing, Importing, Exporting or Trafficking, (if resulting in death or serious bodily injury and the defendant had prior conviction for a similar offense), and Treason (if tantamount to waging war against the United States)). But a defendant can also get to that level through aggravating factors based on such factors as drug weight, role in the offense, etc.

Tzedek joins other groups who share the strong view that life sentences should be spared for the most heinous of crimes, should almost never be imposed for non-violent offenses, and clearly should not be mandated for those with little or no criminal history. Accordingly, the Commission should amend the U.S.S.G. to

eliminate the level 43 life recommendation and substitute a sentencing range, especially for those with a Criminal History of less than IV.

Criminal History

Just as the mechanistic approach to loss calculation and drug quantity can distort and often exaggerate an individual's criminal responsibility, so too can the point system approach to criminal history lead to distorted outcomes. These distortions arise from multiple factors: variable sentencing practices among states, counties, and localities, which can result in arbitrarily overstated criminal history based upon local sentencing practices; over-policing of certain populations and communities, which results in higher criminal histories and therefore longer sentences for some groups; failure to adequately account for age at the time of the prior offenses, except for limited circumstances; failure to recognize that prior imprisonment itself may have contributed to subsequent criminality; and countless more intangibles such as the offender's current age, family circumstances, and employment history.

Tzedek proposes that the current point system be replaced with more adaptive categories that will provide the sentencing judge with an opportunity to make a qualitative assessment of a person's criminal history. To provide greater flexibility within a criminal history range and to underscore the importance of a court making a qualitative rather than a quantitative assessment of criminal history, Tzedek suggests that the current model, which has six criminal history categories, be condensed into four categories: 1) no or limited criminal history; 2) low criminal history; 3) moderate criminal history; or 4) extensive criminal history. The Commission should draw on its extensive recidivism research to promulgate empirically sound criteria to aid courts in making the necessary assessment. These criteria should include an evaluation of the age at the time of the prior offenses, the nature of the offense and the extent to which the conduct evinced a motive for personal gain or reflected impulsive or reactive behavior, the extent to which the offender intentionally caused significant harm to others, whether prior sentences included treatment or any ameliorative component to address underlying pathologies, and other criteria that objectively justify enhanced punishment.

To aid in the promulgation of these criteria, Tzedek urges the Commission to undertake a multifaceted study to assess whether and to what extent criminal history scoring is assessing points for past conduct that has little or no additional risk-predictive value. Such a study should also assess whether unique personal factors, such as age, employment history, family circumstances, community

support, and medical and mental health issues are more risk-predictive than a mere point-based quantification of criminal history standing alone.

Ameliorating the Trial Penalty

As reported in the 2023 Sourcebook, 97.2 percent of all cases were disposed of by a guilty plea.[7] This is relatively consistent with data from the past several years. It is generally now well-established that a principal reason why trials have virtually disappeared from the federal criminal justice system is a phenomenon known as the trial penalty.[8] The trial penalty has essentially so burdened the fundamental right to a trial and is so costly to the accused – in terms of the additional years of imprisonment one faces if convicted after trial – as to transform the system into a plea-bargaining assembly line. Indeed, if one were to eliminate from the data those cases that proceed to trial where the crime is so heinous that the government makes no offer, the frequency of meaningful trials is even more miniscule. It is beyond the scope of this submission to detail the many reasons why the loss of criminal trials, and the accompanying pre-trial litigation through which courts and juries can exercise a check on government excess, is detrimental to justice. Suffice it to say that this system of pleas is clearly not what was envisioned by the founders and is a development that has been decried by advocacy groups across the ideological spectrum.[9]

The various studies of the trial penalty rightly note that one of, if not the main driver of the trial penalty is the government's unilateral control over charging decisions and the impact of mandatory minimum sentences and the U.S.S.G., even since they were rendered advisory. Prosecutors alone can select the charges and have the power to determine what conduct to urge the court to consider in imposing sentence. It is established practice for prosecutors to bring superseding indictments, add new charges and threaten to withdraw prior offers for those who

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[7] *See:* FY 2023 Sourcebook, *supra*, note 5, Table 11. https://www.ussc.gov/research/sourcebook-2023

[8] American Bar Association/Criminal Justice Section, *Plea Bargaining Task Force Report*, 2023, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf; Federal Sentencing Reporter, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, Vol 31, Issue 4 -5, April/June 2019, https://online.ucpress.edu/fsr/issue/31/4-5; National Association of Criminal Defense Lawyers, *The Trial Penalty on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf

[9] *Id*., especially, Federal Sentencing Reporter, *Tyranny of the Trial Penalty.*

do not capitulate. It is also routine practice for prosecutors to extract all manner of waivers as the price of the plea, thereby preventing legitimate issues that implicate other constitutional rights from ever being subjected to judicial review.

While some of the contributors to the trial penalty are beyond the scope of the Commission, there are many factors that could be alleviated by the Commission. One such contributor has been the use of acquitted conduct to enhance a sentence. Tzedek lauds the Commission for partially addressing this factor in the last amendment cycle. Tzedek now urges the Commission to take additional steps and tackle several other factors, which overly burden the right to trial and incentivize even the arguably innocent defendant to "cut a deal" rather than risk the consequences of the trial to which they are theoretically entitled.

- **Relevant Conduct**

Last year, when Tzedek commented on the proposed revisions to address the use of acquitted conduct, it urged the Commission "to consider in future cycles reforms that address the pernicious impact of sentencing based upon uncharged conduct."[10] Tzedek now urges the Commission to tackle the extraordinary harshness and disparity that have arisen from the use of uncharged conduct under the rubric of determining Relevant Conduct pursuant to U.S.S.G. § 1B1.3.

The context for this proposed reform is the indisputable fact that the government pervasively and routinely uses the threat that a sentence will be enhanced with uncharged conduct to coerce defendants to plead guilty. Because of the operation of the U.S.S.G., the government exploits the current process that requires a court to consider relevant conduct under U.S.S.G. § 1B1.3 and directs the court to enhance the sentence, without the evidentiary safeguards of trial, if the other conduct is established by a preponderance of the evidence pursuant to U.S.S.G. § 6A1.3. This process makes a mockery of the fundamental constitutional right to a trial by jury. That right is so essential that it is mentioned multiple times in the Constitution and the Bill of Rights (e.g. Art. III, § 1 [3]; Amendment VI; Amendment VII). Indeed, even in the context of civil matters, the Supreme Court in the term just concluded struck down a statute that vested the executive branch with the power to impose a civil fine for fraud rather than afford the defendant the constitutional right to a jury

[10] *See* Letter from Tzedek Association, *Re: Proposed 2023-2024 Amendments and Issues for Comment* (February 20, 2024), https://www.ussc.gov/policymaking/public-comment/public-comment-february-22-2024#pa3 531, 533-53

trial.[11] It is hard to fathom and, in Tzedek's view, unacceptable that the federal criminal justice system has evolved to the point where one can be severely punished for conduct absent any finding or admission of guilt and upon the low preponderance of the evidence threshold.

While there are cases where the individual's responsibility for the full scope of the criminality is embraced within the count of conviction and the jury's finding of guilt beyond a reasonable doubt, in virtually all multi-defendant prosecutions, especially when (as is usually the case) there is a conspiracy charge, that is not so. The operation of § 1B1.3, which *inter alia* involves "all acts and omission reasonably foreseeable in connection with that criminal activity" (§ 1B1.3(a)(1)(B), and that provision's interaction with § 6A1.3 (and the accompanying commentary), which allow a court to rely on assertions without the procedural protections of a trial on a finding of "probable accuracy," truly allow the tail to wag the dog. Further, the current approach to uncharged conduct also implicates important concerns with respect to the evisceration of *mens rea* requirements, which are addressed later in this submission.

In sum, the Commission's efforts to adopt a real offense as opposed to a charge offense sentencing model to prevent the prosecution from "influenc[ing] the sentence by increasing or decreasing the number of counts in the indictment"[12] has been frustrated by how relevant conduct leads to the same problems of undue prosecutorial control over sentencing factors. In actuality, the process is even worse in terms of promoting excessive harshness and unwarranted disparity because it permits prosecutorial arguments that lead to sentencing enhancements based on conduct that is neither charged and nor proved beyond a reasonable doubt. Tzedek firmly believes that the U.S.S.G. should be restructured to minimize this bludgeon, which is routinely deployed to assert overbearing leverage to extract guilty pleas and to punish those who assert their right to a trial.

Tzedek urges the Commission to think broadly about how best to address this fundamental flaw. There are numerous possible approaches, each of which implicates other aspects of the current sentencing regime. For example, one approach might be to revise the U.S.S.G. to have far fewer offense levels, but with considerably wider ranges, essentially evolving into a system where the charged conduct is the anchor. If that were the case, then a solution that will constrain how

[11] *SEC v. Jarkesy,* No. 22-859 (S. Ct. June 27, 2024).
[12] *See* U.S. Sentencing Comm'n, Real Offense v. Charge Offense, Guidelines Manual 2023, Ch. 1, Pt A(1)(4)(a).

uncharged conduct drives the sentence might be to amend § 1B1.3 to limit relevant conduct to adjustments with the guideline range. Broader ranges, of course, could run afoul of the statutory 25 percent rule (28 U.S.C. § 994(b)(2)), and therefore would likely require legislative action.

Another possibility could be to revise §1B1.3 to limit the scope of any increase to the guideline established by the application of U.S.S.G. Chapter 2 for the offense conduct charged and admitted or proved at trial.

Yet another possibility is to amend U.S.S.G. § 6A1.3 to provide that when a relevant fact in dispute relates to uncharged conduct the court may not rely upon that fact unless admitted or found beyond a reasonable doubt.

Any of these approaches, or others, are obviously significant change - but significant change is necessary if the Commission is to curtail the pervasive trial penalty. Accordingly, Tzedek urges the Commission to prioritize a reconsideration of how uncharged and unproved conduct is taken into consideration and invite thoughtful and comprehensive proposals as part of the current amendment cycle.

- **Acceptance of Responsibility**

Not all individuals who proceed to trial do so as an act of defiance or stubborn denial. There are cases where an individual has a legitimate defense. This is especially true when the ultimate issue relates to intent. If the right to a jury trial is to have meaning, it should not be that merely because one puts the government to its constitutional duty to prove its case, they are automatically disqualified from receiving a third point for acceptance of responsibility.[13] Accordingly, Tzedek proposes that the Commission amend U.S.S.G. § 3E1.1 to provide that a court may award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial.

Additionally, in practice, proceeding to trial is not just about the third point, it about all three of the acceptance points. Proceeding to trial will almost always mean not getting any points off, especially since U.S.S.G. § 3E1.1 App. N.2

[13] This is all the more important if one believes that trial should be the norm and the default for the Government to take away somebody's freedom. In our system, a defendant is allowed to go to trial even if they lack a good defense and even if defiant or stubborn, and a decision to exercise a constitutional right alone should not be the basis for additional criminal punishment. Nor should proceeding to trial automatically support a finding that a person is without remorse or recognition of wrong-doing.

provide that it will be the "rare situation []" where a person "may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to trial," and unequivocally states that the adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial…" Tzedek believes this approach is flawed.

First, there is nothing inherently inconsistent in maintaining that the government cannot prove its case and yet sincerely express regret and accept responsibility for one's conduct. Second, it is fundamentally inconsistent with the constitutional right to a trial to cast that right as merely a "burden" that the government must shoulder rather than the norm that is contemplated by the Constitution. Third, while there certainly may be circumstances where a defendant's behavior or failure to express remorse may justify denial of an acceptance adjustment, Tzedek believes that the Commission should not put its finger on the scale with an Application Note that clearly states that denial of acceptance should be the norm whenever a defendant goes to trial.

Accordingly, Tzedek proposes that the Commission strike the first sentence of Application Note 2 to U.S.S.G. § 3E1.1 and strike "[i]n rare situations" from the beginning of sentence two. Additionally, the last sentence should be amended to make clear that post-trial statements or conduct, including the completion of any treatment programs, payment of restitution or other manifestations of remorse may also be considered in determining whether to grant an acceptance reduction following a conviction at trial.

- **Obstruction**

It is common practice to assess an obstruction enhancement when a defendant testifies at a hearing on a motion to suppress evidence or at trial. This practice chills fundamental constitutional rights by imposing an unwarranted tax merely for presenting a claim for consideration by the court or jury. In a sense, it uniquely places the defendant in a "double or nothing" dilemma. If the court or jury rejects their version, they not only lose the motion or the trial, but they get an additional penalty merely for presenting their version.[14]

The imposition of an obstruction enhancement <u>solely for testifying</u> should be contrasted with situations in which a defendant does more than provide their own

[14] Note that no corresponding penalty is imposed upon the government or the government's witnesses when their witnesses are not believed, or a jury renders a not guilty verdict.

account by taking independent steps to obstruct or impede justice, such as by presenting false evidence or any of the numerous others way that a defendant or a subject of an investigation may affirmatively engage in efforts to frustrate the administration of justice. In those situations, the assessment of the enhancement remains appropriate.

Accordingly, Tzedek proposes that the text of U.S.S.G. § 3E1.1 should be amended to make clear that the obstruction adjustment should not be assessed solely for testifying at a hearing or trial in support of the defendant's rendition of the facts. Similarly, Application Note 2 should also be amended to reflect this principle.

- **Departures for Substantial Assistance**

There may be no greater contributor to irrational disparity in federal sentencing practice that the current statutory and U.S.S.G. framework that vests the government with the sole power to seek a downward departure for a defendant who provides substantial assistance.

At the outset, Tzedek notes that as a matter of fundamental principle, there is something profoundly disturbing about a system of justice that pervasively relies upon the testimony of cooperating witnesses to initiate or buttress investigations and/or prosecutions of others. Further, courts, scholars and experience teach us that testimony of such witnesses is often unreliable.[15] Indeed, false testimony from cooperating witnesses is a major contributor to wrongful convictions in the very small subset of criminal cases in which DNA evidence is available to support an eventual exoneration.[16] For cases in which there is no biological evidence, which is the case the overwhelming majority of federal prosecutions, it is virtually

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[15] *See Giglio v. United States*, 405 U.S. 150 (1972); *On Lee v. United States*, 343 U.S. 747, 757 (1952); *United States v. Bernal Obeso*, 989 F.2d 331, 334 (9th Cir. 1993); Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 108, 108 (2006); Schatz, DeLoach, Hillgartner, Fessinger, Wetmore, Douglass, Bornstein, and LeGrant, *The Truth About Snitches: An Archival Analysis of Informant Testimony*, Psychiatry, Psychology and Law, (Nov. 10, 2020), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9090405/

[16] *See* Innocence Project, *Unregulated Jailhouse Informant Testimony Deeply Harms Our System of Justice*, https://innocenceproject.org/informing-injustice-the-disturbing-use-of-jailhouse-informants/ (last visited July 11, 2024), (False informant testimony contributed to nearly one in five of the 375 DNA-based exonerations); Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737, 744 (2016) (The use of informant testimony is so pervasive throughout the criminal legal system, but only a fraction of wrongful convictions are challenged postconviction.)

impossible to establish the extent to which cooperator testimony contributes to an unwarranted conviction.[17]

Notwithstanding these concerns, Tzedek recognizes that the government use of and reward for cooperation is a key element of the current federal criminal justice system. According to the data from 2023, 10.2 percent of all sentences imposed involved U.S.S.G § 5K1.1 motions, with 100 percent of those sentences beneath the guideline range. The mean decrease in those cases was a sentence reduction of 56.3 percent.[18] The current application of this incredible power to avoid both mandatory minimum sentences and guideline sentencing ranges is highly problematic. There are all too many cases in which the determining factor as to who gets this benefit turns on such arbitrary factors as 1) who gets to the government first;[19] 2) who gets an attorney that is more inclined to promote or recommend an early guilty plea and cooperation rather than an attorney who is more deliberative and committed to assessing the evidence before providing a recommendation to plead and cooperate; or 3) who has the most information to offer.

The first two of these factors are determined by arbitrary factors that have little or nothing to do with an individual's state of mind and level of culpability. And the third factor is a manifestation of the most abusive aspect of the substantial assistance departure, namely that the most culpable defendants are often in the best position to provide truly substantial assistance and the least culpable are in the worst position. The Commission is no doubt aware of the many cases in which more culpable defendants cooperate and receive far lesser sentences that other co-defendant who ranked lower in the criminal enterprise, especially when the less culpable are convicted after trial.

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[17] The Guidelines, government, and judges should also pay attention to how dangerous cooperation often is and to how incredibly little the Federal Bureau of Prisons (BOP) does to actually protect cooperators. The Guidelines should remind judges of the possible dangers related to cooperation and to factor that in both in whether to depart for somebody who did not cooperate and/or for someone who did.

[18] *See* FY 2023 Sourcebook, *supra*, note 5, Tables 29 and 37., and Figure 9, (over the ten-year period of 2014 – 2023 § 5K1.1 departures have ranged between 10.2 and 12.87 percent of sentences imposed, only dropping below 10 percent during the peak COVID-19 years of 2020 and 2021).

[19] It must be noted that while it might be an indication of extreme contrition if a defendant cooperates early, it is just as likely that it may be because a defendant got counsel sooner than other co-defendants or that their attorney's workload was such that the attorney brought their client to the government before counsel could do so for co-defendants. That is hardly a legitimate basis to deprive the other defendants of access to this relief mechanism.

Additionally, there are some circumstances where an individual is willing to cooperate, but the government will not agree that the cooperation is substantial if it is does not include implicating a loved one, sometimes including parents, spouses, children or siblings. To mandatorily deny the departure when the sole reason why a cooperative individual cannot provide substantial assistance is a reluctance to cooperate against a close family member undercuts values which should be extolled rather than denigrated.

While it may seem like the current structure is necessary to ensure that the government secures cooperation to pursue other wrongdoers, those who practiced law before the U.S.S.G. know that this is not the case. Prior to the SRA, there was a time when the judge's authority to reduce a sentence pursuant to F.R. Cr. P. 35 was more than adequate to ensure that cooperators were rewarded. But it also left open the possibility that even a defendant who could not provide "substantial assistance" could nevertheless secure a sentence reduction for making good faith efforts to cooperate. There was no evidence that the government was unable to secure cooperation when the authority to determine who qualified for a benefit from cooperation was shared with the court.

Tzedek urges the Commission to address the disparity that results from the way the U.S.S.G. § 5K1.1 operates by amending the section to include a provision that would permit the court to grant a downward departure, notwithstanding the absence of motion by the government, provided a defendant made a good faith effort to cooperate, and that although the defendant could not truthfully provide substantial assistance it was not through any fault of the defendant.[20]

Tzedek further recognizes that pursuant to 18 U.S.C. 3553(e), a sentence below a mandatory minimum requires a motion by the government attesting to the defendant's substantial assistance.[21] Accordingly, Tzedek urges the Commission to recommend that Congress implement a statutory revision to similarly permit the court to consider imposing a sentence below a mandatory minimum by authorizing

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[20] Notably, there are sincerely held religious beliefs that certain people of faith have that prevent them from cooperating. Accordingly, courts should be advised to consider such a departure without motion of the government, when the defendant made a good faith effort in cases where the extent of their cooperation was limited by good faith religious boundaries.

[21] *S*ee *Melendez v. United States*, 518 U.S. 120 (1996) (holding that absent a motion by the government to depart from the mandatory minimum due to substantial assistance, a sentencing court lacks authority to do so).

a court to grant a departure where a defendant has made good faith efforts to provide substantial assistance.[22]

Aberrant Behavior Departure

There are circumstances in which a heretofore law-abiding individual, often with an exemplary background, encounters some kind of trauma which leads to criminal behavior. Where the behavior is impulsive, not well thought out and wholly out of character, it may be deemed aberrant. The current text of U.S.S.G. § 5K2.20 (b), however, limits the departure to "single criminal occurrence" or a "single criminal transaction." This tends to negate the other three criteria, most notably that the crime was of limited duration. Tzedek urges the Commission to amend this guideline to make clear that it is the limited duration, the lack of significant planning and the marked deviation from a law-abiding life, that is controlling – and that the mere fact that there were multiple acts is not a mandatory disqualifier.

***Mens Rea* Reform**

Mens rea, or criminal intent, is the moral anchor of a criminal code. An unintended consequence of the SRA, which has received far too little attention, is the extent to which the U.S.S.G. approach to sentencing has eviscerated traditional notions of *mens rea*.

The Honorable Judge Jack Weinstein & Fred Bernstein wrote[23]:

> "In the guidelines era, *mens rea* has been all but eliminated from the sentencing of drug offenders. This development is a disastrous departure from the great traditions of Anglo-American law…It contorts the meaning of *mens rea* to say that state of mind is irrelevant to sentencing. It is at sentencing that *mens rea* is most crucial…Punishing a defendant for facts she 'reasonably should have foreseen' is tantamount to punishing negligent conduct. This is a substantial departure from 2b1 traditional principles of *mens rea*. The Model Penal Code, for example, permits criminal liability

[22] As noted above, one of the more grotesques elements of cooperation is that often it requires a person to inculpate a loved one and thus choose between an extremely close relationship and longer prison terms. Accordingly, courts should be advised not to penalize a person when the inability to provide substantial assistance arises solely because it would require the inculpation of someone in such a relationship.

[23] Judge Jack Weinstein & Fred Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 Federal Sentencing Reporter 121 (1994).

> only in cases of extreme negligence, and then only rarely. Moreover, punishments are 'proportional' to mental states."

The Honorable Judge Gerard E. Lynch similarly wrote[24]:

> "The guidelines significantly muddle questions of *mens rea* as applied to factors that can have a dramatic effect on culpability…The lack of attention to *mens rea* issues [means] the guidelines totally ignore the question of the level of culpability required with respect to the quantities of narcotics that determine the severity of sentencing in drug cases."

Tzedek believes that the need for the reform of *mens rea* is long overdue. As noted in the above sections, reliance upon arithmetic formulations related to loss amount or drug quantity, as well as reliance upon numerous other enhancing factors without proof of a defendant's knowledge and intent, are poor substitutes for an assessment of individual culpability.

Tzedek urges the Commission to review and revise the U.S.S.G. to ensure they properly incorporate and ensure courts properly consider *mens rea*, motive, purpose and personal culpability issues at sentencing. This review and revision of the U.S.S.G. should ensure: (a) that aggravating sentencing enhancements are imposed only in instances in which the defendant exhibited sufficient *mens rea* with respect to a sentencing factor to justify the corresponding sentencing enhancement, and (b) that the sufficient *mens rea* is adequately proven at the appropriate level of proof. The government should generally be required to prove a culpable state of mind with respect to any key offense facts that impact guideline ranges, such as the quantity of drugs or the amount of loss involved in the offense, and proof of a more culpable state of mind should generally be required for greater sentencing enhancements. This review and revision of the U.S.S.G. should also ensure that courts are fully and clearly instructed to consider any and all mitigating aspects of a defendant's *mens rea*, including motive, purpose, and personal culpability as a basis for a departure under the U.S.S.G.

Departures for Family Hardship

The incarceration of a parent can have devastating effects on children. Astonishingly, the number of minors with a parent in prison increased 500%

[24] Judge Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 Federal Sentencing Reporter 112 (1994).

between 1980 and 2000.[25] In 2007, there were 1.7 million children in America with a parent in prison, more than 70% of whom were children of color.[26] A study based on U.S. Department of Justice statistics found that between 1980 and 2019, the number of incarcerated women increased by more than 700% – and about 60% of these incarcerated women have children under age 18.[27]

Incarceration of a parent, and especially of a mother, is associated with a host of poor outcomes for children, including a substantially increased likelihood of being incarcerated themselves as adults. One study found that a majority of children with an incarcerated parent are subject to four or more risk factors.[28] Obviously, almost immediately, family income (already low among this group) drops sharply when a parent is incarcerated. About one-third of children with an incarcerated parent live in poverty.[29]

Children's behaviors also diverge dramatically from their peers who do not have an incarcerated parent. One study found that children with an incarcerated parent "had higher levels of problem behaviors between the 5th and 10th grades," with the differences being significant and increasing over the course of this time period. Moreover, "serious" delinquency – essentially, conduct that was otherwise a felony crime – was significantly higher for this group than for children without incarcerated parents.[30]

Overall, and not surprisingly, having an incarcerated parent was strongly correlated in children with increased rates of substance abuse, mental health disorders, violence, anti-social behaviors, learning disabilities, homelessness, and mental and physical health issues (including migraines, asthma, high cholesterol, depression, anxiety, and post-traumatic stress disorder).[31]

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[25] Leila Morsy & Richard Rothstein, *Mass incarceration and children's outcomes*, Economic Policy Institute (Dec. 15, 2016), https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/.
[26] D.H. Dallaire, *Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families*, 56 Family Relations 440 (2007).
[27] The Sentencing Project, *Incarcerated Women and Girls* (Nov. 20, 2020), https://www.sentencingproject.org/publications/incarcerated-women-and-girls/.
[28] J. Poehlmann, *Children's family environments and intellectual outcomes during maternal incarceration*, 67 J. Marriage & Family 1275 (2005).
[29] Jean M. Kjellstrand & J. Mark Eddy, *Parental Incarceration During Childhood, Family Context, and Youth Problem Behavior Across Adolescence*, 50 J. Offender Rehab. 18 (Jan. 1, 2011).
[30] Kjellstrand & Eddy, *supra* note 29.
[31] Morsy & Rothstein, *supra* note 25.

Incarceration of a mother especially seems to have an outsized impact on children. Adult children of incarcerated mothers were 2.5 times more likely to be incarcerated than the adult children of fathers. The risk of incarceration for the adult children of women who used drugs regularly was particularly high.[32] And nearly half of all children with an incarcerated mother live in poverty, as opposed to slightly less than one-third who have an incarcerated father.[33]

Given the deleterious impact of parental incarceration, it seems clear that reducing the number of parents and caregivers who are incarcerated is not just good criminal justice policy, it is a pro-family policy that can serve society's interests in many ways.

The Commission long ago promulgated a policy statement that mere "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted." (§ 5H1.6). Since nearly every person has some family ties and responsibilities, this old policy statement is understandable. But, before and since the *Booker* ruling, federal judges have recognized there are many situations in which family hardships are directly relevant to the sentencing purposes and considerations Congress set forth in 18 U.S.C. § 3553(a). Indeed, the Commission data show that family considerations are consistently one of the most commonly cited factors for traditional departures and for variances from the U.S.S.G.

Tzedek also stresses the imperative to have compassion, including compassion for a defendant's children, spouse or other family member who would be greatly affected by a long sentence. Examples may include a family member with a fatal illness, young children who would be essentially orphaned for a long period of time, special needs children who would surely regress due to the incarceration, and spouses who would not know how to feed their children. Contrary to the thinking of many, showing compassion is a strength, not a weakness. It is a sign of true leadership, and an idea fundamental to the American way. The fact that compelling family dynamics may be common is not a reason to ignore it at sentencing.

To more effectively guide federal judges toward appropriately considering family hardships at sentencing Tzedek urges the Commission to consider amending the U.S.S.G. § 5H1.6, and that the accompany commentary make clear that family ties

[32] Dallaire, *supra*.
[33] Kjellstrand, et al., *supra*.

and relationships are relevant and should be assessed by the court in determining whether a departure is warranted.

Expansion of Alternatives to Incarceration

Tzedek vigorously urges the Commission to undertake multiple steps to encourage the robust use of diversion and restorative justice programs as alternatives to incarceration, and to adopt the necessary amendments to make non-jail sentences more broadly available.

It is well-established in states and the federal districts which have started diversion and alternative to incarceration (ATI) programs that these initiatives promote less severe sentences and ultimately result in decreased recidivism. This should not be a surprise because criminal behavior is often the inevitable result of underlying pathologies, such as substance abuse and addiction, mental health problems, and other issues that can better be addressed through treatment, counseling, and community support rather than through imprisonment. Unfortunately, however, these alternatives are all too rare in the federal system. As reported in the 2023 Sourcebook of Federal Sentencing Statistics, only 5.9 percent of federal defendants received a sentence of probation, which stands in stark contrast to 63 percent in 1986.[34]

Tzedek passionately encourages the Commission to take all appropriate steps to promote the expansion of ATI programs. In addition to expanding the availability of information and best practices related to ATI, the Commission should more generally promote alternatives to incarceration, including the use of home confinement, electronic monitoring, intermittent (e.g. weekend) jail sentences, and other forms of supervision. There needs to be far greater emphasis on the criminogenic consequences of jail sentences and the cascading impact of incarceration on families. Sentencing practices that facilitate rehabilitation and minimize recidivism also promote public safety and respect for the law.

Accordingly, Tzedek proposes that the Commission plan a national convening in the form of a Commission-sponsored symposium, and/or conduct a series of regional hearings to give much needed attention to alternatives to prison. Federal judges, U.S. Probation, lawmakers, prosecutors, states and localities nationwide –

[34] *See* FY 2023 Sourcebook, *supra*, note 5, fig. 6 and Table 13; Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, Federal Offenses and Offenders Federal Sentencing in Transition, 1986-90 (June 1992), https://bjs.ojp.gov/content/pub/pdf/fst8690.pdf

as well as many other stakeholders and interested parties – could and would draw considerable guidance from a Commission-sponsored event that brought together leading researchers and scholars to discuss the role of alternatives to incarceration in promoting public safety. In addition to informing this Commission's work, one (or a series of major events) on this topic would help advance collective knowledge of whether and when incarceration is needed and appropriate as a response to a range of wrongdoing.

Concomitantly, the Commission should take steps to address the fact that over the 40 year history of the SRA, there has been marked decrease in the imposition of non-jail sentences, such as probation – a development that there is no empirical basis to conclude promotes public safety and is plainly at odds with the intent of the SRA. Congress, in the SRA, stated clearly that the Commission "shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense," and also provided that the U.S.S.G. should direct that imprisonment is generally appropriate only when persons are "convicted of a crime of violence that results in serious bodily injury." 28 U.S.C. § 994(j). Yet, the undeniable fact is that this mandate is almost entirely ignored in today's sentencing system. Indeed, the Commission's most recent data shows that in FY 2023 for the 43.9 percent of sentenced persons who had the lowest criminal history score (CHC 1),[35] the mean sentence imposed on that group, (many of whom would fit the category Congress indicated should generally receive a "sentence other than imprisonment"), was imprisonment for 45 months (nearly 4 years).[36]

Additionally, because there is empirical evidence showing that even individuals with a prior criminal history can benefit from ATI, there is no rational basis to categorically exclude such individuals from these beneficial approaches. To the contrary, ATI in many cases offers the best hope of reducing recidivism. Further, since higher criminal history scores are more common for defendants of color, which correlates to over-policing of certain communities, expanding the availability of these programs to include those with modest criminal histories will ensure that ATI does not exacerbate racial and ethnic disparity.

To ensure that the U.S.S.G. implement the statutory preference that first offenders qualify for non-jail sentences and to ensure the broadest availability of non-jail

[35]See FY 2023 Sourcebook, *supra*, note 5, fig. 7.
[36] See FY 2023 Sourcebook, *supra*, note 5, Table 28.

alternatives for all defendants who may benefit from ATI, Tzedek proposes the following array of reforms:

- The Commission should amend U.S.S.G. §§ 5B1.1 and 5C1.1 to make ATI sentences available for all sentences imposed pursuant to Zones A, B, and C of the Sentencing Table.

- The Commission should amend U.S.S.G. § 3E1.1 (Acceptance of Responsibility), Part 5F (Sentencing Options), and Part 5H (Specific Offender Characteristics) to provide for downward adjustments and departures for individuals who participate in court-approved ATI programs. Courts should be given broad discretion to consider the level and extent of participation in determining the extent of the adjustment and the departure.

- The Commission should consider promulgating best practices for ATI programs to ensure fair access and to ensure that they do not replicate pre-existing racial, ethnic, and economic disparities and that individuals who may not benefit from participation in such a program retain eligibility for a non-jail alternative sentence. Simply because a defendant does not have a condition that warrants participation in some kind of treatment program should not lead to imprisonment where a different alternative sentence is appropriate.

- The Commission should advise Congress to amend 18 U.S.C. § 3553(b) to insert a subsection that would address alternatives to prison sentences. The new subsection should establish that, at least for defendants with no prior felony convictions for federal or state criminal offenses, and no act of violence was involved in the offense for which they were convicted, it shall be presumed, absent a specific judicial finding of aggravating circumstances, that alternatives to prison shall be sufficient to satisfy justice and the other purposes set forth under § 3553(a) of Title 18. Such legislation should make clear that this provision applies irrespective of any pre-existing statute which prescribes a mandatory sentence of imprisonment.

Examples of alternatives to prison sentences should include: Home-confinement, supervised probation, community service, intermittent confinement (being home on weekends and in prison on weekdays or vice versa), fines, restitution payments

to victims, electronic monitoring, participation in rehabilitation programs, participation in faith-based programs, placement in residential confinement centers (centers based in communities for the purpose of confinement similar to Residential Reentry Centers currently contracted by the BOP), and other alternatives to prison.

Identify Collateral Consequences and Their Punitive Impact

It is now widely recognized that criminal convictions result in wide-ranging collateral sanctions. Often these sanctions bear no rational relationship to the nature of the crime nor are there any reasonable temporal limitations on these consequences. Collateral consequences can impact family rights, access to housing and education, immigration status, access to credit, all manner of prospective employment and countless other aspects of human endeavor. Nevertheless, when convicted of a crime these consequences are a component of the punishment suffered by the defendant and, because the sentencing court invariably lacks authority to eliminate them, they should be considered as such by a sentencing court and serve as a ground for downward departure.

Accordingly, Tzedek proposes that the Commission should review collateral sanctions imposed by federal and state laws to ensure courts properly consider the nature and impact of collateral consequences likely to be endured by federal defendants. The Commission should conduct research and issue a report concerning the array of collateral consequences faced by federal defendants. This report should give special attention to whether and how collateral consequences may undermine or otherwise impede the effectiveness of the recidivism reduction provisions in Title I of the FIRST STEP Act of 2018 and should include specific recommendations to Congress as to how to mitigate the harmful impacts of collateral consequences, as well as recommendations for courts as to how they should adjust sentencing practices in recognition of the punitive nature of collateral consequences.

Tzedek further proposes that the Commission create a new encouraged departure factor, perhaps as § 5H1.13, which would advise courts to consider departing downward based on factors relating to punitive collateral consequences resulting from the defendant's prosecution. Examples should include loss of employment and income, mandatory removal from the country, or other formal and informal societal sanctions, coupled with the defendant's demonstration of genuine remorse and sincere effort to make amends to any victims or the broader community.

Recommendation that Judges, DOJ Officials and Others Visit Federal Prisons

As an organization the works with prisoners, Tzedek is acutely aware of the conditions of confinement in our nation's prisons. The impetus for this proposal is simple: those involved in sentencing persons to imprisonment should be keenly aware of the conditions of those institutions and have some first-hand knowledge of what life in prison is like. The Commission conducts training sessions for judges and other court personnel throughout the year, and Commission staff speak at numerous circuit conferences and other like events. In line with such sessions Tzedek proposes that the Commission should make a concerted effort to make visits to prison an integral part of this training and other programming.

Additionally, Tzedek urges the Commission to recommend that Congress amend 28 U.S.C. § 134, mandating that within one year of their initial appointment, and every five years thereafter, all United States District Judges,[37] United States Magistrate Judges, United States Circuit Judges, United States Supreme Court Justices, all U.S. Attorneys, Assistant U.S. Attorneys, the U.S. Attorney General, the Deputy Attorney General, and all attorneys of the Criminal Division of the U.S. Justice Department, should visit at least one federal prison. The BOP should be required to help coordinate these visits and help ensure that these visitors shall have access to all areas within the prison and be permitted to speak with any prison staff and prisoners.

Conclusion

Through its regular review of the U.S.S.G., the Commission plays a pivotal role in enlightening our justice system. This Commission, in particular, has taken a number of important and exceedingly valuable steps toward an improved federal sentencing system through its Guideline amendments in the recent amendment cycles. But there is much more work to do, and significant and ambitious reforms are needed to more fully address the substantial and systemic problems of the current federal sentencing system. We pray that the above recommendations and input will serve the Commission well in its noble and critical endeavor to greatly improve our justice system in general and our sentencing system in particular.

[37] As a case in point, Judge Mark W. Bennett, former U.S. District Judge to the Northern District of Iowa, visited 400 inmates he had sentenced, encouraging other judges to follow suit. https://www.desmoinesregister.com/story/opinion/columnists/rekha-basu/2019/10/31/judge-pursued-justice-where-others-didnt-visiting-inmates-prison/4107681002/

Tzedek appreciates the opportunity to provide its input on priorities for the current amendment cycle and looks forward to continuing to work with the Commission in the pursuit of justice.

Sincerely,

Rabbi Moshe Margaretten[38]
President

[38] Tzedek wishes to express enormous gratitude to Norman L. Reimer and Professor Douglas A. Berman for their instrumental assistance and counsel to formulate this document.

Comments from the Vera Institute of Justice in response to the Call for Comments on Priorities for the 2024-2025 Amendment Cycle.

Thank you for the opportunity to comment on ways the Commission can realign its work with its statutory mission as it marks 40 years since its inception in the Sentencing Reform Act of 1984. I am Mona Sahaf, director of the Reshaping Prosecution initiative at the Vera Institute of Justice. Vera is a 63-year-old national criminal justice reform organization that seeks to end mass incarceration, protect immigrants' rights, ensure dignity for people behind bars, and build safe, thriving communities.

The Reshaping Prosecution initiative works with state-level prosecutors across the country to build evidence-based alternatives to incarceration that increase community safety by charging and incarcerating fewer people and addressing racial disparities endemic to the criminal legal system. I came to lead this work after more than 12 years as federal prosecutor. In the federal system, there is little formal policy that supports evidence-based alternatives to incarceration, either during the pendency of a case or at the time of sentencing. We ask that the Commission lay the groundwork for a more expansive policy, including restorative justice practices, by creating a task force to study the issue and recommend how these practices may be included as part of the resolution of a case.

Studying and making recommendations about restorative justice practices fits directly into the Commission's charge in 28 USC 991(b)(1)(C) to establish "sentencing policies and practices for the Federal criminal justice system that . . . reflect, to the extent practicable, advancement of knowledge of human behavior as it relates to the criminal justice process." Restorative justice programs use victim-centered approaches to deliver healing to people who have been harmed and to help people who have caused harm take accountability for their actions. Research about restorative justice programs shows positive impacts on procedural justice—satisfaction with the criminal process from both victims and defendants—and public safety outcomes. [1] Perhaps now more than ever before—when trust in the criminal legal system and the judiciary has eroded—the Commission can play a vital role in helping to rebuild that trust by incorporating measures with track records of increasing participant satisfaction with criminal legal processes.

Judges in the United States District Courts for Hawaii and Massachusetts have actively used restorative justice processes in their courts for nearly a decade.[2] During my years of experience in this field, I have had many conversations in which federal judges, federal public defenders, and federal prosecutors learned about the Hawaii and Massachusetts programs and have expressed interest and enthusiasm for replicating them in their own courts and offices. By studying these and other programs and their impact on sentencing outcomes, recidivism, procedural justice, and other important outcomes such as a person's ability to obtain or maintain employment or housing, the Commission could help the greater field better understand and adopt such programs across the remaining 92 U.S. district courts.

Thank you for the opportunity to provide comment. Vera's experts and researchers would be glad to provide more information on this issue, and you can contact me at [redacted] to facilitate further discussion.

[1] Bailey Maryfield, Roger Przybylski, and Mark Myrent, *Research on Restorative Justice Practices*. (Washington, DC: Justice Research and Statistics Association, 2020), https://web.archive.org/web/20230612164653/https://www.jrsa.org/pubs/factsheets/jrsa-research-brief-restorative-justice.pdf; Kyle Ernest, "Is Restorative Justice Effective in the U.S.? Evaluating Program Methods and Findings Using Meta-analysis" PhD diss (Phoenix, AZ: Arizona State University, 2019), 101, https://keep.lib.asu.edu/items/157635; Heather Strang, Lawrence Sherman, and Evan Mayo-Wilson, et al., "Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review," Campbell Systematic Reviews 9, no. 1 (2013), 1–59, https://restorativejustice.org.uk/sites/default/files/resources/files/Campbell%20RJ%20review.pdf.

[2] Lorenn Walker and Leslie E. Kobayashi, "Hawaii Federal Court Restorative Reentry Circle Pilot Project," *Federal Probation Journal* 84, no. 1 (2020), https://www.uscourts.gov/federal-probation-journal/2020/06/hawaii-federal-court-restorative-reentry-circle-pilot-project; and United States District Court for the District of Massachusetts, "Repair, Invest, Succeed, Emerge (RISE)," https://www.mad.uscourts.gov/specialty-courts.htm#rise-info.

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California · Colorado · Florida · Massachusetts · Michigan · Minnesota · New Jersey · New York · Texas

June 24, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Joshua Kappel, and I am submitting this comment letter on behalf of the Vicente LLP. Vicente LLP is a law firm that has been at the forefront of advancing smart policies to better accomplish the goals of the "war on drugs." I am writing today concerning the United States Sentencing Commission's (USSC) oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, we urge the Commission to conduct a complete review and revision of the Tables.

While reversing and mending the harms of the war on drugs will take effort from people across the government and political spectrum, one way to shift policy in a more humane direction - and in alignment with contemporary evidence - is to go to one of the current roots of the problem: drug sentencing. Bringing the Drug Quantity and Drug Conversion Tables (the Tables) into alignment with modern research about drug risks and harms would lead to more accuracy in sentencing decisions, which would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

Despite widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables remain based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors. Congress and this Commission have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine. For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the drug or other substance," potentially positive "pharmacological effect[s],"[4] and likelihood of misuse and dependence.

Vicente LLP and countless other organizations across the political spectrum and around the country are coming together to organize and inform the USSC and the general public about the importance of this issue. The United States is long overdue for sentencing reform, and the

urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Respectfully,

/Joshua Kappel

Joshua Kappel, Esq.
Founding Partner
Vicente LLP

Zendo Project
2443 Fillmore St #380-6645, San Francisco, CA 94115

6/26/24

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attn: Public Affairs – Priorities Comment

Dear United States Sentencing Commissioners,

My name is Valerie Beltran, and I am submitting this comment letter on behalf of the Zendo Project. Zendo Project offers professional harm reduction education to communities and organizations, and provides peer support services at events to help transform difficult psychedelic experiences – and other complex emotions – into opportunities for learning and growth. I am writing today concerning the United States Sentencing Commission's (USSC) oversight of drug sentencing and the Drug Quantity and Drug Conversion Tables (hereinafter, the Tables). Specifically, we urge the Commission to conduct a complete review and revision of the Tables.

For over half a century, the United States' drug policy has ripped families and communities apart while failing to achieve its stated purpose of realizing a drug-free world. Richard Nixon announced the War on Drugs in 1971 and, in doing so, perpetuated an ongoing rhetoric and myth of Black criminality[1]. Ronald Raegan escalated the impact of this policy by prioritizing punishment over treatment, thereby causing a significant increase in the incarcerated population, especially for nonviolent drug offenses.

While over fifty years of ongoing political and educational messaging demonizing drug use and stigmatizing drug users has failed to realize a drug-free world, the underlying racial and social motivations have succeeded. Since its inception, the drug war has been overwhelmingly enforced in BIPOC communities, especially low-income ones,[2] causing the country's inflated prison

[1] John Ehrlichman, Nixon's Assistant for Domestic Affairs, said: "You want to know what this [war on drugs] was really all about? The Nixon [Administration] . . . had two enemies: the antiwar left and [B]lack people . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did." (Equal Justice Initiative. *Nixon Adviser Admits War on Drugs Was Designed to Criminalize Black People*. March 25, 2016. https://eji.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/)

[2] *See*, Colleen Walsh, *Solving Racial Disparities in Policing*, Feb. 23, 2021, https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing/; *see also*, ACLU DC, *Racial*

population to be disproportionately comprised of Black, Latino, and Indigenous people.[3] It has led to lengthy terms of imprisonment for relatively low-level offenses and for those with little to no criminal history[4], which perpetuates cycles of trauma and violence. The same conditions have fueled and perpetuated violence internationally and in inner-city neighborhoods nationwide,[5] and have led to increases in concentration, adulteration, and toxicity of the substances themselves.

An increasingly multi-partisan coalition is calling for change. In 2017, the USSC published a report describing, in part, how drug-related mandatory minimum penalties have been "applied more broadly than Congress may have anticipated."[6] Such non-discretionary sentencing fails to promote public health. Instead, it has the effect of incarcerating people for longer amounts of time than the evidence shows deters further criminal activity[7] - at the taxpayer's expense.

While reversing and mending the harms of the war on drugs will take effort from people across the government and political spectrum, one way to shift policy in a more humane direction - and in alignment with contemporary evidence - is to go to one of the current roots of the problem: drug sentencing. The Drug Quantity and Drug Conversion Tables, set by the USSC, are used as a benchmark for federal drug sentencing and are often referenced or relied on in state sentencing decisions. Bringing these Tables into alignment with modern research about drug risks and harms would lead to more accuracy in sentencing decisions, which would both alleviate some of the socioeconomic harms of the drug war and save public funds, without risking public safety.

Disparities in Stops by the DC Metropolitan Police Department, June 16, 2020, https://urldefense.com/v3/__https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf__;!!Phyt6w!M3tbrIzizSTS6KMjsaPASYXWMFeEA1fkh6tY9rjOLLeAtcunXEj6k0DAkg0%24)

[3] "The incarceration boom fundamentally altered the transition to adulthood for several generations of [B]lack men and, to a lesser but still significant extent, [B]lack women and Latino men and women. By the turn of the 21st century, [B]lack men born in the 1960s were more likely to have gone to prison than to have completed college or military service." (Vera, *American History, Race, and Prison*, https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison)

[4] *Id*.

[5] Heather Ann Thompson explained in a 2015 interview with Nursing Clio that "intensive incarceration has emptied communities of their elders, their parents, their grandparents, and their children now, through the juvenile justice system. It has made them even poorer because there are no jobs. It has basically created an environment where violence can flourish . . . Should we be surprised that violence is a problem when we make an economy illegal, and make it the only economy that is available because there are no factories?" (Nursing Clio, *An Interview with Historian Heather Ann Thompson (Part 2)*, Nov. 5, 2015, https://nursingclio.org/2015/11/05/an-interview-with-historian-heather-ann-thompson-part-2/#:~:text=What%20we%20start%20to%20see,environment%20where%20violence%20can%20flourish)

[6] USSC, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System*, Oct. 2017, at 6. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf

[7] National Institute of Justice. *Five Things About Deterrence*. May 2016. https://www.ojp.gov/pdffiles1/nij/247350.pdf

This is not only a significant opportunity[8] but a timely one. In April 2024, following the Health and Human Services Department's recommendation, the Drug Enforcement Administration (DEA) announced its decision to reschedule cannabis to Schedule III.[9] Given that the Tables presently translate quantities of various illegal drugs into their marijuana-equivalent quantities for the purpose of determining relative harm, it would be appropriate to utilize the multi-agency review already happening with cannabis to review and update the tables.

Additional research about other historically stigmatized substances should also inform this review. The Food and Drug Administration (FDA) granted a breakthrough therapy designation to MDMA-assisted therapy in 2017, and again granted two breakthrough therapy designations for psilocybin in treatment-resistant depression in 2018 and major depressive disorder in 2019.[10] In 2024, the FDA extended the same status to an LSD formula for the treatment of generalized anxiety disorder.[11] The FDA is also reviewing a new drug application for MDMA-assisted therapy[12], for which they will likely have a decision by August 2024.

Meanwhile, there has been growing bipartisan support to fund clinical trials exploring the use of psychedelics[13] to treat traumatic brain injuries, depression, military sexual trauma, and post-traumatic stress disorder in veterans.[14] For instance, in the 2024 National Defense Authorization Act, the Department of Defense authorized funding a study on psychedelics for the treatment of PTSD in military members.[15] In March 2024, the Department of Veterans Affairs passed a budget allocating $20 million for clinical trials for MDMA and psilocybin.[16] The National Institutes of Health has also opened funding opportunities for studying

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[8] Drug offenses make up the largest portion of the federal docket. (*See*, Fiscal Year 2021 Overview of Federal Criminal Cases. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf)

[9] Alicia Wallace et al. CNN. *Justice Dept Plans to Reschedule Marijuana as a Lower-risk Drug.* April 30, 2024. https://www.cnn.com/2024/04/30/economy/dea-marijuana-rescheduling/index.html

[10] Heal DJ, Smith SL, Belouin SJ, Henningfield JE. *Psychedelics: Threshold of a Therapeutic Revolution. Neuropharmacology*. 2023 Sep 15;236:109610. doi: 10.1016/j.neuropharm.2023.109610. Epub 2023 May 27. PMID: 37247807.

[11] Joao L. de Quevedo. *FDA Grants Breakthrough Status to LSD Formula and Opens a New Frontier in the Generalized Anxiety Disorder (GAD) Treatment*, April 1 2024, https://med.uth.edu/psychiatry/2024/04/01/fda-grants-breakthrough-status-to-lsd-formula-and-opens-a-new-frontier-in-the-generalized-anxiety-disorder-gad-treatment/#:~:text=Legal%20Experts-,FDA%20Grants%20Breakthrough%20Status%20to%20LSD%20Formula%20and%20Opens%20a,Generalized%20Anxiety%20Disorder%20(GAD)%20Treatment&text=In%20a%20groundbreaking%20move%2C%20the,generalized%20anxiety%20disorder%20(GAD).

[12] *Lykos Therapeutics Announces FDA Acceptance and Priority Review of New Drug Application for MDMA-Assisted Therapy for PTSD*, February 9, 2024, https://news.lykospbc.com/2024-02-09-Lykos-Therapeutics-Announces-FDA-Acceptance-and-Priority-Review-of-New-Drug-Application-for-MDMA-Assisted-Therapy-for-PTSD

[13] Referred to as "hallucinogenic substances" in the Controlled Substances Act.

[14] Matt Saintsing, *The Potential Healing Power of Psychedelics*, November 27, 2023, https://www.dav.org/learn-more/news/2023/veterans-and-the-new-psychedelic-renaissance/

[15] Herrington, *Biden Signs Defense Spending Bill Funding Psychedelic Research* Forbes.

[16] Curtis, *VA-funded psychedelic therapy trials for PTSD could save lives, veteran organization says* Fox 13 News

psychedelic-assisted therapy for chronic pain in older adults.[17] This shift in the evidence base, and concurrent changes in federal policy, reflects an increasing willingness and mandate to reevaluate long-held assumptions about controlled substances, paving the way for more drug policies driven by data rather than dogma.

Alongside the evidence and government agencies, recent polls have found an overwhelming majority of American voters are also eager for a new approach to drug laws and responses to drug-related offenses.[18] Over 60% support ending the War on Drugs; "eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services"; repealing mandatory minimum sentences for drug crimes; and commuting, or reducing, the sentences of people incarcerated for drugs.[19] Representing one of "the few truly bipartisan issues in American politics," the "breadth and depth of support for change suggests that there are few issues for which the nation's laws so misrepresent the preferences of the American people as for drugs."[20]

Despite these widespread calls for evidence-based policies and new approaches for regulating controlled substances, the Tables remain based on outdated medical, scientific, and sociological information. Not only do they recommend disproportionately severe penalties, they have no basis in the actual risks posed by each substance, the realities of the illicit drug market, criminal culpability, or other public safety factors.[21] Congress[22] and this Commission[23] have already acknowledged that the Tables have resulted in outrageous sentencing disparities for otherwise similar behaviors, at least in the context of crack versus powder cocaine. For the Tables to be more in line with the Controlled Substances Act's stated process for regulation, there is a serious need for the USSC to re-evaluate sentences based on "current scientific knowledge regarding the drug or other substance," potentially positive "pharmacological effect[s],"[24] and likelihood of misuse and dependence[25].

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[17] *See e.g., Safety and Early Efficacy Studies of Psychedelic-Assisted Therapy for Chronic Pain in Older Adults (UG3/UH3 Clinical Trial Required) NOFO*

[18] ACLU. *Poll Results on American Attitudes Toward War on Drugs*. June 9, 2021. https://www.aclu.org/documents/poll-results-american-attitudes-toward-war-drugs

[19] *Id.*

[20] *Id.*

[21] Jonathan Perez-Reyzin, Leslie Booher & Ismail Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 Federal Sentencing Reporter 24–26 (2022); *see also*, Hon. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 Federal Sentencing Reporter 2–11 (2021).

[22] Aris Folley, *Congress Set to Tackle Crack, Powder Cocaine Sentencing Disparity Before Year's End*, December 18, 2022, https://thehill.com/business/3778680-congress-set-to-tackle-crack-powder-cocaine-sentencing-disparity-before-years-end/

[23] *Change In Federal Cocaine Sentencing Policy Recommended Findings To Be Submitted To Congress*, April 5, 2002, https://www.ussc.gov/about/news/press-releases/april-5-2002

[24] United States Drug Enforcement Administration. *The Controlled Substances Act*. https://www.dea.gov/drug-information/csa

[25] Any inquiry should take into account ways harm reduction approaches, public education, and proven methods of avoiding harm and use among minors can reduce the likelihood of misuses and dependence. Revising the Tables

Zendo Project and countless other organizations across the political spectrum and around the country are coming together to organize and inform the USSC and the general public about the importance of this issue. The United States is long overdue for sentencing reform, and the urgency lies especially with drug-related offenses. As a complete review and revision of the Tables will likely require the USSC to conduct a multi-year study, the Commission must take an important first step to initiate such an inquiry now.

Sincerely,
Valerie Beltran
Outreach Director, Zendo Project

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would likely lead to a reduction in resources spent on enforcement, prosecution, and punishment. Those resources could then be reinvested to bolster effective harm reduction and public education efforts. (*See*, Counsel of State Governments, Justice Reinvestment Initiative, https://csgjusticecenter.org/projects/justice-reinvestment/#:~:text=Justice%20Reinvestment%20is%20a%20data,Justice%20Reinvestment)

July 15, 2024

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs – Priorities Comment

Dear Chairman Reeves and Members of the Commission:

This letter responds to the U.S. Sentencing Commission's request for public comments in conjunction with its recent Notice of Proposed Priorities. The undersigned applaud the Commission's efforts to consider how the U.S. Sentencing Guidelines could and should be redesigned to better serve the statutory goals set forth by Congress and our nation's commitments to liberty and justice. To that end, this letter focuses specifically on the need to revise the Guidelines applicable in fraud cases, particularly with respect to the undue emphasis placed on loss amount.

The Widely-Recognized Issue with Guideline 2B1.1

As the Commission knows, modern times have seen a dramatic increase in the severity of authorized and mandated sentencing terms for nonviolent offenders. Not long ago, any sentence of more than a few years of imprisonment for a nonviolent white-collar offender was rare. But sentencing guidelines that were perhaps originally designed to ensure that the most culpable and harmful of white-collar offenders face significant sentences now operate to increase excessively the prison terms recommended for less culpable fraud offenders. The U.S. Sentencing Guidelines can often call for decades in prison even for first-time offenders whose fraud offense may have been driven by dire personal or professional circumstances and who have shown great remorse for their wrongdoing and are eager to make amends for harms caused.

Extreme increases in recommended prison terms for white-collar offenders have largely been driven by the U.S. Sentencing Guidelines placing extraordinary emphasis on loss (and intended loss) calculations and giving too little consideration to those other factors that are most important to a fair and just sentence and that Congress emphasized in 18 U.S.C. §3553(a). As courts and commentators have pointed out, the Guidelines' heavy emphasis on loss calculations can problematically drive a sentencing court away from focusing on Congress's statutory instruction that a sentence be "sufficient, but not greater than necessary" to comply with the purposes of sentencing set out in 18 U.S.C. §3553(a)(2). In Guideline calculations, which still serve as the starting point and initial benchmark for federal sentencing decisions, the loss table too often dwarfs all other factors and can distort the assessment and impact of all other sentencing considerations.

There is no reason to believe Congress intended for loss determinations to overwhelm other considerations set forth in applicable sentencing statutes. Indeed, there is every reason to believe that the Guidelines' undue emphasis on loss can undermine Congress's interest in fair and balanced sentencing decision-making. The considerable tensions between the Guidelines' emphasis on loss

and Congress's statutory sentencing instructions in 18 U.S.C. §3553(a) are manifold because, even if soundly calculated: (1) loss is just one aspect of the "nature and circumstances of the offense" and does not capture other relevant offense factors; (2) loss frequently will not "reflect the seriousness of the offense" or produce "just punishment for the offense" but instead produces advisory Guideline ranges that are excessively high; (3) loss does not help a court decide how "to promote respect for the law" and may undermine respect for the law by suggesting sentences unconnected to true culpability; (4) loss poorly addresses the need "to afford adequate deterrence to criminal conduct" and may undermine deterrence by failing to focus on motivations for, and other considerations affecting, fraudulent conduct; and (5) loss may operate, perversely, to distort efforts "to impose similar punishment on similar offenders" because it can lead to similar Guideline-recommended ranges for different types of fraud offenses involving distinct defendants with disparate motives who produce different sorts of harms. And these myriad problems with the Guidelines' heavy reliance on loss are further compounded in those cases where calculations of loss end up having little or no relationship to either economic realities or an offender's actual personal gain from an offense.

Critically, many of the points stressed here have been stressed frequently by academics and practitioners in various ways for many years. One leading academic (a former prosecutor), for example, has opined that the "rules governing high-end federal white-collar sentences are now completely untethered from both criminal law theory and simple common sense." Frank Bowman, *Sacrificial Felon: Life Sentences For Marquee White-Collar Criminals Don't Make Sense*, AMERICAN LAWYER, Jan. 2007, at 63. Others agree. *See, e.g.*, Barry Boss & Kara Kapp, *How the Economic Loss Guideline Lost its Way, and How to Save It*, 18 OHIO STATE JOURNAL OF CRIMINAL LAW 605, 605-06 (2021) ("The economic crimes Guideline, Section 2B1.1 of the United States Sentencing Manual, routinely recommends arbitrary, disproportionate, and often draconian sentences to first-time offenders of economic crimes. These disproportionate sentences are driven primarily by Section 2B1.1's current loss table, which has an outsized role in determining the length of an economic crime offender's sentence."); Alan Ellis, John R. Steer & Mark Allenbaugh, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 CRIMINAL JUSTICE 34 (2011) (explaining why "loss" under the Sentencing Guidelines provides a very poor proxy for the true seriousness of an offense and the culpability of a defendant). Indeed, others — including a former federal prosecutor — have long acknowledged that "the current Federal Sentencing Guidelines for fraud and other white-collar offences are too severe" and appear much greater than "necessary to satisfy the traditional sentencing goals of specific and general deterrence — or even retribution." Andrew Weissmann & Joshua Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286 (2007), *at* http://yalelawjournal.org/forum/white-collar-defendants-and-white-collar-crimes. *See also generally* Barry Pollack & Addy Schmitt, *Restoring Sentencing Sanity in White-Collar Criminal Cases*, 29 WESTLAW J. WHITE-COLLAR CRIME 6 (Oct. 2014) (noting that "many judges have declined to employ the guidelines in economic crimes cases" because they too often recommend "sentences for first-time nonviolent white collar offenders … substantially higher than for the most heinous violent criminal offenses [which] undermines the fairness and integrity of our judicial system").

Examples of the excesses produced by the loss table abound; two examples of such cases are *United States v. Gozes-Wagner*, 14-cr-637 (S.D. Tex.) (involving the imposition of a 20-year (below-guideline) prison sentence in health care fraud case for mid-level first-time offender/single

mother of two children) and *United States v. Rubashkin*, 08-CR-1324 (N.D. Iowa) (involving a 27-year (within-guideline) sentence in bank fraud case for first-time offender with 10 children).

In the *Rubashkin* case, six former U.S. Attorneys General, two former U.S. Deputy Attorneys General, a former U.S. Solicitor General, and 14 former U.S. Attorneys submitted a letter to the sentencing judge stating their concerns about the severity of the fraud Guideline. They wrote that the "potential absurdity" of the Guidelines was "on full display," as the government's proposed Guideline calculation would have resulted in a recommended life sentence for Mr. Rubashkin – "a 51-year-old, first-time, non-violent offender whose case involved many mitigating factors and whose personal history and extraordinary family circumstances suggested that a sentence of a modest number of years could and would be more than sufficient to serve any and all applicable sentencing purposes." In the *Gozes-Wagner* case, more than 130 former officials, including six U.S. Attorneys General, an FBI director, two U.S. Solicitors General, two state Governors, a Member of Congress, several Deputy, Associate, and Assistant Attorneys General, scores of U.S. Attorneys, and more than three dozen Judges and Justices, submitted an *amicus curiae* brief to the Fifth Circuit Court of Appeals. In their brief, *amici* pointed to "the district court's excessive concern with the Guidelines range" and wrote that "given the effect of the calculated 'loss' on the Guideline range in this case and the lack of a rational relation to Ms. Gozes-Wagner's level of culpability, it was particularly problematic that the district court entirely failed to discharge its obligation to 'filter the Guidelines' general advice through § 3553(a)'s list of factors.' *Rita*, 551 U.S. at 357-58."

Notably, the injustice of such extreme prison terms in these two cases resulting from this problematic Guideline prompted the President of the United States to grant clemency in the form of prison commutations.

More generally, it is a telling and disconcerting reality that, in recent years, sentencing courts are granting downward variances in more than 42% of all fraud/theft cases. *See* U.S. Sentencing Commission, *Quick Facts – Theft, Property Destruction, & Fraud* (August 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Theft_Property_Destruction_Fraud_FY22.pdf. These data document not only how often federal judges consider the fraud guideline unduly severe to comply with statutory sentencing instructions, but also that there is a heightened risk of unwarranted sentencing disparity in this arena where judges are so often compelled to sentence outside the terms of the Commission's guidance.

A Thoughtful Proposal from the American Bar Association

Though there have been many ideas for how to improve federal sentencing for fraud offenses, we see value in and support this Commission looking to work already completed a decade ago by the Task Force on the Reform of Federal Sentencing of Economic Crimes created by the Criminal Justice Section of the American Bar Association ("ABA Proposal"). That impressive Task Force, which consisted of five professors, three judges, six practitioners, two organizational representatives, and observers from the U.S. Department of Justice and the Federal Defenders, drafted a comprehensive and thoughtful proposed new federal sentencing guideline to effectuate needed reforms. The work of the Task Force, starting with the specifics of the ABA Proposal, is

available at: https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf

There are many facets of the ABA Proposal that we think merit careful study and adoption in some form, though signers of this letter might differ on any number of the detailed particulars. For this letter, we want to highlight a fundamental feature of the ABA Proposal that should be central to this Commission's work – namely, its emphasis on individual culpability. Though the ABA Proposal gives some attention to loss in the revised guideline, it centers the guideline calculation around "various culpability factors." In so doing, the ABA Proposal seeks to deemphasize a mathematical focus on loss in order to ensure judges focus mostly on determining an "appropriate culpability level" which "for any given case will depend on an array of factors." Notably, the ABA Proposal does not seek to define intricately and mechanistically all possible culpability factors, but rather soundly encourages and expects sentencing judges to carefully weigh the "almost limitless variety" of possible culpability considerations.

Conclusion

We are very encouraged by the Commission's recent efforts to modify the U.S. Sentencing Guidelines to better serve the statutory goals set forth by Congress and our nation's commitments to liberty and justice. The Guidelines' undue emphasis on loss in fraud cases has often resulted in excessively punitive sentence calculations that may bear little relation to traditional sentencing factors, thus undermining Congress's statutory sentencing instructions in 18 U.S.C. §3553(a) that judges impose sentences that are no greater than necessary to achieve the purposes of sentencing. We respectfully suggest that the Commission consider efforts, like the ABA Proposal, that seek to promote an emphasis on individual culpability to improve federal sentencing for fraud and theft offenses.

Thank you very much for your consideration of our views.

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July 15, 2024

The Honorable Carlton W. Reeves, Chair
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The Presumption of Probation – 28 U.S.C. § 994(j)

Dear Judge Reeves:

We write this letter in response to the U.S. Sentencing Commission's request for public comments in conjunction with the recent Notice of Proposed Priorities. We are former federal judges and senior Justice Department officials, and we applaud your efforts to consider how the U.S. Sentencing Guidelines and related laws can and should be improved to better serve the goals set forth by Congress and our nation's commitments to liberty and justice. This letter presents our ideas to further the legislative directive that the Guidelines promote sentences other than incarceration for non-violent first-time offenders who commit less serious crimes.

Undue Presumption of Incarceration of Low-Risk Offenders

In 1984, Congress enacted 28 U.S.C. § 994(j), directing the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense…." Yet, over the last 40 years, our federal criminal justice system has favored a presumption of imprisonment as the default form of punishment, resulting in mass incarceration. Whereas in 1987, 53% of federal defendants were sentenced to prison, by 2023, that number was 92%. Developments during the last four decades – including prison overcrowding, the emergence of viable alternatives to incarceration, and data showing that lower-level offenders can be safely rehabilitated within their own communities – have raised serious questions about the effectiveness of incarceration as punishment, especially for less serious offenses. These developments support the notion that prison should no longer be the presumptive form of punishment that it has become, especially for cases at the lower end of the severity scale, and further suggest that robust implementation of section 994(j) is long overdue.

Given the numerous economic and human costs associated with prison terms and the effectiveness of alternative forms of punishment, the Guidelines should look to limit the incarceration of low-risk offenders to cases in which no viable alternative would meet the system's needs. In addition to negatively impacting the defendant, lengthy periods of incarceration devastate the families and communities left behind and have little if any impact in reducing recidivism. Indeed, a recent analysis concluded that, with respect to reducing recidivism, the "null effect of custodial compared with noncustodial sanctions" is now established as a "criminological fact."[1] The research concludes that "[i]ncarceration cannot be justified on the grounds it affords public

[1] Damon M. Petrich, Travis C. Pratt, Cheryl Lero Jonson, and Francis T. Cullen, *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, Crime and Justice, September 22, 2021.

safety by decreasing recidivism. Prisons are unlikely to reduce reoffending unless they can be transformed into people-changing institutions on the basis of available evidence on what works organizationally to reform offenders."[2]

Alternatives to incarceration can take numerous forms, including but not limited to electronic monitoring; halfway house; home confinement; community service; and participation in substance abuse, mental health or other treatment programs. Data shows that effective alternatives like home confinement can and should be used more frequently as a sentencing option for first-time, non-violent offenders convicted of less serious offenses. The federal criminal justice system's experience with the COVID-19 pandemic demonstrated that there were thousands of low-risk incarcerated individuals who were released to home confinement with extremely minimal incidence of recidivism. Home confinement (as opposed to incarceration) also results in notable cost savings: the cost to incarcerate a federal inmate in 2020 was $120.59 per day, versus $55.26 for home confinement.[3] These resources should be re-directed towards rehabilitative programs that could potentially have a more positive impact on recidivism reduction.

A Vision for Reform: Guidance to Effectuate the Statutory Directive

The Guidelines should promote the statutory directive that they reflect the appropriateness of non-prison sentences for first-time, non-violent offenders convicted of less serious offenses. The Commission should consider issuing guidance that defendants who fall within the lowest zones of the sentencing table (Zones A, B, or C) should ordinarily receive a non-prison sentence. This would further Congress's instruction set forth in 28 U.S.C. § 994(j), while retaining for the courts the discretion to impose a prison sentence where circumstances require it. The Commission should also consider whether to broaden the scope of defendants who fall within this category by expanding the range of Zone C—for example, by increasing the maximum offense level from Level 13 to Level 15 for defendants with little or no criminal history.

The Commission's guidance should also discourage any categorical exclusion of an offense as being "otherwise serious." Rather, this determination should be made only after a thorough consideration of all the factors pertaining to the offense in question. Such factors may include, for example, the duration of the offense; the resulting injury or loss; the defendant's role; the defendant's motivation; and any other mitigating or extenuating circumstances.

Conclusion

The Commission can and should address the undue presumption of incarceration of first-time, non-violent offenders who commit less serious crimes. The Commission may achieve this by providing consistent guidance supporting non-prison sentences in such cases, and by laying out a thorough process for evaluating what may constitute an "otherwise serious" offense. This would reflect the current understanding that prison has been resorted to all too frequently in cases in which it is unnecessary to achieve the ends of justice, and in many cases can be counterproductive in light of the many collateral harms caused by prison to defendants, their families, their communities and society.

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[2] *Id.*
[3] 88 FR 19830.

We thank Your Honor, and the Commission, for considering our views.

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INVITED COMMENT ON THE USSC NOTICE OF PROPOSED 2024-2025 PRIORITIES

One of the stated goals of the Commission is to consider the issue of reducing costs of incarceration and overcapacity of prisons. **Policies that make sentencing costs explicit can assist courts in managing rising incarceration rates and costs by helping to balance conflicts between the purposes of sentencing.**

Criminal court judges are explicitly trained to consider the expected benefits of their sentences, such as retribution, incapacitation, and deterrence, but not the costs—including direct operational costs and also indirect costs such as lost wages, divided families, and criminogenic risks, which disproportionately impact disadvantaged communities.[1,2] Scholars have argued,[3] and scientific research suggests,[4] that insulating judges from information about these various costs of their sentences undermines judges' effectiveness by inflating their incarceration rates—particularly for nonviolent defendants—and in some cases, increasing recidivism, thus drawing limited correctional resources away from defendants who present an even greater need for deterrence, incapacitation, or rehabilitation, or who are even more deserving of punishment.

To remediate these risks, some scholars have proposed policies to help judges internalize these costs by requiring probation departments to disclose the expected sentencing costs in their presentence reports or by requiring judges to provide a written justification explaining why their sentencing determination is worth the additional cost to taxpayers.[5] The prediction suggested by these scholars is that prompting judges to consult cost information and to justify overages in prison capacity should reduce their reliance on incarceration by encouraging them to more fully consider alternatives to incarceration. A promising body of experimental research has generated support for this prediction,[4,6-11] particularly for defendants convicted of nonviolent crimes.[9] In this vein, some jurisdictions (e.g., Colorado, Missouri, Philadelphia) have already introduced sentencing cost disclosure policies.[12-15] Their example can serve as a natural experiment to clarify the effects of such policies.

On the basis of these considerations, we suggest that the Commission includes among its priorities:

- **initiatives to advance research**— legal, economic, and experimental—on sentencing cost disclosure policies, including their legal precedents and their impacts on: sentencing decisions, incarceration rates, overcapacity, crime rates, and sentencing disparities across different jurisdictions and demographic groups.
- **requests for policy proposals** to increase transparency in sentencing costs and collateral consequences of incarceration for use by trial judges and prosecutors during the sentencing phase.
- **support for legal education** about sentencing cost disclosure in the form of seminars, workshops, and other instruction for judges, lawyers, and probation and parole officers.

My collaborators and I are happy to provide additional information, as needed.

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BIOGRAPHICAL SKETCHES

Dr. Aharoni is an Associate Professor with tenure of psychology, philosophy, and neuroscience at Georgia State University. He is a leading expert on the effects of sentencing cost disclosure on sentencing judgments. He has published research on this topic with professional judges and prosecutors and has presented this research to practitioners around the country, including the Minnesota Annual Conference of State Judges, the Colorado Judicial Conference, the San Francisco District Attorney's Office, and the Philadelphia District Attorney's Office. He has obtained research funding from the National Institute of Justice, among others, and obtained letters of support from Federal Judge Aiken (Oregon), CO State Justice Boatright, and the Association of Prosecuting Attorneys. Aharoni earned his Ph.D from the University of California, Santa Barbara, and served as a fellow for the John D. and Catherine T. MacArthur Foundation's Law and Neuroscience Project.

Dr. Heather Kleider-Offutt, is an Associate Professor with tenure at Georgia State University where she conducts research on different aspects of memory and decision-making as it applies to police, witnesses and the legal system generally. She is an expert witness in criminal trials speaking to jurors on the fallibility of memory, in addition to giving invited talks to attorneys (criminal defense associations) and podcast and documentary interviews to the community more broadly. Dr. Kleider-Offutt has published over 40 peer reviewed journal articles, given numerous professional and conference presentations, and has trained 14 PhD students. Dr. Kleider-Offutt is a member of several professional organizations including the Psychology and Law Society and she is a Fellow of the Psychonomic Society.

Judge Hoffman served as a Colorado state trial judge for 30 years before his retirement in 2021. He is a member of the John D. and Catherine T. MacArthur Foundation's Law and Neuroscience Project, and a fellow in the Gruter Institute for Law and Behavioral Research. He has written more than 30 law review articles focusing on the criminal law, in journals that include The University of Chicago Law Review, Duke Law Journal, Penn Law Review, and Stanford Law Review. He has co-authored more than a dozen papers on the science of punishment in scientific journals that include Proceedings of the National Academy of Sciences, Proceedings of the Royal Society, Journal of Neuroscience, and Trends in Neuroscience.

REFERENCES

Flanders, C. (2012a). Cost and sentencing: Some pragmatic and institutional doubts. *Federal Sentencing Reporter. 24(3)*, 164–168. https://doi.org/10.1525/fsr.2012.24.3.164

Stemen, D. (2017). The Prison Paradox: More Incarceration Will Not Make Us Safer. New York: Vera Institute of Justice.

Bierschbach, R. A., & Bibas, S. (2017). Rationing criminal justice. *Michigan Law Review*, *116*(2), 187–246. https://doi.org/10.36644/mlr.116.2.rationing

Aharoni, E., Kleider-Offutt, H. M., Brosnan, S. F., and Hoffman, M. B. (2022). Nudges for judges: An experiment on the effect of making sentencing costs explicit. *Frontiers in Psychology, 13,* 889933. https://doi.org/10.3389/fpsyg.2022.889933

Johnson, C. L., Eck, J. E., & Cullen, F. T. (2014). The Small Prison. In F. T. Cullen, F. T. & C.L. Johnson (Eds.), *The American prison: Imagining a different future* (pp. 215–234). SAGE.

Aharoni, E., Kleider-Offutt, H. M., Brosnan, S. F., and Watzek, J. (2019). Justice at any cost? The impact of cost-benefit salience on criminal punishment judgments. *Behavioral. Sciences & the Law, 37*, 38–60. https://doi.org/10.1002/bsl.2388

Aharoni, E., Kleider-Offutt, H. M., Brosnan, S. F., and Fernandes, S. (2020). Slippery scales: Cost prompts, but not benefit prompts, modulate sentencing recommendations in laypeople. *PLoS ONE 15*, e0236764. https://doi.org/10.1371/journal.pone.0236764

Aharoni, E., Kleider-Offutt, H. M., and Brosnan, S. F. (2021). Correctional "free lunch"? Cost neglect increases punishment in prosecutors. *Frontiers in Psychology. 12*, 778293. https://doi.org10.3389/fpsyg.2021.778293

Aharoni, E., Nahmias, E., Hoffman, M. B., & Fernandes, S. (2023). Punishment as a scarce resource: a potential policy intervention for managing incarceration rates. *Frontiers in Psychology, 14*, 1157460. https://doi.org/10.3389/fpsyg.2023.1157460

Conklin, M. (2021). Reducing mass incarceration through cost salience: Why juries should be told the cost of incarceration. *UCLA Criminal Justice. Law Review, 5*(1), 103-128. https://doi.org/10.5070/CJ85154809

Rachlinski, J. J., Wistrich, A. J., and Guthrie, C. (2013). Altering attention in adjudication. *UCLA Law Review, 60*, 1586-1618

Alpert, D. (2021, June 3). *California assembly passes bill requiring prosecutors and judges to consider costs of sentencing in criminal cases*. California State Assembly Democratic Caucus. https://a46.asmdc.org/press-releases/20210603-california-assembly-passes-bill-requiring-prosecutors-and-judges-consider

Colorado Revised Statutes. §16-11-102(1.9(c)) (2021)

Ewing, M. (2018, March 4). *Philadelphia's new top prosecutor is rolling out wild, unprecedented criminal justice reforms*. Slate Magazine. https://slate.com/news-and-politics/2018/03/phillys-new-top-prosecutor-is-rolling-out-wild-unprecedented-criminal-justice-reforms.html

Flanders, C. (2012b). Cost as a sentencing factor: Missouri's experiment. *Missouri Law Review*. *77*(2), 391-410.

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Philip Torrey, Harvard Law School

Topics:

Research Recommendations

Legislation

Comments:

Criminal punishment for immigration-related crimes such as "illegal re-entry" can have devastating effects on immigrant families, particularly those who are seeking life-saving forms of relief from removal such as asylum. Immigration-related offenses are often some of the most prosecuted crimes in the country, despite the nonviolent nature of these offenses. They can also carry significant criminal punishment. See e.g., 8 U.S.C. 1326(b)(2) (prescribing a sentence of up to 20 years for an individual convicted of illegal re-entry with a prior deportation order based on an aggravated felony conviction). Advocacy groups have identified that charging decisions and sentencing amounts disparately impact Latinx people. NIJC & NIPNLG, "Fact Sheet: Immigration Prosecutions by the Numbers" (Nov. 14, 2022), https://immigrantjustice.org/staff/blog/fact-sheet-immigration-prosecutions-numbers.

In 2015, the Commission published a report concerning illegal reentry offenses. Among its key findings, the Commission noted that there were "18,498 illegal reentry cases, which constituted 26 percent of all federal criminal cases reported to the Commission" in fiscal year 2013. Recently, the Commission released a "QuickFacts" document detailing 64,124 immigration-related cases, 71.1% of which involved illegal reentry, demonstrating a stark increase in prosecutions. The document also noted that 98.5% of individuals in those cases were sentenced to prison and received an average of twelve-month term of imprisonment. Given the massive increase in illegal reentry cases, the mounting evidence of the law's racial origins, as well as the fact that many of those convicted and sentenced to prison are here seeking critical and lawful fear-based relief from removal, the Commission should conduct a comprehensive study on the offense's current prosecution and punishment. Matt Ford, New Republic, "A Nevada Judge Ruled that a Major Immigration Law is Too Racist to Remain" (Aug. 25, 2021), https://newrepublic.com/article/163419/miranda-du-unconstitutional-immigration-law (discussing racial origins of 8 USC 1326). This study should consider the significant financial costs of these prosecutions, as well as how they may divert resources from arguably more serious criminal and violent criminal offenses. It should also consider implementing guidelines that deter sentencing

courts from implementing lengthy terms of incarceration, and advocate with Congress to repeal the offense or reduce the statutory sentencing range.

-- Eleni Bakst, Clinical Instructor, Harvard Law School Crimmigration Clinic
-- Tiffany Lieu, Clinical Instructor, Harvard Law School Crimmigration Clinic

Submitted on: July 15, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Dan Berger, University of Washington Bothell

Topics:

Policymaking Recommendations

Comments:

We write as scholars of the US prison system. In particular, we study the reasons for and consequences of this country having the largest prison system in the world. The expansion of criminal sentencing is a central driver of mass incarceration. Its deleterious effects impact not only people who are imprisoned but their loved ones and communities.

We implore the Commission to pursue policies that would reduce the federal prison population. To do that, we recommend the following actions:
1) Reinstitute parole. The federal Sentencing Act of 1984 eliminated parole for people sentenced after that date. This restriction has caused a bottleneck in our federal prisons, as have similar policies at the state level. Bringing back parole would incentivize people's education and betterment during their incarceration and provide meaningful pathways for people to return home.
2) Eliminate the death penalty. The United States is the only industrialized country that retains the death penalty. Its prejudicial cruelties are well-documented and internationally condemned. Its existence runs counter to everything the US criminal justice system says about rehabilitation and redemption. After years without executions, more than a dozen people incarcerated in the federal prison system were put to death in six months in 2016-17. This scale of killing seemed to inspire several states to accelerate the pace of executions as well, despite limited availability of the drugs needed. Simply put, the practice has no place in a democratic or civilized country.
3) Eliminate the "other death penalty" and excessive sentences. US prisons have become punitive nursing facilities through the use of life, life without parole, and excessive sentences that become effective life sentences. Such policies act not as an alternative to the death penalty but as an alternative form of the death penalty. No less than the original death penalty do these excessive sentences discourage the possibility of rehabilitation or redemption. Whether through lethal injection or just the slow passage of time, sentencing someone to die in prison disincentivizes people to make the most of their incarceration in the form of education, making amends, or other forms of self-betterment.
4) Stop prosecuting immigration. It is a great misfortunate that recent years have seen criminal

sentencing overtake the civil regulation of immigration. In addition to those confined in detention centers, thousands of immigrants have been charged with federal crimes for entering or reentering the country. This policy involves the criminal legal system in matters that it was not set up or qualified to address. Criminal sentencing ought to be removed from immigration policy.
5) Eliminate sentencing for drug offenses. Drug offenses comprise almost half of those incarcerated in the federal prison system. The prosecution of drug use, possession, and distribution has been a central and devastating driver of mass incarceration. For those struggling with addiction, a public health approach is both more necessary and more productive than a criminal punishment approach. Others may find themselves incarcerated for lack of other job prospects. Across the board, the United States must revisit its punitive approach to drugs—including by reconsidering its current sentencing schema away from prison.

Simply put, the way to stop having so many people in prison is to stop sending so many people to prison. We have highlighted several areas where the U.S. Sentencing Commission could take meaningful steps to reduce the number of people who are currently in prison and propose or pursue alternatives that would reduce the number of people being sent to prison to begin with. These policy changes would mark a long overdue sea change in criminal justice policy. In addition to their impacts on the federal prison system, they would encourage state policy makers to follow suit as well.

Thank you for your consideration.
Sincerely,
Dan Berger, PhD, University of Washington Bothell
Keramet Reiter, JD-PhD, University of California Irvine

Submitted on: July 14, 2024

Joint Letter:
Creation of a Science and Technology Advisory Group

July 10, 2024

Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

Re: Proposed Priority: Science and Technology Advisory Group

Dear Chair Reeves and Members of the Sentencing Commission:

We are law professors, judges, legal practitioners, criminologists, psychiatrists, psychologists, and economists who are highly invested in the critical work of the Commission. We commend the dedication to public service of this Commission, its staff, and each of your predecessors.

We write today to urge the Commission to prioritize a historically underappreciated policy area that Congress made integral to the Commission's responsibilities. Specifically, 28 U.S.C. § 991(b)(1)(C) states that among the "purposes of the United States Sentencing Commission [is] to establish sentencing policies and practices for the Federal criminal justice system that . . . reflect, to the extent practicable, *advancement in knowledge of human behavior as it relates to the criminal justice process*." This provision exists alongside others that reveal the core values underpinning this command. For example, 28 U.S.C. § 995(a)(20) authorizes the Commission to recommend to Congress "modification or enactment of statutes" needed to "carry out an effective, humane and rational sentencing policy." The Commission is also tasked with "measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(2). We believe that these provisions and many others confirm a clear congressional intent to create a Commission guided by scientific and other advancements to promote more just, humane, and effective sentencing policies.

By its terms, the SRA requires the Commission to keep abreast of advancements in knowledge of human behavior and, to the extent practicable, integrate that knowledge into sentencing policies and practices. Advisory groups, created by the Commission pursuant to 28 U.S.C. § 995 and Rules 5.2 and 5.4 of the Commission's Rules of Practice and Procedure, assist the Commission in carrying out its statutory duties under 28 U.S.C. § 994(o). Yet, missing from departments within the Commission and the list of existing advisory groups is a resource that can specifically assist the Commission in keeping abreast of and integrating "advancement in knowledge of human behavior as it relates to the criminal justice process."

During the Commission's early years, some policymakers appeared skeptical of whether and how certain social sciences could or should have a central role at sentencing.[1] And at the time of the SRA's enactment, the tools available for data collection were substantially more limited. But at that time, a computer with less processing power and storage than your cell phone would have cost over $200 million and filled 16 semi-trucks.[2] As the Supreme Court has recognized in multiple cases, our understanding of human behavior has improved significantly since the 1980s.[3] In just the last decade there has been an "explosion" of studies that have substantially advanced our understanding of human behavior.[4] Developing guidelines based on past practices was a logical opening act for the Commission, but the stage is set for the Commission's next act.

We urge the Commission to adopt as a priority the establishment of a Science and Technology Advisory Group ("STAG") (or a similar group) to help inform the important work of the Sentencing Commission. STAG would be primarily comprised of subject-matter experts who would assist the Commission on the intersection of human behavior and sentencing policies, practices, and the Guidelines themselves. STAG could also assist the Commission by keeping up with technological advancements that influence sentencing.[5] While the first few decades of the Commission prioritized 28 U.S.C. § 991(b)(1)(B) (avoiding unwarranted disparities), the next few should continue that work while honoring the text and spirit of § 991(b)(1)(*C*)—establishing policies and practices that reflect advancements in knowledge of human behavior when it intersects with the criminal-justice process.

The Commission's last amendment cycle gave Commissioners a glimpse into how specialized scientific information provided by experts can aid guideline reforms. In amending §5H1.1 (Age Policy Statement), the Commission acknowledged its duty under 28 U.S.C. § 991(b)(1)(C) to establish sentencing policies that reflect advancements in our knowledge of

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[1] *See, e.g.*, KATE STITH AND JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN FEDERAL COURTS 30–31 (1998) (noting criticism by the early 1970s about reliability of psychiatric prediction and "conflicts between medical and legal objectives"); Nancy Gertner, *Neuroscience and Sentencing*, 85 FORDHAM L. REV. 533, 535 (2016) ("From the turn of the century through the 1980s, the predominant view was that crime was a 'moral disease.' Sentencing mimicked a medical model in which judges were charged with tailoring the punishment to the individual—in effect, coming up with a 'cure.'") (footnotes omitted).

[2] Edouard Mathieu, *The Price of Computer Storage Has Fallen Exponentially Since the 1950s*, OUR WORLD IN DATA (May 21, 2024), https://ourworldindata.org/data-insights/the-price-of-computer-storage-has-fallen-exponentially-since-the-1950s; Mike O., *How Storage Compares: 1985 vs. 2019*, LINKEDIN (Mar. 1, 2019), https://www.linkedin.com/pulse/how-storage-compares-1985-vs-2019-mike-o-konski; *see also* Sascha Segan, *1982 vs. 2022: Has Technology Really Become More Affordable?*, PCMAG (June 15, 2022), https://www.pcmag.com/news/1982-vs-2022-has-technology-really-become-more-affordable.

[3] *See, e.g.*, Kahler v. Kansas, 589 U.S. 271, 296 (2020) ("Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time. And it is a project, if any is, that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve."); Miller v. Alabama, 567 U.S. 460, 472 n.5 (2012) (behavioral and social science supporting cases like *Roper v. Simmons*, 543 U.S. 551 (2005) and *Graham v. Florida*, 560 U.S. 48 (2010) "have become even stronger" since those cases were decided); *see also* Commonwealth v. Mattis, 493 Mass. 216, 224 N.E.3d 410 (2024) (Supreme Judicial Court of Massachusetts reviewed a robust scientific record from experts in developmental neuroscience and developmental psychology before holding that sentences of life without the possibility of parole for individuals under the age of 21 are unconstitutional).

[4] OWEN D. JONES, JEFFREY D. SCHALL, & FRANCIS X. SHEN, LAW AND NEUROSCIENCE 697 (2nd ed. 2020).

[5] For example, use or misuse of large-language models or predictive algorithms.

human behavior. The Commission acknowledged that "this amendment reflects the evolving science and data surrounding youthful individuals, including recognition of the age-crime curve and that cognitive changes lasting into the mid-20s affect individual behavior and culpability."[6] The Commission credited "expert testimony to the Commission indicating that certain risk factors may contribute to youthful involvement in criminal justice systems, while protective factors, including appropriate interventions, may promote desistance from crime."[7] The Commission can utilize experts to more systematically study these and other issues in a manner that is targeted to federal sentencing and with the unique authority that Congress gave the Commission to collaborate with other government agencies.[8] *Formalizing* the role of relevant scientific expertise within the Commission's structure is essential given the importance of that expertise on the Commission's various responsibilities.

Currently, judges may explicitly or implicitly disagree about the role of behavioral sciences at sentencing, which can contribute to sentencing disparities.[9] Imagine two judges, one parenting a child diagnosed with autism spectrum disorder ("ASD") and another who believes based on anecdotes that ASD is over-diagnosed. Each judge might consider ASD evidence at sentencing very differently resulting in an unwarranted disparity.[10] Congress, the Commission, and the Supreme Court have reiterated for decades that federal sentencing is to be concerned with horizontal consistency—in this context, not having certain federal judges treat the "history and characteristics of the defendant" at sentencing differently than other judges.[11] The Commission can and should play a central role in promulgating guidelines, policy statements, reports, primers, training, educational materials, and studies to help ensure that widely accepted scientific realities are better understood within the federal judiciary.[12] In short, this proposal also advances the Commission's existing focus on avoiding unwarranted disparities.

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[6] *See* U.S. SENT'G COMM'N, *Amendments to the Sentencing Guidelines* 14 (2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202405_Amendments.pdf.

[7] *Id*.

[8] *See, e.g.*, 28 U.S.C. § 995(a)(8) (Commission may request "information, data, and reports from any Federal agency or judicial officer" in fulfilling its statutory duties); *id*. § 995(a)(5) (Commission may "utilize, with their consent, the services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor").

[9] *See, e.g.*, Colleen M. Berryessa, *Judiciary Views on Criminal Behaviour and Intention of Offenders with High-Functioning Autism,* 5 J. INTELL. DISABILITIES & OFFENDING BEHAV. 97, 97–100 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4392381/ (studying judges' uncertainty and disparate handling of ASD defendants); *cf.* Adi Leibovitch, *Punishing on A Curve*, 111 NW. U. L. REV. 1205 (2017) (finding disparity in sentencing based on the different types of cases on a judge's docket).

[10] As one of many ideas, with the aid of experts the Commission could issue a Primer or other aid on mental health and sentencing.

[11] *See, e.g.*, Rita v. United States, 551 U.S. 338, 349 (2007) (Congress "sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct" (quoting USSG § 1A1.1, intro. to cmt., pt. A, ¶ 3 (The Basic Approach))).

[12] The Commission's report on Youthful Offenders, and its series of recidivism reports in which the Commission presents data on recidivism risk by age, are already important contributions to judges, attorneys, probation officers and all those connected to federal sentencing. However, we encourage the Commission to integrate science and advancing knowledge into the Guidelines themselves. Despite the Commission's extensive research and reporting on age, the policy statement at §5H1.1 continues to state that age "may be relevant in determining whether a departure is warranted." The only elaboration in the guideline itself refers to advanced age and infirmity, not youth. While the most effective advocates and judges with great interest in the work of the Commission might cite the Commission's Youthful Offenders report, many will not, particularly given that the report was published seven years ago. And even those familiar with it might not integrate the information in the

Most judges are not trained scientists or medical doctors. This lack of expertise can lead to understating or overstating the significance of studies, data, or expert testimony. Some judges may believe that it is not their role to integrate scientific advancements into their decision-making until they receive guidance from other branches of government;[13] other judges might believe that it is their responsibility to act on these advancements. Some judges have confided to some of the undersigned that they resort to "Googling" unfamiliar scientific terms, concepts, or studies discussed at sentencing to try to understand the issues as best they can. Rather than leaving judges unassisted in this complicated and growing area of sentencing, the Commission can, as Congress has directed in § 991(b)(1)(C), help bridge the knowledge gap in sentencing by, among other measures, publishing accessible training materials and supporting studies that judges can confidently rely upon.[14] This approach entails not only advising on the appropriate use of science and technology, but also training on improper reliance on "junk science"[15] or underdeveloped areas of caution for judges.

Importantly, as many of the undersigned have reiterated in the past, factoring in the realities of human behavior at sentencing should not be viewed as "soft on crime." Data might suggest that certain individuals should receive *longer* sentences than the current averages to meet the purposes of punishment, or that these individuals might need programming or alternatives that are objectively more onerous than those they currently experience. Alternatively, factoring in advances in the knowledge of human behavior might lead to neutral changes that better protect public safety.[16] Ultimately, an important goal for the Commission and for the undersigned is to better align punishments with offenses and individuals to promote public safety, not to advocate for sentence reductions.

We urge the Commission to adopt as a priority the potential establishment of a Science and Technology Advisory Group, which would open the proposal to formal public comment.

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report with other relevant information on age in other reports. Therefore, we encourage the Commission to do more with the knowledge it has, and to create mechanisms for routinely remaining abreast of and educating the public about advancements in knowledge. We believe an advisory group can be an effective mechanism to achieve those goals on an ongoing basis.

[13] For example, the *Mattis* dissenters (*see supra* note 3) argued that in the State of Massachusetts, it should be the legislature (rather than individual judges) who weigh the scientific evidence and promulgate associated laws. Unlike the concerns of the *Mattis* dissenters, Congress not only delegated to the Commission the authority to study advancements in knowledge of human behavior, it *expects and relies on the Commission* to do so. *See* 28 U.S.C. § 991(b)(1)(C); *see also id.* § 994 (duties of the Commission). The Commission clearly has the power to study (and to collect other studies and research) human behavior and to serve as a clearinghouse and educator of the same pursuant to its enumerated powers under 28 U.S.C. § 995 (and "necessary and proper" analog in § 995(b)).

[14] *See also* Gertner, *supra* note 1, at 544 ("Judges can be trained in how to evaluate what works and what does not and what offenders would be amenable to which sentencing alternatives. A sentencing commission can evaluate programs in terms of their efficacy, publicize the best practices in sentencing drug-addicted offenders or juveniles rather than enforcing compliance with the Guidelines.").

[15] Carlin Meyer, *Brain, Gender, Law: A Cautionary Tale*, 53 N.Y.L. SCH. L. REV. 995, 997 (2009) ("The U.S. legal system has a long history of romance with brain science—often junk science.").

[16] For example, the Commission's series of publications on recidivism provided important guidance to Congress regarding whether reductions in drug trafficking penalties should be made retroactive, and the Commission has continued working on recidivism publications. There is a role, however, for a comprehensive study of desistance among federal offenders. Desistance is more difficult to measure, but the Commission could use its statutory authority to obtain data from other federal agencies to conduct a comprehensive study of the factors that keep people from committing new crimes.

Adopting this as a priority would allow robust discussion from scholars and stakeholders about the utility, scope, powers, duties, and composition of STAG. Upon creating the advisory group, we recommend at least quarterly meetings and an annual conference, symposium, or related event so that STAG and the Commission can benefit from additional feedback by prominent individuals with diverse expertise.

The priority could be worded as follows:

> The creation of a standing Science and Technology Advisory Group to assist the Commission in complying with its statutory purpose and mission of establishing "sentencing policies and practices for the Federal criminal justice system that . . . reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C).

If created, STAG would generate proposed priorities and complete projects in the context of science, technology, and sentencing so that advancements in the understanding of human behavior are consistently brought to the Commission in a formalized way by experts. We believe that creating such a group is a vital step toward integrating modern scientific understanding into the federal sentencing process. By doing so, the Commission will not only honor its statutory mandate but also enhance the fairness and effectiveness of the justice system. We appreciate your dedication to this important work and stand ready to support the Commission in this endeavor.

Sincerely,

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Ohio State University Moritz College of Law
Executive Director, Drug Enforcement and Policy Center

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July 11, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

This submission responds to the U.S. Sentencing Commission's request for comment on possible policy priorities for the amendment cycle ending May 1, 2025. We are lawyers who share not only a long-standing interest in improving sentencing laws and policies, but also a long-standing belief that robust second-look resentencing mechanisms are essential to fair and just sentencing systems. We write to encourage the Commission, especially in the wake of its important recent work expanding the Sentencing Guidelines' sentence reduction policy statement, to continue enhancing federal resentencing tools in its efforts to advance congressional goals and in service to "effective, humane and rational sentencing policy." 28 U.S.C. § 995(a)(20).

Background on "second look" sentencing mechanisms

For much of the Twentieth Century, parole was a fundamental component of nearly every sentencing system in America, and it served as a primary means for regular and often repeated reconsideration and reduction of prison sentences. But in recent decades many jurisdictions, including the federal system, eliminated parole entirely and replaced it with determinate sentencing as part of modern sentencing reforms. The elimination of parole came during a period that also saw increases in the length of long prison terms imposed. With lengthy prison terms increasing dramatically in the absence of traditional parole review, many sentencing experts and advocates have urged jurisdictions to create or expand judicial authority to revisit past sentences, and a growing number of legislatures are enacting or actively considering judicial second-look sentencing authority.[1]

The expansion of resentencing authority has strong support. Notably, the American Law Institute's 2017 revision of the Model Penal Code's sentencing provisions calls for all jurisdictions to "authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications

[1] *See, e.g.*, Becky Feldman, The Sentencing Project, *The Second Look Movement: A Review of the Nation's Sentence Review Laws* (May 2024), https://www.sentencingproject.org/reports/the-second-look-movement-a-review-of-the-nations-sentence-review-laws/; Nazgol Ghandnoosh, The Sentencing Project, *A Second Look at Injustice* (May 2021), https://www.sentencingproject.org/reports/a-second-look-at-injustice/.

for modification of sentence" from ***all*** prisoners after 15 years of imprisonment.[2] The commentary for this proposal explains the fundamental wisdom and multiple policy and practical justifications for providing a means for lengthy prison sentences to be reviewed and potentially modified:

> The passage of many years can call forward every dimension of a criminal sentence for possible reevaluation. On proportionality grounds, societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods…. It would be an error of arrogance and ahistoricism to believe that the criminal codes and sentencing laws of our era have been perfected to reflect only timeless values.…
>
> On utilitarian premises, lengthy sentences may also fail to age gracefully. Advancements in empirical knowledge may demonstrate that sentences thought to be well founded in one era were in fact misconceived…. For example, research into risk assessment methods over the last two decades has yielded significant (and largely unforeseen) improvements. Projecting this trend forward, an individualized prediction of recidivism risk made today may not be congruent with the best prediction science 20 years from now. Similarly, with ongoing research and investment, new and effective rehabilitative or reintegrative interventions may be discovered for long-term inmates who previously were thought resistant to change.[3]

Put more simply, times change and people change, so it is not wise (nor cost-effective) to lock in long prison sentences without robust mechanisms in place to systematically reconsider who still needs to be incarcerated. Of course, widespread calls for second-look sentencing reforms, which have also been made by prominent groups representing prosecutors and defense attorneys,[4] do not expect or advocate for every prisoner to automatically get resentenced upon request; rather, the call is for giving prosecutors and judges explicit discretionary authority to determine whether a sentence reduction would be consistent with public safety and the interests of justice.

As this Commission knows, on this front, Congress was ahead of the modern sentencing reform curve: through 18 U.S.C. § 3582(c) of the Sentencing Reform Act of 1984 (SRA), Congress expressly recognized that, with the abolition of parole, there needed to be authority for judges to modify a "term of imprisonment" in certain situations, for example where "extraordinary and compelling reasons" are present (§ 3582(c)(1)(A)(i)), the individual is aging and has served the majority of their prison sentence (§ 3582(c)(1)(A)(ii)), or there has been a retroactive decrease in the Sentencing Guidelines range (§ 3582(c)(2)). Recognizing that parole historically played a key

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[2] *See* REVISED MODEL PENAL CODE: SENTENCING § 305.6 (Final Draft, April 2017), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf.

[3] *Id.* The ALI proposes jurisdictions adopt broad second look sentencing authority ***in addition to*** provisions permitting "judicial modification of prison sentences under circumstances of advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons." *Id.*

[4] *See* Fair and Justice Prosecution, *Statement On Sentencing Second Chances* (Apr. 2021), https://fairandjustprosecution.org/wp-content/uploads/2021/04/FJP-Extreme-Sentences-and-Second-Chances-Joint-Statement.pdf ("[W]e urge our state legislatures and the federal government to adopt measures permitting prosecutors and judges to review and reduce extreme prison sentences imposed decades ago and in cases where returning the individual to the community is consistent with public safety and the interests of justice."); JaneAnne Murray et al., *Second Look = Second Chance: Turning the Tide through NACDL's Model Second Look Legislation*, 33 FED. SENT'G REP. 341, 341 (2021) ("By providing an orderly procedure for all sentences to be revisited after appropriate lengths of time, the model legislation proposed by NACDL provides a safe and effective means for legislators to meet the challenge of the moment.").

role in responding to changed circumstances after sentencing, the SRA's legislative history explained why some cases would warrant resentencing: "there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment."[5] And, as this Commission has soundly effectuated through its recent amendments to its sentence reduction policy statement § 1B1.13, Congress adopted expansive statutory language in 1984 ("extraordinary and compelling reasons") – and made further amendments to the provisions of 18 U.S.C. § 3582(c)(1)(A) in the First Step Act to allow defense-initiated motions – that make evident that Congress envisions robust use of sentence reduction authority. Indeed, the only limitation set out by Congress is that an individual's rehabilitation "alone" may not serve as an "extraordinary and compelling" reason for motions filed under § 3582(c)(1)(A)(i).[6]

Recent state and local experiences with prosecutor-initiated resentencing

An important addition to second-look sentencing mechanisms has emerged in recent years in a number of states in the form of prosecutor-initiated resentencing laws. The nation's first prosecutor-initiated resentencing law was enacted in California in 2018.[7] Spearheaded by former prosecutor Hillary Blout, who had served in the San Francisco District Attorney's Office, this law expressly authorizes prosecutors to file a motion requesting that the court resentence an individual if "continued incarceration is no longer in the interest of justice."[8] When deciding the motion, the court considers post-conviction factors such as disciplinary record and rehabilitation, recidivism risk, and whether circumstances have changed since the person's original sentencing.[9] The process also ensures that victims have proper notice and an opportunity to participate. Under the law and after consideration of the factors listed above, the court is authorized to resentence the incarcerated person to any lesser sentence.[10]

California has expended ample resources to ensure the success of its prosecutor-initiated resentencing law. In 2021, California appropriated $18 million for a multi-year pilot program to support the law's implementation in nine counties throughout the state.[11] Midway through the pilot, a RAND examination of case-level data in the nine counties found that 684 case reviews

[5] Senate Report No. 98-225, at 55–56 (1983).
[6] 21 U.S.C. § 994(t).
[7] A.B. 2942, 2017-18 Reg. Session. (Cal. 2018).
[8] *Id.* at d(1). *See also* Press Release, Phil Ting, California Assemblymember, District 19, *Governor Signs Ting Bill That Could Help Inmates Get a Second Chance* (Sept. 30, 2018), https://a19.asmdc.org/press-releases/20180930-governor-signs-ting-bill-could-help-inmates-get-second-chance.
[9] *See generally* For The People, *Prosecutor-Initiated Resentencing: California's Opportunity to Expand Justice and Repair Harm* (Dec. 2021), https://www.fortheppl.org/s/ForThePeople_Report_121321.pdf.
[10] *Id.*
[11] *See* Phil Ting, California Assemblymember, District 19, *California County Resentencing Pilot Program Fact Sheet* (2021), https://a19.asmdc.org/sites/a19.asmdc.org/files/2021-09/Resentencing%20Pilot%20Program%20Fact%20Sheet.pdf.

were initiated by prosecutors with 105 cases referred to the court for resentencing.[12] Of the 94 cases for which courts ruled on a resentencing motion, 91 resulted in resentencing in the nine pilot counties.[13] More than half of the cases initiated by prosecutors involved incarcerated people who were over the age of 50, with more than 40% involving three-strikes sentences and more than 75% having a sentence enhancement present.[14] Among the cases selected for review, the most common categories of controlling offenses in the nine pilot counties were robbery, assault, and burglary.[15] San Diego County Assistant District Attorney Dwain Woodley said that, in a number of cases, "these sentences were excessive – way excessive – for what the person did. People should have a chance to reunite with their families and be back in community."[16]

Since 2018, prosecutor-initiated resentencing laws have also been enacted in Illinois, Minnesota, Oregon, and Washington, and have been proposed or introduced in Georgia, Maryland, Massachusetts, New York, Texas, and Utah, among other states.[17] To date, hundreds of incarcerated people in states with prosecutor-initiated resentencing laws have been released from prison pursuant to these laws.[18] In liberal and more conservative counties alike where prosecutor-initiated resentencing laws have been implemented, prosecutors are generally embracing the opportunity to ensure that their role as ministers of justice should not end once they have finished processing a case.[19] As the Ramsey County (Minnesota) Attorney has explained, he is working to identify cases for resentencing "because for some people sentenced to prison in the past, their sentence may no longer serve the interests of justice; may no longer be needed to protect public safety; and may not be a good use of critical correctional and public safety resources."[20]

Recognizing the wisdom of second-look sentencing mechanisms and also the positive experiences of state reforms, the American Bar Association's House of Delegates in 2023 approved a resolution calling on governments nationwide to adopt prosecutor-initiated resentencing legislation and to provide resources to support implementation.[21] This resolution built on a previous resolution urging a "second look" for incarcerated people serving long

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[12] Davis, Lois M. et al., RAND Corporation, *Evaluation of the California County Resentencing Pilot Program, Year 2 Findings* (Sept. 27, 2023), https://www.rand.org/pubs/research_reports/RRA2116-2.html

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Christina Carrega, *This Law Gives Prosecutors Authority to Reduce Mass Incarceration,* Capital B (Oct. 6, 2023), https://capitalbnews.org/prosecutor-resentencing-law/.

[17] *See* Marco Poggio, *Minnesota Joins Prosecutor-Led Resentencing Law Movement*, Law360 (June 23, 2023), https://www.law360.com/articles/1680599/minnesota-joins-prosecutor-led-resentencing-law-movement.

[18] *See* Julia Marnin, *Prison Guard Beatings of Women are 'Rampant,' Experts Say. Push Underway to Free Some*, Sacramento Bee (June 14, 2024), https://www.sacbee.com/news/nation-world/national/article289251140.html.

[19] *Id.*

[20] Ramsey County Attorney's Office, Prosecutor-Initiated Sentence Adjustment, https://www.ramseycounty.us/your-government/leadership/county-attorneys-office/news-updates/prosecutor-initiated-sentence-adjustment (last visited July 6, 2024).

[21] ABA Resolution 504 (2023), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/504-annual-2023.pdf (adopted Aug. 7, 2023).

sentences, placing prosecutor-initiated resentencing among several important tools in the broader second-look movement.[22] The ABA report that accompanied the resolution concluded its advocacy for prosecutor-initiated resentencing (PIR) this way:

> Through PIR, prosecutors can initiate a thorough and methodical review of the prison population in their jurisdiction to identify people who can be safely released from prison and ask the court for recall and resentencing. PIR gives prosecutors a tool to provide redress for people where confinement is no longer in the interest of justice while keeping victims and community safety at the forefront of their decisions. When done with care, the PIR process can have lasting benefits for prosecutor offices, incarcerated people, families, and communities, and will positively contribute to public safety.[23]

Proposing a robust "second look" agenda for the U.S. Sentencing Commission

In part because this Commission has recently given focused consideration to one aspect of sentence reconsideration through recent amendments to § 1B1.13, we believe this Commission is now uniquely positioned and able to develop and advance a robust "second look" sentencing agenda in the months and years ahead. Many activities might comprise such an agenda, and here we will propose just a few possibilities for Commission consideration:

- **Convene a *national* second-look sentencing conference:** To establish sentencing laws reflecting the "advancement of knowledge of human behavior as it relates to the criminal justice process," 28 U.S.C. § 991(b)(1)(C), this Commission should hold a public conference in order to collect information about, and get stakeholder input about, the development and implementation of second-look sentencing mechanisms nationwide. Given the variety of "second look" laws being proposed and implemented in states and localities across the country – ranging from "traditional" compassionate-release laws to laws enabling resentencing of youthful offenders, to broad prosecutor-initiated and universal second-look resentencing laws – the policies and practices surrounding the review and reconsideration of prison sentences are quite dynamic and yet still quite opaque. A national convening conducted by the Commission to consider these laws would help not just this Commission, but also policy makers nationwide, have a more informed understanding of "second-look" best practices.

- **Broadening *federal* resentence reductions:** To effectuate the "purposes of sentencing" and to avoid "unwarranted sentencing disparities," 28 U.S.C. § 991(b)(1)(A-B), this Commission should conduct workshops to assess and improve the functioning of the sentence reduction authority in 18 U.S.C. § 3582(c)(1)(A). Though Commission data indicate more sentence reductions motions have been filed since Congress sought to expand their use in the First Step Act of 2018, recent data also show that, on a monthly basis, far less than 0.05% of all federal prisoners are able to secure a sentence reduction. Particularly given data showing remarkably low recidivism rates for persons released early from federal prison during the COVID pandemic, Commission data suggest federal sentence reduction could and should be expanded. Potential approaches to expansion

[22] ABA Journal, *Let courts consider a prosecutor's recommendation to reduce a sentence, ABA House says* (Aug. 7, 2023), https://www.abajournal.com/web/article/resolution-504.
[23] Report to accompany ABA Resolution 504 (2023), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/504-annual-2023.pdf.

might include statutory reform for second looks for long-serving federal prisoners (as Senator Corey Booker proposed in 2019), reforms enabling federal prosecutors to initiate sentence reductions for a wide range of reasons, a right to counsel and funding for representation for federal prisoners bringing sentence reduction motions, careful study and review of Department of Justice opposition to sentence reduction motions, and further expansion of the Commission's categories of cases in policy statement § 1B1.13 that can justify sentence reductions.

- **Analyzing processes of federal sentence reductions:** Though this Commission has started providing data about sentence reduction motions brought under 18 U.S.C. § 3582(c)(1)(A)(i) since Congress sought to expand their use in the First Step Act of 2018, these data raise a host of questions about who is seeking and who is securing sentence reductions. First, just when, how, and why federal prosecutors and/or BOP officials support or oppose these motions are unclear. Second, the patterns of grants and denial of these motions in different districts and circuits raise further questions about whether local cultures, rather than consistent national policies and practices, may unduly shape the outcome of sentence reduction motions. Third, federal prisoners do not have a constitutional right to counsel for bringing these motions, and it is unclear whether and how prisoners who may merit sentence reductions are obtaining sufficient representation. This Commission could and should produce a series of reports about ways to improve the sentence-reduction process and decision-making.

We can readily imagine a range of additional activities that could be part of a sound robust "second-look" sentencing agenda for this Commission. We sincerely hope you find some of these specific suggestions helpful, but the main goal of this letter is to urge this Commission to seize a leadership role in advancing research and sound policymaking with respect to resentencing opportunities for prisoners in both federal and state systems. Even if the United States did not have a massive prison population, such leadership on these issues would be valuable. Given that the federal prison system is the largest in a nation with a massive number of persons behind bars, we consider such leadership a true moral and constitutional imperative.

Sincerely,

Douglas A. Berman
Newton D. Baker-Baker & Hostetler Chair in Law
Executive Director, Drug Enforcement and Policy Center
The Ohio State University Moritz School of Law

Jeremy Haile
Director of Policy
For The People

Erica Zunkel
Clinical Professor of Law
Criminal and Juvenile Justice Clinic
The Law School at The University of Chicago

Date: 6-20-2024
To: Conor Reynolds – U.S. Sentencing Commission
From: John Carl, PhD and Mary Looman, PhD

Conor – Below are a few ideas Mary and I have related to our research and experiences regarding the U.S. prison system. They are listed in no particular order of importance; however, we believe all are important changes that could lead to a more humane and just system.

Culture

Many people have written about the culture of the prison system. Our philosophy is that prison, in and of itself, is punishment enough. Prison, by extension, should not be the place where people go to receive more punishment; they should receive habilitative training. Therefore, we advocate more humane prisons, where the adversarial culture that exists in many prison is not tolerated and the prison culture models the American democratic culture. The inherent power differences between staff/guards and inmates make this difficult to address but that does not mean we should not attempt it. There are many historical accounts of adversarial and controlling cultures transforming to democratic values.

Below are some suggestions to make prisons more humane and decrease the adversarial prison system.

1. Eliminate the term "inmate" and change to "client."
2. Eliminate overcrowding and decrease the number of prisoners per cell to no more than two.
3. Eliminate all open bay housing units.
4. Where possible, decrease the overall size of prisons and/or divide larger institutions into separate prisons/with in prisons. Smaller prisons have better control, and better outcomes.
5. House client's according to age development (17 to 22; 23 to 30, 31 to 50, etc) with appropriate culture standards and levels of self-directed behavior and activities.
6. Tie "roommate" decisions involve a reciprocal process between the clients and the staff.
7. Improve food quality.
8. Assure climate control systems function properly.
9. Increase the number of "rewards" available for good behavior such as:
    a. Allowing limited but controlled access to electronic communication with family/children/friends to facilitate and potentially strengthen relationships.
    b. Affirm pro-social behavior –
        i. expand *good time* available to programs/completion of goals/etc.
        ii. cease global punishment measures whenever safety measures allow. These include but are not limited to decisions such as

elimination of visitation, closing of 'yard' or exercise equipment, for the 'bad behavior' of a few.

10. Conduct social science research that examines the differences from
    a. Those who grow up in prison communities that do not become criminals versus those that do. People who become criminals who do not grow up in prison communities versus those who do. Compare families in poverty versus middle class and wealthy.
    b. At-risk Elementary students who grow up with help from community and school programs and those who do not (concept of 'caring communities').
    c. Middle School and High School students who don't get involved with gangs versus those who do.

Discharge Planning

Data on desistence from crime show several avenues to increase positive outcomes after release from prison. Whatever can be done to link incarcerated people to pro-social groups should be enhanced. This should include, but should not be limited only to, 12 step programs, religious services, educational programs, GED programs, personal growth opportunities, individual and group therapy, etc. At intake, we recommend the incarcerated person be asked to start thinking about his/her discharge (where appropriate) and what steps need to be taken to successfully negotiate discharge. The following issues should be considered. Too often individuals come to prison with poor skills and return to society with exactly the same level of skills. They often come from environments with limited opportunities, and where crime and violence are rampant. All efforts need to be made to not return formerly incarcerated people back into such communities.

1. Discharge planning should begin the first week after the person is convicted with weekly meetings with the case manager (at first, then monthly). The plan should be like an employee performance review that highlights deficits and strengths with the case manager responsible for reducing the number of deficits and increasing the number of strengths.
2. Appropriate paperwork to assure the discharged individual has government ID, including SSA card, photo id, driver's license (if appropriate), etc.
3. Vocational discussions with the prison discharge case manager who will be charged with doing more than simply counting the days remaining on the sentence but working with the individual to create an agreed upon plan to successful release.
4. Applications for housing, food subsidies, Medicaid, etc, should all be available and processed prior to discharge, and where legal changes to the system need to be made (Medicaid applications) such changes should be advocated by the Sentencing Commission.
5. Best case scenario would allow for housing to be acquired before release, and that the lease for such housing be paid by the system for at least 6

months to a year while the formerly incarcerated person is returning to the community.
6. Best case scenario would suggest that all released people have full employment at the time of their release.
7. Case managers' client loads should be lightened so they can accomplish these expanded tasks.

Mental Health

Deinstitutionalization of the formerly called "asylum system" has resulted in increases in the numbers of seriously and perpetually mentally ill people living in the prison system. The challenge for the system is to determine whether a person's "bad behavior" is the result of a verifiable mental illness, or simply criminal thinking. Psychological testing exists to help determine who is who in this dilemma and generally will be accurate and should be used whenever possible. But one thing is certain, the general population of a prison is no place for a person suffering from a serious mental illness. Of course, the reality of the living conditions of many in prison are such, that even individuals who previously showed no-sign of mental illness may now be at risk of suffering complications from depression and/or anxiety disorders. The potential for violence on a daily basis, as well as the reality that individual locus of control is often not possible due to security constraints, means that all inside residents could be considered at risk for a mental health issue. We suggest the following.

1. Build within existing prisons, separate mental health units were medication management and social opportunities exist to assist in a person's functioning.
    a. Residence in such a unit should be stabilized whenever possible, allowing even inmates whose symptoms are now controlled to remain in the therapeutic setting permanently. This would allow the inmate, who has a serious mental health disorder, a stable, living condition and potentially avoid the cycle of healthy living vs unhealth coping mechanisms.
2. Expand after care programs for those who are released.
    a. Frequently mentally ill inmates are released without medication and without proper discharge information to allow for a continuum of care. This should be avoided at all costs so as to not set up the discharged individual for failure.

1. Allow judges to sentence the convicted person to a therapeutic prison.

Age/Crime

Criminologists have known for decades that few things work to curb criminality like a 40th birthday. Even amongst those who have shown a proclivity toward anti-social behavior in their youth, tend to desist from criminality as they age. Sentencing guidelines frequently fail to take this into account, keeping individuals who are likely to no longer be a

threat to the community staying inside prisons for far longer than is required to protect the public. The "justice" component of sentencing may for some, in fact, require that an individual remain in prison throughout his life; however, many crimes, for which people are incarcerated for long periods of time, do not necessarily meet this standard.

1. Sentencing should take into consideration the reality of age, and where possible. Repeat non-violent offenders are likely to be less of a threat if released in their mid-40's.
2. Any sentence that requires an individual to remain in prison, even when medically they are no -longer able to care for themselves, thus poses no threat to the community, should not be sentenced to prison or remain in prison.
3. Age considerations should be made related to what type of prison and individual is sent to as well. When youthful offenders are mixed with middle – aged to elderly offenders, the running of the prison becomes more complex. Targeting groups by age allows for developmental processes that are normative, to be considered when making decisions about how to best house clients.

<u>Measuring success – Pitfalls of a recidivism only process</u>

Is prison effective? The clearest measure of success will often be related to recidivism. Does the inmate return within a given period of time, usually 3-5 years? However, studies show that almost half of those who return to prison are recidivating because of some technical violation and not due to the commission of a new crime. Secondly, measuring the efficacy of a prison by this standard means that only one measure is valid in answering "does the prison work?" Below are some alternative measures of success that could be used and considered.

1. Per capita rate violence inmate to inmate
2. Per capita rate violence inmate to staff
3. Per capita completion rate of programs

NYU | LAW

July 15, 2024

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C., 20002-8002

Dear Judge Reeves,

We write in response to your request for comment regarding the work the United States Sentencing Commission plans to prioritize over the upcoming year, with the goal of "fulfill[ing] its mission to make the federal criminal legal system fairer and more just." Our recommendations are informed by our extensive experience with the criminal legal system, federal criminal practice, and federal sentencing.

We commend the Commission for all that is has done to fulfill its mission, including efforts to: make the Commission's and resources widely accessible; enable the analysis of jurisdiction and population specific sentencing data; provide an ongoing, robust account of problem solving courts, alternatives to incarceration, and reentry programs. The Commission's role in the implementation of the First Step Act of 2018, its efforts to reduce the significance of criminal history to align with research demonstrating some of its diminished predictive value, and incorporation of a departure provision informed by the legal landscape regarding simple possession of marijuana are also praiseworthy. And we applaud the Commission's unanimous vote in April 2024 to restrict the use of acquitted conduct in calculating a sentence range under the Federal Sentencing Guidelines, as well as the Commission's decision to amend the uidelines to account for research regarding an individual's youthfulness at the time of their offense or during prior offenses.

In our view, these efforts are notable because they encourage judges and practitioners to reduce reliance on incarceration, challenging a decades-old cultural addiction to prisons and a reflexive impulse to imprison people as a first response to conduct, rather than a last resort. In keeping with that perspective, we encourage the Commission to undertake the following efforts:

- **Prioritize Measures that Limit Incarceration and Encourage Decarceration**
    - Research and experience have long underscored the harmful, criminogenic effects of incarceration.[1] The severe understaffing, overcrowding, and crumbling infrastructure of the Bureau of Prisons ("BOP") has exacerbated the harms of inceracertion, enhancing the danger of imprisonment for those in BOP custody.[2] Yet the Sentencing Guidelines recommend some period of incarceration in an outsized number of cases, ensuring that a prison term is the prevailing norm rather than the narrow exception. Whether through application notes, policy statements, or guideline provisions, we encourage the Commision to ensure that the exercise of judicial discretion at sentencing is rooted in an understanding of the deleterious effects of incarceration on the individual being sentenced, their family, and community, in an effort to limit incarceration to the maximum extent possible.
    - Limit the reach and extent of probation and supervised release by encouraging shorter probation and supervised release terms, narrowing probation and supervised release conditions, developing policies to curtail and limit the use of electronic monitoring and other

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[1] *See, e.g.*, Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 49S, 53S (Supp. 2011) ("Most criminologists would predict that, on balance, offenders become more, rather than less, criminally oriented due to their prison experience. . . ."); *see also, e.g.*, as one recent study explained:

> Imprisonment can exacerbate pre-existing mental health problems or cause new ones that may increase the risk of engaging in violence or being victimized by violence. While in prison, people may develop internal dispositions (for example, attitudes and values) that are deeply cynical and distrustful of the justice system, making their relationship with the law more antagonistic and unstable, as well as aggressive strategies for coping with the constant threat of victimization (for example, being hypervigilant and reacting to minor slights with force). Imprisonment may also erode social networks that support health and well-being, and introduce obstacles (for example, legal exclusion and social stigma) to finding housing, employment and health care after release or encourage the formation of pro-criminal social networks.

David J. Harding et al., *A Natural Experiment Study of the Effects of Imprisonment on Violence in the Community*, 3 NATURE HUM. BEHAV. 671, 671 (2019) (footnotes omitted).

[2] *See* DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., EVALUATION OF ISSUES SURROUNDING INMATE DEATHS IN FEDERAL BUREAU OF PRISONS INSTITUTIONS 72 (2024) (detailing the circumstances surrounding the deaths of 344 people in BOP custody from FY2014 through FY2021, including "significant recurring issues and contributing factors, including inadequate staff response to inmate emergencies; failure to properly assess, manage, and monitor inmates at risk for suicide; and deficiencies in the BOP's ability to collect, maintain, and learn from evidence and post-incident documentation" as well as "long-standing and well-documented challenges in BOP operations"); *see also* DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., AUDIT OF THE FEDERAL BUREAU OF PRISONS' EFFORTS TO MAINTAIN AND CONSTRUCT INSTITUTIONS 26 (2023) (detailing the BOP's significant maintenance, repair, and modernization needs, "ranging from routine inspections to large-scale replacements").

forms of digital surveillance, and reducing the number and type of violations that lead to violation hearings. Such steps have the potential to decrease the number of revocations, and in turn, opportunities for re-imprisonment.

- Engage in research on probation and supervised release to examine the use of special conditions, the volume and frequency of violations, the extent to which probation and supervised release revocations result in incarceration, and the use of accommodations for people with disabilities on probation or supervised release pursuant to the Rehabilitation Act of 1973.
- As the Commission's work to account for the shifting landscape on marijuana offenses and updated research on juvenile brain development and youthful status illustrates, judgments about one's criminal conduct today may differ dramatically from judgments made about the same conduct in the past. Thus, while an individual may have been subjected to a harsh punitive sanction years ago, intervening changes in the law, policy, or societal attitudes may mean that a person engaged in the same conduct today would not be punished as severly as they were in the past. Criminal history is static, and fails to account for such shifts and changes. We ask that the Commission explore ways to inform judicial discretion that accounts for new knowledge, research, and insights that bear on one's culpability and the nature of prior offenses, in an effort to further reduce the guideline ranges faced by individuals at sentencing.

- **Undertake Efforts to Reduce and Eliminate Racial Disparities in the Criminal Legal System**
  - The sentencing ranges in the Sentencing Guidelines are anchored in one's criminal history and current offense. The rampant racial disparities that define arrests, prosecutions, and convictions in the state and federal criminal legal system,[3] are by virtue of the Guidelines' reliance on prior criminal history, baked into the recommended guideline ranges faced by those who are sentenced in federal court. This dynamic exacerbates and compounds extant racial disparities. The Commission should conduct research to

[3] *See* THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS (2021), https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/; *See generally* Hedwig Lee, *How Does Structural Racism Operate (in) the Contemporary US Criminal Justice System?*, 7 ANN. REV. OF CRIMINOLOGY 233 (2024), https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-022422-015019; *See generally* Radley Balko, *There's overwhelming evidence that the criminal justice system is racist. Here's the proof.*, THE WASHINGTON POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/.

determine if there are ways to account for and mitigate such disparities, and in turn further discount reliance on criminal history.

- **Seek Out Varied Perspectives**
    - The Commission's outreach to seek input regarding its priorities is laudable. We suggest that the Commission continue these efforts by actively encouraging input, guidance, and recommendations from state and federal defenders, who bring to bear a unique perspective about the administration of criminal law in the state and federal system. Beyond defenders, the Commission should solicit the guidance of civil rights lawyers who engage in litigation and advocacy related to jail and prison conditions, and who can share specific concerns related to their work. Finally, the Commission should seek the views of those who have themselves endured arrest, prosecution, conviction, sentencing, and imprisonment. Those with lived experiences of this sort can provide nuanced guidance about a range of concerns in the criminal system that inform the Commission's judgment. That may include insights about the availability of rehabilitative programming, medical care, reentry supports, and other services in the federal criminal system; the nature of supervised release; and the value of alternatives to imprisonment. In conjunction with input from those who have direct lived experience with the criminal system, the Commission should further request the input of their family members and loved ones. These individuals can inform the Commission about the effects of incarceration and supervision on their lives, further shaping the Commission's views and work.

We thank the Commission for seeking out input from the public regarding its work and priorities, and appreciate the opportunity to provide our views. Please feel free to reach out to by email [redacted] or phone [redacted] as needed.

Sincerely,

David Chen
Zelnick Clinical Teaching Fellow

Alexis Karteron
Professor of Clinical Law

Daniel Harawa
Professor of Clinical Law

Vincent Southerland
Associate Professor of Clinical Law

Randy Hertz
Fiorello LaGuardia
Professor of Clinical Law

Jason Williamson
Adjunct Professor of Clinical Law

UNIVERSITY OF BALTIMORE
Criminal Defense and Advocacy Clinic

PashmanStein WalderHayden
A Professional Corporation

July 12, 2024

To United States Sentencing Commission:

We urge the United States Sentencing Commission (USSC) to prioritize addressing the unique needs and characteristics of persons with mental disabilities because the current guidelines neither account for the experiences of people with mental disabilities nor the biases they face in the criminal legal system.

The United States criminal legal system is overly punitive. Though this comment focuses on how to ensure that vulnerable people, such as those with mental disabilities, are treated more equitably and have their needs considered in sentencing mitigation, this is just a starting point. The USSC should also consider decreasing the punitive nature of the federal sentencing guidelines broadly.

Katie Kronick is an Assistant Professor of Law and Director of the Criminal Defense and Advocacy Clinic at University of Baltimore School of Law. She has researched and written several law review articles on the experiences of persons with mental disabilities in the criminal legal system. She is a former public defender who has represented clients, including those with mental disabilities, in several jurisdictions.

Claude Heffron is a fellow in the Justice Gary S. Stein Public Interest Center at Pashman Stein Walder Hayden, where she works on pro bono criminal justice cases in trial and appellate courts in New Jersey. She was previously a public defender who represented clients at all stages of the criminal legal process, including individuals with disabilities. Recently, she served as co-counsel on a parole release matter for a person with severe mental disabilities, and successfully obtained his release after fifty-one years of incarceration.

Persons with Mental Disabilities Are Overrepresented in the Criminal Legal System and Experience Worse Outcomes

Likely 40% of persons facing criminal charges in the criminal legal system report having one or more mental disability as defined by the Americans with Disability Act. Sec. 12102(1)(A) (defining a mental disability as a "mental impairment that substantially limits one or more major life activities of such individual"). See Prison Policy Initiative, Disability, Prison Policy Initiative (July 2024). Mental impairments that rise to the level of a disability can include intellectual disability, severe mental illness, and other cognitive impairments, such as autism and traumatic brain injury.

The actual number of people with mental disabilities in the criminal legal system likely exceeds 40% since many people do not disclose their disability. This failure to disclose can be due to a fear of negative stigma, which is borne out by the disparate treatment people with disabilities experience, generally, as well as in the criminal legal system, specifically. For example, persons with intellectual disability are more likely to be arrested, incarcerated pretrial, receive worse plea deals and longer sentences, and spend more time

incarcerated than similarly situated individuals. See Tammy Smith, et al., Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System and Implications for Transition Planning, 43 Educ. & Training in Developmental Disabilities 421, 422 (2008); Jennifer C. Sarrett & Alexa Ucar, Beliefs About and Perspectives of the Criminal Justice System of People with Intellectual and Developmental Disabilities: A Qualitative Study, 3 Soc. Scis. & Humans. Open, Feb. 6, 2021. In a review of sixty-three federal cases in which intellectual disability was raised, in two-thirds of the cases, the sentencing court found intellectual disability either irrelevant to sentencing or aggravating. See Katie Kronick, Intellectual Disability, Mitigation and Punishment, 65 B.C. Law Rev. 1561, 1582-86 (2024).

Persons with mental illness also fare poorly in the criminal legal system. People who are mentally ill are often arrested at higher rates, charged with more serious offenses, and sentenced to longer periods of incarceration than those without mental illness. See, e.g., Erin J. McCauley, The Cumulative Probability of Arrest by Age 28 Years in the United State by Disability Status, Race/Ethnicity, and Gender, 107 Am. J. of Public Health 1977 (Nov. 8, 2017); Donna Hall et al., Major Mental Illness a Risk Factor for Incarceration, 70 Psychiatric Servs. 1079 (2019). The belief that individuals with mental illness are dangerous contributes to these adverse outcomes, despite clear evidence that people who suffer from severe mental illness are more likely to be victims than perpetrators of violence. See Human Rights Watch, Callous and Cruel: Use of Force Against Inmates with Mental Disabilities in U.S. Jails and Prisons, available at https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and; see also Noman Ghiasi et al., Psychiatric Illness and Criminality (2024). For instance, half of all people who die at the hands of police have a mental disability. National Association on Mental Illness Illinois, Half of People Killed by Police Have a Disability: Report, available at https://namiillinois.org/half-people-killed-police-disability-report/. Moreover, people who suffer from mental disabilities are two to three more times more likely to be injured and nine times more likely to be sexually assaulted while incarcerated. Ibid.

The Sentencing Guidelines Do Not Sufficiently Provide Mechanisms for Treating Mental Disabilities as Mitigating

To the extent that the guidelines provide mechanisms for treating mental disabilities as mitigating, they are vague or insufficient. The guidelines only contemplate mental disabilities as downward departures rather than having an impact on guideline calculations. We urge the commission to reconsider the current approach which fails to adequately address disability in the following ways.

Though 5H1.3 notes that "[m]ental and emotional conditions may be relevant in determining whether a departure is warranted," such conditions must be "present to an unusual degree and distinguish the case from the typical cases." As noted above, many individuals facing charges in the criminal legal system may have one or more mental disabilities, so demonstrating that the disability is "unusual" might not be possible. Similarly, 5K2.13 provides that if a person has "reduced mental capacity" the court may downward depart, but the diminished capacity must have "contributed substantially to the commission of the offense." Sometimes, demonstrating the connection between disability and crime is obvious, such as

when a person with intellectual disability is used by a large-scale drug distributor to deliver drugs. Other times, such as when a person with a disability that impairs their judgment voluntarily gets into a car with a friend for a joyride, the nexus between the disability and the offense may be less apparent. Thus, demonstrating the mere presence of a mental disability is unlikely to warrant a downward departure unless fairly high standards are met.

In contrast, several considerations embedded in the guidelines can unintentionally contribute to higher sentences for persons with mental disabilities. One example is criminal history—as stated above, persons with intellectual disability are more likely to have worse outcomes in the criminal legal system. Thus, their criminal history might appear worse than someone who had engaged in the same conduct, resulting in longer sentences. In addition, persons with mental disability might struggle to express remorse and acceptance of responsibility for a variety of reasons, such that they might not receive the benefit of that offense level decrease. Also, because many believe that people with mental illness are inherently dangerous, presenting this mitigating information about a person's offense can activate unconscious biases that result in worse outcomes.

The Sentencing Guidelines Should Encourage Treating Mental Disabilities as Mitigating

Through her research, Prof. Kronick has demonstrated that courts are often unwilling to treat mental disabilities as mitigating even when the theories of punishment support such treatment. See Katie Kronick, Intellectual Disability, Mitigation and Punishment, 65 B.C. Law Rev. 1561 (2024). In her most recent law review article, she details how the theories of punishment, which should undergird all sentencing decisions and approaches, support treating intellectual disability as mitigating. Ibid. Yet, in sentencing decision after decision, courts fail to treat intellectual disability as mitigating.

In addition, decreases in sentence should not solely be tied to the commission of the offense. Mental disabilities can impact every aspect of a person's life, often in hidden ways that may make it appear they are deserving of a harsher sentence. For example, a person with intellectual disability might struggle to maintain employment or interpersonal relationships such that their community connections might seem weak. Or a person might fail to appear for court or come late because of their severe anxiety that being in court triggers, leading the court and prosecutor to believe they are seeking to avoid taking responsibility for their actions.

Making Mental Disabilities a Priority Will Have Cascading Beneficial Effects

One of the benefits of making mental disabilities categorically mitigating is that this will incentivize actors in the criminal justice system to investigate, disclose, and act upon such information. Clients will have a counterweight to the stigma that weighs against disclosure of disability. Defense attorneys will more diligently investigate and disclose such information. As a result, all actors will be better equipped to accommodate the needs of persons with disabilities. When disabilities are known to attorneys and judges, it is easier to ensure defendants understand the legal process. When attorneys investigate client's disabilities, there are fewer ineffective assistance of counsel for failure to argue such mitigation. When prosecutors are aware of disabilities, they can better scrutinize their evidence with the understanding of a

person's vulnerability to influence, such as giving false confessions or manipulation by a co-conspirator, reducing the number of wrongful convictions and resulting in more just plea offers. When probation officers know about a person's mental disability, they are better able to accommodate that person's needs, as required by the ADA, resulting in more successful terms of supervision, which in turn can decrease incarceration and generate financial savings.

Conclusion

In sum, the high rate of people with mental disabilities in the criminal legal system makes attention to this issue a pressing concern of justice, equity, and public safety. For these reasons, an important step towards making a less punitive system is ensuring that mental disabilities are reported, treated as mitigating, and disseminated to relevant system actors so that people with disabilities can be better supported in the criminal legal system. We are eager to work with the Commission to prioritize persons with mental disabilities. Should you have any questions or need additional resources to implement such changes, please do not hesitate to contact us.

Sincerely,

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July 15, 2024

Honorable Carlton W. Reeves
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Re: Comment Recommending Revisions to Supervised Release Guidelines

Deer Judge Reeves,

We write in response to the Sentencing Commission's request for comment on possible policy priorities for the amendment cycle ending May 1, 2025. We are two law professors, an assistant federal public defender, and a research fellow with the Aoki Criminal Justice Practicum at the University of California, Davis School of Law.[1] We recommend that the Sentencing Commission make it a policy priority to revise the Sentencing Guidelines on the imposition and revocation of supervised release (U.S.S.G. § 5D and Ch. 7).[2]

The current Sentencing Guidelines on supervised release are out of date, unfair, and ineffective. In fact, the Guidelines on revocation of supervised release have not been updated in over 30 years. A coalition of probation and parole officials recently warned that "community supervision has … become overly burdensome, punitive and a driver of mass incarceration, especially for people of color."[3] The same is true of supervised release. Below, we outline our proposals to revise the Guidelines to better align supervised release with its goals of promoting public safety and rehabilitation.

I. Proposed Revisions to Guidelines on Imposing Supervised Release (§ 5D)

A. Recommend Less Supervision and Consider Obstacles to Reentry.
The "primary goal" of supervised release is to "ease the defendant's transition into the community."[4] According to the legislative history, supervised release "may not be imposed for purposes of punishment," which is "served to the extent necessary by

[1] We submit this comment in our individual capacities only, not on behalf of our institutions or the Practicum.
[2] Although the federal government uses two forms of community supervision – probation and supervised release – the vast majority of defendants under federal supervision are serving terms of supervised release. *See generally* Cecelia Klingele, *What's Missing? The Absence of Probation in Federal Sentencing Reform*, 34 FED. SENT. REP. 322 (2022). Our comment therefore focuses on supervised release, though most of our recommendations would also apply to probation.
[3] *Statement on the Future of Probation & Parole in the United States*, EXIT: EXECS. TRANSFORMING PROB. & PAROLE (Nov. 13, 2020), https://www.exitprobationparole.org/statement.
[4] S. REP. NO. 98-225, at 125 (1983).

the term of imprisonment."[5] In practice, however, supervised release has become extremely punitive, driving incarceration rather than aiding reentry.[6] As the Department of Justice observed, "overly lengthy supervision terms," and "numerous and potentially burdensome requirements" too often "lead to unnecessary violations and reincarceration."[7] The Commission should reduce the burden of supervised release by revising the Sentencing Guidelines to recommend shorter terms of supervision and that sentencing judges consider the obstacles that supervision may pose to reentry.

The current Guidelines instruct that judges "shall" impose supervised release whenever required by statute or whenever a prison sentence of one year or more is imposed, and "may" impose it in any other case.[8] They also suggest a term of two to five years of supervised release for any Class A or B felony, one to three years for any Class C or D felony, and up to one year for any Class E felony or a Class A misdemeanor.[9] Finally, they recommend 8 mandatory conditions, 13 standard conditions, and 14 "special" and "additional" conditions.[10] These recommendations have led to extremely high rates of supervision, as well as onerous conditions that expose defendants to imprisonment for non-criminal technical violations. Judges impose supervised release in approximately 90% of non-immigration cases,[11] and about one-third of defendants are ultimately sent back to prison for violating a condition, approximately two-thirds of the time for technical violations.[12] To reduce these numbers, the Commission should revise the Guidelines to recommend shorter terms of supervision and fewer conditions.

The current Guidelines also do not require judges to consider how conditions of supervision can sometimes undermine rather than assist the reentry process. Although the Guidelines instruct that conditions of supervision should "involve no greater deprivation of liberty than is reasonably necessary,"[13] they do not account

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[5] *Id. see also United States v. Johnson*, 529 U.S. 53, 59 (2000).
[6] *See, e.g.,* Eric Fish, *The Constitutional Limits of Criminal Supervision*, 108 CORNELL. L. REV. 1375, 1392-1395 (2023); Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 603-606, 623-631 (2020); Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 997-1017 (2013); Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 199-204 (2013).
[7] *Department of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release* at 1, U.S. DEPARTMENT OF JUSTICE (2023), https://www.justice.gov/d9/2023-05/Sec.%2015%28h%29%20-%20DOJ%20Report%20on%20Resources%20and%20Demographic%20Data%20for%20Individuals%20on%20Federal%20Probation.pdf.
[8] U.S.S.G. § 5D1.1(a) & (b).
[9] *Id.* § 5D1.2(a).
[10] *Id.* § 5D1.3.
[11] *2023 Annual Report* at 18, U.S. SENTENCING COMMISSION (2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023-Annual-Report.pdf.
[12] *Department of Justice Report, supra* note 7, at 15-16.
[13] U.S.S.G. § 5D1.3(b).

for the way that conditions of supervision themselves can interfere with a defendant's return to the community. For example, conditions requiring mandatory meetings with a probation officer, periodic drug tests, prohibitions on interstate travel, and occupational restrictions may make it more difficult for the defendant to attend to family or employment responsibilities. To address these concerns, the Commission should revise the Guidelines to include the specific recommendation that judges not only consider the extent of the deprivation of liberty imposed by each condition, but also the feasibility of complying with the conditions given the defendant's circumstances and capacity to return to their community.

B. Recommend No Supervision for Deportable Defendants. About one-third of all federal criminal defendants are charged with immigration crimes.[14] Because most of these defendants will be deported from the country after serving their prison sentences, it serves little purpose to sentence them to supervised release. The current Guidelines instruct that judges "ordinarily should not impose a term of supervised release in a case in which … the defendant is a deportable alien who likely will be deported after imprisonment," yet an application note adds that judges should "consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case."[15] Unfortunately, the exception appears to have swallowed the rule – judges still impose supervised release in 68% of immigration cases.[16]

What is the point of sentencing deportable defendants to supervised release? The answer the Guidelines give is that the possibility of revocation if they ever return to the United States provides "an added measure of deterrence and protection."[17] In other words, defendants who return to the United States after they are deported not only will violate the immigration law but also the condition of their supervision barring them from returning, and therefore will be subject to additional punishment.

This justification for imposing supervised release on deportable defendants, however, does not survive scrutiny. Revoking supervised release for defendants who return after deportation is unnecessary, because illegal reentry is already a federal crime that may be prosecuted under 18 U.S.C. §1326, with punishments up to 20 years imprisonment. Revoking supervision in these cases is also unfair, because the revocation proceeding will usually be held in a district different than the § 1326 prosecution, which forces the defendant to be transferred between the

[14] *See* Eric Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1053 (2022).
[15] U.S.S.G. § 5D1.1(c) & app. note 5.
[16] *2023 Annual Report*, *supra* note 11, at 18.
[17] U.S.S.G. § 5D1.1, app. note 5.

districts for duplicative cases.[18] These transfers will not only waste resources but also keep the defendant in custody for longer, based on the fiction that they violated the terms of their supervision, when in reality they may not have even met their probation officer. Finally, revocations for illegal reentry allow prosecutors to evade mechanisms meant to ensure that defendants to challenge the lawfulness of their prior deportation proceedings.[19] The Commission should revise the Guidelines to recommend that judges never impose supervised release on deportable defendants.

II. Proposed Revisions to Policy Statements on Revoking Supervised Release (Ch. 7)

A. Abandon the "Breach of Trust" Doctrine and Recommend Concurrent Revocation Sentencing for New Criminal Conduct. The Commission first promulgated a set of "policy statements" on revocation proceedings in 1990.[20] In the introduction to the statements, the Commission explained that they were intended to be "evolutionary," and promised that it would "review relevant data and materials concerning revocation determinations" and issue new "[r]evocation guidelines … after federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment on these policy statements."[21] Despite that promise, thirty-four years later, the Commission still has not promulgated any new revocation guidelines.

The lack of progress on this issue is unfortunate, because the policy statements rest on a foundational misunderstanding of supervised release that has undermined not only their sentencing recommendations, but also Supreme Court jurisprudence. In writing the policy statements, the Commission "adopted an approach that [wa]s consistent with the theory" that revocation "should sanction primarily the defendant's breach of trust … inherent in the conditions of supervision."[22] Describing a violation of supervised release as a "breach of trust," however, is fundamentally inaccurate. Violating a condition of *probation* might be considered a breach of "trust," because probation is a term of supervision imposed in lieu of imprisonment. However, violating a condition of supervised release does not breach any "trust," because supervised release is not imposed in lieu of imprisonment, but rather to follow the defendant's prison term:

> Supervised release involves no act of trust by the government. Instead, supervised release is the opposite of trust … The supervision is not "granted" as an alternative

[18] Revocation proceedings are usually held in the district where the defendant was sentenced for their original crime, which could be anywhere in the country. By contrast, illegal reentries are prosecuted in the district where the crime occurred, which is typically along the border.
[19] *See* Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, 1893 (2022).
[20] U.S.S.G. Ch. 7 (1990).
[21] *Id.* Ch. 7, Pt. A.1.
[22] *Id.* Ch. 7, Pt. A.3(b).

> to imprisonment, but rather imposed by the judge … to follow the defendant's prison sentence. Defendants make no "promise" to obey the conditions of release, and the government engages in no act of "risk" or "grace" by sentencing them to supervision. Violating a condition of supervised release might be misguided and even harmful … [but] do[es] not "breach" any "trust" [placed in the defendant].[23]

What are the negative consequences of the "breach of trust" doctrine? Twofold. First, the doctrine led the Sentencing Commission to recommend that when a defendant violates their supervised release by committing a new crime, the judge should run the sentence for their revocation *consecutively* to the sentence for their new conviction.[24] This approach to punishing "criminal violations" is different from the practice of the old Parole Commission, which instead imposed a concurrent revocation sentence in these circumstances.[25] The Sentencing Commission justified the change in policy on the ground that a consecutive revocation sentence was necessary to punish the defendant's breach of trust.[26] But because violating supervised release does not breach trust, that justification is specious. The judge who sentences the defendant for their new conviction will already consider all the relevant factors necessary to determine the appropriate punishment. Consecutive revocation sentences for criminal violations are therefore unfair and unnecessary. The Commission should amend the policy statements to recommend concurrent revocation sentencing for new criminal conduct.

Second, the "breach of trust" doctrine has contaminated the Supreme Court's constitutional jurisprudence. In *United States v. Haymond*, 588 U.S. 634 (2019), the Supreme Court held in a 4-1-4 split of opinions that 18 U.S.C. § 3583(k) violated the jury right by imposing a 5-year mandatory minimum on sex offenders who violated their supervised release by committing another sex offense. At the same time, the solo concurrence and four-vote dissent also agreed that there was no right to a jury trial in revocation proceedings as "typically understood" based on the Commission's claim that violating a condition of supervised release was a "breach of trust."[27] The Commission should stop perpetuating this misunderstanding by officially abandoning the "breach of trust" doctrine.

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[23] Jacob Schuman, *Revocation and Retribution*, 96 WASH. L. REV. 881, 907 (2021); *see also* Fiona Doherty, *"Breach of Trust" and U.S. v. Haymond*, 34 FED. SENT. REP. 274 (2022).
[24] *See* U.S.S.G. § 7B1.3(f).
[25] *See* Schuman, *supra* note 19, at 1842-43.
[26] *See* U.S.S.G. Ch. 7, Pt.A.3(b) ("as a breach of trust inherent in the conditions of supervision, the sanction for the violation of trust should be in addition, or consecutive, to any sentence imposed for the new conduct").
[27] *United States v. Haymond*, 588 U.S. 634, 658 (2019) (Breyer, J., concurring) (citing U.S.S.G. Ch. 7, Pt. A.3(b)); *id.* at 670-71 (Alito, J., dissenting) (same).

B. Recalculate Criminal History. The current policy statements on revocation proceedings recommend ranges of imprisonment for supervision violations based on the "grade" of the defendant's violation and their criminal history at the time of their original sentencing.[28] Using the defendant's original criminal history to calculate the appropriate punishment for a violation, however, makes no sense. In all other sentencing proceedings, the Guidelines require the judge to calculate the defendant's criminal history at the time of the instant offense.[29] But because the policy statements base revocation sentences on the defendant's criminal history as determined at their original sentencing, they prevent defendants from aging out of old crimes, which ordinarily would not be included in their criminal history after a sufficient period of time has passed.[30] The statements also exclude new crimes the defendant may have committed since their original sentencing. The Commission should revise the policy statements to recommend that judges recalculate the defendant's criminal history at the time of the instant violation.

C. Recommend Shorter Sentences for Drug-Related Violations. As the current policy statements acknowledge, federal law mandates revocation of supervised release for drug-related violations, including possessing drugs, refusing a drug test, or testing positive for drugs more than three times in a year.[31] However, the process of recovery from drug addiction "often includes relapses," even if the person is "amenable to treatment" and "receiving effective, evidence-based interventions."[32] Rather than reduce or deter drug use, revoking supervision "exacerbates the psychological trauma and socio-economic disadvantage that foster[s] addiction in the first place."[33] As a result, revocation can "trap some defendants, particularly substance abusers, in a cycle where they oscillate between supervised release and prison."[34] Even the DOJ has suggested that courts should "focus on reducing carceral sentences for individuals found to commit technical violations related to drug use."[35] Although the Commission does not have the power to change the governing statute, it can amend the policy statements to recommend that judges impose the shortest sentence possible (one day in prison or time served) in these cases.

Medical marijuana merits special attention. Congress has enacted appropriations riders every year since 2014 that prohibit the DOJ from using funds to prosecute state-legal medical marijuana activity.[36] President Biden has also

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[28] U.S.S.G. § 7B1.4(a)
[29] *Id.* § 4A1.2(e).
[30] *Id.*
[31] *Id.* § 7B1.4, app. notes 5 & 6; 18 U.S.C. § 3583(g).
[32] Jacob Schuman, *Drug Supervision*, 19 OHIO ST. J. CRIM. L. 431, 436-37 (2022) (citations omitted).
[33] *Id.* at 437.
[34] *United States v. Trotter*, 321 F. Supp. 3d 337, 339 (E.D.N.Y. 2018).
[35] *Department of Justice Report, supra* note 7, at 20.
[36] *See United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016).

declared that "no one should be in jail just for using or possessing marijuana."[37] Yet federal judges still routinely revoke supervised release for marijuana use, even use of medical marijuana in legal states.[38] The Commission should revise the Guidelines to recommend against initiating revocation proceedings for medical marijuana.

We thank the Commission for considering our views on this topic, and we are available to address any questions or concerns you may have.

Sincerely yours,

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[37] *Statement from President Biden on Marijuana Reform*, THE WHITE HOUSE (Oct. 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-onmarijuana-reform/.
[38] Jacob Schuman, *Prosecutors in Robes*, 77 STAN. L. REV. ____, at 37-38 (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4732874.

Suggestions Regarding USSG: Algorithmic Risk Assessment

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We recommend that the United Steps Sentencing Commission ("the Commission") consider the possibility of updating the United States Sentencing Guidelines ("USSG") to regulate the use of algorithmic risk assessment scores at sentencing. We base this recommendation on existing research on the reliability of algorithmic risk assessment, research on how human beings react to risk assessment, and our own research on judicial decision making. We believe that although algorithms hold great promise to regularize sentencing using empirical realities, the USSG already perform that function to some extent. Based on the research on human judgment, especially as it applies to judges, we believe that adding algorithmic risk assessment to the existing structure of the USSG would be misleading to judges and produce more erratic sentences.

The motivation for our recommendation arises from two basic insights into human judgment that have also been shown to influence judges: anchoring and the inability to disregard information. Anchoring refers to the tendency to rely on numeric reference points when making numeric judgments. It is a logical and sensible approach in many settings, but a wealth of evidence shows that anchors have an oversized influence on judgment. To put it briefly, numeric reference points are hard to discount properly. Second, human beings lack the ability to ignore information that is or seems relevant. The human mind is well-accustomed to incorporating novel information quickly and efficiently—so much so that this ability cannot simply be turned off. Both of these observations about human judgment have ample support from decades of research in psychology and also have been shown to influence judges.

Algorithmic risk assessment supplies judges with a number that should be viewed with some skepticism and only carefully used in conjunction with the sentencing ranges that already exist in the USSG. Anchoring, however, suggests that risk assessments will have an outsized influence on judgment, especially inasmuch as they appear to reflect well-supported empirical evidence on the likely risk a defendant presents. Properly discounting the value of these algorithms in comparison to the sentencing range provided by the USSG exceeds human cognitive capacities. In short, properly integrating existing algorithmic risk assessment into the USSG system asks judges to perform a calculation that they are ill-equipped to perform.

For now, the most sensible step would be to prohibit disclosure or use of algorithmic risk assessment at sentencing. We recognize that pretrial reports will often contain such information. Our recommendation is to limit the use of algorithmic risk assessments to that setting. Eventually, as risk assessment tools improve and their use and impact is better understood, it might be appropriate to regulate their use or integrate the information provided by risk assessment into the USSG themselves. We believe that the Commission is already contemplating—or performing—such an analysis. *See* 2023 Year-End Report on the federal Judiciary 6 (Dec. 31, 2023) ("As AI evolves, courts will need to consider its proper uses in litigation."). Nevertheless, we share these ideas because research we and others have conducted might assist the Commission in addressing these challenging issues.

Specifically, our recommendation is that a new section 5H1.XX be added to the USSG, as follows:

5H1.XX Algorithmic Risk Assessment Scores

Algorithmic risk assessment scores are not ordinarily relevant to the determination of a sentence.

Application Notes

1. Algorithmic risk assessment instruments use actuarial data to predict the defendant's future behavior by ranking the defendant relative to others who share some characteristics with defendant and whose behavior is known.
2. Algorithmic risk assessment tools designed for purposes other than sentencing—such as for determining pretrial release or detention, custody placement, or diagnosis or treatment of any physical or mental disorder—are not appropriate for use at sentencing.

3. The contents of an algorithmic risk assessment shall not be disclosed to the sentencing judge for any purpose—including a determination of its relevance or admissibility—except upon the stipulation of all parties.
4. Disclosure to or use of an algorithmic risk assessment by the Probation Office in preparing a presentence report is prohibited, as is disclosure to or use by a victim of an offense.
5. In many instances the same judge may preside over bail and sentencing and thus appropriately becomes aware of a risk assessment score in a different context. In such a case, neither the judge nor the parties should refer back to the risk assessment used at bail setting.

If the use of algorithmic risk assessment at sentencing is permitted, then at least for the present, such use should be confined to within guideline range variation rather than departures from the guideline range. That step would at least mitigate concerns about bias and the quality of algorithmic recommendations by confining its impact. This is the minimum step necessary until the quality of algorithmic risk assessment improves and the interaction between risk assessment scores and judges is better understood.

We base our recommendation on the following considerations, among others:

First, as we noted above, instructing judges not to consider or rely upon information to which they have been exposed, or directing them to utilize it for some purposes but to disregard it for other purposes, will likely be ineffective. People generally cannot perform such "mental gymnastics." Our research confirms that judges cannot do so either. *See* Andrew J. Wistrich et al, *Can Judges Disregard Inadmissible Information? The Difficulty of Deliberately Disregardi*ng, 153 U. PA. L. REV. 1251 (2005). Accordingly, attempts to limit or preclude reliance on algorithmic risk assessment post-disclosure, as some courts have done, are likely to be ineffective. *See* State v. Loomis, 881 N. W. 2d 749 (Wis. 2016), *cert. denied*, 137 U. S. 2290 (2017); Christoph Engel & Nina Grgic-Hlaca, *Machine Advice With a Warning About Machine Limitations: Experimentally Testing the Solution Mandated by the Wisconsin Supreme Court*, 13 J. LEGAL ANALYSIS 284 (2021) (finding that lay subjects largely ignored the *Loomis* warnings).

Second, the difficulty of disregarding algorithmic risk assessment is compounded by the fact that most risk assessment tools express their assessment by assigning the defendant a numerical score or percentile. Dozens of studies indicate that injecting extraneous numbers into a numerical assessment task, such selecting the appropriate sentence a defendant should serve in prison denominated in months, distorts numerical assessments in irrational and erratic ways. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011). Our own research consistently shows that these effects influence judges as well. *See* Jeffrey J. Rachlinski et al, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L. J. 695 (2015). As one example of the dangers of misleading numeric reference points, one study showed that judges are influenced by presentence reports and recommendations, even when these reports are clearly erroneous. *See* Shawn D. Bushway et al., *Sentencing Guidelines and Judicial Discretion: Quasi-Experimental Evidence from Human Calculation Errors,* 9 J. EMPIRICAL LEGAL STUD. 291 (2012).

Third, although it can have an overwhelming influence on decision makers, the quality of the evidence currently provided by algorithmic risk assessment tools is currently unimpressive and potentially incorporates improper bias. *See* Julia Augwin et al., *Machine Bias, ProPublica* (May 23, 2016); 2023 Report at 6 ("In criminal cases, the use of AI in assessing flight risk, recidivism, and other largely discretionary decision that involve predictions has generated concerns about due process, reliability, and potential bias."). Some algorithmic risk assessments might also either explicitly or indirectly base their recommendations on factors that are expressly prohibited by the USSG or that are carefully limited or minimized. As an example, age, education or vocational skills, employment history are common factors influencing risk assessment scores, but which may not be considered in sentencing. *See* 5H1.1, et seq. Such inconsistencies would have to be identified and reconciled. Relatedly, the recommendations of risk assessment tools and factors specified by the USSG likely overlap. As an example, a defendant's criminal history already plays a significant role in the determination of the sentence and likely would also play a role in any credible algorithmic risk assessment designed for use in pretrial detention or sentencing. Thus, criminal history might be double counted. Such redundancies would need to be identified and reconciled.

Fourth, we suggest caution in embracing the exciting potential for algorithmic risk assessment tools to improve the rationality and neutrality and uniformity of sentencing. One prominent study showed that algorithms can outperform judges in the context of pretrial detention, enabling, among other things, crime reductions of up to 24.7% with no increase in pretrial detention rates, or pretrial detention rates up to 41.9% lower with no increase in crime. Jon Kleinberg et al., *Human Decisions and Machine Predictions*, 133 Q. J. ECON. 237 (2018). The promising results in this study, however, arose from replacing judges with an algorithm, not keeping judges in the loop by having them consider algorithmic recommendations. Research suggests that when most people deviate from an algorithmic recommendation they perform worse than if they had simply followed the algorithm. *See* Michael Yeomans et al., *Making Sense of Recommendations*, 32 J. BEHAV. DEC. MAKING 403 (2019) (finding that a recommendation algorithm outperformed humans even at the quintessentially human task of predicting which jokes people will find funny, but that people are reluctant to follow the algorithm's recommendations). Algorithmic judges are apt to rely too much or too little on risk assessment. Research shows that in the pretrial detention context, risk assessment scores initially influence judges to some degree, but the initial effect dissipates and judges quickly return to their historical baseline. *See* Megan T. Stevenson & Jennifer L. Doleac, *The Roadblock to Reform* 3 (Am. Const. Soc. 2018) (reporting that the median Kentucky judge overruled the recommendation of risk assessment two-thirds of the time in deciding pretrial detention or release, that the median Virginia judge grants pretrial diversion to merely 40% of these recommended for diversion by the risk assessment instrument, and that in both instances the introduction of the risk assessment had little or no impact on judge's decisions). In other contexts, people sometimes default too often to the algorithmic recommendations. *See* David Lyell et al., *Automation Bias in Electronic Prescribing*, 17 BMC MED. INFORMATICS & DEC. MAKING 28 (2017).

Fifth, adding risk assessment tools to the existing sentencing system raises the possibility that judges will be overwhelmed by having to integrate too much information. People commonly experience difficulty in integrating multiple sources of information, often tending to select one and ignore others or to adopt simplifying but erroneous strategies such as averaging. *See* Maya Balakrishnan et al., *Improving Human-Algorithm Collaboration: Cause and Mitigation of Over- and Under-Adherence* (working paper Feb. 29, 2024) (finding that people are biased toward naive advice weighting in that they average their prediction and the algorithm's prediction,

thereby underweighting valuable private information when they have it). Our research indicates that judges are no better. They tend to over-emphasize individualizing information and under-emphasize base rates or aggregate population statistics. *See* Jeffrey J. Rachlinski & Andrew J. Wistrich, Judicial Neglect of Base Rates (working paper, 2024). Sentencing already requires judges to integrate a large amount of information and to consider numerous factors. *See* 18 U. S. C. Sect. 3553(a). Requiring judges to consider additional information and factors—a risk assessment score—such as might be counter-productive. *See* Barton Beebe, *An Empirical Study of Multifactor Tests for Trade-Infringement*, 94 CALIF. L REV. 1581 (2006) (finding that judges do not use all of the components of complex multifactor tests); Calvin N. Mooers, *The Next Twenty Years of information Retrieval*, 11 AM. DOCUMENTATION 229 (1960).

Sixth, judges exhibit different levels of skill in deciding whether to follow or deviate from algorithmic recommendations. *See* Marvin Neumann et al. *Predicting Decision-Makers' Algorithm Use*, COMPUTERS IN HUM. BEHAV. 145, 107759 (2023) (people vary in their willingness and ability to use algorithmic recommendations). This might exacerbate inter-judge disparity in sentencing, an undesirable effect the USSG were intended to eliminate or reduce. *See* USSG ch. 1. Whatever the shortcomings of the current sentencing process, caution about injecting new elements carrying potential unintended consequences is warranted. We have found that seemingly minor or merely cosmetic changes in wording or problem structure can shift judges' perspectives. *See* Jeffrey J. Rachlinski & Andrew J. Wistrich, *Gains, Losses, and Judging: Framing and the Judiciary*, 94 NOTRE DAME L. REV. 521 (2018); Jeffrey J. Rachlinski et al., *Altering Attention in Adjudication*, 60 UCLA L. REV. 1586 (2013).

Seventh, judges would at least need guidance and training in determining how to integrate risk assessment scores and individuating information before they could be expected to do so effectively. *See* Michelle Vaccaro & Jim Waldo, *The Effects of Mixing Machine Learning and Human Judgments: Collaboration Between Humans and Machines Does Not Necessarily Lead to Better Outcomes*, 17 QUEUE 19 (2019). Studies suggest that absent training, only a small percentage of judges consistently outperform the algorithm. *See* Victoria Angelova et al., *Algorithmic Recommendations and Human Discretion* (Nat'l Bur. Econ. Rsch., working paper, 2023) (finding that 90% of judges underperform an algorithm when making a discretionary override in pretrial detention, with nearly 70% making rulings that are no better than random, but

that 10% of judges outperform the algorithm). Without extensive training, algorithmic recommendations might influence judges in undesirable and unforeseeable ways. *See Alex Albright, The Hidden Effects of Algorithmic Recommendations* (working paper, 2024) (finding that judges deviate from lenient bail recommendations more frequently if the defendant is black rather than white).

Eighth, reliance on a risk assessment score might undermine perceived legitimacy of sentence in eyes of relevant audiences such as the defendant, prosecution, victim, public, etc. *See* 2023 Report at 6 ("At least at present, studies show a persistent public perception of a 'human-AI fairness gap,' reflecting that human adjudications for all their flaws, are fairer than whatever the machine spits out."). Among other things, defendants might react negatively to the idea that the judge was required to or chose to consult a computer program designed or endorsed by the government arrive at his or her sentence. Even if risk assessment instruments reliably achieved better than human quality in some respects, there remain concerns about involving them in sentencing. *See* 2023 Year-end Report in the Federal Judicial 6 (December 31, 2023) ("Machines cannot fully replace key actors in court. Judges, for example, measure the sincerity of a defendant's allocution at sentencing. Nuance matters: much can turn on a shaking hand, a quivering voice, a change of inflection, a bead of sweat, a moment's hesitation, a fleeting break in eye contact. And most people still trust humans more than machines to perceive and draw the right inference from these cues."). Doing so might transform sentencing in undesirable ways and would be inconsistent with the traditional role of the sentencing judge which the Supreme Court has recognized must be respected. *See* Koon v. United States, 518 U. S. 81, 113 (1996); United States v. Booker, 543 U. S. 220 (2005).

* * *

Finally, we note that one potential obstacle to forbidding all disclosure or use of algorithmic risk assessment at sentencing is USSG sect. 1B1.4, which provides:

> "In determining the sentence to impose within the guideline rage, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character, and conduct of the defendant unless otherwise prohibited by law."

Of course, the Commission could modify that provision, but not the statute it implements. See 18 U.S.C. sect. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.") *But see* Diaz v. United States, __ U.S. __ (June 20, 2024) (holding that expert testimony about what most drug mules know is not information "about whether the defendant did or did not have a mental state or condition" for Fed. R. Evid. 704(b) purposes). Under *Diaz*, a risk assessment score might not contain "information concerning the background, character, and conduct of the defendant" for section 3661 purposes.

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July 8, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
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Dear Judge Reeves:

We hope this finds you, yours, and all at the Commission well.

This submission is in response to the U.S. Sentencing Commission's Notice of Proposed Priorities ("Priorities") recently published in the *Federal Register*.[1] We are three longtime students and teachers of federal sentencing law and policy and editors of the *Federal Sentencing Reporter*. We genuinely appreciate the opportunity to share a few thoughts with you and the Commission as you develop your research and policy agenda for the current guideline amendment year.

We were gratified to read in the Priorities that in this 40th anniversary year of the Sentencing Reform Act, the Commission will reflect on its core goals, the progress made towards meeting them, and what actions might be taken, now and in the future, to further them. In this amendment year, we will also be celebrating the 20th anniversary of the Supreme Court's decision in *United States v. Booker*.[2] We believe these significant anniversaries present an ideal time not just for big and broad reflection, but also for charting a course for a new era of federal sentencing policies and practices based on the experience of the last four decades.

When and how the federal sentencing guidelines were first developed, they necessarily reflected particular views about sentencing decision-making after decades of federal sentencing that was rightly decried as "lawless."[3] Then, for nearly two decades, federal practitioners, probation officers, and judges struggled to understand and apply a flush of new and unnecessarily complex sentencing laws, guidelines, and case law that led to legally mandatory and presumptive outcomes,

[1] U.S. SENT'G COMM'N, Proposed Priorities for Amendment Cycle, 89 Fed. Reg. 48029 (June 4, 2024), https://www.federalregister.gov/documents/2024/06/04/2024-12244/proposed-priorities-for-amendment-cycle.
[2] 543 U.S. 220 (2005).
[3] MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER*, 49 (1973).

some which were disconcertingly severe. The *Booker* ruling came along and functioned to make the guideline system less binding at sentencing, but at least a third of federal criminal cases are still adjudicated in the shadow of some mandatory minimum sentencing statute.

The Commission has forcefully documented, going back three decades, the injustices, disparities, and other harms and distortions of sentencing subject to problematic mandatory minimum sentencing provisions. And Congress has partially listened to the Commission's advice. In 1995, it enacted the so-called "safety valve" exception to drug offense mandatory minimums, and in 2018, expanded its reach; in 2010, Congress eliminated a mandatory minimum for simple possession of crack cocaine and reduced the number of crack cocaine trafficking offenses subject to a mandatory minimum; in 2018, Congress reduced the severity and limited the applicability of additional mandatory minimums for certain gun and drug offenses; and Congress has not enacted any new mandatory minimum – or increased the severity of any existing mandatory minimum – in many years. And perhaps most significantly, Congress has never seriously considered making the federal sentencing guidelines fully – or even partially – presumptive again since the *Booker* ruling.

Put simply, the Commission has often advised Congress that federal judges could and should be trusted to exercise *effectively guided* sentencing discretion wisely. Congress has followed that advice, but only partially. We urge the Commission to deliver the heart of that advice once again, perhaps by producing an updated version of the mandatory minimum report issued in 1991 or perhaps by producing a series of smaller reports highlighting the problems of the most commonly applied mandatory minimums (with particular attention to their impact on people who exercise their constitutional right to trial).

We think it is critical, though, that such a report on mandatory minimum sentencing statutes be accompanied by an examination of how advisory guidelines, as applied after *Booker*, are functioning to advance or undermine the range of sentencing purposes Congress has articulated. The Commission has already issued a series of reports focused on how *Booker* has reduced sentencing consistency.[4] Although that remains a critical consideration – especially if Congress will be asked to reduce or eliminate mandatory minimums in an environment where just 42.4% of sentences are imposed within the guideline range – it is just one component of the sentencing goals Congress set forth in the Sentencing Reform Act.

Booker has had a profound impact on federal sentencing in the 20 years since it was decided. Yet, in many ways, the structure of federal sentencing today looks very much like it did before the case was handed down. As the Commission continues to examine *Booker*'s impact, we urge more specific research on how *Booker* has affected federal sentencing and whether reforms – including, but not limited to reforms to the role of departures in the Guidelines Manual – are needed to fully reflect the import of Supreme Court rulings and to better achieve the goals of the Sentencing

[4] U.S. Sent'g Comm'n, *Inter-District Differences in Federal Sentencing Practices: Sentencing Practices Across Districts from 2005-2017*, Jan. 2020; U.S. Sent'g Comm'n, *Intra-City Differences in Federal Sentencing Practices: Federal District Judges in 30 Cities, 2005-2017*, Jan. 2019.

Reform Act. As part of this examination, the Commission ought to consider the potential virtues and vices of different possible iterations of an advisory guideline system.

We believe if the Commission thinks broadly about how advisory guidelines function and seeks to *fully* reflect the *Booker* changes with an explicit intent to further the goals of the Sentencing Reform Act, it can fundamentally change federal sentencing for the better. We know that this is a tall order. It may take several years to conceptualize, draft, and execute across the entire justice system. Nevertheless, we think that doing so, in combination with an examination of mandatory minimum sentencing statutes, is worth the effort. We believe a political consensus can be developed to make systemic reforms to the Guidelines *and* to mandatory minimum sentencing statutes a reality that could lead to a more effective sentencing system. This reimagined approach could be far simpler while also effectively nudging sentencing judges towards more completely and consistently achieving the goals of the Act. In doing so, it would yield more justice.

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When *Booker* was decided, many of us thought it would be the decisive turning point towards significant changes in the structure and functioning of federal sentencing law and policy. Especially once it was clear Congress was content to allow an advisory guideline system to remain in place, we were hopeful that significant innovation, and even experimentation, could and would follow. The Court's decision made a fundamental change in federal sentencing law that we thought would prompt some systemic reexamination of – and then reform to – the existing sentencing laws and Guidelines. And we expected, and hoped, that post-*Booker* reforms would seek to fix some of the most thoughtful and oft-repeated criticisms of the federal sentencing guidelines as a system within a reasonable timeframe.

Perhaps understandably, because the severity and rigidity of the Guidelines were seen by many as a major vice, some, including Congressman Bobby Scott of Virginia, concluded that "*Booker* was the fix."[5] While Scott and others had long been among the most vocal critics of the Guidelines and strongest voices for reform, after the Court's decision, they thought the decision would, in and of itself, bring about desired changes in sentencing outcomes. Their hope was that the advisory system would enable and encourage judges to use their broadened sentencing discretion to significantly soften both the severity and rigidity of the federal sentencing system while retaining reasonable levels of uniformity. And, reflecting an era when new laws and guidelines were typically proposed seeking to make federal sentences more severe, they were also concerned that any direct reforms by Congress or the Sentencing Commission at that time would seek to reinstate presumptive guidelines or create new mandatory minimum statutes, both of which they saw as harmful for federal sentencing.[6]

In an article for an upcoming issue of the *Federal Sentencing Reporter*, Jonathan looks at how *Booker* fits into the history of federal sentencing reform and then briefly reviews whether *Booker*

[5] S*ee, e.g.*, Bobby Scott, *United States v. Booker: System Failure or System Fix?*, 160 U. PA. L. REV. ONLINE (2011).
[6] *Id.*

was indeed "the fix." The article concludes that today, the Guidelines Manual looks an awful lot like it did in January 2005, when *Booker* was decided, dictating sentencing outcomes within a narrow range based almost entirely on offense conduct and through detailed and legally complex formulas. The Manual still tells courts to consider fully most offender characteristics only in extraordinary cases, which is in tension with, if not directly contrary to, 18 U.S.C. § 3553(a)'s instructions to sentencing judges. Because the Supreme Court has directed that the Guidelines are still to serve as the starting point and initial benchmark for sentencing decision-making, the Manual forces judges to struggle through how to integrate statutory law that unambiguously mandates that offender characteristics be considered in every case with rules from the expert sentencing body urging their general disregard.[7] *Booker* gave sentencing judges the freedom to follow their own path and policy determinations on not only these offender issues, but a host of other statutory considerations that come up in nearly every case. Because the Commission has never globally amended its Guidelines to reflect its changed role and the ways in which judges must apply section 3553(a) post-*Booker*, it is understandable to see patterns of sentencing decision-making that do not reflect a clear and cogent development of a sound common law of sentencing in the federal system. And it is unsurprising to see growing disparities in sentencing outcomes among federal district courts.

Before *Booker*, federal sentencing was criticized for being overly complex, overly harsh, overly reliant on quantifiable offense factors like drug quantity and loss, and for helping to create a system of ever-growing plea bargaining and the "vanishing jury trial."[8] Twenty years after *Booker*, the system is even more complex. It is still overly reliant on quantifiable factors, even in cases where such quantification serves as a poor proxy for blameworthiness or dangerousness. There are fewer jury trials today, not more, and perhaps even less certainty about the sentencing process, even though the *Booker* decision was predicated on vindicating the Fifth Amendment's due process right and the Sixth Amendment's jury trial right.[9] The average federal sentence has increased since *Booker*.[10] And there is more unwarranted disparity in sentencing among the districts and within districts, with some courts following the Guidelines Manual regularly and others following it rarely.[11]

Was *Booker* the fix? At first blush, it doesn't appear to be so, at least with the wisdom of hindsight that follows from the last two decades of sentencing experience in federal courts. With the 20th anniversary of *Booker* and the 40th anniversary of the Act now upon us, the time is right for the Commission to think not only about the extent to which the current guidelines system is achieving the purposes of the Act, but also once again about *Booker* and the role of the Commission and the

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[7] U.S. Sent'g Comm'n, *Guidelines Manual*, Chapter 5, Nov. 1, 2023.
[8] *See, e.g.,* Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315 (2005); The National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, July 2018.
[9] U.S. Sent'g Comm'n, *2003 Sourcebook of Federal Sentencing Statistics*, 2004; U.S. Sent'g Comm'n, *2023 Sourcebook of Federal Sentencing Statistics,* 2024.
[10] *Id.*
[11] U.S. Sent'g Comm'n, *Inter-District Differences in Federal Sentencing Practices: Sentencing Practices Across Districts from 2005-2017*, p. 7, Jan. 2020; U.S. Sent'g Comm'n, *Intra-City Differences in Federal Sentencing Practices: Federal District Judges in 30 Cities, 2005-2017*, p. 7, Jan. 2019.

Guidelines post-*Booker*. We believe the Commission should do more than reconsider isolated vestiges of the pre-*Booker* regime that some find outdated, such as departures. Rather, we recommend that the Commission take a holistic look at the entire Guidelines enterprise. This will require research into the effects of *Booker* certainly, but much more too, including how behavioral economics and the best understanding of how psychology, heuristics, guideline design, and other factors involved in guided decision-making might help the Commission restructure an advisory set of guidelines to nudge judges better towards greater consistency, proportionality, and the other goals of sentencing. (The Commission here could and should also seek to draw insights from both state and international sentencing experiences; the federal system is unique in many ways, but there are important lessons to be drawn from how judges in a wide array of legal systems look to craft fair and effective sentences.)

This moment calls for reflection on the role of the Commission and that of the Guidelines. The overwhelmingly bipartisan First Step Act, followed by the bipartisan appointment of a full slate of Commissioners, signals in a powerful way that there is broad support in Congress for systemic, sizeable, and continuing sentencing reform. To advance that end effectively, this Commission may need to urge Congress to enact additional legislation to amend or even repeal various sentencing statutes. In other words, we recommend, and sincerely believe Congress would support, that the Commission engage in what the *Model Penal Code: Sentencing* refers to as an "omnibus review."[12]

Taking on this vital but daunting project is worth doing in part because we think a consensus can be developed to make genuine structural changes that will lead to greater justice. The possibility of creating a political coalition – including a unanimous Commission – for such comprehensive reform is real. It comes from the promise of less unnecessary litigation *and* more fair sentences; identifying the most violent offenders *and* greater attentiveness to Sixth Amendment principles; greater consistency in the sentencing process *and* more individualized sentencing; and overall, a more just federal sentencing system for all. We think a better, politically viable sentencing system can be crafted, and we view the Commission as a capable and essential leader in the path toward this better system.

We include a draft of Jonathan's article. And we plan to share with you all of the commentaries we gather in the upcoming *Federal Sentencing Reporter* issue.

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A quick word on artificial intelligence (AI) with a recommendation that the Commission explore how it might integrate AI tools into its work.

Since the launch of ChatGPT in 2022, there has been much hype over how AI can and will transform almost every aspect of our society. While there are reasons to be cautious about such

[12] Model Penal Code: Sentencing § 8.09 (describing "the need for global self-assessment of the sentencing system at regular intervals.").

hype, we also believe the Commission ought to explore the possible use of AI in its operations, and in particular, how AI might improve its analytics and research function.

Since its creation, the Commission has looked to the documentation of actual judicial decisions as a starting point for establishing sentencing policy and guideline formulas. The first Commission based the original Guidelines on a statistical analysis of pre-guidelines sentencing practices, as documented in court files. It analyzed data drawn from thousands of cases sentenced in 1985 and additional data from older cases. That work depended on Commission staff painstakingly reviewing individual case documents one at a time and extracting data on aggravating and mitigating factors that significantly correlated with increases or decreases in sentences. It was a heroic human effort that formed the bases for specific offense characteristics for each type of crime and other elements of the Guidelines. But at the same time, this effort left major gaps in our understanding, for example, not being able to identify patterns in the use of offender factors in sentence determinations. And AI tools now have the potential to dramatically expand and improve this Commission function.

The Commission has used optical recognition software to expand its work extracting data from its document collection. We think moving to AI tools is the natural next step in the evolution of the Commission's research work. These tools have the potential to significantly expand our understanding of criminal behavior, judicial, prosecutorial, and defense practices, and what works in corrections, too.

The Commission's document collection includes millions of indictments, plea agreements, presentence reports, and more. Together with data from outside sources related to community programming, supervision operations, recidivism, family circumstances, employment, just to name a few, the application of AI has the potential to lead to a far greater understanding of what works to promote public safety, reduce reoffending, successfully integrate those who have offended back into the community, all at far lower human and fiscal costs.

In short, we think the opportunities are vast for the Commission to improve criminal justice outcomes and increase the delivery of justice using these tools. We strongly encourage the Commission to explore, in a transparent way, how such tools could be used to improve its work.

Just last month, the Council on Criminal Justice, of which all three of us are members, convened a high-level gathering of industry and criminal justice experts, including Jonathan, to explore how AI is already being deployed in the criminal justice system and the risks and potential rewards of further use and deployment. There is growing expertise at the Council on AI in criminal justice, with a recognition of both the promise and risk associated with it. The Commission may want to reach out to the Council – as well as to technical experts and federal criminal justice stakeholders – as it considers all of this and how AI can lead to greater justice.

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We hope some of these suggestions will be helpful to you. Please let us know if there's anything else we might do to assist in your work. We are grateful for this opportunity to weigh in. And please know that we are pulling for your success.

Sincerely,

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Booker v. United States **and Its Place in the History of Federal Sentencing Law and Policy**

by Jonathan J. Wroblewski[1]

Many of us thought that when the Supreme Court issued its decision in *Booker v. United States*,[2] it would be the decisive turning point in what was then a twenty-year cold war over federal sentencing law and policy. We surmised that innovation would follow, for the decision made a fundamental change in federal sentencing law, policy, and practice that would surely require some systemic reexamination – and then reform – to the existing sentencing laws and guidelines. And we thought, and hoped, that with that reform, some of the most reasonable, thoughtful, and oft-repeated criticisms of the federal sentencing guidelines as a system would be addressed within a short time.

For others, though, "*Booker* was the fix."[3] While they had been, for some years, among the most vocal critics of the Guidelines and strongest voices for reform, now these voices believed the Court's decision would, in and of itself, bring about the desired changes in sentencing outcomes. They were as concerned, certainly, that any direct reforms by Congress or the Sentencing Commission at that time would likely only reinstate presumptive guidelines and with it, much of what they believed harmful with federal sentencing.[4]

Justice Breyer, of course, famously said in the *Booker* remedial opinion, "[o]urs, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."[5] Breyer expected a reaction from policymakers. So did many of us. But Congress never did pick up that ball and act.[6] And the Sentencing Commission never really did either, at least not to implement in the Guidelines the changes to sentencing law and policy made in *Booker.*

Perhaps Congress can be excused for its inaction. For most of the last 20 years, crime rates have been near generational lows, and crime was for years losing its salience as a political issue, beginning around the time *Booker* was decided.[7] Whatever concerns were being expressed about unwarranted disparities in sentencing were being focused on the specific rather than the systemic, most notably around the federal cocaine sentencing policy and the 100-to-1 crack/powder quantity ratio.[8]

But the Commission's inaction is a bit more puzzling. Initially, a cautious approach may have been sensible, as voices in 2005 indeed called immediately and reflexively to reinstate presumptive guidelines.[9] But over the next 20 years, neither the Commission nor Congress ever pivoted in a significant way once those voices had passed from the scene and more moderate ones replaced them. There was never a serious dialogue among the factions, and the Commission never amended the Guidelines Manual to reflect the change from a presumptive guideline system to an advisory one. And it never addressed the structural flaws with the Guidelines identified and spoken about by so many for so long.

Today, the Guidelines Manual looks an awful lot like it did in January 2005, when *Booker* was decided, dictating sentencing outcomes within a narrow range based almost entirely on

offense conduct. The Manual still tells courts to consider most offender characteristics only in extraordinary cases, when the law is unambiguously otherwise, mandating that offender characteristics be considered in every case.[10] *Booker* gave sentencing judges the freedom to follow their own path and their own policy determinations. And yet the Commission never reflected its changed role – and those of the Guidelines – in the Guidelines Manual.[11]

Before *Booker*, federal sentencing was criticized for being overly complex, overly harsh, overly reliant on quantifiable offense factors like drug quantity and loss, and for helping to create a system of ever-growing plea bargaining and the "vanishing jury trial."[12] Twenty years after *Booker*, the system is even more complex. It is still overly reliant on quantifiable factors. There are fewer jury trials today, not more, even though the *Booker* decision was expressly predicated on vindicating the Sixth Amendment jury trial right. The average federal sentence has increased since *Booker*. And there is more unwarranted disparity in sentencing among the districts and within districts, with some courts following the Guidelines Manual regularly and others following it rarely.[13]

Was *Booker* the fix? It doesn't appear to be so. With the 20th anniversary of *Booker* and the 40th anniversary of the Sentencing Reform Act both now upon us, the time is right for the Sentencing Commission to think again about *Booker* and about comprehensively addressing *Booker* in the Guidelines and with it, many of the Guidelines longstanding structural flaws.

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Back in the mid-1980s, crime rates were high and rising, leading to much public concern and with it, congressional action.[14] That action, which became known as tough-on-crime policy, among other things raised criminal penalties and limited judicial sentencing discretion, which was seen then as being exercised in a disparate way and too favorably toward the guilty. It included the enactment of the Sentencing Reform Act of 1984[15] and severe mandatory minimum sentencing statutes for certain drug trafficking, firearms, and later, child exploitation offenders.[16] The forces supporting long, determinate sentencing were firmly in control, both in Congress and in the Executive Branch. Democrats and Republicans supported most of these changes to federal sentencing policy. There was some resistance, but it wasn't really much of a fight then.

In the coming years, the Reagan, Bush (H.W.), and Clinton Administrations were all supportive of "strong" sentencing policy as a critical part of an overall federal crime control strategy. So was Congress. There were a few advocating moderation, including a newly-formed non-profit called Families Against Mandatory Minimums (later, FAMM), created in 1991 by a great leader, Julie Stewart. The U.S. Sentencing Commission, too, advocated moderation at times. The Commission, for example, issued a unanimous report in its early days condemning mandatory minimum sentencing statutes,[17] and it even modified its sentencing guideline for drug offenses in the early 90s to limit the most extraordinarily long sentences.[18]

Those glimpses of moderation also manifested themselves during the Clinton Administration in a few important provisions of the now-mostly-discredited 1994 Crime Bill. Those provisions created the so-called "safety valve" exception to the application of drug mandatory minimum sentencing statutes and replaced proposed new mandatory minimums with

directives to the Sentencing Commission.[19] There was also the Reno "Bluesheet," named after Attorney General Janet Reno, that installed a new charging policy at the Justice Department, requiring a more complete examination of a case rather than simply charging the most serious, readily proven offenses.[20]

But there was little doubt where federal sentencing policy was heading in those days and the policy perspectives that were in command. Retributive justice and a tariff-based system of sentencing guidelines – where the crime and its harms were translated by formula to presumptive sentencing ranges – were the order of the day. Offender characteristics were largely left out of federal sentencing decisions, sentences were generally severe, and the federal prison population was growing, and growing quickly. Trials were slowly decreasing in number, and the Guidelines were becoming more complex as "factor creep" played out over time.[21] When the Sentencing Commission voted in 1995 to lower penalties for crack cocaine offenses following the issuance of well-received report identifying gross, unwarranted sentencing disparities in the treatment of cocaine offenses, the new Republican congressional majority, led by the new Speaker of the House, Newt Gingrich, and the new Michigan Senator, Spencer Abraham, quickly enacted legislation to overturn the Commission's action.[22] And President Clinton signed it into law.

But despite all this, by the late-90s, the forces of change were organizing and growing. As importantly, crime rates were falling, and the political imperative to increase penalties was slowly, if not completely, fading.[23] That political imperative would reappear now and then, but only in limited pockets, for example as the Internet emerged and a new platform for distributing child sexual abuse material was created.[24] But the tide was changing. And it was helped along immensely by the Supreme Court. In *Koons v. United States,* in 1996, the Court, in an opinion by Justice Kennedy, held that while the Sentencing Reform Act intended to guide sentencing courts, the Act manifested "an intent that district courts retain much of their traditional sentencing discretion."[25]

> We agree that Congress was concerned about sentencing disparities, but we are just as convinced that Congress did not intend, by establishing limited appellate review, to vest appellate courts wide-ranging authority over district court sentencing decisions.[26]

The Supreme Court gave greater latitude to district courts to depart from the otherwise applicable sentencing guideline range. "A district court's decision to depart from the Guidelines, by contrast, will in most cases be due substantial deference, for it embodies traditional exercise of discretion by sentencing courts."[27] The Court reversed the decision of the Ninth Circuit Court of Appeals that had, along with other circuits, reviewed de novo, and quite closely, decisions by district courts to depart from the Guidelines. Justice Kennedy summed up the view of the Court this way –

> The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. . . . This, too, must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the

> punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States district judge. Discretion is reserved within the Sentencing Guidelines, and reflected by the standard of appellate review we adopt.[28]

For some, these were fighting words. They would lead directly to a measurably greater use of downward departures by district judges. And they would later lead to blowback from Congress and from the Justice Department.

In the years following the decision in *Koons*, the rate of non-substantial downward departures doubled, albeit from a small base, reflecting the greater discretion brought on by the holding.[29] For several years, the Justice Department reacted by asking the Commission to limit the grounds for departure as new ones were identified by district courts or as the use of existing ones increased.[30] It didn't stem the tide. And by the turn of the 21st century, the cold war around federal sentencing was getting warm. In 2000, in the midst of a heated presidential election campaign, the Senate Judiciary Committee held an oversight hearing of the Sentencing Commission, in large part to voice its discontent with the growing trend of non-guideline sentences.[31] Senator Strom Thurmond summed up the view of many on the Committee –

> Today, the purpose of the Guidelines is being threatened by the increasing trend of sentencing criminals below the range established in the Guidelines. . . . Although we would expect [downward departures] to be more rare as the Commission has reformed the Guidelines, just the opposite is occurring. . . . If the trend continues much longer, we will see more criminals being sentenced below the Guidelines than within them.[32]

After President Bush (W.) was elected a few months later, his Justice Department would increase the frequency and volume of its complaints about below-guideline sentences. For example, in 2002, then-U.S. Attorney James Comey of the Southern District of New York testified before the Senate Judiciary Subcommittee on Crime and Drugs that "the pattern now seems clear that federal judges are using downward departures frequently, in some cases nearly routinely, as a way of getting around the prescribed Guideline sentences."[33] Comey made clear that "[t]his Administration is very concerned about the type and increasing number of non-substantial assistance downward departures."[34]

These concerns in Congress and at the Department of Justice led directly to the enactment of the PROTECT Act of 2003 and the so-called Feeney Amendment.[35] The goal of the Feeney Amendment was as clear as the swiftness of its passage: to reduce judicial sentencing discretion and ensure guideline sentences in the vast majority of cases. The changes in law were multifaceted, but the impact was simple: making it more difficult for defendants to obtain downward departures and easier for the Justice Department to challenge downward departures on appeal.

For the Bush Administration and the voices of determinate sentencing and limited judicial discretion, this was an enormous victory, and they boasted publicly about it and of the connection between "strong" sentencing and increases in public safety being experienced around the country. For example, then-Assistant Attorney General Christopher Wray testified in

November 2004 before the Sentencing Commission that the ten-year crime decline experienced at that time was directly attributable to the 1984 sentencing reform and the "strong" sentencing policy it brought into being.[36] "Among the principal reasons that the United States is experiencing such low crime rates today are the effects of tougher determinate sentences and the elimination of parole that the 1984 federal sentencing reforms reflect and that many states have also adopted."[37]

By the time Wray testified before the Commission, though, the Supreme Court had already decided *Blakely v. Washington*, invalidating parts of the Washington State sentencing guidelines and casting doubt on the procedures used in other states and in federal sentencing.[38] And *Booker* had already been argued by then-Acting Solicitor General Paul Clement. The die certainly seemed to have been cast.

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When the *Booker* decision was handed down, the reaction of the tough-on-crime sentencing advocates was swift and robust. Congressman Tom Feeney, the author of the Feeney Amendment, said that the Court's decision was an "egregious overreach" and said that it "flies in the face of the clear will of Congress."[39] The House Judiciary Committee called a hearing almost immediately and held it less than a month after the decision was handed down. There, Daniel Collins, a former Associate Deputy Attorney General and a driving force behind the PROTECT Act, captured the view of the decision's critics well: "By declaring the U.S. sentencing guidelines to be merely advisory, the United States Supreme Court's decision in *Booker* effectively demolishes in one stroke the entire edifice of Federal sentencing reform that had been carefully built over the course of the last 20 years."[40]

"*Booker* fix" legislation was quickly drafted and circulated. Some, with rather colorful names like "topless guidelines," tried to work around the constitutional particulars of the *Booker* opinion.[41] Others were simpler and more straightforward, proposing new mandatory minimum sentencing statutes.

The forces that for years had been calling for change, moderation, and reform were now resisting change. They supported greater judicial discretion and more modest sentencing outcomes, and they took an understandably defensive stance following the Court's decision. The Judicial Conference, the defense bar, many advocacy groups, and the Sentencing Commission too all advocated a "go-slow" approach.[42] "Wait-and-see" was one of their tag lines. Congressman Bobby Scott, the then-Ranking Member on the House Judiciary Crime Subcommittee, encapsulated the views of this side of the debate with a different tag line. "*Booker* is the fix," he said.[43] And the position carried the day. No "*Booker* fix" legislation made any significant headway towards enactment, and the Commission was content to gather and report data on how *Booker* was being implemented in the courts.

In the context of this history, perhaps it is no wonder that here we are, twenty years later, with roughly the same constitutional framework the Court created in *Booker* and the same guidelines framework the Commission created in 1987. The forces of discretion and moderation never pivoted to reform, in large part out of fear that the advocates of the immediate-post-*Booker*

period and their desire for presumptive guidelines and longer sentences would ultimately prevail in the political branches. There were many new and more moderate sentencing voices on the scene, but little serious dialogue took place among the factions. When Judge William Pryor in 2016 gave a talk to the American Law Institute advocating a simpler and presumptive set of guidelines, for example – "[t]oday I want to propose a solution both to the original problems created by the mandatory guidelines and to the new problems created by *Booker*" – the same opposition to reform mobilized again.[44] Few saw Pryor as a moderate sentencing voice or his proposal as an opportunity to develop a coalition to address fundamental structural flaws of the original Guidelines by adjusting the guidelines for the post-*Booker* era.

Were they right to take that stance? Was *Booker* indeed the fix? Did *Booker* on its own, solve the problems that Congressman Scott and so many of the critics of the Guidelines voiced, including the vanishing trial, sentencing severity, complexity, over-reliance on quantifiable factors, and increased litigation? Did *Booker* lead to more moderate sentencing outcomes and a better sentencing policy, one we should be satisfied with today?

The answers to these questions will require much further study beyond what's possible here, and I hope the Commission will undertake to answer them more fully in the months ahead. This guideline amendment year encompasses the 40th anniversary of the Sentencing Reform Act and the 20th anniversary of Booker. It is certainly time for a thorough reevaluation.

For now, though, the Sentencing Commission's data and research suggest that we should not be content; that the answers to all the questions above are "no." Here are some data points to consider around these questions –

Trials: Justice Stevens made clear in his *Booker* majority opinion the principles the Court was trying to vindicate in the case.[45] "The Framers of the Constitution understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases."[46] The foundation of the decision was that juries were being wrongfully cut out of the process.

The data shows that juries are playing a lesser role now than they were pre-*Booker*. In Fiscal Year 2003, the last full fiscal year before the Supreme Court's decision in *Blakely v. Washington* and the year arguably best for comparison, 95.7% of sentenced federal defendants resolved their case through a guilty plea (there were 2,996 trials reported that year by the Commission).[47] All those who pled guilty were sentenced without the benefit of jury involvement. In 2023, 97.2% of sentenced federal defendants resolved their cases through a guilty plea; even more (there were 1,824 trials reported that year, a 39% reduction from 2003).[48] So fewer trials post-*Booker*. And it's fair to surmise that in an advisory sentencing system, the risk and incidence of "arbitrary punishments" has risen, not fallen.

Sentence length: From the earliest days of sentencing reform, criticism of federal sentencing has focused on its severity. At least one measure of severity suggests that it has increased post-*Booker*. In FY 2003, the Commission reported that the average federal sentence for all cases was 47.9 months imprisonment.[49] In FY 2023, the Commission reported that it was 52 months imprisonment.[50]

Since *Booker*, there have certainly been changes in the kinds of cases prosecuted in the federal system, changes that impact the average sentence imposed. In Fiscal Year 2003, the Commission reported that 69,680 were sentenced in federal courts for felonies and Class A misdemeanors.[51] Of those, 38.1% were sentenced for drug offenses, 21.6% for immigration offenses, and 17% for fraud and theft offenses.[52] In Fiscal Year 2023, 64,124 were sentenced in federal courts for felonies and Class A misdemeanors.[53] Of those, 29.9% were sentenced for drug offenses, 30.0% for immigration offenses, and 8.1% for fraud and theft offenses.[54] Comparing average sentences by certain crime types, in FY 2003, the average sentence for drug trafficking offenders was 76.9 months imprisonment.[55] In FY 2023, it was 82 months.[56] In FY 2003, the average sentence for fraud offenders was 14.4 months.[57] In 2023, it was 22 months.[58]

Disparity: In 2010, the Department of Justice's annual report to the Commission noted that post-*Booker*, "federal sentencing practice is fragmenting into at least two distinct and very different sentencing regimes. On the one hand, there is the federal sentencing regime that remains closely tied to the sentencing guidelines. . . . On the other hand, there is a second regime that has largely lost its moorings to the sentencing guidelines."[59] The available data suggests this is even more so today.

The Commission itself has studied inter- and intra-district sentencing disparities, and its findings are unambiguous. On inter-district disparities, the Commission said that "[v]ariations in sentencing practices across districts increased in the wake of the Supreme Court's 2005 decision in *Booker*. These inter-district sentencing differences have persisted in the 13 years after *Booker* and six years after the Commission's 2012 analysis."[60]

On intra-district disparities, the Commission said, its "current analysis measured judges' average percent differences from the guideline minimums in their cases in relation to their city's average during three periods between 2005 and 2017. It demonstrated a clear increase in the extent of differences in sentencing practices in a majority of the cities studied following the Supreme Court's 2005 decision in *Booker* and continuing after the Court's 2007 decisions in *Gall* and *Kimbrough*."[61]

A glance at the percentage of cases sentenced within the guidelines by district further shows the increased post-*Booker* disparities. For example, in FY 2023, only 42.4% of cases were sentenced within the guideline range,[62] while in FY 2003, 69.4% were sentenced within the range.[63] This is not surprising, given the post-*Booker* requirement that offender characteristics be considered in every case and the lack of guideline reform implementing it. But the change in non-guideline sentences has not been consistent across districts or across judges, and the numbers suggest growing disparities.

For example, the highest rate of within-guideline sentences in FY 2003 was in the First Circuit, where 77.3% of cases were sentenced within the range. The lowest rate that year was in the Ninth Circuit, where 59.6% of cases were sentenced within the range.[64] This resulted in a difference between the highest and the lowest rates of 17.7 percentage points. In FY 2023, by contrast, the highest rate of within-guideline sentences was in the Fifth Circuit, where 63.9% of cases were sentenced within the range, while the lowest rate that year was in the Ninth Circuit,

where 22.5% of cases were sentenced within the range.[65] This was a difference of 41.4 percentage points. Examination of other circuit and district data similarly show expanding disparities.

Complexity: The post-*Booker* federal sentencing system has grown in complexity. The pre-*Booker* guideline calculations remain part of the sentencing process and with them the pre-*Booker* complexity. But now, there is a new step added to the sentencing process, a freeform determination based on the factors listed in 18 U.S.C. § 3553(a). Appeals are now available not just for outside-the-guideline cases – as they were pre-*Booker* – but for all cases. The Guidelines Manual and its list of aggravating and mitigating factors has continued to grow – "factor creep" – including for example, a new seventh criminal history category added in 2023 (because six weren't good enough in an advisory system) with ten exclusions for the seventh category, each subject to interpretation and litigation.[66] There is the unnecessary categorical approach within the now-advisory guidelines, and an increasing number of second looks at otherwise final sentences, through compassionate release and retroactive application of guideline amendments.

Innovation: While the basic framework of federal sentencing has been unchanged since *Booker*, it is important not to overlook some significant changes and innovations that have taken place, albeit almost entirely unrelated to *Booker.* In 2007, the Commission reduced the guidelines applicable for crack offenses and later, in 2014, for all drug offenses.[67] As stated above, the average drug sentence has not gone down, though. In FY 2003, the average sentence for drug trafficking was 76.9 months imprisonment, while in FY 2023, it was 82 months.[68] Much of that increase is certainly due to the changing mix of drug cases in the federal docket, with more methamphetamine and fentanyl cases and fewer marijuana and cocaine cases now compared to 20 years ago.[69]

There was also the enactment of the Fair Sentencing Act,[70] President Obama's clemency initiative led by Acting Pardon Attorney Robert Zauzmer and Deputy Attorneys General James Cole and Sally Yates, and changes to compassionate release and the criminal history score.[71] All of these are important changes, but all are independent of *Booker* and none address the systemic changes brought on by *Booker* or the systemic issues at the heart of the now-almost-40-year critique of the federal guidelines system.

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So, is it time for guideline reform that incorporates *Booker* in the Guidelines Manual? Last year, under the heading of "simplification," the Commission seriously looked at eliminating departures from the Guidelines Manual.[72] This was considered, in part, to address the anomaly that sentencing courts are required, post-*Booker*, to consider offender factors in every sentencing, while the Guidelines Manual suggests that most offender factors should be considered only in extraordinary cases.[73]

This was an important first step in thinking about how to incorporate *Booker* into the Guidelines Manual. And the Commission should certainly consider it further. But it should, at the same time, consider all the aspects of *Booker* as it looks at reform. It is the way to politically viable systemic reform.

The Commission should fully research the issues of severity, disparity, complexity, and guilty pleas discussed above. It should consider whether there is still a need for the complex guideline formulas of the current Guidelines Manual, when, post-*Booker*, judges are required to undertake the freeform step. It should consider whether the Guidelines Manual should try to nudge judges in the way it exercises both the guidelines part of the sentencing process and the third step of sentencing – perhaps using a very different guideline framework – or whether the Commission has no role to play in the third step. It should consider alternatives structures to simultaneously reduce unwarranted disparities. And depending on its findings, the Commission should then propose a comprehensive reform – rather than a series of partial reforms over several years that will just frustrate many practitioners (including judges and probation officers) – that can guide sentencing decision over the next 20 years and beyond.

The possibility for creating a political coalition – including a unanimous Commission – for such comprehensive reform is real. It comes from the promise of less litigation *and* more modest sentences; identifying the most violent offenders *and* greater attentiveness to Sixth Amendment principles; greater consistency in the sentencing process *and* more individualized sentencing; and overall, a more just federal sentencing system for all. There are ways to craft a better guidelines system and a coalition to enact it. In this year of anniversaries, the time is right to have this on the Commission agenda.

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[2] 543 U.S. 220 (2005).
[3] *See, e.g.*, Bobby Scott, *United States v. Booker: System Failure or System Fix?*, 160 U. Pa. L. Rev. Online (2011).
[4] *Id.*
[5] *Booker*, 543 U.S. at 265.
[6] It is worth noting that Congress did reform federal corrections policy when it enacted the First Step Act of 2018 in December 2018. It was certainly a significant innovation in the federal corrections law that will significantly impact the time served in prison by many federal offenders.
[7] *See, e.g.* Brennan Center for Justice, *U.S. Crime Rates and Trends – Analysis of FBI Crime Statistics*, Oct. 16, 2023.
[8] The Sentencing Commission issued several reports on federal cocaine sentencing policy beginning with, U.S. Sent'g Comm'n, *Special Report to Congress: Cocaine and Federal Sentencing Policy*, Feb. 1995.
[9] *See, e.g.*, *Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines*, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security, Feb. 10, 2005.
[10] U.S. Sent'g Comm'n, *Guidelines Manual*, Chapter 5, Nov. 1, 2023.
[11] It should be noted that in 2010, the Commission, led by then-Chair William Session, made several small changes to departure provisions in Chapter Five of the Guidelines Manual addressing offender characteristics. Those changes, motivated in part by *Booker*, do not appear in the Commission's published statistics to have led to significant changes in practice. *Id*. at Appendix C, Amendment 739, November 1, 2010.
[12] *See, e.g.,* Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315 (2005); The National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, July 2018.
[13] *See infra* for further discussion and citations to Commission data and studies.
[14] U.S. Dep't of Justice, Nat'l Inst. of Justice, *Crime and Justice Atlas 2000*, June 2000.
[15] Pub. L. 98-473, title II, ch. II (sec. 211 *et seq*.), 98 Stat. 1987, Oct. 12, 1984.

[16] *See, e.g*., *id*. at title II, ch. X (sec. 1005).
[17] U.S. Sent'g Comm'n., *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, August 1991.
[18] U.S. Sent'g Comm'n, *Guidelines Manual*, Appendix C, Amendment 505, Nov. 1, 1994.
[19] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796, Sept. 13, 1994.
[20] *See, e.g*., Sara Sun Beale, *The New Reno Bluesheet: A Little More Candor Regarding Prosecutorial Discretion*, 6 Fed. Sent'g Rep. 310-12 (1994).
[21] R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psych. Pub. Pol'y & L. 739, 752-53 (1001).
[22] Pub. L. 104-38, 109 Stat. 334, Oct. 30, 1995.
[23] *See supra* note 7.
[24] *See, e.g.,* the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, July 27, 2006.
[25] 518 U.S. 81, 97 (1996).
[26] *Id*.
[27] *Id*. at p. 98.
[28] *Id.* at p. 113.
[29] *See*, U.S. Sent'g Comm'n, Various editions of the Sourcebook of Federal Sentencing Statistics, 1996 – 2003.
[30] *See, e.g.,* James K. Robinson and Laird C. Kirkpatrick, U.S. Dep't of Justice, *Letter to the Honorable Diana E. Murphy, Chair, U.S. Sentencing Commission,* Mar. 10, 2000.
[31] *Oversight of the United States Sentencing Commission*, Hearing before the Senate Judiciary Subcommittee on Criminal Justice Oversight, Oct. 13, 2000.
[32] *Id.*
[33] *Penalties for White Collar Offenses: Are We Really Getting Tough on Crime*, Hearing before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002.
[34] *Id.*
[35] The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 108 Stat. 1925, Apr. 30, 2003.
[36] *The Future of Federal Sentencing*, Hearing before the U.S. Sentencing Commission, Nov. 17, 2004.
[37] *Id.*
[38] 542 U.S. 296 (2004).
[39] Carl Hulse and Adam Liptak, *New Fight Over Controlling Punishments is Widely Seen*, The New York Times, Jan. 13, 2005.
[40] *Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines,* Hearing Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, February 10, 2005.
[41] *See, e.g.,* Frank O. Bowman, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing after* Booker, 2005 Univ. of Chic. Legal Forum 1, Article 5, 2005.
[42] There were several hearings before the U.S. Sentencing Commission and in Congress in the months following the decision. *See, e.g., Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines,* Hearing Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, February 10, 2005.
[43] 24 Fed. Sent'g Rep. 340 (2011-2012)
[44] Honorable William H. Pryor, Jr., *Returning to Marvin Frankel's First Principles in Federal Sentencing*, Address before the American Law Institute's Annual Meeting, May 18, 2016.
[45] 543 U.S. at p. 238-39.
[46] *Id.* citing The Federalist No. 83, p. 499 (C. Rossiter ed. 1961) (A. Hamilton).
[47] U.S. Sent'g Comm'n, *2003 Sourcebook of Federal Sentencing Statistics*, Figure C and Table 10, 2004.
[48] U.S. Sent'g Comm'n, *2023 Sourcebook of Federal Sentencing Statistics*, Table 11, 2024.
[49] U.S. Sent'g Comm'n, *2003 Sourcebook of Federal Sentencing Statistics* at Table 13.
[50] U.S. Sent'g Comm'n, *2023 Sourcebook of Federal Sentencing Statistics* at Table 15.
[51] U.S. Sent'g Comm'n, *2003 Sourcebook of Federal Sentencing Statistics* at Table 3.
[52] *Id.*
[53] U.S. Sent'g Comm'n, *2023 Sourcebook of Federal Sentencing Statistics* at Table 3.
[54] *Id.* at Figure 2.
[55] U.S. Sent'g Comm'n, *2003 Sourcebook of Federal Sentencing Statistics* at Table 13.
[56] U.S. Sent'g Comm'n, *2023 Sourcebook of Federal Sentencing Statistics* at Table 15.
[57] U.S. Sent'g Comm'n, *2003 Sourcebook of Federal Sentencing Statistics* at Table 13.

[58] U.S. Sent'g Comm'n, *2023 Sourcebook of Federal Sentencing Statistics* at Table 15.
[59] Jonathan J. Wroblewski, U.S. Dep't of Justice, *Letter to the Honorable William K. Sessions III, Chair, U.S. Sentencing Commission,* June 28, 2010.
[60] U.S. Sent'g Comm'n, *Inter-District Differences in Federal Sentencing Practices: Sentencing Practices Across Districts from 2005-2017*, p. 7, Jan. 2020.
[61] U.S. Sent'g Comm'n, *Intra-City Differences in Federal Sentencing Practices: Federal District Judges in 30 Cities, 2005-2017*, p. 7, Jan. 2019.
[62] U.S. Sent'g Comm'n, *2023 Sourcebook of Federal Sentencing Statistics* at Table 29.
[63] U.S. Sent'g Comm'n, *2003 Sourcebook of Federal Sentencing Statistics* at Table 26.
[64] *Id.*
[65] U.S. Sent'g Comm'n, *2023 Sourcebook of Federal Sentencing Statistics* at Table 30.
[66] U.S. Sent'g Comm'n, *Guidelines Manual*, Appendix C, Amendment 821, Nov. 1, 2023.
[67] U.S. Sent'g Comm'n, *Guidelines Manual*, Appendix C, Amendment 706, Nov. 1, 2007; Amendment 782, Nov. 1, 2014.
[68] *See infra* notes 55, 56.
[69] U.S. Sent'g Comm'n, 2023 *Sourcebook of Federal Sentencing Statistics* at Figure D-4.
[70] Pub. L. No. 111-220, 124 Stat. 2372, August 3, 2010.
[71] *See, e.g.,* Office of the Pardon Attorney, *Obama Administration Clemency Initiative*, available at https://www.justice.gov/archives/pardon/obama-administration-clemency-initiative.
[72] U.S. Sent'g Comm'n, *Sentencing Guidelines for United States Courts, Notice and Request for Public Comment and Hearing*, 88 Fed. Reg. 89142 *et seq*., Dec. 26, 2023.
[73] *Id.*

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Abiodun Adeneye, Washington staff

Topics:

Policymaking Recommendations

Legislation

Comments:

I believe the commission can look into the rate of racism , It can be eradicated because the Americans are all one nobody is to force to commit crimes due to racism the government can advice the citizen how to live a love friendship life
Most people are in prison just because they lack proper advice I think they should be given chance to speak up their ideal and advices.

Submitted on: June 26, 2024

Dear Judge Reeves:

Over fifty years ago, the United States embarked on the path to mass incarceration. To ensure that our country does not experience another fifty years of mass incarceration's harms, I urge you to take bold steps to decrease incarceration.

Lower Federal Sentences

In 1980, federal prisons held 25,000 people; now, over 158,000 people are incarcerated for federal crimes. Longer sentences have been a major driver of this growth. But longer sentences do not prevent crime – instead, they fracture families and impoverish communities. I urge the Commission to lower recommended sentence ranges to downsize the federal prison population.

Decrease Racial Disparities

Racial disparities are pervasive within the federal criminal legal system. Black men are dramatically overrepresented within federal prisons and receive sentences that are 13% longer than white men. Hispanic men receive sentences 11% longer than white men. The Commission should continue to study and work to reduce racial disparities in federal sentencing.

Reduce Life Without Parole Sentences

Life without parole sentences are inhumane and unnecessary to protect public safety. Currently the Guidelines recommend that all level 43 base offenses receive a sentence of life without parole, regardless of whether the individual has any prior criminal history. The Commission should amend the Guidelines to give judges more discretion, especially for those with no or little criminal history.

Reform Drug Sentences

Federal drug sentences have significantly contributed to mass incarceration. The Sentencing Guideline's current focus on the quantity and purity of drugs involved in an offense – rather than an individual's actual responsibility, history, and capacity for rehabilitation – results in inappropriate sentences. I urge the Commission to work towards ending the War on Drugs by adopting more rational drug sentencing policies.

Thank you for this opportunity to suggest priorities for the Commission.

Sincerely,
Bekky Baker, MSW
Program Director, Ignite Peace

Comment to the United States Sentencing Commission

Priorities for Upcoming Amendment Cycle and Beyond

Submitted by Jeffrey Bellin, Professor at William & Mary Law School

July 2024

I am a former prosecutor and the author of *Mass Incarceration Nation: How the United States Became Addicted to Prisons and Jails and How It Can Recover* (Cambridge Univ. Press 2023). I write to offer four insights gleaned from the research for my book. I hope that these insights are useful to the Commission as it considers its upcoming priorities.

The **first** insight is that sentences in this country are, as a general matter, too long. This is apparent by reference to historical sentence lengths, sentences in other countries, and the overall prison population. Yet many insiders do not perceive this problem. The paradox is explained by the fact that, in any individual scenario, a long sentence can be justified through familiar rhetoric and speculative assumptions about recidivism and deterrence. That allows legislators, police officers, prosecutors, judges, parole officers, etc., to view the cases they are involved with as involving moderate, reasonable, and even lenient outcomes. Yet the product of all these moderate/reasonable/lenient actions is perhaps the most punitive criminal law enforcement apparatus in history.

The **second** insight is how large a contributor the federal system is to the United States' overall prison population. As the table below (from the book) shows, every American jurisdiction's prison population ballooned starting in the 1970s. As a result, while the country's overall population increased by about 55%, its incarcerated population increased more than ten times that. While the federal system contributes only a fraction of the overall prisoner total, the federal system is the single largest contributor to America's prison population.

Table 3.1 *Incarceration by jurisdiction*

	2019	1972	% change
Federal	175,116	21,713	+707
Texas	158,429	15,709	+909
California	122,687	16,970	+623
Florida	96,009	10,382	+825
Georgia	54,816	8,225	+566
Ohio	50,338	8,276	+508
New York	43,500	11,693	+272
All Others	729,910	103,124	+608

The **third** insight is the specialization of federal criminal prosecutions. Most federal prosecutions are for drug, weapons possession, immigration, and "public order" offenses. While there are, of course, exceptions, most of these cases are relatively mundane. Consistent with human nature, law enforcement agents and prosecutors gravitate to the routine processing of offenses that are most easily detected and offenders who are most easily prosecuted.

The **fourth** insight is broad changes over time in the availability of lenience. For long periods of American history, the sentence imposed by a judge was only part of the equation. Parole boards released prisoners early after evaluating their individual circumstances. Broad grants of executive clemency were routine. The abolition of federal parole and the steady erosion of executive clemency changed the system dramatically. Today if lenience is not incorporated into the judge's initial sentence, it will likely never come.

These four insights suggest that the path forward requires actors across the system to address every individual decision with an eye on a big picture of crowded prisons filled with aging prisoners, and a system bogged down with too many arrests, prosecutions, convictions, and too much (post-conviction) supervision. While the Sentencing Commission cannot control the discretionary decisions of federal agents and prosecutors and judges, it can employ research and directives to help these actors see the big picture. And it can push toward reducing overall incarceration by building more leniency into the sentencing guidelines.

Disability in sentencing

Liat Ben-Moshe, PhD, Criminology, Law and Justice, UIC [redacted]

Disability (physical, psychological, sensory, cognitive, learning) plays a major role in criminal justice, from victimization, arrest, being convicted, sentencing and serving long sentences because of lack of access to appropriate or accessible diversion or re-entry programs. At every stage, people with disabilities fare worse than their non disabled peers.

As an expert on the topic of disability and incarceration/decarceration[i]*, my recommendation is to take this under account in sentencing policies. Even if a disabled person is sentenced for a relatively short time, I hope that judges can contemplate the following*:

Is there an alternative to incarceration? How can the alternative (program, support staff) be made accessible (interpreters for Deaf people for example) or disability appropriate (affirming disability as identity, not only a deficit) by the court?

Is the offense so severe that it calls for harming the defendant/offender, via compounding trauma (as I discuss below) or further mental or physical deterioration? If we know that disabled and mentally ill people fare especially worse when incarcerated, does the original offense justify this, knowing that their incarceration becomes additional (often unintended) punishment?

What mitigating factors might exist that can aid in reducing the sentences of disabled defendants, since they tend to serve longer sentences, compounded with their disability (lack of access to rehab program, appropriate vocational programs, re entry etc.)? Or recommending community and supportive alternatives (that are disability competent, like peer support, counseling, rehabilitation)?

What disability competency components exist in each case? Is the lawyer competent? Is the trial accessible, so as to make it a fair trial? (same with a plea bargain)

Are there aspects of the case or the way it was handled that exhibited not only lack of access but ableism? Ableism is the oppression and discrimination that is faced due to (perceived or actual) disability (similar to and often compounded with racism, sexism etc.). It can also manifest as a demand to perform tasks solely by nondisabled standards (without accommodations), pre trial, during trial/plea, and during incarceration.

Which disability rights and advocacy services be contacted to ensure the rights of disabled defendants are being protected (including access to a just trial and reduced sentence or access to program that reduce sentences)? (e.g. the relevant state's Protection and

Advocacy office, which is the state's legal protector of the civil and human rights of people with disabilities)

A second set of considerations that arise are for all defendants, especially those who are older or sentenced to prolonged prison sentence- does the original offense justify the disablement of the person? Knowing that the one is sentenced not only for incarceration but for mental/physical deterioration?

If the goal is rehabilitation, what other options might be available? (bail, early parole, compassionate release, alternatives to incarceration, diversionary programs)?

Research context for the above policy considerations:

The majority of prisoners are poor and are people of color. Poverty is a strong conduit to disablement. In addition, the prison environment itself is disabling so that even if one entered prison without a disability or mental health diagnosis, they likely to get one - from the trauma of incarceration to closed tight spaces with poor air quality and circulation (as we saw during COVID lockdown); from doing labor in toxic conditions and materials; to circulation of drugs and unsanitary needles as well as spread of infectious diseases (like HIV and Hepatitis), some of which come from environmental toxins related to the sites prisons are built on[ii]. Add to that the lack of medical equipment and medication or at times overmedication[iii] and the various impairments that come with aging in prison as a result of prolonged sentencing policies, and the debilitating nature of imprisonment cannot be denied.

In addition, those incarcerated who are identified as mentally ill, queer, gay, gender non-conforming or exhibit "disruptive behaviors" are often sanctioned to "administrative segregation" in separate units (often referred to as the SHU, security housing units)[iv]. These are isolation units resembling a closet, in which one stays for 23 hours a day[v]. These segregated forms of incarceration are likely to cause or exacerbate mental and physical ill-health of those incarcerated, regardless of their mental state prior to incarceration[vi]. Legal scholar DeMarco argues that since confinement in supermax facilities almost guarantees the creation of a mental disability, such confinement violates the Convention on the Rights of People with Disabilities (which was approved by the UN in 2006)[vii].

Even if one is already disabled, conditions of confinement may cause further mental breakdown for those entering the system with diagnoses of mental, psychiatric or intellectual disabilities. The American Psychiatric Association reports in 2000 that up to 5 percent of prisoners are actively psychotic and that as many as one in five prisoners were "seriously mentally ill". Bureau of Justice Statistics reports that in 2005 more than half of all

prison and jail inmates were reported as having a mental health problem. The reported prevalence of "mental health problems" of those imprisoned seems to vary by race and gender. White inmates appear to have higher rates of reported "mental health problems" than African-Americans or Hispanics[viii]. However, African-Americans, especially men, seem to be labeled "seriously mentally ill" more often than their white counterparts. It is also reported that, in general, women inmates had higher rates of "mental health problems" than men[ix]. Gender expression that does not match people's genitals (as this is the main criteria of sex based separation that is the prison system) compounds these factors and leads to a psychiatric diagnosis and/or placement in solitary confinement in the name of protection.

There is also a racial and gender bias in the *interpretation* and diagnosis of mental health differences in prisons. Prisoners of color who experience emotional breakdown are more likely than their White counterparts to be sent to segregation, to be thought of as malingering/stubborn/violent and to be denied treatment.

In relation to Deaf people who are incarcerated, there is vast lack of access to interpreters during arrest, trial and imprisonment, which may lead to unwarranted incarceration due to lack of basic communication. While incarcerated, Deaf (those who are culturally Deaf and use sign language as their main mode of communication), hard of hearing and deaf inmates are at an extreme disadvantage. First, for not being able to respond to commends because of lack of access to interpreters or communications aids and devices, which might result in direct violence, especially from guards who might think they are disobeying. Secondly, because prisons are reluctant or unable to provide communication devices or aids, those incarcerated who are Deaf/deaf or hard of hearing cannot access various programming, including programs that can lead to parole[x].

Women, trans and gender variant folks who are incarcerated report high levels of trauma, both before and during their incarceration. This previous experience with trauma is hardly taken into account both in sentencing and during their incarceration. Terry Kupers, a prominent psychiatrist and advocate for racial justice and prison reform estimated that about 80% of women behind bars had experienced domestic violence, or physical or sexual abuse before incarceration[xi]. This trauma is then triggered and re-triggered by the further violence within prison, such as the common practice of bodily cavity search. Even if one believes that people who are incarcerated 'deserve' their sentence (including women and trans people), they were not sentenced to daily sexual assault in the form of strip search and cavity search, especially if they have been previously assaulted, this has a cumulative effect. This led feminist abolitionists to refer to incarceration as State sponsored violence against women (and trans and gender non conforming people)[xii].

When someone who is imprisoned is in crisis or is acting out, the response comes from security guards and not mental health professionals. If someone seeks mental health aid, correctional staff are often reluctant (because they think the person is faking it or is manipulative), unwilling (because of what they deem as security risks), unable (because even if they see those imprisoned as human beings, they, like the rest of us, have been de-skilled in dealing with human variation and put it on so called experts, which are only available for a few hours a month in any given prison) or tentative (refuse to let a prisoner see a professional until they disclose some information, such as who started a fight) in their decision to 'allow' an inmate to be given access to even request treatment.

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[i] Ben-Moshe, Liat. *Decarcerating disability: Deinstitutionalization and prison abolition*. U of Minnesota Press, 2020.

[ii] Liat Ben-Moshe and Jean Stewart, "Disablement, Prison and Historical Segregation: 15 Years Later," in Ravi Malhotra and Marta Russell, eds., *Disability Politics in a Global Economy: Essays in Honor of Marta Russell* (London ; New York: Routledge, Taylor & Francis Group, 2017).; Rose Braz and Craig Gilmore, "Joining Forces: Prisons and Environmental Justice in Recent California Organizing," *Radical History Review* 2006 (October 1, 2006): 95–111, https://doi.org/10.1215/01636545-2006-006.

[iii] Stewart and Russell, "Disablement."

[iv] For a history of this practice: Lisa Guenther, *Solitary Confinement: Social Death and Its Afterlives*, 1 edition (Minneapolis: Univ Of Minnesota Press, 2013).

[v] On segregation of gay, trans or gender non conforming prisoners: Elias Walker Vitulli, "Dangerous Embodiments: Segregating Sexual Perversion as Contagion in US Penal Institutions," *Feminist Formations* 30, no. 1 (May 1, 2018): 21–45, https://doi.org/10.1353/ff.2018.0002.

[vi] Haney lists rage, loss of control, hallucinations, and self-mutilations as some of the adverse effects prisoners secluded in supermax and solitary confinement have experienced. Haney, Craig. "Mental Health Issues in Long-Term Solitary and "Supermax" Confinement." *Crime & Delinquency* 49, no. 1 (2003): 124-56.

[vii] Kathryn D DeMarco. Disabled by solitude: The convention on the rights of persons with disabilities and its impact on the use of supermax solitary confinement. *University of Miami Law Review*, 2011 *66*(2).

[viii] Patricia Erickson and Steven Erickson, *Crime, Punishment, and Mental Illness: Law and the Behavioral Sciences in Conflict* (Chicago: Rutgers University Press, 2008).

[ix] Human Rights Watch, "U.S.: Number of Mentally Ill in Prisons Quadrupled," *Human Rights Watch*, September 5, 2006, https://www.hrw.org/news/2006/09/05/us-number-mentally-ill-prisons-quadrupled.

[x] For more information of the plight of Deaf prisoners: http://www.behearddc.org/advocacy/prison-advocacy.html

[xi] Kupers, Terry Allen. *Prison Madness : The Mental Health Crisis Behind Bars and What We Must Do About It*. 1st ed. San Francisco: Jossey-Bass, 1999.

[xii] See Davis, Angela Y. *Are Prisons Obsolete?* Open Media Book. New York: Seven Stories Press, 2003. As well as the organizations Justice Now, based on Oakland California and Sisters Inside, based in Brisbane Australia.

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July 15, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment

RE: Public Comments on Proposed 2024-25 Priorities of the U.S. Sentencing Commission

Dear Chairman Reeves and Members of the Commission:

I am grateful for the opportunity to provide comments on the proposed priorities for the 2024-2025 amendment cycle. The thoughts I share with you in this letter derive from my recent research on disparities in plea bargaining and relate to the interaction of priorities 2, 3 and 6.

Most of the literature exploring racial and gender disparities in the criminal justice system has focused on sentencing, including in federal courts. These studies have identified substantial disparities: black defendants are incarcerated more frequently and receive on average longer sentences than white defendants and female defendants are less likely than male defendants to be incarcerated and receive on average shorter sentences.

These results tell just part of the story. Other actors in the criminal justice system make decisions that impact the case that a judge reviews, conditioning the exercise of judicial discretion in determining a sentence. Sentencing guidelines provide a set of recommended sentencing ranges determined by the crime a defendant was convicted of and a defendants' criminal history. Generally, a judge has no direct control over the ultimate crime of conviction, which itself is, in the vast majority of cases, the product of a plea bargain between the defendant's counsel and the prosecuting attorney.

Being aware of what happens during the plea-bargaining process is thus essential to understand the nature of disparities in the criminal justice system. Unfortunately, empirical work analyzing disparities in plea bargaining has been limited, at least compared to work analyzing sentencing disparities. Though results have sometimes been mixed, existing studies have also documented racial and gender disparities in plea bargaining.

In recent work, I employed data from a state that maintains very detailed records of cases from initial filing to sentencing to document racial and gender disparites in charge reduction rates. The analysis revealed significant disparities: white defendants are 26% more likely than black defendants to receive a charge reduction and female defendants are 18% more likely than male defendants to see their most serious charge reduced. These disparities are statistically significant and persist even after controlling for various defendant and crime characteristics.

To address these disparities, we must first understand what drives them. My work explored the role played by uncertainty and incomplete information. Court actors must often make decisions without full knowledge of a defendant's likelihood of recidivating or the danger that the defendant poses to the community, factors that help determine the optimal outcome in a criminal case. In a setting characterized by time and information constraints, salient and observable defendant characteristics, such as race or gender, can become heuristics or proxies for unobservable attributes relating to the risk posed by a defendant.

Implicit biases can thus lead court actors to make decisions that systematically discriminate against defendants of a given race or gender if they ascribe certain unobservable characteristics to members of that demographic group. For example, if prosecutors perceive black defendants as being more dangerous or more likely to recidivate than white defendants, we may expect prosecutors to be on average more lenient on white defendants. However, if prosecutors have other salient and easily accessible information about a particular defendant's dangerousness, race should play a smaller role in their decision-making. That, in cases where easily available proxies for the defendant's inherent dangerousness exist racial disparities should be lower, while in low information cases disparities should be greater.

Racial disparities should then be smaller when defendants share a characteristic that is associated with recidivism, such as a prior criminal record. The data supports this. In the subset of cases of defendants with no prior convictions, white defendants are 26% more likely than black defendants to obtain a charge reduction; however, in cases where defendants have a prior criminal history, black and white defendants receive similar treatment. Similarly, race should be less valuable as a proxy in cases where the crime a defendant has been accused of committing carries information about the inherent dangerousness of the individual. The data supports this as well: while in misdemeanor cases white defendants are 45% more likely to receive a charge reduction than black defendants, racial disparities disappear in cases involving high-level felonies.

Based on these facts, we could think of various strategies to address racial disparities in the criminal justice system. We can provide training to court actors to make them aware of the existence of such biases and their potential effects, particularly in cases involving low-level crimes or defendants with no prior criminal history. We can increase judges' sentencing discretion to alleviate disparities generated in earlier stages. We can examine whether the bail system is placing any specific group systematically in a disadvantageous bargaining position.

Since my work has not examined the federal criminal justice system, I am not in position to make this type of concrete recommendations to the Commission. My thoughts are intended to

highlight how as the Commission seeks to establish policies and practices that avoid unwarranted sentencing disparities (priority 2) it must be mindful of how human cognitive limitations and biases (priority 3) can generate disparities during the various stages of the criminal justice system, particularly prior to the sentencing stage. Understanding the true magnitude and nature of these disparities will require information from the different agencies involved in the various stages of the federal criminal justice system (priority 6). The Commission is well-positioned to take a leadership role in this process by organizing and coordinating these efforts.

I appreciate the opportunity to provide the Commission with my views and suggestions and I am always available to provide any help or support I can to further its mission.

Respectfully yours,

Carlos Berdejó

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Edward Bernstein, Boston University School of Medicine

Topics:

Policymaking Recommendations

Comments:

Consider policies to end federal over-incarceration, privatization, reduce life imprisonment and end racial and ethnic inequities

Submitted on: June 26, 2024

My name is Dr. Colleen Berryessa, and I am an Associate Professor at the Rutgers School of Criminal Justice. Broadly, my research agenda within criminal justice examines how psychological and social processes shape attitudes toward sentencing in criminal contexts. I have recommendations for the committee on augmenting research and funding on sentencing contexts in two main areas, both of which will help to better understand the effectiveness of sentencing, penal, and correctional practices and make the agency's work more responsive, democratic, and reflective of the diverse values and perspectives of all people.

First, research and funding should prioritize experimental survey methods to examine how psychological and social contexts influence public perceptions, support, and subsequent consideration of practices, policies, and the philosophical foundations surrounding criminal sentencing. In recent years, there has been great interest across various policy spheres and academic fields, including criminology and psychology, in identifying how and why laypeople prioritize their values when considering punitive choices. Recognizing these values, and how they arise, has been considered especially important for sustaining the legitimacy and moral authority of our sentencing systems, as sentencing represents a collective social exercise that expresses disapprobation on behalf of society as a whole. As such, the U.S. Sentencing Commission has acknowledged and should continue to prioritize that public opinion should be considered when developing, reviewing, or reforming guidelines, systems, and practices–with their particular interest in defining and understanding circumstances in which members of the public believe that certain sentencing practices or goals are just, warranted, or inappropriate. More important data are needed for academic and policy audiences on the public's support for and values within critical sentencing contexts, with a specific priority on studying the motivating, and previously undetermined, reasons for their interest in and prioritization of these values for sentencing.

Second, research and funding should prioritize interview methods to examine how psychological and social factors influence the discretion and decisions of "sentencing players" during the criminal sentencing process. As inequities in sentencing outcomes remain even under sentencing guidelines, Judge Nancy Gertner has argued that multiple discretion points can meaningfully affect final outcomes at sentencing. While the trial judge is the most recognized "sentencing player," probation officers, attorneys, and other court actors also influence the sentencing process and its outcomes within their respective roles. To date, quantitative research designs have been predominantly used to study dispositional sentencing outcomes in criminology and other disciplines. However, there has been minimal qualitative work to explore the actual sentencing process and even less that has used theoretical lenses drawn from psychology and areas of socio-legal research to examine the implicit processes that can shape the perceptions and discretionary power of sentencing players at different points during sentencing. This area research is integral to better understanding the actual process of sentencing, rather than final outcomes which has been the priority of both sentencing research and funding to date.

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Simone Bertoli, University Professor

Topics:

Research Recommendations

Policymaking Recommendations

Comments:

The PSR includes information about national origin (and, notably, Hispanic identity). The USSC Guidelines Manual include the following policy statement:

§5H1.10. Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status. These factors are not relevant in the determination of a sentence.

Our analysis of the sentence-level data from the USSC, on a large set of defendants that are only citizens of the United States, reveals that Hispanic defendants receive longer sentences compared to non-Hispanic defendants if they are sentenced at a time of a peak in border apprehensions of illegal (mostly Hispanic) aliens along the southern border (see https://docs.iza.org/dp15866.pdf). We thus wonder whether this information, which is legally irrelevant in the vast majority of cases, could be erased from the PSR, or (at least) made less visible (as it might be legally relevant in some specific circumstances, such as hate crimes). This, according to our work, should reduce the disparities in sentencing for otherwise identical cases.

We are aware that a judge would still have the opportunity to know the national origin of the defendant, but this would become less salient if its prominence in the PSR was reduced.

A randomized controlled trial, where the visibility of this information about the defendant is varied randomly in different PSR would offer an opportunity to verify the extent to which our proposal would be effective in reducing noise in sentencing. In case the USSC is willing to consider this option (which could be introduced for a limited period of time), we stand ready to contribute to the evaluation of the effectiveness of our proposal.

Submitted on: July 10, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Kent Borges, Mr. Jun. 26, 2024

Topics:

Policymaking Recommendations

Comments:

As a retired attorney from Colorado Springs, CO, I am deeply concerned by the phenomenal amount of damage we inflicted on our society, our nation, and millions of our fellow Americans and their family through mass incarceration over the last fifty years. It is absolutely essential that we not continue to repeat this failed policy by taking bold steps now to decrease incarceration.

We need lower federal sentences. In 1980 shortly after I graduated from law school, federal prisons held 25,000 people; now, over 158,000 people are incarcerated for federal crimes. Longer sentences have been a major driver of this growth, however, longer sentences do not prevent crime but rather fracture families and impoverish communities. I strongly urge the Commission to lower recommended sentence ranges to downsize the federal prison population.

We also need to decrease the glaring racial disparities in the federal criminal legal system. Black men are dramatically overrepresented within federal prisons and receive sentences that are 13% longer than white men. Hispanic men receive sentences 11% longer than white men. It is critical that the Commission continue to study and work to reduce the pervasive racial disparities in federal sentencing.

In addition, life without parole sentences need to be reduced. These sentences are not only cruel and inhumane, they are not necessary to protect public safety. Currently the Guidelines recommend that all level 43 base offenses receive a sentence of life without parole, regardless of whether the individual has any prior criminal history. The Commission should amend the Guidelines to give judges more discretion, especially for those with no or little criminal history.

Federal drug sentences have significantly contributed to mass incarceration. The Sentencing Guideline's current focus on the quantity and purity of drugs involved in an offense, rather than

an individual's actual responsibility, history, and capacity for rehabilitation, has resulted in millions of inappropriate sentences. It is high time that we end our failed War on Drugs that has had disastrous consequences for our and many other nations since the 1970's. As a start, I ask that the Commission to adopt more rational drug sentencing policies.

Thank you for your consideration of these matters of the utmost importance and urgency.

Sincerely,

Submitted on: June 26, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

James Brennan, Law

Topics:

Research Recommendations

Policymaking Recommendations

Career Offender

Legislation

Comments:

Mass incarceration has failed as a policy. We are not safer. Offenders are integrated back into the community with little support and prospects. At the same time, a growing disparity of the rich and powerful viz. lower class and minorities in the criminal justice and corrections system is stunning. Carreer offender status should also apply with equal vigor to white collar offenders. There is a stench of Jim Crow that needs to be addressed in the system. Sentencing guidelines do not mask the stench.

Submitted on: June 26, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Kyle Brett, North Carolina, Eastern

Topics:

Simplification

Comments:

Thank you for all that you do. I have a small recommendation that has probably been mentioned before. That recommendation is removing the separate converted drug weights between methamphetamine, "Ice," and actual methamphetamine. I do not have an opinion on what the converted drug weight amount should be but I believe we should be treating it all equally. It is all the same substance.

Submitted on: June 5, 2024

UNIVERSITY OF TORONTO
FACULTY OF LAW

78 Queen's Park
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[redacted]

ASSOCIATE PROFESSOR VINCENT CHIAO

July 3, 2024

The Honorable Carlton W Reeves
Chair, United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington DC, 20002-8002
Attention: Public Affairs – Priorities Comment

To the Honorable Carlton W Reeves,

I have been asked to provide a comment regarding the work the United States Sentencing Commission for the upcoming year. By way of background, I am an associate professor at the University of Toronto Faculty of Law, specializing in the philosophy of criminal law and punishment. I am the author of *Criminal Law in the Age of the Administrative State* (OUP 2018. While I reside and teach in Canada, I received my legal training in the United States, and the focus of my research has been on criminal justice in the United States.

First, I commend the Sentencing Commission for its continued progress in reducing the number of people in federal confinement or under federal supervision in the community. As is well appreciated, even after a decade of reductions, American jails and prisons continue to house a disproportionate number of the world's prisoners, with nearly 1.25 million imprisoned persons.[1] While the federal system is a relatively small part of this total, it is nonetheless heartening to see continued progress toward a more balanced penal system. I would first and foremost urge the Sentencing Commission to continue seeking ways to shrink the number of people confined in federal institutions or under federal supervision.

Scaling back the penal footprint of federal criminal law should continue until the costs of continued reduction unambiguously outweigh the benefits.[2] I especially stress that the benefits of reducing incarceration include minimizing the direct impact on incarcerated persons, their families, and communities, as well as the indirect and long-term opportunity costs of incarceration on future employment and household formation.

I believe that an asymmetrical, and high, burden of proof is appropriate in this context. Just as we demand that the prosecution affirmatively prove its case beyond a reasonable doubt before someone may be convicted and sentenced, we should similarly demand an affirmative, and rigorous, proof that our penal policies do more good than harm. This

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[1] Carson and Kluckow, *Prisoners in 2022 – Statistical Tables*, available at: https://bjs.ojp.gov/document/p22st.pdf.

[2] See e.g., Donohue III, J. (2009) *Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin*, in Raphael, S. & Stoll, M.A., eds., *Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom*: 269-341.

applies at both the extensive and intensive margins—that is, to the number of incarcerated people, and the length of time they serve.

Toward this end, it is worth considering whether the sentencing grid can, in whole or in part, be adjusted incrementally downwards without causing an unacceptable increase in crime. I note that in 2022, the median prison sentence for a felony increased by approximately 10% compared to 2021.[3] Year-to-year fluctuations are only to be expected. However, given the widely shared belief among criminologists and social scientists that longer sentences have minimal effect on crime, when it comes to time served, the secular trend should be toward less rather than more.[4]

At the top end, a consistent criminological finding is that most people "age out" of crime during the life course.[5] While there are clearly exceptions at the individual level, and perhaps also for some types of offense, in general the age-crime curve raises questions about the overall utility of long periods of incarceration. It is also relevant to assessing the significance of a person's prior criminal record. As a class, repeat offenders may or may not be more culpable, but they are certainly older, and hence closer to aging out of crime.

At the other end of the spectrum, I would encourage the Sentencing Commission to consider ways to further expand eligibility for non-custodial sentences.

Finally, the "categorical" approach to assessing crimes of violence for career offender status may also be worth reconsidering. The important question is not whether a past conviction was for a "violent" offense, but whether it is evidence that the accused continues to be a serious threat to others. In that regard, focusing on whether the prior conviction involved substantial physical harm to a specific victim, along with subjective *mens rea* (e.g., "knowledge," as understood by the Model Penal Code) with respect to that harm, may be a better proxy than the contested concept of "violence." While *mens rea* is a matter of how an offense is defined rather than its particular facts, determining whether a prior offense resulted in "substantial physical harm" is case-specific. Appropriate levels of harm could be subject to more precise specification, should further standardization be deemed appropriate. In comparison to "violence," the concept of intentionally harming others arguably better tracks why we might be especially concerned with "career" offenders. That said, I recognize that existing law may in any case constrain the Sentencing Commission's discretion in this area.

In summary, I would urge the Sentencing Commission to:

- Continue seeking ways to reduce the federal prison population.
- Apply rigorous cost-benefit reasoning toward status quo sentencing practice.
- Require unambiguous evidence to support more punitive measures over less punitive ones.

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[3] Motivans, M. *Federal Justice Statistics, 2022* at 12. Available at: https://bjs.ojp.gov/document/fjs22.pdf.

[4] Doob, A., & Webster, C.M. (2003). Sentence Severity and Crime: Accepting the Null Hypothesis. *Crime & Justice* 30: 143-195.

[5] Hirschi, T., & Gottfredson, M. (1983). Age and the explanation of crime. *American Journal of Sociology, 89*(3), 552–584. https://doi.org/10.1086/227905.

- Consider adjusting the sentencing grid downward, especially in light of the age-crime relationship and the minimal impact of lengthy sentences on crime.
- Expand eligibility for non-custodial sentences.
- Re-evaluate whether continued focus on "violence" is an appropriate basis for career offender sentencing.

In conclusion, the Sentencing Commission is well placed to take federal sentencing law in a more balanced, evidence-based direction. By implementing these recommendations, the Sentencing Commission can significantly reduce the human and social costs of excessive incarceration while maintaining its commitment to public safety.

Yours truly,

Vincent Chiao

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Peter Cohen, CJA attorney

Topics:

Miscellaneous Issues

Comments:

I think the look back period for criminal history points should be lowered particularly the 15 year period for cases where a sentence was served. Also for misdemeanor and non violent offenses. Also reduce reliance on relevant conduct based upon statements and not on seizures

Submitted on: June 15, 2024

STATEMENT OF ERIN R. COLLINS
PROFESSOR OF LAW, UNIVERSITY OF RICHMOND SCHOOL OF LAW
PUBLIC COMMENT REGARDING PROPOSED PRIORITIES FOR THE 2024 – 2025 AMENDMENT CYCLE
SUBMITTED TO THE UNITED STATES SENTENCING COMMISSION
JULY 14, 2024

Thank you for this opportunity to comment on the Commission's priorities for the upcoming amendment cycle. As the Commission reflects on the last forty years and looks to the future, I urge it to reconsider the role of recidivism data on federal sentencing law and policy, for reasons I highlight below.

Recidivism has been central to the Sentencing Commission's research agenda for its entire existence.[1] Studying recidivism is said to advance the Commission's directive to "conduct research on sentencing issues related to the purposes of sentencing," specifically specific deterrence, rehabilitation, and incapacitation.[2] Recidivism data is presumed to indicate whether a past punishment impacted a person's future behavior. According to this presumption, if a person recidivates – or "relapse[s] into criminal behavior"[3] – after being released from incarceration, one or more of the following inferences follows: the sentence imposed was insufficient to deter them, they were not meaningfully rehabilitated while incarcerated, and/or they should be imprisoned for a longer term to prevent criminal activity in the community.

However, the way the Commission defines and measures recidivism in its studies breaks the inferential connection necessary to link past punishment to an individual's future behavior. Recidivism data is arguably probative of whether sentencing practices advance one of the utilitarian purposes of sentencing *only if* the data tells us how frequently people do, in fact, engage in behavior the criminal law proscribes after they are punished. But the data the Commission uses to measure recidivism does not tell us that crucial information. The Commission measures recidivism using data about arrests of the study participants, including arrests for alleged probation or state parole violations[4] – behavior that is not prohibited but for the person's status as being on a form of supervised release. For reasons I explained at length in my testimony before the Commission in March, 2024, arrest is a misleading and inaccurate measure of recidivism.[5] "An arrest reflects the determination by a law enforcement officer that there was probable cause to believe someone engaged in criminal activity. . . . That someone was arrested does not tell us whether the arresting officer's assessment was correct, whether

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[1] The Commission "began studying recidivism shortly after the enactment of the Sentencing Reform Act of 1984." Tracey Kyckelhahn & Trishia Cooper, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders*, U.S. SENT'G COMM'N, 2 (March 2017). In just the last 3 years, it has published seven detailed reports regarding recidivism. *See*, Ryan Cotter, *Length of Incarceration and Recidivism*, U.S. SENT'G COMM'N, 2 (June 2022) (describing this study as the seventh in a series of Commission reports on recidivism). The Commission also conducted another seven report series about recidivism in 2016. *See id.* at 2, n 5.

[2] *See* Kim Steven Hunt & Robert Dumville, *Recidivism Among Federal Offenders: A Comprehensive Overview*, U.S. SENT'G COMM'N, 3 (March 2016). Recidivism research has also been linked to the Commission's obligation to establish sentencing policies that "reflect, to the extent practicable, advancements in the knowledge of human behavior as it relates to the sentencing process." Kyckelhahn & Cooper, *supra* note 1, at 2.

[3] *See id.* at 2 (defining recidivism).

[4] *See, e.g.,* Kristen Tennyson, Ross Thomas, Tessa Guiton, & Alyssa Purdy, *Recidivism and Federal Bureau of Prison Programs: Drug Program Participants Released in 2010*, U.S. SENT'G COMM'N 7-8 (2022).

[5] *See Statement of Erin R. Collins before the United States Sentencing Commission*, March 7, 2024 https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240306-07/collins.pdf.

the government was able to substantiate the officer's determination with proof beyond a reasonable doubt, or whether the arrested person actually committed a crime."[6] In short: arrest statistics do not tell us whether a person did, in fact, violate the criminal law after a term of incarceration.

The Commission is aware of the limitations of using arrest as a proxy for recidivism, but does so because it has more robust data about arrests than it does about conviction or incarceration.[7] But the fact that there is more data about arrest does not make arrest a more reliable indicator of how people behave after they complete a federal sentence. For these reasons, if the Commission elects to continue with past tradition and center its sentencing law and policy recommendations on recidivism, I urge it to measure recidivism in a way that more accurately reflects what the Commission aims to analyze.

However, I strongly encourage the Commission to break with this tradition to set a new research agenda for the future, one that asks new questions, employs different research methods and knowledge sources, and leads us in new directions. The Sentencing Reform Act requires the Commission it to assesses the effectiveness of sentencing practices, but it does not specify what effectiveness means.[8] The Commission has chosen over the years to use recidivism data as the primary proxy for efficacy of sentencing practices. For example, one of the Commission's recent recidivism studies looked at the impact of participation in prison-based vocational programs.[9] These programs are designed to achieve many aims, including reducing misconduct and substance use during incarceration, increasing employment and assisting in reintegration upon release from incarceration, and reducing recidivism.[10] The Commission chose to study only the impact of participation on recidivism, declaring all other any program goals "outside the scope" of the study. [11] The Commission has not followed up to assess whether these program achieves any other goals in any reports I have found on its website.

This study underscores the limitations and dangers of a recidivism-only focus. There are many important reasons to offer meaningful educational and recreational opportunities to people who are incarcerated. Yet, the Commission studied one only reason – the possibility of recidivism reduction – and found that, on this measure, program participation produced no statistically significant impact.[12] If recidivism is the only metric that is measured and valued, one *could* cite this study to argue that there is no reason to offer incarcerated people the opportunity to participate in job training programs. Such a claim would resound in Robert Martinson's infamous conclusion that "nothing works" to rehabilitate incarcerated people – the same conclusion that helped usher in our current era of mass incarceration[13] and left a legacy the Commission is now actively working to undo.

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[6] *Id.*
[7] *See, e.g.* Tennyson, Thomas, Guiton, & Purdy, *supra* note 4 at 4.
[8] 28 U.S.C. § 991(1)(B), (2); 28 U.S.C. § 995(16).
[9] Kristin M. Tennyson, Ross Thomas, Alyssa Purdy, & Tessa Guiton, *Recidivism and Federal Bureau of Prisons Programs: Vocational Program Participants Released in 2010*, U.S. SENT'G COMM'N, 27 (June 2022).
[10] *Id.* at 2, 4
[11] *Id.* at 4. Commission researchers similarly focused only on recidivism impacts of residential drug treatment programs, despite the programs having goals that also include reducing substance abuse and potential relapse. *See* Tennyson, Thomas, Guiton, & Purdy, *supra* note 4, at 4 ("this study was not designed to measure the effectiveness of BOP drug treatment modalities generally or serve as a process evaluation of program implementation.")
[12] Tennyson, Thomas, Purdy, & Guiton, *supra* note 9, at 5 (June 2022). The study found those who completed OEP courses had lower recidivism rates than those who participated and did not complete the course, and that those who participated in FPI had *higher* recidivism rates than those who did not, but neither of these findings was statistically significant after controlling for certain characteristics. *Id.*
[13] *See* Robert Martinson, *What Works? — Questions and Answers About Prison Reform*, 35 THE PUBLIC INTEREST 22 (1974).

Going forward, the Commission could – and, I suggest, should – choose metrics beyond recidivism to assess the impact of federal sentencing law and policy. Staying with the example of vocational programs, for example, researchers could engage questions including the following: What does participation in vocational programming mean to those who participate? How, if at all, does participation in these programs impact how they feel about themselves, their future, their potential to thrive and contribute to their communities when they are released? Do these programs give them skills and knowledge that will meaningfully assist them upon release? If not, how could the programs be improved?

Of course, these kinds of questions cannot be answered with quantitative data alone. Towards that end, I hope the Commission will expand the types of methods it employs to fulfill its statutory research mandate. As I have argued in my scholarship, quantitative research methods exclude important knowledge sources, data, and insights.[14] I encourage the Commission to incorporate more qualitative empirical methods in its research, particularly methods that meaningfully engage the people most impacted by its policies, including people who are incarcerated, people who have experienced crime, and the communities of people in both of these categories.[15] The Commission has recently taken active steps to include these important perspectives at its public hearings. I hope it will expand this inclusive approach to its research agenda and research design.

As the Commission embarks on the important task of reflecting on the past 40 years and looking ahead, I hope it envisions a very different future for federal sentencing law and policy, a future that involves significantly fewer people who are incarcerated and more communities that are safe and thriving. To achieve this different future we must forge a path that diverts from the one we've followed in the past. Thank you for your consideration.

[14] *See* Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 BYU L. REV. 403 (2022).
[15] *See, e.g.*, *id.* at 454-455 (describing community-based participatory research methods).

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Genaro Cortez, Law Office of Genaro R. Cortez, PLLC

Topics:

Research Recommendations

Policymaking Recommendations

Simplification

Miscellaneous Issues

Comments:

To USSC:

USSG 2L1.1 creates two anomalies that lead to unfairly high jail terms for first-time human smugglers with clean records.

The first issue is the specific offense characteristics under 2L1.1(b)(2). If police catch you with 5 or less migrants, then you don't get a bump.

However, if you get caught with 6 to 24 migrants, then you get a 3 level bump.

Similarly, if you get caught with between 25- 99 migrants, then you get a 6 level bump.

How did the USSC decide that 5 is the cutoff to avoid any bump?

And what data did the USSC use to give smugglers bumps for the following ranges of migrants: 0-5, 6-24, 25-99, or 100+?

The second issue is with 2L1.1(b)(5)(C). It applies a 2 level bump if any smuggler "possessed" a pistol during the crime.

Worse yet, if the smuggler possessed a gun and his offense level is less than 18, then this guideline creates an automatic offense level of 18.

Similar to the first issue, what data did the USSC use to support either a 2 level bump for

possessing a gun or an automatic offense level of 18?

On top of that, the term "possess" is overly broad and leads to jail time that is greater than necessary under the Booker factors.

To explain, it makes the mere presence of a pistol or firearm an automatic enhancement even if the gun was never used or brandished in the crime.

As an example, in many cases, smugglers will have a pistol in the glove box, the center-console container, under a seat, or in the trunk of the car. But they never brandish it, threaten the migrants with it, or even have access to it during the crime.

Nevertheless, this will trigger either a 2 level bump or an automatic offense level of 18.

Another example is when there are 2 or more smugglers working together in a conspiracy. One smuggler may have a gun the other smuggler does not know about and that is never used in the crime. Under this scenario--both smugglers will get a 2 level bump--even the smuggler that had no knowledge of the gun (and even if the gun is never used in the crime).

Can you provide guidance to the Bar and the Courts on what factors to consider before automatically applying a 2 level bump for mere possession of a pistol that is never used in the case?

Interestingly, it seems like the USSC is punishing human smugglers for the theoretical harm pistols may cause rather than the actual facts of the case.

Last thing, is this bump still valid under the Supreme Court's Bruen decision?

Respectfully,

Genaro R. Cortez

Submitted on: June 5, 2024

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To: United States Sentencing Commission July 14, 2024
From: Elliott Currie

I appreciate the opportunity to offer some thoughts on sentencing practices going forward. I might start with the general observation that, when it comes to the goal of diminishing both our longstanding reliance on incarceration as a response to our outsized crime problem, and the continuing disparate impact of incarceration by race and class in the United States, there has been good news and bad news in recent years.

The good news is that our national incarceration rate has fallen very significantly since about 2009, and that it has fallen more rapidly for Black Americans than for others, thus somewhat reducing enduring racial disparities in confinement. Strategies to replace the default resort to incarceration, especially for lower-level offenses, have spread widely in both state and federal systems. In general, a vision of a less punitive, more integrative and more mindful approach to sentencing that would have been widely considered as both unrealistic and radical in the past has gained a great deal of ground in America and has won many tangible victories. And these developments have an impact that isn't abstract: they mean that tens of thousands of people have been spared the disruptions and deprivations of incarceration who would have gone to prison before.

The bad news, however, is both troubling and frustrating. Despite those developments, the United States continues to suffer by far the worst incarceration rate in the advanced industrial world and very close to the highest of any country on the planet. While the number of people sent behind bars for some low-level offenses has declined significantly, the number serving very long sentences has increased, a problem that has most strongly affected people of color. Rates of recidivism for serious offenses remain disturbingly high, and, more broadly, the quality of life for people released from prison often remains intolerably low, with widespread joblessness and poverty the norm rather than the exception. In the face of a period of sharply rising levels of

violence in many parts of the country in the early Covid years, which continues in all too many places, there has been a significant backlash against the less punitive, more inclusive approaches we've achieved in recent years, from bail reform to de-carceration of minor offenses.

Given those somewhat contradictory realities, how do we think about moving forward? I think that two related elements are important. It will be crucial to push ahead with several key strategies around sentencing policy itself that we know are promising in terms of moving us away from a default emphasis on incarceration as our response to crime. But it will also be crucial to think outside the box to ways in which inclusive reforms in sentencing can be linked with broader strategies to both decrease the flow of "recruits" to mass incarceration and to greatly enhance the prospects for successful re-entry into lives of thriving and contribution for those who do wind up behind bars.

As to the first, I am strongly in support of an integrated set of inclusive strategies that has been put forward by the Sentencing Project, the Vera Institute of Justice, and others, that includes capping most sentence lengths, eliminating mandatory minimum sentences, mandating a "second look" review for sentences of ten years of more, and promoting greater use of "good time" and "merit time" credits toward release. All of these hold promise of effectively reducing incarceration and helping to return people to the community. But their impact in that regard will be limited without simultaneous investments in concrete mechanisms to increase peoples' chances of integration into thriving communities of opportunity and dignity.

On this front, there is much that is promising in the experience of recent programs. A key problem for the formerly incarcerated, for example, is that they face a truly daunting outlook in the labor market on release—which often replicates what they faced before they were sentenced. Recent research suggests that roughly a third of formerly incarcerated people never find legitimate work in the course of four years after release, and at any given point the majority—close to 60%--are without jobs. Moreover, even those who are officially in jobs are working disproportionately in ones that are poorly paying and insecure. If we want to keep them from coming back to prison, much less offer them the prospect of hope and genuine opportunity, that situation must change.

There is recent evidence that suggests encouraging potential for programs designed to train justice system-involved people for jobs in sectors of the economy that can pay well and provide both stability and opportunities for advancement. One such program, California's SECTOR program, though it is relatively new and needs further evaluation, has shown both increased employment in good jobs and reductions in arrests and convictions among participants. But so far, such programs are few and far between: many have been exploratory and underfunded.

More broadly, another California program, Re-entry Intensive Care Management Services (RICMS), linked people released from the Los Angeles County jail system with supportive Community Health Workers, most of whom had personal experience with the problems faced by the formerly incarcerated, who helped them navigate a coordinated network of local service providers. The dedication of the community health workers seems to have paid off, with positive effects om reduced arrests, convictions for new offenses, probation revocations, and incarceration. But the surrounding community context often created major

obstacles to success. It proved very difficult, in particular, to secure adequate and stable housing for the participants—which in turn undercut their efforts to maintain employment, physical health, and more.

All of this suggests that in thinking about a more inclusive approach to people who break the law, we can't ignore the larger social context to which they will hopefully return, and we can't accomplish what we would like to without very significant investment—well beyond what we've been willing to commit so far—into measures that address the social and economic obstacles and deficits that the formerly incarcerated now encounter on release. We often think of sentencing policy and this kind of community reconstruction as two very different realms. But it's important to break down those boundaries. We have been trying to develop a more egalitarian and inclusive approach to criminal sentencing in the context of a harshly unequal and cruelly marginalizing society. And while much good can probably be done even then, the limits are stark and obvious.

To a very important degree, our outsized violent crime problem is rooted in generations of disinvestment in our communities, especially communities of color. If we are ever to move past our unfortunate position as the world's "leader" in both violence and incarceration, we will have to reverse that history and finally commit to reinvesting in those communities on a level that goes far beyond promising demonstration programs. And we will need to consider our sentencing strategies in the context of that broader commitment.

Sincerely,

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Adam Davidson
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July 15, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
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Dear Judge Reeves:

Thank you for the invitation to comment. I write this comment in the spirit of attempting to find ways to make the federal criminal legal system, and criminal sentencing in particular, fairer and more just. I also write this comment less with an eye towards making technical changes to any single guideline than towards viewing the process of sentencing, and the Commission's role in that process, holistically.

I humbly suggest that the Commission should focus on ensuring that criminal defense attorneys and prosecutors are empowered to litigate, and sentencing judges are empowered and encouraged to consider, the full ramifications of a criminal sentence when deciding what sentence is appropriate to impose. I suggest that the Commission can do this by creating guidelines that require these actors to think about these issues both explicitly and systematically.

I make this recommendation for two reasons. First, the Guidelines currently do not inform either lawyers or judges how to litigate or evaluate numerous aspects of a sentence that, both for the convicted person and others in community with them, can make any chosen sentence significantly more or less punishing. For example, the Guidelines currently do not guide how judges should consider the likelihood of solitary confinement or its possible effects on the person they are sentencing, does not mention the punishment of slavery or involuntary servitude being included with an incarceratory sentence, and are unhelpful, if not obfuscative, to judges considering the importance of how their sentence may create hardships for people and communities beyond the convicted person his or herself.

This last point—a sentence's relationship to and ability to harm others—also relates to the second reason for my recommendation: The Commission can and should help lawyers and judges to see and consider how a given sentence contributes to the

broader system in which it sits. By now the statistics are well known. The United States incarcerates more people than any other country on Earth,[1] and it does so by disproportionately locking up racial minorities and people with few economic means.[2] We reached this state of the world because of a combination of choices made at the broad policy level and at the individual sentencing level, and the Commission is well positioned to influence both. It can influence individual judges' sentencing decisions by promulgating guidelines that lead lawyers and judges to consider how each sentence fits within the criminal legal system, and whether that sentence advances or hinders some of the troubling trends within our system. But, even if those guidelines do not lead to substantive changes in the sentences that judges issue, they can at least lead to the creation of better, more detailed data, which the Commission can study and use to make recommendations to Congress for policy change.

I. Considering the Whole of the Sentence

There are numerous aspects of the ultimate imposition of a sentence that are beyond a federal judge's control. For example, though they might make a recommendation, a judge cannot mandate in which facility a sentence is served. But of course, where a sentence of incarceration is served can make an enormous difference as to how punishing two sentences of similar length are. It would be odd indeed if a judge deciding on a particular term of imprisonment was indifferent to whether imprisonment meant time spent at the proverbial "Club Fed" or the person would be incarcerated in a prison where Eighth Amendment violations have historically been rampant.

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[1] Emily Widra, *States of Incarceration: The Global Context 2024*, Prison Policy Initiative (June 2024), https://www.prisonpolicy.org/global/2024.html ("[M]any of the countries that rank alongside the *least* punitive U.S. states, such as Turkmenistan, Belarus, Russia, and Azerbaijan, have authoritarian or dictatorial governments, but the U.S. … still incarcerates more people per capita than almost every other nation.").

[2] *See* Sonja A. Starr, *Did* Booker *Increase Disparity? Why the Evidence Is Unpersuasive*, 36 Fed. Sent. R. 332, 334 (2024) (finding that although *Booker* did not increase disparities, "Black arrestees do face significantly longer sentences compared to similar White arrestees"); James W. Ganas, *Paygo for Criminal Sentencing: Political Incentives and Process Reform*, 99 N.Y.U. L. Rev. 320, 354 (2024) (noting "the long-standing notion in criminology that poverty is a major contributor to one's likelihood to commit crime"); Ben Harris and Melissa S. Kearney, *The Unequal Burden of Crime and Incarceration on America's Poor*, Brookings Inst. (Apr. 28, 2014) ("Rates of crime and incarceration disproportionately impact low-income and minority communities, and contribute to the social and economic marginalization of the poor.").

I do not suggest that the Commission create a matrix for every possible difference between facilities, but I do believe that some differences, like the possibility of solitary confinement, are simply too important not to address systematically. And other differences—here I discuss the inclusion of the punishment of slavery and involuntary servitude with a sentence of incarceration, as well as the effect of a sentence on those beyond the convicted person—may be within the judiciary's ken even if they are currently not treated as such.

A. Solitary Confinement

The harms of prolonged solitary confinement are extreme and, at this point, well known. Solitary confinement has been likened to a "penal tomb" by Justice Sotomayor.[3] And "ever-mounting evidence shows that solitary confinement can induce and exacerbate severe mental illness, provoke self-mutilation and suicide, and cause the brain to literally shrink in physical size."[4] Though imprisonment has its own suite of negative effects, the harms of solitary confinement create additional, compounding, and potentially lasting mental and physical health consequences.[5]

But the Guidelines make no mention of this punishment, even though it seems not only different in degree, but potentially different in kind from traditional incarceration. As I have suggested, perhaps this omission is because the sentencing judge cannot directly control whether a convicted person will be subjected to solitary confinement. Nevertheless, when extended solitary confinement is a possibility—and particularly when there is a likelihood of its imposition—the Guidelines can and should advise lawyers and judges how to proceed.

For example, the Commission might promulgate a Guideline suggesting that sentencing judges recommend to the Bureau of Prisons that a particular individual should not be subjected to solitary confinement either because it seems unjustified by the facts underlying their conviction or because other characteristics, such as a

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[3] Apodaca v. Raemisch, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., respecting the denial of certiorari); *see also Johnson v. Prentice*, 144 S. Ct. 11, 12 (2023) (Jackson, J., dissenting) ("As Members of this Court have recognized, the practice of solitary confinement 'exact[s] a terrible price.'" (quoting *Davis v. Ayala*, 576 U.S. 257, 289 (2015) (Kennedy, J., concurring))).

[4] David M. Shapiro, Emily McCormick, Annie Prossnitz, *Foreword*, 115 Nw. U. L. Rev. 1, 2 (2020).

[5] *See* Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 Nw. U. L. Rev. 211, 248-54 (2020).

history of trauma and mental illness, make solitary confinement the sort of punishment that may have outsized and lasting consequences that decrease the chances of any successful reintegration with society.[6] Alternately, when extended solitary confinement seems like a real possibility—perhaps because of the penal institution where someone is most likely to be sent—judges should likely consider a downward departure given the additional harshness that would be inherent to their sentence. While the problem of solitary confinement may not raise its head in every case,[7] in those cases where it is salient, the Commission could significantly aid attorneys and judges both by making them aware of this long-simmering issue,[8] and by guiding their argument and decision to the most productive grounds.

B. Slavery and Involuntary Servitude

Unlike solitary confinement, I do not believe that the consideration and imposition of the punishment of slavery and involuntary servitude is beyond a sentencing judge's power.[9] There is currently no federal statute requiring that the judiciary impose this punishment for any given crime; instead it is punted to the realm of

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[6] *See, e.g.*, *id.* at 253 (noting that the "heightened vulnerability [of people with pre-existing mental illness to the effects of solitary confinement] is precisely why many legal, human rights, mental health, and even correctional organizations have issued recommendations or mandates to exclude the mentally ill from such units").

[7] I recognize, however, that this does raise the possibility of an argument that may be raised in nearly every sentencing given solitary confinement's widespread use in our criminal legal system. *See, e.g.*, *Apodaca*, 138 S. Ct. at 8 (noting that "a recent study estimated that 80,000 to 100,000 people were held in some form of solitary confinement"). The Commission may be of two minds about this reality. On the one hand, the Commission may wish to signal that solitary confinement should only be raised by defense attorneys and considered by judges when a convicted person is somehow especially likely to be placed in, or to be especially susceptible to the harms of, extended solitary confinement. On the other hand, perhaps the regularity of the argument being made would highlight for sentencing judges what, exactly, they are sentencing people to.

[8] *See, e.g.*, United States v. Lara, 905 F.2d 599, 602 (2d Cir. 1990) (affirming a downward departure under the then-mandatory Guidelines "where the only means for prison officials to protect Morales was to place him in solitary confinement"); *cf.* United States v. Smith, 27 F.3d 649 (D.C. Cir. 1994) (holding "permissible" departures "where the defendant, solely because he is a deportable alien, faces the prospect of objectively more severe prison conditions than he would otherwise").

[9] *See generally* Adam Davidson, *Administrative Enslavement*, 124 Colum. L. Rev. 633 (2024).

prison administration.[10] As I have recently argued, this choice is an odd one, given that the Constitution clearly states that both slavery and involuntary servitude may only be imposed "as punishment for a crime."[11] The treatment of this punishment as something *other than a punishment* instead seems more like a story of historical path dependency than one of deep and considered judgment of a difficult issue.[12]

Because of the grievous nature—both as a historical matter and as a matter of present reality—of the punishment of slavery or involuntary servitude, I recommend that the Commission take two steps. First, the Commission should recommend to Congress that it remove the punishment of slavery and involuntary servitude from crimes of insufficient seriousness. It seems unlikely that Congress intended every violation of the federal criminal code that might lead to a single day of imprisonment to also include the punishment of enslavement, and this is an oversight that it should prioritize fixing. Second, even in the absence of Congressional change, the Commission should promulgate guidelines that outline for prosecutors, defense attorneys, and sentencing judges factors that suggest when the punishments of slavery and involuntary servitude may be appropriate or inappropriate in a given case, as well as the consequences for the convicted person when those punishments are allowed or disallowed.[13] But perhaps just as important as which factors the Commission promulgates is simply requiring attorneys and judges to inform people accused and convicted of crimes that slavery and involuntary servitude is a possible punishment that they face. Currently nothing in the colloquy leading to the acceptance of a plea nor the imposition of a sentence

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[10] *Id.* at 684 (discussing 18 U.S.C. § 4001 and 28 C.F.R. § 545.23).

[11] *Id.* at 636 (quoting U.S. Const. amend. XIII, § 1).

[12] *See id.* at 651-65.

[13] For example, the disallowance of involuntary servitude as a punishment may mean that a person cannot be subjected to additional punishment, like the imposition of solitary confinement, for refusing to work. *See id.* at 697-98 (discussing the problem of discerning what is a punishment imposed for refusal to work versus a benefit of working that may be permissibly removed); ACLU & Univ. of Chi. L. Sch. Glob. Hum. Rts. Clinic, *Captive Labor: Exploitation of Incarcerated Workers* 5 (2022), https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf (describing how a refusal to work in prison currently may lead to "fac[ing] additional punishment such as solitary confinement, denial of opportunities to reduce their sentence, and loss of family visitation, or the inability to pay for basic life necessities like bath soap").

requires this.[14] And this absence has led to the disturbing situation of incarcerated people filing suits after their convictions attesting that they were never told that, by dint of their conviction, they had lost the protections of the Thirteenth Amendment.[15]

C. Accounting for Harms to Communities

The Guidelines currently state that "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted."[16] But as the Tzedek Association recently noted in a comment to the Commission, "Commission data show that family considerations are consistently one of the most commonly cited factors for traditional departures and for variances from the Guidelines."[17]

I join the Tzedek Association's call for changes to the Guidelines that explicitly guide judges' discretion when considering the effects that a sentence will have on others beyond the sentenced individual. I believe that these guidelines should include, but not be limited to, the loss of caretaking, financial, or other support, as well as the collateral consequences of a conviction and sentence.[18]

Instead of giving more technical suggestions for these guidelines, however, I offer an additional reason for the Commission to take on this task: Too often the criminal system's punishments can create a double harm for the very communities it purports to help. Crimes are often committed against communities that the convicted person inhabits, harming the community once.[19] But too often simply removing and incarcerating that convicted individual harms the community again by tearing at the fabric of connections that make up the community. That is

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[14] Davidson, *supra* note 9, at 638.

[15] *See, e.g.*, Ali v. Johnson, 259 F.3d 317, 317-18 (5th Cir. 2001).

[16] U.S.S.G. § 5H1.6.

[17] Mordechai Biser, *Public Comment to the U.S. Sentencing Commission's Request for Comment on Proposed Priorities for Amendment Cycle 2023-2024*, Tzedek Assoc. at 19 (Aug. 1, 2023).

[18] *Id.* at 20.

[19] Erika Harrell, Lynn Langton, Marcuz Berzofsky, Lance Couzens & Hope Smiley-Mcdonald, *Household Poeverty and Nonfatal Violent Victimization* 2008-2012, at 3 (Nov. 2014), https://bjs.ojp.gov/content/pub/pdf/hpnvv0812.pdf (finding higher nonstranger than stranger victim-offender relationships at all income levels).

especially so when incarceration minimally helps to rehabilitate an individual,[20] community members must support that incarcerated individual with their already limited resources,[21] and convictions create collateral consequences that further prevent individuals from reintegrating into society after they serve a sentence.[22]

For this reason, I recommend that the Commission create guidelines that require sentencing judges to explicitly and directly consider how they are balancing the benefits they believe a community might gain from the punishment imposed with the harms that the most commonly imposed punishment—incapacitation and deterrence through incarceration—is likely to cause to that same community. These guidelines should also serve as a reminder, and encourage judges to consider, when incarceration is not the only punishment available to them. Further, these guidelines should highlight that because of collateral consequences, the end of the term of incarceration and supervised release a judge imposes is not likely to be the end of society's punishment of the individual before them.[23]

II. Connecting Individual Sentences to the Criminal Legal System

Finally, I recommend that the Commission create more rigorous guidance that aids lawyers and judges in grappling with each individual sentence's contribution to the systemic effects of our criminal legal system. The suggestions above regarding

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[20] Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Institute (July 207), https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1027&context=criminaljustice_facpubs (reviewing studies that find that "[i]ncreased incarceration has no effect on violent crime and may actually lead to higher crime rates when incarceration is concentrated in certain communities").

[21] *See, e.g.*, Reginald Stephen, *Three Generations of Incarceration*, Prison Journalism Project (Feb. 27, 2023), https://prisonjournalismproject.org/2023/02/27/family-three-generations-incarceration/ (describing how his mother felt that she "can't keep a dollar to [her]self" because of the need to give financial support to "three generations of family members incarcerated: my mother's brother, her son and her grandson").

[22] *See, e.g.*, Nazgol Ghandnoosh, Ph.D., Luke Trinka and Celeste Barry, *One in Five: How Mass Incarceration Deepens Inequality and Harms Public Safety*, The Sentencing Project (Jan. 16, 2024), https://www.sentencingproject.org/publications/one-in-five-how-mass-incarceration-deepens-inequality-and-harms-public-safety/#executive-summary ("explor[ing] laws and policies that exacerbate socioeconomic inequalities by [] imposing financial burdens and collateral consequences on people with criminal convictions").

[23] *Cf.* Mordechai Biser, *Public Comment to the U.S. Sentencing Commission's Request for Comment on Proposed Priorities for Amendment Cycle 2023-2024*, Tzedek Assoc. 20 (Aug. 1, 2023) (proposing a guideline stating that "[p]unitive collateral consequences resulting from the defendant's conviction … may provide a reason to depart downward").

solitary confinement, slavery and involuntary servitude, and the effects of sentences on those beyond the convicted person are part of this recommendation. Each of them, in addition to addressing a substantive gap in federal criminal sentencing, also aims to create a more accurate picture of the full effect of a federal criminal sentence.

But paying attention to these issues at the level of each individual sentence is only part of the solution to making the federal criminal system fairer and more just. To fully capture the promise of these recommendations, the Commission should endeavor to link the individual consideration of a sentence to the role that it plays in constructing the federal criminal system's broader society-wide effects.

Most obviously, the Commission might undertake this task through its role in collecting and analyzing data created by the federal criminal system and in the policy recommendations it makes to Congress and other actors within that system. But perhaps the Commission could utilize existing guidelines to connect the imposition of an individual sentence to its place within the broader system for sentencing judges too.

For example, the Commission might reconsider its implementation of 28 U.S.C. § 994(d)'s mandate that "[t]he Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."[24] Instead of simply stating that "[t]hese factors are not relevant in the determination of a sentence" in U.S.S.G. § 5H1.10, the Commission might interpret Congress's directive to require judges actively to engage in de-biasing as they choose a sentence. Indeed, given consistent findings that racial disparities continue to exist between the sentences of similarly situated convicted people,[25] the Commission's choice to implement this mandate through a simple blanket statement denouncing these issues' relevance to sentencing seems like a failed experiment. While I do not purport to know exactly why racial disparities continue to exist despite the Guidelines' statement purporting to require

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[24] Similarly, the Commission might revisit the other parts of U.S.S.G. § 5H1 relating to other characteristics like education, employment record, and family ties and responsibilities, of the convicted person. This is especially so given that, "when used in the context of social responses to race, including criminal sentencing, race seems to mean something other than genetic variation." Christina Dyous, Ryan Kling, Jeremy Luallen & William Rhodes, *Federal Sentencing Disparity: 2005-2012*, Bureau of Justice Statistics, 22 (2015).

[25] *See, e.g.*, Starr, *supra* note 2 at 334; Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. Legal Stud. 75 (2015).

neutrality, one obvious potential explanation is the role of implicit bias.[26] In the absence of more explicit guidance, it is perhaps unsurprising that implicit (and at times, explicit) biases may take on greater importance.[27] And indeed, studies have suggested, and judges have reported, that being made aware of their biases helped to undermine them, while ignorance—blissful though it may be—allowed those hidden biases to flourish.[28] This sort of change could enable litigants to better argue for similar sentences for similarly situated individuals, for judges to better explain the sentence when they deviate from their historical practice, and for judges to self-evaluate and self-correct if they notice trends in their sentencing that they find troubling.

Conclusion

In this comment I have made several recommendations for the Commission's upcoming priorities in an effort to move the federal criminal system in a fairer and more just direction. I have argued that to achieve this laudable goal, the Commission should prioritize two related tasks. It should attempt to better account for the full scope of the sentences that judges impose, and it should work towards better enabling lawyers and judges to connect how *individual* sentences ultimately comprise the often-troubling results that our federal criminal *system* produces.

I have suggested a few relatively concrete steps that the Commission might take along this path. It might guide judges in the consideration of the role of solitary confinement in a sentence, in determining how and whether to impose the punishments of slavery and involuntary servitude, and in ameliorating the double harm that criminal offenses and criminal punishments might combine to inflict on often-already-disadvantaged communities. The Commission might also rethink how it implements Congress's mandate that the Guidelines remain neutral as to several

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[26] *See generally* Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 Yale L.J. Forum 391 (2017).

[27] *See id.* at 400-01 (describing studies which suggest that "implicit biases among judges are widespread and can influence judgments, but when judges are aware of potential biases, they seem to have the cognitive skills to avoid their influence").

[28] *See id.* at 402-05 (discussing bias against those with Afrocentric features); *see also* Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. Davis L. Rev. 745 (2018); William T. Pizzi et. al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 Mich. J. Race & L. 327 (2005).

immutable and individual characteristics so as to better prevent the types of bias that seem, almost inevitably, to seep into discretionary decisionmaking.

Ultimately, these are certainly not the only changes that the Commission might make, nor are they the only changes necessary, to create the fair and just federal system that we all one day hope to have. Numerous other commenters have, and will continue, to make other excellent suggestions that I hope the Commission considers as well.[29]

Thank you for the opportunity to comment. I look forward to working with the Commission in building towards making our system one that deserves the label of *justice*.

Sincerely,

Adam Davidson
Assistant Professor of Law
The University of Chicago Law School

[29] *See, e.g.*, Biser, *supra* note 17, at 9-14 (discussing alternatives to incarceration); *id.* at 30-31 (proposing that Congress require, and the Commission recommend, judges and other government actors in the federal criminal system to regularly visit prisons); Kara Gotsch, *The Sentencing Project Comment on the Commission's Proposed Policy Priorities*, Sentencing Project 2-3 (July 31, 2023) (urging the Commission to, among other proposals, "make recommendations that will assist the Bureau [of Prisons] in reducing overincarceration and crowding, improving access to rehabilitative services, and bettering conditions" as well as to promote alternatives to incarceration).

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Kevin Durkin, CJA Panel Attorney

Topics:

Policymaking Recommendations

Comments:

Please eliminate the meth/ice purity enhancement. This provision does not reflect the reality of this drug in 2024.

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Scott Duxbury, University of North Carolina at Chapel Hill

Topics:

Research Recommendations

Policymaking Recommendations

Comments:

A continued source of sentencing disparities in long sentence lengths for petty drug crimes. Current reform efforts show promise in reducing sentencing disparities but have been most widely implemented at the state-level. Reducing sentence lengths and promoting prison alternatives for lower schedule V to III drugs, especially, will help to reduce long-term burden. Prison alternatives are critical for producing short-term declines in sentencing disparities because policies targeting lengths of stay will only realize their full effects years down the line.

Reforms targeting minor drug crimes are promising but they are not enough. More than half of prison beds are occupied by repeat offenders or by persons incarcerated for violent crime. The racial disparity in violent offending means that racial minorities receive disproportionately harsh sentences compared to white offenders. Similarly, sentencing enhancements for repeat offenders have not enjoyed the same reform efforts that drug and petty property crime reforms have enjoyed. Such minor reforms will necessarily hit their limit and cease to shrink either prison populations or racial disparities within them if violent and repeat offender mandatory sentences are not targeted as well.

Research priorities should focus on reintegration for formerly incarcerated persons. Current recidivism rates combined with the high proportion of repeat offenders in U.S. prisons underscore the need for more successful reintegration frameworks. We need knowledge on what works. Further, many states and counties have responded to over-sized prisons by increasingly relying on jails and parole as prison alternatives. Current criticisms of these practices emphasize that both parole and jail dole out social harm in a manner comparable to prisons. If incarceration is being replaced by jails and prisons, then decarceration efforts will not repair the social damage caused by mass incarceration. We need further research on racial disparities in jail and parole, and the collateral consequences of those disparities.

SCHOOL OF LAW

July 15, 2024

Jelani Jefferson Exum
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Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comment on Proposed 2024–2025 Priorities

Dear Chair Reeves, Vice Chairs, and Commissioners:

My name is Jelani Jefferson Exum, and I am the Dean of St. John's University School of Law in Queens, New York. I have been in legal academia as a scholar and tenured law professor for over 18 years, the last three of which I've served as a Dean. I have taught courses in Constitutional Law, Criminal Law, Criminal Procedure, Sentencing, and Race and American Law. I am on the Editorial Board of the *Federal Sentencing Reporter* and have special expertise in sentencing reform—especially at the cross-section of drug law and policy and racial justice. I have authored numerous law review articles on these topics, and I've enclosed three of my recent works for your consideration as you set your priorities agenda for 2024-25.

While there are, no doubt, many pressing issues for this Commission to tackle, chief among them, in my view, is the need to revisit the federal drug guidelines and the relevant conduct rule. As I explain in the first two of the enclosed articles, we are at an inflection point when it comes to broad recognition of the historic failures of the racist War on Drugs. Severe mandatory minimum drug sentencing laws have been the government's weapon of choice in waging this war, and the targets have been underserved Black and brown communities. As with any

war, the War on Drugs has left in its wake devastating casualties. The carnage includes decimated families and communities, an overcrowded prison system filled with Black and brown bodies, and a whole host of collateral consequences. Yet, this war has failed to eradicate drug abuse in America. And while the rhetoric seems to be shifting away from a criminal justice response (warfare) to a public health approach (welfare) to drug use and crime, there are still far too many people serving sentences that are too long for nonviolent federal drug crimes, and racial disparities abound.[1]

The Commission has the power to ameliorate some of the harmful effects of the War on Drugs. It should start by revisiting the fateful decision to tether drug base offense levels to the quantity-based mandatory minimums set by Congress. Incorporating those mandatory minimums into the guidelines also ingrains racial disparities. And one of the strongest criticisms of the drug guidelines is that they do not represent the empirical data and national sentencing trends for which the Commission is known and respected.[2] This Commission might even reconsider the concept of a drug quantity table all together, and work toward constructing a guideline that instead focuses on actual culpability by reflecting such factors as nature of, and role in, the offense; motivation for the offense (profit vs. drug use); and the empirical level of dangerousness of the substances involved.

The drug quantity table works in tandem with the relevant conduct rule (which reflects the original Commission's policy choice to adopt a modified, real-offense sentencing system) to create disproportionately long sentences, primarily for Black and brown individuals.[3] Further, as I discuss in the third enclosed article, the relevant conduct rule insulates federal sentencing from any meaningful antiracist construction.

Consider this:

> In today's federal system, even if courts had an appetite to entertain arguments that a defendant's sentence is unconstitutional because it differs from similarly situated

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[1] This reality is borne out by Commission data showing that in fiscal year 2023, more people were sentenced under USSG §2D1.1 (which covers drug trafficking offenses) than any other guideline. USSC, FY 2023 Sourcebook of Federal Sentencing Statistics tbl. 20 (2023). And 74% of individuals sentenced in drug trafficking cases in fiscal year 2023 were people of color. *Id.* at tbl. D-2. Commission research also reveals that for federal drug trafficking offenses in fiscal years 2017 to 2021, Black and Hispanic individuals were much less likely to receive a probation-only sentence than their white counterparts. *See* USSC, Demographic Differences in Federal Sentencing 27-28 & tbl. 6 (2023).

[2] *See Kimbrough v. United States*, 552 U.S. 85, 96-97 (2007).

[3] *See, e.g.*, David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 451-52 (1993).

> defendants who only differ in race, there would often be the counterargument that there was something materially different about the guidelines calculation in one case versus another. The complexity of the guidelines' real-offense sentencing approach buries racial discrimination and makes it nearly impossible for one defendant to successfully reveal being caught in the web of bias.[4]

There is much work to be done. But my hope is this Commission is ready to do just that: to be bold, think creatively, and entertain real, large-scale changes to a sentencing system that has for too long operated unevenly against poor, Black and brown people, undermining public confidence in the criminal legal system. If we are going to be serious about ridding sentencing of racist outcomes, we have to be willing to reinvent our approach to sentencing.

Thank you for considering my views.

Very truly yours,

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[4] Jelani Jefferson Exum, *Judge Frankel's Fifty-Year-Old Invitation to Reconstruct Sentencing*, 35 Fed. Sent. Rep. 234, 237 (2023).

[[Enclosures

cc [[(w/ encl.): Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex Officio*
Scott A.C. Meisler, Commissioner *Ex Officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

From Warfare to Welfare: Reconceptualizing Drug Sentencing During the Opioid Crisis

Jelani Jefferson Exum[*]

I. INTRODUCTION

The War on Drugs officially began in 1971 when President Nixon decried drug abuse as "public enemy number one."[1] The goal of the war rhetoric was clear—to cast drug abuse and the drug offender as dangerous adversaries of the law-abiding public, requiring military-like tactics to defeat. Criminal sentencing would come to be the main weapon used in this pressing combat. In continuation of the war efforts, the Anti-Drug Abuse Act of 1986 was passed under President Reagan, establishing a weight-based, and highly punitive, mandatory minimum sentencing approach to drug offenses that has persisted in some form for the last thirty years.[2] When the Act passed, crack cocaine was touted as the greatest drug threat, and crack cocaine offenders—the vast majority of whom were Black—were subjected to the harshest mandatory minimum penalties.[3] Like any war, the consequences of the War on Drugs has had widespread casualties, including (but not limited to) the devastation of many communities, families, and individuals; the increase in racial disparities in punishment; and fiscal catastrophe in penal systems across the country.[4] What the War on Drugs has not done is eradicate drug abuse in the United States. And now, nearly fifty years after drugs became our national

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1. Remarks About an Intensified Program for Drug Abuse Prevention and Control, PUB. PAPERS 738, 738 (June 17, 1971) [hereinafter Intensified Program].

2. Anti-Drug Abuse Act of 1986, § 1002, Pub. L. No. 99-570, 100 Stat. 3207, 3207-2 to 4 (codified as amended at 21 U.S.C. § 841 (2012)).

3. *See* AM. CIVIL LIBERTIES UNION, WRITTEN SUBMISSION OF THE AMERICAN CIVIL LIBERTIES UNION ON RACIAL DISPARITIES IN SENTENCING 5 (2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf [https://perma.cc/5JSF-LRS3].

4. *See, e.g.*, Eric L. Jensen et al., *Social Consequences of the War on Drugs: The Legacy of Failed Policy*, 15 CRIM. JUST. POL'Y REV. 100 (2004) (discussing the repercussions of the War on Drugs and the resulting increased rates of incarceration).

enemy, we have a new face of drug crime—the opioid addict.[5]

The current Administration has recognized that "[d]rug addiction and opioid abuse are ravaging America."[6] However, rather than ramping up punishment for opioid offenders through lengthier drug sentencing, in October 2017 the opioid crisis officially became a Public Health Emergency under federal law.[7] And while it is largely understood that this was mostly a symbolic statement with little practical effect,[8] the rhetoric is markedly different than it was during the purported crack epidemic of the 1980s. Rather than drug offenders being the enemy, the opioid addict has been cast as the American Everyman, and the opioid addiction problem has become known as the "crisis next door" that "can affect any American, from all-state football captains to stay-at-home mothers."[9]

Now that the drug emergency is portrayed as destroying wholesome American communities—as opposed to poor, crime-ridden communities of color—the tone has changed from punishment toward treatment and rehabilitation. The National Institute on Drug Abuse (NIDA) at the National Institutes of Health (NIH) has described opioid misuse and addiction as "a serious national crisis that affects public health as well as social and economic welfare."[10] While we are in the midst of this shift in messaging about drug addiction, it is an ideal time for drug sentencing as a whole to be reconceptualized from use as a weapon—designed to destroy—to having a public welfare agenda. To do this it requires recasting potential drug offenders as community members, rather than enemies. This change in perspective and approach also necessitates understanding drug crime as undeterred by incarceration. The tasks must

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5. When using terms like "the opioid crisis" and "the opioid addict," experts are referring to "[t]he misuse of and addiction to opioids—including prescription pain relievers, heroin, and synthetic opioids such as fentanyl." *See Opioid Overdose Crisis*, NAT. INST. ON DRUG ABUSE, https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis [https://perma.cc/N7PY-LVPV] (last visited Feb. 4, 2019).

6. *The Opioid Crisis*, WHITE HOUSE, https://www.whitehouse.gov/opioids/ [https://perma.cc/ZXJ5-LD49] (last visited Feb. 4, 2019).

7. Determination that a Public Health Emergency Exists, DEP'T OF HEALTH AND HUM. SERV. (Oct. 26, 2017), https://www.hhs.gov/sites/default/files/opioid%20PHE%20Declaration-no-sig.pdf [https://perma.cc/5J67-46TG]. *See also* Memorandum on Combatting the National Drug Demand and Opioid Crisis, 2017 DAILY COMP. PRES. DOC. 788, at § 2 (Oct. 26, 2017) (requiring the Secretary of Health and Human Services to consider declaring the opioid crisis a public health emergency).

8. *What Does it Mean to Declare a Public Health Emergency Over the Opioid Crisis?*, GEO. WASH. U. MILKEN INST. SCH. OF PUB. HEALTH, https://publichealth.gwu.edu/content/what-does-it-mean-declare-public-health-emergency-over-opioid-crisis [https://perma.cc/J4XS-NBRJ] (last visited Feb. 7, 2019).

9. THE CRISIS NEXT DOOR, https://www.crisisnextdoor.gov/ [https://perma.cc/XP23-DFHS] (last visited Feb. 7, 2019).

10. *Opioid Overdose Crisis*, *supra* note 5.

be to decide on a goal of drug sentencing, and to develop multifaceted approaches to address and eradicate the underlying sources of the drug problem. When this is done, we may find that more appropriate purposes of punishment—rehabilitation and retribution—compel us to think beyond incarceration, and certainly mandatory minimum sentencing laws, as the appropriate punishment type at all.

II. SENTENCING AS WEAPON: THE WAR ON DRUGS

In 1971, President Nixon launched the War on Drugs, which marked a turning point in sentencing law; however, this was not the first time the federal government imposed mandatory minimum sentences for drug offenses. Rather, it imposed the first mandatory minimum sentencing laws for drug offenses through the Narcotic Drugs Import and Export Act in 1951.[11] For various drug offenses, the act carried mandatory minimum penalties of two, five, or ten years of imprisonment depending on a person's prior convictions.[12] In 1956, Congress expanded this punitive approach in the Narcotic Control Act to include more mandatory minimum penalties for drug crimes.[13] However, by the 1960s, this punitive approach to drug sentencing was becoming unpopular.[14] And in sweeping reform, in 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, which repealed almost every mandatory minimum penalty for drug offenses.[15] According to the Congressional Record, the purpose of the change was to institute "a more realistic, more flexible, and thus more effective system of punishment and deterrence of violations of the Federal narcotic and dangerous drug laws."[16] However, just a year later, President Nixon set the stage for an about-face on drug policy by calling for a "war" to commence. In his words, given at a now-famous press conference on June 17, 1971, President Nixon proclaimed, "[i]n order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive" on drug abuse.[17] And, with those words, he laid the foundation

11. *See* Act of Nov. 2, 1951, § 1, Pub. L. No. 82–255, 65 Stat. 767, 767–68 (amending the Narcotic Drugs Import and Export Act).

12. *See id.*

13. *See* Narcotic Control Act of 1956, §§ 103, 105–08, Pub. L. No. 84–728, 70 Stat. 567, 568–72.

14. U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 22 (2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf [https://perma.cc/CKW6-Q5NU].

15. *Id.* (citing Pub. L. No. 91–513, 84 Stat. 1236 (1970)).

16. H.R. REP. NO. 91-1444 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4566, 4638.

17. Intensified Program, *supra* note 1, at 738.

for a return to rigid, punitive drug sentencing. But, perhaps even more damaging, was that the war rhetoric cast the would-be drug offenders as dangerous enemies to be fought with the force of the criminal justice system.

The Richard Nixon Foundation claims that Nixon's drug war "has been blamed, rather unfairly, for steering national drug policy to the law enforcement modality most familiar to the nation today."[18] By "law enforcement modality," the Foundation is referring to harsh mandatory minimum penalties for drug crimes. In defense of Nixon, the Foundation points out that it was President Nixon who created the Special Action Office for Drug Abuse Prevention (SAODAP) and "requested $155 million in new funds, $105 million which would be made for treatment and rehabilitation nationwide."[19] In the words of the Foundation, "[f]or the first time in the history of the United States, the government offered treatment to any drug addict that needed and wanted it; heroin addicts were now given a choice of rehabilitation without fear of being criminalized for their drug addiction."[20] It is true that SAODAP took a treatment approach to the perceived drug abuse problem by supporting federally-funded drug treatment programs and conducting research on drug abuse and addiction.[21] However, even in supporting treatment, Nixon held fast to the imagery of war. In a handbook issued by SAODAP, Nixon penned a letter calling for the American people to "represent the front-line soldiers in this critical battle."[22] He also described the federal government approach to the "battle against drug abuse."[23] An important part of the fight was targeting drug trafficking through enhanced criminal penalties. As Nixon explained, "[d]omestically we have developed strong new laws and tough new law enforcement efforts, backed by more money and greater manpower."[24] And though "drug *abuse*," and not necessarily the drug abuser, is what Nixon characterized as "public enemy number one,"[25] he used imagery that necessitated putting a face to the enemy. After all,

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18. Chris Barber, *Public Enemy Number One: A Pragmatic Approach to America's Drug Problem*, RICHARD NIXON FOUND (June 29, 2016), https://www.nixonfoundation.org/2016/06/26404/ [https://perma.cc/ZEF9-4RLB] (last visited Mar. 7, 2019).

19. *Id*.

20. *Id*.

21. SPECIAL ACTION OFFICE FOR DRUG ABUSE PREVENTION, SPECIAL ACTION OFFICE FOR DRUG ABUSE PREVENTION ANSWERS THE MOST FREQUENTLY ASKED QUESTIONS ABOUT DRUG ABUSE 2–3 (1972), https://files.eric.ed.gov/fulltext/ED075187.pdf [https://perma.cc/5NWH-2ZJM].

22. Richard Nixon, *Foreword* to *id.* at ii.

23. *Id.*

24. *Id.* at i.

25. *Id.*

according to Nixon, there was some menace out there who "creeps quietly into homes and destroys the bonds of family."[26] This adversary, pitted against the unsuspecting, wholesome American, had to be defeated.

A. Locating the Enemy

It is now no secret that pandering to racist beliefs about criminality underscored President Nixon's 1968 "law and order" presidential campaign.[27] As Professor Michelle Alexander explains in her prominent text The New Jim Crow: Mass Incarceration in the Age of Colorblindness, "By 1968, 81 percent of those responding to the Gallup Poll agreed with the statement that 'law and order has broken down in this country,' and the majority blamed 'Negroes who start riots' and 'Communists.'"[28] Nixon fed into these views in crafting the rhetoric for his campaign. While viewing one of his own campaign ads, he was accidentally recorded saying, "[The ad] hits it right on the nose. It's all about those damn Negro-Puerto Rican groups out there."[29] Later, Nixon's domestic policy advisor, John Ehrlichman, would reportedly admit that "[t]he Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and Black people."[30] According to the report of Ehrlichman's 1994 interview,[31] Ehrlichman divulged the racist strategy in this way:

> You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or Black, but by getting the public to associate the hippies with marijuana and Blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were

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26. *Id.*

27. Nixon's own racist views toward Blacks, Jews, and other groups were captured in recordings released in 2010 by the Nixon Presidential Library and Museum. For an account of these tapes, see Rob Stein, *New Nixon Tapes Reveal Anti-Semitic, Racist Remarks*, WASH. POST (Dec. 12, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/11/AR2010121102890.html [https://perma.cc/WJ8A-369V].

28. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 46 (rev. ed. 2011).

29. *Id.* at 47.

30. Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG (Apr. 2016), https://harpers.org/archive/2016/04/legalize-it-all/ [https://perma.cc/A25M-5FNX].

31. Ehrlichman reportedly gave these statements to reporter Dan Baum in a 1994 interview. *Id.* Baum did not publish these remarks until 2012 and again in 2016 in Harper's Magazine. Dan Baum, *Truth, Lies, and Audiotape*, *in* THE MOMENT: WILD, POIGNANT, LIFE-CHANGING STORIES FROM 125 WRITERS AND ARTISTS FAMOUS & OBSCURE 174, 175 (Larry Smith ed., 2012); Baum, *supra* note 30. Ehrlichman died in 1999. Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016), https://www.cnn.com/2016/03/23/politics/john-ehrlichman-richard-nixon-drug-war-blacks-hippie/index.html [https://perma.cc/P2KA-ARG8].

lying about the drugs? Of course we did.[32]

Whether one believes the accuracy of these revelations,[33] disrupting Black communities is just what the war on drugs accomplished. Nixon seems to have known that this was the eventual course. While flying over the New York City borough of Queens in June 1972, he was quoted as saying, "The people down there could care less about treatment or education. All they want to do is lock the folks up involved with drugs . . . just lock them up."[34] And, though Nixon never signed extensive, tougher drug sentencing punishment reform into law, the "just lock them up" attitude that he identified and the focus on Black communities that such a view exploited would prevail.

B. Firing the Sentencing Weapon

It was President Ronald Reagan who pushed the War on Drugs agenda forward.[35] On October 14, 1982, Reagan declared that illegal drugs were a threat to U.S. National Security.[36] Congress followed his lead and passed the Anti-Drug Abuse Act of 1986, which created highly punitive, weight based mandatory minimum sentences for drug offenses. In doing so, Congress was reacting to the war rhetoric without giving the country's actual drug issue true study. A closer look at the infamous 100-to-1 powder cocaine to crack ratio established through the Act reveals this trigger-happy Congressional response.

The 1980s were a time of misleading media-fueled concern regarding the dangers of crack cocaine.[37] Perhaps the most well-known news

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32. Baum, *supra* note 30.

33. Three of Ehrlichman's former colleagues questioned whether Ehrlichman made the statement, and, if he did, contended that he made it sarcastically. They also stated the war on drugs' impetus was not based on race. Hilary Hanson, *Nixon Aides Suggest Colleague was Kidding About Drug War Being Designed to Target Black People*, HUFFINGTON POST (Mar. 25, 2016), https://www.huffingtonpost.com/entry/richard-nixon-drug-war-john-ehrlichman_us_56f58be6e4b0a3721819ec61?j4cvxkk6gn39b2o6r [https://perma.cc/A2SZ-ZN6B]. Ehrlichman's children also dispute the quote. LoBianco, *supra* note 31.

34. Edward Jay Epstein, *The Krogh File—the Politics of "Law and Order"*, 39 PUB. INT. 99, 121 (1975).

35. Andrew Glass, *Reagan Declares 'War on Drugs,' October 14, 1982*, POLITICO (Oct. 14, 2010, 4:44 AM), https://www.politico.com/story/2010/10/reagan-declares-war-on-drugs-october-14-1982-043552 [https://perma.cc/P4R7-XXWH].

36. Ronald Reagan, Remarks Announcing Federal Initiatives Against Drug Trafficking and Organized Crime, 2 PUB. PAPERS 1313, 1315–16 (Oct. 14, 1982) (outlining a plan to fight organized crime generally and drug trafficking specifically).

37. "'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride [powder cocaine] and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." U.S. SENTENCING GUIDELINES MANUAL, § 2D1.1(c) n.D (U.S. SENTENCING COMM'N

account encouraging this fear was the cocaine-induced death of the popular college basketball star Len Bias in June 1986.[38] It had been widely reported that Bias died from a crack overdose, and the public outcry was heard in the halls of Congress. Though it was eventually discovered that Len Bias died from a combination of snorting powder cocaine and using alcohol, and not from crack cocaine use at all, the fear created by stories like that of Len Bias was pervasive and the effects were long-lasting.[39]

Further, Len Bias was Black, and the panic surrounding crack was definitely colored by racial stereotypes. In the 1994 Eastern District of Missouri case *United States v. Clary*, Judge Clyde Cahill explained the damaging racism of the media attention this way:

> Crack cocaine eased into the mainstream of the drug culture about 1985 and immediately absorbed the media's attention. Between 1985 and 1986, over 400 reports had been broadcast by the networks. Media accounts of crack-user horror stories appeared daily on every major channel and in every major newspaper. Many of the stories were racist. Despite the statistical data that whites were prevalent among crack users, rare was the interview with a young black person who had avoided drugs and the drug culture, and even rarer was any media association with whites and crack. Images of young black men daily saturated the screens of our televisions. These distorted images branded onto the public mind and the minds of legislators that young black men were *solely* responsible for the drug crisis in America. The media created a stereotype of a crack dealer as a young black male, unemployed, gang affiliated, gun toting, and a menace to society.[40]

This racialized impact is evident in another enduring image of the crack hysteria—the crack baby. The Sentencing Project described this imagery and its erroneous nature aptly:

> The notion of the "crack baby" became common in the 1980s and was associated mostly with African American infants who experienced the effects of withdrawal from crack. Over time, the medical field determined the effects of crack on a fetus had been overstated. Deborah Frank, a professor of Pediatrics at Boston University describes the "crack baby" as "a grotesque media stereotype [and] not a scientific diagnosis."

2018).

38. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 122 (1995) [hereinafter 1995 REPORT], https://www.ussc.gov/research/congressional-reports/1995-report-congress-cocaine-and-federal-sentencing-policy [https://perma.cc/HNK2-RDYJ].

39. *See* Carol A. Brook, *Mukasey Puts Latest Crack in Truth on Drugs*, CHI. TRIB. (Mar. 7, 2008), https://www.chicagotribune.com/news/ct-xpm-2008-03-07-0803060576-story.html [https://perma.cc/T3YV-CSPE].

40. 846 F. Supp. 768, 783 (E.D. Mo.) (citations omitted), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

> Indeed, she found the negative effects of crack use on the fetus are similar to the negative effects of tobacco or alcohol use, poor prenatal care or poor nutrition on the fetus.[41]

At the same time that images of the Black crack baby and crack mother were frightening concerned (white) Americans, the story was being told that crack was significantly worse than powder cocaine.[42] The distorted story has been explained this way:

> The driving force behind passage of these anti-crack laws was the exaggerated claims made in the media on a near-daily basis. Multiple stories warned of "crack-crazed" addicts. In the months before the 1986 elections, more than 1,000 stories on cocaine appeared in the national press, including five cover stories in *Time* and *Newsweek*. *Time* magazine called crack cocaine the issue of the year.[43]

Though the concern focused on crack cocaine and the misleading image of the Black people using crack, scientific data proved this concern to be misplaced. Studies show that "[t]here are no pharmacological differences between crack and powder cocaine to justify their differential treatment under the law."[44] Still, the public outcry and misinformation pushed Congress to rush the 1986 Drug Act through the legislative process.[45] As Judge Cahill explained:

> Legislators used these media accounts as informational support for the enactment of the crack statute. The *Congressional Record*, prior to

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41. RESEARCH & ADVOCACY FOR REFORM, THE SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING 6 (Oct. 2010), https://www.sentencingproject.org/publications/federal-crack-cocaine-sentencing/ [https://perma.cc/2NR3-U6PA] (alteration in original) (first citing U.S. SENTENCING COMM'N., REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 68 (2007); then citing *Cocaine Pharmacology, "Crack Babies," Violence: Hearing Before the U.S. Sentencing Comm'n*, 14 FED. SENT'G REP. 191, 195 (2002) (statement of Deborah Frank, M.D., Professor at Boston University School of Medicine)).

42. CARL L. HART, JOANNE CSETE, & DON HABIBI, OPEN SOC'Y FOUND., METHAMPHETAMINE: FACT VS. FICTION AND LESSONS FROM THE CRACK HYSTERIA 2 (2014), https://www.opensocietyfoundations.org/sites/default/files/methamphetamine-dangers-exaggerated-20140218.pdf. [https://perma.cc/8DUF-H8CV].

43. *Id.*

44. *Id.*

45. *See* U.S. SENTENCING COMM'N., REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 5 (2002) [hereinafter 2002 REPORT], https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf [https://perma.cc/3U2E-BFVC]; *see also* 1995 REPORT, *supra* note 38, at 122 ("[F]ollowing Bias's death, newspapers across the country ran headlines and stories containing a quote from Dr. Dennis Smyth, Maryland's Assistant Medical Examiner, that Bias probably died of 'free-basing' cocaine. Newspapers that ran such headlines included the Los Angeles Times, USA Today, the Chicago Tribune, The Atlanta Constitution, and the Washington Post.").

> enactment of the statute, is replete with news articles submitted by members for their colleagues' consideration which labeled crack dealers as black youths and gangs. Members of Congress also introduced into the record media reports containing language that was either overtly or subtly racist, and which exacerbated white fears that the "crack problem" would spill out of the ghettos.[46]

Therefore, in response to the perceived national drug emergency, the 1986 Drug Act passed with no committee hearings and no accompanying House or Senate reports, and the disparate 100-to-1 powder-to-crack cocaine sentencing ratio was born.[47]

Under this new Act, an offense had to involve 100 times more powder cocaine for a defendant to receive the same sentence as defendants convicted of a crack cocaine offense. Offenses involving five grams of cocaine base (commonly referred to as "crack") were treated as equivalent to those involving 500 grams of cocaine hydrochloride (commonly referred to as "powder cocaine") for triggering a five-year mandatory minimum sentence.[48] Likewise, 5000 grams of powder cocaine were necessary to trigger the same ten-year mandatory minimum sentence that was triggered by fifty grams of crack.[49] Though this new sentencing scheme was seemingly race-neutral, its enforcement certainly was not. The 100-to-1 powder-to-crack cocaine sentencing ratio was incorporated into the Federal Sentencing Guidelines[50] and has given police, prosecutors, and judges weapons to disproportionately imprison Black offenders. The incredible racial disparity that resulted has persisted for over three decades.

C. The Carnage of War: Drug Sentencing and Racial Disparities

The full force of the 1986 Act was dispatched against Black

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46. United States v. Clary, 846 F. Supp. 768, 783–84 (E.D. Mo. 1994) (citations omitted), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

47. *See* 2002 REPORT, *supra* note 45, at 5–6.

48. Anti-Drug Abuse Act of 1986, § 1002, Pub. L. No. 99-570, 100 Stat 3207, 3207-2 to 3207-4 (codified as amended at 21 U.S.C. § 841 (2012)). Pursuant to the resulting 21 U.S.C. § 841, a five-year mandatory minimum applied to any trafficking offense of five grams of crack or 500 grams of powder, 21 U.S.C. § 841(b)(1)(B)(ii), (iii); its ten-year mandatory minimum applied to any trafficking offense of fifty grams of crack or 5000 grams of powder, § 841(b)(1)(A)(ii), (iii). The 1986 Drug Act imposed the heavier penalty on "cocaine base" without specifying that to mean crack. However, in 1993, the Sentencing Commission clarified that "'[c]ocaine base,' for the purposes of this guideline, means 'crack.'" U.S. SENTENCING GUIDELINES MANUAL app. C, vol. I, amend. 487 (U.S. SENTENCING COMM'N 2003) (effective Nov. 1, 1993).

49. Anti-Drug Abuse Act of 1986, § 1002.

50. *See* Kimbrough v. United States, 552 U.S. 85, 96 (2007).

communities. As is the scene with any warzone, the result was devastating. In a February 1995 report, the U.S. Sentencing Commission related that a startling 88.3 percent of crack cocaine offenders were Black.[51] The Commission cited to a study conducted by the Bureau of Justice Statistics finding that, due to the 100-to-1 ratio, "the average sentence imposed for crack trafficking was twice as long as for trafficking in powdered cocaine."[52] Ultimately, the Sentencing Commission concluded that "[t]he 100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants."[53] In May of the same year, the Commission urged Congress to equalize crack and powder cocaine penalties.[54] Congress rejected the proposed amendment to the Sentencing Guidelines—"the first time in the guidelines' history [that] Congress and the president rejected a guideline amendment approved by the [C]ommission."[55] In 1997, the Sentencing Commission again issued a report unanimously recommending "the elimination of the 100:1 ratio."[56] Congress, however, did not act on this recommendation.[57]

This call for racial equality through a change to drug sentencing came again in the Commission's 2002 Report to Congress, in which the Sentencing Commission explained its findings that an "overwhelming majority of crack cocaine offenders" were Black—"91.4 percent in 1992 and 84.7 percent in 2000."[58] The Commission also reported that "[i]n addition, the average sentence for crack cocaine offenses (118 months) is 44 months—or almost 60 percent—longer than the average sentence for powder cocaine offenses (74 months), in large part due to the effects of the 100-to-1 drug quantity ratio."[59] As a result of the hearings and findings, the Commission again advocated for a reduction in the 100:1

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51. 1995 REPORT, *supra* note 38, at 152.

52. *Id.* at 153 (quoting DOUGLAS C. MCDONALD & KENNETH E. CARLSON, BUREAU OF JUSTICE STATISTICS, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES, 1986–90, at 1 (1993)).

53. *Id.* at 154.

54. *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,075–77 (proposed May 10, 1995).

55. DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. CIVIL LIBERTIES UNION, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 6 (2006), https://www.aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf [https://perma.cc/NPN9-7ZM9] (citing Act of Oct. 30, 1995, § 1, Pub. L. No 104-38, 109 Stat. 334, 344).

56. *Id.* (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997)).

57. *Id.*

58. 2002 REPORT, *supra* note 45, at 62.

59. *Id.* at 90.

ratio, stating in its report that: (1) "the current penalties exaggerate the relative harmfulness of crack cocaine"; (2) the "current penalties sweep too broadly and apply most often to lower level offenders"; (3) the "current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality"; and (4) the "current penalties' severity mostly impacts minorities."[60] However, again, Congress did not respond.[61]

By 2004, the Sentencing Commission was directly expressing its views on the racial injustice of the cocaine sentencing guidelines. The Commission explained:

> This one sentencing rule contributes more to the differences in average sentences between African-American and White offenders than any possible effect of discrimination. **Revising the crack cocaine thresholds would better reduce the gap than any other single policy change**, and it would dramatically improve the fairness of the federal sentencing system.[62]

Finally, in 2007, after three more years of inaction by Congress, the Sentencing Commission took the initiative and enacted a series of Guideline amendments that it called "only a partial step in mitigating the unwarranted sentencing disparity that exists between Federal powder and crack cocaine defendants."[63] Amendment 706, effective November 1, 2007, reduced by two levels the base offense level for most crack offenses.[64] Despite twenty years of recognizing the hugely racially disparate consequences of using sentencing as a weapon in the War on Drugs, it took until 2010 for Congress to pass federal legislation reducing the 100:1 ratio—and even then Congress did not change the destructive

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60. *Id.* at v–viii.

61. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 51 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf [https://perma.cc/6FDU-6QP8] (noting Congress did not act on the Commission's 2002 recommendation).

62. *Id.* at 132 (emphasis added).

63. U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses, U.S. SENTENCING COMM'N (Dec. 11, 2017), https://www.ussc.gov/about/news/press-releases/december-11-2007 [https://perma.cc/F9ZV-K2MR].

64. Sentencing Guidelines for United States Courts, 72 Fed. Reg. 51,882, 51,882–83 (Sept. 11, 2007). The Sentencing Guidelines assigns a base offense level to every federal criminal offense. U.S. SENTENCING GUIDELINES MANUAL ch. 2 (U.S. SENTENCING COMM'N 2018). Because the Sentencing Commission adopted a system of "real offense sentencing," chapter three of the Sentencing Guidelines also includes several sections of adjustments that add points to the base offense level based on particular offense factors and offender conduct (i.e., role in the offense, type of victim, etc.). *Id.* at ch. 3. The sum is the total offense level which corresponds to the Sentencing Grid and is matched up with a criminal history category to result in a sentencing range. *Id.* at ch. 5, pt. A.

nature of drug sentencing.

In 2010, Congress passed the Fair Sentencing Act of 2010 (the "FSA"), which decreased the powder to crack cocaine sentencing ratio to nearly 18:1.[65] Now, under the FSA, it takes twenty-eight grams (instead of the former five grams) of crack cocaine to trigger a five-year mandatory minimum imprisonment and 280 grams (rather than fifty grams) of crack cocaine to trigger a ten-year mandatory minimum imprisonment term.[66] The 500 grams and five kilograms (or 5000 grams) of powder cocaine that it takes to activate the five-year and ten-year mandatory minimum, respectively, remained unchanged.[67] The mandatory minimum for a first-time offense of simple possession was eliminated, and first-time simple possession of any quantity of crack cocaine, like powder cocaine, will result in a sentence no longer than one year.[68] Though this was a major change, because it did not result in a one-to-one parity in cocaine sentencing, the Act really took the form that Rep. Ron Paul said should more aptly be called "the Slightly Fairer Resentencing Act."[69] At fiscal yearend 2012, "[t]he vast majority of crack cocaine offenders (88%) were non-Hispanic black or African American," meaning that the sights of the lengthiest sentencing weapon are still set on Blacks.[70] But a new battle was seemingly on the horizon, only its casualties were seen as the good guys, worthy of saving, rather than the enemy.

III. THE OPIOID CRISIS AND A WELFARE APPROACH

Today's drug news is not overrun with images of crack addicts who must be eradicated before they infiltrate our safe neighborhoods. Instead, the current media fixation is on what has been deemed "the opioid crisis." In January 2017, the New York Times ran a story titled "Inside a Killer Drug Epidemic: A Look at America's Opioid Crisis."[71] The startling headline was followed by what the news outlet described as "stories of a national affliction that has swept the country, from cities on the West Coast

65. Pub. L. No. 111-220, 124 Stat. 2372 (to be codified at 21 U.S.C. § 841).

66. 21 U.S.C. § 841(b)(1)(A)–(B) (2012).

67. *Id.*

68. Fair Sentencing Act of 2010, § 3 (codified at 21 U.S.C. § 844 (2012)).

69. 156 Cong. Rec. 14,395 (2010) (statement of Rep. Paul).

70. SAM TAXY ET AL., BUREAU OF JUSTICE STATISTICS, DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA 3 (Oct. 2015), https://www.bjs.gov/content/pub/pdf/dofp12.pdf [https://perma.cc/Y7F2-2PD7].

71. Julie Bosman, *Inside a Killer Drug Epidemic: A Look at America's Opioid Crisis*, N.Y. TIMES (Jan. 6, 2017), https://www.nytimes.com/2017/01/06/us/opioid-crisis-epidemic.html [https://perma.cc/ZG5T-9VCK].

to bedroom communities in the Northeast."[72] The article refers to towns "where people overdose in the aisles of dollar stores."[73] Other media sources have also addressed the topic with alarm. The Guardian issued an article calling the opioid crisis "a national trauma" and revealed that "[o]verdoses killed more people in the US in 2015 than car crashes and gun deaths combined."[74] These accounts are not without expert backing. The National Institutes of Health (NIH) dedicates a webpage to the "Opioid Overdose Crisis" on which it explains that "[e]very day, more than 130 people in the United States die after overdosing on opioids."[75] The Centers for Disease Control and Prevention (CDC) also has a webpage devoted to the opioid crisis. According to the CDC data shared there, "[o]verdose deaths from opioids . . . have increased almost six times since 1999. Overdoses involving opioids killed more than 47,000 people in 2017, and 36% of those deaths involved prescription opioids."[76] It would seem, then, that drug abuse is once again America's public enemy number one. However, both drug abuse and the abuser have been cast in a very different light than the enemy in the War on Drugs.

During the opioid epidemic, we have seen a shift in drug policy rhetoric from one of warfare to welfare. After declaring the opioid crisis a national Public Health Emergency, the White House launched an informational website, CrisisNextDoor.gov, "where Americans can share their own stories about the dangers of opioid addiction."[77] As the President explained, "[t]his epidemic can affect anyone, and that's why we want to educate everyone."[78] The Crisis Next Door website directs visitors to "See America's Stories" and invites them to "[s]hare your story below by uploading a video about how you overcame addiction, volunteered at a recovery center, or worked as a family to help a loved one get on the path to recovery."[79] Rather than having a crazed, dangerous enemy threatening the wholesome (white) American family—as was the image during the

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72. *Id.*

73. *Id.*

74. Joanna Walters, *America's Opioid Crisis: How Prescription Drugs Sparked a National Trauma*, THE GUARDIAN, (Oct. 25, 2017), https://www.theguardian.com/us-news/2017/oct/25/americas-opioid-crisis-how-prescription-drugs-sparked-a-national-trauma [https://perma.cc/7JGR-WJSG].

75. *Opioid Overdose Crisis*, *supra* note 5.

76. *Opioid Overdose: Data Overview*, CTRS. FOR DISEASE CONTROL & PREVENTION (citations omitted), https://www.cdc.gov/drugoverdose/data/index.html [https://perma.cc/V6CW-UJQP] (last visited Mar. 30, 2019).

77. *The Opioid Crisis*, *supra* note 6.

78. Remarks in Manchester, New Hampshire, 2018 DAILY COMP. PRES. DOC. 168, at 4 (Mar. 19, 2018).

79. THE CRISIS NEXT DOOR, *supra* note 9.

crack epidemic—we now have "loved ones" who need help.

A. Neighbors, not Enemies: Race and the Opioid Addict

It is not insignificant that the demographics of the affected populations are markedly different when one compares the War on Drugs to the Opioid Crisis. According to the National Survey on Drug Use and Health, from 2010–2013, "the prevalence of [opioid abuse] was highest among whites (72.29%), with lower prevalence among blacks (9.23%), Hispanics 13.82%, and others 4.66%."[80] In other words, opioid abuse is a very white problem. Contrarily, in its 1995 report to Congress, the Sentencing Commission acknowledged that "[p]ublic opinion tends to associate the country's drug crisis, specifically its perceived 'crack problem,' with Black, innercity neighborhoods."[81] The injustice in this perception of the purported crack epidemic is that Blacks were not actually using crack at a higher rate than whites. Data from the National Household Survey on Drug Abuse revealed the following in 1991, five years after the Anti-Drug Abuse Act of 1986 was passed:

> [O]f those reporting cocaine use at least once in the reporting year, 75 percent were White, 15 percent Black, and 10 percent Hispanic. And of those reporting crack use at least once in the reporting year, 52 percent were White, 38 percent were Black, and 10 percent were Hispanic.[82]

Despite the majority of crack users being white, the War on Drugs aimed its sentencing weapon at Black communities. The public response to the opioid crisis, however, has not been to criminalize communities. In fact, rather than being called an addiction, opioid abuse is now referred to as "Opioid Use Disorder."[83] On all fronts, the discourse, and the response, has changed from one of warfare against communities to welfare for communities.

B. Community Welfare Responses to the Opioid Crisis

In October 2018, a year after declaring the opioid crisis a public health

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80. THE PRESIDENT'S COMMISSION ON COMBATING DRUG ADDICTION AND THE OPIOID CRISIS, FINAL REPORT 25 (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final_Report_Draft_11-1-2017.pdf [https://perma.cc/YH46-G9SD].

81. 1995 REPORT, *supra* note 38, at 34.

82. *Id.*

83. *See, e.g.*, *Prevent Opioid Use Disorder*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/prevention/opioid-use-disorder.html [https://perma.cc/SJF9-7443] (last visited Feb. 11, 2019).

emergency, the President signed into law the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, known as the SUPPORT for Patients and Communities Act.[84] The purpose of the SUPPORT Act is to "provide for opioid use disorder prevention, recovery, and treatment."[85] It is important to note that this was not criminal justice legislation. Instead, the Act directs funding to federal agencies and states in order to support increased addiction treatment and to set policies in place to screen for and prevent the abuse of prescription opioids.[86] Likewise, government agencies have taken a treatment approach to the opioid epidemic. The Health Resources and Services Administration (HRSA), an agency of the U.S. Department of Health and Human Services, has awarded over $396 million to address the opioid crisis.[87] The purpose of the grants is to "enable HRSA-funded community health centers, academic institutions, and rural organizations to expand access to integrated substance use disorder and mental health services."[88] Under an initiative called the Rural Communities Opioid Response Program-Planning, HRSA has given $19 million in grants to organizations that "develop plans to implement evidence-based opioid use disorder prevention, treatment, and recovery interventions designed to reduce opioid overdoses among rural populations at the highest risk for substance use disorders."[89] The HRSA website does not indicate any such investments in inner cities or funding related to combatting cocaine use.

The HRSA also hosts the Addressing Opioid Use Disorder in Pregnant Women & New Moms Challenge.[90] The goal of the prize competition is "to support tech innovations to improve access to quality health care, including substance use disorder treatment, recovery, and support services

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84. Marianna Sotomayor, *Trump Signs Sweeping Opioid Bill with Vow to End 'Scourge' of Drug Addiction*, NBC NEWS (Oct. 24, 2018), https://www.nbcnews.com/politics/congress/trump-signs-sweeping-opioid-bill-vow-end-scourge-drug-addiction-n923976 [https://perma.cc/8KQQ-66T8].

85. Pub. L. No. 115-271, 132 Stat. 3894 (2018).

86. *See* Jennifer M. Lohse & Brad Lerner, *SUPPORT Act: Highlights of the 2018 Opioid Legislation*, AM. HEALTH LAW. ASS'N (Oct. 15, 2018), https://www.healthlawyers.org/Members/PracticeGroups/TaskForces/BH/alerts/Pages/SUPPORT_Act_Highlights_of_the_2018_Opioid_Legislation.aspx [https://perma.cc/22F7-X294] (explaining the various aspects of the Act); Kevin B. O'Reilly, *10 Ways the New Opioids Law Could Help Address the Epidemic*, AM. MED. ASS'N (Oct. 24, 2018), https://www.ama-assn.org/delivering-care/opioids/10-ways-new-opioids-law-could-help-address-epidemic [https://perma.cc/8XKN-SL7G].

87. *FY18 HRSA Opioids Fundings*, HEALTH RESOURCES & SERVS. ADMIN., https://www.hrsa.gov/opioids/HRSA-fy18-awards.html [https://perma.cc/F5AN-EE64] (last visited Mar. 30, 2019).

88. *Id.*

89. *Id.*

90. *Id*.

for pregnant women with opioid use disorders, their infants, and families, especially those in rural and geographically isolated areas."[91] This concern for the welfare of the pregnant, opioid-addicted mother is a far cry from the characterization of the irresponsible, Black crack mother who was committing a crime against her ill-fated, Black crack baby.[92] Clearly, the messaging about the illegal use of drugs has changed dramatically. What has not changed significantly, however, is the sentencing of drug offenders.

IV. RECONCEPTUALIZING DRUG SENTENCING

Even as the discourse about drug addiction has changed from one focusing on annihilating a drug enemy to one focused on the recovery of victims, the mandatory minimum sentences applicable to drug offenses remain largely unchanged since the Anti-Drug Abuse Act of 1986. The most recent criminal justice reform, the First Step Act, has been hailed as legislation that will bring "the most significant changes to the criminal justice system in a generation."[93] Congress passed it in 2018, while the nation was still reeling from the hundreds of thousands of deaths caused by opioid abuse. The Act does a number of things, including, but not limited to the following:

- Increasing good time credit earning from forty-seven days per year to fifty-four;
- Requiring the Bureau of Prisons to examine its capabilities in creating evidence-based recidivism reduction programs; and
- Allowing participation in those programs to lead to incentives such as prerelease custody in a halfway house, increased visitation opportunities, email access, commissary funds, etc.[94]

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91. *Id*.

92. For more information on how the crack baby problem was a myth, see Michael Winerip, *Revisiting the 'Crack Babies' Epidemic That Was Not*, N.Y. TIMES: RETRO REPORT (May 20, 2013), https://www.nytimes.com/2013/05/20/booming/revisiting-the-crack-babies-epidemic-that-was-not.html [https://perma.cc/2UMW-W2EC] ("[L]imited scientific studies in the 1980s led to predictions that a generation of children would be damaged for life. Those predictions turned out to be wrong. This supposed epidemic—one television reporter talks of a 500 percent increase in damaged babies—was kicked off by a study of just 23 infants that the lead researcher now says was blown out of proportion. And the shocking symptoms—like tremors and low birth weight—are not particular to cocaine-exposed babies, pediatric researchers say; they can be seen in many premature newborns.").

93. Nicholas Fandos & Maggie Haberman, *Trump Embraces a Path to Revise U.S. Sentencing and Prison Laws*, N.Y. TIMES (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/us/politics/prison-sentencing-trump.html [https://perma.cc/R8AT-MT7P].

94. *Frequently Asked Questions on the First Step Act, S. 756*, FAMM, https://famm.org/wp-

Therefore, under the Act, certain populations of federal prisoners will qualify for release sooner than they would have otherwise. Additionally, for another limited number of inmates, life in prison will be made more palatable in exchange for the inmates becoming "less dangerous" through the recidivism reduction programs. Though these are welcomed changes, the First Step Act has been criticized for not truly being sweeping criminal justice reform.[95] A main point of contention for critics is that it does not "eliminate mandatory minimums, restore judicial discretion, reduce the national prison population, and mitigate disparate impacts on communities of color."[96] Though the First Step Act makes the Fair Sentencing Act of 2010 retroactive—meaning that it will apply the newer 18-1 powder cocaine to crack cocaine ratio to inmates serving sentences under the older 100-1 ratio—it will only affect approximately 2600 federal inmates, and petitions for release are still subject to judicial discretion.[97] Ultimately, though the purported focus during the opioid crisis is treatment and welfare, sentencing is still being used as a weapon disproportionately fired at Black offenders. The momentum of the opioid crisis gives legislators and criminal justice advocates the opportunity to move away from a warfare model of sentencing.

Leaving behind a warfare model of drug sentencing means acknowledging the failure of sentencing as a weapon in the War on Drugs. The mandatory minimum sentences of the '80s did not reduce the use of crack cocaine, though that was the target of the harsh sentencing scheme. According to reports from the National Household Survey on Drug Abuse (NHSDA),[98] from 1988–1992, "there was no change in the monthly use of crack."[99] When we focus on cocaine use generally, rather than solely crack

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content/uploads/First-Step-Act-FAQs.pdf [https://perma.cc/5NGS-JU8D].

95. *See, e.g.*, Chrysse Haynes, *The First Step Act—A Pros and Cons List*, EQUAL JUST. UNDER L. (Aug. 30, 2018), https://equaljusticeunderlaw.org/thejusticereport/2018/8/21/the-first-step-act-a-pros-and-cons-list [https://perma.cc/N97A-SPXN]; letter from Opponents of the First Step Act to Members of the House Judiciary Committee (May 8, 2018), http://civilrightsdocs.info/pdf/policy/letters/2018/not-retroactive-Sign-On-Letter-Oppose-First%20Step%20Act-5.8.18-FINAL.pdf [https://perma.cc/9QLV-5W3U].

96. Lydia Wheeler, *House Judiciary Delays Markup of Prison Reform Bill*, THE HILL (Apr. 25, 2018), https://thehill.com/regulation/384918-house-judiciary-delays-markup-of-prison-reform-bill [https://perma.cc/BL7W-9ZWT].

97. Justin George, *What's Really in the First Step Act?*, MARSHALL PROJECT (Nov. 16, 2018), https://www.themarshallproject.org/2018/11/16/what-s-really-in-the-first-step-act [https://perma.cc/DV8K-TCQR].

98. In 2002, the NHSDA was renamed the National Survey on Drug Use and Health. *National Survey on Drug Use and Health*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/data/data-we-collect/nsduh-national-survey-drug-use-and-health [https://perma.cc/JLV2-LDBF] (last visited Mar. 31, 2019).

99. *See* 1995 REPORT, *supra* note 38, at 32.

cocaine, while it is true that cocaine use in the United States has declined since the consumption levels seen in the 1980s and 1990s,[100] it is unlikely that this reduction had anything to do with sentencing law. Most of this decrease in cocaine use has happened since 2006 and has been attributed to "a severe cocaine shortage, reflected in rapidly falling purity levels and a consequent rise in the cost per unit of pure cocaine, doubling over the 2006–2009 period."[101] This decline seems to have little to nothing to do with penalties for cocaine offenses. Instead, the United Nations Office on Drugs and Crime reports that "in 2007, five of the 20 largest individual cocaine seizures ever made were recorded," causing large-scale disruption to the cocaine supply.[102] Yet we continue to operate with the 1986 drug sentencing model based on mandatory minimum sentencing laws.

Abandoning a warfare model of drug sentencing also means admitting that using sentencing as a weapon can and has been abused. The purported purpose of the sentencing scheme adopted in the Anti-Drug Abuse Act of 1986 was to target major drug trafficking. However, the U.S. Sentencing Commission has reported that low-level crack offenses represent more than sixty percent of federal crack defendants, and the harsh crack cocaine penalties "apply most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility."[103] Because of the misuse of the sentencing weapon:

> African American drug defendants have a 20 percent greater chance of being sentenced to prison than white drug defendants. Between 1994 and 2003, the average time served by African Americans for drug offenses increased by 62 percent, compared to an increase of 17 percent for white drug offenders. Moreover, African Americans now serve virtually as much time in prison for a drug offense (58.7 months) as

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100. UNITED NATIONS OFFICE ON DRUGS & CRIME, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT 90 fig. 82 (2010) [hereinafter GLOBALIZATION OF CRIME], http://www.unodc.org/res/cld/bibliography/the-globalization-of-crime-a-transnational-organized-crime-threat-assessment_html/TOCTA_Report_2010_low_res.pdf [https://perma.cc/L9QJ-G3NZ] (graphing the decrease in U.S. cocaine consumption from 1988–2008). *See also* Beau Kilmer & Greg Midgette, Opinion, *Mixed Messages: Is Cocaine Consumption in the U.S. Going Up or Down?*, BROOKINGS INST. (Apr. 28, 2017), https://www.brookings.edu/opinions/mixed-messages-is-cocaine-consumption-in-the-u-s-going-up-or-down/ [https://perma.cc/P5QC-BRDK] (evaluating the effectiveness of cocaine use measures from 2005 to 2015).

101. GLOBALIZATION OF CRIME, *supra* note 100, at 86. This supply decline was also given as a reason for declined cocaine use in the United States. NAT'L DRUG INTELLIGENCE CTR., DEP'T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 2011, at 24 (2011), http://www.justice.gov/archive/ndic/pubs44/44849/44849p.pdf [https://perma.cc/K39M-ZXDF].

102. GLOBALIZATION OF CRIME, *supra* note 100, at 86.

103. 2002 REPORT, *supra* note 45, at 99–100.

whites do for a violent offense (61.7 months).[104]

A shift to a welfare model of sentencing is imperative to rectify this injustice. The first step in moving from a warfare to a welfare model of sentencing is to repeal the mandatory minimum drug sentencing laws. The only purpose of those laws is to serve as weapons in the War on Drugs. Only then can we begin crafting a welfare model of sentencing that will embrace the rehabilitative purpose of the opioid epidemic discourse of the day. Under a welfare model of drug sentencing, we can redirect funding to challenge agencies and organizations to partner with the criminal justice system in order to think of ways to address the underlying social issues faced by all drug offenders. This approach more closely aligns with the welfare approach the Department of Health and Human Services (HHS) and respected medical experts have taken in response to the opioid crisis. These agencies have taken such an approach because they recognize that eradicating drug abuse requires a comprehensive plan that requires better data and better research.[105] The same can be said for drug sentencing. Rather than relying on incarceration and mandatory minimum sentencing as our main criminal justice responses to drug offenses, meaningful sentencing reform requires better data and better research on how (or if) punishment can actually be used to curb drug abuse. Only by reconceptualizing the role of sentencing in this way can we begin to seriously address the issues of drug abuse in this country.

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104. THE SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING 5 (2010) (citations omitted), https://www.sentencingproject.org/wp-content/uploads/2016/01/Federal-Crack-Cocaine-Sentencing.pdf [https://perma.cc/3DXV-WAU8].

105. The Department of Health and Human services "has developed a five-point comprehensive strategy: (1) better data, (2) better pain treatment, (3) more addiction prevention, treatment, and recovery services, (4) more overdose reversers, and (5) better research." *CDC's Work to Prevent Opioid Overdose Deaths: HHS Efforts*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/index.html [https://perma.cc/6K3H-ERG3] (last visited Feb. 4, 2019).

RECONSTRUCTION SENTENCING: REIMAGINING DRUG SENTENCING IN THE AFTERMATH OF THE WAR ON DRUGS

Jelani Jefferson Exum*

INTRODUCTION

The year is 2020, and the world has been consumed by a viral pandemic, social unrest, increased political activism, and a history-changing presidential election. In this moment, anti-racism rhetoric has been adopted by many, with individuals and institutions pledging themselves to the work of dismantling systemic racism.[1] If we are going to be true to that mission, then addressing the carnage of the failed War on Drugs has to be among the top priorities. The forty years of treating drug law offenders as enemies of society have left us with decimated communities and have perpetuated a biased view of individuals in those communities. Of course, the

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1. For an example of the discourse concerning dismantling systemic racism that was sparked in June 2020, see N'Dea Yancy-Bragg, *What is Systemic Racism? Here's What It Means and How You Can Help Dismantle It*, USA TODAY (June 15, 2020, 9:33 AM), https://www.usatoday.com/story/news/nation/2020/06/15/systemic-racism-what-does-mean/5343549002/.

bulk of the devastation waged by the War has been borne by Black[2] and brown families. To begin the work of repairing the damage caused by overly punitive and racially disproportionate drug law enforcement, we must make commitments to actually end the War. Moreover, we must commit to reinterpret our Constitution to protect those who suffered most from Wartime policies and those who are most vulnerable to post-War retaliation. Dr. Henry Louis Gates, Jr. has written that "few American historical periods are more relevant to understanding our contemporary racial politics than Reconstruction."[3] This Article argues that Reconstruction's modern relevance goes beyond politics and is especially applicable to the criminal sentencing context where law and policy have been used to perpetuate racialized oppression. With that in mind, this Article uses the promise and pitfalls of the Reconstruction Era as a model for reimagining drug sentencing in the aftermath of the War on Drugs.

The War on Drugs officially began in 1971 when President Nixon targeted drug abuse as "public enemy number one."[4] The goal of the war rhetoric was clear: identify drug abuse and the drug offender as dangerous foes to the law-abiding public and mandate military-like tactics to contain and defeat them. Criminal sentencing would come to be the weapon of choice used in this urgent combat. As a part of the war efforts, the Anti-Drug Abuse Act of 1986 was passed under President Reagan, establishing a weight-based, highly-punitive, mandatory-minimum sentencing approach to drug offenses that has persisted in some form for the last four decades.[5] When the Act was passed, crack cocaine[6] was publicized as the greatest drug threat, and crack cocaine offenders—the vast majority of whom

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2. I have chosen to capitalize Black when used to refer to African Americans in any manner throughout this Article. Using the lowercase "black" treats it like an adjective describing a color. Black people are rarely black, and I believe that using the lowercase "black" as an adjective acknowledges that a descriptor was attached to African people by white colonists in order to justify their dehumanizing treatment of those Africans. Capitalizing Black elevates it beyond a mere color adjective that was originally meant to demean and embraces it as a descriptor of shared history, culture, and struggle. This approach has also now been adopted by AP editors. *See Explaining AP Style on Black and White* (July 20, 2020), available at: https://apnews.com/article/9105661462. For a discussion of capitalizing Black, see Merrill Perlman, *Black and White: Why Capitalization Matters*, COLUM. JOURNALISM REV. (June 23, 2015), https://www.cjr.org/analysis/language_corner_1.php; Barrett Holmes Pitner, *The Discussion on Capitalizing 'B' in 'Black' Continues*, HUFFPOST (Nov. 4, 2014, 7:12 PM), https://www.huffpost.com/entry/thediscussion-on-capitalizing-the-b-in-black-continues_b_6194626. For an explanation of the growing trend among editors to capitalize Black, see Shirley Carswell, *Why News Organizations' Move to Capitalize 'Black' is a Win*, WASH. POST (June 30, 2020, 9:07 AM), https://www.washingtonpost.com/opinions/2020/06/30/why-news-organizations-move-capitalize-black-is-win/.

3. HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW 5 (2019).

4. I explain more about this in my previous article, *From Warfare to Welfare: Reconceptualizing Drug Sentencing During the Opioid Crisis*, 67 U. KAN. L. REV. 941 (2019); *see also Timeline: America's War on Drugs*, NAT'L PUB. RADIO (April 2, 2017), https://www.npr.org/templates/story/story.php?storyId=9252490.

5. Anti-Drug Abuse Act of 1986, § 1002, Pub. L. No. 99-570, 100 Stat. 3207, 3207-2 to -4 (codified as amended at 21 U.S.C. § 841).

6. "'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride [powder cocaine] and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." U.S. SENT'G COMM'N, U.S. SENT'G GUIDELINES MANUAL, § 2D1.1(c) n.D (2018) [hereinafter SENT'G GUIDELINES].

were Black—were subjected to the heaviest mandatory minimum penalties.[7] Like any war, the consequences of the War on Drugs has had widespread casualties, including (but not limited to) the destruction of many communities, families, and individuals; the increase in racial disparities in punishment; and a fiscal disaster in penal systems across the country.[8] What the War on Drugs has failed to do is eradicate drug abuse in the United States.[9] It is time to move on from this failed War. This Article imagines an America in which the War on Drugs has officially ended and introduces the idea of a "Reconstruction Sentencing" model in which we heal from the devastating effects of the drug war through intentional reinterpretation of key constitutional provisions. During the aftermath of the War, reconstruction sentencing necessitates an understanding that drug crime is undeterred by incarceration. Reconstructing our approach to drug sentencing requires identifying the goals of drug sentencing and developing multifaceted approaches to address and eradicate the underlying sources of the drug problem. When this is done, we may find that more appropriate purposes of punishment—rehabilitation and retribution—compel us to think beyond incarceration and move us away from viewing mandatory minimum sentences as ever appropriate.

This Article proceeds in four parts. Part I explores the need for Reconstruction following the Civil War and compares that period to the usefulness of a Reconstruction model for a post-Drug War period. The causes and casualties of the War on Drugs are explained in Part II, with a focus on how the War has disproportionately targeted Black communities. Part III then discusses how a reinvigoration of constitutional protections, namely those found in the Thirteenth Amendment, can and should be used to end the War on Drugs and rectify the damage that the War has caused over the past four decades. In Part IV the Article introduces ways in which this Reconstruction approach can lean on other constitutional amendments to reach similar restorative ends.

I. THE NEED FOR RECONSTRUCTION: THEN AND NOW

When the Civil War ended in 1865, the United States faced the readmission of Southern states from the Confederacy as well as the integration of four million formerly enslaved people into the United States. This "Reconstruction Era" was not a seamless transition period. It began with the passage of the Emancipation Proclamation and the adoption of the Thirteenth Amendment to officially end

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7. *See* AM. CIV. LIBERTIES UNION, WRITTEN SUBMISSION OF THE AMERICAN CIVIL LIBERTIES UNION ON RACIAL DISPARITIES IN SENTENCING 5 (2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

8. *See, e.g.*, Eric L. Jensen, Jurg Gerber & Clayton Mosher, *Social Consequences of the War on Drugs: The Legacy of Failed Policy*, 15 CRIM. JUST. POL'Y REV. 100 (2004) (discussing the repercussions of the War on Drugs and the resulting increased rates of incarceration).

9. For a discussion of the failed War on Drugs, see Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs,* CATO INSTITUTE (Apr. 12, 2017), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-811-updated.pdf.

slavery in the United States. However, this advancement was met with resistance from the former Confederate states. At the beginning of this post-war period, during President Andrew Johnson's administration, Southern state legislatures passed Black Codes to maintain white supremacy and to continue their pre-war control of Black people's labor and behavior.[10] Under Johnson's Reconstruction policies, the former Confederate states were required to uphold the abolition of slavery, swear loyalty to the Union, and pay off their war debt.[11] However, Johnson was a strong believer in state's rights.[12] Therefore, beyond those few Reconstruction requirements, the states were given the freedom to rebuild their own governments as they saw fit. This meant that Black Codes, designed to continue the legacy of slavery, were able to thrive in the South.[13] The Southern states' deliberate circumvention of Black people's emancipation prompted the later Radical Reconstruction period that resulted in the United States' adopting the Fourteenth Amendment—extending due process and equal protection rights—and the Fifteenth Amendment—protecting against race-based disenfranchisement.[14]

There are many similarities between the early Reconstruction period and today's criminal justice reform movement. The end of the Civil War was hailed as an anti-slavery moment that "inspired a collective sense of optimism among formerly enslaved African Americans"[15] and "a millennial sense of living at the dawn of a

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10. As succinctly explained by the Editors of Encyclopedia Britannica:

> The black codes enacted immediately after the American Civil War, though varying from state to state, were all intended to secure a steady supply of cheap [labor], and all continued to assume the inferiority of the freed slaves. There were vagrancy laws that declared a black person to be vagrant if unemployed and without permanent residence; a person so defined could be arrested, fined, and bound out for a term of [labor] if unable to pay the fine. . .
>
> Apprentice laws provided for the "hiring out" of orphans and other young dependents to whites, who often turned out to be their former owners. Some states limited the type of property African Americans could own, and in other states black people were excluded from certain businesses or from the skilled trades. Former slaves were forbidden to carry firearms or to testify in court, except in cases concerning other blacks. Legal marriage between African Americans was provided for, but interracial marriage was prohibited.

Black Code, ENCYCLOPEDIA BRITANNICA (Aug. 20, 2019), https://www.britannica.com/topic/black-code.

11. *Black Codes*, HISTORY.COM (Jan. 21, 2021), https://www.history.com/topics/black-history/black-codes.

12. Elizabeth R. Varon, *Andrew Johnson: Life in Brief*, MILLER CENTER, https://millercenter.org/president/johnson/life-in-brief (last visited Mar. 16, 2021).

13. *Black Code*, *supra* note 10.

14. The editors of Encyclopedia Britannica explain:

> Radical Reconstruction, also called Congressional Reconstruction, process and period of Reconstruction during which the Radical Republicans in the U.S. Congress seized control of Reconstruction from Pres. Andrew Johnson and passed the Reconstruction Acts of 1867–68, which sent federal troops to the South to oversee the establishment of state governments that were more democratic. Congress also enacted legislation and amended the Constitution to guarantee the civil rights of freedmen and African Americans in general.

Radical Reconstruction, ENCYCLOPEDIA BRITANNICA, (Jun. 23, 2020), https://www.britannica.com/topic/Radical-Reconstruction.

15. GATES, *supra* note 3, at 2.

new era."[16] At the same time that freedom was being hailed, the so-called New South was actually repackaging white supremacy into the Black Codes as a system of "neo-enslavement" on recently freed Blacks.[17] Similarly, today, we have seen criminal justice reforms that inspire excitement among some and, at least in rhetoric, acknowledge that our country's drug issues cannot be fought through the criminal justice system. However, there still has not been any official declaration of the end of the War on Drugs.[18] The reality of what is happening today is quite reminiscent of the emergence of the Black Codes in the 1860s. At the same time that criminal justice reforms seem to be moving away from a punitive-only model of addressing the American drug problem,[19] the tools of the drug war—punitive mandatory minimum drug sentencing—have not been significantly altered, and in some cases, have even been used with increased intensity.[20]

The answer to Southern defiance during the age of Reconstruction was for Congress to step in with Military Reconstruction Acts[21] and the introduction of the Fourteenth and Fifteenth Amendments. That period of Congressional Reconstruction—also called Radical Reconstruction—required the same type of constitutional rebirth that is necessary today to dismantle the War on Drugs and repair the damage of that war. As Dr. Henry Louis Gates, Jr. explains, Reconstruction had the dual tasks of "readmitting the conquered Confederate states to the Union and of granting freedom, citizenship", and other rights to African Americans.[22] But more fundamentally, he further expounds:

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16. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 281 (Harper & Row 1988).

17. GATES, *supra* note 3, at 4.

18. For an account of recent drug law reforms, see *Drug Law Reform*, NACDL, https://www.nacdl.org/Landing/DrugLaw. For a discussion on the changed warfare rhetoric, see Exum, *supra* note 4.

19. This can be seen in the treatment of the opioid crisis as a public health emergency, requiring medical, rather than simply criminal justice, interventions. *See, e.g.*, *CDC's Response to the Opioid Overdose Epidemic*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/opioids/strategy.html (last accessed Mar. 16, 2021).

20. *See, e.g.*, Leslie Scott, *Federal Prosecutorial Overreach in The Age of Opioids: The Statutory and Constitutional Case Against Duplicitous Drug Indictments*, 51 U. TOL. L. R. 491 (2020) (explaining and criticizing the recent prosecutorial tactic of aggregating small opioid sales by addicts in order to trigger harsher mandatory minimum penalties meant for serious drug traffickers).

21. The Military Reconstruction Acts of 1867 divided the South into five military districts, each under the command of a Northern General. Further, the Acts outlined how the new governments would be designed, requiring new state delegates and constitutions in order to provide for equal rights for Black Americans. The Acts required any state seeking readmission to the Union to ratify the Fourteenth Amendment. Additionally, the Act granted the right to vote to African American men, but disenfranchised former Confederates. *See Reconstruction*, U.S. HISTORY, https://www.ushistory.org/us/35.asp (last accessed Mar. 16, 2021); *see also The History Engine: The First Reconstruction Act Is Passed*, UNIV. RICHMOND DIGIT. SCHOLARSHIP LAB, https://historyengine.richmond.edu/episodes/view/1431 (last accessed Mar. 16, 2021). For a detailed study of this time period, see EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR (3rd Ed. 2017), https://lynchinginamerica.eji.org/report.

22. GATES, *supra* note 3, at 7.

> Reconstruction, in this sense, meant *repairing* what the war had broken apart while simultaneously attempting to *uproot* the old slave system and the ideology underpinning it that had rationalized the process of making property of men a "black and white" issue.[23]

The same type of repairing and uprooting is required if we are to meaningfully move away from the War on Drugs. Our approach to sentencing law, and constitutional challenges to those laws, must both repair the damage done by the War on Drugs, but also uproot the very system that relies on a wartime ideology of seeing the drug offender, who is often viewed as a Black man, as the enemy.

In many ways, Reconstruction was a glorious time for Black involvement in American political life. Black men were elected to office at every level of government, including two U.S. senators, twenty congressmen, and an estimated two thousand additional Black office holders at the state and local levels.[24] But Reconstruction was a woefully short-lived ten years,[25] followed by 100 years of legally sanctioned Jim Crow segregation. During that time, the very Reconstruction Amendments that were hailed as ringing in a new era of Black freedom were interpreted by the Supreme Court as being unable to do more than maintain a surface level of white supremacy-styled legal equality.[26] Therefore, while the promise of Reconstruction can be a lesson for reinvigorating constitutional sentencing arguments in order to end the War on Drugs, the pitfalls of Reconstruction are instructional as well. In order to move away from the War on Drugs in a way that creates true systemic change, constitutional provisions must be reinterpreted to eradicate the effects of racism within drug sentencing as well. In the Parts that follow, this Article will further discuss the underlying racism and disparate racial effects of the War on Drugs and highlight the ways in which reinvigorated constitutional arguments can reconstruct sentencing to truly bring an end to the War on Drugs.

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23. *Id*. (emphasis added).

24. *Id*. at 8.

25. It is important to note, however, that even during this era of unprecedented political involvement by Black men, Black people continued to suffer from horrendous violence from whites in order to quash political and social gains and to maintain the existing racial hierarchy. The Equal Justice Initiative has reported that during Reconstruction "at least 2,000 Black women, men and children were victims of racial terror lynchings." EQUAL JUSTICE INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876 (2020), https://eji.org/report/reconstruction-in-america.

26. *Plessy v. Ferguson*, 136 U.S. 537 (1896), is a clear example of the Supreme Court failing the Reconstruction Amendments. In *Plessy*, the Court refused to find that Louisiana law requiring racially segregated railway cars violated Fourteenth Amendment's Equal Protection Clause. *Id.* at 544. According to the Court, the Fourteenth Amendment was meant to provide absolute equality of the races under the law, but "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races." *Id*. The Supreme Court interpreted the Fourteenth Amendment to allow for the continued racial segregation that would be the hallmark of the Jim Crow era's subjugation and stigmatization of Blacks. In Section III.A of this Article, I discuss how, in *Plessy*, the Supreme Court also fails the promises of Reconstruction in its interpretation of the Thirteenth Amendment as well.

II. UNDERSTANDING THE WAR ON DRUGS: THE WEAPONS, THE TACTICS, AND THE CASUALTIES

Before turning to the discussion of the constitutional reinvigoration needed to reconstruct sentencing, it is important to understand the impact and context of the War on Drugs. The War on Drugs gained momentum by feeding on the country's racial prejudices. As Professor Michelle Alexander explains in her influential book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, "By 1968, 81 percent of those responding to the Gallup Poll agreed with the statement that 'law and order has broken down in this country,' and the majority blamed 'Negroes who start riots' and 'Communists.'"[27] President Nixon's domestic policy advisor, John Ehrlichman, reportedly admitted that "[t]he Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and [B]lack people."[28] According to accounts of a 1994 Ehrlichman interview,[29] Ehrlichman described the racist strategy in this way:

> You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or Black, but by getting the public to associate the hippies with marijuana and Blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.[30]

This revelation shows that the War on Drugs was a political strategy rooted in centuries old prejudices against Blacks. Though there were concerns about drug use at the time, there was no evidence that African Americans were a driving force behind the country's increased drug use. In fact, in a 1969 Gallup poll, forty-eight percent of Americans said that drug use was a serious problem in their own

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27. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 46 (The New Press 2011).

28. Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG (Apr. 2016), https://harpers.org/archive/2016/04/legalize-it-all/.

29. Ehrlichman reportedly gave these statements to reporter Dan Baum in a 1994 interview. *Id.* Baum did not publish these remarks until 2012 and again in 2016 in Harper's Magazine. Dan Baum, *Truth, Lies, and Audiotape*, *in* THE MOMENT: WILD, POIGNANT, LIFE-CHANGING STORIES FROM 125 WRITERS AND ARTISTS FAMOUS & OBSCURE 174, 175 (Larry Smith ed., 2012). Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016, 3:14 PM), https://www.cnn.com/2016/03/23/politics/john-ehrlichman-richard-nixon-drug-war-blacks-hippie/index.html. Ehrlichman died in 1999. Ehrlichman's children dispute the quote. Likewise, three of Ehrlichman's former colleagues questioned whether Ehrlichman made the statement, and, if he did, contended that he made it sarcastically. They also stated the war on drugs' impetus was not based on race. *See* Hilary Hanson, *Nixon Aides Suggest Colleague Was Kidding About Drug War Being Designed to Target Black People*, HUFFPOST (Mar. 25, 2016, 5:32 PM), https://www.huffingtonpost.com/entry/richard-nixon-drug-war-john-ehrlichman_us_56f58be6e4b0a3721819ec61.

30. Baum, *supra* note 28.

community.[31] But when the war was picked up by President Reagan, the intended disparate racial devastation was realized. Punitive drug sentencing was the weapon used in the War on Drugs, but the war required tactical enforcement efforts in order to attack the perceived enemy. And, unsurprisingly, Black Americans would bear the brunt of that enforcement.[32]

In the 1980s, President Reagan created a multi-agency federal drug task force and increased anti-drug enforcement spending from $645 million in fiscal year 1981 to over $4 billion in fiscal year 1987.[33] His tactics were described this way:

> [T]he Administration acted aggressively, mobilizing an impressive array of federal bureaucracies and resources in a coordinated—although futile—attack on the supply of illegal drugs, principally cocaine, marijuana, and heroin. The Administration hired hundreds of drug agents and cut through bureaucratic rivalries like no Administration before it. It acted to streamline operations and force more cooperation among enforcement agencies. It placed the FBI in charge of the Drug Enforcement Administration (DEA) and gave it major drug enforcement responsibility for the first time in history. And, as the centerpiece of its prosecutorial strategy, it fielded a network of Organized Crime Drug Enforcement Task Forces in thirteen "core" cities across the nation.[34]

Reagan gathered his massive troops and sent them out into the field: American cities. To support his deployed troops, President Reagan needed the law on his side. He called for a "legislative offensive designed to win approval of reforms" of laws regarding bail, sentencing, criminal forfeiture, and the exclusionary rule, among others.[35]

The President was successful in gaining support for his efforts. In 1981, members of Congress proposed over 100 bills to alter some aspect of the criminal justice system, with "more than three-fourths specifically propos[ing] harsher treatment for drug offenses or drug offenders" and many others calling for harsher sentences for drug traffickers.[36] There were also bills that proposed the elimination of the exclusionary rule for Fourth Amendment violations and others adopting a

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31. Jennifer Robison, *Decades of Drug Use: Data from the '60s and '70s*, GALLUP (July 2, 2002), https://news.gallup.com/poll/6331/decades-drug-use-data-from-60s-70s.aspx.

32. For a discussion of how the racially disparate impact of the War on Drugs, see Jelani Jefferson Exum, *Forget Sentencing Equality: Moving From the "Cracked" Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95, 105–10 (2014).

33. Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 894 (1987); DRUG ABUSE POLICY OFFICE, FEDERAL STRATEGY FOR PREVENTION OF DRUG ABUSE AND DRUG TRAFFICKING 74 (1982).

34. *Id*. at 892 (internal citations omitted) (1982); Leslie Maitland, *President Gives Plan to Combat Drug Networks*, N.Y. TIMES, Oct. 15, 1982, § A, at 1, col. 2; *see also* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, THE BORDER WAR ON DRUGS 33–39 (1987) (explaining the structure of drug enforcement agencies in the U.S. in the 1980s); ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCES: GOALS AND OBJECTIVES, 11 DRUG ENFORCEMENT 7 (1984).

35. President's Radio Address to the Nation, 18 WEEKLY COMP. PRES. DOC. 1249, 1249 (Oct. 2, 1982); Wisotsky, supra note 33, at 890.

36. Wisotsky, *supra* note 33, at 897.

good faith exception to the Fourth Amendment warrant requirement.[37] The stated goals of these proposals were to "significantly increas[e] the risk of conviction and certainty of long prison sentences."[38] The energy of the moment finally found a home in the Comprehensive Crime Control Act of 1984, which has been described "as an historic rollback of the rights of those accused of crime."[39] That Act authorized the use of pretrial detention, restricted post-conviction bail, and enhanced criminal forfeiture authority, among other changes.[40] In authorizing pretrial detention, the Act included a rebuttable presumption of a defendant's dangerousness upon a judicial finding of "probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act."[41]

Pretrial detention is hugely consequential. An increasing number of studies have exposed how the inability to make bail and the experience and impact of pretrial detention produce more guilty pleas, higher rates of conviction, and harsher sentencing outcomes.[42] And, of course, this phenomenon plays out to the detriment of Black people in the criminal justice system. For example, findings from a 2018 empirical study undertaken by sociologists Ellen Donnelly and John MacDonald, which focused specifically on data from Delaware, showed that "[p]retrial conditions contribute to 43.5% of explainable Black-White disparity in convictions and 37.2% of the disparity in guilty pleas."[43] According to the study, the criminal processing stages "explain nearly 30% of the Black-White disparity in the decision to sentence a defendant to any period of incarceration."[44] Further, the study demonstrated that pretrial treatment of a defendant explained "under a quarter of the disparity in average incarceration sentence length."[45] Ultimately, the study concluded that "pretrial decisions appear to be an important source of Black-White disparities in court processing and Blacks being overrepresented in the jail and prison population in Delaware."[46] Racial disparities like these play out across the country.[47]

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37. H.R. 4259, 97th Cong. (1981); S. 751, 97th Cong. (1981).

38. *Sentencing Practices and Alternatives in Narcotics Cases: Hearings Before the H. Select Comm. on Narcotics Abuse & Control*, 97th Cong. 3 (1981) (statement of Rep. Edward Beard).

39. Wisotsky, *supra* note 33, at 898. The Controlled Substances Act is codified at 21 U.S.C. §§ 801–971.

40. For a fuller discussion of the CCCA, see Wisotsky, *supra* note 33, at 898–903.

41. 18 U.S.C. § 3142(e).

42. Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence From Randomly Assigned Judges*, 108 AM. ECON. REV. 2, 212–14 (2018); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 724–28, 736 (2017); Meghan Sacks & Alissa Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL'Y REV. 59, 62–63, 71 (2014).

43. Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 780 (2018).

44. *Id.* at 780–81.

45. *Id.* at 781.

46. *Id.*

47. Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

These racial disparities were made possible by the foundation laid in the Comprehensive Crime Control Act of 1984. By authorizing the use of reduced bail options and increasing pretrial detention opportunities to widen the net cast by War on Drug policies, the legal shield for discriminatory punishment was strengthened.

The wartime offensive escalated further in the Anti-Drug Abuse Act of 1986, which turned to sentencing as the preferred weapon. With extremely punitive mandatory minimums, including the infamous 100-to-one crack to powder cocaine ratio, the 1986 Act was poised to take down any drug offenders in its sights. Under this Act, an offense had to involve 100 times more powder cocaine for a defendant to receive the same sentence as defendants convicted of a crack cocaine offense.[48] Offenses involving five grams of cocaine base (commonly referred to as "crack") were treated as equivalent to those involving 500 grams of cocaine hydrochloride (commonly referred to as "powder cocaine"), triggering a five-year mandatory minimum sentence.[49] Likewise, 5,000 grams of powder cocaine were necessary to trigger the same ten-year mandatory minimum sentence that was triggered by fifty grams of crack.[50] The 100-to-one powder-to-crack cocaine sentencing ratio was incorporated into the Federal Sentencing Guidelines.[51] Though seemingly race-neutral, this War on Drugs sentencing scheme has given police, prosecutors, and judges the firepower to disproportionately arrest, charge, and imprison Black offenders.[52]

Though prosecutors levy charges and judges impose sentences, police officers were used to root out the perceived enemy. To support their efforts, police funding has increased significantly since the War on Drugs began. Between 1993 and 2008, state and local expenditures on police doubled, from $131 per capita to $260 per capita.[53] Actual police forces increased as well. The number of sworn officers in the United States increased by 26% between 1992 and 2008.[54] In certain cities this increase was even more dramatic. For instance, the number of patrol officers

48. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to -4 (1986) (codified as amended at 21 U.S.C. § 841). Pursuant to the resulting 21 U.S.C. § 841, a five-year mandatory minimum applied to any trafficking offense of five grams of crack or 500 grams of powder, 21 U.S.C. § 841(b)(1)(B)(ii)–(iii), and its ten-year mandatory minimum applied to any trafficking offense of fifty grams of crack or 5,000 grams of powder, § 841(b)(1)(A)(ii)–(iii). The 1986 Drug Act imposed the heavier penalty on "cocaine base" without specifying that to mean crack. However, in 1993, the Sentencing Commission clarified that "'[c]ocaine base,' for the purposes of this guideline, means 'crack.'" SENT'G GUIDELINES, *supra* note 6, app. C.

49. Anti-Drug Abuse Act § 1002.

50. *Id.*

51. *See* Kimbrough v. United States, 552 U.S. 85, 96–97 (2007).

52. *See infra* Section III.B.2.

53. Mona Lynch, *Theorizing the Role of the "War on Drugs" in US Punishment*, 16 THEORETICAL CRIMINOLOGY 175, 189 (2012).

54. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008 (2011).

in New York City increased by 47% between 1990 and 1997.[55] With more police on the streets across America, law enforcement had the support to weed out the enemy. And they did just that. The Bureau of Justice Statistics has reported that between 1982 and 2007, the number of arrests for drug possession tripled, from approximately 500,000 to 1.5 million.[56] Currently, drug arrests constitute the largest category of arrests in the United States.[57] Staying true to form, law enforcement strategies during the War on Drugs operated in a racially discriminatory manner. In 1976, Blacks constituted 22% of drug-related arrests.[58] However, by 1990 Blacks accounted for 40% of all drug-related arrests.[59] One scholar explains the philosophy behind race-based policing this way:

> The legislative and law enforcement responses to crack "cannot be attributed solely to objective levels of criminal danger, but [also reflect] the way in which minority behaviors are symbolically constructed and subjected to official social control." Law enforcement efforts against crack in poor minority neighborhoods reinforced control of the urban "underclass," a group deemed by the political and white majority to be particularly "dangerous, offensive and undesirable." The conflation of the underclass with crack offenders meant the perceived dangerousness of one increased the perceived threat of the other. Urban blacks, the population most burdened by concentrated socio-economic disadvantage, became the population at which the war on drugs was targeted.[60]

In other words, the War on Drugs' law enforcement efforts focused on poor, Black communities as a method of social control, as opposed to purely crime control.

This perception of the dangerous urban "underclass" (code for poor Black communities) that needed to be policed more aggressively and punished more often than not with the longest prison sentences is just the sort of continued control of Black bodies that was evident in the Black Codes that proliferated just after the end of the Civil War. The Black Codes were enforced "by a police apparatus and judicial system in which blacks enjoyed virtually no voice whatever. Whites

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55. Jennifer R. Wynn, *Can Zero Tolerance Last? Voices from Inside the Precinct*, *in* ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 111 (Andrea McArdle & Tanya Erzen eds., 2001).

56. *Drug and Crime Facts: Drug Law Violations,* BUREAU OF JUST. STAT. (Mar. 16, 2021), http://www.bjs.gov/content/dcf/enforce.cfm.

57. Lynch, *supra* note 53.

58. Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25.

59. *Id.*

60. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 265 (2009) (internal citations omitted) (citing Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, *in* ETHNICITY, CRIME, AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES 358, 361, 368 (Michael Tonry ed., 1997)); KATHARINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997) (arguing that wars on crime and drugs reflected efforts by politicians to mobilize a white electorate anxious over its declining status through the race-coded language of crime).

staffed urban police forces as well as State militias, intended, as a Mississippi white put it in 1865, to 'keep good order and discipline amongst the negro population.'"[61] The same suggestion that policing was needed to keep Blacks in line was perpetuated during the War on Drugs in the way that crack was touted as a Black problem.

The view that Black people have a propensity for criminal disorder was used to push back against Reconstruction and can similarly be seen in the War on Drugs rhetoric. In the 1994 Eastern District of Missouri case *United States v. Clary*, Judge Clyde Cahill explained the damaging racist discourse this way:

> Crack cocaine eased into the mainstream of the drug culture about 1985 and immediately absorbed the media's attention. Between 1985 and 1986, over 400 reports had been broadcast by the networks. Media accounts of crack-user horror stories appeared daily on every major channel and in every major newspaper. Many of the stories were racist. Despite the statistical data that whites were prevalent among crack users, rare was the interview with a young black person who had avoided drugs and the drug culture, and even rarer was any media association with whites and crack. Images of young black men daily saturated the screens of our televisions. These distorted images branded onto the public mind and the minds of legislators that young black men were *solely* responsible for the drug crisis in America. The media created a stereotype of a crack dealer as a young black male, unemployed, gang affiliated, gun toting, and a menace to society.[62]

As Judge Cahill's account reveals, the War on Drugs rhetoric stirred up and drew on fear of Black people in order to legitimize race-based policing. This is what Nixon had been counting on when he declared war in the first place. Reagan developed an administrative framework for carrying out that war, and Congress gave it legal force through punitive drug sentencing laws. Police and prosecutors now had a healthy storehouse of ammunition to use against Black communities. The racially disparate sentencing outcomes made possible by the Anti-Drug-Abuse Act of 1986 make the race-based destruction of the War on Drugs undeniable.

The racial sentencing disparities in the U.S. criminal justice system are well known at this point. Studies continue to demonstrate the differences between the sentences imposed on white versus non-white offenders, with Black male offenders receiving the brunt of sentencing severity.[63] In its 2014 written testimony to the Inter-American Commission on Human Rights, the American Civil Liberties Union ("ACLU") explained that "Black and Latino offenders sentenced in state and federal courts face significantly greater odds of incarceration than

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61. FONER, *supra* note 16, at 203.

62. 846 F. Supp. 768, 783 (E.D. Mo.) (citations omitted), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

63. *See, e.g.*, WILLIAM RHODES, RYAN KLING, JEREMY LUALLEN & CHRISTINA DYOUS, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., FEDERAL SENTENCING DISPARITY: 2005–2012 (2015), https://www.bjs.gov/content/pub/pdf/fsd0512.pdf (providing data on federal sentencing disparity).

similarly situated white offenders and receive longer sentences than their white counterparts in some jurisdictions."[64] Over-policing and severe punishment manifest in disproportionate incarceration. For example, in 2011, African-American males were six times more likely to be incarcerated than white males.[65] In a 2016 sentencing study, the Sentencing Project revealed that "African Americans are incarcerated in state prisons at a rate that is 5.1 times the imprisonment of whites."[66] Today, Blacks make up thirteen percent of the U.S. population, yet comprise thirty-eight percent of the U.S. prison population.[67] More than half of the prison population is African American in twelve states.[68] Incarceration is just one aspect of the consequences of the War on Drugs on Black communities.

There is a long list of the collateral consequences of incarceration. Drug convictions and subsequent incarceration lead to disenfranchisement, the loss of federal benefits, and reduced employment opportunities, to name a few.[69] There is ample evidence that children of incarcerated parents face emotional, mental, and physical health difficulties at a greater rate than other children.[70] The list of repercussions goes on and on, and Black children suffer the most.[71] This evidence is the reason why drug sentencing must be reconstructed to move away from the War on Drugs and towards a post-war approach: an approach that truly repairs the damage of the war and protects us from simply repackaging racism into another form. In other

64. AM. CIV. LIBERTIES UNION, *supra* note 7, at 1.

65. *See* ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., PRISONERS IN 2011 8 (2012), https://www.bjs.gov/content/pub/pdf/p11.pdf (providing graphs and data on incarceration statistics); *see also* THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING THE RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), https://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf (discussing the disproportional incarceration rates between African Americans and white males).

66. THE SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4 (2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnicdisparity-in-state-prisons/ (documenting the rates of incarceration of different races, identifying contributors to distributors, and providing recommendations for reform).

67. *Id*. at 4 ("The Bureau of Justice Statistics reports that 35% of state prisoners are white, 38% are black, and 21% are Hispanic.").

68. *Id*. at 3 ("Maryland, whose prison population is 72% African American, tops the nation.").

69. For an explanation of the numerous consequences of incarceration, see HUM. RTS. FOUND., THE COSTS AND CONSEQUENCES OF THE WAR ON DRUGS (2019), https://hrf.org/wp-content/uploads/2019/05/WoD_Online-version-FINAL.pdf; Eric L. Jensen, Jurg Gerber & Clayton Mosher, *Social Consequences of the War on Drugs: The Legacy of Failed Policy*, 15 CRIM. JUST. POL'Y REV. 100, 102 (2004).

70. For a review of the effects on children of having an incarcerated parent, see Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT. INST. JUST. J., May 2017, at 2–4, https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children. *See also* STEVE CHRISTIAN, NAT'L CONF. STATE LEGIS., CHILDREN OF INCARCERATED PARENTS (2009), https://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf (noting that "[p]arental incarceration can affect many aspects of a child's life," but acknowledging that a definitive causal link between parental incarceration and children's problems has yet to be established).

71. *See* THE SENT'G PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN 1–2 (2009), https://www.sentencingproject.org/wp-content/uploads/2016/01/Incarcerated-Parents-and-Their-Children-Trends-1991-2007.pdf.

words, a change in rhetoric is not enough. To make an imagined post-War-on-Drugs system a reality, we must reinterpret constitutional protections.

III. WHY INTERPRETATION MATTERS: A LESSON FROM THE THIRTEENTH AMENDMENT

During the Reconstruction Era, Congress rebuilt the country through constitutional amendments and legislation to bolster those amendments. However, ending and sustaining an end to the War on Drugs does not necessarily require new constitutional amendments. It does, though, require a renewed interpretation of existing constitutional amendments. Again, the promises and pitfalls of the Reconstruction Era are instructional here. The story of the Thirteenth Amendment reveals the door left open for reconstructing the approach to drug sentencing and giving sentencing reform a constitutional basis for survival.

A. The Thirteenth Amendment: Original Interpretation

President Lincoln called for the end of slavery in the Emancipation Proclamation in 1863. But Republicans at the time understood that for the *system* of slavery to actually end, a constitutional amendment was necessary. As Eric Foner explains:

> As a presidential decree, the proclamation could presumably be reversed by another president. Even apart from its exemptions, moreover, the proclamation emancipated people; it did not abolish the legal status of slaves, or the state laws establishing slavery. Emancipation, in other words, is not quite the same thing as abolition.[72]

And so, to rid the country of the institution of slavery, Republicans began to plan for amending the Constitution.[73] Section 1 of the Thirteenth Amendment states that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[74]As far as constitutional language goes, this amendment is clear and straightforward. It does not speak to vagaries such as "due process" or require an understanding of what might be deemed "unreasonable." Perhaps it was because of its indisputable abolition of slavery that the Thirteenth Amendment did not have an easy road to ratification. After the proposed amendment passed in the Senate in April 1864, it stalled in the House of Representatives because Democrats refused to support it during an election year.[75] President Lincoln became

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72. ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 26 (2019).

73. *Id*. at 28.

74. U.S. CONST. amend. XIII, § 1.

75. *13th Amendment*, HISTORY.COM (June 9, 2020), http://www.history.com/topics/black-history/thirteenth-amendment.

heavily involved once Congress reconvened in December 1864, and the amendment finally passed on January 31, 1865, by a vote of 119 to 56 (just a few votes over the required two-thirds majority).[76] It took until December 6, 1865, for the necessary number of states to ratify the amendment.[77]

It should be no surprise that there was not an avalanche of support for the abolition of slavery through the passage of Thirteenth Amendment, or that disagreements about the application of the amendment would quickly ensue. After all, slavery had been a hallmark of America for centuries at that point. There were more slaves in the United States at the start of the Civil War than there had been at any other point in U.S. history.[78] Slaveholders had controlled the federal government since the country's founding.[79] Therefore, once ratified, some in Congress argued that the Thirteenth Amendment gave Blacks "no rights except [their] freedom and [left] the rest to the states."[80] Most others, though, understood that abolition of slavery gave some substantive meaning to the freedom of Black Americans. Representative James Ashley, the amendment's floor leader in the House, declared that the amendment would provide "a constitutional guarantee of the government to protect the rights of all and secure the liberty and equality of its people."[81] James Harlan, a Republican Senator from Iowa, put forth a long list of the "necessary incidents" and peculiar characteristics of slavery, which he believed the Thirteenth Amendment abolished as well.[82] Included in his lists were the barriers to marry, to raise children, to own property, and to testify in court, along with the denial of education and restrictions on the freedoms of speech and press.[83] Similarly, Senator Henry Wilson of Massachusetts vowed that if the Amendment were enacted, "it [would] obliterate . . . everything connected with [slavery] or pertaining to it," including denials of "the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child."[84] To that end, just five months after the ratification of the amendment, Congress passed the Civil Rights Act of 1866. It did so under the authority of Section 2 of the Thirteenth Amendment, which gave Congress the power to use "appropriate legislation" to enforce the article.[85]

The Civil Rights Act of 1866 declared that all U.S.-born persons ("excluding Indians not taxed") were citizens of the United States and granted all citizens the

76. *Id.*

77. Lincoln did not live to see ratification of the Thirteenth Amendment—he was assassinated on April 14, 1865.

78. FONER, *supra* note 72, at 21.

79. *Id.*

80. *Id.* at 41 (quoting border Unionist John Henderson).

81. REBECCA ZIETLOW, THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION 125 (2018).

82. CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. James Harlan).

83. *Id.*

84. *Id.* at 1324 (statement of Sen. Henry Wilson).

85. U.S. CONST. amend. XIII, § 2.

"full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens."[86] The Act recognized racial equality in the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property."[87] Interestingly, as for punishment issues, the Act prohibited those acting under the color of law from subjecting anyone "to different punishment, pains, or penalties . . . by reason of his color or race, than is prescribed for the punishment of white persons."[88] It was clear even at that time that the criminal justice system could be, and had been, used to facilitate racial oppression and terror.

Of course, the breadth of the Act's grant of equality was met with forceful opposition. Senator Willard Saulsbury, a Democrat from Delaware, reasoned, "A man may be a free man and not possess the same civil rights as other men."[89] According to Senator Saulsbury and others who were in agreement with him, the Civil Rights Act went beyond the scope of the Thirteenth Amendment. As he explained, "If you intended to bestow upon the freed slave all the rights of a free citizen, you ought to have gone further in your constitutional amendment, and provided that not only the *status* and condition of slavery should not exist, but that there should be no inequality in civil rights."[90] President Andrew Johnson embraced this limited view and vetoed the Act once it had passed the House and Senate.[91] Debate continued, and for the one of the first times in the country's history, Congress overrode the President's veto, and the Civil Rights Act of 1866 was enacted in April 1866.[92] The force of the Act and its subsequent versions, however, would depend on the Supreme Court's interpretation of the meaning of the Thirteenth Amendment.

A look at the *Civil Rights Cases*[93] shows the importance of constitutional interpretation in moving from war to reconciliation and repair. Writing for an eight-Justice majority, Justice Joseph Bradley used the term "badges and incidents of slavery" to discuss the constitutionality of the Civil Rights Act of 1875, which built

86. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

87. *Id*.

88. *Id*. § 2.

89. CONG. GLOBE, 39th Cong., 1st Sess. 477 (1866) (statement of Sen. Willard Saulsbury). Senator Cowan explained, "The true meaning and intent of that amendment was simply to abolish negro slavery. That was the whole of it. What did it give to the negro? It abolished his slavery. Wherein did his slavery consist? It consisted in the restraint that another man had over his liberty, and the right that that other had to take the proceeds of his labor." *Id*. at 1784 (statement of Sen. Edgar Cowan); *see also id*. at 1156 (statement of Rep. Anthony Thornton) ("The sole object of that amendment was to change the *status* of the slave to that of a freeman. . . ."); *id*. at 1268 (statement of Rep. Michael Kerr) ("But if these discriminations [prohibited by the Civil Rights Act] constitute slavery or involuntary servitude, which are the only things prohibited by the last constitutional amendment, then whose slaves are the persons so discriminated against?"). For further discussion of this debate, see James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426 (2018).

90. CONG. GLOBE, 39th Cong., 1st Sess. 477 (1866) (statement of Sen. Willard Saulsbury).

91. For an explanation of President Johnson's constitutional argument for his veto, see 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3603–11 (James D. Richardson ed., 1897).

92. CONG. GLOBE, 39th Cong., 1st Sess. 1809, 1861 (1866).

93. 109 U.S. 3 (1883).

on the 1866 Act by outlawing private race discrimination in transportation and other public accommodations.[94] Justice Bradley explained that the Thirteenth Amendment "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[95] However, rather than holding that the amendment itself abolished all incidents of slavery, as its Republican supporters wished, Justice Bradley and seven of the other Justices in the majority adopted the narrow view, writing:

> There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement."[96]

In holding that the 1875 Act could not be upheld under the Thirteenth Amendment, Justice Bradley defined freedom as the absence of a person being held as property.

This limited view of the Thirteenth Amendment was clear by the time the Supreme Court decided *Plessy v. Ferguson* in 1896.[97] In upholding Louisiana's Separate Car Act, which required race-based segregation of railroad train passengers, the Court rejected the argument that the Act amounted to an incident of slavery.[98] Justice Henry Billings Brown even stated that it was "too clear for argument" that the Thirteenth Amendment didn't apply to this situation.[99] As he explained:

> Slavery implies involuntary servitude,—a state of bondage; the ownership of mankind as a chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services.[100]

With those words, it was plain that the Court believed the Thirteenth Amendment had limited to no application beyond the end of the Civil War.

This approach was not a foregone conclusion, and it was not within the understanding of those who proposed the Thirteenth Amendment in the first place. In his dissent in *Plessy*, Justice Harlan reiterated the Republican view:

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94. *Id*. at 20 (discussing the Civil Rights Act of 1875, ch. 114, 18 Stat. 335).
95. *Id*.
96. *Id*. at 25.
97. 163 U.S. 537 (1896).
98. *Id*. at 542.
99. *Id*.
100. *Id*.

> The [T]hirteenth [A]mendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude.[101]

But the majority view—reducing the Thirteenth Amendment to merely a form of simple emancipation—dashed the promise of Reconstruction. A reinvigoration of the intended purpose of the Thirteenth Amendment can combat this Supreme Court's failure to address the legacy of slavery.

B. Reinterpreting the Thirteenth Amendment: An Opportunity for Reinvigoration and Promise for the War on Drugs

There was a brief resuscitation of the Thirteenth Amendment during the Civil Rights Era, also known as the Second Reconstruction Era. In *Jones v. Alfred H. Mayer Co.*, the Supreme Court upheld the Civil Rights Act of 1866 as a ban on private racial discrimination in the sale and rental of housing.[102] Rather than expounding on the meaning of slavery and servitude in Section 1 of the Thirteenth Amendment, the Court focused on Section 2. Writing for the Court, Justice Stewart reasserted Justice Bradley's words in the *Civil Rights Cases* that the Thirteenth Amendment "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'"[103] Ultimately, Justice Stewart left to Congress the choice "rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."[104] What is important, though, is that Justice Stewart saw the post-Civil War Black Codes as "substitutes for the slave system."[105] Likewise, he recognized that housing discrimination was "a substitute for the Black Codes."[106] This revitalized view of the Thirteenth Amendment allowed Congress to use the Amendment's force to attack any "relic of slavery."[107] However, this interpretation has gained little traction in the intervening years.

Despite recognizing that Congress has broad deference in this area, which arguably required a broad view of the reach of Section 1 of the Thirteenth Amendment, the Court failed to use the Thirteenth Amendment to uphold the only two Section 1 race claims to come before it since *Jones*. In the 1971 case, *Palmer v. Thompson*, Black plaintiffs challenged the decision by the City of Jackson, Mississippi, to shut

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101. *Id.* at 555 (Harlan, J. dissenting).
102. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).
103. *Id.* at 439 (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883)).
104. *Id.* at 440–41 n.78.
105. *Id.* at 441–43.
106. *Id.*
107. *Id.* at 443.

down all of its segregated pools rather than to integrate them.[108] In his opinion for the Court, Justice Black claimed that upholding the plaintiff's claim "would severely stretch [the Thirteenth Amendment's] short simple words and do violence to its history."[109] In the second case, *City of Memphis v. Greene*, Black residents of Memphis, Tennessee, challenged the City's decision to block a road that had provided the most direct route for residents of a mostly Black neighborhood to reach downtown Memphis.[110] The U.S. Court of Appeals for the Sixth Circuit found that the closure constituted a badge or incident of slavery because it was a racially-motivated attempt to disparately control Black motorists and hurt property values in the Black neighborhood.[111] In addressing whether the Thirteenth Amendment reaches the badges and incidents of slavery, Justice Stevens's opinion for the Court chose "to leave that question open"[112] and instead concluded that, even if Section 1 did directly ban badges and incidents, the road closing was a "slight inconvenience" that did not impose any badge or incident of slavery.[113] The Supreme Court has not answered the badges and incidents questions since it was left open in *Greene*.

Scholars have attempted to resurrect the Thirteenth Amendment in the criminal punishment space. Some have claimed that the Thirteenth Amendment was meant to, and should, apply to some extent to the conditions of prison labor.[114] Others make arguments specifically related to incarcerated individuals working in agriculture.[115] Of course, the hurdle faced by all of these situations is that the Thirteenth Amendment explicitly exempts from its prohibition of slavery and involuntary servitude "punishment for crime whereof the party shall have been duly convicted."[116] But, when it comes to moving from wartime to a post-war era, the Thirteenth Amendment holds the same promise today that it did during the post-Civil War years. Moving the country to a post-War-on-Drugs age only requires an answer to the open question regarding the badges and incidents of slavery. And adopting the answer that embraces the spirit of Reconstruction—that the Thirteenth Amendment requires eradicating the vestiges of slavery—naturally necessitates criminal justice reform of all sorts, but certainly in the drug sentencing realm. Arguments urging a reliance on the Thirteenth Amendment to address specific areas of criminal justice reform show the promise that the Amendment still holds. As discussed below, the Thirteenth Amendment can be a protection against the

108. 403 U.S. 217, 219 (1971).
109. *Id.* at 226.
110. 451 U.S. 100 (1981).
111. *Id.* at 103, 107–10, 138.
112. *Id.* at 126.
113. *Id.* at 119, 128.
114. *See, e.g.*, Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395 (2009).
115. *See, e.g.*, Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869 (2012).
116. U.S. CONST. amend. XIII, § 1.

racial profiling that leads to disproportionate arrests and harsh sentencing of Blacks, as well as a constitutional source to challenge drug sentencing themselves.

1. The Thirteenth Amendment Reinvigorated: Protection Against Racial Profiling

When it comes to the War on Drugs, racial sentencing disparities are merely a symptom of a larger systemic problem of biased law enforcement and prosecution. So, the utility of the Thirteenth Amendment in reconstructing the approach to drug crime need not only focus on actual sentencing laws. As explained earlier, racial prejudice in policing played a role in upholding racist legal systems, including the Black Codes and the War on Drugs. In 1990, during the height of the War on Drugs, national police leaders Hubert Williams and Patrick V. Murphy[117] wrote:

> The fact that the legal order not only countenanced but sustained slavery, segregation, and discrimination for most of our Nation's history—and the fact that the police were bound to uphold that order—set a pattern for police behavior and attitudes toward minority communities that has persisted until the present day.[118]

Even then, there was an internal recognition of the racial bias in policing. This has played out in the way racial profiling undergirds the War on Drugs.

Racial profiling refers to "stereotype-based policing" practices by which police make "decisions about criminal suspicion based on prior conceptions about groups and their prevailing characteristics."[119] The use of racial profiling to focus on Blacks in the traffic stop context has been well documented.[120] Studies show that racial profiling continues to be prevalent today, even though traffic stops based on racial profiling do not increase the yield of evidence of a crime.[121] This racist practice is tied to the tactics developed as part of the War on Drugs. Jack Glaser, a leading expert on racial profiling, has explained that "[f]ormal racial profiling as we

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117. Patrick Murphy was a President of the National Police Foundation and served as Commissioner of the New York Police Department. Hubert Williams has been described as "one of our Nation's pioneering African-American police leaders." *See* Jim Burch, *A Letter from the President of the National Police Foundation*, NAT'L POLICE FOUND., https://www.policefoundation.org/presidents-page/.

118. Hubert Williams & Patrick V. Murphy, *The Evolving Strategy of Police: A Minority View*, PERSPECTIVES ON POLICING, Jan. 1990, at 2, https://www.ncjrs.gov/pdffiles1/nij/121019.pdf.

119. JACK GLASER, SUSPECT RACE: CAUSES AND CONSEQUENCES OF RACIAL PROFILING 43 (2015).

120. *See, e.g.*, WILLIAM R. SMITH, DONALD TOMASKOVIC-DEVEY, MATTHEW T. ZINGRAFF, H. MARCINDA MASON, PATRICIA Y. WARREN & CYNTHIA PFAFF WYATT, N.C. STATE UNIV., THE NORTH CAROLINA HIGHWAY TRAFFIC STUDY (2003), https://www.ncjrs.gov/pdffiles1/nij/grants/204021.pdf (providing statistical compilations on racial profiling in traffic stops).

121. For a discussion on rates of racial profiling in traffic stops and the resulting low yields of evidence, see Camelia Simoiu, Sam Corbett-Davies & Sharad Goel, *The Problem of Infra-marginality in Outcome Tests for Discrimination*, 11 ANNALS APPLIED STAT. 1193, 1213 (2017). For a summary of this study, see Edmund Andrews, *A New Statistical Test Shows Racial Profiling in Police Traffic Stops*, STAN. ENGINEERING (June 28, 2016), https://engineering.stanford.edu/magazine/article/new-statistical-test-shows-racialprofiling-police-traffic-stops.

know it today . . . stems largely from the War on Drugs. Early drug courier profiles were developed in the mid-1970s by the Federal Bureau of Investigation (FBI) and the newly formed DEA."[122] Glaser notes that widely used, early drug courier profiles "included explicit reference to race (usually African American)."[123] The biased assumption that race—specifically Blackness—is relevant to criminal suspicion, and therefore has a place in policing, can be traced back to the foundations of our country, continuing well into the Reconstruction Era.[124]

In *A Thirteenth Amendment Framework for Combating Racial Profiling*, Professor William M. Carter, Jr. makes a case for using the Thirteenth Amendment to defeat the lawfulness of racial profiling.[125] He asserts that "[t]he continuing stigma of criminality because one is African American is so pervasive and indiscriminate precisely because it did not arise by accident. The use of race as a 'free-floating proxy' for criminality arose during slavery as a means of social control over enslaved Africans and, later, the freedmen."[126] Professor Carter ties this method of criminality as control to the Slave Codes.[127] In order to maintain the institution of slavery, slaveholding states passed a set of laws—the Slave Codes—to control all aspects of the lives of enslaved people. The restrictions were numerous, including prohibiting slaves from leaving their owners' premises without permission, owning firearms, learning to read or write, marrying, as well as restricting slaves' right to assemble.[128] Professor Carter expounds on how those laws sowed the seeds of a belief in Black criminality:

> Additionally, race-based criminal suspicion, legally enforced through the Slave Codes, was used to keep blacks in fear and in their "place" during slavery. It also had the corollary effect of placing whites in constant fear of blacks, thereby making them more willing to accept black subordination in the name

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122. GLASER, *supra* note 119, at 9.

123. *Id*.

124. *See id*. at 45 ("[I]t could be said that informal criminal profiling is as old as law enforcement. . . .").

125. William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling,* 39 HARV. C.R.-C.L. L. REV. 17 (2004).

126. *Id*. at 56–57 (quoting Randall Kennedy, *Suspect Policy: Racial Profiling Usually Isn't Racist. It Can Help Stop Crime. And It Should Be Abolished*, NEW REPUBLIC, Sept. 13, 1999, at 34). Carter continues:

> The American association of race and criminality under the slave regime was repeated in other colonial projects. Under British rule in India, for example, the Criminal Tribes' Act of 1871 provided for the "registration, surveillance and control of certain tribes . . . [designated] criminal." Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219, 1235-36 (1999). In addition to providing physical control over some 13 million people by imposing a pass system and forced labor penalties similar to those under the American Slave and Black Codes, the Act legislatively validated the "notion of hereditary and biological propensity to crime. . ." *Id*. at 1236. In doing so, the Act provided both legal and moral support for the British colonial project in India.

Id. at 56 n.209.

127. *Id*. at 57.

128. For a succinct explanation of the Slave Codes, see *Slave Code*, ENCYC. BRITANNICA, (2020), https://www.britannica.com/topic/slave-code.

> of white safety. The Slave Codes heavily punished whites who aided slaves or interfered with the system of white dominance, since merciless discipline was seen as necessary because of blacks' supposed natural savagery.[129]

The Slave Codes, which fostered distrust and fear of Blacks, were precursors to the Black Codes already addressed. The Black Codes, clear vestiges of slavery, merely carried on "the racialization of the criminal law as a means of controlling the freedmen."[130] The use of racial profiling during the War on Drugs continues this "stigmatization of African Americans as congenital criminals."[131] And in this way racial profiling has always been a "component of our national fabric"[132]—from the days of slavery to now.

In making the case that the Thirteenth Amendment should be read as barring racial profiling, Professor Carter characterizes this stigmatization as an injury suffered by African Americans that is "one most relevant for purposes of understanding racial profiling as a badge or incident of slavery."[133] In other words, the racial profiling that became a linchpin of the War on Drugs "is a modern-day manifestation of a means of social control that arose out of slavery."[134] This is because these biased policing practices are "a part of a larger series of institutions and cultural practices that relegate racial minorities to caste-like, second-class citizenship."[135] For those reasons, Professor Carter argues that "it is precisely the type of lingering effect of slavery that the Thirteenth Amendment was designed to eradicate."[136] This same sort of argument that characterizes War on Drug law enforcement

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129. Carter, *supra* note 125, at 57 n.212 ("The issue of safety and the natural fear of slave revolts was also intertwined in the chain of legal judgments [during the colonial period]. . . . Many feared that any judicial protection of the slave would trigger further challenges to the legitimacy of the dehumanized status of blacks and slaves.") (quoting A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 8 (1978)). Carter's discussion on this issue is particularly helpful and includes the following two citations:

> Patricia J. Williams, *Meditations on Masculinity*, *in* CONSTRUCTING MASCULINITY 238, 242 (Maurice Berger et al. eds., 1995). (describing the function of the connection between race and crime and stating that this connection results in "any black criminal becom[ing] all black men, and the fear of all black men becom[ing] the rallying point for controlling all black people") KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 211 (Knopf 1961) (1956) (noting that the Slave Codes "were quite unmerciful toward whites who interfered with slave discipline") . . .

Id. at 57 nn.212–13; *see also infra* Section IV.D.3 (discussing the use of pseudo-scientific theories in the early twentieth century to convince whites that racial equality was dangerous because of the inherent dangerousness of Blacks).

130. Carter, *supra* note 125, at 57 (citing KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, AND OTHER MACROAGGRESSIONS 19–21 (1998)).

131. *Id*. at 58.

132. F.M. Baker, *Some Reflections on Racial Profiling*, 27 J. AM. ACAD. PSYCHIATRY L. 626, 627 (1999).

133. Carter, *supra* note 125, at 24.

134. *Id*. at 60.

135. *Id*.

136. *Id*.

tactics as violative of the Thirteenth Amendment can be applied to drug sentencing as well.

2. The Thirteenth Amendment Reinvigorated: Challenges to Drug Sentencing

Like policing, using punishment to control Blacks is also a practice woven into our nation's fabric dating back to slavery. The Slave Codes authorized whipping, branding, and imprisonment, among other tortures, as punishments for enslaved Blacks.[137] Under the next iteration of state-sponsored control of Blacks—the Black Codes—those Blacks who did not comply could be arrested, subjected to impossible-to-pay fines, and forced into unpaid labor on plantations.[138] Acknowledging that these punishments were race-based clarifies why the Civil Rights Act of 1866 prohibited those acting under the color of law from subjecting a person "to different punishment, pains, or penalties . . . by reason of his color or race, than is prescribed for the punishment of white persons."[139] A system that punishes Blacks more severely than whites is a badge of slavery. A reinvigoration of this line of Thirteenth Amendment interpretation could open the door to taking down the entire drug sentencing scheme.

The racially disparate carnage caused by the sentencing system used in the War on Drugs is indisputable. The U.S. Sentencing Commission has repeatedly called attention to this fact. In its February 1995 report to Congress, the Commission revealed that 88.3% of crack cocaine offenders were Black.[140] Citing to a Bureau of Justice Statistics study, the Commission explained that the 100-to-1 quantity ratio was the cause for "the average sentence imposed for crack trafficking [being] twice as long as for trafficking in powdered cocaine."[141] The Sentencing Commission determined that "[t]he 100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants."[142] In its 2002 Report, the Commission told Congress that an "overwhelming majority of crack cocaine offenders" were Black—"91.4 percent in 1992 and 84.7 percent in 2000."[143] The Commission further reported that "[i]n addition, the average sentence for crack cocaine offenses (118 months) is 44 months—or almost 60 percent—longer than the average sentence for powder cocaine offenses

137. *See Slave Code*, *supra* note 10.

138. *Black Codes*, HISTORY.COM (Jan. 21, 2021), https://www.history.com/topics/black-history/black-codes.

139. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866).

140. U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 152 (1995), https://www.ussc.gov/research/congressional-reports/1995-report-congress-cocaine-and-federal-sentencing-policy.

141. *Id.* at 153 (quoting DOUGLAS C. MCDONALD & KENNETH E. CARLSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES, 1986–90, at 1 (1993)).

142. *Id.* at 154.

143. *See* U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 62 (2002), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf.

(74 months), in large part due to the effects of the 100-to-1 drug quantity ratio."[144] At that time, the Commission advocated for a reduction in the 100:1 ratio, emphasizing in its report that there was no sound reason for maintaining the disparate sentencing. The report stated that: (1) the "current penalties exaggerate the relative harmfulness of crack cocaine"; (2) the "current penalties sweep too broadly and apply most often to lower level offenders"; (3) the "current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality"; and (4) the "current penalties' severity mostly impacts minorities."[145]

Congress did not respond by adjusting drug sentencing, however.[146] In 2004, the Commission again called out the disparate force that the War on Drugs cocaine sentencing policy was inflicting upon Blacks, stating:

> This one sentencing rule contributes more to the differences in average sentences between African-American and White offenders than any possible effect of discrimination. Revising the crack cocaine thresholds would better reduce the gap **than any other single policy change**, and it **would dramatically improve the fairness** of the federal sentencing system.[147]

Despite these clear statements of racial injustice, it took until 2010 for Congress to pass legislation reducing the 100:1 ratio—yet crack is still sentenced more harshly than powder cocaine, and the racial sentencing disparities persist.

Now, under the Fair Sentencing Act of 2010 ("FSA 2010"), it takes twenty-eight grams (instead of the former five grams) of crack cocaine to trigger a five-year mandatory minimum imprisonment and 280 grams (rather than fifty grams) of crack cocaine to trigger a ten-year mandatory minimum imprisonment term—a ratio of nearly eighteen to one.[148] At fiscal year-end 2012, "[t]he vast majority of crack cocaine offenders (88%) were non-Hispanic black or African American," meaning that Blacks were still being sentenced more harshly than white offenders.[149] While the First Step Act of 2018 allowed for the FSA 2010 to be applied retroactively, and African Americans comprise 91% of those receiving retroactive sentencing reductions,[150] it does not constitute true reconstruction

144. *Id*. at 90.

145. *Id*. at v–viii.

146. U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 51 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf (noting Congress did not act on the Commission's 2002 recommendation).

147. *Id*. at 132 (emphasis added).

148. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended at 21 U.S.C. § 841).

149. SAM TAXY, JULIE SAMUELS & WILLIAM ADAMS, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA 3 (2015), https://www.bjs.gov/content/pub/pdf/dofp12.pdf.

150. Kara Gotsch, *One Year After the First Step Act: Mixed Outcomes*, SENT'G PROJECT (Dec. 17, 2019), https://www.sentencingproject.org/publications/one-year-after-the-first-step-act/.

sentencing. Legislation that reduces racial sentencing disparities but does not prohibit such disparities does not actually purge the system of the vestiges of slavery. By making the sentencing changes under the Fair Sentencing Act selectively retroactive, the First Step Act does not "provide the systemic change necessary to undue (sic) the harm caused by decades of mass incarceration at the federal level fueled by mandatory minimums and federal prosecutors' focus on extreme punishments for street-level crime."[151] The same is true at the state level where, though there have been a number of recent state sentencing reforms, Black people are still subjected to the harshest treatment. At the state level, Blacks are 6.5 times as likely as whites to be incarcerated for drug-related offenses.[152] Legislative reform without constitutional force is not reconstruction.

In the same way that an argument can be made that the law enforcement practices of the War on Drugs are unconstitutional under the Thirteenth Amendment, it is logical to argue that our current drug sentencing model—one that allows for racist manipulation—violates the Thirteenth Amendment as well. Perhaps this would be a weaker argument if there was evidence that drug sentencing outcomes are reflective of crime commission. However, when it comes to drug crime statistics, "whites are more likely to sell drugs and equally likely to consume them."[153] When the system is more closely examined, the systemic racism is evident. In a thorough empirical study specifically focused on federal sentencing, Professors Sonja Starr and M. Marit Rehavi make the following revelation:

> We identify an important procedural mechanism that appears to give rise to the majority of the otherwise-unexplained disparity in sentences: how prosecutors initially choose to handle the case, in particular, the decision to bring charges carrying "mandatory minimum" sentences. The racial disparities in this decision are stark: ceteris paribus, black men have 1.75 times the odds of facing such charges, which is equivalent to a 5 percentage point (or 65 percent) increase in the probability for the average defendant. The initial mandatory minimum charging decision alone is capable of explaining more than half of the black-white sentence disparities not otherwise explained by precharge characteristics.[154]

This racist manipulation of mandatory minimums supports an argument that the sentencing system is a remnant of slavery. Professors Starr and Rehavi argue that this charging phenomenon has contributed to a stark sentencing disparity that they

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151. *Id.*

152. *Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race*, HAMILTON PROJECT (Oct. 21, 2016), https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice.

153. Jessica Eaglin & Danyelle Solomon, *Reducing Racial and Ethnic Disparities in Jails: Recommendations for Local Practice*, BRENNAN CTR. FOR JUST. 7 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_Racial%20Disparities%20Report%20062515.pdf.

154. Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

call the "black premium."[155] In concluding their study, Professsors Starr and Rehavi posit that the percentage of the sentencing disparity that their findings attributed to race alone could be lessened by "simply eliminating the disparity in mandatory minimum charges."[156] Extrapolating their findings to state sentencing, they add: "If one assumes that all black male sentences in federal and state court face an average race premium of 9 percent, eliminating this disparity would ultimately move nearly 1 percent of all the black men under 35 in the United States from prisons and jails back to the community."[157] This could be the beginning of the sort of repair that was envisioned during the Reconstruction Era. Returning Black men to their communities is a start. However, merely relying on prosecutors to curb their discretion so as to not rely on racial prejudices is not sufficient. The sentencing framework that allows for such abuses must be deemed unconstitutional.

The Supreme Court's precedent leaves open a door to reinvigorating a Thirteenth Amendment argument that would allow for actual Reconstruction drug sentencing. Such sentencing would both "repair[] what the war had broken apart while simultaneously attempting to uproot"[158] the racist foundations of the War on Drugs by invalidating sentencing laws that can be manipulated to achieve racially disparate sentencing outcomes. In a true Reconstruction Sentencing model, there would be no requirement to prove the explicit racist intent of any government actor. Rather, the racist effect of the law would be enough to support its unconstitutionality. In making his Thirteenth Amendment argument against racial profiling, Professor Carter uses a line of reasoning that applies to drug sentencing as well. He reminds us that:

> It is crucial to understand that a current practice or social condition need not actually be enslavement, or inflict an injury as severe as that inflicted by slavery, in order for it to be a badge or incident of slavery. The *Jones* Court did not hold that whites' refusal to sell real property to blacks amounted to enslavement, nor did it reason that limitations on blacks' ownership of real property inflicted an injury upon African Americans equivalent to slavery in severity. Instead, the Court concluded that white refusal to sell to blacks was a lingering vestige of legal structures and prejudices that existed during slavery prohibiting slaves from owning property in order to better control and subjugate them. Under *Jones*, the badges and incidents analysis examines modern-day inequalities to determine whether such inequalities are rationally traceable to the system of slavery.[159]

155. *Id.*
156. *Id.* at 1349–50.
157. *Id.* at 1351.
158. GATES, *supra* note 3, at 7.
159. Carter, *supra* note 125, at 60.

Drug sentencing paints a picture of "modern-day inequalities" that are traceable to the system of slavery. Mandatory minimum drug sentencing laws were focused on poor, Black communities, inflicting excessive punishment that was endorsed by societal prejudices against Blacks. These are the same prejudices and views of criminality that were cultivated during slavery, legalized in the Slave Codes, and further perpetuated in the Black Codes. These were the same incidents and badges of slavery sought to be eradicated by the Thirteenth Amendment.

During the debates over the Thirteenth Amendment, supporters were clear that the constitutional change was meant to do more than simply formally prohibit forced labor. It was designed to reconstruct the treatment of Black Americans. Representative Thomas Treadwell Davis of New York said that the Amendment was meant to "remove[] every vestige of African slavery from the American Republic."[160] Henry Wilson, a Senator from Massachusetts, affirmed that the Amendment was intended to "obliterate the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or pertaining to it. . . ."[161] Iowan Senator James Harlan argued that the Amendment's goals included full equalization of civil status for the formerly enslaved.[162] Especially enlightening are the words spoken by Senator Lyman Trumbull of Illinois:

> With the destruction of slavery necessarily follows the destruction of the incidents to slavery. When slavery was abolished, slave codes in its support were abolished also.
>
> Those laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery. They never would have been thought of or enacted anywhere but for slavery, and when slavery falls they fall also.[163]

While Trumbull identifies laws that affirmatively prohibited Blacks from engaging in certain activities, what is evident in Trumbull's words is that the Thirteenth Amendment was meant to lift freedmen from their oppressed position in society.

Fast forwarding to today, the entire system of policing, prosecution, and punishment that was ramped up during the War on Drugs can be shown to prevent Blacks from living on equal footing with whites. Some may be unwilling to say that mandatory minimum drug sentencing "would never have been thought of or enacted" except for the existence of slavery. However, as Professor Carter points out, when

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160. CONG. GLOBE, 38th Cong., 2nd Sess. 155 (1865).

161. Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 177 (1951) (citing CONG. GLOBE, 38th Cong., 1st Sess. 1319, 1321, 1324 (1864)).

162. *See id*. at 177–78 (citing CONG. GLOBE, 38th Cong. 1st Sess. 1439, 1440 (1864)).

163. CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).

constructing a Thirteenth Amendment argument that a law or practice continues the "badges" of slavery, "the focus is not on whether a specific practice that existed during slavery continues today. Rather, this theory concentrates on whether a current social condition can be rationally linked to inequalities arising out of slavery."[164] Given the history of the War on Drugs, so long as there is willingness to view the Thirteenth Amendment as intended, there is room to argue for the unconstitutionality of the mandatory minimum sentencing scheme developed during that war. Doing so is crucial to making it possible to actually begin to repair some of the wartime devastation. A willingness to return to the spirit of the Reconstruction amendments will also create an avenue for attacking the constitutionality of other tactics associated with the War on Drugs—from policing practices, to the disparate use of pretrial detention, to inequitable charging decisions. But, without constitutional force, sentencing reforms are threatened by the same pitfalls of reconstruction—the continuation of a system that accepts and sustains systemic racism.

IV. APPLYING THE LESSON BEYOND THE THIRTEENTH AMENDMENT

This Article seeks to introduce the idea of constitutional reinterpretation in order to reconstruct sentencing. Like the possible approach to the Thirteenth Amendment, the same promise of constitutional reinvigoration applies to all of the ways in which constitutional interpretation has been used to perpetuate the racialized harms of the War on Drugs. For instance, the Supreme Court has interpreted the Fourth Amendment in a manner that allows the racial profiling and use of force against Black people that have become staples in War on Drugs policing. In 1996, during the height of the War on Drugs, the Supreme Court decided *Whren v. United States* and upheld police officers using the pretext of a minor traffic offense to stop and search individuals.[165] In that case, the defendant argued that allowing pretextual stops would increase the risk that police officers would routinely use minor traffic violations as legal cover for profiling racial minorities.[166] The Court rejected the defendant's arguments, holding that an officer's subjective intent in confronting an individual is not relevant to determining whether a Fourth Amendment violation has occurred.[167] So long as there is some objectively reasonable basis for the search or seizure, that search is valid under the Fourth Amendment.[168] In this unanimous decision, the Court failed to read freedom from racist targeting as a part of being free from "unreasonable searches and seizures."[169]

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164. Carter, *supra* note 125, at 66.
165. 517 U.S. 806 (1996).
166. *Id.* at 810.
167. *Id.* at 813.
168. *Id.*
169. U.S. CONST. amend. IV.

It is important to recognize that *Whren* was a drug case. The defendant, Michael Whren, was convicted of a crack offense under the Anti-Drug Abuse Act of 1986, meaning that the harsh crack mandatory minimum sentencing laws applied to him.[170] The then-mandatory Federal Sentencing Guidelines, which incorporated those mandatory minimums, called for a sentence range from 168–210 months of imprisonment in Whren's case.[171] He was sentenced to 168 months, or fourteen years.[172] This all stemmed from a pretextual stop by officers patrolling a "high drug area" in the District of Columbia and their suspicion of the youthful occupants in a dark Pathfinder truck that lingered at a stop sign a bit too long while the driver looked into the passenger's lap.[173] A reconstructionist approach to this case—one intended to move away from the failed War on Drugs—would have allowed for arguments that the mandatory minimum sentences to which Whren was subjected served no penological purposes other than race-based retribution.[174] Further, a reconstructionist approach would have given credence to arguments that, when pretext can be shown to have a racial component, that practice is likewise an unconstitutional perpetuation of the racist War on Drugs. In this way, Whren could have had strong constitutional arguments challenging several aspects of his case under the Thirteenth Amendment (badges and incidents of slavery), Fourth Amendment (unreasonable search and seizure, when unreasonable is held to prohibit racially biased practices), and perhaps even the Eighth Amendment (cruel and unusual punishment due to a lack of satisfying any penological goals).[175] With such an approach, courts would look beneath the surface of challenged criminal laws and policies in order to acknowledge and seek to rectify the racially discriminatory impact of those laws.

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170. *See* United States v. Whren, 111 F.3d 956, 961 n.1 (D.C. Cir. 1997) (Henderson, J., concurring) (citing United States v. Whren, 53 F.3d 371, 376 (D.C. Cir. 1995)).

171. *See id.* at 957–58 (main opinion).

172. *Id.*

173. *Whren*, 517 U.S. at 808.

174. For a lengthy discussion of how drug sentencing is divorced from the penological goals of deterrence, incapacitation, rehabilitation, and legitimate retribution, see Jelani Jefferson Exum, *Forget Sentencing Equality: Moving From the "Cracked" Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95 (2014). Despite the name of the article, my argument was not against racial equality in sentencing. Instead, I argued that calling for racial equality in sentencing, particularly in the cocaine sentencing context, will not necessarily result in better sentencing. Rather, if racial inequality in drug sentencing was remedied by sentencing the overwhelmingly black cocaine defendants to the same sentences as powder cocaine defendants, we would simply be left with cocaine defendants of all races getting a sentence that is not serving any purpose of sentencing and is contributing to ineffective mass incarceration. This is because, as explained in the article, current cocaine sentencing does not deter drug offenses, rehabilitate offenders, incarcerate only dangerous defendants, or adequately reflect community sensibilities of just desserts or retribution.

175. For a discussion of how certain interactions with the police should also be viewed as punishment under the Eighth Amendment, see Jelani Jefferson Exum, *The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force*, 80 MO. L. REV. 987 (2015).

CONCLUSION

A Reconstruction Sentencing model can emerge when constitutional challenges to War on Drugs laws and policies are given credibility. When racially destructive sentencing laws, like mandatory minimum drug sentencing, are struck down as unconstitutional, then other racist criminal justice policies can be uprooted as well. To be sure, the damaging laws and policies of the War on Drugs go beyond criminal sentencing. From policing, to pretrial detention, to charging decisions, the War on Drugs has facilitated massive destruction. It has also perpetuated the subjugation of hundreds of thousands of Black people. Therefore, a Reconstruction Sentencing model cannot solely about sentencing.

Proponents of the Thirteenth Amendment understood that by outlawing slavery, the Amendment went beyond simply formally ending forced labor. It was also meant to give force to legislation targeted at dismantling the caste system set up by slavery. Further, it was understood that the Thirteenth Amendment prohibited any laws that sustained that racial caste system.

Reconstruction Sentencing comes with the same understandings. The purpose of reconstructing drug sentencing laws is to take away the weapon that police and prosecutors can use to decimate communities so efficiently. Changes to laws regarding race-based policing remove the tactics that have been used to carry out that destruction. But a true Reconstruction Sentencing model both uproots oppressive systems and restores rights. Such an approach requires a restorative focus on reinvestment in damaged communities. This was the heart of Reconstruction—the understanding that the "mere exemption from servitude is a miserable idea of freedom."[176] Like the calls throughout the country for anti-racist action to address systemic racism envision, Reconstruction Sentencing is a step toward long overdue realization of true freedom.

176. tenBroek, *supra* note 161, at 175 (citing CONG. GLOBE, 38th Cong., 1st Sess. 2692 (1864) (statement of Rep. William Holman)). Holman was an opponent of the proposed amendment. *Id.*

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Judge Frankel's Fifty-Year-Old Invitation to Reconstruct Sentencing

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America was a different place at the time Judge Marvin Frankel penned his now-famous text *Criminal Sentences: Law without Order* in 1973.[1] Richard Nixon was the U.S. president. The Vietnam War was ending. The Watergate scandal was unfolding. There was much to grab the public's attention, and criminal sentencing was not a national or international headline. Just two years earlier, President Nixon had declared a war on drugs and targeted drug abuse as "public enemy number one,"[2] but it would be over a decade before punitive mandatory minimum drug sentences would become our sentencing norm.[3] At the time of Frankel's publication, the national prison population stood at only 200,000.[4] Given this backdrop, Judge Frankel's thoughts on all that was wrong with federal sentencing could have seemed completely insignificant.[5] In the Preface to his book, Frankel even acknowledged that, when it came to sentencing, "we draw curtains over such dank subjects."[6] However, fifty years later, we celebrate his work as a formative text that shaped the sentencing systems adopted throughout the country and by the federal government. Though the sentencing guideline systems and sentencing commissions we see today are not exact replicas of the ideas Frankel set forth in his book, he planted the seeds that eventually led to significant changes in the sentencing landscape. As a sentencing scholar, Judge Frankel's boldness and willingness to dream big about creating a different sentencing system have inspired me throughout my career. His willingness to call for reconstructing the sentencing system is an appeal that still rings true today.

Despite the many changes in the United States since Frankel wrote *Law without Order*, the need for systemic changes to criminal punishment remains. Over the past fifty years, sentencing has trended toward the more frequent use of incarceration, and incarceration periods have grown longer. The prison population grew at a staggering pace—from 200,000 people incarcerated in 1973 to nearly 2 million people incarcerated in U.S. jails and prisons in 2022.[7] Though Frankel's goal was not to address mass incarceration—a term that entered American discourse in the twenty-first century[8]— he repeatedly questioned the purpose of criminal sentencing. Questions on why we are punishing the way we punish those we punish are central to today's advocacy against mass incarceration. Fifty years ago, Frankel wrote:

> Our Congress and state legislatures have failed to even study and resolve the most basic of the questions affecting criminal penalties, the questions of justification and purpose. Why do we impose punishment? Or is it properly to be named "punishment"? Is our purpose retributive? Is it to deter the defendant himself or others in the community from committing crimes? Is it for reform? rehabilitation? incapacitation of dangerous people?[9]

Though Judge Frankel admitted that these are hard questions to answer, he also rightly recognized that "these problems as to the purposes of criminal sanctions are, or should be, at the bedrock of any rational structure of criminal law."[10] Yet, today, we still have not answered those central purpose-focused questions regarding punishment.[11] If we sincerely attempt to do so and then honestly assessed our failures at fulfilling those purposes, we just may find ourselves in the same position as Judge Frankel—concluding that "the need for change is clear"[12] because it is "our duty to see that the force of the state, when it is brought to bear through sentences of our courts, is exerted with the maximum we can muster of rational thought, humanity, and compassion."[13] Seventeen years ago when I read *Law without Order* at the start of my academic career, I accepted Judge Frankel's challenge to "not close the topic along with the book."[14] And, inspired by his confident approach to pitch an entirely new sentencing dream, I "submit the following observations and proposals."[15]

The Need for Sentencing Reconstruction

My first observation is hardly a novel one—there are racial disparities in criminal sentencing. Likewise, my second observation is one that has been argued by many for some time—these racial disparities in criminal sentencing come at a cost that are not outweighed by any benefit to the communities they most affect.[16] However, my proposal to address these observations—an antiracist reconstruction of sentencing laws and practices—is one that may need time before it is widely accepted. It is the type of proposal that is in line with the bold recognition of the need for massive change that Judge Frankel inspires.

My concept of "Reconstruction Sentencing"[17] has antiracism as it's foundation. Just as antiracism requires the belief that "racial groups are equals in all their apparent differences,"[18] Reconstruction Sentencing requires

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adopting the premise that "racially disparate sentencing outcomes rooted in racial bias are racist and must be eliminated through law and policy."[19] In writing, *Law without Order*, Frankel was particularly concerned about judicial discretion in sentencing, which he described as "almost wholly unchecked and sweeping powers."[20] Ultimately, his thought was that largely unbounded judicial discretion in sentencing was incompatible with a society committed to the rule of law.[21] He recognized that truly individualized sentencing that allowed judges to weigh characteristics of the convicted and the offenses as they pleased is incompatible with equality, objectivity, and consistency—attributes of the law that he considered fundamental.[22] In making this observation, Judge Frankel touched on concerns about racial bias and questioned how "the flesh-and-blood judge coming (say) from among the white middle classes" might sentence the "suburban college youth" differently than someone from an underserved, urban area.[23] He asserts:

> There is dignity and security in the assurance that each of us—plain or beautiful, rich or poor, black, white, tall, curly, whatever—is promised treatment as a bland, fungible "equal" before the law.[24]

Though Judge Frankel's fully colorblind approach to equality has fallen out of favor with those of us who ascribe to the goals of antiracism, his detection of the system's failure to protect the convicted from bias in sentencing rings true.[25] Reconstruction Sentencing requires challenging current sentencing laws and their outcomes with the goal of repairing the damage caused by racism and protecting the subjects of that racism from the continuation of laws, policies, and procedures that facilitate those damaging results.

The racial sentencing disparities in the U.S. criminal justice system are well documented by numerous studies highlighting that Black males bear the heaviest burden of sentence severity.[26] The United States Sentencing Commission reported that, in the period from 2012–2016 and the prior four-year period, Black males sentenced in the federal system received sentences on average 19.1 percent longer than similarly situated white males.[27] When accounting for violence in an individual's criminal history, Black males still received federal sentences on average 20.4 percent longer than similarly situated white males.[28] While, fifty years ago, Judge Frankel worried that judicial discretion led to inequitable outcomes, today's systems give much more discretion and power to prosecutors. Much has been written about the consequences of prosecutorial discretion.[29] However, as American sentencing systems have shifted from the unbridled judicial bias of Frankel's day to judicial constraint under mandatory sentencing guidelines, to the advisory sentencing guideline systems employed in most jurisdictions,[30] Frankel's concern about judicial bias still bears out. In assessing the factors contributing to the racial sentencing disparities, the Sentencing Commission identified judicial departures from the guidelines as significant contributors to sentencing disparities between Black males and white males.[31] Black males received non-government sentence departures less frequently than their white counterparts.[32] When Black males did receive a non-government sponsored departure, they still received longer sentences thank white males receiving non-government sponsored departures.[33] Judge Frankel remarked about this "crazy quilt of disparities – the wide differences in treatment of defendants whose situations and crimes look similar and whose divergent sentences are unaccounted for."[34] He also recognized the consequences of those disparities – that they "stir doubt as to whether the guarantee of the 'equal protection of the laws' is being fulfilled."[35] My observation— bolstered by decades of research and statistics gathered by a variety of sources—is that the guarantee is sorely lacking. Reconstructing sentencing to address racial inequities is a proposal that, like Frankel's proposals, may take decades to realize. However, the need for "broad and drastic reform of the law"[36] that prompted Frankel's proposals can inspire us to work toward true, systemic change today.

Proposals for Sentencing Reconstruction

Judge Frankel addressed his several observations by outlining a number of proposals. I echo the disclaimer he offered in his final chapter: "The ideas set out here [. . .] are incomplete, as must be any proposals in a slender volume touching a subject so huge[.]"[37] I have written about the concept of Reconstruction Sentencing in other publications,[38] so rather than reiterating previously discussed avenues for employing this approach, I will focus my remaining comments on a few basics, and elaborate on how Judge Frankel's writing fifty years ago underscore the need for such an approach.

A Role for the Courts and the Constitution

The Reconstruction Sentencing approach draws its inspiration from the American Reconstruction era. During that time, following the Civil War and the end of American slavery, there was an opportunity to build a notion of racial equality that would be protected and guarded by the law.[39] When southern states refused to embrace racial equality, Congress interceded with the Military Reconstruction Acts[40] and by introducing the Fourteenth and Fifteenth Amendments. That "Radical Reconstruction" period entailed the same type of constitutional rebirth that a Reconstruction Sentencing approach would require. Reconstruction Sentencing calls for the interpretation of constitutional provisions in a manner intended to eradicate the effects of racism within sentencing and protect against repackaging racism into new forms.[41]

In *Law without Order*, Judge Frankel offered many proposals to protect against sentencing bias. One proposal was to introduce more robust appellate review of sentences. In Frankel's opinion, "trial judges are invited to proceed by hunch, by unspoken prejudice, by untested assumptions, and not by 'law.'"[42] He therefore argued that one way to

move toward the rule of law in sentencing would be for appellate courts to begin to develop a common law of sentencing to bring order to sentencing decisions.[43] The decades following the publication of Frankel's text have seen an increase in appellate court's role in sentencing. Beginning with *U.S. v. Apprendi*, and moving to *U.S. v. Booker* and a line of cases that followed, the U.S. Supreme Court has fleshed out the reasonableness review of sentences that it now requires.[44] This appellate review, which greatly insulates within-guideline sentences, is not as substantive as Frankel envisioned. I argue that it is also not properly focused. A mechanism of sentencing review that focuses solely on whether the length of a sentence is reasonable as measured by guidelines that are not clearly tethered to sentencing purposes fails to address Frankel's underlying concern—a system of sentencing without rationality. Further, such a system of review utterly fails to protect against the racial discrimination evident in our sentencing outcomes. In fact, our current system of appellate review leaves no room at all to argue that a particular sentence or category of sentencing laws perpetuate racially disparate sentencing outcomes. A Reconstruction Sentencing approach invites looking at the role of appellate courts in a manner that would allow for consideration of such arguments. On appeal, defendants should have an avenue for arguing that their sentence is out of line with the sentences of other similarly situated defendants who only differ in terms of race. In *Law without Order*, Judge Frankel was hesitant to get into matters of Constitutional Law.[45] However, in order to recreate a fairer sentencing system, Reconstruction Sentencing requires a re-invigoration of key Constitutional principles.

Despite his desire to stay away from constitutional issues, Judge Frankel still took the time to "register the view that the central point about whimsical and unequal sentencing is in principle germane in non-capital cases."[46] In other words, there should be constitutional bases for arguing against unequal sentencing. Fifty years later, no such pathway exists. Sixth Amendment reasonableness review leaves no room for such an argument.[47] Further, the Supreme Court's Equal Protection doctrine has made it nearly impossible to prevail on broader claims of systemic racism within any area of the law.[48] The Court has clearly and repeatedly refused to hold that "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."[49] However, with a Reconstruction Sentencing approach, the Supreme Court would need to revise this jurisprudence and find that "where there are disparate outcomes by race that are explainable by bias—whether individual or systemic, and whether those outcomes are in policing, prosecution, or sentencing—the underlying policies violate equal protection and must be addressed to restore equity."[50] As Frankel wrote when he dared to dream big about sentencing reform, "This could mean one day that the Supreme Court might deem itself constrained finally to move more broadly on constitutional grounds against the kinds of 'wanton and freakish' disparities I (and so many others) have deplored."[51] The last fifty years have shown us that disparities will persist without that Constitutional intervention.

A Role for the Legislature

While waiting for the Court to intervene with a constitutional fix, Judge Frankel encouraged legislative action. Reconstruction Sentencing does as well. Frankel said, "It remains the essence and hope of our polity that those we elect should be taking the lead in our efforts to civilize ourselves through law."[52] I, too, call on legislative action to restore to communities what has been lost through the systemic caging of their loved ones as a result of unequally imposed criminal punishment. Just as in the Reconstruction Era, the legislature now also has a role in Reconstruction Sentencing that would require lawmakers to intentionally protect against racial disparity in sentencing and adjust sentencing laws that have a history of racially disparate outcomes. Judge Frankel's specific legislative recommendations included attention to sentencing purposes.[53] Frankel wrote:

> There should be at a minimum basic provision of the criminal code listing and defining the legislatively decreed purpose of objectives community has chosen to pursue, for the time being, by means of criminal sanction.[54]

I have argued for a similar approach—purpose-focused sentencing[55]—which is also an integral part of Reconstruction Sentencing. Certainly, criminal codes now include some provision stating purposes. However, they tendency is to state all possible sentencing purposes, without identifying guiding principles. This stops any efforts to actually study whether sentences are carrying out their intended effect. There is much data doubting the deterrent effects of sentences, showing that sentences are out of line with societal retributive sensibilities, and that prison does not rehabilitate offenders.[56] However, without a legislative mandate that sentences fulfill any particular purpose, there is no accountability now that we know they do not. This lack of sentencing utility makes the racial discrimination even more unjust. While we have no clarity on what goals our current systems of punishment achieve, we do know that our systems of punishment routinely sanctions people of color more severely. Reconstruction Sentencing requires us to take a closer look at how to rectify these outcomes. Though sorting it all out may take another fifty years, we have a real opportunity to begin that work now.

A Role for the Sentencing Commission

The key components of Judge Frankel's vision for sentencing that did come to pass were sentencing guidelines and sentencing commissions. These are also useful tools in the antiracist reconstruction of our sentencing system. Frankel envisioned a system of codified weights and

measures for sentencing factors.[57] Such an approach is taken in our current federal and state sentencing guidelines. Frankel's purpose was to find a method of informing judges on what facts ought to be material to sentencing and in what manner.[58] Taking the Federal Sentencing Guidelines as an example, sentencing guidelines do indeed focus judges on a certain set of factors and inform the judge on how to weigh those factors to come up with an ultimate—now advisory—range from which to choose a sentence. However, the complexity that has developed under today's guidelines exacerbate some of the problems Frankel sought to solve and insulate the system from meaningful antiracist reconstruction. In today's federal system, even if courts had an appetite to entertain arguments that a defendant's sentence is unconstitutional because it differs from similarly situated defendants who only differ in race, there would often be the counterargument that there was something materially different about the guidelines calculation in one case versus another. The complexity of the guidelines' real-offense sentencing approach buries racial discrimination and makes it nearly impossible for one defendant to successfully reveal being caught in the web of bias. This is true though the U.S. Sentencing Commission in its own studies has repeatedly confirmed racially disparate outcomes even when controlling for varied applications of the guidelines provisions.[59] If we are going to be serious about ridding sentencing of racist outcomes, we have to be willing to reinvent our approach to sentencing. Congress can direct the Sentencing Commission to take on the huge task of reconstructing the guidelines.

We have seen the seeds of such an expectation of the Commission recently— though not completely within an antiracist, Reconstruction Sentencing framework. In 2022, the Bipartisan Safer Communities Act (BSCA) became federal law.[60] The Act's main proponents, Senators Chris Murphy and Cory Booker, warned that "it is essential that the implementation of the law avoids the mistakes of the past."[61] In specifically addressing the BSCA's directive to amend the §2K2.1 firearms provision, the Senators asked the Commission "to give special consideration to the primary purposes of the BSCA and to the consequences which the Commission's guidelines may have for communities of color."[62] Though this request for attention to racialized consequences is admirable, any measures that the Commission could take to heed this warning are constrained both by Congress increasing the penalties in the accompanying statutes[63] and the BSCA's directive to the Commission to "review and amend" the guidelines to reflect those increased penalties.[64] However, the legislature left little to room for the Commission to actually review the guidelines in a manner that would correct for any adverse impact on communities of color. Further, the Commission's proposed amendments in response to that directive reveal the effect of those constraints. The Commission proposed two options: either to increase penalties for straw purchasers and firearms trafficking or increase penalties more broadly across the guideline to address proportionality issues with the penalties for felons in possession of a firearm.[65] Neither option addresses the existing racially disparate imposition of the §2K2.1 guideline.[66] Neither option ties the sentencing lengths to sentencing purposes. Neither option reconstructs sentencing in any meaningful way, other than to continue the upward ratcheting of sentence lengths that we have seen across many offenses for the last several decades. If Congress were to take an antiracist Reconstruction Sentencing approach, it would ask the Sentencing Commission to truly take the time to assess the racial impact of prosecution under new laws and ask for recommendations on how to remediate that impact.[67] In doing so, Congress just might find that there is no saving certain punitive sentencing laws. That would be true, restorative change.

Not Closing the Topic along with the Book

Like Judge Frankel, I believe "that there is need for broad and drastic reform of the law."[68] While Frankel wanted that change to come through structure and reduced sentencing discretion, I hope that we can one day focus reform on acknowledging and rectifying racial disparities in sentencing. It is a vast and persistent problem that will require bold change to even begin to address. But, I hope that, like Frankel's work, my thoughts open minds to thinking differently about what we can do in the criminal sentencing space. Judge Frankel showed us how to propose large-scale changes. His legacy demonstrates that, though it may take time, these large-scale changes can come to pass. Just as the world is different than it was fifty years ago, sentencing today has changed significantly from Frankel's time. But, what remains the same is that we continue to have a sentencing system without a clear purpose that causes harms it cannot justify. There is much work to be done. In honor of Judge Frankel, I'll use his words to end this essay, not as the conclusion of a thought, but as the opening of discourse. For, as Judge Frankel said of his own work those decades ago, "[T]he main goal of this effort is not to argue for definitive solutions, but to suggest lines of inquiry, debate, and experimentation. Let us begin."[69]

Notes

* Author is a member of the *Federal Sentencing Reporter* Editorial Board.

1 Marvin E. Frankel, *Criminal Sentences: Law without Order* (Hill and Wang New York, 1973).

2 For a lengthier description of this era, *see* Jelani Jefferson Exum, *From Warfare to Welfare: Reconceptualizing Drug Sentencing during the Opioid Crisis*, *UNIVERSITY OF KANSAS LAW REVIEW* 67 (2019): 941; *see also Timeline: America's War on Drugs*, NATIONAL PUBLIC RADIO (April 2, 2017). www.npr.org/templates/story/story.php?storyId=9252490

3 This norm was set by the Anti-Drug Abuse Act of 1986, § 1002, Pub. L. No. 99–570, 100 Stat. 3207, 3207–2 to -4 (codified as amended at 21 U.S.C. § 841).

4 National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Washington, DC: The National Academies Press, 2014). https://doi.org/10.17226/18613

5 Though seemingly unrelated to sentencing, it is worth noting that 1973 was also the year the Supreme Court decided *Roe v.*

Wade, recognizing that the constitutional right to liberty also included the right to decide whether to terminate a pregnancy (410 U.S. 113 [1973]). This underscores the assertion that criminal sentencing was far from the being the national legal hot topic in 1973. Additionally, given that the Court overturned Roe in the 2022 case *Dobbs v. Jackson Women's Health Organization*, it is also safe to say there was a very different concept of liberty amongst Supreme Court justices in 1973 (142 S. Ct. 2228 [2022]).

6 Frankel, *supra* n. 1 at ix.

7 See Jason M. Breslow, *New Report Slams "Unprecedented" Growth in US Prisons,* Frontline, May 1 2014, www.pbs.org/wgbh/frontline/article/new-report-slams-unprecedented-growth-in-us-prisons and Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, March 14, 2023, www.prisonpolicy.org/reports/pie2022.html

8 Katherine Beckett, "The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration," *Annual Review of Criminology* 1 (2018): 235, 237 (explaining that Sociologist David Garland "coined the term 'mass imprisonment' in 2001 to call attention to the 'unprecedented expansion of prison populations' in the United States and to the 'systematic imprisonment of whole groups of the population'" in his *text Mass Imprisonment: Social Causes and Consequences* (Beverley Hills, CA: Sage, 2001).

9 Frankel, *supra* n. 1, at 7.

10 *Id*.

11 For a full discussion of the failures of our sentencing systems to fulfill sentencing purposes, *see* Jelani Jefferson Exum, "Forget Sentencing Equality: Moving from the "Cracked" Cocaine Debate toward Particular Purpose Sentencing," *Lewis & Clark Law Review* 18 (2014): 95, and Jelani Jefferson Exum, "Purpose-Focused Sentencing: How Reforming Punishment Can Transform Policing," *Journal of Civil Rights and Economic Development* 29.1 (2016). https://ssrn.com/abstract=2952491

12 Frankel, *supra* n. 1, at 124.

13 *Id*.

14 *Id*.

15 Frankel, *supra* n. 1, at x.

16 Several sources explain the toll our criminal justice system has taken on communities of color in the United States. For a few examples, *see*, The Sentencing Project, *Report to the United Nations on Racial Disparities in the US Criminal Justice System*, April 19, 2018, www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system; see also Elizabeth Hinton, LeShae Henderson, et al., "An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System," Vera Institute of Justice, May 2018; www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf; Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, May 10, 2019, www.americanprogress.org/article/3-ways-1994-crime-bill-continues-hurt-communities-color; and, Trevariana Mason, *Extreme Sentences Disproportionately Impact and Harm Black Women*, National Black Women's Justice Institute, September 23, 2021, www.nbwji.org/post/extreme-sentences-disproportionately-impact-and-harm-black-women.

17 For a full discussion of my concept of Reconstruction Sentencing, see Jelani Jefferson Exum, "Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs," *American Criminal Law Review* (Georgetown) 58 (2021): 1685; *also see* Jelani Jefferson Euxm, "Addressing Racial Inequities in the Criminal Justice System through a Reconstruction Sentencing Approach," *Ohio Northern Law Review* 47 (2021): 557.

18 Ibram X. Kendi, *How to Be An Antiracist* (2019), 20.

19 Jelani Jefferson Exum, "Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs," *American Criminal Law Review* (Georgetown) 58 (2021): 1685, 1710; and Jelani Jefferson Euxm, "Addressing Racial Inequities in the Criminal Justice System," 557, 559.

20 Frankel, *supra* n. 1, at 5.

21 *Id.*

22 *Id.* at 10.

23 *Id.* Though he does not invoke the defendants' racial identities in this example, Judge Frankel's actual language of comparison of the "suburban college youth" to the "street-wise young ghetto hustler" can be taken as racially charged imagery. Even if Judge Frankel did not intend it as such and was only meaning to invoke economic station and locale, by juxtaposing that language with that of a judge of the "white middle classes" he certainly invites racial tropes into the reader's mind.

24 *Id.*

25 Several scholars and authors have argued that colorblindness perpetuates racism. One important text on the subject is, Jennifer L. Eberhardt, *Biased* (Penguin, 2019); see also Helen A. Neville, Miguel E. Gallardo, et al., *Introduction—Has the United States Really Moved beyond Race?* (American Psychological Association, 2016), www.apa.org/pubs/books/The-Myth-of-Racial-Color-Blindness-Intro-Sample.pdf. I have also addressed this topic in my scholarship. See e.g., "Nearsighted and Colorblind: The Perspective Problems of Police Deadly Force Cases," *Cleveland State Law Review* 65 (2017): 491.

26 *See, e.g.*, William Rhodes, Ryan Kling, Jeremy Luallen, & Christina Dyous, Bureau of Just. Stat., U.S. Dep't of Just., Federal Sentencing Disparity: 2005–2012 (2015), www.bjs.gov/content/pub/pdf/fsd0512.pdf (providing data on federal sentencing disparity).

27 United States Sentencing Commission, *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*, November 2017, Key Findings at p. 2, Demographic Differences in Sentencing: An Update to the 2012 Booker Report (ussc.gov) (hereinafter, *Demographic Differences*).

28 *Id.*

29 For example, *see* Sonja B. Starr and M. Marit Rhavi, "Racial Disparity in Federal Criminal Sentencing," *Journal of Political Economy* (2014): 1320, 1323 (explains that their studies led them to "identify an important procedural mechanism that appears to give rise to the majority of the otherwise-unexplained disparity in sentences: how prosecutors initially choose to handle the case, in particular, the decision to bring charges carrying 'mandatory minimum' sentences").

30 This change from mandatory to advisory sentencing guidelines began with *Apprendi v. New Jersey*, 530 U.S. 466 (2000) when the Court held that other than fact of a prior conviction, any fact that increases the penalty for an offense beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Next, in *Blakely v. Washington* in 2004, the Court examined a Washington state determinate sentencing scheme that shared many similarities with the Federal Sentencing Guidelines and clarified that a defendant's Sixth Amendment rights were implicated whenever a judge imposes a sentence not "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely v. Washington, 542 U.S. 296, 303–4 (2004). Eventually, in 2005, the Court ruled, in *U.S. v. Booker*, that *Blakely* applied to the Federal Sentencing Guidelines and determined that the Federal Guidelines must be advisory in order to comply with this view of the Sixth Amendment.

31 *Demographic Differences*, *supra* n. 27, at 14–15 (Black male offenders were 21.2% less likely than white male offenders to

receive a non-government sponsored downward departure or variance during the reporting period).

32 *Id.*

33 *Id.* Furthermore, when Black male offenders did receive a non-government-sponsored departure or variance, they received sentences 16.8 percent longer than White male offenders who received a non-government-sponsored departure or variance. *Id.* at 13.

34 Frankel, *supra* n. 1, at 103.

35 *Id.*

36 Frankel, *supra* n. 1, at 105.

37 *Id.*

38 See *supra* n.17

39 See full discussion in *supra* n.17

40 The Military Reconstruction Acts of 1867 divided the South into five military districts that were each under the command of a Northern General. Additionally, the Act set forth the manner in which the new governments would be designed, including provision for equal rights for Black Americans. The Acts required any state seeking readmission to the Union to first ratify the Fourteenth Amendment. Further, the Act granted the right to vote to African American men, but disenfranchised former Confederates. *See Reconstruction*, U.S. HISTORY, www.ushistory.org/us/35.asp; *see also The History Engine: The First Reconstruction Act Is Passed*, UNIV. RICHMOND DIGIT. SCHOLARSHIP LAB, https://historyengine.richmond.edu/episodes/view/1431. For a more detailed study of this era, see *EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3rd ed. 2017). https://lynchinginamerica.eji.org/report

41 For complimentary scholarship, see Brandon Hasbrouck, "The Antiracist Constitution," *Boston University Law Review* 102 (2022): 87.

42 Frankel, *supra* n. 1, at 84

43 Frankel, *supra*, at 83–85.

44 See *supra* n.30 for an explanation of the line of cases that led to *U.S. v. Booker,* which set forth reasonableness review. Other cases fleshing out reasonableness review include *Gall v. United States*, 128 S. Ct. 586, 597 (2007) and *Kimbrough v. United States*, 128 S. Ct. 558, 574–75 (2007).

45 Frankel, *supra* n.1 at 104.

46 *Id.*

47 The Supreme Court has held that reasonableness review has both a procedural and substantive component. Neither approach has a clear avenue for arguing that one's sentence is the by-product of systemic racism.

48 *See* Euxm, "Addressing Racial Inequities in the Criminal Justice System," 557, 581–82.

49 See Washington v. Davis, 426 U.S. 229, 242 (1976).

50 Euxm, "Addressing Racial Inequities in the Criminal Justice System," 557, 583.

51 Frankel, *supra* n.1, at 104.

52 *Id.*

53 Frankel, *supra* n.1, at 106.

54 *Id.* at 107

55 *See* Jelani Jefferson Exum, "Forget Sentencing Equality: Moving from the "Cracked" Cocaine Debate Toward Particular Purpose Sentencing," *Lewis & Clark Review* 18 (2014): 95; Jelani Jefferson Exum, "Purpose-Focused Sentencing: How Reforming Punishment Can Transform Policing," *Journal of Civil Rights and Economic Development* 29.1 (Fall 2016). https://ssrn.com/abstract=2952491

56 *Id.*

57 Frankel *supra* n. 1, at 112

58 *Id.*

59 See *Demographic Differences*, *supra* n.27.

60 Public Law No: 117–159 (2022), available at www.congress.gov/bill/117th-congress/senate-bill/2938/text.

61 Letter from Sens. Cory Booker & Christopher Murphy to Hon. Carlton W. Reeves, Chair, United States Sentencing Comm'n at 1 (Dec. 5, 2022), https://tinyurl.com/n9s52veb ("Booker & Murphy Letter"); see also Letter from Sen. Christopher Murphy to Att'y Gen. Merrick Garland, Sept. 12, 2022, at 3, https://tinyurl.com/4xzu29et ("As the Department implements these new criminal provisions, it is incumbent on Department leadership to ensure that these new tools and power do not come at the expense of historically over-policed and overprosecuted communities.").

62 Booker & Murphy Letter, supra note 9 at 1–2

63 Among other things, the BSCA created new statutory provisions covering straw purchasers and gun traffickers, at 18 U.S.C. §§ 932 and 933. It increased the statutory maximum penalties for four firearms statutes from 10 to 15 years. See BSCA §§ 12001, 12002, 12004, 12005.

64 The BSCA also directed the Commission to "review and amend" the firearms guidelines and policy statements to (1) ensure that people convicted of offenses under the "new sections 932 and 933 of title 18 and other offenses applicable to straw purchases and trafficking of firearms, are subject to increased penalties in comparison to those currently provided"; (2) reflect the intent of Congress that a person convicted of a §§ 932 or 933 offense who is "affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual"; and (3) reflect the intent of Congress that "straw purchasers without significant criminal histories receive sentences that are sufficient to deter . . . and reflect the defendant's role and culpability, and any coercion, domestic violence survivor history or other mitigating factors."

65 United States Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines*, February 2, 2023, pp. 24–59, www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf. (The proportionality concern is that increasing the base offense levels for straw purchasers without an across-the-board increase would result in prohibited persons getting shorter sentences than a person who purchased the gun for them.)

66 In the written *Statement of Michael Carter, Federal Public Defender for the Eastern District of Michigan on Behalf of the Federal Public and Community Defenders*, Carter urged the Sentencing Commission to take account of the racially disparate sentencing under the federal firearms guidelines and spend more time studying the racialized outcomes of the BSCA. He noted that "In the Eastern District of Michigan [. . .]: during the fiscal years of 2017 to 2021, 85 percent of people sentenced under primary guideline §2K2.1 with at least one count of conviction under § 922(g) were Black. Compared to all other races, in my district, Black individuals are 5.9 times more likely to be sentenced with at least one § 922(g) conviction and under §2K2.1 than non-Black individuals." March 7, 2023, p. 1, www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/FPD1.pdf. These same arguments were made during the live testimony given before the Commission by Leslie E. Scott, National Sentencing Resource Counsel, Federal Public and Community Defenders, March 7, 2023 (video transcript available at www.ussc.gov/policymaking/meetings-hearings/public-hearing-march-7-8-2023).

67 This is what the Federal Defenders have asked the Commission to do. See *Id.* at 27 ("The Commission should not abandon its characteristic institutional role and expertise, and should collect, study, and publish data and other information about the sufficiency of current penalties for firearms offenses").

68 Frankel, *supra* n.1 at 105.

69 *Id*.

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Ryan Farrell, Trial Attorney/Federal Defenders of Eastern Washington & Idaho

Topics:

Research Recommendations

Policymaking Recommendations

Comments:

1. Please eliminate methamphetamine's purity penalty. Purity is no longer an accurate proxy for culpability when everyone has "pure" meth.

2. Please revise 2G2.2(b) to better reflect culpability. Many enhancements were designed in a pre-Internet age to capture more sophisticated offenders. Today, most offenses are committed using computers, which means many run-of-the-mill offenders have large numbers of images, which frequently depict at least one minor under 12, sadistic or violent conduct, etc. And "distribution" is all too common when peer-to-peer networks are ubiquitous. Bottom line, many enhancements routinely apply and push the guideline range near the statutory maximum instead of applying only to more culpable offenders as intended.

Submitted on: June 5, 2024

July 15, 2024

Honorable Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comment Recommending Changes to Guideline § 2L1.2

Deer Judge Reeves,

I am writing in response to the Sentencing Commission's request for comment on possible policy priorities for the amendment cycle ending May 1, 2025. I am a law professor at the University of California, Davis School of Law. My research focuses on federal immigration crimes, in particular 8 U.S.C. § 1326. My recommendation is that the Sentencing Commission make it a policy priority to revise the Sentencing Guidelines on unlawful reentry (U.S.S.G. § 2L1.2). The current Guidelines double-count criminal history in a way that is arbitrary and unfair to unlawful reentry defendants. These Guidelines have been subjected to constitutional challenge, with one judge finding that they violate the Equal Protection Clause.[1] I am writing to propose two changes in the alternative: 1. Eliminating the Specific Offense Level enhancements in U.S.S.G. § 2L1.2(b)(2) and (b)(3), or 2. Collapsing them into one enhancement so that the timing of the first deportation does not matter.

In keeping with your request, I plan to keep this letter brief. I am happy to supplement it with additional information. I am currently drafting an article, titled "Sentencing Immigrants," that discusses Guideline § 2L1.2 more exhaustively.

The baseline structure of the Sentencing Guidelines distinguishes between "Criminal History Category" and "Offense Level." The former enhances a defendant's sentence for their past crimes, the latter enhances a defendant's sentence for facts about the current crime. § 2L1.2 is unique in that it makes prior convictions the most important sentencing factor in both directions. It is the only Guideline that functions this way. There are a few Guidelines that give "Offense Level" enhancements for having committed the same type of crime previously. For example § 2L1.1(b)(3), the Guideline for immigrant smuggling, has a 2- or 4-point enhancement for having one or two prior "felony immigration or nationalization offenses." But § 2L1.2 is the only Guideline that makes the Offense Level depend entirely on past convictions.

This double counting creates a sentencing system that discriminates by immigration status, and also in effect by race. 8 U.S.C. § 1326 is the most-commonly-

[1] United States v. Osorto, 995 F.3d 801 (11th Cir. 2021) (Martin, J., dissenting).

charged federal felony, with about 20,000 prosecutions per year.[2] Not being a citizen of the United States is an element of the crime, thus only non-citizens can receive this double counting. About one-third of all federal criminal defendants are charged with immigration crimes, with the great majority of those cases being unlawful reentry.[3] Over 99% of the defendants in those cases are Latin American.[4] This double-counting thus effectively creates two federal sentencing systems: a baseline system for U.S. citizens where criminal history is counted once, and a separate system for deported immigrants from Latin America where criminal history is counted twice.

The double-counting rules in Guideline § 2L1.2 have changed significantly over time. The first version was enacted by the Commission in 1991. It created a +16 enhancement for having an aggravated felony conviction prior to deportation. This enhancement was created with minimal hearings or debate, just the comments of one federal prosecutor named Joe Brown.[5] It was crafted in response to Congress increasing the statutory maximum from two years to twenty years for defendants deported after receiving an "aggravated felony" conviction.[6] Initially, the category "aggravated felony" only applied to a small number of serious crimes – murder, firearms trafficking, and drug trafficking.[7] But the definition expanded significantly from 1990 to 1996, to include a laundry list of crimes with varying degrees of seriousness.[8] Because the definition of "aggravated felony" expanded to include more minor crimes, the Commission no longer saw it as fair to give every 1326 defendant with a pre-deportation aggravated felony a 16-point enhancement. Guideline § 2L1.2 was thus amended in 2001 to create a sliding scale of enhancements based on the type of prior conviction, ranging from 4 points to 16 points. This version of the Guideline, in turn, became unpopular with judges and prosecutors because it required applying the much-maligned categorical approach. The Guideline was thus amended a third time in 2016, to create its current structure.

The present version of Guideline § 2L1.2 provides for up to two enhancements of up to +10 for prior felony convictions. A defendant receives one enhancement between +4 and +10 for a felony conviction prior to their first deportation, and another identical enhancement for a felony conviction after their first deportation. The size of each enhancement depends on the nominal sentence length. This new structure is somewhat less punitive than the prior version of § 2L1.2, at least

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[2] *See* American Immigration Council, Prosecuting People for Coming to the United States (2021), available at https://www.americanimmigrationcouncil.org/research/immigration-prosecutions.
[3] *See* Eric Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1053 (2022).
[4] U.S. Sent'g Comm'n, Quick Facts: Illegal Reentry Offenses (2023), /https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY22.pdf.
[5] *See* Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases are Unjust and Unjustified (and Unreasonable Too)*, 51 BOSTON COLLEGE LAW REVIEW 719, 734 (2010).
[6] *Id.* At 732-33.
[7] Anti-Drug Abuse Act of 1988, Pub. L. 100-690, §§ 7342, 7344, 102 Stat. 4469, 4470.
[8] 8 USC § 1101(a)(43).

according to the Sentencing Commission's statistics.[9] But it is arbitrary and unjust in practice. Here I will briefly describe four major problems: 1. Huge swings in sentence length depend on the specific order of convictions and deportations; 2. There are potential constitutional problems with the post-deportation enhancement in § 2L1.2(b)(3), because it was not endorsed by Congress; 3. It is often very difficult to know at the point of a guilty plea what sentence the defendant is actually going to receive; and 4. Counting rules that try to translate state sentences into federal enhancements significantly inflate the signal provided by the state sentences.

(1) When the Commission created parallel pre- and post-first-deportation enhancements in the 2016 amendments, it was trying to end the arbitrariness of treating immigrants differently based on whether their conviction happened before or after their first deportation. The Commission's logic was that a person who commits a felony and then is deported does not deserve more punishment than a person who is deported then commits a felony. But the Commission's solution just compounded the arbitrariness problem by making it depend on the specific order of events. Consider the following defendants' chronological deportation and criminal histories:

Defendant 1: two year sentence, deportation, two year sentence: +16 enhancement (+8 under (b)(2), +8 under (b)(3)).

Defendant 2: deportation, three year sentence, deportation, one year sentence, deportation, deportation, four year sentence, deportation, deportation: +8 enhancement under (b)(3)

Defendant 3: two year sentence, five year sentence, ten year sentence, deportation, deportation: +10 enhancement under (b)(2)

There is no logical reason why Defendant 1 would merit a higher sentencing range than Defendant 2 or Defendant 3. Defendants 2 and 3 have much more serious deportation and criminal histories. But they don't have convictions straddling their first deportation. According to the Commission's data, the average number of prior deportations for a 1326 defendant is 3.2.[10] It makes little sense for huge swings in

[9] *See* United States Sentencing Commission, Federal Sentencing of Illegal Reentry: The Impact of the 2016 Guideline Amendment (2022) https://www.ussc.gov/research/research-reports/federal-sentencing-illegal-reentry-impact-2016-guideline-amendment.
[10] U.S. Sent'g Comm'n, Illegal Reentry Offenses (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

sentence length to depend on whether just the first deportation divides two felony convictions.

(2) Beyond this arbitrariness, there are potential Equal Protection problems with specifically § 2L1.2(b)(3). These are laid out in Judge Beverley Martin's dissent in *United States v. Osorto*.[11] That case involved an Equal Protection challenge to the post-first-deportation enhancement. Judge Martin found that a higher degree of scrutiny applies to this enhancement because it has not been directed by Congress. Section 1326 creates a higher maximum sentence for a defendant "whose removal was subsequent to a conviction" for a felony or aggravated felony.[12] It provides no maximum sentence increase for a person who commits a felony after they are deported. Judge Martin found that under the framework set out in *Hampton v. Wong*, this rule receives heightened scrutiny under the Equal Protection Clause because it was not directed by Congress.[13] Judge Martin concluded that the enhancement is unconstitutional: "In the absence of a justification that recognizes the discriminatory effect of § 2L1.2(b)(3) and explains why differential treatment is necessary to advance an 'overriding national interest,' I am not convinced the Sentencing Commission has met its burden under *Hampton's* heightened scrutiny."[14]

(3) It is very difficult for defense lawyers to effectively advise unlawful reentry clients about the sentencing guidelines range, because multi-year swings in sentence length turn on the precise timing of deportations and convictions. Often accurate information about past deportations and convictions is not available quickly. Law enforcement database records are often spotty and inaccurate, and conviction/deportation records are slow to arrive from courthouses and the federal immigration authorities. Because a large percentage of § 1326 cases are disposed of very quickly through the "Fast Track" program, defendants often accept a guilty plea before they know what kind of sentence they are actually facing. This leads to a lot of problems down the line, including attorneys being fired and attempts to withdraw guilty pleas.

(4) Problems of translation between state sentencing rules and the federal Guidelines also inflate the recommended sentences.[15] For example, the Guidelines treat nominal sentence length as the true sentence length even when a defendant is released early. Thus an indeterminate sentence of between six months and five years is treated as a 5-year sentence, meriting a +10 enhancement. And if a person receives

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[11] United States v. Osorto, 995 F.3d 801 (11th Cir. 2021) (Martin, J., dissenting).
[12] 8 U.S.C. § 1326(b).
[13] Hampton v. Wong, 426 U.S. 88 (1976).
[14] *Osorto* at 828.
[15] *See* Eric Fish, *The Paradox of Criminal History*, 42 CARDOZO LAW REVIEW 1373 (2021).

a short sentence plus probation, then is deported, then receives a long sentence for a new crime plus a concurrent probation violation, this is treated as two separate sentences and triggers the double enhancement.

One rather dramatic case that the undersigned is familiar with illustrates many of these problems. In that case, the defendant received an erroneous Guidelines calculation of 130 to 162 months (and a sentence of 96 months) when his true Guidelines range was 46 to 57 months. This case occurred in 2019. The Probation Officer doing the calculation gave defendant a +8 enhancement for a cocaine possession conviction from 1995, and a +10 enhancement for a robbery conviction from 1998. The 1995 conviction should not have counted because it was too old. However, because there was a parole violation concurrent with the 1998 sentence the Probation Officer writing the PSR treated it as within the 15-year time limit. The only way to find out that the 1995 conviction should not have counted was to order the physical prison records from California, an onerous process that took weeks. The Probation Officer and defense counsel in the defendant's case did not do this, and so he was erroneously given a sentence many years longer than he should have received. When such large swings in sentence length turn on obscure minutiae of state conviction records, mistakes like this become common.

For these reasons, I recommend that the Commission either eliminate the enhancements in § 2L1.1(b)(2) and (b)(3), or else combine them into a single enhancement that applies regardless of the timing of a defendant's deportations. I thank the Commission for considering my views on this topic, and I am available to address any questions or concerns you may have and to provide more information.

Sincerely yours,

Eric Fish
Acting Professor of Law
U.C. Davis School of Law
[redacted]

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Jane Francis, Attorney

Topics:

Policymaking Recommendations

Comments:

3B1.2 can only be applied when more than one participant is involved. Many drug possession with intent to distribute charges are based on a single interdiction of a courier. This action would potentially qualify for a minor/minimal reduction if it were on a multiple-defendant indictment. The government's charging decision does not change the defendant's culpability in this situation yet it can eliminate the role reduction evaluation. The committee should review the application note and considering changing it to focus on the action of the defendant by eliminating the requirement for multiple participants.

Submitted on: July 2, 2024

Michelle Garcia, Psy.D. & Associates
Improving Quality of Life

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7/15/24

Honorable Judge Carlton W. Reeves
Chair, U.S. Sentencing Commission
One Columbus Circle, NE Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves,

I am writing to emphasize the legal and ethical obligations of the criminal justice system under Title II of the Americans with Disabilities Act (ADA) to provide reasonable accommodations for individuals with autism. It is imperative that the U.S. Sentencing Commission recognizes autism as a significant mitigating factor in sentencing decisions and takes immediate action to ensure justice for autistic individuals.

Autism Spectrum Disorder (ASD) affects millions of Americans, impacting their ability to communicate, interact socially, and adapt to new or stressful environments. The unique challenges faced by autistic individuals often lead to misunderstandings and misinterpretations by law enforcement and judicial personnel, resulting in unjust treatment and sentencing.

Title II of the ADA requires public entities, including the criminal justice system, to make reasonable modifications in policies, practices, and procedures to avoid discrimination on the basis of disability. This mandate ensures that autistic individuals can fully participate in legal proceedings and receive fair treatment. Accommodations may include:

1. **Communication Support**: Providing interpreters, communication devices, or modified questioning techniques to ensure that autistic individuals can understand and respond appropriately.
2. **Sensory Accommodations**: Creating environments that minimize sensory overload, such as reducing noise and bright lights, which can cause significant distress for autistic individuals.
3. **Behavioral Understanding**: Training law enforcement and judicial personnel to recognize and appropriately respond to autistic behaviors, such as repetitive movements or difficulty maintaining eye contact, which may be misconstrued as non-compliance or deceit.
4. **Appropriate Counseling and Medications:** Counseling specific for persons with Autism by trained and licensed personnel who understand these unique needs, even if that means outsourcing these services, as well as ensuring persons have access to the appropriate medications they were prescribed prior to this already difficult time is critical to maintaining their safety and well being during this time.

In addition to these accommodations, I respectfully request that the U.S. Sentencing Commission consider the following specific recommendations:

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1. **Options for Diversion**: Develop and implement diversion programs specifically tailored for individuals on the autism spectrum. These programs should focus on treatment and support rather than punishment, recognizing the unique needs and challenges faced by autistic individuals.
2. **Dropping Mandatory Minimums**: Eliminate mandatory minimum sentences for cases involving autistic individuals. Mandatory minimums do not account for the mitigating factors related to autism and can result in disproportionately harsh sentences for these individuals.
3. **Training for Personnel**: Provide comprehensive training for law enforcement, judicial personnel, and prison staff on understanding and appropriately responding to autistic behaviors. This training should emphasize de-escalation techniques and the importance of accommodations under the ADA.

Failing to provide these accommodations not only violates the ADA but also perpetuates systemic injustices against autistic individuals. By ensuring that the criminal justice system adheres to the requirements of Title II of the ADA and implementing these specific recommendations, the U.S. Sentencing Commission can help create a more just and equitable system for all individuals, regardless of their neurological differences.

Thank you for your attention to this vital issue.

If you have any further questions, feel free to contact me at the above number.

Michelle Garcia, PsyD

Michelle Garcia, Psy.D.
Clinical Psychologist

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Ruben Garcia, solo practitioner

Topics:

Miscellaneous Issues

Comments:

I was a member of the southern district of Florida for 39 years and recently stopped accepting appointments. the reason is that the BOP makes more and mor difficult to visit and spent time with the client, I do realize that the sentencing Commision has not the power to do anything about this situation, but your work is for naught if I can't spent adequate time with the defendant to explain how it applies to his case. thank you for all your work. be well.

Submitted on: June 11, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Ari Gatsios, Louisiana, Middle

Topics:

Research Recommendations

Policymaking Recommendations

Simplification

Comments:

Guidelines in general should be simplified. Specifically, categorical approach and financial crimes. Child pornography guidelines also need to be updated.

Streamline/improve the process for probation offices' requirement to notify victims in cases with a large amount of victims.

It should be standard for probation officers/Courts to work with an agreed upon factual basis/offense conduct at sentencing. Probation officers exploring discovery is cumbersome/impractical within presentence investigation time frames and allows the USA to place the sentencing fact finding burden on the probation office.

Recidivism rate data as it correlates to the different sentencing options - i.e. prison and length of prison time, probation, supervised release etc. would be very helpful to have populated to Part D of the PSR in order to help the probation officer in their recommendations, and the Judge in their sentencing decisions, account for one of the largest and most important effects of sentencing (recidivism chance).

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Biagio Giaimo, Ohio, Northern

Topics:

Research Recommendations

Comments:

There has been a great deal of confusion regarding intervening arrests. Specifically, the confusion is surrounding the definition of "arrest" as used in the term "intervening arrest," found in Chapter 4, Part A. In the Sixth Circuit, U.S. v. Rogers found that the term "arrest" means, "placing someone in police custody as part of criminal investigations." This has produced confusion as to whether or not that includes something as simple as detainment by police during a traffic stop, or if a defendant must be booked into a holding facility. It would be helpful if the commission could define the term "arrest" as it relates to its usage in Chapter 4.

Submitted on: July 9, 2024

Thanks again for the opportunity to suggest areas of research for the Sentencing Commission. I've come up with some, with some help from stakeholders in the district. Here they are:

1. Survey BOP to find out what actual programming they are offering in facilities and what those programs entail. Given that the First Step Act mandates rehabilitation programs, it would be good to know what, if any, have developed in its wake.
2. Research how 5Ks are being used for different categories of offenses and defendants in districts around the country.
3. Find out who is serving time under mandatory minimum sentences, for what offenses, from what jurisdictions, and with what defendant circumstances.
4. Research how many people, from what jurisdictions, and with what defendant characteristics and offenses, were subjected to sentencing enhancements using convictions under youthful offender or juvenile statutes, which the Sentencing Commission has now suggested is not best practice.
5. Revisit 5H1.5 (departure regarding employment) – why does it say it is not ordinarily relevant?
6. Regarding all the departures in the 5H section more research on when, how often, and in what circumstances are they invoked and ways of incorporating more and varied departures.

I hope these are helpful.

Enjoy summer!

Sincerely,
Miriam

Miriam Gohara
Clinical Professor of Law
Yale Law School
[redacted]

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Steven Guttman, New York, Eastern

Topics:

Miscellaneous Issues

Comments:

For the robbery guideline, there should be an enhancement for impersonating a law enforcement officer.

It's long past time for crack and cocaine to be equal for guidelines purposes. We are the only entity that still differentiates.

USSG 4C1.1 should be expanded to include those with one criminal history point.

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Kyla Hamilton, Colorado

Topics:

Policymaking Recommendations

Simplification

Career Offender

Comments:

Please eliminate the need for determination about crimes of violence or controlled substance offenses in the Guidelines that subsequently create the need for the court and parties to do the categorial or modified categorical approach. These issues create such a significant amount of litigation and work for all parties involved in sentencing.

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Brett Handmaker, Ohio, Southern

Topics:

Policymaking Recommendations

Comments:

2G2.2 needs to be updated for the times. Many of the SOCs are outdated. For instance, 2G2.2 (b)(6), I haven't seen this SOC not applied for over 17 years. All of these cases use some form of a computer, internet, etc. 2G2.2(b)(7), number of images, also needs to be updated. With a video file equaling 75 images, it most always is 600 or more images per case. These two SOCs should be factored into an increased BOL.

Submitted on: June 10, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

US Probation

Topics:

Miscellaneous Issues

Comments:

I think it would be wise to revise the definition of firearm in 2K2.1 to include machineguns. At present, the definition reaches silencers and even receivers but not machineguns. It seems they should be included, and this causes strange results otherwise. We have had a large increase in those cases of late. It might be helpful to also revise the definition of "ice" in 2D1.1. In our district, the labs are no longer testing for d meth v l meth hydrocholoride, so the definition is unusable to us.

Submitted on: June 6, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Laura Harris, Wyoming

Topics:

Policymaking Recommendations

Comments:

The CDW equivalent for methamphetamine actual overrepresents the seriousness of offense conduct due to nearly all methamphetamine in federal cases being nearly 100% pure.

Nearly all child pornography cases involve computers/devices and involve 600 or more images. Therefore, cases with these specific offense characteristics are no longer outliers, and these enhancements unnecessarily increase the guideline range in what appears to be a majority of federal cases involving the conduct. USSG 2G2.2 seems to be a guideline that results in downward variances in the majority of cases in our district and likely across the nation.

There is a disparity between what the statute at 26 U.S.C. Sec. 5845(b) defines as a firearm and what Application Note 1 at USSG Sec 2K2.1 defines as a firearm as it relates to conversion switches and "Glock switches." The application note defines a firearm as the meaning given in 18 U.S.C. § 921(a)(3), which does not include a conversion device within the enumerated definitions. Therefore, a person can be charged with having an illegal firearm for possessing a conversion switch under the statute, but if they have multiple switches, their sentence cannot be enhanced under 2K2.1(b)(1). This recently came up in a case in our district, wherein the defendant possessed four switches but could not be enhanced. This disparity between definitions should be resolved.

Submitted on: June 13, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500,
Washington, D.C. 20002-8002
Attention: Public Affairs – Priorities Comment.

July 12, 2024

Via: Public Comment Submission Portal

I am a Senior U.S. Probation Officer. July 2024 marks my 15th year conducting presentence investigations, and I have been the Sentencing Guidelines Specialist in the District of Minnesota since March of 2015. This letter reflects only my individual views as an experienced technician and is in direct response to Honorable Carlton W. Reeves invitation on June 5, 2024, encouraging broad comment on "what big picture issues you'd like us to tackle – or what technical problems you'd like us to look into."

These are formatting suggestions, impossible in practice instructions, or seemingly arbitrary discrepancies that have frustrated or confounded me regularly over my 640+ presentence investigation reports (which has included at least one report from every single part, A through X, due to the variety of offenses prosecuted in the District of Minnesota):

USSG §1B1.3, formatting

A great deal of confusion, both in relevant conduct and in grouping, might be avoided if the list at USSG §3D1.2(d) simply appeared directly in USSG §1B1.3. Both relevant conduct and grouping are intuitive once they are broadly understood, but for a new practitioner, each is confusing enough that asking one to move forward two chapters to understand the most foundational principle, into a guideline that is discussing multiple counts even as relevant conduct analysis does not require multiple counts, is a breeding ground for confusion. Given the directive that the book is always applied in order, it would be far more natural to include the expanded relevant conduct list right in relevant conduct, explaining that multiple counts for offenses referenced to those guidelines would be aggregated into a single offense level computation. That analysis would already be complete when one arrived in Chapter 3, and USSG §3D1.2(d) could simply say, "offenses covered by the principals of expanded relevant conduct, detailed at USSG §1B1.3(a)(2), are to be grouped under this subsection."

This would also help an additional area of confusion in USSG §3D1.2. Because "rule (d)" grouping is by and far the most common form of grouping, and because USSG §3D1.2(d) appears differently than the rest of USSG §3D1.2 in having that guideline list appear in the guideline (rather than in the application notes, where further direction for USSG §3D1.2(a) through (c) appears), I have repeatedly seen that the two groups at USSG §3D1.2(d) are casually seen as "the Grouping list" and "The Doesn't Group list," rather than what they actually are: a list simply for grouping under rule (d), with three other options for grouping available: (a), (b), and (c).

USSG §§3C1.1 and 3E1.1, Obstruction/Acceptance preclusion

The sweeping suggestion that an obstruction adjustment would typically negate an acceptance reduction is concerning given there is no description of timing. One illustrative example would be of a defendant who tells a roommate to "keep her mouth shut" during an early jail call between an initial

appearance and detention hearing. This potentially would trigger the obstruction adjustment, as described at USSG §3C1.1, comment. (n.4(A)), and thus suggest this defendant should not receive an acceptance of responsibility reduction, even if the defendant thereafter was fully cooperative and pleads guilty in a timely manner. Although Application Note 4 to USSG §3E1.1 does note "extraordinary cases in which adjustments under both USSG §3C1.1 and USSG §3E1.1 may apply," the fact that the term "extraordinary" is used still weighs against its regular consideration, even as the example I provided is not extraordinary at all. Without mention of timing, obstructive conduct significantly prior to a guilty plea could result in not just a 2-level enhancement, but also the denial of a 3-level reduction. This then becomes a 5-level swing that provides little to no incentive to a defendant who has obstructed justice, even if there is a change of heart and they become cooperative and accepting of responsibility as pretrial proceedings move forward. This instruction then becomes just as arbitrary as saying, "if a defendant engaged in sophisticated means, or the offense involved a vulnerable victim, a reduction for acceptance of responsibility is ordinarily not warranted." Rather, obstruction of justice arguably should just be one additional aggravating factor, like sophisticated means or having a vulnerable victim, that increases your offense level but does not categorically prevent your acceptance reduction. The instruction would be far less arbitrary, and I believe more accurate to its original intent, if clarified that "Conduct ***in conjunction with or occurring after a defendant's guilty plea*** that results in an enhancement under USSG §3C1.1…ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct."

USSG §3C1.1, Obstruction Examples of Covered/Ordinarily Not Covered Conduct

One of the most common forms of obstructive conduct is absconding from pretrial release. This does not fall neatly among the examples under Application Note 4 or 5. Application Note 5 simply has nothing similar (discussing only "avoiding or fleeing from arrest,"), and Application Note 4 is limiting in its specificity, including only "escaping or attempting to escape from custody" or "willfully failing to appear." Far more common than escaping from custody or willfully failing to appear is simply absconding from supervision. At first glance, this seems more akin to that listed at Application Note 4 than the examples at 5, but the specificity at Note 4 is hard to achieve because once a person absconds, the Court does not set hearings for them to then willfully fail to appear. The Court issues a warrant, and because there is a warrant, no hearings are set. Because the person absconded from supervision (and was not in a facility to escape from), they do not meet the first prong of that example either. This is one of the most common forms of obstructive conduct, and further clarification of where that would fall between Note 4 and 5 would be enormously clarifying.

Further clarification on this common scenario also dovetails with the issue I detailed above, with the obstruction/acceptance preclusion. Example: A defendant is arrested but released after their initial appearance to pretrial release. They are scared and abscond immediately, before even meeting with their appointed defense attorney. After some months, they are found in another state, arrested, and detained. Following their detention, they have time to meet with their attorney and learn the more-likely stakes of what they are facing (guideline range vs. statutory maximum). They then are immediately cooperative and now want to plead guilty, but the length of their fugitive status has the government considering an obstruction of justice enhancement. Not only is that very common scenario unclear in Application Note 4 and 5, the threat of the 5-level swing could remove the defendant's incentive to plead guilty, fearing that their early actions take away any possibility of the reduction even with a guilty plea.

USSG §3C1.3, Commission of Offense While on Release

The wording of this guideline has made its application far more confusing than it is. After multiple cases involving this provision and significant independent research, I see it as very straightforward and understand that the Order Setting Conditions of Release **is** the notice, but not because anything about USSG §3C1.3 pointed me in that direction. All practitioners would benefit from a more straightforward presentation that focuses on this as a guideline adjustment (something like, "If the defendant committed the instant offense while on pretrial release for another federal offense, increase the offense level by 3 levels"), with additional education in the Commentary/Application Note that notice is typically provided in the release documents for the other federal case. This would remove the confusion if 18 U.S.C. § 3147 must be charged in the new Indictment (which seems to be the most common concern among Assistant U.S. Attorneys).

USSG Part T, Offenses Involving Taxation

There are seven active guidelines under Subpart 2T1. None have more than two specific offense characteristics, some have none, and nearly all point to the Tax Table in yet another guideline, USSG §2T4.1. Like fraud, tax offense severity is largely based on aggregate loss. Like fraud, there may be different technical ways to steal money, but just as wire fraud is largely similar to mail fraud, tax evasion is largely similar to filing a false return. As a practitioner, tax fraud itself is not that complicated, but the strange delineations in the 2T1 subpart make it difficult to correctly apply tax guidelines (especially if someone is convicted of multiple tax statutes) and difficult to research disparities (given the preferred statute for prosecuting tax fraud seems to change year by year). Part T entirely, but particularly Subpart 2T1, could be wildly simpler, with a single USSG §2T1.1 guideline that directly incorporates the Tax Table with specific offense characteristics that broadly cover all tax offenses, similar to USSG §2B1.1 and the ways in which it covers all fraud offenses.

USSG §§4A1.1 and 4A1.2, Marijuana Offenses

USSG §4A1.3 is among the most used departures, and the addition of marijuana possession as a specific factor for consideration has been particularly appreciated as states begin to navigate legalization and expungement of previous offenses. However, continuing to apply at least one criminal history point for marijuana possession will lead to disparity in guideline ranges between defendants in different states. For example, a defendant living in Minnesota, where marijuana legalization and pending expungements helps support USSG §4A1.3 departures for previous cases that have not yet been expunged, may be more likely to receive that departure and eventually not require the departure at all (once expungements are processed). The same kind of offense behavior in a state that is not legalizing marijuana nor processing expungements could result in a person receiving up to 4 criminal history points under USSG §4A1.1(c), and the fact that the state has decided not to legalize marijuana may result in less weight being given to USSG §4A1.3, as that conduct is still illegal (versus in Minnesota, where previously illegal conduct would not be considered illegal if committed today).

Consistent with the Background at USSG §4A1.1, which discusses that categories (determined by point application) "are based on the maximum term imposed in previous sentences rather than other measures," marijuana possession should be considered for addition to the list at USSG §4A1.2(c)(1). Addition here would mean that marijuana possession, in states where it may not be legalized, would only result in criminal history points if the sentence signaled a particular kind of severity by receiving a jail term of at least 30 days or probation of greater than 1 year. To the degree that there is concern

that there would be argument that any kind of drug possession, including of more concerning scheduled substances, be subject to this consideration, an application note could specify it applies to marijuana, hemp, or khat only (similar to the clear direction that Driving While Intoxicated convictions "are always counted, without regard to how the offense is classified.")

USSG §2B1.1, Sophisticated Means

There is ample caselaw that has assisted in expanding an inadequate/limited definition, and that could be looked to in more directly defining or providing examples of sophisticated means.

USSG §2K2.1, Ghost Gun mens rea

Whatever intention existed in adding language to capture ghost guns as an aggravating factor, similar to obliterated serial numbers and stolen firearms, it has been decimated by the "knew or was willfully blind or consciously avoided knowledge of such fact" requirement. I urge the Commission to consider the kind of offense materials available in an illegal gun possession case, which is typically proof of prior conviction and proof of possession. We cannot download the totality of a defendant's thoughts. The best we can do is review their text messages and social media, and while occasionally present, that is outside the scope of a typical investigation and should not be required to only possibly capture the aggravating factor of a ghost gun's inherent traceability. The attempt to capture ghost guns has now been so limited by the requirements of knowledge (that are not required for similar aggravating circumstances) that we are essentially back to a guideline that does not capture them at all.

Thank you for the direct invitation to "tell *us* what to do this year and in the years to come." As evidenced here, I have taken that invitation to heart, but these comments remain solely my own. I appreciate the willingness to hear from technicians about what intentions or directions have been difficult to accomplish or implement in practice, and I admire the Commission's ongoing efforts to create a fairer, more just sentencing system.

Respectfully submitted,

Leah D. Heino
Senior U.S. Probation Officer
District of Minnesota

Public Comment - 2024-2025 Proposed Priorities

Submitter:

District of Delaware PADR

Topics:

Policymaking Recommendations

Comments:

The purity of methamphetamine has become consistently close to 100 percent. Those individuals charged with the offense typically have no sense of the purity when the obtain on the wholesale level. Given the present USSG scheme, practically all individuals charged with Methamphetamine offenses automatically are enhanced because of the standard purity in the market. It is imperative that this fact be addressed so that an enhancement applies where other factors exist. Thank you.

Submitted on: June 18, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Kenneth Jeffers, Georgia, Northern

Topics:

Simplification

Career Offender

Comments:

As the Guidelines have developed, they have become increasingly cumbersome and litigious for the Court insofar as the determination of Career Offender / ACCA is concerned.
The intention of Congress is clear - individuals who repeatedly commit violent and serious drug offenses should be punished more severely. Simplify the Guidelines and return common sense to the equation. The means by which defendants avoid the consequences of their history is a travesty to justice and lends itself to creating exactly what the Guidelines sought to avoid - huge disparities in sentences of similarly situated individuals and increased danger to the community.

Submitted on: June 6, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Christopher Jennings, NORML, ETC

Topics:

Research Recommendations

Policymaking Recommendations

Legislation

Comments:

Hello my fellow colleagues and fellow American's I'm glad that we could connect and continue to forge the future of Cannabis on a global scale of course etc , as well as the future of America □□

Submitted on: June 26, 2024

July 10, 2024

Re: Comment on U.S. Sentencing Commission Priorities

Your Honor:

I am pleased to submit my thoughts on the U.S. Sentencing Commission's priorities. I've included a brief comment below and support for you to add to your consideration on the following page.

The current sentencing guidelines, post-*Booker*, allow federal judges to use their discretion in disproportionate ways that only heighten the sentencing disparities among defendants of different races. In 2023, the USSC found that Black males received sentences 13.4% longer and Hispanic males received sentences 11.2% longer than white defendants. Final offense level calculations have also increased post-*Booker,* highlighting the decreased judicial concern of deflating offense levels (Yang 2015). Because of this, judges during sentencing hearings may feel as though they are being more flexible with their sentencing calculations but may still be motivated by implicit bias toward career offenders or Black/Hispanic defendants.

Black offenders are also generally more likely to be charged with mandatory minimum sentences than are similar to white offenders (Yang). Revisions to the sentencing guidelines should ensure that mandatory minimums are not being charged disproportionately based on race or offense levels. Furthermore, focusing on sentencing disparities can ensure that sentencing hearings are being used to hear what federal defenders and their clients have to say rather than having the hearings as a symbol of due process. As the guidelines stand today, the charge often dictates the sentence, allowing prosecutors significant power in sentencing (Patton 2013). Thus, already overworked federal defenders are forced to fight for their clients in a system where their sentence is more than likely decided by the prosecutors and the judge (Patton).

Even with a safety valve/5K/minor role, judges maintain discretion to weigh certain factors like the type of offense or a person's criminal history against them during the sentencing process rather than focusing on rehabilitation or a person's family circumstances. The USSG should allow for more downward departures based on a person's cooperation with the government and account for racial disparities in the criminal process. As such, federal defenders' arguments should favor a downward departure from the guidelines to ensure that defendants' personal histories and experiences are being considered. These arguments should be considered in addition to the current factors as a way to remedy racial disparities in sentencing.

Please do not hesitate to contact me if you need any additional information.

Sincerely,

Irene Oritseweyinmi Joe
Chancellor's Fellow
Professor of Law and Martin Luther King Jr. Hall Research Scholar
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[redacted]

Research Support

Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing (Crystal S. Yang, 2015)

- The federal sentencing guidelines were created to reduce unwarranted sentencing disparities among similar defendants.
- Impact of increased judicial discretion on racial disparities in sentencing after the guidelines were struck down in United States v. Booker (543 U.S. 220 [2005])
- Post-Booker
    - Black defendants received 2 months more in prison than white defendants
- Black defendants are sentenced to 5 months longer in prison than white defendants who commit similar offenses and have similar observable demographic traits and criminal histories.
- Black offenders are generally more likely to be charged with mandatory minimum sentences than are similar white offenders.
- Final offense levels increased after Booker for all offenders, which is potentially reflective of less judicial concern with deflating offense levels.
- The evidence is even more striking when excluding cases with mandatory minimum sentences, as it is apparent that sentence lengths for white defendants decreased after Booker while sentence lengths for black defendants continued to rise, increasing racial disparities in sentence length.
- Using comprehensive data on federal defendants sentenced from 1994 to 2010, I find evidence that increased judicial discretion after Booker has led to large and robust increases in racial disparities in sentencing, particularly after periods of reduced appellate scrutiny.
- Recidivism rates are higher among nonwhite offenders, offenders with more extensive criminal histories, and offenders with lower levels of educational attainment, and I find that judges sentenced these defendants to longer prison terms after Booker.

2023 DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING (USSC, 2023)

- Specifically, Black males received sentences 13.4 percent longer, and Hispanic males received sentences 11.2 percent longer than White males (depicted below).
- Hispanic females received sentences 27.8 percent longer than White females, while Other race females received sentences 10.0 percent shorter.
- Among individuals sentenced to 18 months or less incarceration, Black males received 6.8 percent longer than White males. The difference narrowed to 1.3 percent for individuals who received sentences of greater than 18 months to 60 months, but for sentences longer than 60 months, Black males received lengths of incarceration approximately one percent shorter than White males. Few differences were statistically significant when comparing sentences for females.

David E. Patton, Federal Public Defense in an Age of Inquisition, 122 YALE L. J. 2578 (2013).

- "In describing the typical representation, they noted that "counsel's role is generally limited to appearances at arraignments and sentencing, discussions with his client and the prosecutor, and occasionally a brief investigation of the case in order to uncover mitigating circumstances."

- Rigid sentencing regimes mean that prosecutors now control not just the charge, as they always have, but also the final sentencing outcome, because the charge itself often dictates the sentence.
- The elimination of mandatory minimum sentences, continued movement away from rigid sentencing guidelines, reduced sentencing severity, and serious attention to the presumption of innocence in the practice of pretrial release (not to mention fuller and more timely discovery-a problem that predates Gideon) would go a long way toward solving the problem.

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The Honorable Carlton W. Reeves
Chair, U.S. Sentencing Commission's Chair
One Columbus Circle, N.E.
Washington, DC 20002-8002

RE: USSC Research & Policy Recommendations

June 13, 2024

Dear Chair Reeves:

I would like to begin by expressing my appreciation for your initiative to solicit input from the pubic regarding upcoming research priorities for the U.S. Sentencing Commission. Efforts to consider the community's voice in research and policy are increasingly important and play a key role in improving perceptions of fairness, transparency and procedural justice in the federal criminal legal system.

As a long-time Professor at the University of Maryland, I have studied issues related to fairness and effectiveness in U.S. sentencing policy for the better part of two and a half decades. I also serve on the Maryland State Commission on Criminal Sentencing Policy, so I appreciate the difficulties inherent in soliciting and incorporating community input into commission initiatives. I have immense respect for the consistently high-quality research produced by the U.S. Sentencing Commission. I certainly understand that the focus of the Commission is on judicial decision-making, but I also believe the most pressing future priority involves taking a step back to better appreciate the broader federal punishment process as a more holistic enterprise involving multiple court actors in addition to the sentencing judge.

As you well know, most cases are resolved via plea negotiations, yet we know little about how federal plea bargaining occurs or how it conditions final sentencing decisions. In addition to U.S. Attorneys, federal defense attorneys and probation officers play important roles in sentencing, but little work considers their impacts in the federal context. As such, my recommendation for the Commission's work moving forward is to take concrete steps to collect better data on the crucial decisions that occur prior to sentencing. For example, how do initial charges filed by USAs change as a result of plea negotiations? How much does charge bargaining shape sentencing? To what extend does sentencing bargaining occur, and how does this vary across districts? Do the quality of plea offers differ for defendants of different demographic groups and how does this contribute to sentencing disparity? How often do prosecutors charge mandatory minimums or use them to negotiate plea agreements? I believe a study of this ilk would require going beyond what we can learn from the USSC data alone; it would need to incorporate information on charging via the AOUSC, EOUSC, and similar databases. Years ago, the PROMIS (Prosecutor's Management Information System) data allowed for these types of inquiries, but it was ultimately discontinued, and with it we lost virtually all knowledge of how federal charging and plea negotiation processes shape patterns of inequality in federal sentencing.

A passel of studies and research reports focuses on federal sentencing, but almost none of this work adequately accounts for the many consequential decisions that precede it; to fully understand judicial decision-making it is necessary to understand how plea negotiations shape judges' decisions. This will require new approaches to data collection and analysis. This is an ambitious request, but one that I believe has significant potential to improve federal sentencing policy by better identifying the range of factors that shape federal punishment.

Sincerely,

Brian D. Johnson, PhD

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[redacted]

MEMORANDUM

July 15, 2024

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

I am honored to submit this memorandum to the U.S. Sentencing Commission following its call for comments on the fortieth anniversary of the Sentencing Reform Act of 1984. After offering context on the rise of mass incarceration and the bipartisan movement for reform, the memorandum discusses a series of recommendations: i) improving the consideration of individualization and proportionality as core sentencing principles to remedy the normalization of excessive prison terms; ii) enhancing the sentencing process for teenagers and young adults to better account for mitigation and the "aging-out" phenomenon that leads maturing adults to move away from crime; iii) introducing a parole mechanism for life sentences to limit the use of lifelong imprisonment that rigidly bars social reentry based on rehabilitation, remorse or lack of dangerousness; and iv) developing more sensible sentencing policies for gun crime, such as possession offenses that can result in draconian punishments that are disproportional and exacerbate disparities in the federal penal system.

I. Context: The Bipartisan Movement to Rethink Mass Incarceration

Over the past two decades, the United States has experienced a growing momentum for penal reform. The rise of mass incarceration since approximately the 1980s had led the U.S. incarceration rate to reach the highest level of any country worldwide.[1] A bipartisan reform movement emerged. Both Democrats and Republicans, from blue states to red states, explored ways to build a fairer, wiser, and more effective penal system.[2]

[1] WORLD PRISON BRIEF, WORLD PRISON POPULATION LIST 2 (13th ed. 2021), https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_13th_edition.pdf.

[2] *See, e.g.*, DAVID DAGAN & STEVEN M. TELES, PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION (2016).

These developments have had encouraging results, as imprisonment levels declined over the past decade for prisoners in both federal and state custody.[3] The U.S. incarceration rate nonetheless remains the sixth highest worldwide, a few notches below El Salvador, Cuba, Rwanda, Turkmenistan, and American Samoa, as the Appendix to this memorandum shows. The U.S. incarceration rate is still markedly higher than those of peer Western democracies,[4] such as 5.9 times higher than Canada, 3.66 times higher than England and Wales, and over 7 times higher than Germany. [5]

The federal penal system contributed to this trend, as the National Research Council observed: "Between 1980 and 2000, the federal prison population increased by nearly 500 percent, from 24,363 to 145,416, surpassing the growth in state prison systems."[6]

The United States' extremely high incarceration rate is not explained by a much higher crime rate, as crime in America tends to be within the range of other Western democracies except for a higher homicide rate.[7] Rather, this divergence was largely explained by the normalization of harsh punishments in modern America, both at the federal and state levels, despite the huge financial and human costs of this counterproductive approach.

The rise of a zero-sum framing has contributed to the vicious circle at the heart of American justice today, as respecting victims is often equated with routinely imposing long or merciless sentences. Meanwhile, many crime victims do not actually receive critical assistance, such as medical or mental health treatment. Yet calls for penal reform have come from numerous victims who believe that punishments should better fit the crime and allow for prisoners' social reentry based on rehabilitation.[8] It is indeed possible to value the lives of both victims and offenders, to denounce wrongdoing and sentence mercifully while promoting public safety.

The United States previously was a trailblazer and model to foreign countries in introducing principles of humanity, rehabilitation, and proportional punishment in the founding era and 19th century.[9] Before mass incarceration emerged in approximately the 1980s, the U.S. incarceration rate was relatively similar to those of peer Western democracies.[10] This context is relevant to understanding the evolution of both the federal and state penal systems, as well as the urgent need for wider sentencing reform.

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[3] U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2022 – STATISTICAL TABLES 9 (2023), https://bjs.ojp.gov/document/p22st.pdf.

[4] This memorandum defines Western democracies as the United States, Canada, Australia, New Zealand, and European countries except Russia and countries aligned with Russia, such as Belarus.

[5] WORLD PRISON BRIEF, *Prison Population Rate* (last visited July 15, 2024), https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All.

[6] NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 55 (2014).

[7] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 50 (2011).

[8] *See, e.g.*, ALLIANCE FOR SAFETY AND JUSTICE, CRIME SURVIVORS SPEAK (2019), https://allianceforsafetyandjustice.org/wp-content/uploads/2019/04/Crime-Survivors-Speak-Report.pdf (survey of crime victims); LENORE ANDERSON, IN THEIR NAMES: THE UNTOLD STORY OF VICTIMS' RIGHTS, MASS INCARCERATION, AND THE FUTURE OF PUBLIC SAFETY (2019).

[9] *See generally* Mugambi Jouet, Rev*olutionary Criminal Punishments: Treason, Mercy, and the American Revolution*, 61 AMERICAN JOURNAL OF LEGAL HISTORY 139 (2021); David J. Rothman, *Perfecting the Prison*, *in* OXFORD HISTORY OF THE PRISON 100 (Norval Morris & David J. Rothman eds., 1995).

[10] STUNTZ, *supra* note 7, at 33-34.

II. Improving Individualization and Proportionality in Sentencing

One reason for the rise of mass incarceration is that modern America has come to give limited weight to the principles of individualization and proportionality in sentencing. The Commission should therefore keep exploring ways to expand the weight of these core principles. At present, obstacles to doing so include long baseline punishments in current sentencing practice and disproportionate mandatory minimums, which reflect the normalization of excessive punishments. Reinvigorating individualization and proportionality is a means toward greater restraint in the use of imprisonment by better tailoring sentences to the crime and the offender. Overall, this approach is key to pursuing diverse sentencing goals holistically, such as rehabilitation, incapacitation, deterrence, denunciation, and retribution.

The Commission has indicated that comments should notably focus on making "recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy."[11] Moreover, it requested comments on ways to enhance "rehabilitation, deterrence, just punishment, and incapacitation" in sentencing.[12]

Improving individualization and proportionality in sentencing should be priorities. These principles enable judges to consider both aggravating and mitigating circumstances while pursuing various sentencing objectives holistically. In practice, however, two considerations tend to dominate the sentencing process in both the federal and state penal systems nowadays, namely the nature of the crime and the defendant's criminal record. These considerations can overwhelm any mitigation and readily lead to long prison terms, such as due to mandatory minimums. Naturally, the gravity of the crime and defendant's criminal history are standard considerations in any penal system, including in peer Western democracies that do not have mass incarceration. The issue is that these factors tend to overwhelm all other considerations in the modern U.S. penal system.

Compounding this difficulty, baseline punishments have become very long in modern America, which has skewed conceptions of what is a "lenient," "moderate," or "harsh" sentence. For instance, as of January 2024, "[t]he average guideline minimum for individuals in federal prison was 169 months [i.e., 14.08 years]. The average length of imprisonment imposed was 149 months [i.e., 12.42 years]."[13] While a share of offenders received relief from mandatory minimums, "the average sentence length was 144 months [i.e., 12 years] for those subject to the mandatory minimum."[14] In other words, data suggest that the norm is to regularly impose sentences of over twelve years on average.

An average sentence of twelve years is long by U.S. historical standards and compared to peer Western democracies.[15] Just as American society showed greater moderation in the use of imprisonment until recent times, peer Western democracies tend to reserve prison terms of over ten years or life sentences for the most aggravated cases. In contrast, a key factor behind prison population explosion in modern America was the normalization of lengthy or endless prison terms, as Justice Anthony Kennedy

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[11] 28 U.S.C. 995(a)(20).

[12] 28 U.S.C. 991(b)(1)(A); U.S. COMMISSION, PROPOSED PRIORITIES FOR AMENDMENT CYCLE (2014), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20240531_fr_proposed-priorities.pdf.

[13] U.S. SENTENCING COMMISSION, INDIVIDUALS IN THE FEDERAL BUREAU OF PRISONS (January 2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_January2024.pdf.

[14] U.S. SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES (Fiscal Year 2022 data), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY22.pdf

[15] *See generally* STUNTZ, *supra* note 7, at 49-50.

observed in a prominent 2003 speech urging penal reform: "Our resources are misspent, our punishments too severe, our sentences too long."[16]

The Commission should reform the guidelines accordingly, as more significant steps are required to remedy the profound problems described above. In addition to revising baseline sentences, some scholars have called for the reintroduction of a parole mechanism for federal sentencing. For example, Douglas Berman has argued that in eliminating parole the Sentencing Reform Act of 1984 contributed to creating a modern federal sentencing system "marked by considerable and problematic complexity, rigidity, and severity."[17] While acknowledging that a parole mechanism would not be a panacea, Berman suggests that it could help remedy the excessive use of long prison terms: "[N]ot only does the elimination of parole inherently 'raise the stakes' for all the actors involved in front-end sentencing decisions, it also tends to calcify the consequences of—and compound any problems resulting from—the sentencing decisions made by these front-end actors."[18] Illustratively, the absence of a parole mechanism may incentivize some judges to impose long determinate sentences by trying to make predictive judgments about future dangerousness with no knowledge of an offender's mindset or rehabilitation five, ten or twenty years in the future. Rather, a functional parole system would allow the evaluation of these factors to determine whether continued incarceration is justified.

However, this option should not be misinterpreted to mean that indeterminate *life* sentences should replace current determinate sentences. Congress and the Commission should instead consider indeterminate sentences for a moderate, sensible number of years. For instance, rather than an average sentence of twelve years, as noted above, an average sentence of six-to-twelve years would allow the release of prisoners whose incarceration no longer serves a penological goal after six years or otherwise keep them imprisoned up until twelve years. The parole board would be able to make such determinations based on objective evidence and through a non-political process, as parole board members should be civil servants with expertise in sentencing.

In any event, there are multiple ways of building effective and humane penal systems. The sentencing procedures of other Western democracies are hardly identical, although none has mass incarceration. Whether the federal penal system maintains a determinate sentencing scheme or reintroduces parole, it is important to continue working toward more sensible sentencing practices to remedy the normalization of excessive sentences. As the National Research Council emphasized in 2014, "[t]he U.S. rate of incarceration, with nearly 1 of every 100 adults in prison or jail, is 5 to 10 times higher than rates in Western Europe and other democracies. . . . The growth in incarceration rates in the United States over the past 40 years is historically unprecedented and internationally unique."[19]

III. Improving Sentencing for Teenagers and Young Adults

The Commission should continue ongoing efforts to better consider youth in sentencing. In 2024, the Commission made commendable revisions to the federal sentencing guidelines' policy statement on age under Section 5H1.1. The amended language states that age "may be relevant in determining whether a

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[16] Address by Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, American Bar Association, August 9, 2003, https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html.
[17] Douglas A. Berman, *Reflecting on Parole's Abolition in the Federal Sentencing System*, 81 FEDERAL PROBATION 18, 19 (2017), https://www.uscourts.gov/sites/default/files/81_2_3_0.pdf.
[18] *Id.*
[19] NATIONAL RESEARCH COUNCIL, *supra* note 6, at 2.

departure is warranted." The Commission should strengthen this language by replacing "may" with "is." Further, the Commission should develop formal sentencing guidelines for teenagers and young adults.

As the Commission has noted, experts have urged sentencing authorities to account for advancements in the understanding of youth and brain development, including cognitive changes lasting into the mid-twenties that affect individual behavior and the age-crime curve.[20] Relatedly, in its call for comments on the fortieth anniversary of the Sentencing Reform Act of 1984, the Commission invited recommendations regarding "advancement in knowledge of human behavior as it relates to the criminal justice process;" and "measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing."[21]

Clarifying the relevance of youth as mitigation at sentencing is important, such as by amending "age may be relevant" with "age is relevant" in the policy statement. One rationale for this amendment is that the deficits of youth are not individual- or crime-specific but relevant to all cases. By stating "may be relevant," the policy statement risks furthering the misconception that age is irrelevant if the defendant appears unsympathetic or was convicted of a violent offense. The *relevance* of a factor is a different question from its *weight*. For example, a judge might find that aggravating circumstances have more weight than mitigating circumstances in a particular case. Yet language stating "age may be relevant" risks being interpreted to mean "age may be irrelevant" altogether in many cases. In addition to amending the language to specify the relevance of age in all cases, the Commission should develop formal sentencing guidelines for teenagers and young adults.

IV. Limiting Lifelong Incarceration

Congress and the Commission should introduce a parole mechanism for federal prisoners serving life sentences. The lack of such a mechanism tends to mean that a life sentence in the federal penal system signifies life without parole. This reform would limit the use of lifelong imprisonment allowing no possibility of release based on rehabilitation, remorse or lack of dangerousness at great human and financial cost.

The abolition or limitation of life without parole is a growing shift in the United States and peer Western democracies. Today, twenty-eight states have fully abolished life without parole for juveniles, going beyond what the Supreme Court requires under the Eighth Amendment.[22] Moreover, life without parole has been abolished in continental Europe and Canada for both juveniles *and* adults, as discussed below.[23]

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[20] U.S. SENTENCING COMMISSION, 2024 AMENDMENTS IN BRIEF (2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/amendments-in-brief/AIB_2024-youthful.pdf.

[21] 28 U.S.C. 991(b).

[22] CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *States that Ban Life Without Parole for Children*, https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole/ (last visited July 14, 2024). The reconsideration of life without parole for children follows seminal U.S. Supreme Court cases. *Graham v. Florida* (2010) abolished life without parole for juvenile nonhomicide offenses. *Miller v. Alabama* (2012) held that life without parole cannot be a mandatory punishment in juvenile homicide cases, meaning that judges must have the option of imposing another sentence. *Montgomery v. Louisiana* (2016) made *Miller* retroactive, leading to numerous resentencing hearings nationwide.

[23] Mugambi Jouet, *The Abolition and Retention of Life Without Parole in Europe: A Comparative and Historical Perspective*, 4 EUROPEAN CONVENTION ON HUMAN RIGHTS LAW REVIEW 306 (2023), https://doi.org/10.1163/26663236-bja10072.

As life sentences are not common in the federal penal system, establishing a parole mechanism for these cases would be a practical and feasible reform. "During fiscal years 2016 through 2021, there were 709 federal offenders sentenced to life imprisonment, which accounted for 0.2 percent of the total federal offender population."[24] In addition, "there were 799 offenders sentenced to de facto life imprisonment, which accounted for 0.2 percent of the total federal offender population."[25] A sizeable proportion of these offenders were sentenced under inflexible mandatory minimums imposing a permanent, lifelong sentence: "Between fiscal years 2016 and 2021, over two-fifths (43.8%) of offenders sentenced to life imprisonment were convicted under a statute carrying a mandatory minimum penalty of life imprisonment."[26] These sentences further exemplify disparities in the federal penal system: "Black offenders comprised the largest proportion of offenders sentenced to life imprisonment (43.6%), followed by Hispanic offenders (27.1%), White offenders (22.3%), and Other race offenders (7.1%)."[27]

Abolishing life without parole does not impede public safety or the capacity to impose harsh sentences, as life *with* the possibility of parole remains an option to potentially incarcerate an offender for the rest of their natural life. The distinction is that parole officials have the means to assess whether a valid penological goal continues to exist when evaluating the case of defendants who have served many years in prison. A functional parole system allows professional civil servants to determine, based on objective evidence, whether continued incarceration would serve a penological purpose.

This reform would build upon the compassionate release mechanism introduced in 2018. While this step was an encouraging step, it differs from the present recommendation regarding the creation of a dedicated parole mechanism for life sentences.

Peer Western democracies have nearly all abolished life without parole or lifelong incarceration schemes allowing no possibility of social reentry. In its landmark *Vinter* decision of 2013, the European Court of Human Rights notably underlined that a period of ineligibility for parole should not exceed twenty-five years.[28] This means that twenty-five-years-to-life is the longest possible prison term under the European Convention on Human Rights, namely a life a sentence with a parole ineligibility period of twenty-five years at most. Such sentences are scarcely applied and limited to the most aggravated cases in Europe. Even before its abolition in *Vinter*, life without parole was either an unlawful or rare sentence in European countries.[29]

Canada has likewise abolished life without parole. Similarly to Europe, the longest possible sentence in Canada is twenty-five-years-to-life, which is the penalty for first-degree murder.[30]

While the United Kingdom has not followed the European Court of Human Rights' decision in *Vinter* so far, sentences of life without parole, known as "whole life orders," are rarely applied there. In March 2023, only fifty-five prisoners were reported to be serving whole life orders in Britain.[31] Elsewhere in the

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[24] U.S. SENTENCING COMMISSION, LIFE SENTENCES IN THE FEDERAL SYSTEM 2 (July 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220726_Life.pdf.
[25] *Id.* at 3.
[26] *Id.* at 14.
[27] *Id.* at 11.
[28] Jouet, *The Abolition and Retention of Life Without Parole in Europe*, *supra* note 23, at 320-21, 336.
[29] *Id.* at 315-18.
[30] *Id.* at 348-50.
[31] *Id.* at 345.

West, namely Australia and New Zealand, life without parole is also imposed extremely rarely in comparison to modern America.[32]

The normalization of "death-in-prison" sentences has contributed to the rise of the U.S. incarceration rate to near world-record levels.[33] As of 2021, one in seven prisoners in America were serving life without parole, life with the possibility of parole or a term of 50 years or more, totaling over 200,000 people. Nearly a third of lifers were fifty-five years old or more. Overall, upwards of two-thirds were people of color.[34] In addition to the surge of life without parole and "virtual-life sentences" that exceed human life expectancy (e.g., an eighty-year term for a twenty-year-old),[35] life sentences with the possibility of parole often offer no prospects for release in states where parole has been largely eliminated in practice by granting it very rarely.[36] This trend marked the abandonment of rehabilitation, social reentry, and human dignity as sentencing principles, which are slowly regaining ground in the United States after decades of mass incarceration.[37]

Leading criminologists and legal scholars have emphasized that draconian punishments are not necessary to public safety, even for serious crimes, as they do not deter crime more than moderate punishments allowing the possibility of future social reentry based on rehabilitation.[38] Among other factors, the aforementioned age-crime curve or aging-out phenomenon calls into question the utility of endless punishments. The aging-out phenomenon is a feature of human behavior that also exists in other Western societies, which are far more inclined to consider this evidence in sentencing.[39]

Long-term incarceration carries a tremendous human, social, and financial toll. It disproportionality affects minorities and poor whites, who are routinely condemned to die behind bars without any hope of release, regardless of remorse, rehabilitation, and old age. Taxpayer dollars are wasted in warehousing people for decades or until they die, taking away resources that would be better used on crime prevention or addressing root social causes of crime. Yet we saw above that life sentences are not common in the federal penal system, meaning that establishing a parole mechanism for these cases would be a practical and feasible reform.

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[32] *Id.* at 347.

[33] *See generally* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? (Charles Ogletree & Austin Sarat eds., 2012).

[34] SENTENCING PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 4 (2021), https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf.

[35] Melissa Hamilton, *Extreme Prison Sentences: Legal and Normative Consequences*, 38 CARDOZO LAW REVIEW 59, 67, 110-11, 117 (2016); Alfred C. Villaume, *"Life Without Parole" and "Virtual Life Sentences": Death Sentences by Any Other Name*, 8 CONTEMPORARY JUSTICE REVIEW 265, 267 (2005).

[36] PRISON POLICY INITIATIVE, *No Release: Parole Grant Rates Have Plummeted in Most States Since the Pandemic Started*, October 16, 2023, https://www.prisonpolicy.org/blog/2023/10/16/parole-grants/.

[37] Mugambi Jouet, *Mass Incarceration Paradigm Shift?: Convergence in an Age of Divergence*, 109 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 703 (2019).

[38] *See generally* RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019); FRANKLIN ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003).

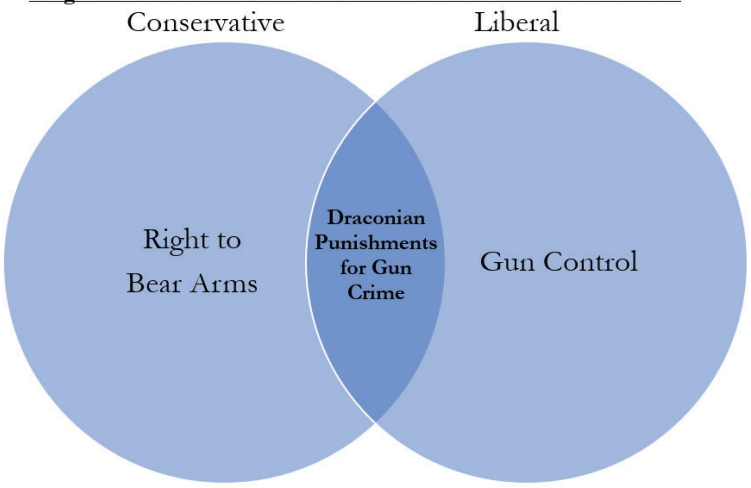
[39] *See generally* LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 88-89 (2014); Rolf Loeber & David P. Farrington, *Age-Crime Curve*, *in* ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 12 (Gerben Bruinsma & David Weisburd eds., 2014); Mary Allen, *Young Adult Offenders in Canada*, 2014, 36 JURISTAT 1, 7-8 (2016); Mugambi Jouet, *Juveniles Are Not So Different: The Punishment of Juveniles and Adults at the Crossroads*, 33 FEDERAL SENTENCING REPORTER 278 (2021).

V. Sentencing Gun Crime More Sensibly

Congress and the Commission continue prior efforts to reform the draconian sentencing schemes for certain firearms offenses, such as possession. In particular, offenses under 18 U.S.C. § 924(c) have led to disproportionate sentences for possessing a gun when committing drug trafficking, among other situations. In fiscal year 2023, "[t]he average sentence for all section 924(c) individuals was 145 months [i.e., 12.08 years]," including "80 months [i.e., 6.66 years] for individuals convicted only under section 924(c)" and "143 months [i.e., 11.91 years] for individuals also convicted of an offense not carrying a mandatory minimum."[40] This sentencing scheme has further contributed to racial disparities. In 2022, "[t]hirty-five percent of black federal prisoners were serving sentences for a weapons offense, compared to 15% of white; 14% of American Indian or Alaska Native; 12% of Asian, Native Hawaiian, or Other Pacific Islander; and 11% of Hispanic federal prisoners."[41]

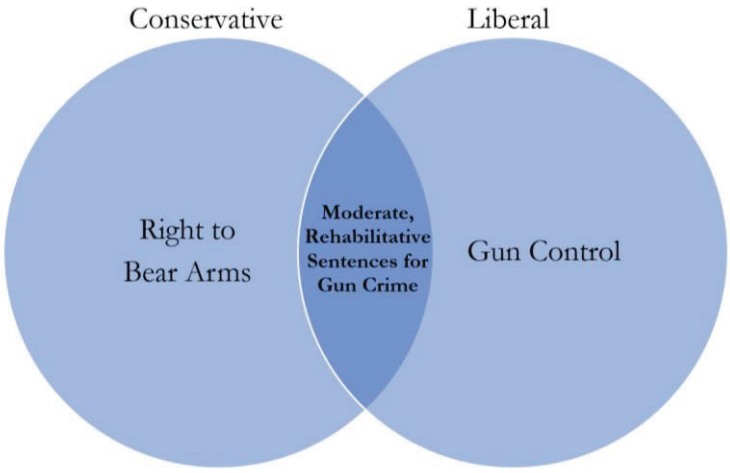
In a recent article, I explained that the sentencing of gun crime is an area where bipartisanship could develop and serve as a stepping stone toward wider sentencing reform.[42] Diagram 1 in the article, pasted below, represents the present situation in American society, namely a relative divergence between conservatives and liberals on firearms but a convergence on draconian punishments for gun crime. Diagram 2 envisions another model where convergence would shift from great punitiveness on gun crime to more moderate, proportional, and rehabilitative policies.

Diagram 1: Present Attitudes Toward Guns and Criminal Punishment



[40] U.S. SENTENCING COMMISSION, 18 U.S.C. § 924(C) FIREARMS OFFENSES (Fiscal Year 2023 data), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY23.pdf.
[41] U.S. BUREAU OF JUSTICE STATISTICS, *supra* note 3, at 33.
[42] Mugambi Jouet, *Guns, Mass Incarceration, and Bipartisan Reform: Beyond Vicious Circle and Social Polarization*, 55 ARIZONA STATE LAW JOURNAL 239 (2023).

Diagram 2: Aspirational Attitudes Toward Guns and Criminal Punishment



This is among the areas where conservatives and liberals, Republicans and Democrats, could find common ground. In short, conservative citizens could embrace this shift on the ground that the right to bear arms is an important principle and that guns are not inherently evil—meaning that people who commit gun crime should not be deemed beyond rehabilitation. By the same token, the rehabilitation of people convicted of gun crime is consistent with the views of liberal citizens focused on gun control, as rehabilitation enhances public safety. "Overall, both conservatives and liberals could agree that gun crime warrants a meaningful response, albeit not merciless punishments that do not make society safer, waste a fortune in taxpayer dollars, and have disproportionate impacts on the underprivileged," as the article concludes.[43]

[43] *Id.* at 289.

APPENDIX

WORLD PRISON BRIEF

Ranking of Countries by Incarceration Rate as of July 15, 2024

Highest to Lowest - Prison Population Rate

Donate to WPB

Please use drop down menu 1 to choose the category of data you wish to view, and press 'Go' to load category page. Once the page has reloaded please choose the continent/region from drop down menu 2 and then press 'Apply'.

Data shown in the highest to lowest lists are the most recent available but not necessarily from the same date. Please click on each individual country to see the date to which the data refer. As it is not possible to obtain meaningful comparative data on numbers of children in custody in different countries, we do not include juvenile imprisonment data in the highest to lowest lists.

1. Select a category of data and press 'Go' (the page will reload)

Prison Population Rate Go

2. Select a continent/region and click 'Apply'

Entire world

Apply

Show results on chart

Show All **entries** **Search:**

Ranking	Title	Prison Population Rate
1	El Salvador	1 086
2	Cuba	794
3	Rwanda	637
4	Turkmenistan	576
5	American Samoa (USA)	538
6	United States of America	531
7	Panama	522
8	Tonga	516
9	Guam (USA)	475
10	Palau	428
11	Uruguay	424
12	Bahamas	409
13	Antigua and Barbuda	400
14	Turkey	392
15	Thailand	391
16	Brazil	390
17	Virgin Islands (United Kingdom)	368
18	Cape Verde (Cabo Verde)	366
19	St. Vincent and the Grenadines	353
20	Dominica	348
21 =	Nauru	345
21 =	Virgin Islands (USA)	345
21 =	Belarus	345
24	Costa Rica	343
25	Grenada	338
26	Seychelles	337
27	Nicaragua	332
28	Namibia	318
29	Maldives	314
30	French Guiana/Guyane (France)	312
31	St. Lucia	308
32	Russian Federation	300
33 =	Chile	296
33 =	St. Kitts and Nevis	296

Ranking	Title	Prison Population Rate
35	Belize	289
36	Aruba (Netherlands)	288
37	Peru	282
38	Cayman Islands (United Kingdom)	277
39	Trinidad and Tobago	276
40 =	Northern Mariana Islands (USA)	273
40 =	Gibraltar (United Kingdom)	273
42	Guyana	271
43	Georgia	270
44 =	Martinique (France)	269
44 =	Libya	269
46	Morocco	267
47	Curaçao (Netherlands)	261
48 =	South Africa	258
48 =	Barbados	258
50	Cambodia	257
51	Argentina	254
52	Fiji	248
53	Azerbaijan	244
54 =	Taiwan	243
54 =	Eswatini/Swaziland	243
56	Greenland (Denmark)	241
57	Anguilla (United Kingdom)	240
58	Paraguay	239
59	Moldova (Republic of)	236
60	Bahrain	234
61 =	Gabon	228
61 =	Iran	228
63	Dominican Republic	225
64	Cook Islands (New Zealand)	224
65	Puerto Rico (USA)	221
66 =	Guadeloupe (France)	217
66 =	Israel	217
66 =	Malaysia	217

Ranking	Title	Prison Population Rate
66 =	Algeria	217
70	Bolivia	209
71	New Caledonia (France)	208
72 =	Mayotte (France)	207
72 =	Saudi Arabia	207
74	French Polynesia (France)	201
75	Bermuda (United Kingdom)	200
76	Venezuela	199
77	Colombia	198
78 =	Mauritius	197
78 =	Macau (China)	197
80 =	Tunisia	196
80 =	Sint Maarten (Netherlands)	196
82	Poland	195
83	Hungary	192
84	Honduras	189
85	Brunei Darussalam	186
86 =	Jordan	185
86 =	Suriname	185
88	Kazakhstan	184
89 =	Mongolia	183
89 =	Myanmar (formerly Burma)	183
91	Czech Republic	180
92 =	New Zealand	179
92 =	Samoa	179
92 =	Iraq	179
95 =	Ecuador	178
95 =	Slovakia	178
97	Mexico	174
98	Latvia	172
99	Albania	170
100 =	Montenegro	166
100 =	Laos	166
102 =	Serbia	162

Ranking	Title	Prison Population Rate
102 =	Philippines	162
104	Botswana	161
105	Australia	157
106 =	Reunion (France)	156
106 =	Lithuania	156
106 =	Singapore	156
109 =	Isle of Man (United Kingdom)	153
109 =	Zimbabwe	153
111	Uganda	151
112	United Kingdom: Scotland	147
113 =	United Kingdom: England & Wales	145
113 =	Bhutan	145
115 =	Lebanon	141
115 =	Tajikistan	141
117	Sri Lanka	139
118	North Macedonia	138
119 =	Vietnam	135
119 =	Jersey (United Kingdom)	135
121	Guernsey (United Kingdom)	133
122	Malta	132
123 =	Sao Tome e Principe	129
123 =	Estonia	129
125	Micronesia, Federated States of	127
126	Romania	126
127 =	Zambia	125
127 =	Jamaica	125
129 =	Guatemala	123
129 =	Ukraine	123
131	Hong Kong (China)	121
132	China	119
133 =	Portugal	117
133 =	Kyrgyzstan	117
135 =	Cameroon	116
135 =	Egypt	116

Ranking	Title	Prison Population Rate
137	France	114
138 =	Spain	113
138 =	Kiribati	113
140	Tuvalu	110
141	Luxembourg	107
142	Croatia	106
143	Italy	105
144 =	Belgium	104
144 =	Lesotho	104
144 =	United Arab Emirates	104
147 =	Burundi	103
147 =	Kenya	103
147 =	Cyprus (Republic of)	103
147 =	Republic of (South) Korea	103
151 =	Bulgaria	101
151 =	Kuwait	101
151 =	Greece	101
151 =	Madagascar	101
155	Austria	100
156 =	Kosovo/Kosova	99
156 =	Haiti	99
156 =	Ethiopia	99
159	United Kingdom: Northern Ireland	98
160	Indonesia	95
161	Ireland, Republic of	93
162 =	Cote d'Ivoire	91
162 =	Benin	91
164 =	Canada	90
164 =	Nepal	90
166 =	Slovenia	85
166 =	Uzbekistan	85
168	Bosnia and Herzegovina: Federation	83
169	Sweden	82
170 =	Armenia	79

Ranking	Title	Prison Population Rate
170 =	Solomon Islands	79
172	Switzerland	77
173	Malawi	76
174	Andorra	74
175 =	Denmark	71
175 =	Djibouti	71
177 =	Germany	69
177 =	Senegal	69
177 =	Qatar	69
177 =	Monaco	69
181	Angola	68
182	Marshall Islands	66
183 =	Netherlands	65
183 =	Vanuatu	65
185 =	Mozambique	63
185 =	Equatorial Guinea	63
187	Syria	60
188 =	Chad	59
188 =	Togo	59
190	South Sudan	58
191 =	Papua New Guinea	57
191 =	Mauritania	57
193 =	Norway	55
193 =	Liberia	55
193 =	Timor-Leste (formerly East Timor)	55
196 =	Sierra Leone	52
196 =	Finland	52
196 =	Sudan	52
199 =	Bangladesh	50
199 =	Tanzania	50
201 =	Comoros	46
201 =	Democratic Republic of Congo	46
201 =	Oman	46
204	Afghanistan	45

Ranking	Title	Prison Population Rate
205 =	Ghana	44
205 =	Bosnia and Herzegovina: Republika Srpska	44
207	India	41
208 =	Niger	40
208 =	Mali	40
208 =	Central African Republic	40
211	Burkina Faso	39
212	Pakistan	38
213 =	Nigeria	36
213 =	Iceland	36
215	Yemen	35
216	Guinea (Republic of)	34
217	Japan	33
218	Guinea Bissau	31
219	Congo (Republic of)	27
220	Faeroe Islands (Denmark)	23
221	Gambia	22
222	Liechtenstein	15
223	San Marino	9

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July 8, 2024

The Honorable Carlton W. Reeves
Chair, United States Sentencing Commission

Re: Comment, USSC priorities

Dear Judge Reeves,

Thank you for the opportunity to submit my suggestions on how the United States Sentencing Commission (USSC) can fulfill its mission to make the federal criminal legal system fairer and more just. My work over the last 25 years has mostly focused on innocence, rehabilitation, mitigation, and excessive sentencing in the criminal justice system, with my scholarship and case and policy work dedicated to the backend of the criminal legal system. Below are some areas I believe the USSC should focus on as it considers enacting policy to end unwarranted sentencing disparities and infuse the federal criminal justice system with knowledge of human behavior as it relates to the criminal justice process. Specifically, I focus on Federal Compassionate Release, Emerging Adult Justice and Brain Injury Trauma.

Federal Compassionate Release

Federal compassionate release law should include automatic release and/or regular consideration, a "second look," for compassionate/geriatric release.[1] Recently, the USCC promulgated amendments to the federal sentencing guidelines, which specifically address the issue of reduction in sentences specific to Compassionate Release.[2] While these amendments make favorable changes to the federal Compassionate Release policy, further progress can be made. A report from 2022 found that nearly a quarter of all prisoners serving sentences of life without parole are over the age of 65 and nearly half are over the age of 50.[3] Older prisoners are more susceptible to illness (broken and underutilized), and experience an increased rate of aging as a result of prison conditions.[4] Not only are there individual-level consequences of this situation, but there are also substantial economic costs. Studies have found that, on average, it costs at least twice as much to care for elderly individuals than for younger incarcerated individuals.[5] Therefore, the federal Compassionate Release policy should follow current trends

[1] *Ten Principles on Reducing Mass Incarceration*, AMERICAN BAR ASSOCIATION WORKING GROUP ON BUILDING PUBLIC TRUST IN THE AMERICAN JUSTICE SYSTEM, www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-ten-principles-booklet.pdf (Aug., 2022).
[2] *2023 Compassionate Release Amendment*, UNITED STATES SENTENCING COMMISSION, www.ussc.gov/sites/default/files/pdf/amendment-process/amendments-in-brief/AIB_814.pdf (2023).
[3] Ashley Nellis, *Americans Serving Life Without Parole*, THE SENTENCING PROJECT, https://www.sentencingproject.org/reports/nothing-but-time-elderly-americans-serving-life-without-parole/ (last updated June 23, 2022).
[4] *Id.*
[5] AMERICAN BAR ASSOCIATION WORKING GROUP ON BUILDING PUBLIC TRUST IN THE AMERICAN JUSTICE SYSTEM, *Supra* note 18

~~to provide prisoners a "second~~ look" to reduce their sentence for those who are serving lengthy sentences and have reached an advanced age.

Emerging Adult Justice

The age in which an individual can be tried as an adult at the federal level should be raised from 18 to 25, and offenders under this age should be given "second looks" at a designated point in their sentence. Although the federal Juvenile Delinquency Act (JDA) favors referring juveniles to state authority[6] the federal government can play an important role by setting foundational standards and advancing priorities.[7] Neuroscience supports that brain development is not complete at age 18;[8] therefore, setting this age as the age of adulthood is arbitrary. The brain areas responsible for judgment and impulse control are two of the last regions of the brain to complete development.[9] Harsh punishments and longer sentences can have adverse effects on emerging adults leading to diminution in temperance and responsibility, and to misconduct the same or similar to the original sentence.[10] Accordingly, while accountability should be sought for their actions, punishment for criminal acts of adolescents should be considered in the context of lessened responsibility[11] to promote hope for rehabilitation and the development of productive societal members.[12]

Brain Injury Trauma

A brain injury increases the odds that a person will commit a crime, and should factor into how someone is sentenced for that crime. A traumatic brain injury (TBI) is "an alteration in brain function, or other evidence of brain pathology, caused by an external force."[13] In 2014, there were 2.87 million TBI-related emergencies, hospitalizations, and deaths in the United States.[14] The problem is serious enough that the CDC considers TBI a serious health issue and notes the prevalence rate of TBI in the general population is around 1.1%.[15] In contrast, a meta-analysis was conducted of people who were either incarcerated or avoiding imprisonment by

[6] *Juvenile Delinquents and Federal Criminal Law: The Federal Juvenile Delinquency and Related Matters in Short*, CONGRESSIONAL RESEARCH SERVICE, (May 9, 2023).
[7] Vincent Schiraldi, Lael E.H., & Ruth T. Shefner, *Emerging Adult Justice: America's Recent Attempts to Apply Research to Policies and Practices*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2024/winter/emerging-adult-justice/ (last updated Jan. 22, 2024).
[8] Sara B. Johnson, Ph.D., M.P.H, Robert W. Blum, M.D., Ph.D., and Jay N. Giedd, M.D., *Adolescent maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45(3) JOURNAL OF ADOLESCENT HEALTH, 216 (2009).
[9] *Id.*
[10] Martin L. Forst & James M. Brady, *The Effects of Determinate Sentencing on Inmate Misconduct in Prison*, 63 PRISON J. 100, 103 (1983).
[11] Alexandra O. Cohen & B.J. Casey, *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 18 Trends in Cognitive Science, 63 (2014).
[12] J.S. Cheavens & S.T. Michael, *The Correlates of Hope: Psychological and Physiological Benefits*, INTERDISCIPLINARY PERSPECTIVES ON HOPE, 119–132 (2005).
[13] Position Statement: Definition of Traumatic Brain Injury, https://doi.org/10.1016/j.apmr.2010.05.017
[14]CDC Surveillance Report, https://www.cdc.gov/traumaticbraininjury/pdf/TBI-Surveillance-Report-FINAL_508.pdf
[15] History of traumatic brain injury in prison populations: A systematic review, https://doi.org/10.1016/j.rehab.2017.02.003

~~participating in a day program~~ and reported the overall TBI prevalence rate to be 64% among men and 70% among women.[16] The prevalence of TBIs are so high among the incarcerated population that even the CDC recommends those sentenced to prison be screened for TBI as they enter confinement.[17]

Moving the CDC's screening recommendation earlier in the prosecutorial process, perhaps after a person is indicted, would assist in the appropriate direction of the case. It would also help avoid punishing a defendant for a crime they are not strictly culpable for. Another solution is to make it mandatory for courts to order CT scans for people accused of violent crimes. If the damage to the brain is so severe, a different kind of custody or treatment can be discussed that is appropriate since the average prison isn't equipped to handle adults who suffer from head trauma.

Thank you again for the opportunity submit my suggestions. Please do not hesitate to contact me with any questions or comments.

Sincerely,

Professor Aliza B. Kaplan

[16] Prevalence of Traumatic Brain Injury in an Offender Population: A Meta-Analysis, https://doi.org/10.1177/1078345809356538

[17] CDC Traumatic Brain Injury & Concussion, https://www.cdc.gov/traumatic-brain-injury/health-equity/correctional-facilities.html

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Samantha Klunk, Patuxent Institution

Topics:

Policymaking Recommendations

Simplification

Career Offender

Legislation

Circuit Conflicts

Miscellaneous Issues

Comments:

To Whom it May Concern:
Over fifty years ago, the United States embarked on the path to mass incarceration. To ensure that our country does not experience another fifty years of mass incarceration's harms, I urge you to take bold steps to decrease incarceration.

Lower Federal Sentences
In 1980, federal prisons held 25,000 people; now, over 158,000 people are incarcerated for federal crimes. Longer sentences have been a major driver of this growth. But longer sentences do not prevent crime – instead, they fracture families and impoverish communities. I urge the Commission to lower recommended sentence ranges to downsize the federal prison population.

Decrease Racial Disparities
Racial disparities are pervasive within the federal criminal legal system. Black men are dramatically overrepresented within federal prisons and receive sentences that are 13% longer than white men. Hispanic men receive sentences 11% longer than white men. The Commission should continue to study and work to reduce racial disparities in federal sentencing.

Reduce Life Without Parole Sentences
Life without parole sentences are inhumane and unnecessary to protect public safety. Currently the Guidelines recommend that all level 43 base offenses receive a sentence of life without parole, regardless of whether the individual has any prior criminal history. The Commission should amend the Guidelines to give judges more discretion, especially for those with no or little

criminal history.

Reform Drug Sentences
Federal drug sentences have significantly contributed to mass incarceration. The Sentencing Guideline's current focus on the quantity and purity of drugs involved in an offense – rather than an individual's actual responsibility, history, and capacity for rehabilitation – results in inappropriate sentences. I urge the Commission to work towards ending the War on Drugs by adopting more rational drug sentencing policies.

Thank you for this opportunity to suggest priorities for the Commission.

Sincerely,
Samantha Klunk

Submitted on: June 26, 2024

Comments for the United States Sentencing Commission

- Noncitizen Representation in Federal Sentencing
  - Recent data from MFCS (2018 – 2023) shows that individuals without U.S. citizenship make up 36.82% (120,248 people) of the federal sentencing population.
  - This group is arguably the largest minority in the U.S. federal criminal court population.

- Research Limitations on Noncitizen disparity in the U.S. Federal Criminal Courts
  - Studies generally show noncitizen defendants are more likely to be incarcerated but receive shorter sentences.
  - Scholars attribute shorter sentences to the deportation process, though this is not confirmed.

- Deportation Data Gaps
  - The Monitoring of Federal Criminal Sentences dataset lacks indicators for scheduled deportations of noncitizen defendants.
  - Some researchers use Supervised Release data as a proxy:
    - 8 U.S. code § 1228(a)(1): "Deportation processes should be facilitated in a way that ensures the noncitizen defendant's expeditious removal, following the end of his or her incarceration sentence"
    - 18 U.S. Code § 3583(d)(3): "If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation."
  - However, still, this is an unconfirmed proxy measure.

- Sentencing Disparities by Citizenship and Nationality
  - Research by Koo, Feldmeyer, and Holmes (2022) found sentencing varies by citizenship status (documented vs. undocumented) and nationality (defendant's country of origin).
  - Main finding: Undocumented defendants from Mexico, Latin American, and African countries face higher incarceration odds and longer prison sentences, even when they are not charged with immigration offenses.

- Citizenship disparity directly contradicts the U.S. Constitution, which applies to all individuals, not just U.S. citizens.
- Nationality disparity directly violates the U.S. Federal Sentencing Guidelines (§5H1.10), which exclude race, sex, national origin, creed, religion, and socio-economic status from sentencing considerations.
- Citation: Koo, D., Feldmeyer, B., & Holmes, B. (2022). Citizenship and sentencing: Intersectionality in national origin and legal status on sentencing. Journal of Research in Crime and Delinquency, 59(2), 203-239.

- Policy Recommendations
  - Improve Data Collection: Enhance MFCS to include deportation scheduling information for noncitizen defendants.
    - This may need collaboration with related government agencies, such as the Department of Homeland Security or U.S. Immigration and Customs Enforcement.
    - In this process, at least for legal/documented noncitizen defendants, using A-number would be greatly helpful to identify individuals.
  - Research Priorities: Focus on research to fill gaps in understanding noncitizen sentencing disparities.
  - Policy Adjustments: Revise policies to address unwarranted sentencing disparities based on citizenship status and nationality.
  - Anticipate Noncitizen Population Growth: With the rising trends in immigration in the U.S. general population, addressing these disparities is crucial to prevent increased unwarranted disparities in federal courts.

The Honorable Carlton W. Reeves, June 30, 2024
Chairman of the United States Sentencing Commission:

Sincere thanks for the opportunity to offer what insights I can regarding the sentencing guidelines you are charged with reviewing. I'm both flattered and honored to be asked to comment on the basis of my work with the writing of incarcerated people and the insights I have gathered from them in my book, *Inside Knowledge* (IK).

As is my committed habit, and because *Inside Knowledge* quotes incarcerated people writing as far back as 2009, I have polled both currently and formerly incarcerated people for their input, as well as gathering what seem to me the most relevant passages and inside-writer comments from *Inside Knowledge*.

Below, for your convenience, I have broken this letter roughly into four parts: summary overview; comments from directly impacted people writing since receipt of you request for comment; sentencing as a deterrent; and sentencing as a retributive measure.

Summary Overview:

To counter excessive sentencing driven not by research or evidence of effectiveness but by law-and-order *politics*—which prevailed starting in the 1970's and whose vestiges remain today—the Commission might take a page from Norwegian (and EU) guidelines: the level and length of confinement should be the *minimum* required to assure public safety and enact reform (rather than maximums used to secure lawmakers' electoral success). Punishment should mirror the crime and the circumstances of each crime, and it should start from the acknowledgement that imprisonment is an ineffective and often damaging remedy for the factors that actually drive crime.

To counter unequal sentences, the Commission could also seek, in effect, to reverse engineer California's recently enacted The Repeal Ineffective Sentencing Enhancements (RISE) Act of 2021, and the Racial Justice Act (RJA) of 2024; these acts respectively eliminate sentence enhancements for past actions and allow review of existing sentences that can be shown to have been increased due to racial bias on the part of police, prosecutors, and/or judges. Sentencing guidelines could seek to obviate the need of these retroactive procedures by incorporating their effects into sentencing.

Cease to rationalize criminal punishment as retribution or deterrence: the former is an act of magical thinking; the latter is a well-debunked myth.

Finally, ground guideline changes in the evidence proffered by those on the receiving end of excessive and unequal sentencing.

Comments from incarcerated and formerly incarcerated people writing since receiving your request for comment:

The gist of these comments suggests that central concerns among the incarcerated today are to remove arbitrariness and subjectivity, as well as one-size-fits-all thinking from sentencing, and to factor in circumstances of crimes and the consequences of sentencing not only for victims but for perpetrators' families and communities. Bringing the insights of those who have been on the receiving end of sentencing into the sentencing guidelines and process is also widely favored.

As one man states boldly, "Abolish the commission and replace it with one led by people with actual experience of the criminal justice system."

Another writes, "purge personally flawed prejudices before granting (…) access to authority over critical system which rule over peoples' lives, freedoms, and liberties."

Another: "…prosecutors have a great deal of power in terms of how the crime is charged. Sure there are statutes, but it seems like there's a lot of subjectivity in the charging decision. Perhaps change that through transparency."

And another: "..my case necessitated a mitigation specialist, just in case it went to capital phase. (…) [X] also had a mitigation specialist, as did another friend. These mitigators compile evidence of the whole person. What if mitigation was baked into the process?"

"I am such a nerd for a spreadsheet. I can see a column describing a bill of particulars, and then that row can have examples of all the different outcomes for the same set of facts. (…) there's something to seeing the disparity so clearly laid out that makes a solid case."

"…feds have a lot of mandatory minimums, no? seems like that drives a good deal of harsh sentences."

As I have myself written, "Legal professionals should have a concrete sense of what sentencing to prison will look like for each convicted individual, the people who care for and are cared for by them, and the communities they leave behind and will someday hope to rejoin" (IK 224).

Sentencing as a Deterrent

Incarcerated people also regularly testify that no sentencing standard should be rationalized as deterrent since the supposed deterrent effects of sentencing are largely lost on potential law breakers. As one incarcerated man writes, "Judge [X] intended for my original sentence to be one of those 'example sentences' meant to deter others, but it didn't. People didn't stop committing crimes after I was sentenced . . . nor did the local, state or national crime rates drop" (IK 209). People who have been convicted of crimes and know others who might—as well as knowing the people they meet in jails and prisons—consistently confirm what research has

shown: Perpetrators rarely consider the potential negative outcomes of their actions; their primary focus—when thought precedes their acts—is on avoiding detection. As I write,

Riding the populist punishment wave, legislators ignored evidence that harsher sentences and conditions only make incarcerated people less able to get footholds in law-abiding society and more prone to re-offend. They lengthened sentences on the premise that harsher consequences would deter crime before it occurred, based on the assumption that each perpetrator, in each instance, was 'a lightning calculator of pleasures and pains' able to weigh acts and consequences in the often split-second decisions that precede crime. These policies ignored research and what incarcerated writers had been reporting for centuries: crime and other desperate acts are fostered by desperate conditions. (IK 39)

Tough and mandatory sentencing—a major practical driver of mass-scale incarceration—has consistently been shown to fail at significantly affecting crime rates or to have a deterrent effect either on would-be or formerly incarcerated people (IK 184).

The testimony gathered here reveals a system in which the legalized pain imposed or institutionally tolerated inside prisons is so widespread and generic, and sentencing—retribution's only legal measure—so arbitrarily allotted, the connection to any single criminal act can appear as opaque to the punished as the minds and hearts of the punished are to those who support these measures from outside prison walls (IK 56).

It is as though the perpetrator's ghost is sentenced, rendering the living and evolving person a moot being (IK 59).

Reese S. Wilson Writes from Pennsylvania:
Time itself is not going to provide inmates with the Employment and interpersonal skills needed to successfully re-enter free society… Minimum mandatories, often heavily-applied against ethnic minorities and the poor, do not deter crime. Criminals commit crime because they don't believe they'll be caught. They don't think, "I'll get this much time if I do this crime." Criminals don't think about sentences until they're standing before a judge. Whatever sentencing scheme our legislature enacts, it won't deter someone who does not believe he'll get caught. (IK 208)

The incarcerated know that sentence lengths bear a weaker relationship to crime than to some unwritten algorithm factoring in race, financial means, location and culture . . . all tossed into the mix-master of laws and mandatory minimum sentences that, as critic Rachel Barkow points out, have for forty years been based not on evidence of what is effective for addressing crime but upon public cries to respond quickly to the most sensational cases. The laws then formed are often grossly indiscriminate: the person who "strikes out" with a third felony shoplifting charge gets the same twenty-five to life as those who strike out on rape or assault. Through felony murder laws, the person who drives a friend to a location (even unknowingly) where that friend commits armed robbery or murder gets the same punishment as the person who carried or fired the gun. "The unlucky," Barkow writes, "are placed in the same box as the malevolent." (IK 63)

Sentencing as Retribution

Daniel Perry writes from an Oregon Prison:
When a punishment drags on for years it stops being punishment because the point of why we are to learn our lesson, is lost. We understand what we did was wrong, but most of us know what we were doing was wrong in the first place, and still made the choices we made. (…) There is no uniformity in the way crimes are dealt with. One person in a big city could rob someone at gunpoint and get 5 years with good time. The same crime 50 mins down the road turns to 15 years no good time. (IK 61)

As I document in Chapter Two of *Inside Knowledge*, retribution should send a message to convicted people if it is to be anything other than a damaging means of venting public anger at perpetrators. Like Daniel Perry, incarcerated people often report that they see no point in their continued confinement. As one man writes, "Having to remain incarcerated is serving me, the community, and tax payers absolutely no purpose. I've completed everything asked of me and some, yet I'm forced to remain incarcerated with no chance of release in sight" (IK 173).

"I have seen a man who's lived forty-plus years in prison for a crime he committed when he was nineteen years old," Tshombe Amen writes from California. "Yes, he made a mistake which by standard of correction he should pay for, but is the mistake of a teenager worth more than twice their life?" (IK 173).

When sentencing is no longer about enacting rehabilitation but simply about quantifying pain (IK 40), we are engaging in collective magical thinking, imagining that the perpetrator is 'learning a lesson' rather than suffering debilitation and growing resentful of law itself.

(It is worth note that the often repeated grounds for retribution, the Old Testament principle of "an eye for an eye," was originally intended to *limit* retribution; even Wikipedia knows that the aim was "to *restrict* compensation to the value of the loss."[2] When thinking about criminal penalties, this principle is less often quoted from another source: "You have heard that it was said, 'An eye for an eye and a tooth for a tooth. ' But I say to you, Do not resist the one who is evil. But if anyone slaps you on the right cheek, turn to him the other also" (Matthew 5:38-42).)

Incarcerated writers make clear that the sentences our courts mete out are only the door charge to the punishments they experience (IK 6). What is added does not protect the public. As Roberto C. Gamez writes from an Arizona prison, "the law says the punishment for being convicted of a crime is the prison sentence. But the law enforcement community sees the prison as a place to inflict terror and abuse upon its prisoners until all hope for humanity is lost" (IK 56).

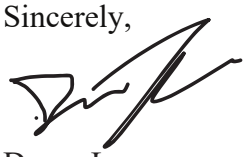
Conclusion

The ability of the Commission to regulate what happens to people once they are imprisoned is, of course, limited. But the Commission could factor in the evidence that imprisonment in the US—at the state and federal level—is profoundly damaging to individual perpetrators, their partners, families, and communities. It can also openly and explicitly acknowledge and proactively seek

to ward off disparities in sentencing across race, class, and gender identification. It can seek to minimize retribution and deterrence as sentence drivers. And it could heed the words and wisdom of those who know prisons and their effects from the inside.

I would, of course, be happy to provide whatever other insights I can, and I wish you the best of luck in your vital work. Lives depend upon it.

Sincerely,



Doran Larson
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Public Comment - 2024-2025 Proposed Priorities

Submitter:

Richard Levitt, Levitt & Kaizer

Topics:

Research Recommendations

Policymaking Recommendations

Miscellaneous Issues

Comments:

Thank you for providing this opportunity to comment. The newly constituted Commission is doing extraordinary work.

1. Now that you have clarified that loss includes intended loss under 2B1.1 there should be commentary suggesting that intended loss not be considered as serious as actual loss. Those who intend loss but don't cause actual loss are culpable but the severity of sentencing should be less.

2. You should permit searches of individual judges' sentencing histories. It is a simple matter for the USAO to keep and benefit from those records but individuals have no way to do so.

3. Both JSIN and the Interactive Data Analyzer of useful tools but should be combined. The IDA has info JSIN does not but is not searchable by specific offense levels -- it should be.

4. 2B1.1's loss table needs to be updated to reflect how courts are actually sentencing defendants in fraud cases.

5. You should go forward with eliminating the outdated distinction between departures and variances.

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Rachel Li Wai Suen, Senior Counsel

Topics:

Policymaking Recommendations

Comments:

The 2B1.1 loss table and associated guidelines are outdated and need to be amended to better reflect reality. As it stands the loss table results in dramatically inflated Guidelines ranges for first-time financial/white collar offenders. The loss calculation is at present a poor proxy for actual culpability of an offender.

Submitted on: June 24, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Warren Little, Kentucky, Eastern

Topics:

Career Offender

Comments:

Thank you for the opportunity to comment. I have been applying the guidelines for 27 plus years. Each year the guidelines get a little more complicated. As a Probation Officer (and now the Chief), it is becoming more and more difficult to apply the guidelines as a lay person. I call the act of presentence writing the last great apprenticeship because there is really no other way to teach them. So, with that said, I wish the Commission would take on a massive effort to simplify the guidelines and they can start with the career offender, categorical and modified categorical approach. This needs to be a priority. Thank you very much.

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Jolie Masterson, Masterson Hall, PC

Topics:

Research Recommendations

Comments:

While it makes sense for the drug guidelines to be driven by weight, there is a great disparity in sentencing simply based upon how long, or how consistently, law enforcement decided to watch someone who is dealing drugs. Most drug dealing does not appear to be a one-off. Many people deal frequently during a week, or daily. If law enforcement watches for 3 months or 2 years dramatically changes the guideline range by a decade or more. Obviously that is not in the control of the Commission. Nor should the Commission be guessing what conduct might have occurred that can't be proven. But I wonder if there is a way to research whether there is a better measure of involvement (or a secondary consideration moving the levels up or down). For instance, 20 kilos in 1 year seems far less serious than 20 kilos in 3 months. Perhaps there is the unlucky individual who only dealt for 3 months and was all-in from the get-go on dealing, but that would seem to be the exception. Perhaps some statistics taking into consideration period of time could lead to additional guideline rules adding or removing levels based on this.

Submitted on: June 5, 2024

Two sentencing issues we continue to see as discussion topics and requests for variances are the methamphetamine vs. “ice” conversion and the two-level enhancement for the use of a computer or interactive computer service for child pornography offenses. This will address the ice conversion first.

Historically, the 1-to-10 conversion from methamphetamine to ice was intended to target the higher culpability individuals who had access to pure or high-quality methamphetamine, potentially leaders of conspiracies or those with cartel connections. Since the addition of the application note defining ice, continuing drug trends have emerged that may impact the equitability of this conversion. Federal defendants now commonly have easier access to higher-purity methamphetamine, and this availability is not inherently indicative of a leadership role or strong ties to sources of supply. An article published in 2022 supported this fact and concluded that the purity and potency of methamphetamine increased by nearly 100% between 2007 and 2017 (Jones et al., 2022).

There is no downplaying the insidiousness of methamphetamine and the havoc it has wreaked on communities across the country. The practical issue comes from how to derive a sufficient sentence that captures the sentencing factors outlined in 18 U.S.C. § 3553(a) and balances updated research. While some view the ice conversion as disproportionate in and of itself and request a downward variance that is equal or closer to the methamphetamine conversion, others acknowledge the disparity but lack current research to derive a more appropriate calculation. The most significant question is whether this conversion rate continues to validly capture the increased culpability and increased dangerousness of high-purity methamphetamine. I agree with other practitioners who argue that methamphetamine ice is worse than methamphetamine mixture, which supports the conclusion that the two substances should

not have the exact conversion; however, research is needed to address at what point to affix the conversion for ice. It would not be suggested that pure methamphetamine be included in this analysis unless empirical evidence suggests that the higher conversion rate no longer accomplishes the directives of sentencing. Pure methamphetamine continues to be diluted and cut with additional substances for subsequent resale, causing significant harm and perpetuating addiction. It appears that its increased dangerousness could support its current conversion.

Secondly, the two-level enhancement for the use of a computer or interactive computer service at §2G2.2(b)(6) appears to apply in most cases. The Commission's research indicates that this enhancement was applied in 97.1% of child pornography cases in 2023 (United States Sentencing Commission, n.d.). With the philosophical underpinnings of the *Guidelines Manual*, does this enhancement continue to differentiate a defendant's case from the heartland of other cases? Does current and future research support an inverted approach to this topic? Rather than a two-level increase for a factor that is present in this high percentage of cases, would it be appropriate to allow for a two-level downward adjustment in the small percentage of cases that do not involve a computer or interactive computer service? Additional research is needed to determine whether this enhancement continues to validly capture increased culpability or dangerousness.

Thank you for your indulgence.

Respectfully,

April J. McCommon

April J. McCommon, PhD, MBA
Senior United States Probation Officer

References

Jones, C. M., Houry, D., Han, B., Baldwin, G., Vivolo-Kantor, A., & Compton, W. M. (2022). Methamphetamine use in the United States: epidemiological update and implications for prevention, treatment, and harm reduction. *Annals of the New York Academy of Sciences*, 1508(1), 3–22. https://doi.org/10.1111/nyas.14688

United States Sentencing Commission (n.d.). Use of Guidelines and Specific Offense Characteristics Guideline Calculation Based Fiscal Year 2023. Retrieved from https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2023/Ch2_Guideline_FY23.pdf

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Daniel Mears, Professor

Topics:

Research Recommendations

Comments:

Adopting reforms specific to particular issues can be effective and often is needed. However, for long-term accountability, effectiveness, and efficiency, institutionalizing strong research into all aspects of the USSC's work will be critical. Core questions for research to address: (1) How necessary are the different policies? What is the empirical basis for determining that they are needed relative to other policies? (2) How defensible is the logic by which the policies are supposed to achieve given goals? How accurate are the assumptions on which the logic rests? (3) How well implemented are the policies? How consistently are the policies implemented across court practitioners and among different social and demographic groups, courts, and regions? (4) What is the magnitude of impact of specific policies on particular goals? (5) What is net cost and benefit of the policies? Answering such questions in a comprehensive and systematic manner will require a substantial investment in research infrastructure and capacity. Such an investment would seem consistent with bi-partisan calls for government accountability and efficiency.

Submitted on: June 12, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Maranna (Mara) Meehan, Asst Federal Defender EDPA

Topics:

Research Recommendations

Policymaking Recommendations

Simplification

Miscellaneous Issues

Comments:

good afternoon- my apologies for this last minute submission although I have thought quite a bit about the guidelines over the years I've been a defender.
- the sex offender GL are extremely confusing and no amount of training seems to alleviate the confusion. The number of SOC applied in each production case usually leads to an offense level that doesn't exist and a range (life) that FAR exceeds what Congress authorized as the mand. minimum. Because judges are faced with a range from 15 years mandatory to life, disparity is inevitable. Use of a computer is obsolete 2) I wish there was a better way to assign criminal hx points to prior offenses than using indeterminate sentences for Chapter 4 and other chapter adjustments. In PA we only have indeterminate sentences but that is not true of other districts. I will often argue for a variance but it doesn't seem all that persuasive to some judges--ie that someone who served a flat 3 months gets fewer criminal history points than a defendant with PA priors with a parole tail of 23 months... 3) meth disparity which I know is already on the Commission's radar. 4) grouping, grouping, grouping--always confusing and leads to incorrect calculations and badly developed C pleas and frustration from clients and judges alike 5) something I recently realized w/r/t 2B3.1 (b)(7)carjacking- if the defendant steals a fancy car the defendant potentially gets an increase for loss but if the defendant takes a Toyota Tercel from someone who can't afford a fancier car, there's no increase... since there's already a +2 adjustment for carjacking, there should be no loss increase. 8) 2B1.1 loss increases are too high... defendants face immense jail time for non violent offenses 9) stronger glue for the binding of the November 2024 Manual please! Thank you for inviting comments from all of us. See you in San Antonio. Very truly yours, Maranna Meehan

Submitted on: July 15, 2024

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July 9, 2024

Honorable Carlton W. Reeves
United States District Judge
Chair, U. S. Sentencing Commission

Re: 2024 Priorities

Dear Judge Reeves:

I want to thank you for reaching out to the community for input on the Commission's 2024 priorities. I am the Federal Public Defender for the Southern District of Texas and I was previously the chair of the Federal Defender Sentencing Guideline Committee. The Southern District of Texas encompasses 3 divisions along the Mexican border – Brownsville, McAllen and Laredo – as well as divisions in Houston, Galveston, Corpus Christi and Victoria. The border divisions have the busiest criminal dockets in the country. The bulk of our practice is devoted to immigration and drug cases, numbering at least in the 1000's in any given year. There are many areas that I could comment on but I decided to focus on the illegal reentry Guideline, USSG § 2L1.2, because of its impact on so many of the people we represent in the Southern District of Texas and in other border districts.

In particular, the enhancement set forth at USSG § 2L1.2(b)(3) for sentences imposed for offenses committed after the first order of removal results in unduly harsh sentences. At a minimum, the Commission should amend the Guideline to provide that an offense used for an enhancement under 2L1.2(b)(3) should not result in criminal history points and the federal sentence should run concurrently or be reduced to reflect time spent in custody on the § 2L1.2(b)(3) offense, as set forth in USSG § 5G1.3(b).

The illegal reentry Guideline contains three types of enhancements: 1) for prior immigration convictions, 2) for convictions based on criminal conduct that occurred before the first order of removal, and 3) for convictions based on conduct that occurred after the first order of removal. An individual receives an enhancement of 2 levels for 2 prior misdemeanor illegal entry convictions or 4 levels for a prior illegal reentry conviction. USSG § 2L1.2(b)(1). The individual then receives an enhancement for a conviction, which was based on engaging in criminal conduct before their first removal. The enhancement ranges from 4 to 10 levels depending on the length of the sentence imposed. USSG § 2L1.2(b)(2). Finally, an individual receives an additional enhancement if they engaged in criminal conduct after the first order of removal or

deportation, which resulted in conviction. Again, the enhancements are graduated based on the length of the sentence imposed. USSG § 2L1.2(b)(3).

The (b)(3) enhancement fosters unwarranted disparity because as written, it often gives prosecutors the unilateral power to trigger the enhancement, depending on when they choose to bring federal charges. For example, our client might be arrested on a state drug possession charge with a sentencing exposure of two years or more. ICE, which has a presence in the Harris County Jail, locates him, determines that he is illegally present after a previous removal, and refers his case for federal prosecution for illegal reentry. At this point, the U.S. Attorney could writ him over and charge him federally, the (b)(3) enhancement would not apply and he might be able to serve a concurrent sentence. Without other criminal convictions, he would have a base offense level of 8, a post-acceptance level of 6, and an advisory Guideline range of 0 to 6 months.

Or the U.S. Attorney could wait until completion of his state sentence and only then bring federal charges, in which case, the (b)(3) enhancement would apply. An individual sentenced to serve two years in state prison would now receive an 8-level enhancement, an adjusted offense level of 16, and a post-acceptance total offense level of 13. With 3 criminal history points and a Criminal History Category of II, the advisory Guideline range would be 15 to 21 months and the individual would be deprived of the opportunity for a concurrent sentence. Many of our clients who have no pre-deportation felony convictions are facing the statutory maximum of 2 years under 8 U.S.C. § 1326(a), even after a guilty plea. If they do have a previous countable felony conviction, they face at least another 4-level enhancement under USSG § 2L1.2(b)(2), and additional criminal history points, ratcheting up the Guideline range to a total offense level after acceptance of 17, and a criminal history category of at least III, resulting in a range of 30-37 months.

In other words, the U. S. Attorney has the power to manipulate the sentence threefold merely by deciding when to bring federal charges. And, we see this disparity even within the divisions of the same district. In most of the divisions within the Southern District of Texas, three of which are along the border with Mexico, the U. S. Attorney generally brings federal charges as soon as individuals are found illegally present in the United States. If they are in state custody with pending charges, the prosecutor writs them into federal custody and they normally receive a sentence of no more than six months. In contrast, in the Houston Division, the U. S. Attorney chooses to prosecute people only after they have been convicted in state court. In fact, the government does not bring them into federal court until after they have completed their state sentence, often many years later, and sometimes even years after a federal indictment has been returned. Meanwhile, these incarcerated individuals are led to believe that they will be turned over to ICE for removal upon completion of their state sentence. Instead, they find themselves facing additional years in federal prison.

The Commission's current suggestion for a downward departure for time spent in state custody, USSG § 2L1.2, cmt. (n.7), does not provide adequate relief. Because these people have just served a state sentence, the automatic response of the prosecutors and the probation officers is to argue that the departure is not warranted because the defendant committed the state offense after reentry and that early release would jeopardize the community. Of course, this departure normally applies precisely because the person committed an offense after reentry. And, it does not matter whether the state offense is for possession of a controlled substance or robbery, the response of the government and the probation office is always the same.

A recent case illustrates the flaws in this Guideline. My client was a citizen of Mexico. In 2005, he was convicted of possession of a controlled substance (1 to 4 grams of cocaine) and

sentenced to serve 2 years in prison. He was ordered removed in 2006 but not actually removed until March 10, 2014. In 2014 and 2015, he received 6-month sentences for 2 separate illegal reentry conviction. He was deported again on July 19, 2015.

On September 23, 2019, he was arrested in Texas and charged in state court with possession with intent to deliver a controlled substance (13.6 grams of cocaine). He was discovered by immigration agents on the same date. In 2020, he pleaded guilty and was sentenced to serve 5 years in state prison. He was taken into federal custody on August 3, 2023, after his release from state custody and almost 4 years after his arrest and discovery by the agents.

He pleaded guilty to illegal reentry and received an adjusted offense level of 30: Base offense level 8, USSG § 2L1.2(a); +4 for the prior reentry conviction, § 2L1.2(b)(1); +8 for the pre-deportation 2-year sentence, § 2L1.2(b)(2)(B); and +10 for the post-deportation 5-year sentence, § 2L1.2(b)(3)(A). With a 3-level reduction for acceptance of responsibility, his total offense level was 27. These convictions, coupled with some other shorter sentences, resulted in a Criminal History Category of VI. Accordingly, his advisory Guideline range was 130 to 162 months to be served in addition to the 4 years he had already spent in prison. Fortunately for this client, the district court understood that his criminal history was the result of addiction not malevolence and imposed a sentence of 48 months.

This case is not an anomaly. Undocumented individuals who are placed on probation by the State and deported, and are therefore unable to report to their probation officer, usually face a prison term of at least 2 years if they return illegally. The total offense level of 12 for reentry after a felony conviction is suddenly an adjusted offense level of 16 because of the sentence, with a minimum of 3 criminal history points. A new felony offense will usually add another 8 to 10 levels and more criminal history points. These mechanical calculations often lead to overly harsh Guideline ranges that fail to address the purposes of punishment. And they result in disparate sentences in similar cases, subject to the whims of the prosecutor rather than consideration of aggravating and mitigating factors that might warrant individualization.

In summary, I would urge the Commission to revise Guideline 2L1.2. At the very least, the Commission could exclude offenses considered for a § (b)(3) enhancement from the Criminal History Calculation. Also, the Commission should direct that the federal sentence run concurrently with the sentence on the § (b)(3) offense or that it be reduced if the state sentence has been discharged.

Thank you for your consideration.

Very truly yours,

Marjorie A Meyers

MARJORIE MEYERS
Federal Public Defender
Southern District of Texas

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Laurel Boatright Milam, Assistant U.S. Attorney

Topics:

Miscellaneous Issues

Comments:

Greetings. I am an AUSA in the Northern District of Georgia who has been working as a federal criminal prosecutor (primarily in drug enforcement) for the better part of fourteen years. I write to suggest that the U.S. Sentencing Commission consider addressing a significant problem that has been plaguing Georgia over the past number of years. Specifically, in most of our federal investigations into drug distribution activity in the Atlanta area and northern counties of Georgia, we discover that there is at least one (often more than one) person incarcerated in state or federal prison, either serving a sentence for prior criminal conduct or in pretrial detention, who is brokering new drug deals while in custody that connect drug suppliers with customers outside prison. This conduct is particularly egregious and worthy of the Commission's attention, not just because it demonstrates that the particular prison broker has not been and is not likely to be specifically deterred by a new prison sentence. But also because it directly undermines the public's faith in the criminal justice system to actually prevent a criminal defendant who is "safely behind bars" from engaging in new criminal conduct while he or she is custody. Section 4A1.1's 1-point enhancement when the instant offense of criminal conduct is committed "while under any criminal justice sentence" is insufficient to address this phenomenon because it only applies when a defendant has at least 7 other CH points and because it treats a prison broker the same as someone who engages in new criminal conduct while on parole or probation. This new phenomenon is so widespread that the Commission should take note of it as an aggravating circumstance worthy of a specific additional enhancement, akin to recognizing that a defendant is more culpable when they distribute fentanyl as if it were a legitimate oxycodone pill.

Submitted on: June 7, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

US Probation

Topics:

Miscellaneous Issues

Comments:

As a USPO for 16 years, this is exciting.

One guideline amendment I would like to see made is in 2G. The idea that most enhancements apply to most cases is not the idea behind enhancements. I would like to see the computer enhancement removed as our court frequently considers and variance based on same. Also the number of images changed.

I would like to see the disparity between cocaine and cocaine base conversions match.

I would like more clarity on how to handle 2023 amendments to criminal history when ex post facto issues arise (even in our district we are divided on how to note the retroactive amendments).

Submitted on: June 6, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Nick Mirr, Assistant Federal Defender/Federal Defenders of Eastern Washington and Idaho

Topics:

Policymaking Recommendations

Comments:

Please consider updating §2G2.2. As the commission is aware, these guidelines are significantly out of date. Many of the specific offense characteristic apply in virtually every case. The specific offense characteristics therefore no longer serve to differentiate a more serious offense from a "run of the mill" offense. The guideline range is inflated without reason in many cases.

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Marti Morgan, AFPD NDTX

Topics:

Research Recommendations

Policymaking Recommendations

Comments:

--Do away with meth actual as it's all meth actual at this point, so the only differentiation is between judicial sentencing practices and prosecutor drug testing specifications (did they seek purity analysis or not)

--Revise the CP guidelines as most enhancements now apply to most cases, so, again, there's no actual differentiation based on behaviors and GL ranges are almost always at or near the stat max.

--decrease baselines for all drug GLs, the sentence ranges are astronomical for non-violent crimes

--Adjust high-capacity magazine commentary to better account for what's actually an extended magazine now. Many standard magazines today hold more than 15 rounds, see: Glock 17.

Submitted on: June 10, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Jaime Muse, Arizona

Topics:

Simplification

Comments:

1. Simplify 2B1.1 and 2K2.1

2. Define infant/toddler in 2G2.2

Submitted on: June 13, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Nelson Meghan, North Dakota

Topics:

Simplification

Miscellaneous Issues

Comments:

In the District of North Dakota, we have a high number of drug conspiracies involving sales of fentanyl-laced pills which are brought to the reservations in our state and sold at high profit margins. It would be very beneficial to get clarification and guidance on the application of the four-level enhancement under 2D1.1(b)(13)(A). The language in this enhancement is vague and has caused disagreement in our District on when and how it should be applied in cases. For example, what constitutes knowingly misrepresenting or marketing as another substance - how is this defined by the commission? Is it enough the pills being sold were marked to resemble legitimate oxycodone pills and the defendant knew the pills contained fentanyl? A primary argument from defense attorneys in our district against application is the buyers knew the pills contained fentanyl and were requesting fentanyl pills; hence, defendants in these cases were not misrepresenting or marketing the pills as another substance. Thank you.

Submitted on: June 11, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Jeffrey Nowacki, Colorado State University Jul. 15, 2024

Topics:

Research Recommendations

Comments:

Hello! Thank you for reaching out regarding research recommendations. I hope that the commission will examine the effects of Amendment 821, which has addressed the application of Status Points to Criminal History scores. While the Amendment has been effective for less than one year, and it may be ideal for more time to pass before drawing firm conclusions on its outcome, I hope it is on the Commission's radar.

Submitted on: July 15, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Michael O'Hear, Marquette Law School

Topics:

Policymaking Recommendations

Comments:

Proposal: In order to support greater use of probation and other alternatives to imprisonment by federal sentencing judges, I would encourage the Commission to consider a systematic zone shift, enhancing the coverage of Zone A at the expense of Zone D in the Sentencing Table. For instance, for each Criminal History Category, the offense levels covered by Zones A, B, and C might be increased by 1. This would, of course, be just a small step toward greater dispositional flexibility for sentencing judges. If research finds no adverse effects from an initial small zone shift, then further, larger-scale changes might be considered.

Explanation: In the 1980s, in conjunction with implementation of the federal sentencing guidelines, use of probation in the federal system dropped precipitously—falling from 29% of cases to 14% between 1987 and 1991. U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing 43 (2004). Since then, Booker notwithstanding, the use of probation has only become less common. For instance, in FY2022, fewer than 6% of sentenced federal defendants received a sentence of straight probation. U.S. Sentencing Commission, 2022 Sourcebook of Federal Sentencing Statistics fig. 6. Intermediate sentences (authorized in Zones B and C) were even less common. The vast majority of sentenced defendants (89%) were in the "prison only" category.

This neglect of probation and intermediate dispositions is regrettable. The social costs of imprisonment are well-known and high, including not only the fiscal burdens of 24-7 housing and supervision, but also adverse effects on defendants (e.g., in the areas of physical health, mental health, and employability) and their families (e.g., for minor children, greater incidence of homelessness, need for food assistance, and behavioral problems in school). See generally Committee on Causes and Consequences of High Rates of Incarceration, National Research Council of the National Academies, The Growth of Incarceration in the United States: Exploring Causes and Consequences (2014). Moreover, while the research on the effect of incarceration on recidivism rates is mixed, there are grounds for concern that sentences of incarceration may increase the post-sentence risk presented by some defendants. See Elizabeth Berger & Kent S. Scheidegger, Sentence Length and Recidivism: A Review of the Research, 35 Federal

Sentencing Reporter 59 (2022).

Federal sentencing judges should be encouraged to make greater use of alternatives to "prison only" sentences. The Commission could helpfully signal its support of alternatives through a zone shift of the sort that has been suggested here.

Submitted on: June 17, 2024

Department of Criminology and Criminal Justice
University of Missouri-St. Louis
324 Lucas Hall
One University Boulevard
St. Louis, Missouri 63121

June 27, 2024

Dear United States Sentencing Commission:

I wanted to reach out as a researcher who uses the USSC data for public comment on fulfilling its mission to make the federal criminal legal system fairer and more just. I appreciate the invitation to comment, and I hope that the commission continues to reach out to researchers in the future.

Research-wise, there are a few things that would be helpful to start documenting. First, including some sort of document for fast track/deportation cases in the data would be very helpful, as it is sometimes difficult to see what happens with these cases. Second, a lot of research has become interested in prosecutorial behavior, including any kind of prosecutorial "hammers" or charging tools that could be reflected in the USSC data. These are currently somewhat difficult or impossible to identify in the data, however. For example, more information about 851 enhancements, or 924(c) charges would be incredibly helpful. While a lot of people know about mandatory minimum sentences in general, I think that these less visible enhancements that also affect sentences are important to document. There is more information in Lynch's (2016) book. Additionally, in terms of policies, I believe that these represent some of the best-hidden, but most harmful policies that likely increase racial disparities in the federal system.

The other thing that would help researchers is to improve data linkages between the USSC and the other federal datasets. I know that the Federal Justice Statistics Program has worked to improve its data linking capabilities, but creating a unique/unified case-defendant ID that would work across all systems (especially between EOUSA, AOC, USSC, and BOP) would help make the linkages much more useful.

Finally, I realize that this would be more difficult to document (and perhaps outside of the USSC's scope), but maybe developing some additional dataset/documentation including both official US Attorney policies and/or informal directives might be helpful. In some prior work, co-authors and I found that internal policies mattered for prosecutorial behavior, much of it reflected in USSC datasets (Lynch, Barno, and Omori, 2021).

Again, I appreciate the Commission's willingness to engage in public comment. If there are any questions, I can be reached at [redacted]

Sincerely,

Marisa Omori
Associate Professor, University of Missouri-St. Louis

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Oppenheim Jessica, Consultant

Topics:

Miscellaneous Issues

Comments:

As an attorney working with people with developmental disabilities who become involved in the criminal legal system and as a parent of a person with developmental disabilities, I urge the Commission to this topic a priority this year. People with disabilities are grossly overrepresented in the criminal legal system, have cognitive limitations which effect their ability to understand the nature of their acts and the consequences. They do very poorly in the prison/jail system resulting in profound trauma. The Commission should seek ways to educate courts and attorneys and provide deflection and diversion programs for people with developmental disabilities. Assistance in addressing this can be found at the National Center for Criminal Justice and Disabilities at The Arc of the US. Please consider this priority so that the criminal system stops punishing individuals for their disability, as well as enduring compliance with the Americans with Disabilities Act. Thank you.

Submitted on: July 14, 2024

Mark Osler
Robert & Marion Short Distinguished Professor of Law
University of St. Thomas (MN)
1000 LaSalle Ave., MSL 400
Minneapolis MN 55403
[redacted]

Public Comment
United States Sentencing Commission
2024-2025 Proposed Priorities

Chairman Reeves & Members of the Commission,

I submit this comment as a longtime student of the guidelines, a teacher of sentencing, and a practitioner in state and federal courts. My ideas go to the bold strokes that could be taken rather than the fine-tuning detailed in many of the excellent comments you receive. I will address three longstanding problems with the guidelines:

- **Uniformity**
  - The guidelines fail to create uniformity between judges as the Sentencing Reform Act of 1984 intended.
  - An untapped tool to create uniformity would be the reporting of sentencing data for each federal judge.

- **Proportionality in narcotics sentencing**
  - In §2D1.1, the guidelines fail to create penalties that are proportionate to real culpability.
  - To create proportionality, the primary aggravating factor should be profit taken from the drug trafficking scheme, not weight of narcotics.

- **Complexity**
  - As the Commission has recognized, the guidelines are far too complicated.
  - The starting point for simplification should be the identification of a discrete ordering mechanism for the guidelines—something that has never been done.

I. Uniformity

The core reason for having guidelines at all was to create uniformity in sentencing, and the federal guidelines were born out of a concern that (as Judge Frankel put it in the very title of his 1972 book) federal sentences reflected "law without order." There are good reasons for uniformity, and two great ones: that it is only fair that people receive the same punishment for similar acts, and that disparities usually run against those who are already disadvantaged in the system.

This Commission knows that our current system is failing to produce uniformity, because that is what the Commission's own excellent data reporting has shown. Most recently, the 2023 report on demographic differences in federal sentencing concluded that **"**Sentencing differences continued to exist across demographic groups when examining all sentences imposed during the five-year study period (fiscal years 2017-2021)."

It's clear what will not be done to create uniformity in federal sentencing, if rational minds prevail. We will not be returning to mandatory guidelines. We won't revive mandatory minimums. So, what will we do?

The single biggest step the Commission could take to reduce disparities would be to publish full data—including racial and gender numbers—for each federal judge individually. This is a step that others have pushed for in the past, and which judges have steadfastly resisted, but which presents the best remaining opportunity to create uniformity. It would do this not through mandate, but through something much more powerful: peer effects. Judges are human, and most humans do not like to be out of step with their peers. Transparent data and regular reporting on individual judge's sentencings would make this possible.

Certainly, judges will insist they don't follow the path of others. Those with a long history on the bench may remember, though, a voluntary peer-effect system that arose in many places in the years before the guidelines were implemented, sometimes called "sentencing councils" or "sentencing consults." There, small groups of judges compared notes before any sentencing. That is, they relied on peer effects to create uniformity, at least within that courthouse. That kind of collaboration has largely been lost in the guideline era, and the transparency (at least between the judges) that went with it. Making judge-level data publicly

available would return to the field a mechanism with a chance of creating uniformity: that observation of behavior affects that behavior over time.[1]

II. True Proportionate Sentencing in Narcotics Trafficking Cases

No section of the guidelines has been subjected to as much criticism as section 2D1.1. A crucial structural flaw in those guidelines has been the employment of the weight of drugs as the primary factor in measuring relative culpability and ultimate sentence. If I hire a man to drive down to Laredo and pick up meth, offer to pay him $800 when he gets back, and then make $50,000 on the deal I conceived of, organized, and benefitted most from, we both start at the same base offense level score.

That doesn't make sense—the mule and I simply do not have the same level of culpability, and adjustments for role in the offense (if they are made at all) don't do enough to create proportionality.

To truly create proportionality, 2D1.1 should be structured like 2B1.1, with a financial amount-- the amount of profit rather than amount of loss—determining the base offense level.

The burden of showing this amount, as with 2B1.1, would be on the government by a preponderance of the evidence. The analysis would not be significantly different than that used in many fraud cases, and the tools prosecutors have developed in seeking forfeitures enable them to determine these amounts. To accomplish this, 2D1.1 would be simplified to establish groups of narcotics subjected to similar aggravating factors with the primary factor being the amount of profit taken by that actor.[2]

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[1] In the past, I have suggested replacing the guidelines as they exist with a trailing-edge plan that would set benchmarks based on the average sentences given by judges across the country. Mark Osler, *The Promise of Trailing-Edge Sentencing Guidelines to Resolve the Conflict Between Uniformity and Judicial Discretion*, 14 NORTH CAROLINA JOURNAL OF LAW AND TECHNOLOGY 203 (2012); Mark Osler, *After the Implosion: Trailing-Edge Guidelines For a New Era*, 7 OHIO STATE JOURNAL OF CRIMINAL LAW 795 (2010).

[2] I have previously argued for this approach in the context of both sentencing and forfeitures. Mark Osler, *We Need Al Capone Drug Laws*, NEW YORK TIMES, May 4, 2014, https://www.nytimes.com/2014/05/05/opinion/we-need-al-capone-drug-laws.html; Mark Osler, *Asset Forfeiture in a New Market Reality Narcotics Policy*, 52 HARVARD JOURNAL ON LEGISLATION 221 (2015).

III. Theoretical and Practical Simplification

As this Commission has recognized, the guidelines are too complicated. There are real costs to this complication, too. Complexity almost always favors the more powerful party because they have the ability not only to understand that complexity through greater resources, but to create complexities and manipulate them.[3]

I saw this play out in real time when I practiced federal criminal law in Waco, Texas while I taught at Baylor Law School (2000-2010). The Waco Division of the Western District of Texas had no federal defender at that time, and appointed CJA counsel almost always were practitioners who did relatively few federal cases. They did not know the guidelines, and the complications understood by the AUSAs—who only did federal cases-- worked to their advantage in sometimes dramatic ways.

The complexity within the guidelines themselves reflects the theoretical mess this Commission was handed by Congress in the form of thirty-one distinct (and sometimes contradictory) statutory directives reflecting different goals for the project as a whole.[4]

Out of those 31 directives, the four traditional sentencing goals set out in 18 U.S.C. 3553(a)—rehabilitation, deterrence, incapacitation and retribution—are likely viewed as the most important and are still described as the "statutory mission" in §1A1.2. But when the Commission first formulated the guidelines, they punted on building them around any of these goals and instead just structured them around existing practice.[5] Thus, there is no ordering principle or principles for the guidelines and never has been. The first step of simplification must be to start at the beginning and define guiding principles. Only then can the guidelines be rebuilt not only with simplicity, but with integrity.

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[3] Mark Osler*, Rule Complexity, Story Complexity, Mercy & Hope*, 102 TEXAS LAW REVIEW 1495, 1498 (2024).

[4] Mark Osler, Policy, Uniformity, Discretion, and Congress's Sentencing Acid Trip, 2009 Brigham Young Univ. Law Review 293, 294 n. 4 (listing 31 directives).

[5] "Faced, on the one hand, with those who advocated 'just deserts' but could not produce a convincing, objective way to rank criminal behavior in detail, and, on the other hand, with those who advocated 'deterrence' but had no convincing empirical data linking detailed and small variations in punishment to prevention of crime, the Commission reached an important compromise. It decided to base the Guidelines upon typical, or average, actual past practice." Stephen Breyer*, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra Law Review 1, 17 (1988).

UNC GREENSBORO
Department of History

July 15, 2024

Hon. Carlton W. Reeves, Chair
U.S. Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Washington, D.C., 20002-8002

Dear Judge Reeves:

I write to provide comments on the U.S. Sentencing Commission's 2025 Proposed Priorities from my perspective as an historian and the author of *From Asylum to Prison: Deinstitutionalization and the Rise of Mass Incarceration.* In my research, I studied the rapid decline of mental hospitals between 1955 and 1985. I was particularly interested in the lessons it teaches us as we work to reduce the overuse of imprisonment today. On the one hand, deinstitutionalization marked a rapid change as people with mental health conditions were granted legal and civil rights and society shifted away from an institutional approach. On the other hand, the rapid reforms of that time did not bring about substantive community alternatives. Instead, limited resources, race and class inequalities, and societal criticism plagued the mental health system.

I encourage the Sentencing Commission in 2025 to take action to reduce the overuse of institutionalization, as policymakers did in the 1960s and 1970s. At the same time, I suggest that the Commission take steps to expand community-based alternatives and thoroughly evaluate sentencing reforms. These actions will ensure that the sentencing reforms the Commission undertakes not only meet the goals of reducing overincarceration, but will also create a more equitable and just system of sentencing that avoids the pitfalls of deinstitutionalization.

Reduce Federal Sentences
The United States currently has some of the highest imprisonment rates in the world, which disproportionately affect people of color, individuals with mental health conditions, and people with substance abuse disorders. I encourage the U.S. Sentencing Commission to continue to study and work to minimize racial and ethnic disparities, reduce life without parole sentences, and reform drug sentences. With these actions, the Commission will address the problem of overincarceration and create a more fair and equitable criminal system.

Alternatives to Incarceration
In 2022, the Sentencing Commission stated its priorities of studying alternatives to incarceration and possibly developing amendments to its guidelines. Since then, the Commission has created an online survey of alternative to incarceration programs nationwide, an invaluable resource. I

recommend that the Commission in 2025 build upon this survey and publish a report on problem-solving courts. I also encourage the Commission to draft amendments to further the development of alternatives to incarceration. One of the greatest failings of deinstitutionalization was that state agencies, the courts, and other health systems did not adequately create enough local alternatives to meet the varied needs of communities. As the Commission seeks to make changes to criminal sentences, it must also support new problem-solving courts and local programs.

Evaluate Sentencing Reforms

Finally, the U.S. Sentencing Commission could avoid the major failings of deinstitutionalization if it sets as a 2025 research priority the continued evaluations of its sentencing reforms. I recommend that the Commission evaluate recent laws and amendments and examine how they have affected the length of sentences, incarceration rates, recidivism, racial/ethnic disparities, and community responses to reforms. The Commission has in recent years prioritized this type of evaluation, publishing reports on retroactivity on recidivism, compassionate release, and the First Step Act. This work should continue to be a priority in 2025 alongside efforts to reduce sentences.

Why this suggestion? From the 1960s to the early 1980s, court systems and state agencies often did not substantively evaluate the legal changes they made to mental health commitment laws. As a result, tens of thousands of people were released from mental hospitals without enough resources, leading to a rise in homelessness and a major backlash against mental health reforms. Careful evaluation of the effects of sentencing changes will minimize any unintended consequences that could result. This information will also arm judges with the necessary information to learn from these reforms and address any public criticism.

I appreciate the opportunity to give feedback on the U.S. Sentencing Commission's 2025 Priorities. If you have any questions about my comments, please do not hesitate to contact me at [redacted]

Sincerely,

Anne E. Parsons

Anne E. Parsons
Associate Professor
Director of Public History

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Carolyn Patten, Massachusetts

Topics:

Career Offender

Comments:

Please considered getting rid of the career offender guideline.

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Fritzroy Petty, Virgin Islands

Topics:

Policymaking Recommendations

Comments:

Addressing Disparity for Certain Populations

While we seek to address the guideline commentary to reduce the disparity in sentencing in various ways, there remains the larger issue of cultural disparities which persisted even when the guideline and the commentary were mandatory decades ago. There was a recent release of the disparity of sentencing by population and we continue to see that the same populations of defendants continue to be disadvantaged for the same crimes with similarly situated defendants. Consequently, it would appear that changes, no matter how genuine or sincere over these many years, whether through the amendments to the guidelines, commentary, etc., have not helped the population of individuals who are negatively impacted. I am hoping the sentencing commission would be able to achieve greater fairness when changes to the commentary from being mandatory to advisory and other changes to the guidelines, continue to result in the same disparities for the same particular populations.

In my recommendation, the guidelines should address the disparity in sentencing directly and / or there should be a mechanism that directs courts to reduce the sentences of individuals who are disadvantaged with similarly situated individuals at sentencing. The percentage of reduction should follow the statistics for the disadvantaged populations. For example, if one group of similarly situated individuals are sentenced to disproportionate sentences, the reduction in sentence should be in line the historical disadvantaged percentage. The practice should maintain until sentencing is equal across the board and no disparities are seen based on cultural background / populations.

While we cannot address bias directly from circuit to circuit, the statistical facts embodied in the advisory guidelines from year to year, would be able to address the disparity and would serve as an objective beginning point. Moreover, while the guidelines in and of itself is not enough to address the problem and may not appeal to the factors that drive the disparities, it may provide a

better way to highlight the facts associated with the disparity statistics and shed public light on the objectivity of unadulterated sentencing; thus, sending a message to all involved in the process that fairness would be measured from the facts. This approach may result in more objective sentencing and relieve the disadvantage populations over time.

Submitted on: June 17, 2024

PFEIFFER RUDOLF
ATTORNEYS AT LAW

July 15, 2024

United States Sentencing Commission

One Columbus Circle, N.E., Suite 2-500

Washington, D.C. 20002-8002

Attention: Public Affairs – Priorities Comment

To Whom it May Concern:

I am a practicing attorney in both the United States and in Canada. I am licensed to practice law in North Carolina, Massachusetts, and the District of Columbia, as well as in all federal jurisdictions in North Carolina and before the United States Supreme Court. I am a licensed Barrister and Solicitor in the Province of Ontario and a member in good standing of the Law Society of Ontario. My practice is primarily criminal defense and civil rights.

In connection with the Commission's request for public input regarding possible policy priorities for the amendment cycle ending May 1, 2025, I write with the following statutory purposes and missions as set forth in the Sentencing Reform Act in mind:

(1) Establishing "sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing"—namely, rehabilitation, deterrence, just punishment, and incapacitation. 28 U.S.C. 991(b)(1)(A).

(2) Establishing "sentencing policies and practices for the Federal criminal justice system that . . . reflect, to the extent practicable, advancement of knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. 991(b)(1)(C).

(3) "[M]easuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing." 28 U.S.C. 991(b)(2).

225 East Worthington Avenue
Charlotte, NC 28203
[redacted]
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My practice in Canada has provided unique perspective as it relates to sentencing in the United States. I suggest the commission consider the following changes to the current sentencing structure, undertaking whatever research is necessary to implement these changes over time:

1. Abolish mandatory minimums;
2. Abolish life in prison sentences;
3. Make all people eligible for parole after some period of reasonable time served (i.e. 10 years for offenses that yield the most societal harm and 1 year for non-violent, low-level felonies);
4. Reclassify marijuana and sentences related to marijuana to reflect the mitigated impact of marijuana as compared to all other drugs;
5. Abolish loss amount enhancements for conspiracy convictions unless government can prove actual loss amount attributable to the person convicted of conspiracy.

I make these suggestions in light of the sentencing structure in Canada, which reflects considerations similar to the above noted goals articulated by the U.S. Sentencing Commission. By way of context to the recommendations above, I share the following regarding sentencing in Canada:

In Canada, a person sentenced to life in prison must always have an option for parole. Unless the offense is either first-degree or second-degree murder which can have a parole ineligibility period ranging between 10-25 years, any other person serving a life sentence is eligible for parole after serving seven years of their sentence. The Supreme Court of Canada held in 2022 that a life sentence without the possibility of parole is unconstitutional as it amounts to "cruel and unusual punishment." *R v. Bissonette,* 2022 SCC 33

It is of note that *all* offenders serving a custodial sentence of two years or more in Canada are automatically paroled after serving two-thirds of their sentence. Many inmates are released sooner after serving one-third of their sentence and some non-violent offenders, including those convicted of significant fraud-related crimes or drug trafficking, may be eligible for release on parole as early as after serving one-sixth of their sentence based on the parole laws that applied at the time these offenses were committed. While Canadian Courts can order offenders convicted of a criminal organization offense to serve up to half of their sentence before being eligible for parole, they cannot entirely deny these offenders the possibility of being released on parole before the end of their sentence (see s. 743.6 of the *Criminal Code*).

As it relates specifically to marijuana, clearly this is an area where many states are reviewing both the criminalization of marijuana and how marijuana-related offenses are punished. In Canada, the illegal production, importation, and sale of marijuana is viewed as a serious crime, but Canadian courts routinely impose lower sentences for marijuana related offenses than

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other illegal narcotics such as heroin, cocaine and fentanyl. Indeed, there are no reported court judgments where a person convicted of a marijuana-related offense received a life sentence or a sentence beyond 10 years in prison, even when the crime is committed for the financial benefit of a criminal organization.

I hope this information is of assistance to the Commission, and that it is taken into serious consideration. I appreciate the Commission's public outreach efforts so ideas and information can be brought before the Commission as it works to fulfill its statutory goals.

Sincerely,

Sonya Pfeiffer

Sonya Pfeiffer

225 East Worthington Avenue
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Public Comment - 2024-2025 Proposed Priorities

Submitter:

Miloslava Plachkinova, Kennesaw State University

Topics:

Research Recommendations

Simplification

Miscellaneous Issues

Comments:

I salute the Commission for reflecting on its priorities in the context of the 40th anniversary of the Sentencing Reform Act. As society changes, it is important that those changes are also reflected in the criminal sentencing guidelines and how we treat offenders.

As a researcher in the field of information systems and technology, my work on ShowCase helped me better understand the intersection of criminal justice and IT. More specifically, it illuminated the need to provide judges with more data points so they can make more informed sentencing decisions. Furthermore, integrating technology in the courtroom can help promote equality and fairness during sentencing.

We demonstrated in practice how this ambitious goal can be achieved. Judges already have access to most of the relevant information, what we propose to do is create a system that can organize it and present it in an easy to use manner.

One major finding of our work is addressing individual biases by providing judges with a variety of data points. For instance, showing them what sentences their colleagues issued in similar cases. This information can be further refined by location, gender, age, etc. characteristics of the judges. That way a judge can compare their sentence to their peers and more easily identify any potential outliers or significant deviations.

Next, our findings demonstrated the need to balance general guidelines with individual characteristics by taking into consideration the specific defendant's prior history, education, employment, caretaking, drug use, remorse, etc. We argue that it would be much easier for a judge to take all these specific characteristics into consideration when they are presented in a simple and easy to use way.

Finally, while our work is still in a conceptual stage right now, we are more than happy to work with the Commission on building a prototype and pilot testing it with some judges who may be willing to consider such a data-driven approach to their work.

Overall, I think the work the Commission is doing is very important and the guidelines were developed with the best intentions. However, over time it also led to a lot of disproportionate sentencing of minorities and individuals with lower socioeconomic status. Thus, by integrating technology in the courtroom we can better analyze such patterns and assist judges to promote fair and equitable sentencing.

Submitted on: June 12, 2024

Columbia
Law School

David Pozen
Charles Keller Beekman Professor of Law

[redacted]

June 15, 2024

Dear Judge Reeves:

I am grateful for the invitation to contribute a comment on the Sentencing Commission's notice of proposed priorities, based on my book *The Constitution of the War on Drugs*. Because I am not an expert on sentencing, I will keep this comment brief. *The Constitution of the War on Drugs* explains that for much of modern U.S. history, criminal prohibitions on nonviolent drug behaviors have been understood to raise serious constitutional concerns. Depending on the details, such prohibitions may offend privacy and autonomy interests protected by the Due Process Clause or the Privileges or Immunities Clause, the commitments to racial equality and rational government embodied in the Equal Protection Clause, the religious liberty and cognitive liberty rights safeguarded by the First Amendment, and the Eighth Amendment's guarantee against cruel and unusual punishment. Although courts today no longer tend to grapple with challenges to prohibitory drug laws, these constitutional concerns remain just as pressing as they were in prior generations—perhaps even more pressing, now that the "war on drugs" is a proven failure and constitutional courts in democracies across the globe have placed increasingly sharp limits on criminal penalties for drug possession and consumption.

Many of the U.S. courts that rejected constitutional challenges to drug laws in earlier periods emphasized the importance of judicial restraint. They had a point, of course. Yet the less willing courts are to second-guess these laws, the more it behooves other institutions—including the Sentencing Commission—to continually reevaluate and rein them in. The fact that criminal responses to drug problems often do far more harm than good is reason enough for the Commission to take a decisive turn away from incarceration in this context; no legal expertise of any kind is needed to see that U.S. drug sentences have been excessive and counterproductive. But the fact that these sentences *also* threaten so many constitutional values ought to trouble the Commission, too. Both American constitutional history and comparative constitutional law suggest that one priority for 2024-25 should be the scaling back of sentences for nonviolent drug offenses.

Thank you again for inviting this comment and for your efforts to make the federal criminal legal system more just.

Respectfully,

Jerome L. Greene Hall 435 West 116th Street New York, NY 10027

Public Comment - 2024-2025 Proposed Priorities

Submitter:

John Pryor, Florida, Middle

Topics:

Policymaking Recommendations

Comments:

I would recommend revising and/or eliminating the specific offense characteristic(s)/guideline enhancement(s) for the use of a computer in sex offense cases. Virtually all sex offense cases in the federal system involve the use of a computer. Its applicability is almost never offense-specific, and it significantly enhances the recommended sentence as if it were an aggravating factor.

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Alexis Quintero-Brode, Forensic Social Worker

Topics:

Policymaking Recommendations

Comments:

Dear Judge Reeves:
Over fifty years ago, the United States embarked on the path to mass incarceration. To ensure that our country does not experience another fifty years of mass incarceration's harms, I urge you to take bold steps to decrease incarceration.

Lower Federal Sentences
In 1980, federal prisons held 25,000 people; now, over 158,000 people are incarcerated for federal crimes. Longer sentences have been a major driver of this growth. But longer sentences do not prevent crime – instead, they fracture families and impoverish communities. I urge the Commission to lower recommended sentence ranges to downsize the federal prison population. This not only is more cost-effective and saves tax-payers money, it also keeps our communities safer by reuniting families and addressing the harmful effects of lengthy incarceration.

Racial disparities are pervasive within the federal and local criminal legal system, and unfortunately, our legislature has been all bark and no bite when it comes to addressing this. Black men are still dramatically overrepresented within federal prisons and receive sentences that are 13% longer than white men. Hispanic men receive sentences 11% longer than white men. The Commission should be prioritizing the work to reduce racial disparities in federal sentencing.

Additionally, life without parole sentences are inhumane and unnecessary to protect public safety. Currently the Guidelines recommend that all level 43 base offenses receive a sentence of life without parole, regardless of whether the individual has any prior criminal history. The Commission should amend the Guidelines to give judges more discretion, especially for those with no or little criminal history. I work directly with people that have had their life without parole sentences commuted after lengthy sentences, and are now in the community - these people are often pillars of their community, and offer a unique perspective on the perils of incarceration and the benefits of avoiding recidivism to our youth. They keep our communities safer, and offer

invaluable mentorship to keep our youth out of trouble. Keeping these rehabilitated individuals incarcerated is not only expensive and inhumane, but it is also a disservice to our communities.

Federal drug sentences have significantly contributed to mass incarceration. The Sentencing Guideline's current focus on the quantity and purity of drugs involved in an offense – rather than an individual's actual responsibility, history, and capacity for rehabilitation – results in inappropriate sentences. I urge the Commission to work towards ending the War on Drugs by adopting more rational drug sentencing policies.

Thank you for this opportunity to suggest priorities for the Commission.

Submitted on: June 26, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Benito Rodriguez-Masso, Law Office Benito I Rodriguez Masso

Topics:

Research Recommendations

Comments:

Mandatory minimums;

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Josh Roth, Colorado

Topics:

Simplification

Comments:

Hello - Could the Commission look at ways to simplify/remove the need for the categorical approach when deciding if a crime was a COV?

Submitted on: June 10, 2024

Public Comment on Life Without Parole Sentencing
for
The United States Sentencing Commission

July 14, 2024

Christopher Seeds
Associate Professor
Department of Criminology, Law & Society
University of California, Irvine

I am an Associate Professor in the Department of Criminology, Law & Society at the University of California, Irvine. Much of my research focuses on the history of life without parole sentencing in the United States, in particular on changes in life sentencing that took place in the late twentieth century. Drawing from that research, these comments briefly summarize some key points about the contemporary use of life without parole sentencing (LWOP) in the United States, the history of LWOP, and the utility of LWOP, that may be useful to the Commission. I conclude the comment with several recommendations.

LWOP in the United States

- When one considers the use of LWOP in the United States relative to the use of similar sentences in other nations, one must completely change the scale.
    - The last Sentencing Project survey on LWOP and other forms of life sentencing reports, based on 2020 data, found that nearly 56,000 men and women are serving LWOP sentences in the United States. The five jurisdictions with the most LWOP sentences as of 2020 (Florida, Pennsylvania, California, Louisiana, and Michigan) account for approximately half (52%) of LWOP sentences in the United States. The jurisdiction with the sixth-most LWOP sentences in the United States in 2020 was the Federal system.
        - Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment* (The Sentencing Project 2021).
    - The definitive study of life sentencing worldwide by Van Zyl Smit and Appleton (2019) reports that only a handful of nations authorize life without parole sentences or the equivalent (i.e., sentences formally intended to apply for the remainder of a prisoner's life). The number of LWOP sentences in the United States (more than 50,000) far exceeds that of any other nation (in 2019, Kenya was second with just under 3,700). No nation, other than the United States, authorizes LWOP for juveniles.
        - Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* (Harvard University Press 2019).
- The number of LWOP sentences in the United States has increased substantially over the past forty-five years. From the early 1990s to the present, the number of LWOP sentences nationally has increased by more than 45,000. The increase cannot be connected in substantial part to crime rates. In the Federal system, the number of life sentences (all LWOP) may be relatively "rare" compared to the overall number of sentences imposed—but the Federal system has one of the highest LWOP populations in the nation. Thousands are serving LWOP in Federal prisons—more than 3500 people, according to Sentencing Project data in 2020 (Nellis 2021).

- Life sentences are imposed disproportionately on people of color. At a national level, for example, approximately 55% of the people sentenced to LWOP are Black. This is also true in the Federal system, where over 43% of the new life sentences (LWOP) issued between 2016 and 2021 were imposed on Black people.
    - Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment* (The Sentencing Project 2021); B.D. Johnson et al., "Life Lessons: Examining Sources of Racial and Ethnic Disparity in Federal Life without Parole Sentences," *Criminology*, 59 (2021), 704-737; *Life Sentences in the Federal System* (United States Sentencing Commission 2022).

History of LWOP

- Life without parole sentencing is not an entirely new punishment. One finds the penalty of life imprisonment without possibility of parole authorized in statutes earlier in the twentieth century. However, LWOP was rarely imposed under these statutes and rarely imposed in the United States prior to the last two decades of the twentieth century.
    - Christopher Seeds, *Death by Prison: The Emergence of Life without Parole and Perpetual Confinement* (University of California Press, 2022).

- The rise of life without parole in the last quarter of the twentieth century is not simply a matter of growth. The meaning of the sentence has changed since the early-to-mid twentieth century. For most of the twentieth century, life without parole sentences carried with them a reasonable possibility of release. For example, in Pennsylvania between the early 1940s and early 1970s a majority of life without parole sentences were commuted after prisoners had served, on average, between fifteen and twenty years. Louisiana had a long-standing and well-known rule under which prison administrators would recommend for commutation prisoners who had served ten years and six months of their sentence with good conduct.
    - Edwin Powers, *Parole Eligibility of Prisoners Serving a Life Sentence* (Massachusetts Correctional Association 1972); Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics* (Princeton University Press 2015); Christopher Seeds, "Life Sentences and Perpetual Confinement," *Annual Review of Criminology* 4 (2021).

Utility of LWOP?

- General deterrence
    - Experts recognize that certainty of apprehension is largely responsible for deterrent effects, not severity of sentence.
        - See, e.g., Daniel Nagin, "Deterrence in the Twenty-First Century," *Crime and Justice* 42(1): 199-263 (2013).

    - The general deterrent effect of an LWOP sentence relative to a life-with-parole sentence or other long-term sentences is negligible.
        - Kleinstuber and Coldsmith, "Is Life without Parole an Effective Way to Reduce Violent Crime?," *Criminology & Public Policy* 19(2): 617-651 (2020). In their words: "to the extent that incarceration can produce lower crime rates, the effect of increasing sentencing severity maxes out at some point prior to LWOP. Thus, LWOP does not seem to produce any additional crime reduction beyond that which is produced by parole-eligible life sentences (and possibly by other long-term sentences)."

- Specific deterrence: LWOP is unnecessary as a specific deterrent.
    - Involvement in crime diminishes as people age. Elderly people sentenced to LWOP who have served decades in prison age out of crime. Marc Mauer & Ashley Nellis, *The Meaning of Life: The Case for Abolishing Life Sentences* (2018); American Civil Liberties Union, *At America's Expense: The Mass Incarceration of the Elderly* (June 2012).
    - Incarcerated populations display biological health profiles that appear to exceed their chronological age by 10 to 15 years. The National Institute of Corrections has recommended that, for incarcerated people, age 50 and above should be considered elderly. J.B. Morton, Nat'l Inst. of Corr., *Administrative Overview of the Older Inmate* 3 (1992). See generally Kathryn M. Nowotny et al., *Growing Old Behind Bars: Health Profiles of the Older Male Inmate Population in the United States,* 28 J. Aging & Healthcare 935, 937 (2018).
    - Evidence consistently shows that, upon release from prison, older formerly incarcerated people and paroled lifers are highly unlikely to re-offend. See Kleinstuber and Coldsmith (2020), above, citing studies; Human Rights Watch, "'I Just Want to Give Back': The Reintegration of People Sentenced to Life without Parole" (2023).

- Costs
    - LWOP is racially disproportionate in its imposition and its effects (see statistics above).
    - Human suffering is amplified throughout the LWOP sentence because it lacks review.
        - There are unique pains of spending life from young adulthood onward in prison. Ben Crewe et al., *Life Imprisonment from Young Adulthood* (Palgrave 2020).
        - Aging and elderly people experience added physical and psychological pains in prison. Kazemian & Travis, *Forgotten Prisoners: Imperative for Inclusion of Long Termers and Lifers in Research and Policy*, Crim. Pub. Policy 14 (2015).
    - The human impacts of LWOP extend beyond the prison, to families and communities.
    - Financial costs = costs of holding people for multiple decades + costs of additional medical care needed for aging prisoners who are chronically ill or nearing end of life.

<u>Recommendations for Sentencing Policy</u>

- Recognize LWOP as an *aberration* from a long-term historical view.
    - Not a humane sentence
    - Not a sentence that is institutionalized elsewhere in the world
    - Not a sentence that, historically in the United States, necessarily meant death in prison
        - However, the former meaning of life without parole (which relied on executive review for release) is untenable in the current US political climate.
    - A sentence that in the Federal system began in the early 1980s but is now used less and less. As a 2022 USSC report notes, LWOP sentences imposed annually in the Federal system dropped from 358 LWOP sentences in 2006 to 60 LWOP sentences in 2021.

- Prospectively: Limit and eliminate LWOP for all offenses. Instead, follow recommendations, such as those provided by The Sentencing Project, which would require review after a set period of years and routinely thereafter.

- For people already serving LWOP sentences:
    - Allow reconsideration of the sentence and authorize review for release.
    - Expand existing review procedures, such as elderly parole and second look provisions, to include people sentenced to LWOP.

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Danielle Sered, Author/Non-profit ED

Topics:

Policymaking Recommendations

Legislation

Miscellaneous Issues

Comments:

Any policy change that seeks to address the long-standing history of racial inequity in the United States and the intergenerational impacts that arise from mass incarceration will have to contend with the way the criminal justice system sentences people. This cannot be solved through tinkering; it will require a large-scale overhaul of how we approach crime and punishment. Acting on a national commitment to reduce violence will require inverting the logic that has driven our sentencing pol- icy for the past several decades. We will have to restructure our punishment codes to allow for accountability, repair, and resto- ration. Excessive sentences are the enemy of those aspirations. Lengthy sentences offer diminishing returns at increasing costs to the people incarcerated, their loved ones and communities, and the public. Evidence even suggests that such sentences can reach a tipping point at which both individually and broadly they can become risk factors for violence rather than protective factors against violence as intended. Lowering the maximum allowable sentences will be an essential step toward uprooting the excess of punishment we have baked into our statutes and toward creating a boundary, aligned with reason, morality, and evidence, beyond which our laws should no longer go.

This will include eliminating the most severe penalty avail- able: capital punishment. We can do this because of a moral approbation of state-sponsored killing, because of concern about the practical and financial drain it places on the system through- out the necessary appellate process, because of its inefficacy as a deterrent of any kind, or because we have been persuaded of the imperfection of the criminal justice system and know that any time we have the death penalty we will inevitably execute some people who are innocent. For whatever reasons we reject the use of capital punishment, a criminal justice system that opposes violence cannot have killing as its maximum penalty and still achieve its aims.

Similarly, we will also have to lower minimum sentences for crimes, including crimes of violence. This means, first and foremost, the elimination of mandatory minimums. Mandatory minimum laws are the flagships of a criminal justice orientation we have to outgrow, and no

large-scale change will be possible if we remain constrained by laws that are increasingly under- stood to be archaic and draconian. The elimination of mandatory minimums will also require eliminating or rolling back the host of "three strikes" laws that compound penalties exponentially for people with multiple convictions. These laws place some of the narrowest and most illogical constraints on the sound exercise of discretion and will have to be removed for any system to be empowered to act as humanely and rationally as possible.

When sentencing guidelines still recommend (even if they do not require) a minimum sentence of jail or prison time, those guidelines should allow consideration of public safety, the needs and wishes of survivors, the age and circumstances of the person responsible for harm, the social and financial costs to community and society of incarcerating the person, and the availability of other options (such as diversion programs) that may be capable of producing better short- and long-term results than imprisonment can. These alternatives to prison must be avail- able even for the most serious crimes when a reasonable set of criteria are met. The criteria might include the wishes of the survivor, the availability of diversion programs with a demonstrated record of success, the willingness and capability of the responsible person to engage in a meaningful accountability or treatment process, and any remaining risk to public safety not managed by the alternative to incarceration.

Ultimately, these solutions have to become the default from which we deviate in exceptional circumstances—not the exceptional opportunity available to only a few.

In this way, incarceration has to be rendered an option of last resort, so that ultimately, we would talk not of community- based interventions as "alternatives to incarceration," but of incarceration as an "alternative to community intervention," one we deploy sparingly and reluctantly with full awareness of its drawbacks and risks. We have seen substantial movement in this direction in the juvenile justice arena, where arrest rates are plummeting, incarceration rates are down from their peak by more than half, and systems increasingly rely on responses other

than incarceration to address even serious harm.6 But on the adult side of the system, even where broad networks of alternatives to incarceration, intervention, and treatment programs exist, few jurisdictions make these options available when someone has committed violence. Many people assume—incorrectly—that incarceration is the "toughest" response to crime, when in fact some dignified, humane alternatives to prison turn out to be more difficult and more effective, perhaps in part because of what they require of the people who participate. This is true of some substance use programs that have demonstrably reduced recidivism more effectively than incarceration. Although these programs do not subject people to the isolation and indignities of prison, they require participants—whether mandated by the courts or, even better, engaged voluntarily—to go through the enormously challenging work of battling

addiction. In New York City, numerous alternatives to incarceration that address a combination of nonviolent crimes and lower-level violent crimes have demonstrated better safety outcomes than prison has. These programs in New York and across the country often include education, mental health treatment, community service, and vocational training as ways to help hold people accountable. New responses to violence can build on the les- sons learned from these programs (which thus far have focused primarily on nonviolent offenses) and from violence intervention efforts that have not yet been deployed as alternatives to jail or prison.

One of the ways mass incarceration has grown has been through the classification of an extraordinarily wide range of crimes as felonies, including as violent felonies, even when they do not involve what most people would consider serious violence—or violence at all, for that matter (such as someone stealing from the residence of a person who is not home). Reclassifying a wide range of felonies as misdemeanors will put those crimes into a sentencing range more proportionate with the harm caused and will reserve the censure of felony sanctions for the harm our society takes most seriously.

Along with this reclassification, it will be important to roll back the variety of enhancements that have been legislated to increase the penalties associated with certain crimes. Prime among these are gang enhancements, which add additional penalties (or upgrade the classification of a crime from a misdemeanor to a felony or to a higher-level felony, for example) for people believed to be gang-involved. The information gathered on gang involvement is notoriously inaccurate, and the data- bases in which this information is held raise serious concerns about civil liberties.9 Information about people can be placed in these databases without their knowledge. People are often included based solely on their social connection to others in the databases who have criminal histories. There is no standard mechanism to remove people from these databases and no way for a person to contest being included in these lists. These lists and the enhancements they power have been demonstrated to be inequitable. What they have not been demonstrated to be is effective.

Finally, any changes to sentencing statutes should be applied retroactively. It is important to remember that these changes are not simply reform—they are a form of societal repair. There is arguably no one more entitled to that repair than someone who has paid—and is continuing to pay—the price for our misjudgment and mistakes. This means that sentencing reform can and should include releasing people who are currently incarcerated, as well as supporting them when they come home.

(from _Until We Reckon_, the New Press, 2019)

Submitted on: June 13, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Vivian Shevitz, Attorney (NY, 1st & 2d Circuit fed)

Topics:

Policymaking Recommendations

Comments:

As a former fed. prosecutor/current defense lawyer, I'd like to sese the cCommission move to reduce ALL sentences to far less severe. The system does not work. Too punitive, too costly, to no end.

Submitted on: June 26, 2024

USC Gould
School of Law

DAN SIMON
Richard L. and Maria B. Crutcher
Professor of Law and Psychology

July 12, 2024

The Hon. Carlton W. Reeves, Chair
U.S. Sentencing Commission

The Hon. Carlton W. Reeves,

Allow me first to express my appreciation the Commission's solicitation of public comment in the furtherance of its vital mission.

1. First, as to the Commission's goal of establishing "sentencing policies and practices that … assure the meeting of the purposes of sentencing"—namely, rehabilitation, deterrence, just punishment, and incapacitation.

I focus here not on the validity or appropriateness of the purposes themselves, but on the manner in which they are implemented in the making of legal decisions, whether by judges, legislators, or other policy makers. In light of the scarce attention and limited funding directed at rehabilitation, I will avoid discussing it here (except for expressing a lamentation for its sorry state).

The other three purposes—just deserts, deterrence, and incapacitation—seem to be used by legal decision makers as open-ended permissions to punish, rather than as nuanced regimens geared to both permit and restrict their use.

As posited by Immanuel Kant, just punishment ought to be constrained by proportionality, yet that constraint attracts sparse attention in the punishment discourse (it is likely that Kant's strong insistence on proportionality and due process protections were overshadowed by his ardent endorsement of capital punishment). If we stop to ponder that constraint, we may find ourselves questioning why our punishment scale is out of whack with comparable legal systems, and why we sentence convicted people to LWOP and execute them while other countries find 20-year prison terms harsh enough.

The shunning of the purposes' delimiting mechanisms is starkly evident in legal decision makers' use of the utilitarian purposes—deterrence and incapacitation. Utilitarian purposes are justified only to the extent that they reduce more harm than they cause, or in economic terms, when their benefits exceed their costs (Bentham, 1802; Becker, 1968). To apply them in a principled manner, legal decision makers would need to take into consideration the benefits of crime reduction, which would require gauging the elasticity of criminal behavior to both the probability and severity of punishment (for deterrence) and the probability that convicted persons would have committed crimes had they not been incarcerated (for incapacitation). Importantly, one would also need to take into consideration the myriad of costs, including the expenditures of incarceration, loss of income, public health expenditures, the opportunity costs of incarceration and alternative crime-reduction strategies such as redirecting policing strategies, or investing in education or social programs. Heeding Bentham's admonition that punishment itself is harmful ("all punishment is mischief: all punishment in itself is evil"), one should also incorporate the

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costs relating to the life-crushing experience of confinement on convicted persons, their families and communities, including medical, social, psychic, financial, and stigmatic harms. Focusing on the presumed benefits of punishment (which tend to be inflated, as mentioned below), while ignoring its myriad of costs produces a public policy that is woefully incomplete and stacked to yield virtually limitless punitive permission with scant outer boundaries.

2. Even if legal decision makers were willing to recognize the limiting principles embedded in the the purposes, they would also need to address the conceptual difficulty of reconciling them with one another. Currently, legal decision makers tend to invoke whichever purpose suits the occasion (18 USC 3553(a)), a "mix-and-match jurisprudence," (HLA Hart, 1968) also known as the 'smorgasbord' or 'cafeteria' approach to sentencing (Norrie, 2014). That approach all but ensures that even if decision makers felt constrained by the delimiting powers of a given purpose, they could easily turn to an alternative purpose that provides the sought permission.

3. With respect to the Commission's goal of reflecting "advancement of knowledge of human behavior as it relates to the criminal justice process," allow me to make two observations that reflect my reading of the consensus beliefs in the field.

First, with respect to deterrence – the probability of punishment prong has a vastly more effective deterrent effect than the severity prong. In other words, high probabilities of being apprehended, prosecuted, convicted, and punished are considerably more deterring than even draconian punishment (NRC, 2014; NIJ, 2016). It follows that the habitual intuition of boosting sentences to enhance deterrence is largely futile, and it results in substantial increases in the costs of punishment alongside limited increases in benefits. It should be noted that the elasticity of crime—that is, the responsiveness of criminal offending to changes in incarceration—hovers around an unimpressive coefficient of -0.2 (Donohue, 2009; Johnson & Raphael, 2012).

Second, it must not be overlooked that the severity of our current punishment regime exceeds optimal levels of punishment. This view was endorsed, inter alia, by the National Research Council (2014), Joan Petersilia (2011), Steven Levitt (Levitt & Miles 2006), and even John Dilulio (WSJ, 2014). The upshot of this excess is that our punishment policies stand in stark violation of the fundamental principle of parsimony, which disallows utilitarian punishment when its objectives can "be obtained by means more mild" (Bentham, 1802), or when it is "greater than necessary" (18 USC 3553(a)).

Please do reach out if you think that I can be of any assistance.

Sincerely,

Dear Mr. Reynolds,

Thank you for this opportunity to provide feedback about the sentencing guidelines. I think if I have anything unique to suggest it is with respect to risk assessment. To the extent the USSC thinks assessment of an offender's risk of reoffending is relevant (I realize that generally it does *not* think it's a very important consideration), risk assessment algorithms ought to be a central means of determining risk. These instruments, properly validated, are more accurate and less racially biased than human/judicial judgment. Although they often rely primarily on static risk factors that are not always related to conduct, human judgment relies on the same types of factors, but much less transparently. I could provide you with much more commentary on this subject, as I've written an entire book about it (Just Algorithms: Using Science to Reduce Incarceration and Inform a Jurisprudence of Risk, Cambridge University Press, 2021). I have also written a primer for judges who are involved in using risk assessment instruments: "Primer on Risk Assessment for Legal Decision-Makers" by Christopher Slobogin (vanderbilt.edu).

Let me if there is anything else I can provide or do. Of course, I understand if this is not an area of interest to the Commission.

Christopher Slobogin
Milton Underwood Professor of Law
Vanderbilt University

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Mark Smith, Lauren Faith Smith Ministry for Nonviolence

Topics:

Policymaking Recommendations

Comments:

Dear Judge Reeves:
Over fifty years ago, the United States embarked on the path to mass incarceration. To ensure that our country does not experience another fifty years of mass incarceration's harms, I urge you to take bold steps to decrease incarceration.

Lower Federal Sentences
In 1980, federal prisons held 25,000 people; now, over 158,000 people are incarcerated for federal crimes. Longer sentences have been a major driver of this growth. But longer sentences do not prevent crime – instead, they fracture families and impoverish communities. I urge the Commission to lower recommended sentence ranges to downsize the federal prison population.

Decrease Racial Disparities
Racial disparities are pervasive within the federal criminal legal system. Black men are dramatically overrepresented within federal prisons and receive sentences that are 13% longer than white men. Hispanic men receive sentences 11% longer than white men. The Commission should continue to study and work to reduce racial disparities in federal sentencing.

Reduce Life Without Parole Sentences
Life without parole sentences are inhumane and unnecessary to protect public safety. Currently the Guidelines recommend that all level 43 base offenses receive a sentence of life without parole, regardless of whether the individual has any prior criminal history. The Commission should amend the Guidelines to give judges more discretion, especially for those with no or little criminal history.

Reform Drug Sentences
Federal drug sentences have significantly contributed to mass incarceration. The Sentencing Guideline's current focus on the quantity and purity of drugs involved in an offense – rather than an individual's actual responsibility, history, and capacity for rehabilitation – results in

inappropriate sentences. I urge the Commission to work towards ending the War on Drugs by adopting more rational drug sentencing policies.

Thank you for this opportunity to suggest priorities for the Commission.

Sincerely,
Mark Smith

Submitted on: June 26, 2024

Autism Forensics, LLC

4940 Ward Road

Wheat Ridge CO 80033

July 15, 2024

Honorable Judge Reeves,

My name is Dr. Laurie Sperry and I have been recognized as an autism expert by multiple courts. I am in private practice and have held appointments as an Assistant Clinical Faculty at Yale University in the Department of Psychiatry as part of the Yale Autism Forensics Team. I have also been appointed as a clinical faculty at Stanford University, Department of Psychiatry and Behavioral Health. I hold a PhD and a degree in Forensic Psychology and Criminal Investigation and I am a Licensed, Board-Certified Behavior Analyst at the doctoral level.

In 2006, I was added to the Fulbright Scholarship's Senior Specialist Roster for Autism. The bulk of my research focuses on people with Autism Spectrum Disorder (ASD) who are accused of crimes or otherwise have contact with the criminal or juvenile justice system. I have published numerous peer-reviewed articles and served as an expert panelist at the American Academy of Psychiatry and Law conferences.

In more than 50 cases, I have previously been qualified as an expert and otherwise provided expert services to the Behavior Analysis Unit of the FBI, the Federal Aviation Administration, state and federal prosecutors, and various private entities to evaluate people with autism.

The majority of my forensic cases, approximately 85-90%, involve people with Autism accessing illegal images. Why does this happen? What about autism makes them uniquely vulnerable to going down this particular proverbial rabbit hole? There are a myriad of factors that contribute to this particular offense:

- Inadequate or absent sexuality education in our schools- Sexuality education, if provided at all is aimed at people without disabilities and fails to educate people about the SOCIAL aspects of sexuality and where the social and legal lines are that cannot be crossed.
- Services cliff- When young adults with autism leave school they fall off a services cliff. Insurance no longer covers their services and public services that are available to adults have years long waiting lists.
- High unemployment rates- 80-88% of people with autism are unemployed or underemployed.
- Excessive time online- people with autism spend more time online than pursuing any other leisure pursuit. Why? High unemployment and lack of services for adults.
- Profound loneliness- they find community and belonging online
- Pursuit of deep interests- sometimes they pursue a deep interest that puts them in contact with illegal images (i.e. Anime, Hentai, Pokémon Porn, Hot Thomas the tank engine)

- Lack of perspective taking- This is inherent in a diagnosis of autism. They often do not realize that their viewing behavior creates a market for these images and that children are always harmed in the making of these images.
- Differences between their chronological age and social age. They may be over 18 but their social age is much lower than their age in years.

Points to consider: It's important to note that an online offense is NOT the same as a contact offense. State v. Burr, (2008) "Having ASD actually makes improper sexual contact LESS likely because people with ASD are typically not charismatic and are perceived, even by children as bizarre."

We are using analog laws to punish digital crimes. Hundreds of images can be downloaded in the click of a button. Because of their propensity to hyper systematize, many of my clients never even look at the images, they are cataloguing them.

Prison is qualitatively different for the person with autism. They are unaffiliated prisoners who have no way to protect themselves from physical and sexual violence.

Recommended Activities:

- I would volunteer my time to serve on an advisory council or attend hearings.
- I would volunteer my time to work with the FBI to help them develop a decision matrix to strengthen their sting operations and help redirect people with suspected autism towards support and diversion rather than incarceration.
- Trainings for law enforcement, in particular prosecutors and judges who do not believe that autism is an actual diagnosis and the characteristics of autism implicated in the commission of an offense must be considered.
- Trainings for law enforcement regarding diversion programs that have proven effectiveness that result in increased safety for the community.

Your honor, I have been in the field of Autism since 1980. The worst days of my career have been sitting across from someone with autism in prison. When I ask them 'how did you learn that this behavior was against the law?' and they say "I learned the rules by breaking them" I think to myself, that's one hell of a way to go through life. We cannot arrest our way out of this. It is destroying families, individuals with disabilities and communities. We can and must do better. Please feel free to contact me, [redacted] I am at a stage in my career where I can volunteer time and provide considerable expertise to this Gordian Knot facing the criminal justice system.

With Deepest Respect,

Laurie Sperry, Ph.D., BCBA-D, LBA, MSc Forensic Psychology/Criminal Investigation

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Cassia Spohn, Arizona State University

Topics:

Research Recommendations

Comments:

I have two research recommendations. One is that the offender data files include a unique identifier for the judge who imposed the sentence. Ideally, the judge would be identified (as this would enable researchers to include the characteristics of the judge in models of sentence outcomes). If this is not possible (and I understand that it very well may not be), researchers would nonetheless appreciate a variable that could be used to cluster all cases decided by each judge (without identifying who the judge was). This would enable researchers to test for disparities in sentence outcomes across judges.

The second suggestion is that the USSC consider adding charging data to the offender data files. Currently, these files do not allow researchers to compare the original charges to the charges at sentencing, which precludes our ability to reach conclusions about plea bargaining. Brian Johnson and I recently completed a paper on sentences imposed on offenders convicted under statutes carrying a mandatory life sentence. Because the data files do not include information on the original charges, we could not identify defendants who were originally charged under statutes that required mandatory life sentences but who were not convicted of these charges--perhaps as a result of plea bargaining.

Thank you for soliciting comments.

Submitted on: June 28, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Don Stanton, Church Without Walls

Topics:

Policymaking Recommendations

Comments:

We are no longer in the 1800's, It has been proven over and over again Any sentence over 20 years WILL NOT REHABILITATE.
So unless a person is proven to be non rehabilitee, No sentence should be over 20 years,
Secondly, we have at least 3 - 5% of the prison population who are NOT Guilty!
we need resentencing laws that will be retroactive, and a review board to review all prison cases to see if the person is actually guilty by true Physical evidence.

Submitted on: June 27, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Don Stanton, Church Without walls

Topics:

Miscellaneous Issues

Comments:

Dear Judge Reeves:
Over fifty years ago, the United States embarked on the path to mass incarceration. To ensure that our country does not experience another fifty years of mass incarceration's harms, I urge you to take bold steps to decrease incarceration.

Lower Federal Sentences
In 1980, federal prisons held 25,000 people; now, over 158,000 people are incarcerated for federal crimes. Longer sentences have been a major driver of this growth. But longer sentences do not prevent crime – instead, they fracture families and impoverish communities. I urge the Commission to lower recommended sentence ranges to downsize the federal prison population.

Decrease Racial Disparities
Racial disparities are pervasive within the federal criminal legal system. Black men are dramatically overrepresented within federal prisons and receive sentences that are 13% longer than white men. Hispanic men receive sentences 11% longer than white men. The Commission should continue to study and work to reduce racial disparities in federal sentencing.

Reduce Life Without Parole Sentences
Life without parole sentences are inhumane and unnecessary to protect public safety. Currently the Guidelines recommend that all level 43 base offenses receive a sentence of life without parole, regardless of whether the individual has any prior criminal history. The Commission should amend the Guidelines to give judges more discretion, especially for those with no or little criminal history.

Reform Drug Sentences
Federal drug sentences have significantly contributed to mass incarceration. The Sentencing Guideline's current focus on the quantity and purity of drugs involved in an offense – rather than an individual's actual responsibility, history, and capacity for rehabilitation – results in

inappropriate sentences. I urge the Commission to work towards ending the War on Drugs by adopting more rational drug sentencing policies.

Thank you for this opportunity to suggest priorities for the Commission.

Sincerely, Don Stanton

Submitted on: June 27, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Glenn Starkweather, Assistant Public Defender

Topics:

Policymaking Recommendations

Career Offender

Legislation

Comments:

Your Honor, et al.,

I am writing a short letter to highlight the disparities in the sentencing that has been imposed by our so-called "war on drugs." It's a war that by no means is winnable by mass incarceration, yet we are swinging back that way in the wake of yet another epidemic as new and even more dangerous drugs sweep our nation.

I am a father, and as a father I fear for my son's safety as I see so many fall prey to addiction. So, I understand the knee-jerk reaction to simply lock users up. Lock sellers up. Lock buyers up. I am not talking about traffickers, actual dealers, or those actually responsible for this plague, but the street level individuals.

I have seen my clients face life in prison for selling less than a gram of crack or meth. Both, dangerous, but at the same time I have had clients receive far less for actually taking a life. That calculus just does not add up.

I urge all involved to reconsider the effect mass incarceration has on our society, a society that claims to be free, yet has the most incarcerated population of the developed world.

Thank you for your time,

G. Tommy Starkweather, Jr.

Submitted on: June 26, 2024

From Juliet Stumpf, Edmund O. Belsheim Professor of Law
Lewis & Clark Law School,
Portland, Oregon 97202

Thank you for soliciting comments on the U.S. Sentencing Commission's upcoming priorities. I strongly recommend that the U.S. Sentencing Commission include crimmigration, the intersection of immigration and criminal law, in its agenda for the coming year. Criminal convictions for immigration-related crimes, particularly illegal entry (8 U.S.C. § 1325 and illegal re-entry (8 U.S.C. § 1326), together constitute the second largest category on the federal docket, outstripping nearly all violent crime, weapons, and drug offenses. Deportations based on even minor criminal convictions, and including those committed decades prior to a removal hearing, result in the exile of thousands of lawful permanent residents and their U.S. citizen family members. And these impacts fall disproportionately on immigrants of color, particularly Latinos and Black immigrants.

In particular, the Commission should address the following topics:
1. Racial disparity of immigration-related convictions and sentencing.
The Sentencing Commission's reports reveal that between 2016 and 2022, 98-99% of people convicted of illegal reentry every year are Hispanic, and over 99% of those sentences were served in prison. See U.S. Sentencing Commission's (USSC) Standardized Research Files (2016-2022).

Empirical analysis by Professor Michael Light (see attached, Appendix A ("Light Analysis")) confirms this for the years 2015 through 2019 and also establishes that none of the other guidelines have a similarly skewed racial/ethnic make-up (see Light Analysis, p 2). He further concludes that "2L1.2 offenders are among the most likely to receive a prison sentence despite having the lowest mandatory minimums and final offense levels." Id. at 5. Finally, he establishes that these offenses account for about 40% of the incarceration gap between Hispanic and White offenders. Light Analysis, at 8. I highly recommend the Commission invite Professor Light to present his substantial research on these issues.

Racial disparity for illegal entry and reentry convictions is especially important to consider given the recent historical research revealing the origins of these offenses in white supremacy and the discredited eugenics movement. Historians Kelly Lytle Hernández and Benjamin Gonzalez O'Brien have painstakingly documented the collaboration between a white supremacist senator and a well-known eugenicist to pass these criminal laws. Their explicit purpose was to prevent Latinos from sullying the European racial stock in the United States.

The current structure of the sentencing guidelines exacerbates these racial disparities. Revising the sentencing guidelines to address these disparities and ameliorate the invidious intent behind these facially neutral laws will require research and good policy.

2. Disparate impacts of deportation on U.S. residents, including lawful permanent residents and U.S. citizens. The Commission should take under consideration the impact of sentencing for crimes with deportation consequences on lawful permanent residents and U.S. citizens. Deportation has impacts, beyond the typical collateral consequences that accompany sentences such as loss of income, etc. These impacts can include banishment from home, community, family, work, and "in the loss of . . . all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). A number of deportation grounds, such as aggravated felonies and crimes involving moral turpitude, rely on maximum sentence length and actual sentence length. The Sentencing Commission's research shows that some courts have permitted a downward departure from the guidelines for offenders who are assimilated into the US community, these courts tend to require extraordinary circumstances for such a departure and may look unfavorably on bi-cultural offenders, meaning those who are closely connected to community or family both in the US and in the country of origin.

3. Human behavior: I recommend that the sentencing commission place on its research agenda the reasons underlying recidivism in illegal entry and illegal re-entry convictions. That research may lead to recommendations that would impact departures upward or downward. These crimes differ from other crimes in often being motivated by connection to U.S. family, work, or community. The Commission would benefit from understanding whether the sentencing guidelines, particularly increases for recidivism, comport with the purposes underlying punishment. In other words, if the human compulsion to rejoin family members motivates unlawful border crossing, increases in sentencing are unlikely to deter, rehabilitate, exact retribution, or effectively incapacitate.

I make these recommendations both because of the centrality of the US sentencing commission in guiding fair, just, and proportionate sentencing and its importance in disseminating useful and practical public research and understanding. My hope is that prioritizing these issues may lead to the creation of policies that might include, for example:
-- judicial recommendations against deportation in appropriate cases
-- recommendations to Congress for legislation that addresses racial disparities and impacts on US persons
--the introduction of the kind of proportionality analysis that is standard in similar, European tribunals,
--changes to the departure guidelines to appropriately take into account deportation consequences.

I have much more to say about these thoughts and ideas, and would be happy to lay any of them out more fully. Please let me know if there is anything else I can do to further the work of the Commission.

Best,
Juliet Stumpf

APPENDIX A

Michael T. Light, Ph.D.
Associate Professor of Sociology
University of Wisconsin-Madison

Purpose

Upon request from the Federal Public Defender for the District of Oregon, I undertook an examination of statistical disparities pertaining to illegal re-entry cases in the sentencing data from the United States Sentencing Commission. Specifically, I was asked to examine the demographic composition of illegal re-entry defendants and the statistical features of how these defendants fare at sentencing compared to other offenders and offense types.

Expertise

Professor Light teaches courses on criminology and punishment and is a recognized expert in the field of criminal sentencing. He has published extensively using U.S. Sentencing Commission data.[1] This work appears in leading peer-reviewed, social science journals and has been cited in both state (*State of Wisconsin v. Salas Gayton*, 2016, No. 2013AP646–CR) and federal judicial opinions (*United States v. Valdovinos*, 2014, No. 13–4768). Both the National Science Foundation (SES Award # 1849297) and the National Institute of Justice (Award 2019-R2-CX-0058) currently fund his research on sentencing and criminal case processing.

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[1] *See* Light, Michael T. 2021. "The Declining Significance of Race in Criminal Sentencing: Evidence from U.S. Federal Courts." *Social Forces* https://doi.org/10.1093/sf/soab018; Light, Michael T. and Julia Thomas. 2021. "Undocumented Immigration and Terrorism: Is there a Connection?" *Social Science Research* 94: https://doi.org/10.1016/j.ssresearch.2020.102512; Light, Michael T., Ellen Dinsmore, and Michael Massoglia. 2019. "How do Criminal Courts Respond in Times of Crisis? Evidence from 9/11." *American Journal of Sociology* 125: 485-533.; King, Ryan D. and Michael T. Light. 2019. "Have Racial and Ethnic Disparities in Sentencing Declined? *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press; Light, Michael T. 2017. "Punishing the 'Others': Citizenship and State Social Control in the United States and Germany." *European Journal of Sociology* 58: 33-71; Light, Michael T., Michael Massoglia, and Ryan D. King. 2014. "Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts." *American Sociological Review* 79: 825-847; Light, Michael T. 2014. "The New Face of Legal Inequality: Noncitizens and the Long-Term Trends in Sentencing Disparities across U.S. District Courts, 1992-2009." *Law & Society Review* 48: 447-478; Ulmer, Jeffery T., Michael T. Light, and John Kramer. 2011. "Racial Disparity in the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC's 2010 Report." *Criminology & Public Policy* 10: 1077-1118; Ulmer, Jeffery T., Michael T. Light, and John Kramer. 2011. "Does Increased Judicial Discretion Lead to Increased Disparity? The "Liberation" of Judicial Sentencing Discretion In the Wake of the Booker/Fanfan Decision." *Justice Quarterly* 28: 799-837; Ulmer, Jeffery T. and Michael T. Light. 2010. "Federal Case Processing and Sentencing Before and After the Booker/Fanfan Decision: Little Has Changed." *Journal of Gender, Race, and Justice* 14:143-178; Ulmer, Jeffery T. and Michael T. Light. 2011. "Beyond Disparity: Changes in Federal Sentencing Post-Booker and Gall." *Federal Sentencing Reporter* 23(5):333-341.

An Empirical Analysis of § 2L1.2 Offenses in U.S. Federal Courts

This memo uses the U.S. Sentencing Commission's (USSC) Standardized Research Files from 2015 to 2019 (the five most recent years of data available) to examine cases sentenced under § 2L1.2 - Unlawfully Entering or Remaining in the United States – of the U.S. Sentencing Guidelines. 2L1.2 cases consist almost entirely of those prosecuted under 8 U.S.C. 1326. Over the last 5 years, 99.4% of 2L1.2 cases had only 1 count of conviction. Of the 2L1.2 cases, 99.2% were 8 U.S.C. 1326 convictions.

2L1.2 cases were the second most numerous offense on the federal docket, behind only § 2D1.1 – Unlawful Manufacturing, Importing, Exporting, or Trafficking Drugs. Throughout this memo, I compare 2L1.2 cases to the other guidelines that comprise the 10 most numerous non-immigration offenses. The guidelines section, definition, and number cases for each offense type are shown in Table 1. Combined, these 10 guidelines make up the overwhelming majority (84.5 percent) of cases sentenced over the past 5 years.

Table 1. 10 Most Numerous Sentencing Guidelines, 2015-2019

Section	*Description*	*Cases*
2D1.1	Drugs - Unlawful Manufacturing, Importing, Exporting, or Trafficking	96,062
2L1.2	Unlawfully Entering or Remaining in the United States	87,841
2B1.1	Larceny, Embezzlement, and Other Forms of Theft	32,975
2K2.1	Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition	32,382
2B3.1	Robbery	8,305
2G2.2	Trafficking in Material Involving the Sexual Exploitation of a Minor	7,328
2S1.1	Laundering of Monetary Instruments	5,353
2A3.5	Failure to Register as a Sex Offender	1,963
2T1.1	Tax Evasion	1,963
2D1.2	Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals	1,706

Notes: Total number for top 10 guidelines is 275,878, representing 84.5% of all cases between 2015 and 2019 where the guideline section is known.

Demographic Differences

The demographic composition of 2L1.2 cases is markedly different than the other guidelines. Looking at Figure 1, 99% of all 2L1.2 cases involve Hispanic defendants. As shown in Table 2, none of the other guidelines have a similarly skewed racial/ethnic make-up.

Figure 1. Racial/Ethnic Composition of 2L1.2 Cases

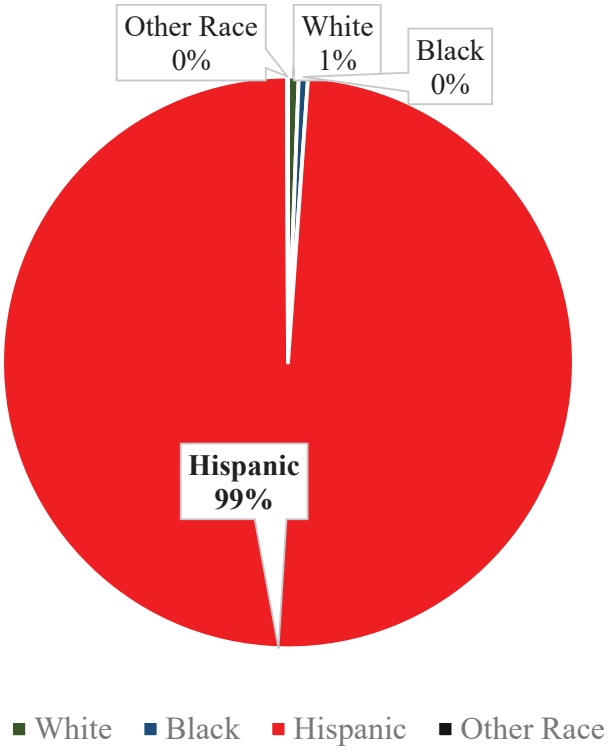


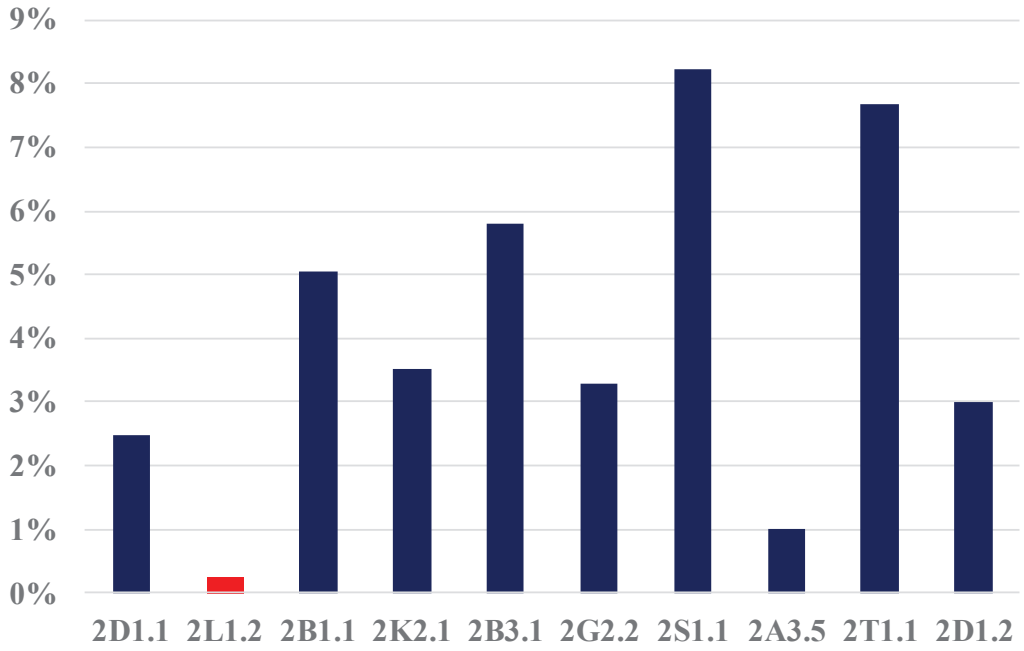
Table 2. Racial/Ethnic Composition by Sentencing Guideline

Section	White	Black	Hispanic	Other Race
2D1.1	24%	25%	48%	3%
2L1.2	1%	1%	99%	0%
2B1.1	44%	32%	18%	7%
2K2.1	26%	51%	19%	3%
2B3.1	24%	58%	15%	3%
2G2.2	81%	4%	12%	3%
2S1.1	37%	20%	36%	7%
2A3.5	45%	26%	11%	17%
2T1.1	64%	19%	10%	7%
2D1.2	9%	23%	66%	2%

Likelihood of a Trial

Although trials in federal court are generally rare, they are virtually non-existent among 2L1.2 cases. As shown in Figure 2, of the nearly 88,000 2L1.2 cases sentenced over the last 5 years, less than 0.3% of them were convicted by trial. The only other offense that even comes close to such a small number of trials are 2A3.5 cases, "Failure to Register as a Sex Offender." Still, even at a 1% trial rate, this means that 2A3.5 cases are over three times more likely to go to trial than 2L1.2 cases.

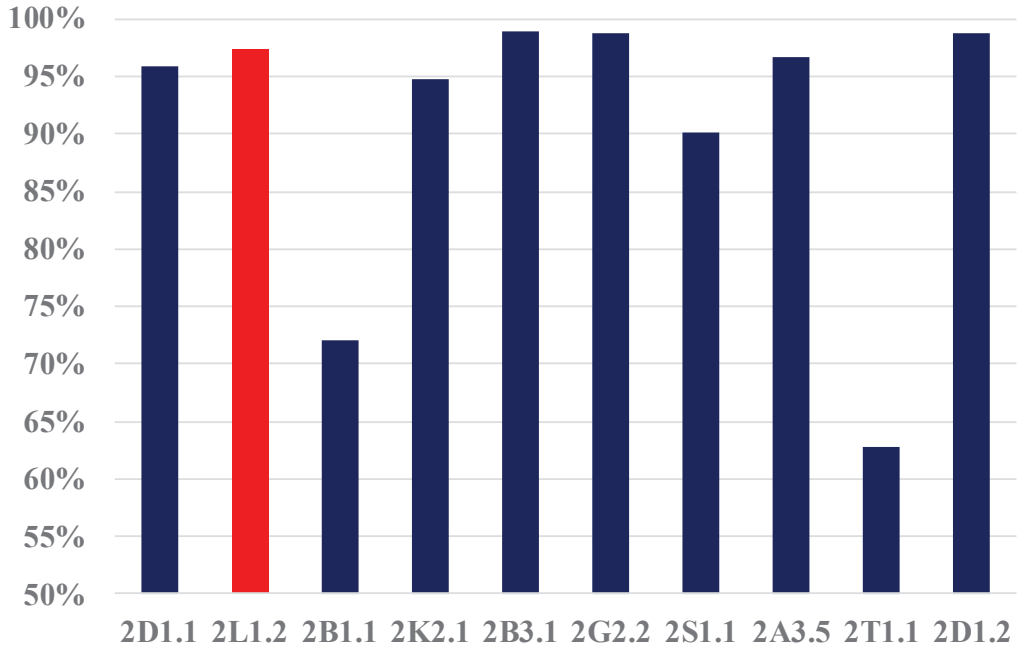
Figure 2. Percent of Cases Convicted at Trial by Sentencing Guideline, 2015-2019



Likelihood of Incarceration

2L1.2 cases are among the guidelines most likely to result in incarceration. As shown in Figure 3, 97% of 2L1.2 cases result in a prison sanction, a higher proportion than Drug Trafficking (2D1.1), Larceny (2B1.1), Money Laundering (2S1.1), Tax Evasion (2T1.1), and even Firearms offenses (2K2.1).

Figure 3. Percent of Cases Sentenced to Prison by Sentencing Guideline, 2015-2019



Severity of Cases

The comparatively high rate of incarceration for 2L1.2 offenses could be a result of the severity of cases. I examine this possibility in two ways. First, I examine the average final offense level (ranging from 1-43) for each guideline. As shown in Figure 4, 2L1.2 cases are in fact the least severe among the top 10 most numerous sentencing guidelines. The juxtaposition between 2L1.2 cases, drug trafficking and money laundering is illuminating. The average offense level for both drug trafficking (2D1.1) and money laundering (2S1.1) cases is roughly 2.5 times the average offense level for 2L1.2 cases. Yet, 2L1.2 cases are more likely to result in a prison sanction.

The second approach is to examine the average statutorily required minimum sentence based on all counts of conviction. These results are shown in Figure 5. There is considerable variation across these different offenses, ranging from 68 months for 2D1.2 cases (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) to virtually no required imprisonment. Important for this memo, the statutory minimum sentence is lowest for 2L1.2 cases, at 0.01 months on average. Combined, the results in Figures 3-5 suggest that 2L1.2 offenders are among the most likely to receive a prison sentence despite having the lowest mandatory minimums and final offense levels.

Figure 4. Average Final Offense Level by Sentencing Guideline, 2015-2019

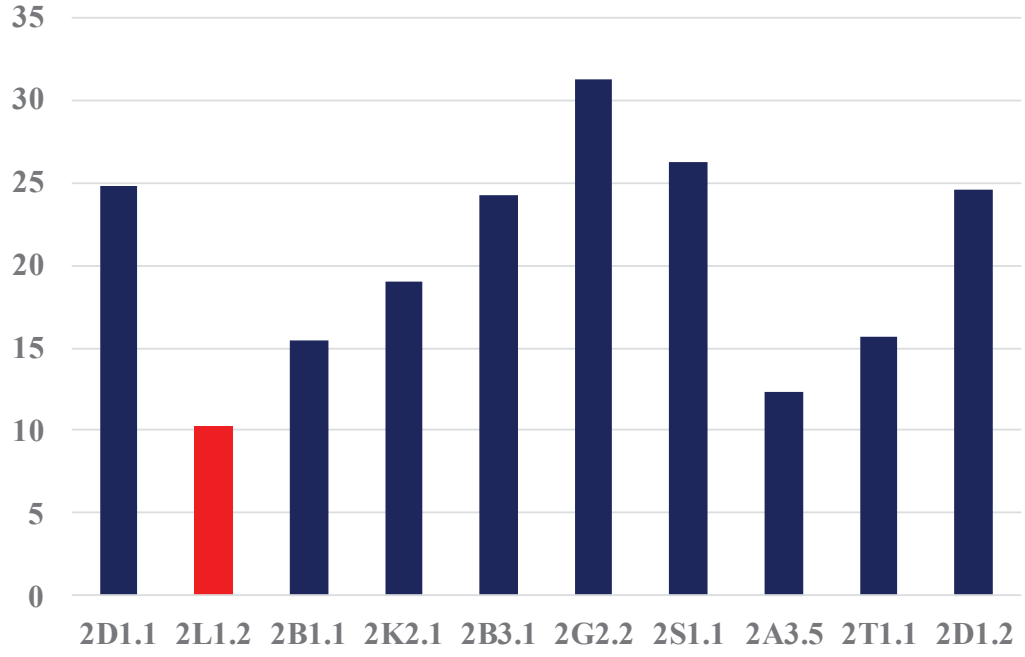
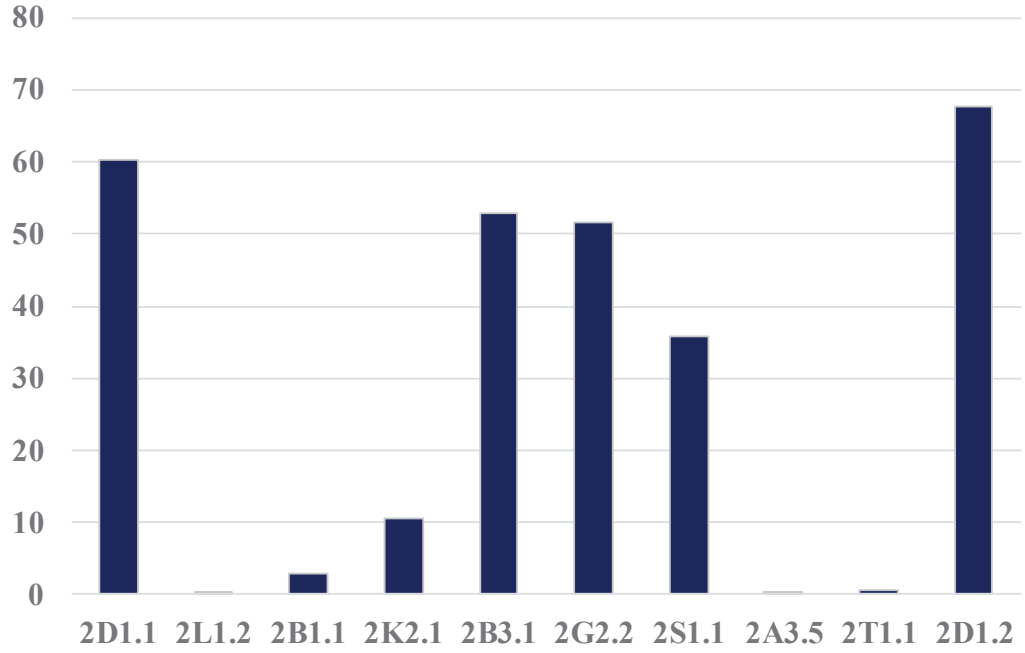


Figure 5. Average Statutory Minimum Sentence by Sentencing Guideline, 2015-2019



Do 2L1.2 Cases Predict Incarceration net of Offense Severity, Criminal History, and Mandatory Minimums?

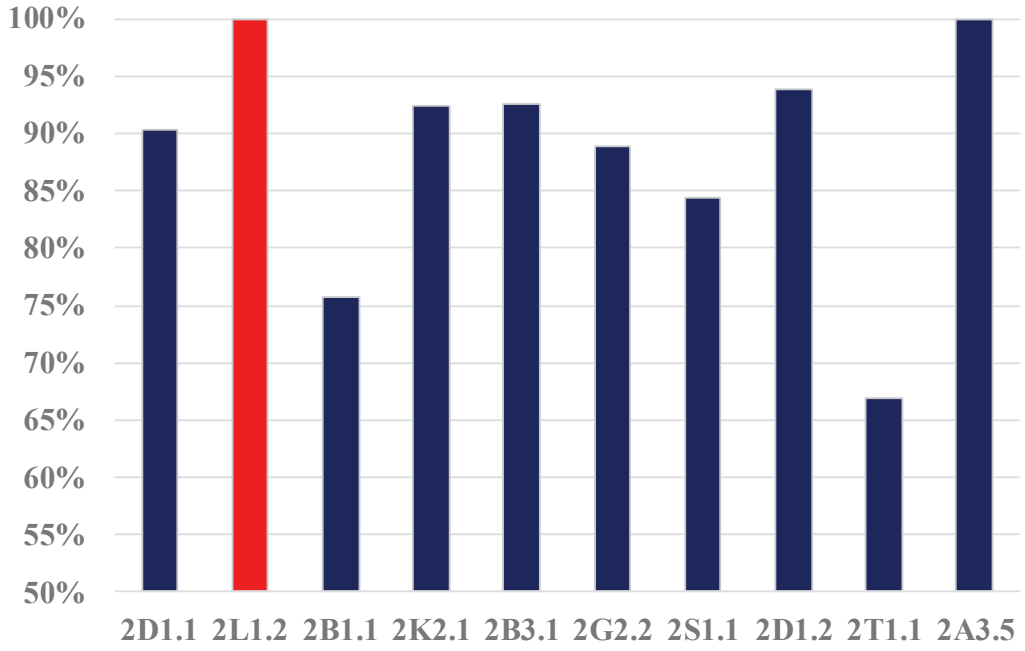
The results thus far provide suggestive evidence that 2L1.2 cases are punished uniquely in U.S. federal courts. However, one would need to account for other relevant sentencing factors before drawing strong conclusions. I thus turn to multivariate regression analysis to examine the influence of 2L1.2 cases on sentencing outcomes. As the U.S. Sentencing Commission notes, "the goal of multivariate regression analysis is to determine whether there is an association between the factors being studied and, if so, to measure the extent to which each factor contributes to the observed outcome…The principal benefit of multivariate regression analysis is that it controls for the effect of each factor in the analysis by comparing offenders who are similar to one another in relevant ways" (USSC 2017: 3).[2]

In this analysis, I compare the likelihoods of receiving a prison sentence among different guidelines, controlling for the three most important determinants of sentencing in U.S. federal courts: the final offense level (ranging 1-43), the final criminal history category (ranging from 1-6), and the statutory minimum penalty based on all counts of conviction (measured in months). I use a linear probability model to examine the likelihood of incarceration. For illustrative purposes, in Figure 6 I show the predicted probability of prison for each guideline holding all variables constant at their means. In other words, the results in the figure show the likelihood of incarceration for offenders sentenced under different guidelines but with the same offense severity, the same criminal history, and the same statutory minimum (the full regression results are shown in Appendix Table 1).

The results in Figure 6 make clear that the sentencing differences observed above are not driven by statutory minimums, offense severity, or criminal history. When these three factors are held constant at their means, 2L1.2 offenders are effectively guaranteed to receive a prison sentence (the predicted probability is 1). Save for 2A3.5 cases (Failure to Register as a Sex Offender), the likelihood of incarceration is higher among 2L1.2 offenders than all other guidelines in the study. Indeed, none of the other offenses have a predicted probability above 95%, including drug trafficking, sexual exploitation of a minor, robbery, money laundering, or firearms offenses.

[2] *See* U.S. Sentencing Commission. 2017. "Demographic Differences in Sentencing: An Update to the 2012 Booker Report." Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

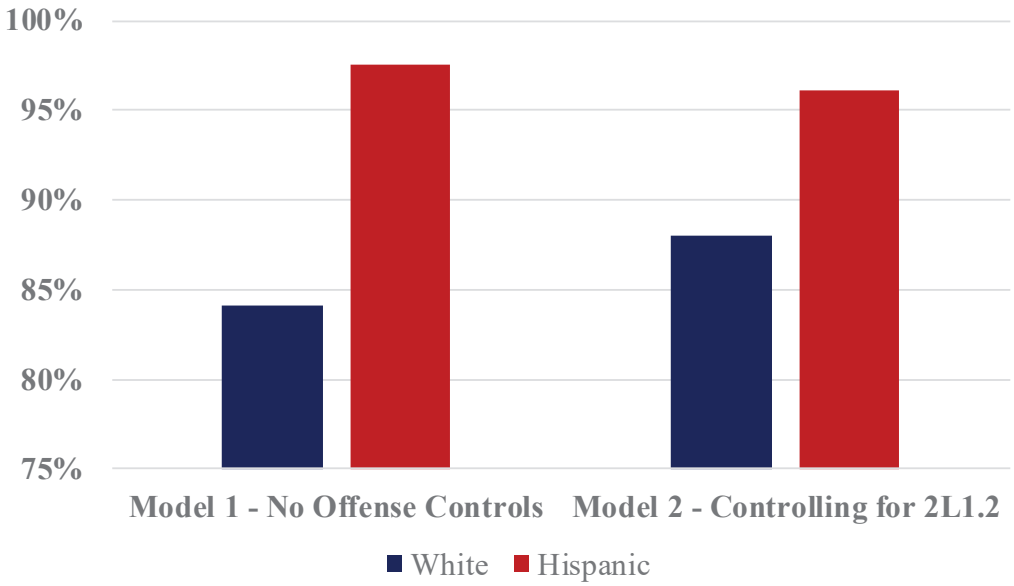
Figure 6. Predicted Probability of Incarceration by Sentencing Guideline, 2015-2019



Do 2L1.2 Cases Help Explain Sentencing Disparities between White and Hispanic Defendants?

The results thus far reach two general conclusions: (a) 2L1.2 cases disproportionately involve Hispanic defendants and (b) 2L1.2 cases are significantly more likely to result in a prison sentence compared to similarly situated non-2L1.2 offenders. Combining these insights, this next analysis examines how much of the sentencing difference between white and Hispanic offenders in U.S. federal courts is attributable to 2L1.2 cases. I do this by conducting a multivariate analysis where the dependent variable is the likelihood of incarceration. Here again, I use a linear probability model and calculate predicted probabilities of prison by race after controlling for the final offense level, the final criminal history category, and the statutory minimum penalty. These results are shown in two models in Figure 7 (full regression results are shown in Appendix Table 2). The first shows the predicted probability of incarceration for white and Hispanic offenders without accounting for the guideline offense. In this model, I observe a 13.5-percentage point gap, favoring white offenders. The second model adds an indicator for 2L1.2 cases to the explanatory variables. With this inclusion, the relative incarceration gap between white and Hispanic offenders decreases substantially, down to an 8-percentage point gap. In other words, adjusting for the punitive sanctions 2L1.2 offenders receive decreases the amount of Hispanic-white disparity in federal sentences by roughly 40 percent (1 - [8.1 / 13.5] = .4).

Figure 7. Predicted Probabilities of Incarceration for White and Hispanic Defendants



Notes : Both models include controls for final offense level, criminal history category, and the statutory minimum penalty.

Summary

Using U.S. Sentencing Commission data from 2015 to 2019, this analysis examined the key sentencing features involving cases sentenced under § 2L1.2 - Unlawfully Entering or Remaining in the United States. The data reveal several notable findings, summarized as follows:

- 99% of all 2L1.2 cases involve Hispanic defendants. Such large demographic disparities are observed for no other guideline among the 10 most numerous non-immigration offense types.
- 2L1.2 cases are the least likely to be convicted at trial.
- Despite having the lowest statutory minimums and offense levels, 2L1.2 cases are among the most likely to receive a prison sentence (97%).
- Accounting for previous criminal history, offense severity, and the statutory minimum sentence, 2L1.2 offenders are still substantially more likely to be incarcerated.
- The differential punishment of 2L1.2 cases explains roughly 40% of the observed sentencing differences between white and Hispanic defendants, net of controls for offense severity, criminal history, and mandatory minimums. Put differently, 2L1.2 offenses contribute significantly to the differential likelihood that white and Hispanic offenders are sentenced to incarceration in U.S. Federal Courts.

Appendix

Appendix Table 1. Linear Probability of Incarceration, 2015-2019

Measures	*b*	*se*	
Offense Type			
2D1.1 (reference)	--	--	
2L1.2	0.14	(0.00)	***
2B1.1	-0.15	(0.00)	***
2K2.1	0.02	(0.00)	***
2B3.1	0.02	(0.00)	***
2G2.2	-0.01	(0.00)	***
2S1.1	-0.06	(0.00)	***
2D1.2	0.04	(0.01)	***
2T1.1	-0.23	(0.01)	***
2A3.5	0.10	(0.01)	***
Final Offense Level	0.01	(0.00)	***
Criminal History Category	0.01	(0.00)	***
Statutory Minimum	0.00	(0.00)	***
Constant	0.70	(0.00)	***
N	275,695		

Notes: *** $p < .001$

Appendix Table 2. Linear Probability of Incarceration by Ethnicity, 2015-2019

	Model 1 - No Offense Controls			Model 2 - Controlling for 2L1.2		
Measures	*b*	*se*		*b*	*se*	
White (reference)	--	--		--	--	
Hispanic	0.14	(0.00)	***	0.08	(0.00)	***
Offense Type						
2L1.2	--	--		0.14	(0.00)	***
Final Offense Level	0.01	(0.00)	***	0.01	(0.00)	***
Criminal History Category	0.03	(0.00)	***	0.02	(0.00)	***
Statutory Minimum	0.00	(0.00)		0.00	(0.00)	**
Constant	0.68	(0.00)	***	0.61	(0.00)	***
R^2	0.10			0.138		
N	208,292			208,292		

Notes: *** $p < .001$; ** $p < .01$

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Razmi Tahirkheli, TPC Law Office

Topics:

Simplification

Comments:

Relevant Conduct leaves too much room for abusive interpretation. It needs some parameters. Otherwise anything can be thrown in there and it makes it difficult to advise the client of a possible sentence.

Submitted on: June 10, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Alexander Testa, University of Texas Health Science Center at Houston

Topics:

Research Recommendations

Comments:

I am writing to express my support for the USSC's mission to foster a fairer and more just federal criminal legal system. The annual release of sentencing data by the USSC has significantly contributed to research into sentencing disparities and their underlying causes. This is a commendable effort. However, to further advance this mission, it is crucial that the scope and depth of data collection and dissemination be substantially enhanced.

The current datasets, while valuable, do not adequately capture several critical dimensions that could provide deeper insights into the sources of sentencing disparities. To address these gaps, I propose the following enhancements to the data collection processes:

Socioeconomic Information: Detailed data on defendants' financial status, education, and employment could provide a clearer picture of how socioeconomic factors influence sentencing outcomes.

Courtroom Workgroup Dynamics: Additional information about the roles and decision-making processes of prosecutors, defense attorneys, and judges would help elucidate their impact on sentencing disparities. Understanding these dynamics could lead to more informed reforms.

Geographic Context: Incorporating data on defendants' backgrounds such as zip code or census tract information could aid in analyzing regional sentencing patterns and their disparities.

Criminal Justice Process Linkages: Expanding datasets to include details from earlier stages of criminal justice proceedings would allow researchers to trace the progression and influence of initial legal decisions on final sentencing outcomes.

Drug Offense Specifics: A more detailed breakdown of drug-related offenses, including the type of drug involved, the quantity, and the defendant's role in the offense, would enhance our understanding of how these factors are weighted in sentencing decisions.

By broadening and deepening the range of data collected, the USSC can better identify and address the multifaceted sources of sentencing disparities. I strongly urge the Commission to consider these recommendations to enrich the research and ultimately contribute to a more equitable justice system.

Submitted on: June 24, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Clark Thompson, Utah

Topics:

Policymaking Recommendations

Comments:

I believe it would be prudent for the Sentencing Commission to take into consideration the current research, as well as changing attitudes and public opinion, on marijuana. The current guidelines do accomplish this in some ways, such as requiring a large amount of marijuana to qualify for even a base offense level of six; however, I feel in some ways the guidelines as they are currently do not sufficiently distinguish marijuana from other controlled substances. I believe marijuana needs to be treated separately from how other controlled substances are treated throughout the guidelines. A common example in our district is Felon in Possession of a Firearm receiving a four-point enhancement under USSG 2K2.1(b)(6)(B) for possessing marijuana. Under these circumstances, a defendant is potentially receiving the same enhancement for marijuana as they would for more dangerous substances, such as heroin and methamphetamine. Consideration for how marijuana impacts the community in comparison to other controlled substances should be taken into consideration not just in USSG 2D1.1, but throughout the guidelines.

Submitted on: June 7, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Katharine Tinto, UC Irvine School of Law

Topics:

Policymaking Recommendations

Comments:

Dear Judge Reeves,

I am a Clinical Professor of Law and the Director of the Criminal Justice Clinic at UC Irvine School of Law. Our clinic represents many individuals seeking a reduction in their sentence pursuant to U.S.S.C. §1B1.13 and 18 U.S.C. § 3852(c)(1)(A).

In my work with the clinic, I've reviewed the cases of many individuals who were sentenced to life in prison under the Guidelines for drug-related offenses due to judicial fact-finding at sentencing. Here is one, admittedly extreme, example: in one case, although the defendant was offered (on the record) a plea deal of 5 years, he chose to go to trial. After trial, his Guidelines offense level started at a high base offense level due to being held responsible for the drug amounts of the entire conspiracy. The judge then added +2 for having a gun, +3 for being the manager of one person, and +2 for obstruction as the PSR stated that the defendant warned another person not to talk to the police. Despite his zero points criminal history, he was sentenced to life under the Guidelines.

I am extremely concerned about life sentences or effective life sentences under the Guidelines that were based on facts not underlying the charged offenses, not admitted to by the defendant, and not proven beyond a responsible doubt.

I would urge the Commission to consider possible procedural or substantive protections when judicial fact-finding in calculating the total offense level increases a sentence to 360-life, or life, particularly for defendants in the Criminal History Categories of I and II. Given the young age of many federal criminal defendants and what we now understand about juvenile brain development, sentences that range from 30 years to death in prison warrant our particular attention. Guidelines-based life sentences due to facts found by an individual judge risk unwarranted sentencing disparities among federal judges, the cementation of a trial penalty, and the creation of a system of punishment unmoored to the constitutional protections offered all

criminal defendants.

Thank you for the opportunity to provide comments and for considering my concerns.

Submitted on: June 16, 2024

From: Michael Tonry
Sent: Thursday, June 6, 2024 4:08 PM
To: Reynolds, Con
Subject: [External] Re: A Request for Comment from Judge Reeves

The subject on which comments are invited is … everything, which is too much for me to contemplate. As to general suggestions from me, they are pretty much what they've always been:

1. Reduce the 43-level grid to a more intuitive 10 or 12 levels;

2. Make community penalties without a prison stay an available sentence for 50% of convictions to return to the level that existed before the guidelines took effect.

3. Abandon real offense sentencing.

4. Redo the guidelines w/o regard to mandatories with the mandatories when they apply serving as trumps.

And so on.

Be well.

Michael

Public Commentary to the United States Sentencing Commission

2024-2025 Proposed Priorities

My commentary is indirectly related to sentencing. I have (thankfully) never been indicted or prosecuted for a federal crime nor committed one. I have filed in the federal court before seeking relief as a petitioner from a state case as well as in civil matters. One of the primary issues pertaining to sentencing is the pre-trial condition. It cannot be understated the importance of bond conditions set for a pre-trial individual simply accused of a crime. This is true at both the State and Federal level. In some cases, surely there is strong evidence of an individuals guilt through the physical evidence obtained while in others, there is overwhelming evidence of an individuals innocence. In the latter scenario, it would be expected that the individual's case is dismissed. This is likely true in most federal cases. However, it is well established that in many State cases, prosecutor's suppress or even purportedly destroy exculpatory evidence as in a case that I faced 4 years ago (Ref: Oakland CC case 2020-274140-FH). In the Motion to Dismiss, trial counsel properly cited case precedent and rational reasonable requirement for the Circuit Court judge to dismiss the case. It had become apparent that the police and prosecutor and/or first defense counsel himself colluded to deny and disparage Defendant's Right to Video Surveillance Evidence. The State courts refused to hear an appeal on the matter despite this glaring injustice. They also rejected hearing the case of Juwan Deering of the same County (Oakland). Only later, after the corrupt prosecutor was forced out of office, did the new prosecutor in reviewing the case determine a fatal miscarriage of justice had transpired to the effect of requiring a dismissal and release of the prisoner.

Traditionally, the Federal courts would intervene on such a glaring case of official misconduct. However, the passage of AEDPA substantially limited Federal review. It's elimination, or at a minimum reinstatement of Federal oversight for State collusion against a party, would enable a closer review. In many cases, individuals take plea deals which substantially limits such reviews. To this effect, sentencing plays a substantial component.

However, as previously articulated, Courts often ignore the factors of pretrial condition that the defendant has been imposition with. Specifically, the Courts ignore effects of pretrial detention. A Federal case precedent set in Bell v. Wolfish undermined Defendant's Right to assert the same Rights as those who enjoy pretrial freedom, especially where a paywall is established between the two, is a clear injustice when one party can pay for their freedom and the other cannot when they have identical cases and in many effects the individual with a higher bond on a generally more serious case is released while a poor individual with a less serious offense is incarcerated, defeating the purpose of public safety. There is plenty of social civil rights movement to this effect. I am championing a movement to house pretrial detainees in spaces akin to those famously attributed to Danish or Norwegian prisons (Search on the internet generally "Denmark Prison Cell"). There is no reason that a pretrial detainee shall suffer the same effects as a convicted criminal in jail. In many cases, there are individuals in pretrial status who are forced to reside in a jail for a longer term than the maximum allowed for a sentenced individual (10+ months where the maximum is 10 months in jail for Michigan). Many individuals purportedly spend 12-24 months, even for high-court misdemeanors which I myself endured in the Oakland case and nearly effected in a Washtenaw case, both cases where the detective or deputy filed a false police report for a crime that never occurred. In the Oakland case, I suffered a substantial medical injury that the jail medical staff ignored. I have since filed a federal lawsuit. The medical injury forced me to take a plea

deal when I was otherwise adamant about taking the case to trial. The State courts refused to hear the case and Federal law (under generally AEDPA) and lack of federal review for non-incarcerated individuals convicted undermined both cases.

Unfortunately, the dovetail of pretrial condition with lack of federal review lead to many wrongful convictions. In Federal cases, it has come to my attention that many Child Porn (CP) cases have a strict liability component to them. Strict Liability entirely violates the Constitutional Right to Jury. It shall be 12 people who determine an individuals fate. Strict liability only serves to assist the prosecutor in substantially limiting a defense counsel's trial strategy and position for argument, especially where mitigating circumstances are prevalent. Those mitigating circumstances shall be presented to a jury (The People of the State or United States) to determine if that individual is guilty. It may rather even be a Judges decision if a Defendant chooses for the Judge to make such a determination of guilt through a Bench Trial.

I also oppose the imposition of 'mandatory minimums' in all cases. These 'mandatory minimums' came to fruition in the late '80s and '90s where society panicked over a rise in crime due chiefly to synthetic drug use, hazardous environmental conditions, and a combination of a multitude of other social stresses. The mandatory minimums put many individuals with simple drug possession and/or drug sales of individuals to other consenting adults in prison fora minimum of 10, 15, or 25+ years. The Chalmers brothers, a notorious drug gang, conversely only spent about 15 years in prison for multiple murders. When an individual who simply possessed cocaine is imprisoned longer and an individual who has multiple murders, it is clear that sentencing laws need be restructured. I hold the personal position that all drug use shall be decriminalized because a user who abuses bleach for instance would not be arrested for possession of bleach or its sale to another individual. This is just one example among thousands. A restriction on certain substances is arbitrary in my view because simply because those substances became popular. However, it was, and is, important to deal with the addiction crisis. Per usual, Europe and the UK have implemented a proper policy to effectively handle drug user addiction. For heroin addicts, instead of incarcerating them as punishment, they are treated in a hospital with heroin alternative support. I don't know too much about drug use as I've never engaged in such but as an objective bystander, I saw a glaring disparity of justice and ineffective process for mitigating drug use. This has taken good tread nationally and is mostly be addressed in many jurisdictions however ignored in many others.

Another critical issue unaddressed are individuals with Autism or other passive psychological disability of no fault of their own who are subjected to harsh punishment of actions manifesting from their disability. Many struggle to understand why Autistic people engage in such acts, unfortunately commonly CP cases. Many often cite characteristics of Autism and explain it is somewhat sophisticated manners. Legal professionals often fail to grasp the concepts because many high functioning Autistic people appear, speak, and function in a fairly normal manner. However, the foundational critical issues are often concealed. The best way that I explain this to those who cannot fully grasp high functioning Autism, and perhaps Autism in general, is that they act in a manner similar to a recreational drug user such as somebody using extensive amount of Marijuana and cocaine or other rec drug use combinations. This, in my view, explains why many Autistic people don't use recreational drugs because their psychology is already in that distorted state from the standpoint of a neurotypical. I often had people (neurotypical)

ask me if I was high on some drug when I clearly was not. This was common in grade school, college/university, and into society. It became clear and apparent to me that an effective way of alternatively describing Autism is that their mannerisms are similar to those using drugs. However, the government can motion for a Defendant to cease from drug use if it was a factor in an alleged crime. Regrettably, there is little to no established recourse for the government to assist an Autistic person. As such, their only tool is to harshly punish that person equally as if they had criminal intent, mistaking Autism for psychological criminality like those famously portrayed in many Hollywood cinemas such as 'Silence of the Lambs'.

Unfortunately, there is no further judicial relief for Autistic individuals who mistakenly or unintentionally committed a State of Federal offense. An individual who committed an offense under the influence of drugs is more culpable because they had the option to not use the drug in the first place. It was voluntary. However, an individual with Autism involuntarily has Autism. However, there are few social support services to aid that person. It is very well established that Autistic people want to socially assimilate and conform to societal standards that do not violate or intercede on their Constitutional Rights not otherwise listed (9th Amendment).

There are many other legal issues left addressed in this commentary. It has been a pleasure to discuss many of the issues plaguing the nation to the US Sentencing Commission in relation to sentencing specifically, those indirectly related to sentencing, and broadly legal issues in the criminal sector that can lead to sentencing.

Cordially,

Kevin Vayko

Kevin Vayko
Environmental & Social Policy Reform Advocate
Accredited Asbestos and Lead Inspector & Risk Assessor
Michigan Tech University
B.S., Environmental Engineering

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Carlos Vazquez, FPD Puerto Rico

Topics:

Miscellaneous Issues

Comments:

The Commission should address from a guideline amendment and/or variance standpoint the additional "hardship" faced by alien defendants. The end result under the current system is that aliens may not be eligible for certain credits United States citizens are -halfway house. They also end up doing time beyond a criminal sentence, while the INS disposes their status, if any, in the U.S, even when not removed, more so when they are removed after the INS Court disposes of their case with removal order.

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Melissa Weinberger, Owner/Law Offices of Melissa A. Weinberger

Topics:

Miscellaneous Issues

Comments:

USSG 2A1.5 (conspiracy to murder) does not account for conspiracy to commit second degree murder. Where a death results, the only cross-reference is to 2A1.1 (which is a level 41). There should be an additional cross-reference to 2A1.2 (level 38) where the conspiracy was to commit second degree murder and a death results. This issue arose in a case of mine and was a problem.

Submitted on: June 24, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Robert Welsh, Partner

Topics:

Policymaking Recommendations

Comments:

I am concerned with guideline or bracket creep in larger white-collar cases. Under 2B1.1 and the chapter three adjustments, a defendant may pick up a big offense level for loss, plus sophisticated means, more than ten victims, financial institution as victim, leader or organizer and special skill. Maybe add obstruction on top. This can lead to truly stratospheric guidelines. I wonder how this issue was handled in the Bitcoin case and the Elizabeth Holmes case. I both cases the judge imposed reasonable sentences. Perhaps this should be the basis for possible invited variance or departure.

As an editorial: I am a former AUSA ('80 to '86) and defense lawyer since '86. I can live with the post-Booker system which I think gives judges the means to reach the right conclusions. Now mandatory minimums are another story but that is not your responsibility.

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Emerson Wheat, Law Offices of Emerson Wheat, APC

Topics:

Miscellaneous Issues

Comments:

Dear Sentencing Commission,

I practice in San Diego and am a member of the CJA panel. A recurrent issue in federal sentencing is the regular use by federal Probation in the Pre-Sentence Report of Guidelines factors that aggravate, but not mitigate, a particular sentence.

I am hopeful the Commission will consider including language in Chapter 5 that stresses the need to consider downward departures more consistently as part of U.S. Probation's Guidelines analysis.

My experience and observation of numerous other sentencing hearings suggests that these departures are being recommended too infrequently, and instead a generic variance under 18 U. S.C. § 3553 is made to account for issues specifically described in Chapter 5 (or in application notes, such as the cultural assimilation in U.S.S.G. § 2L1.2).

The significance of this issue is that certain provisions of the Guidelines have nearly universal application by Probation (e.g., the relevant conduct provisions), whereas others in §§ 5H and 5K are essentially afterthoughts. I attempt to focus on the Guidelines issues that mitigate my clients' potential sentences, and feel like I'm the only one making sentencing recommendations that even considers Chapter 5 departures and specific offense characteristics.

Thanks for your consideration.
-Emerson Wheat

Submitted on: June 8, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Clayton Whittaker, Asst. Federal Defender

Topics:

Miscellaneous Issues

Comments:

Dear Judge Reeves,
You sent notice asking for comments to create a fairer more just sentencing system. Here are mine.
-Fix the methamphetamine disparity between substance and actual meth.
-Fix the problem caused by mandatory sentences which tend to cause aggregation of sentences around the mandatory minimum, and which fails to punish defendants based upon their conduct in the offense and among similar defendants.
-Stop punishing defendants when they cooperate with law enforcement by using confessions and admissions along with relevant conduct to increase the offense level.
-The entire supervised release system is unfair and unjust and unamerican. Dump it.
-Supervised release guidelines are not based upon empiricism and are unfair.

Submitted on: June 5, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Anna Williams, Asst Federal Public Defender

Topics:

Policymaking Recommendations

Comments:

The Commission should revise the methamphetamine guidelines as there is a split among districts as to the pure vs. mixture of methamphetamine. Some consider the methamphetamine as a mixture, which significantly reduces the recommended sentence. I would like to see it revised to comprise the mixture amount only as the rationale for the actual meth amount is no longer relevant. As most meth is now being made in labs, it no longer shows the defendant's real role in the drug conspiracy. I think this change should be retroactive, so that those serving lengthy sentences in overcrowded prisons can reduce their overlong sentences.

Submitted on: June 12, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Cordell Wilson, Utah Jun. 10, 2024

Topics:

Policymaking Recommendations

Comments:

I'm a U.S. Probation Officer for over 22 years and financial crimes seem to be the most egregious for real people who lose big. Please include a major enhancement if the financial crime affected a real person or small business. And lower the threshold of the amount. Even $50k is huge to any regular person. If the victim is a bank, insurance company, big corporation, or government, leave it the same.

I've seen real people save their lifetimes to be devastated by clever charlatans who also end up keeping the money because no one is looking for that money post-conviction. And no one gets their money back.

I'd rather have my neighborhood lined with drug dealers than one silver-tongue ready to put me in ruins. They usually don't have criminal records and seem to have a lovely time in low-risk prison, which is further aggravating to the victims.

Thanks for allowing my input.

Submitted on: June 10, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Fernando Zambrana-Aviles, Colon Serrano Zambrana LLC

Topics:

Research Recommendations

Miscellaneous Issues

Comments:

I believe that Guideline 5K2.23 should be amended to state that sentence adjustments for discharged terms of imprisonments in cases which are relevant conduct can go below a mandatory minimum, similar to what is done under Guideline 5G1.3.
I also recommend research on the correlation between the imposition of mandatory minimums and long terms of imprisonment and deterrence. It seems that much weight is given to long terms of imprisonment and mandatory minimums as a way to achieve general deterrence, while there is no scientific basis sustaining that conclusion.

Submitted on: June 6, 2024

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
Criminal and Juvenile
Justice Clinic

Erica Zunkel
Clinical Professor of Law
Criminal and Juvenile Justice Clinic
[redacted]

July 15, 2024

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
Via Public Submission Portal

Re: Commission '24-'25 Priorities: Further Study of Implementation of Sentence Reduction Policy Statement, U.S.S.G. § 1B1.13

Dear Judge Reeves,

I write in response to the Commission's request for comment on possible policy priorities for the amendment cycle ending May 1, 2025 to share my perspective about how the Commission's updated sentence reduction policy statement, U.S.S.G. § 1B1.13, is working in practice and how further Commission study is needed about implementation of the law across the federal circuits.

I am a Clinical Professor of Law at the University of Chicago Law School, teaching in the Criminal and Juvenile Justice Clinic.[1] My views are based on my extensive experience litigating sentence motions on behalf of indigent individuals in district courts across the country both before and after the updated policy statement took effect. My work has primarily been in district courts in the Seventh Circuit, where, in the absence of an "applicable" policy statement from approximately 2019-2023, the law about what could constitute an "extraordinary and compelling" reason pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) was quite restrictive. Despite these challenges, eleven of my and my students' clients have been released since 2020[2], and we have several motions

[1] I submit this letter in my individual, not institutional, capacity.
[2] *See e.g.*, *United States v. Kindle*, No. 09-cr-687, 2024 WL 1152519 (N.D. Il. Feb. 28, 2024) (reducing sentence to time served under the § 1B1.13(b)(5) catch-all provision based on continued incarceration for a disavowed reverse sting operation, sentencing disparities, and rehabilitation); *United States v. Chavira*, No. 18-cr-4216, 2023 WL 3612389 (S.D. Cal. May 23, 2023) (reducing sentence to time served with no opposition from the government where Ms. Chavira was sexually abused in prison and the sentencing factors supported immediate release); *United States v. Logan*, No. 07-cr-270-2, 2023 WL 2771165 (N.D. Ill. Apr. 4, 2023) (sentence reduction in stash house reverse sting case); *United States v. Ward*, No. 09-cr-687, 2023 WL 5004408 (N.D. Ill. Jun. 22, 2023) (same); *United States v. Spagnola*, No. 07-cr-441-2, 2023 WL 5004396 (N.D. Ill. June 22, 2023) (same); *United States v. White*, 2021 WL 3418854 (N.D. Ill. Aug. 5, 2021) (same); *United States v. Hinojosa*, 2021 WL 170791 (N.D. Ill. Jan. 19, 2021) (granting sentence reduction to time served where Mr. Hinojosa's age and health conditions put him at high risk for serious illness or death from COVID-19); *United States v.*

pending. My released clients have gone on to reconnect with their children and families, contribute to their communities, and advocate for justice and sentencing reform.[3] I previously provided written and oral testimony and submitted public comment about the sentence reduction policy statement to the Commission.[4]

The updated policy statement, which took effect on November 1, 2023 after the Congressional review period ended, has as Congress intended increased "the use and transparency"[5] of the sentence reduction statute and it has done so without over-taxing the system. Despite fears that sentence reduction motions filed under § 3582(c)(1)(A)(i) would flood the courts post-November 1, 2023, Commission data show that has not occurred and that district courts are ably handling and processing motions.[6] The Commission's most recent data show that the number of motions filed has remained remarkably stable since September 2022 and that there was no "surge" as some predicted would occur after the updated policy statement went into effect.[7] Moreover, consideration of the sentencing factors set forth in 18 U.S.C. § 3553(a) has, as Congress intended through the statutory framework of § 3582(c)(1)(A), proven to be an effective guardrail for motions. Approximately 35% of all denials cite the § 3553(a) factors.[8]

In addition, the updated policy statement has brought more uniformity to the law than when the Commission did not have quorum and there was no applicable

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Hernandez, No. 05-cr-472-5, Dkt. 872 (N.D. Ill. Aug. 6, 2020) (granting sentence reduction to time served where Mr. Hernandez was suffering from several serious conditions).

[3] *See, e.g.*, Annie Sweeney & Jason Meisner, *'Like Seeing Color After Being Colorblind': After 12 Years in Prison for a Controversial Stash-house Conviction, Dwayne White Tastes Freedom*, CHI. TRIB. (Aug. 20, 2021), https://perma.cc/RAM3-XPGQ; Michael Friedrich, *Sentencing Reform Offers a Second Chance and a "Purposeful Feeling,"* ArnoldVentures.org (Nov. 9, 2023), https://perma.cc/5BTE-X23L; Oral and Written Testimony of Dwayne R. White Before the United States Sentencing Commission, *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines Before the United States Sentencing Commission* (Feb. 23, 2023), https://perma.cc/7TY8-ZSWP; *Second Chances Symposium*, U. CHICAGO LAW SCHOOL (Feb. 2022), https://perma.cc/N5RR-5E23 (Mr. White speaking in support of second chances at the University of Chicago Law School's Second Chances Symposium).

[4] *See* Oral and Written Testimony of Erica Zunkel, *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines Before the United States Sentencing Commission* (Feb. 23, 2023), https://perma.cc/7TY8-ZSWP.

[5] First Step Act § 603(b).

[6] U.S. Sent'g Comm'n, *FY 2024 Second Quarterly Data Report on Compassionate Release*, Figures 1 & 2 (2024) [hereinafter 2024 Second Quarter Report], https://perma.cc/H35Z-P8KN.

[7] 2024 Second Quarter Report, Figure 1.

[8] 2024 Second Quarter Report, Table 11.

policy statement. However, there is one area in which continued pernicious geographic disparities continue to proliferate—motions that raise changes in law under the "unusually long sentence" provision, § 1B1.13(b)(6). Commission data show that sentence reduction grant rates are lower in circuits with pre-amendment caselaw that held non-retroactive legal changes, such as those in the First Step Act of 2018 (FSA), cannot constitute an "extraordinary and compelling" reason. The vast majority of motions brought in the first and second quarter of Fiscal Year 2024 were in drug trafficking, firearms, and robbery cases—cases implicated by the FSA's changes.[9]

The Commission's promulgation of (b)(6) was intended to remedy resolve the changes in law circuit split[10] and to remedy the unwarranted and unjust geographic disparities that resulted from that split.[11] As the Commission wrote in its Reasons for Amendment, prior to the updated policy statement taking effect, "the likelihood of compassionate release motions succeeding varied significantly depending on the circuit or district in which they were filed."[12] That meant that in the interim period without an applicable policy statement, individuals such as my clinic's client Dion Walker, who is serving a mandatory life sentence that he could not receive today, would likely be free if his case had been prosecuted in a circuit that permitted changes in the law to be an extraordinary and compelling reason for release.[13]

The Commission's promulgation of (b)(6), however, has not remedied the problem because of the Department of Justice's (DOJ) nationwide litigation position

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[9] U.S. Sent'g Comm'n, *FY 2024 First Quarterly Data Report on Compassionate Release*, Table 8 (2024) [hereinafter 2024 First Quarter Report], https://perma.cc/42LD-V2JT; 2024 Second Quarter Report, Tables 8 & 9.

[10] *See United States v. Chen*, 48 F.4th 1092, 1096–97 (9th Cir. 2022) (outlining the circuit split).

[11] In its Reasons for Amendment, the Commission explained that it agreed with law that had developed in the First, Second, Fourth, Ninth, and Tenth Circuits permitting but not requiring district courts to conclude that certain legal changes, including the FSA's profound, once-in-a-generation reductions to drug and firearms mandatory minimums, could be "extraordinary and compelling." U.S.S.G. App. C, Amend. 814, Reason for Amendment at 11 (Nov. 1, 2023).

[12] U.S. Sent'g Comm'n, *2022 Annual Report and Sourcebook of Federal Sentencing Statistics*, at 6 (2022) https://perma.cc/EA8F-TEJL.

[13] Opinion and Order Denying § 3582(c)(1)(A) Motion, *United States v. Walker*, No. 05-cr-70, Dkt. 216 at 1, 13 (Jan. 28, 2022) (acknowledging that Mr. Walker's motion was "full" of "great reasons" for a sentence reduction, that Mr. Walker has been a "model prisoner," and that his mandatory life sentence "is longer than necessary to accomplish the purposes of sentencing," but concluding that *United States v. Thacker*, 4 F.4th 569 (7th Cir. 2021) barred relief); *see also* Erica Zunkel and Nathaniel Berry, *First Step Act Advanced Prison Reform, But Hundreds Are Still Serving Unjust Sentences*, USA Today (Oct. 18, 2023), https://perma.cc/Y96G-XWHC. Mr. Walker's case is stayed pending the Seventh Circuit's decision in *Black*.

that (b)(6) is invalid.[14] The issue has been briefed extensively since the policy statement went into effect, particularly in circuits such as the Third, Fifth, Sixth, Seventh, and Eighth circuits, where there was pre-amendment law that non-retroactive legal changes could not serve as an "extraordinary and compelling" reason in the absence of Commission guidance.[15] For example, in the Seventh Circuit, district courts are split on whether (b)(6) is lawful and the issue is before the Court of Appeals.[16]

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[14] *See* 2024 First Quarter Report at 7–9, 17 (showing lower grant rates in the Third, Fifth, Sixth, Seventh, and Eighth circuits than in other circuits); 2024 Second Quarter Report at Table 3 (2024) (showing same).

[15] *See e.g.*, *United States v. Brown*, No. 2:95-CR-66(2), 2024 WL 409062 (S.D. Ohio Feb. 2, 2024) (finding that § 1B1.13(b)(6), not pre-amendment Sixth Circuit caselaw, governed the case because the policy statement is binding as an exercise of expressly delegated authority and the Commission's interpretation of "extraordinary and compelling" is reasonable, and ultimately reducing sentence that was based largely on stacked § 924(c)s to time served); *United States v. Carter*, No. CR 07-374-1, 2024 WL 136777 (E.D. Pa. Jan. 12, 2024) (holding that pre-amendment Third Circuit caselaw precluded the Sentencing Commission's interpretation of "extraordinary and compelling") (appeal pending (3d Cir. Case No. 24-1115)); *United States v. Skeeters*, No. 2:05-cr-00530-HB, 2024 WL 992171 (E.D. Pa. Mar. 7, 2024) (rejecting the government's validity argument and finding that pre-amendment Third Circuit caselaw did not preclude relief, and ultimately reducing sentence, which was based largely on stacked 924(c)s); *United States v. Capps*, No. 1:11-cr-00108-AGF, 2024 WL 880554 (E.D. Mo. Jan. 31, 2024) (finding that § 1B1.13(b)(6), not pre-amendment Eighth Circuit caselaw, controlled, and finding that (b)(6) is a valid exercise of the Sentencing Commission's authority); Order, *United States v. Loggins*, No. 3:02-cr-00142-CMR-SBJ, dkt. 197 (S.D. Iowa Mar. 4, 2024) (holding that pre-amendment Eighth Circuit caselaw established that nonretroactive legal changes cannot serve as extraordinary and compelling reasons) (appeal pending (8th Cir. Case No. 24- 1488)).

[16] *Compare United States v. Spradley*, 1:98-cr-00038, Dkt. 275 (S.D. Ind. Apr. 18, 2024) (rejecting the government's *United States v. Thacker*-based argument that § 1B1.13(b)(6) is invalid and reducing the life sentence imposed under mandatory guidelines to 480 months); *United States v. Smith*, No. 3:06-cr-30072-BGC, dkt. 43 (C.D. Ill. May 1, 2024) (concluding that *Thacker*, the Seventh Circuit's pre-amendment opinion regarding legal changes, does not preclude relief under § 1B1.13(b)(6) and reducing the sentence for a nonviolent drug offense from 240 months to time served); *United States v. Bailey*, No. 97-CR-00118RLYMG3, 2024 WL 2291497 (S.D. Ind. May 20, 2024) (rejecting the government's argument that (b)(6) is invalid, finding that "[n]ow that the Commission has issued new guidelines applicable to defendant-filed compassionate release motions, the reasoning in *Thacker* has been substantially undermined" and granting relief in stacked 924(c) case); *with United States v. Black*, No. 05 CR 70-4, 2024 WL 449940 (N.D. Ill. Feb. 6, 2024) (holding that *Thacker* compelled a finding that the Sentencing Commission's interpretation of "extraordinary and compelling" is not owed deference under the "*Chevron* framework") (appeal pending (7th Cir. 24-1191)); *United States v. Buggs*, No. 2:99-CR-86, 2024 WL 2130566 (N.D. Ind. May 13, 2024) (declining to find that a non-retroactive legal change could serve as an "extraordinary and compelling reason" on the ground that "in light of its holding in *Thacker*, the Seventh

According to the DOJ, the FSA's "once-in-a-generation" legal changes are "ordinary" not extraordinary, and (b)(6) runs counter to Congress's decision to make the FSA's changes non-retroactive.[17] But (b)(6) does not declare that all non-retroactive changes are "extraordinary and compelling." In fact, "[i]t is far narrower: it requires a defendant to demonstrate a highly specific and rare set of circumstances that includes as just one factor that there is a 'gross disparity' related to a 'change in law.'"[18]

The legal landscape is different in circuits with pre-amendment caselaw that concluded that changes in law could serve as an "extraordinary and compelling" reason and therefore there is no conflict between its circuit caselaw and (b)(6). In *United States v. McFarland*, for example, a case arising in the Ninth Circuit, the district court granted a sentence reduction in a case included § 924(c) "stacked" counts.[19] The court determined that Mr. McFarland's "beyond draconian" 41-year sentence (23 years of which he had served), which would be substantially lower today, amounted to an extraordinary and compelling reason under (b)(6).[20] Meanwhile, many individuals, such as my client Mr. Walker, remain imprisoned even though it is overwhelmingly likely he would be free if his case had been charged in the First, Second, Ninth, Fourth, or Tenth circuits.[21] These disparities are haunting: if Mr. Walker's (b)(6) motion is denied, he will die in prison, when today his likely sentence would be approximately 15 years, and he has already over-served that sentence.

It is important that the Commission work to better understand these disparities, particularly because federal sentencing system is centered on avoiding unwarranted disparities. *See Hughes v. United States*, 584 U.S. 675, 684 (2018) (*quoting Molina-Martinez v. United States*, 578 U.S. 189, 192 (2016) (Congress created the Sentencing

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Circuit is likely to find that the Sentencing Commission exceeded its authority in issuing § 1B1.13(b)(6)") (appeal pending (7th Cir. case no. 24-1926)).

[17] Brief for Appellee United States of America, *United States v. Rutherford*, No. 23-1904, Dkt. 36 at 11 (Feb. 20, 2024).

[18] Brief of Amici Curiae National Association of Criminal Defense Lawyers, FAMM, and Federal Public Defenders and Community Defenders for the Judicial Districts of the Third Circuit in Support of Appellant and Reversal, *United States v. Rutherford*, No. 23-1904, Dkt. 32 at 27 (Feb. 7, 2024) (citations omitted).

[19] 2:00-cr-01025-JFW, Dkt. 496 at 2 (C.D. Cal. Dec. 21, 2023).

[20] *Id.* at 5–6 (citing to *United States v. Chen*, 48 F.4th 1092 (9th Cir. 2022)).

[21] *See e.g.*, *United States v. Carter*, No. CR 07-374-1, 2024 WL 136777, *5, *11 (E.D. Pa. Jan. 12, 2024) (holding that pre-amendment Third Circuit caselaw precluded the Sentencing Commission's interpretation of "extraordinary and compelling" to include "unusually long sentences" but concluding that "[i]f permitted to do so, the Court would be inclined to agree . . . that a shorter sentence" would satisfy the 18 U.S.C. § 3553(a) sentencing factors) (appeal pending (3d Cir. Case No. 24-1115)).

Commission for the purpose of establishing "uniformity in sentencing imposed by different federal courts for similar criminal conduct").

The Commission should also gather data to better understand the DOJ's approach to the updated policy statement beyond (b)(6). My clinic students and I have been tracking § 1B1.13 cases since the updated policy statement went into effect. With limited exceptions—primarily terminal medical cases—the DOJ is largely opposing sentence reduction motions. This is both disappointing and troubling, and merits study.

Going forward, the Commission should:

- Study and gather data on these geographic disparities for grants and denials under § 1B1.13(b)(6); and

- Study and gather data on the DOJ's response to § 1B.13 across categories.

The Commission is well-positioned to undertake these tasks given its expertise in studying and formulating sentencing policy. Thank you for considering my views and I stand ready to work with the Commission to address these important issues.

Sincerely,

Erica K. Zunkel
Clinical Professor of Law
Criminal and Juvenile Justice Clinic

June 13, 2024

Commissioner,
U.S. Sentencing Commission
1 Columbus Circle, N.E., # 2-500
Washington, D.C. 20002

Re: Suggestions for 2024-25 U.S.S.G. Changes/Amendments

Dear Commissioner:

It is my understanding that this Commission is seeking public input on what changes or amendments should be considered with regard to the Sentencing Guidelines. As a federal prisoner who has been directly affected by the guidelines, I would like to propose the following changes to the USSG:

1. Changes to the current base offense level to USSG § 2G2.2 that would reduce those numbers from 18 and 22 to pre-2000 levels to reflect the views of many on the federal bench that the viewing of child pornography that is readily available to anyone on the internet is a societal issue and should not carry with it substantial penalties when the crime involves only personal viewing and downloading.

2. Changes to USSG § 2G2.2(b)(2), (b)(4), (b)(6) and (b)(7)(A)-(D), as specific offense characteristics that are found in most every case where an offender is charged with violations of 18 U.S.C. § 2252 and § 2252A. These enhancements should be abolished to prevent federal prosecutors and probation officers from applying these specific enhancements for no other purpose than to ratchet up the guidelines range to their maximum levels. This practice can really only be curtailed if these enhancements are abolished.

I will add, as it relates to these proposed changes to the USSG that while sex offenses and sex offenders are promoted as the worst in society, that there is also publications, such as the addition of Axis V to the DSM, which is the manual used by professionals in psychology that has adopted pedophilia as a mental disease or defect and not as a crime. These proposed changes would naturally reflect the need to treat such crimes with less time in prison and instead provide treatment solutions upon release from prison.

I do hope my proposed changes will be actually considered and that I can see such issues proposed and voted on by this Commission. Thank you for your time and consideration to these issues.

Sincerely,

Gregory Berry

[redacted]

Cc: File Copy

Thank you for the opportunity to comment on what issues I would like to see prioritized.

My family member was convicted and sentenced to a mandatory minimum 10 years in federal prison, under 18 USC 1591/1594 Attempted Sex Trafficking of Children. Because of the seriousness of this crime, the sentence for 'attempt' is the same as completing the crime – a mandatory 10 years to life in federal prison, even if there is no victim.

My family member was arrested after he answered an ad for an adult woman on an adult prostitution site, using highly sexualized photos and the language of an experienced prostitute. The undercover chatter then switched to age 15. When this family member attempted to confirm age, he was sent another photo of an adult woman. When he arrived at the meeting, he was pulled from his car at gunpoint, arrested, and charged by the state and then federal government.

My family member took his case to trial because he wasn't seeking sex with a minor. Law enforcement agents fabricated a scenario to ensnare unsuspecting men seeking adult sex on adult websites by creating an ambiguous persona that some of men will show up to observe. Only these men don't get the chance to observe anyone (except the adult photos given to them). They are arrested, convicted, and sentenced to a mandatory 10 years in federal prison for "attempted child sex trafficking" of a fictitious persona who switched back and forth from an adult to a minor to an adult again.

At the trial, the judge gave my family member nothing more than he had to, including no fine. I believe that the judge would have given him much less time to serve given the flexibility to do so.

There is a compelling reason to review federal sentencing guidelines for an attempt of 18 USC 1591 when law enforcement agents use a fictitious persona. Law enforcement agents (ICAC, etc.) are given MUCH leeway in how these operations are conducted, often violating federal law without warrants. Some agents do it correctly and ENSURE that the man believed and acknowledged the minor status, some agents use real decoys that the man can observe, or some agents discuss the minor status many times in unambiguous terms, to be SURE the men are truly seeking a minor for sex. Other law enforcement agents do not; doing what they can to keep the man guessing and confused because a certain percentage of men will show up to observe (where they can then be arrested).

Our justice system relies on legislators and law enforcement to operate in a clear, legal, constitutional, and just manner. When legislation is vague, and operational guidelines are unclear, it's up to the courts to bring balance and common sense. But what judge wants to be THE ONE to hold their local law enforcement responsible for unconstitutional actions and arrests, if indeed this behavior is ever revealed to the court? When the court continues to convict men who are arrested by agents acting outside constitutional bounds, then the next fight for justice is now 1000% harder because of the case law that was created.

On the other hand, if a judge can sentence people in a manner befitting the facts of their cases, then perhaps that would set right all that may have gone wrong in these operation.

In 2015, Congress passed the Justice for Victims of Trafficking Act, which added "buyers" to the list of people who could now be prosecuted under 18 USC 1591. What has happened since is that some sting operations have evolved into tricking men seeking adult consensual sex on adult

websites (using adult photos) into showing up (which is the ‘substantial step’ needed for an attempt arrest). Certainly, if you look at the impetus case for this – U.S. v. Jungers – we can see why Congress added “buyers” to those who could be prosecuted, but Congress added some very important, restraining words to their Sense of Congress:

Pub. L. 114–22, title I, §109, May 29, 2015, 129 Stat. 239, provided that: "It is the sense of Congress that—

"(4) ...that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case."

----> “...WHEN THIS IS MERITED BY THE FACTS OF A PARTICULAR CASE.” <----

There is a wide spectrum of “buyers” and how they behave. Some are clearly aware they are soliciting a REAL minor victim. In the case of fictitious personas, some clearly believe they are soliciting a minor, evidenced by their communications. But Congress clearly acknowledged that SOME buyers arrested for 18 USC 1591/1594 do NOT rise to the level of prosecution for Attempted Child Sex Trafficking.

According to a 2022 DOJ-funded study: https://www.ojp.gov/pdffiles1/nij/grants/305453.pdf

“...While more research is needed, this may have implications for some common proactive investigation practices, such as “john stings,” which some law enforcement have moved away from after uncovering little trafficking through those methods.”

The study revealed “little trafficking” was found on adult prostitution sites, and that suggests that even fewer CHILD sex trafficking victims are found there, yet this is the “probable cause” rationale used by law enforcement agents who spend countless resources looking for “child sex traffickers” and “pedophiles” on adult prostitution sites.

Just as an aside, in my family member’s case, the police never bothered contacting the other REAL women he texted; if the rationale were correct, those women could have been human trafficking victims, or they could have been CHILDREN. But, no, not one agent out of a dozen on the operation thought to investigate to ensure those “potential victims” were saved.

I’m sure you are all aware of the funding that follows convictions, and fighting child sex trafficking is also noble and wins elections. But there are countless men in prison right now (either convicted at trial or who plead guilty) based on these unconstitutional stings, and some of these men have been subjected to the SAME mandatory minimum sentence that men seeking real children, men who have had sex with real children, or men who have trafficked real children are receiving. Is this in any way fair or just?

Further, some federally convicted felons are given the right to earn time off their sentence through the First Step Act, but these men with no predisposition, no intent, and no previous crimes cannot because 18 USC 1591 is a “violent crime against children.” Let’s remember. There was NO CHILD, and in many cases, adult photos were the ONLY visual representation they saw.

Let's also remember that justice is supposed to be blind. In some cases, particularly in the case of convicted female sex offenders (with real child victims), 'restorative justice' will step in, and felonies will be wiped from records. Also, at the state level, some men in nearly identical sting operations are given just probation! In one case, a man who raped a five-year-old was given probation. While I don't agree with that, it certainly reveals the disparity.

The sexual offender registry is a whole other issue. Most must stay on the registry for life, for a victimless crime where law enforcement agents purposefully manipulated men into showing up. The registry also means increased funding.

So, what can the sentencing commission do?

- Revisit mandatory minimum sentences for attempts using a fictitious victim, with an understanding that law enforcement operations are using "showing up" as a substantial step. One prosecutor even said, "Well, we ALL know that he WOULD HAVE had sex with that 15-year-old if there had been a real 15-year-old there." Do we "all know that?" Since when, absent of any real evidence, can law enforcement agents and prosecutors predict the future? Law enforcement agents and prosecutors should be 100% SURE these men were seeking a minor before prosecuting, if men are going to be put in federal prison for at least 10 years for showing up to observe this confusing persona. Arresting, prosecuting and convicting on mere supposition must stop!

- Removing a mandatory minimum sentence from this crime would compel more men to go to trial vs. pleading out, making convictions harder to get, and holding law enforcement more accountable for constitutional policing tactics. These tactics never see the light of day because men are scared to go to trial. The sentencing commission should recognize that the threat of a mandatory minimum sentence is being used to coerce men into pleading to a lesser charge for lesser time. It's still a sex trafficking conviction on the books. My family member refused to plead guilty because he felt he wasn't guilty, and he couldn't do that to his family. If the government agrees with sending men to prison for five years with a plea, then there is no reason to send other men for a minimum of 10 years because they took it to trial. No man should be penalized for invoking their constitutional right to a trial. The men who plead are not less of a risk to the public than the man who took it to trial. The public is not safer by giving one man 10 years vs. giving another five years, when they are arrested in identical operations. Is that justifiable?

- Recognize mandatory minimums are being given to men who are arrested in operations that are not constitutional. Tricking men into showing up isn't saving even one child. Judges should have the ability to give lesser sentences when, as Congress stated, "…it is merited by the facts of a particular case." Please consider returning to judicial discretion, if prosecutors are unwilling to use discretion in their prosecutorial decisions, as Congress stated they should. Trust judges to sentence people appropriately.

- Revisit the First Step Act for men who are convicted as first-time sexual offenders.

Thank you!
Janice Bittner

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Jamesha Bland

Topics:

Legislation

Comments:

Those who have served 20 years or more than should be given at A Second Chance at life in the outside world. They should be given the opportunity to experience life outside of prison walls as a free person.

Submitted on: June 7, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Tori Carter

Topics:

Policymaking Recommendations

Comments:

I am a concerned citizen with a loved one currently incarcerated and I wish to offer my opinion after experiencing the system first-hand. There is a need for first-time offenders under the age of 25 to have a deterrent program, instead of simply dumping them into an already stressed and drowning system. I have no doubt, that for the majority of offenders, that would be enough to steer them in a better direction. The current system takes decades of their lives and leaving them with little chance of thriving. For low-level sex offenders in particular, they desperately need help as they have been the victims of sex crimes themselves. The recidivism rate for these people is extremely low, yet the sentences keep getting more extreme. The current facilities are declining and lacking personnel which means very little program availability and more violence between increasing populations and gang takeovers. There is little to no room for actual growth and rehabilitation. Something needs to change drastically very soon. Putting everyone away for more and more years is not the answer. Thank you for your time.

Submitted on: June 11, 2024

Edward Christy
[redacted]

6/20/2024

Re: Sex offender sentencing enhancements and supervision

Hon. Carlton W. Reeves
Chair
U.S. Sentencing Commission

Your Honor:

Thank you for the opportunity to provide input to the sentencing guidelines. In regard to sex offender sentencing, two areas need to be addressed:

- sentencing enhancements; and
- supervised release recommendations.

Sentencing enhancements are failing to differentiate between the seriousness of offenses and the culpability of offenders. This is easily seen in case of non-production child pornography offenses (USSC §2G2.2). Four of the existing enhancements account for a total of 13 offense levels[1]. Between 2005 and 2019, the average guideline minimum increased from 98 months to 136 months. Over time, Congress has incrementally inflated the base offense level from 12 to 18. As a result, non-production offenders are routinely elevated to an offense level above 30.

The 2023 USSC Guidelines Manual contains a policy statement—adopted many years earlier—recommending that the maximum term of supervised release be imposed for any sex offense[2]. The category of sex offenses comprises an extremely wide range of crimes and offender conduct. After the recommendation was initially adopted, Congress added section (k) to 18 U.S.C. §3583 which set a supervised release minimum of 5 years, and a maximum of life. The USSC recommendation for a maximum term was not withdrawn.

Using this legacy recommendation as justification, prosecutors routinely recommend the life term, which is applied by many judges even for Class C felonies such as non-production child pornography offenses. Evaluating the rehabilitative needs of individual offenders is becoming less common. The USSC could encourage individualized evaluations by simply removing the policy statement recommending maximum supervision from its guidelines.

Respectfully,

Edward Christy

1 “Federal Sentencing of Child Pornography: Non-Production Offenses”, USSC, June 2021
2 “(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended” (2023 USSC Guidelines Manual §5D1.2(b)(2)).

TO WHOM IT MAY CONCERN

I am writting as an incarcerated who has been impacted negatively by "INTENDED" loss calculation during my sentence hearing.

I am urging the USSC to truly Consider Calculating loss as an "actual" loss during Sentencing.

The meaning of "Intended loss" is the harm that would have been impossible to occur, which resulting amount determines the increase to the defendants base offense level.

Take my case for example, U.S. vs Cole. My restitution was $111,870.25 while my actual loss was $850,000 but my intended Loss was $ 261,000,000. Is what the government says it is and that figure shoots my guidelines range to the moon.

This amendment seeks to promote respect for the law by addressing some of the concerns that Numerous commenter have raised about "INTENDED" loss.

I believe that thousands of people will be affected if this new ammendment is enacted or retroactive.

Harry Cole [redacted]

[redacted]

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Matthew Cook

Topics:

Research Recommendations

Simplification

Miscellaneous Issues

Comments:

Please consider prioritizing Judicial diversion programs for this year. There are successful programs across the country that can be scaled across the nation. Implementation of those programs would make a tremendous impact to rehabilitate offenders, heal families and allow for accountability for victims without creating lifelong consequences for defendants. This would reduce costs to the system and restore balance and judgement into an adversarial and overly punitive system. This would also reduce the secondary and societal consequences to defendants that hamper housing, employment, banking.

Submitted on: June 7, 2024

RONALD DAVIDOVIC [redacted]
Federal Correctional Institution
[redacted]

June 18, 2024

U.S. Sentencing Commission
Attn: Public Affairs / Priority Comment
One Columbus Cir., NE
Suite 2-500
Washington, DC 20002-8002

RE: Request for Comments on Potential Sentencing Guidelines Amendments.

To the Commission:

I am writing in response to Judge Reeves' invitation to submit comments and suggestions on which guidelines amendments we would like the Commission to consider.

I would appreciate if the Commission enacted guidelines that addressed disparity among prosecutorial discretion in related cases.

Specifically, I was indicted as part of a nationwide healthcare fraud conspiracy dubbed "Operation Brace Yourself". The operation resulted in the prosecution of more than 200 individuals across more than a dozen jurisdictions.

The leaders/organizers of the fraud were prosecuted out of the District of South Carolina. They were sentenced under an "actual loss" amount, while I was prosecuted in the Southern District of Florida and sentenced under an "intended loss".

The difference yeilded absurd results. My "benefit conferred" (and forfeiture amount) was $161,000. Yet my"intended loss" was $6M! I sold sales leads to a medical device supplier who used those leads to commit fraud, "intending" to bill Medicare for Millions. The concept of intended loss presumed that 100% of my leads would have converted into a sale (as if I bowled 300 every time I went bowling), when that percentage is nowhere near attainable under any circumstance. I was sentenced to 70 months.

The kingpin of Operation Brace Yourself, was sentenced under an "actual loss" amount and received probation. All of the prosecutions out of D.SC. (Kimble - 3:19-cr-277; Chmiel - 3:19-cr-299; Lowell - 3:20-cr-583; Hoffman - 3:20-cr-586; Barton - 3:21-cr-24; and more) received sentences of under 18 months, while they were far more culpable than I.

I feel it is a gross injustice to have an ambiguity in your sentencing guidelines (§2B1.1) that affords the Government to apply sentences that are so disparite, all at the whim of the prosecution.

While individuals in sister cases who are far more culpable than I have already completed their sentences, I remain in prison. While these same individuals are being held accountable to pay back only the amount they benefitted from their role in the fraud, I am being held responsible for a $4M restitution that I will never be able to repay, because I never earned a fraction of to begin with.

The disparity can be addressed by capping an individual's guidelines range to match similarly situated co-conspirators arising out of the same prosecution, or eliminating the prosecutor's discretion in applying the completely fictitious "intended loss" amount.

I greatly appreciate your consideration.

Sincerely,

Ronald Davidovic

TRULINCS [redacted] - DECKER, ROBERT KENNETH - Unit: MAR-I-A

FROM: [redacted]
TO: U.S. Sentencing Commission
SUBJECT: ***Request to Staff*** DECKER, ROBERT, Reg# [redacted]
DATE: 05/21/2024 03:39:51 PM

To: Sir/Maam:
Inmate Work Assignment: Legal Assistant

I am commenting on the fact that the sentencing guidelines still does not state anything about "Ghost dope" which is narcotics that was never confiscated or found in possession of the Defendant. I was sentenced to 140 months for pills that was allegedly sold on the darkweb and the darkweb site inflate the number of sales to attract more customers for the person selling narcotics on their sites. Therefore my guidelines range was inflated because of "ghost dope" A lot of other inmates within the BOP have complained that they were sentenced for "ghost dope" that was never found on their possession or was never confiscated at any time during their investigation. This needs to be addressed now or in the future. But it needs to be addressed soon. I should of been able to go back on a Reduction of sentence for the amount of narcotics that I was found guilty of, [b]ut my attorney at my sentencing stated to me if I object to the amount of drugs it would prejudice me to have the judge give me more time then what I got. Let alone that there was inaccurate information in my PSR that caused me to be in a higher criminal history score then what I should of been in, which I am presently in the 11th Circuit Court for a "Privacy Act" violation appeal. Hopefully it will be straightened out in the near future. My sentencing Judge had dismissed my "Privacy Act" violation complaint because the United States Attorney's Office response was that I was seeking a reduction/compassionate petition, which I was not. I was petitioning the Court for inaccurate information in my PSR for purposes of the First Step Act.

I can only hope that the Commission gets their head of the sand and actually rectifies the many discrepancies that are in the Sentencing Guidelines presently.

Sincerely, Robert K. Decker

Copy: Filer/RKD

Robert K. Decker [redacted]
[redacted]

OPEN LETTER

Dear

I, Yesenia De la Cerda, I am currently incarcerated at FCI Aliceville.
I am sending this letter humbly and voluntarily. I would like to request, as a Hispanic/ Latin/ Immigrant person that we are the following:

* Request help with FSA for the people with "final order of removal/deportation" and extradition.

* First offenders with nonviolent crimes could have the opportunity to go home after serving 50% of their sentence, with ankle monitoring or home confinement.

* Remove the IHP Program (Immigration Hearing Program) from BOP for the reason it make us, Inmates, lose our FSA credit after obtaining a job, programming, good behaviour and without any disciplinary infraction. Giving the power to immigration officer's to provide "final order of removal". Every immigrant has to go to an ICE facility after they finish their sentence and wait even more time than necessary behind bars. After Stating this issue going on at FCI Aliceville and other FCI's.
As an example, FCI Carswell, Mariana, Waseca and Tallahassee, Those FCI's are respecting their credit's of FSA. Due to this violation regarding inmates that get FSA credit, many adults in custody at FCI Aliceville are giving up on programming and being productive while incarcerated.

* Remove from BOP the responsibility of deciding inmate classification. Many of us are sick and we re not receiving proper medical care and treatment being in a place like this institution. FCI Aliceville is not medically equipped. The staff jus tell to us "drink water" for every medical need.

* Help us with the access to programs like RDAP, FIT and LCP. We, immigrants, are not allowed to get in these programs even if they are in-house program's. RDAP and FIT, which are not provided in here, we are not allowed to get transferred to another facility, due to having a detainer of a final order of deportation. Often times many of us, hispanics, cubans, fom Lao or other countries, will not be deported. It seems DHS and immigration Department, create their own reasons to place Federal prison holds. While we are behind the fence, we are in compliance with the system, therefore, we are supposed to get the benefit of any program that is provided from BOP. We do not want to keep being discriminated, retaliated, excluded, and classified with wrong codes for claiming our rights. It's fair to have credits for being programming.

* After sentencing, immigrants, want to be placed in a facility that is closer to home, as stated in FSA guidelines. Closer to home give us the opportunity, while serving our sentence, to be close to our family, our kids and loved ones. Many of us have documented recommendations from our judges with our sentencing memorandum. BOP does not take this in consideration. This is one of the most controversial topics included in the FSA guidelines, but here the benefit is given to US citizens. The question is why?

* If we all are included in the same sentencing judgement guidelines, why are we not included for all the benefits the same as well?

Brief reminder The Federal system is only ONE, And nothing may be fraudently alterated by personal purposes or benefits. Although, FCI Aliceville has failes to follow the ordinary rules by the Federal system rights of the inmates.
Not anyone that works for FCI Aliceville can answer us the reason why are we not being respected as ruled by the system our FSA credit like previously stated.
- For these and many other reasons stated, we, the inmates at FCI Aliceville and any other facility that is incurring this violation, are sending this letter to ask for help, intervention, and modifications.

Respectfully submitted and signed,

Reg. No. [redacted]
In God we trust. God Bless you!

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Christina Demarco

Topics:

Miscellaneous Issues

Comments:

Subject: Recommendations for Fairer Sentencing Guidelines

Dear Commissioners,

I am writing to express my views on the 2023 Guidelines Manual and suggest ways to create a more equitable and just sentencing system. As a concerned citizen, I believe that our guidelines should reflect not only the severity of offenses but also the individual circumstances of defendants. Here are some key recommendations:

Equity and Consistency: The guidelines should treat similar offenses consistently, regardless of race, ethnicity, or socioeconomic status. Transparency in decision-making is crucial to reduce disparities.
Sentencing Reform: Consider revising mandatory minimum sentences to allow for more individualized judgments. Promote alternatives to incarceration, such as diversion programs.
Focus on Rehabilitation: Emphasize rehabilitation over punishment. Evidence-based programs can reduce recidivism and improve outcomes.
Circumstances Matter: Encourage judges to consider unique case circumstances. Address systemic issues like poverty, addiction, and mental health.
Early Release and Compassionate Measures: Expand eligibility for early release based on good behavior and compassionate release for elderly or terminally ill inmates.
I appreciate your commitment to justice and fairness. Thank you for considering these recommendations.

Sincerely,

Christina DeMarco
[redacted]

To the Honorable U.S. District Judge Carlton W. Reeves; 11/27/24
Chairman of the Sentencening:

My name is Joshua Randall Friedbauer, a veteran of Foreign wars namely O.I.F., O.E.F. I.F. to name a few and disabled fighting for this country, serving over 22 years of Government service. My daughter is currently serving in the U.S. Navy in the Red Sea on the USS Theodore Roosevelt and I am currently during time in false imprisonment for a cyber crime I did not commit but was accused of due to the implications of my computer being implicated as the tool used in cyber scrutiny and foul play during my absence; while truck driving across country. I fought for freedom for my whole life and had my freedom taken, by my own government for unjust imprisonment. I'm 62 years old and serving 12 years for someone elses crime. I'm writing you on behalf of your sentencing reduction for prisoners of crimes of sexual offences without engangement of Children. Our government has made thousands of examples of cybercrimes without any haven to kids physically. I believe murders, drugs, manslaughter, bodily injury, oprods, weapons related shootings and hate crimes are crimes that hurt people, kill Kids, people of color, race, and are the types of people punishable by law that should be in your prisons. Cyber crimes should be treated under a different umbrella if Kids or a child aren't impacted physically. Our government has targeted men for these crimes and distroyed lives, families and the American way by labeling these cyber acts under the same acts of Child porn as engaging and hurtful porn toward Kids. The sentencing commission needs to rethink cyber convictions and restructure your guidelines towards Alternative sentencing. It's been proven and the writing is on the wall that Cyber offences like these are only reoffended a possibility of 00.15% or less and all the other crimes are of a much greater magnification and are of a hurtful and intentful nature than those of cyber SO crimes. I'm requesting your commission as an American Veteran to consider a reduction for SO cybercrimes as well. God knows its unfair, unjust to mankind. I know this guideline you have made is retroactive and it counts

and effective by President Joe Biden as of February 2024 this year. NONE of the S.O. cyber crimes hurt or Killed any ~~Kilted~~ Kids of any age but the people your reducing Sentencing for are all repeat offenders as Killers, Hate crimes, serious shooting offenses or drug crimes. They are in fact your repeat offences. I have (2) daughters that I Love and want to raise and am requesting that you please take another look at reductions of cyber crimes and those (cyber-sexual offences) that our Government finds easy to convict and prosecute. The use of the Internet is the reason for much of crimes in todays society and this is one of the few countries that spends millions of tax dollars on such an easy cyber crime. Again, I'm asking for you as the Chairman of the Commission to have mercy on us for being curious on the internet. I know the Government has had contact with much of this content and no one has been sabotaged for it because of the power of Money. I'd appreciate it if we could have a Secound chance. I'm pleading with you Honorable Reeves. This is a monetary channeled crime.

Thank you for your consideration;

Respectfully Submitted,

Joshua ~~Randall~~ Smithbauer

SPC/US Army Ret.

[redacted]

United States Sentencing Commission, 15 June 2024

I'm writing in regards to the request of Chairman Carlton Reeves of the U.S. Sentencing Commission.

I'm writing to respectfully ask you to review the guidelines that pertain to the crystle meth guidelines. The guidelines were designed years ago with the intentions that if a suspect was arrested with 80% or higher purity of meth, they were higher in the ranks of whatever organization they were involved in, and therefore closer to the Mexican Cartels. Unfortunately, that is no longer the case. The cartels have flooded our country with metric tons of pure methamphetamine every year. Now instead of street gangs and outlaw Bikers, everyday addicts accross America have access to large amounts of pure meth for as little as a few dollars a gram. What once costed $100.00 now goes for $10.00. The purity no longer matters in the Guidelines. Its all pure. And the current guidelines are sending everyday addicts to Federal Prison for 20 years. Please consider what I have asked. Do I deserve to be in prison? Absolutely! But did I deserve 19½ years

for $150.00 worth of drugs. I dont think I do. I deserve prison, but not this. I would like to thank you and everyone who reads this letter. I wrote it the best way I knew how from my point of view. Thank You and have a blessed day.

Jonathan P.W. Garrison
[redacted]
Federal Bureau of Prisons

To whomever this concerns,

My name is George Gibbs, and I am currently incarcerated at FCI Elkton in Lisbon, OH. I am writing in regards to information I have learned via a posting by a U.S. District Judge and Chairman of the United States Sentencing Commission, Mr. Carlton Reeves. According to this posting, the Sentencing Commission is asking the public if they may submit ideas to improve the structure the Sentencing Guidelines are based on, in an attempt to make them applicable to today's world. In submitting my own ideas I fully acknowledge and understand that my submission is likely to be just one among many, however, if America can benefit from a rare opportunity to participate in an action that could change our future, I am humbled to having a small voice such as mine heard. That said, thank you for taking my thoughts into consideration.

The primary changes I would make to the current set of Guidelines could help with the overcrowding prison issues. A printed source I have statistically explains that of virtually all crimes, sex-offenders have one of the lowest recidivism rates, especially if they were charged with a non-contact offense. In detail, it further explicates the current problems of the overpopulation of the registry, which my source cites that the registry has become more of a hindrance to law enforcement in the matter of performing their duties effectively, especially according to the bigger picture. The particular 3 non-contact offenses I would address in this case would be the receipt, possession, and distribution of child pornography. I would

like to make it clear that while I do not personally condone this type of behavior (in fact I find it rather detestable), I also believe that the current system is being too harsh on those that are non-violent people. As it stands today, each of these charges can carry up to and including 20 years of prison time, in addition to restitution costs to any victims that are identified in the material. The main arguments that I would make is that non-contact internet offenders do not have victims. These individuals were victimized by either a family member, someone else they knew, or in some cases even by recording themselves. On top of that, while this is still happening, the FBI is making things worse by helping to distribute this material just to make a bust. The FBI are directly exploiting these victims, for many, years after the material was created, then bringing back their pain by alerting them of another internet user that came across said material. In my humble opinion, the correct way to HELP this issue is for the FBI to destroy everything related to CSAM they have confiscated up to now, and destroy any new material that surfaces. Charge the webmasters who host these sites, not the many hundreds of thousands of people who stumbled across a video or two, whether they meant to or not. Realistically, there are just too many people in this world to be locking them up for years or decades just for watching a video or looking at a picture. Lock up the ones that are legitimately dangerous, or violent criminals like rapists, murderers, or other hands-on contact crimes. If non-contact offenders must be charged with anything, then make them pay a monetary fine, or temporarily

monitor or restrict their internet use. But most importantly, I would suggest recovery work in place of prison time, especially for first-time offenders. As a mental health case myself, I can't begin to explain the effect that not having reliable access to therapy has been on me so far after 2 years of incarceration, with still almost 5 years to go. Lastly, I would suggest nixing the restitution fees, and adjusting the registry to include only the more heinous of offenders and made available to view only to law enforcement, or eliminate it altogether. As far as the restitution fees, honestly, where is it really going? I'm willing to bet not to the victim to whom it's supposed to be entitled to, especially not for $3,000 a pop. Multiply that by the tens of thousands of offenders and their families who are forced to pay that on top of however many other instances of $3,000 per victim, and I'd say that's how the government can afford to send out paychecks to their employees. To the point of the registry, let me cite an excerpt I found enlightening. It reads, "In their work to revise the MPC (Model Penal Code), the American Law Institute recommends that only people with contact offenses would be considered for registration. The revision limits the registry to law enforcement use only. The Pacific Legal Foundation is challenging the registry and seeks judgement to declare it invalid. They will argue it is unconstitutional and violates the 1st and 5th ammendments. Canada (recently) ruled that mandatory and lifetime registration were unconstitutional. The Florida Action Committee has initiated a petition to the UN stating that the US registry is a violation of human rights."

Just to summarize my suggestions, pertaining to the issues

of child pornography on the internet and other applications, the focus should be on removing the material and shutting down the affected websites as soon as they are discovered. The criminals who operate these illegal sites, and by extension, those that have actual physical contact with their victims should be in prison. Anyone who intentionally distributes CSAM should be held accountable, and that extends to the FBI as well. Destroy everything confiscated, wipe the slate clean, and start fresh. Minimize the prison population to only hold repeat offenders, contact offenders, and those with violent tendencies (sex-offenses only, other crimes would be another matter). First-time offenses should be allowed regular counseling and recovery work instead of prison time. Restitution should be mandatory for direct contact victims of the offender. The registry should be either reduced to allow law enforcement to focus more on larger threats, or eliminated completely. Or, alternatively if people believe these suggestions are "too much work to handle," just make ALL forms of pornography legal. At that stage, all they are are just pictures and videos, right?

In conclusion, thank you for allowing me to participate in this generous opportunity. I hope in some way, as a result of this gesture from Mr. Reeves, that America as a whole may evolve to a new standard that everyone can have a chance of a better future. Regardless of what happens, I feel privileged as an American to have the opportunity to be a part of something that could be the next step to a better America. Best wishes, and good luck with your decisions.

- George Gibbs III

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Dustin Graham

Topics:

Miscellaneous Issues

Comments:

It is interesting that the request is for comments for a "faster, more just" sentencing system. I think those two things do not necessarily work together.

Reading the request for comments, the first thing that came to mind for myself is that my experience was that the Judge did not really understand me as a person. The judge made comments that did not align with who I am, my ethics, morals, values, and how I had lived my life for 20 years.

So what I would really have loved for myself, and what I think would be valuable for humans in the future, is to figure out a way to understand the human being sentenced. I realize that will not make it faster, that would make it slower. But, I truly believe that I was a good human caught up in the system and not looked at for who I am, for my morals, ethics, values, strengths, contributions, love, kindness and what I have available to contribute to society and community, and the system just crushed me.

So I would suggest and recommend reflecting on a way to see each individual as a human and figure out whether the person has good morals and values, or whether they need more help. I don't have an exact solution, but I would strongly hope from my whole heart, that other humans with values like mine that go through this don't get caught up. I feel bad for them already.

Thanks for listening.

Submitted on: June 11, 2024

Sentencing Commission, 6-13

My name is Bryan Hall. I am a Federal pre-trial detainee. I am going to write you every week until you do your job. Because you fail to do your job it is having a major impact on my life. I am a life long drug addict and was addicted to Crack Cocaine from the age of 14 and it destoried my life I can tell you first hand Crack Cocaine is the most destructive drug I've done. At age 36 I was introduced to Meth and never touched Crack again. Crack is a worse drug than meth, Cocaine is a worse drug than meth, Herion is way worse than meth, PCP is worse than meth, and I think you would have to be a complete idiot to think that meth is worse than Fentanyl. So please explain to me why the 9.85 grams of a meth mixture that was 74% pure which comes out to 7.28 grams actual is the same as have 100 to 400 grams of Herion, 500 to 2 Kilo Grams of Cocaine, 28 to 112 grams of Crack 100 to 400 grams of PCP, 40 to 160 grams of FENTANYL. Has the Sentencing lost their mind? Are you complete idiots? It would seem so. You think it's fair that I a addict/user who sold very small amounts of meth and was only caught with 7.28 grams

deserves the same amount of time as someone who sells two kilos of cocaine or 160 grams of Fentanyl. where is the logic in in this? please tell me. you are absolutly delusional if you cant see the problem here. But that is just the beginning. you created the the 3553 sentencing factor the last one is the need to avoid unwarranted sentencing disparities. So I'll have you look at the DEA Intelligence Report (July 2018) stating meth purity grew from 38.7% in 2007 to 94% by 2013 citing DEA, 2013 National level Stride price and purity Data, National average above 90% Purity is no long a proxy for determining the base offense level and it hasnt been for a long time. youve know it since 2008, Judge Bataillon (Nebraska) 2013 Judge Bennett (Iowa), 2018 the lid blew of Judges from 9th, 4th 5th 10th 8th, 6th, 11th, 1st, 2nd from what I can find every circuit has at least 2 judges that have declared policy disagreements

with the meth amphetamine guidelines Some Circuits are only using the mixture guidelines. What you have created is a natural disparity Exactly what 3553 was created to stop from happening. because you fail to do your job Im going to spend 110 months in prison when if I live a hour north or East Id only get 40 months in prison. DO your JOB!!!

Bryan Hall

The person you are affecting by you failing to do your job.

FentanyL Kills more than meth !!!

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Kathleen Hambrick

Topics:

Research Recommendations

Policymaking Recommendations

Legislation

Comments:

Carlton Reeves
United States Sentencing Commission
One Columbus Circle, N.E
Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Affairs – Priorities Comment.

Dear Mr. Carlton,

I read the following note from you and wanted to honor your request.
"My request is this: please take five minutes of your time to tell the Commission how we can create a fairer, more just sentencing system. Tell us how to revise the Guidelines. Tell us what issues to study or what data to collect. Tell us what workshops to conduct, what hearings to hold, what advisory groups to convene, or what ways the Commission can better serve you. Or even just tell us what big picture issues you'd like us to tackle – or what technical problems you'd like us to look into."

I think there are so very many good revisions to be made that would be beneficial. The country is definitely struggling. But as the mother of a young man who was falsely accused, imprisoned, retried, and acquitted - my number one request would be in the area of entrapment and 'attempted' crimes when there is only the police on the offensive (Fictitious victim).

The country has long been challenged by police brutality and misconduct, especially so in the last decade. It should be no surprise to you that law enforcement has found a money stream and

is exploiting it. There is a federal entity named ICAC. Its goal is supposed to be the protection of children online. Instead, having found the perverse incentive loophole within the ICAC funding formula, and the lax oversight due to moral panic sweeping the nation, LE focus their attention to proactive stings. These were intended to be the lowest priority under ICAC yet currently pull in the highest arrests and prosecutions across the U.S.

Here is ICACs stated priorities:
A child at immediate risk
A child vulnerable to a known offender
A known suspect aggressively soliciting children
Manufacturers, distributors, or possessors of CP
Aggressive high volume commercial, sadistic, or repeat CP manufacturers or distributors
CP Criminal conspiracy, or trafficking
CP in any form
Other child victimization

And here is the statute with the perverse incentive:

34 U.S. Code § 21116.ICAC grant program
(A)Development of formula
(B)Formula requirements
(i) A minimum amount equal to 0.5 percent of the funds available
(ii)take into consideration the following factors:
(I) The population of each State
(II) The number of investigative leads
(III) The number of criminal cases referred to a task force for Federal, State, or local prosecution.
(IV) The number of successful prosecutions.
(V) The amount of training, technical assistance, and public education or outreach
(VI) Such other criteria as the Attorney General determines

It's sad to think of real children, in danger, whose plight isn't as lucrative to LE as creating felons for funding. That sentence just sounds surreal to me!

So - to get back to your question, what would I like you all to focus on? Opening up the Entrapment defense as it applies to police sting operations. I'm not entirely sure what all the factors to sentencing are on the federal level as my son was prosecuted in the state of Washington. But I do know there are federal minimum sentencing in these cases. I'm requesting you to "carve out" from those minimums, crimes which originate in the minds of law enforcement. Also look at the charges for 'attempted' crimes. Again, carve out sentencing if the crime originated with law enforcement.

This is not a new area of concern. Police are here to fight crime, not get paid to make 'criminals'. LE will say these stings fight crime before it happens. Yet there is no evidence that trolling adult

sites trying to entice law abiding citizens into the perception of impropriety saves anyone. Not even the famous 'If it saves even one child'. There are hundreds of thousands of lives forfeited to this practice of lazy policing, my sons included. Research has already started showing these facts. More is needed.

I apologize for the length of this letter. Please reach out if you would like more information on these cases.

Be well and thank you for asking for my opinions,
Kathleen Hambrick
[redacted]

Submitted on: June 7, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Dan Holbert

Topics:

Policymaking Recommendations

Simplification

Comments:

Dear USSC,
Thanks for asking. I have three serious ideas.

First ----------
Sentence length needs to be shortened for most crimes. The USA has 5% of the world's population and 25% of the world's prisoners. This is not because we have more law breakers – it is because all sentences are too long. For example, if you get a 3-year sentence, it is very likely that your career is ruined, your marriage is ruined, your retirement savings is ruined, your new job chances are ruined, your relationship with your family is ruined, and society views you as a questionable person. Making it a 6-year sentence does not add any worse punishment. I believe you could shorten almost every sentence by 25% - 50%.

Second ----------
The length of the sentence should be related to the percentage of recidivism. If a crime has a high repeat offence rate, then a longer sentence, to protect society, makes some sense. But if a crime has a low repeat percentage, then a shorter sentence will accomplish the punishment but let the individual get back to a chance for a better life.

Third ----------
Sentences for only viewing child porn need to be shortened. CSC crimes has one of the lowest recidivism rates (only Murder 1 is lower). The BJS report, Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-2014), shows that people convicted of sex offenses are actually much less likely than people convicted of other offenses to be rearrested or to go back to prison." And "only viewing "child porn is the lowest category within CSC.

Thanks for your consideration.

US Sentencing Commission
Attn: Public Affairs Priorities Comment
One Columbus Circle, NE, Suite 2-500
Washington, DC 2002-8002

Dear Sentencing Commission,

In response to your request for the publics assistance for issues that need to be tackled for the 2024-2025 year, I would like to ask that Guidelines to the methamphetamines be addressed. This topic is long overdue and is the reason for so many federal inmates (like my own loved one) serving draconian and disparate sentences for a factor that is existent in ALL methamphetamine cases.

According to the DEA's 2019 National Drug Threat Assessment handbook, ALL meth is now over 80% purity. In fact, these days, the lowest level street addict can purchase meth at almost 100% purity. Purity is no longer an indicator of culpability or hierarchy.

Judge Carlton Reeves made a decision in December of 2022 where he stated the exact same thing. It is time to do away with the "actual meth" portion of the Guidelines, and treat all meth as meth mixture, allowing 3B1.1 to deal with ones role.

If it is truly your intention to seek the publics opinion on what changes are of immediate importance, then as a tax paying citizen, I say these changes belong at the top of the list. Dozens of District Courts agree, as many opinions have agreed with this statement over the last ten years.

Thank you for your assistance and the changes you have already made.

6/12/24
Date

Sincerely,

[redacted]
Name

[redacted]

email and/or Phone #

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Dawn Ledoux

Topics:

Policymaking Recommendations

Career Offender

Miscellaneous Issues

Comments:

To the Committee, thank you for giving us a chance to express our needs and wants to make our justice system a fairer place for everyone. These are my desires to fix a very unfair sentencing system.

1) Mandatory minimums must go! There are too many times a judges hands are tied in considering a fair amount of sentencing time. Criminal history, a life lived without ever being in front of a judge, having a successful life of family and education should be more important than a mandatory decision.

2) Sex offences should have tiers. They should not all be painted with the same brush. My son is serving 188 month for a law enforcement sting he got involved with late at night while suffering depression and insomnia on his computer. He was arrested while getting off a plane. So he was arrested, in my eyes, for intent. When did people start going to prison for intent? There were no victims, no child was harmed and a crime was never perpetrated. He never touched anyone! Yet he is serving more time than those I see on the news who actually committed the assault and got 6-10 yrs. It doesn't make sense, its not fair!

3) People with ADHD, Aspergers, and any form of Autism need to be judged differently. They need court mandated psychological therapy and treatment. Sitting in a prison cell for 10+ years does nothing. Yes, they need some kind of repercussions for their acts, they need to be held responsible. But housing someone behind bars with no real therapy is not the way. Medical specialists could much better give advice on this topic than I.

4) Like my son, many of these guys are in prison for the first time. Never been in ANY kind of trouble before. Most suffer from low self esteem, socially awkward, introverted computer nerds who took the wrong path trying to belong to something!! Trying to fit in somewhere!! AI will

soon make it difficult to distinguish real child victims from fake ones. Those with cases for pictures, law enforcement stings with NO victims should be eligible for the new 2 pt. reduction law. Sen. Grassley is not very well informed of the data showing that recidivism among those convicted of a sex crime is very low. They should be entitled, first time offenders, to the 2pt. reduction.

5) If someone has lived all their lives across from a school, or day care or park and their offence had nothing to do with that establishment then they should be able to return to their homes. Parents like us are looking at moving out of our home we have lived in for 35 yrs because there's a day care across the street that my son attended as a child. His crime had NOTHING to do with that center.

6) PLEASE get rid of the Adam Walsh act. It does nothing but feed the fear mongering of the public. Statistics show, plain and clear, that a very high percentage of these offenders will never offend again.

Our population of special needs people is just growing more and more. They need our justice system to fairly represent them. Please let the 2 pt sentencing guidelines be encompassing to first time offenders.

Submitted on: June 11, 2024

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Dante Lewis

Topics:

Research Recommendations

Comments:

I think the sentence commission should make changes to the Crack laws and pass the equal act. It has been proven that there is no difference between Crack and cocain. To many men are serving very long sentences for Crack. It should be made retroactive so that everybody sentenced under this unjust law will receive a more fair sentence

Submitted on: June 11, 2024

June 18, 2024

Dear Judge Reeves,

Thank you for the opportunity to express my thoughts on improving the sentencing system and to tell my story. My family and I experienced the justice and sentencing systems for the first, and hopefully only, time in 2023. My husband made a very stupid mistake and was arrested in January, 2023. In March my grandfather died, a week later my husband's mom died (that's when my kids asked how much more will we have to go through), in May I lost my job, and in August my husband's grandfather died. Through all of that heartache and loss God provided peace, strength, help from family and friends, and a new job for me.

My husband has never done anything wrong before this. He didn't have a record. He served in the Air Force. He took great care of his family. He served in our church. He helped others. We ate dinner as a family, went to the gym as a family, worked on the house and cars as a family, went camping as a family, and went to church as a family. We've been married for 26 years. His being in prison is deeply felt by me and my three kids every single day. My kids and I have been devastated. We lost our husband, dad, mechanic, handy man, best friend and 75% of our income. He has already missed his mom's passing, his daughter's graduation from college, his older son's graduation from high school, and his younger son learning to drive. He will most likely miss his children's weddings and quite possibly the birth of his first grandchild.

My husband was convicted of a non-violent sex offense, possession of child pornography. He was sentenced to 8.2 years in prison and will most likely spend life on the sex offender registry, which is another sentence altogether. My kids and I were not able to visit him for the first 11 months he was incarcerated. He was not allowed to see his mom before she passed away. I'm not making excuses for or condoning my husband's actions. Like I said, he made a very stupid mistake. He knows that, takes full responsibility for that, and is willing to take his punishment, but wishes that it was more reasonable. He has witnessed fellow inmates who have committed violent sex offenses such as rape and production of child pornography get the First Step Act, something he is not eligible for with his conviction. Someone who is a first-time offender and who has committed a non-violent crime should have a lower sentence and be eligible for First Step Act. Studies show that people with his conviction have a low recidivism rate, another reason they should have a shorter sentence.

I think my husband and others like him would benefit much more from counseling and therapy to help them heal than they would from long prison sentences. We were told in his sentencing hearing that he would receive counseling in prison but that is not happening and is not going to happen. The year and a half that he's already served has

been more than adequate for him to know that he never wants to do anything that would result in a repeat of a prison sentence. If he could at least be on home confinement he could help me maintain the house and vehicles. That would lighten my burden tremendously.

This is a path that I never would have dreamed I would be on. United Voices for Sex Offense Reform (UV4SOR) has been a great resource to me as I have had to educate myself about vocabulary, mandatory minimum sentences, and the sex offender registry. Unfortunately, there is a lot of false information, fear, and prejudice out there regarding sex offenders. I'll admit, before this, I was someone who believed the false information and prejudice. I have learned a lot and have much more to learn.

These are the changes that I would like to be considered for non-violent sex offenders:

- Lower sentences / lower mandatory minimums
- Consideration of criminal history
- Counseling / therapy
- Home confinement
- Less time on the Sex Offender Registry. They should not have to be punished twice.

Thank you so much for you time and consideration,

Sarah McCroskey

[redacted]

From: Maren McKee
Sent: Sunday, May 5, 2024 8:33 PM
[redacted]
Subject: Policy Brief on Excessive Sentencing for Extra Credit

Hello Judge Reeves!

I hope this Email finds you well!
I'm writing to send you a policy brief that I have written up on excessive sentencing in the U.S. and what I think the U.S. Sentencing Commission can do to help remediate this problem. I wrote a report on excessive sentencing for my Public Policy Course at Mt. Holyoke College and was told that, for extra credit, I should attach a briefing of my report to an email sent to someone who might be able to make the changes suggested in my report. I understand that you are quite busy and I am just a college student, but I hope you can at least find my report interesting.

Onwards and upwards, Maren McKee

Finding a Solution to Excessive Sentencing

Policy Brief 2024, Maren McKee

Key Takeaway:

In order to fix America's problem of excessive sentencing for nonviolent drug crimes and make an impact in the journey to eliminating mass incarceration, we must **urge the United States Sentencing Commission to recommend a sentence cap of ten years for all nonviolent drug crimes be added to the U.S. official sentencing guidelines.**

The Most American Problem

The United States has the largest number of incarcerated bodies out of any other country, over two million, as well as the second highest incarceration rate in the world, only having recently been surpassed[1]. Not only are these rates extreme, but crime and incarceration rates don't match. Crime rates have fluctuated over the years, while **incarceration rates have been increasing since the 1960s**[2].

The Result of Racism

Black people are convicted over 50 times more than white people and often given higher sentences for the same crimes. While the U.S. population is **13% black**, the prison population is **32% black**[3]. A huge portion of the incarcerated population are people arrested for nonviolent drug crimes who are serving such long lengths in prison so often because of **mandatory minimums**, which are minimum sentence lengths that can be given for drug crimes. The use of these minimums have been proven to directly correlate with longer and excessive prison sentences[4].

The government has attempted to solve the issue of excessive sentencing without the implementation of sentence caps several times before.

Attempt #1: The Fair Sentencing Act of 2010

Pros	Cons
Reduced the sentence disparity between crack and powder cocaine from 100:1 to 18:1. Crack and powder cocaine are two forms of the same drug and are shown to have little difference in terms of effects[5].	Not Retroactive. Did not racial disparity caused in drug *sentencing*, as white people more often have powder cocaine and black people more often have crack cocaine[6].

Attempt #2: The First Step Act of 2018

Pros	Cons
Made Fair Sentencing Act retroactive Created in-prison rehabilitation programs with an algorithm to determine eligibility, PATTERN. Allowed judges to offer shorter sentences for some drug crimes	PATTERN is proven to favor white over non-white inmates for eligibility because of some determining factors within its program that don't consider the over-policing of black and brown neighborhoods[7]. Gave judges personal discretion over sentence lengths, rather than strict guidelines.

[1] Guglielmino, S, & Kajanaku, K, & Tran, T, & Wucinich, B. (2014). The Big Graph [Exhibition]. (2014). Eastern State Penitentiary Historic Site, Philadelphia, Pennsylvania, United States. https://www.easternstate.org/explore/exhibits/big-graph

[2] Lopez, G. (2016, October 11). *Mass incarceration in America, explained in 22 maps and charts*. Vox. Retrieved April 25, 2024, from https://www.vox.com/2015/7/13/8913297/mass-incarceration-maps-charts

[3] Alexander, M. (2020). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New Press.

[4] Bernstein, J. (2016). *Incarceration Trends In Massachusetts: Long-Term Increases, Recent Progress*. Massachusetts Budget and Policy Center. https://www.massbudget.org/reports/pdf/Incarceration%20Trends%20in%20Massachusetts%20Long-term%20Increases.%20Recent%20Progress%201-26-2016.pdf

[5] Bjerk, D. (2017), Mandatory Minimum Policy Reform and the Sentencing of Crack Cocaine Defendants: An Analysis of the Fair Sentencing Act. Journal of Empirical Legal Studies, 14: 370-396. https://doi.org/10.1111/jels.12150

[6] Carlsen, R. (2010). The Fair Sentencing Act of 2010: How Fair Is It? *Public Interest Law Reporter*, *16*(1), 17-26. https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1105&context=pilr

[7] The Leadership Conference on Civil and Human Rights. (2018, May 8). *Vote "No" on The FIRST STEP Act*. The Leadership Conference on Civil and Human Rights. Retrieved April 19, 2024, from https://civilrights.org/resource/vote-no-first-step-act/

A Constitutional Violation

PATTERN's algorithm, and therefore this act, violates both the fifth and fourteenth amendments of the constitution and the equal protection clause, as it discriminates against inmates' eligibility for rehabilitation based on race[8]. To rectify some of the errors cause by this act, sentencing should also be regulated by the Sentencing Commission and not up to judges, those of which might sentence two different people to two different prison sentences for the same crime based on their own biases[9].

Every previous solution to the issue of excessive incarceration without the complete elimination of mandatory minimums and the implementation of sentence caps has either been racist or made the problem worse. Therefore, we must urge the U.S. Sentencing Commission to recommend a sentence cap of ten years for nonviolent drug crimes. Studies show that eliminating mandatory minimums and instead instituting mandatory maximums, or sentence caps, will not only lower incarceration rates, but crime rates alongside them[10].

Norway as a Case Study

Norway was experiencing similar rates of recidivism to the US and lowered their average prison sentence to seven months in 2010. Since then, their recidivism rate dropped to **16%**[11] and has remained, while the US's stays at **68%**[12]. They have the lowest rate of reconviction out of all Nordic countries.

Signs of Success in the U.S.

There are signs that a sentence cap could work for the US too. The Pennsylvania Department of Corrections reported that from 2012 to 2018, the prison population dropped by 4,387 inmates at its peak, while crime rates across the states also dropped by a dramatic **29%.** The Department explicitly notes that the drop in crime rates was a result of the absence of mandatory minimums. The Brennan Center for Justice conducted a study that reported multiple states having **crime drops as a result of lower imprisonment rates**[13]. South Carolina and New Jersey both **eliminated their mandatory minimums** in 2010 and have since been experiencing their **lowest crime rate since 1974 and 1966** respectively[14]. Additionally, after the decriminalization of marijuana in Massachusetts, the crime rate has **dropped the most it has since 1967**. The Northeast as a whole decreased its imprisonment rate by **24%** between 2007 and 2017, and in response saw a fall in crime rate by an average of over **30%**[15].

Funding

In terms of funding, passing a sentencing reform does not cost any more money than it takes to promote the reform and would actually save money in the long term. It is wildly expensive to house an inmate in prison, almost **$44 thousand** on average per year, so utilizing cheaper alternatives to incarceration like community-based intervention and rehabilitation would result in the U.S. saving thousands in tax dollars by lowering sentence averages and the prison population as a whole[16].

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[8] Dolan, M. (2020). *The First Step Act's Misstep: Why the First Step Act Violates Prisoners' Rights to Equal Protection – American University Law Review*. American University Law Review. Retrieved April 19, 2024, from https://aulawreview.org/blog/the-first-step-acts-misstep-why-the-first-step-act-violates-prisoners-rights-to-equal-protection/

[9] Federal Bureau of Prisons (2019). The First Step Act of 2018: An Overview. https://crsreports.congress.gov/product/pdf/R/R45558

[10] Pennsylvania Department of Corrections. (2018). *Crimelines: The 20 Year History of Crime and Incarceration.* https://www.cor.pa.gov/About%20Us/Statistics/Documents/Reports/Crimelines%20Report.pdf

[11] Kriminalomsorgen, Kristoffersen, R. (2024). *Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018-2022.* Correctional+Statistic+-+Nordic+countries+2018_2022_final.pdf

[12] Harris, K. (2023, December 6). *Recidivism and Criminal Justice – The Novum*. The Novum. Retrieved April 19, 2024, from https://sdsmtnovum.org/2023/12/06/recidivism-and-criminal-justice

[13] Pennsylvania Department of Corrections. (2018).

[14] Kimble, C., & Grawert, A. (2019, August 6). *Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem*. Brennan Center for Justice. Retrieved April 19, 2024, from https://www.brennancenter.org/our-work/analysis-opinion/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem

[15] Kimble, C., & Grawert, A. (2019, August 6)

[16] FAMM. (n.d.). *Untitled*. Families Against Mandatory Minimums. Retrieved April 19, 2024, from https://famm.org/wp-content/uploads/2023/07/First-Step-at-5-successes.pdf

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Sherri Moreno

Topics:

Research Recommendations

Policymaking Recommendations

Legislation

Comments:

We need to eliminate the jury penalty. If someone decides to exercise their right to trial, and a plea deal was offered, someone shouldn't be penalized for taking advantage of their constitutional rights.
Also, the judge should also take into consideration of victims voice if they advocate for a LOWER sentence than what the prosecutor is pushing for.

Submitted on: June 9, 2024

6/11/2024

Randall Morris
[redacted]

US Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Re: Judge Reeves request for public input

In response to the recently reported request by US District Judge Carlton Reeves asking for general public input as to the changes that the Sentencing Commission should consider for 2024, I have a few suggestions and appreciate the opportunity to be heard.

1. The Sentencing Commission should analyze the current mandatory minimum sentences that Congress has applied to sex offenses as these mandatory minimums were created without concern for empirical data and they seem to have been drafted in the midst of hysterical haste and for political points. The result has been that defendants who are found guilty of or who plead guilty to possession, distribution or production of child porn receive significantly higher sentences than those who commit "hands on" sexual offenses and even murder.

   Part of the reason for such high sentencing is the enhancements that are applied. For example, the 2 point enhancement for "the use of a computer" that is applied to child porn possession, distribution and production, applies to virtually every modern defendent. The enhancement for the number of images is also outdated as one video (of any kind) can easily meet the 600 image threshold for the enhancement. The enhancement for pictures containing "sado/masochistic" depictions is also applied to the majority of cases due to the definition of "sado/masochistic" used by the guidelines which happens to fit the basic nature of most all pornography.

   The stacking of these enhancements, which are derived from the inherent nature of these crimes, are creating sentences that are grossly disproportionate to the offenses.

2. The empirical data and year-over-year reductions in recidivism since the signing of the First Step Act in 2018 shows that the EBRR programming and FSA Time Credit incentive to participate in that programming are working. However, federal inmates who are serving time for sex offenses are precluded from receiving FSA Time Credits for this programming.

   The Sentencing Commission needs to consider that if community safety and recidivism are the actual concerns of Congress, then, how does witholding incentives for sex offenders to participate in EBRR programming fit that goal especially considering that whether rehabilitated or not, most sex offenders will be released back to their respective communities eventually. As such, it would seem that incentivized programming should start with the violent and sex offenders, not the lesser crimes.

The Sentencing Commission is really the only avenue of change and relief for the issues described above because it would be political suicide for individual politicians to introduce such legislative changes considering that it was their "tough on crime" posturing that created it in the first place.

Sincerely,

Randall Morris

Dear Sentencing Commission
I am an advocate, advocating for Federl inmates that are currently confined. I appreciate the opportunity to provide input on the Commission's policy priorities for the amendment cycle ending May 1, 2025. I commend the Commission's dedication to enhancing the federal criminal justice system and offer the following recommendations based on collective experience and insight into the current realities of the system:

1. Reduce Incarceration Costs by Expanding Early Release Programs and alternatives to imprisonment (Ranked Highest Priority) I urge the expansion of early release programs, and exploring alternatives to incarceration especially for non-violent offenders. The success of initiatives like home confinement during the CARES Act highlights their effectiveness. By prioritizing early release options, home confinement, and alternatives to incarceration we can reduce costs and ease the burden on halfway houses. Focusing on early release options, home confinement, and alternatives to incarceration should be a top priority, and any legislative adjustments to facilitate this would be greatly beneficial. Here is a brief story of a rather sad situation that could have. An inmate was placed on pretrial release for five years prior to being sentenced. This inmate did not reoffend during these five years. He reestablished contact with his family, maintained gainful employment, participated in community programs designed to assist with addiction, and he became a productive member of society. This man demonstrated his desire to not reoffend he demonstrated true reform. This man was sentenced June 28, 2023, and will spend the next five years incarcerated. I ask why?

2. Ensure Adherence to Existing Policies and Address System-Wide Inconsistencies Before Introducing New Ones (Drawing from Point 8) While the Commission aims to develop new programs and policies, it is crucial first to ensure that existing policies are adhered to and enforced. Before introducing new policies, it's vital to ensure existing ones are enforced uniformly. Holding case managers, Correctional Officers, and staff accountable and addressing system-wide policy disparities will create a fairer environment for all. One example of the current issue is an inmate at FCI Florence was informed he was eligible for FSA programs and credits. This inmate works diligently on his programs completed money smart, AARP, and several other courses to be informed 5 months later he did not qualify for FSA credits. Once the inmate challenged this and requested reevaluation of his eligibility, he was informed he was in fact eligible. However, due to being marked ineligible for the past 5 months he would not get credit for the courses he previously completed.

3. Prioritize Oversight and Accurate Data Collection (Drawing from Point 6) Effective oversight and accurate data collection are paramount. The current data shared with the public is not an accurate representation of the true conditions and issues faced by inmates and staff. I propose leveraging FIRST-Network's platform to gather unbiased data from federal facilities. Establishing an Oversight Task Force and an Ombudsman program will also ensure transparency and accountability.

4. Reform Mandatory Minimum Sentences and Modify Eligibility Reforming mandatory minimum sentences for non-violent offenses and modifying eligibility criteria for time off

and program access are crucial steps. Uniformity and expanded eligibility will aid rehabilitation efforts and reduce overcrowding.

I believe these priorities will not only enhance the fairness and effectiveness of the federal criminal justice system but also ensure that it operates more humanely and efficiently. I am committed to supporting the Commission in these efforts and look forward to the positive changes these priorities can bring.

Sincerely,

To: United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
ATTN: Public Affairs – Priorities Comment

Date: 6/24/2024

Judge Reeves:

I wish to thank you and the other members of the Commission for having the courage to take a different approach in crafting sentencing policy. In this age where the fairness of our justice system is being questioned by so many people, I sincerely hope that this new approach helps lead to a more just sentencing system.

As noted in your request for comment, we are quickly approaching the 40th anniversary of the Sentencing Reform Act of 1984 ("SRA"). In light of this fact, it is worth taking a moment to review the stated goals of the SRA, and assess whether those goals are any closer to being realized today than they were when the SRA was passed. In short, the primary goals of the SRA were as follows:

1) To promote transparency as to the reasons for the sentence imposed;
2) To promote "truth in sentencing" by eliminating federal parole;
3) To curtail sentencing disparities between similar defendants;
4) To develop sentencing policy on the basis of research and reason; and
5) To insulate sentencing policy from the political passions of the day.

Even a cursory examination reveals that, while notable progress has been made towards the first three goals, the progress of the last two (inter-related) items on this list has been significantly hindered. Rather than being allowed to carefully craft sentencing policy using research and reason, the Commission has been forced into a reactive state by the "tough-on-crime" members of Congress. Empirical data, research, and reason have become secondary to mandatory minimums and Congressional directives in influencing an ever-increasing percentage of the guidelines. This point needs no further elaboration, as it has been discussed (and lamented) by members of the judiciary ad nauseam. Instead, this comment will put forward a suggestion as to how the Commission could take a more proactive approach in limiting the influence of Congress so that the Commission can be allowed to fulfill its purpose to the fullest potential.

The most important point to be emphasized is that, by continuously influencing and/or ignoring the Commission's work, the members of Congress have thus far failed to uphold their end of the SRA bargain. In hindsight, it may have been naive to think that grandstanding politicians would be capable of resisting the urge to make political hay by increasing criminal penalties. Equally relevant is the overwhelming influence by the Department of Justice in the crafting of criminal justice legislation. The cold hard reality is that when the Commission's data, research, and recommendations point towards decreasing penalties, that work is routinely ignored by those who are seeking re-election and/or those who measure success by the number of years to which criminal defendants are sentenced.

The Commission excels both in its data collection and in being transparent by readily providing that data to the public. The Commission does not excel, however, in persuading the members of Congress to amend criminal statutes to better reflect the Commission's findings. There is one metric that the Commission is in a unique position to measure which could be helpful in keeping the political branches at bay. In a 2010 article, Judge James S. Gwin expounds on his experiment of having jurors—after finding a defendant guilty—complete an anonymous questionnaire regarding their opinion as to the appropriate sentence for the defendant in the instant case. (See Judge James S. Gwin, Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?, 4 Harv. Law & Pol'y Rev. 173 (Winter 2010)). While Judge Gwin's rationale for this proposed practice is reasonable, there is another reason such information would be useful. It is axiomatic that members of Congress are typically reluctant to vote for any decrease in criminal penalties, and are far more likely to vote for an increase in penalties instead. Yet, as is indicated by Judge Gwin's representative sample, the community sentiment is that—with few exceptions—the existing penalties are already more severe than the average American perceives as being just. Implementing this questionnaire at the national level would provide a data point showing the gulf between the political rhetoric and what the public actually thinks. A grandstanding politician may be less inclined to push for increasing criminal penalties when his opponents can easily point to data sets showing that his constituents believe said penalties are already too harsh. Likewise, the Commission could include the same data sets alongside it recommendations for future legislation.

To be clear, this practice would not drag the Commission into the political thicket, but would merely provide a data point that could be useful in keeping the political branches at bay when it comes to influencing sentencing policy. I believe this proactive approach is necessary for the Commission to fulfill the goals of the SRA. The alternative is the continued escalation of Congressional (and DOJ) influence on the Commission's work—which will eventually render the Commission virtually irrelevant. It is an interesting side note that this proposal is effectively asking the Commission to implement on a permanent basis the values expressed in your request for comment—i.e., asking the average American what he or she thinks.

Thank you for your consideration.

Sincerely,

Michael Gilliam

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Barbara Rojas

Topics:

Policymaking Recommendations

Comments:

I would like for the commission to address the trial penalty issue. It is quite unfair for someone like my son and myself who exercised our right to trial be given such a draconian sentence while the actual confessed person(s) who committed the fraud were given years less because they chose to plea.
I would also like for the commission to address on white collar charges not allowing the courts to use "intended" loss to determine sentence especially when they alleged victim was a financial institution that recovered any losses upon the recovery of a property. How can there be an intended loss when the mortgagee recovered the property and sold it later?
Thank you

Submitted on: June 11, 2024

From: Taylor Davis
Sent: Monday, May 20, 2024 8:46 PM
[redacted]
Subject: Meth purity/policy disagreement

[redacted]

Judge Reeves,

I am the daughter of an incarcerated mother (Amy Berg [redacted] who was sentenced to 100 months over her already high sentence because of the 10:1 ratio for the purity of meth. My mother was a drug addict and had a total of 62 grams of actual meth. She was sentenced to a total of 210 months. I've read the Robinson case which I believe you made to the right decision and I believe my mother's case is a similar situation.
So knowing your stance on the policy disagreement with meth purity and knowing that you are the chairman of the USSC. I'm wondering when you will be taking up the issue of meth purity which is a problem throughout the country? Every day you wait more people are being sentenced with draconian sentences that not only impact their lives but their families lives as well.
This is the year 2024 science has proven that substance abuse is a form of a medical condition/mental health disorder so why are we still using policies that were meant for king pins and leaders of drug cartels to punish addicts? There are too many people in prison for drugs who are not the big players, instead they are the drug addicted people at the bottom of the drug schemes who need the help the most. There is some opportunity for rehabilitation in prison but to achieve lasting recovery an addict usually has to subscribe to an ongoing program of recovery and I can assure you this is not what's being offered. My mom has 17.5 years to spend in prison, after serving 4 years she is already running out of programs to take and they don't even offer Alcoholics Anonymous or Narcotics Anonymous. She has to work on her recovery by reaching out to the community which is very hard to work with a sponsor over 15 min phone calls with limited minutes each month.
I'm asking you as the chairman of the USSC to please take up the meth purity discussion and to make changes to the amendment that is flawed and to make it retroactive. There is a really good article and I've attached it here for you.

https://journals.library.columbia.edu/index.php/bioethics/article/view/5916

Thanks for your attention to this matter.
Lauren Sandoval

(Mis)treating Substance Use Disorder With Prison

PDF (HTTPS://JOURNALS.LIBRARY.COLUMBIA.EDU/INDEX.PHP/BIOETHICS/ARTICLE/VIEW/5916/2979)

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Kaitlin Puccio

I. Introduction

It is largely unethical to sentence individuals who are addicted to drugs to prison. While substance use can be a crime, it must be treated differently from other crimes because addiction is a psychiatric disorder. Prisons are penal institutions. Legitimate goals of penal sanctions include retribution, deterrence, rehabilitation, and incapacitation.[i] Most of these goals do not speak to those with substance use disorder, and incarceration may be counterproductive given

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Section

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the wide availability of drugs and feeble rehabilitation efforts in prison. Further, it may be the case that substance use disorder impairs an addict's autonomy, calling into question his criminal culpability. Our understanding of substance use disorder has evolved and our prison sentencing practices must do the same.

This paper will first provide background on substance use disorder as a psychiatric disorder. Then, the need to focus on rehabilitating rather than punishing those with substance use disorder who commit crimes will be explored. Finally, this paper will address whether an individual with substance use disorder can be considered culpable for any crime–regardless of severity–and whether that individual's autonomy is impaired due to his addiction. I conclude that culpability should depend on whether the serious crime would have occurred in the absence of the drug addiction. In most cases, it is unethical to sentence an individual with substance use disorder to prison where other options such as home confinement are available.

II. Background

The fifth and most recent edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5)–published nearly twenty years after the previous edition was published in 1994–includes a section on substance use disorder.[ii] In prior editions, substance abuse and substance dependence were listed as separate categories. Abuse was conceptualized as "mild or early phase" (dangerous substance use) and dependence as the "more serious manifestation" (regular substance use).[iii] The recently combined category of substance use disorder is measured on a spectrum of severity, reflecting two decades of clinical research. This is a significant development, because it recognizes that what was once considered "substance abuse" is not simply a "mild" vice, but a serious disorder. This new understanding warrants changes to the existing penal system in the United States as applied to those who are addicted to drugs.

III. Analysis

a. *Punishment versus rehabilitation*

Given our recent understanding of the genetic components underlying addiction, it is clear that substance use disorder requires treatment rather than punishment. The three most relevant goals of penal sanctions are deterrence, rehabilitation, and incapacitation. Deterrence is the idea that mandatory minimum sentences will prevent addicts from violating drug laws because the threatened loss of freedom outweighs the perceived benefits (from the addict's perspective) of drug use. If deterrence were effective, states with higher rates of incarceration for drug crimes would have lower rates of drug use.[iv] This is not the case. Further, shorter sentences have not led to higher recidivism rates.[v] The correlation between prison sentences and drug use is thin.

Prisons in the United States have a more punitive than rehabilitative focus. Over 75 percent of inmates released from prison are reincarcerated within five years due to the lack of rehabilitative programs, which include educational and reintegration programs.[vi] Rehabilitation programs in prison targeted at substance use disorder are utilized by only 40-50 percent of the prison population with drug addictions. Despite the availability of these programs in most prisons, drugs are also widely available in prisons. [vii] Those with substance use disorder are less likely to be able to resist using drugs when exposed to them; this is now acknowledged as a symptom of the disorder as opposed to a weakness of character.[viii] Confining an addict to an environment that challenges his self-control is not conducive to his successful rehabilitation.

How to Cite

Puccio, K. (2019). (Mis)treating Substance Use Disorder With Prison. *Voices in Bioethics*, *5*. https://doi.org/10.7916/vib.v5i.5916

MORE CITATION FORMATS

b. *Easy cases*

Incapacitation embodies the idea that incarcerating drug offenders increases public safety. Here the analysis splits into two paths: the easy cases and the hard cases. First, I will address the easy cases. While drug use is itself a crime and often leads to other crimes, petty crimes in conjunction with drug use must be considered differently than more serious crimes. Lesser crimes such as shoplifting often co-occur with drug use (for example, a heroin addict stealing needles). In these cases, it is likely that but for the addiction, the crime would not have occurred. Drug use alone and drug use in conjunction with petty crimes should not involve prison time because there are minimal associated public safety concerns. Other penal options that achieve the goals of incapacitation, retribution, and deterrence include home confinement and fines, in addition to the completion of a court-ordered drug treatment program that achieves the penal goal of rehabilitation.

For example, German prisons emphasize reintegration rather than punishment; the conditions of confinement are not part of the punishment. Rather, the punishment is "the incarceration, the imprisonment itself...the loss of freedom, that's it." [ix] Prisoners–including those who have committed violent crimes–have the keys to their own private cells, complete with a private bathroom. They can decorate how they wish and play darts in common areas throughout what resembles a college campus. The conditions are luxurious compared to prison conditions in the United States, yet the recidivism rate is lower.[x] The loss of freedom is the key, which acts as both a punishment and a deterrent.

Similarly, in the case of mandatory drug treatment programs that we might impose on those with substance use disorder instead of prison, the loss of freedom is the punishment: an addict is removed from his family and forced into a rehabilitation program. Extracting him from his environment is a critical step as well, because it is important to extinguish environmental cues when treating substance use disorder. For example, an individual may associate heroin with the people he is with or the apartment he is in when using the drug. Environmental experiences can trigger a drug craving. Such environmental cues are a type of memory. It would be difficult to extinguish such cues in a prison environment where drugs are rampant and new cues are able to evolve before the individual has been treated for addiction.

Further, drug use often co-occurs with other psychiatric disorders like PTSD. Punishing a self-medicating, traumatized individual with punitive action that may contribute to additional trauma is reinforcing. For example, a female victim of domestic violence and sexual abuse may use drugs to alleviate the stress of her situation. If she is imprisoned for drug possession, sexual assault and violence while incarcerated, and the presence of male guards in a position of authority, may add to her trauma.[xi] A focus on rehabilitation rather than punishment speaks more to the needs of those with substance use disorder and more successfully achieves the apparent aims of the penal system.

c. *Difficult cases*

There are more difficult cases where drug use co-occurs with more serious crimes such as murder. The balance in these cases weighs more heavily in favor of prison for incapacitation purposes due to concerns over public safety. However, the rehabilitative goal should not be disregarded simply because prison is appropriate. To move beyond the challenges that a prison environment presents for those with substance use disorder, the conditions of confinement must

improve. An individual who is released from prison after a long sentence may be more difficult to treat due to what is recognized among psychologists and criminologists as "post-incarceration syndrome."[xii] Researchers at Vrije Universiteit Amsterdam used neuropsychological tests to show that even after a short incarceration, prisoners demonstrated increased impulsivity and decreased attentional control, and concluded that "released prisoners may be less capable of living a lawful life than they were prior to their imprisonment."[xiii] Compounding this with substance use disorder that is unlikely to have been treated in prison may leave addicts prone to even greater dependence on drugs than before entering prison.

d. *Autonomy and culpability*

One remaining question is whether an individual with substance use disorder can be said to be culpable for any crime–regardless of severity–if his autonomy is impaired due to his addiction. Punishment for crimes committed by those with other psychiatric disorders may provide some clarity.

Since 1955, the number of patients housed in psychiatric institutions has declined by 95 percent.[xiv] This is not due to a decline in the number of people with psychiatric illnesses, but because psychiatric hospitals have largely gone out of existence. Many of the mentally ill ended up homeless or in prison. Indeed, 15 percent of state prison inmates suffer from a psychotic disorder.[xv] Prior to this deinstitutionalization, an individual with schizophrenia, for example, who committed murder because voices in his head ordered him to do so would be sent to a psychiatric institution for both mental health care and incapacitation purposes. Now, this same individual would likely be incarcerated. Even though pleading insanity may reduce his sentence, prison conditions–for example, being placed in solitary confinement–may exacerbate this issue.[xvi]

Individuals with antisocial personality disorder (psychopaths and sociopaths) are treated differently in that the insanity defense does not apply.[xvii] On a spectrum, these individuals are the most culpable. Their behavior and lack of remorse does not fit the Model Penal Code test of insanity, where an "individual is not liable for criminal offenses if, when he or she committed the crime or crimes, the individual suffered from a mental disease or defect that resulted in the individual lacking the substantial capacity to appreciate the wrongfulness of his or her actions..."[xviii] Under this test, schizophrenics are less culpable because while they committed the crime, they suffered from volitional impairment. Those with substance use disorder suffer from a similar volitional impairment, though the insanity defense is not available to them. However, the availability of the insanity defense to a defendant does not determine culpability; volitional impairment, which provides the legal basis for the insanity defense, is the key.

The nervous system of an individual with substance use disorder reacts to drugs in a way that is reinforcing. All addictive drugs stimulate the release of dopamine in the nucleus accumbens. An individual may inherit an atypical response to opiates, for example, where the drug makes him feel euphoric and thus is highly reinforcing. By contrast, another individual who has been prescribed opiates after a traumatic physical injury may find that they don't make him feel anything other than a decrease in pain–i.e. there is no feeling of euphoria, or "high." The former has an inherited risk of developing substance use disorder. Even if he desires to stop using heroin, he may be unable to do so as a result of genetic or biological predispositions. He is stripped of his autonomy in this sense. Because of this volitional impairment, it is unethical to find him culpable for using drugs. His culpability with regard to other crimes may depend on whether he would have committed the crime if he did not suffer from substance use disorder.

IV. Conclusion

Research has shown that addiction is a psychiatric disorder. Although substance use can be a crime, it must be treated differently than other crimes. The current penal system in the United States focuses on punishment rather than rehabilitation. This does not speak to the needs of those with substance use disorder, and likely thwarts efforts at reintegrating prisoners into society. Without proper treatment, those with substance use disorder will likely continue to use drugs. Their genetic makeup leaves them vulnerable to addiction and threatens their autonomy. This loss of autonomy means that—like those who suffer from other psychiatric disorders and are volitionally impaired—they are not culpable for the crime of substance use. Cases in which drug use co-occurs with other crimes are more difficult, but an individual's culpability should depend on whether the additional crime would have occurred in the absence of drug addiction. Even if an individual with substance use disorder is incarcerated for the purpose of incapacitation in the context of a serious crime, the institution to which he is sentenced must provide proper rehabilitation. In most cases, it is unethical to sentence an individual with substance use disorder to prison where other options are available.

[i] *Graham v. Florida*, 130 S.Ct. 2011 at 2012 (2010).

[ii] American Psychiatric Association, *Diagnostic and Statistic Manual of Mental Disorders*, 5th Edition, "Substance Use Disorder"

[iii] *See generally* Hasin, Deborah S. et. al, Am. J. Psychiatry, "DSM-5 Criteria for Substance Use Disorders: Recommendations and Rationale" (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3767415/

[iv] Pew Trusts, "More Imprisonment Does Not Reduce State Drug Problems," March 8, 2018, https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems

[v] U.S. Sentencing Commission, "U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses," news release, Dec. 11, 2007, http://www.ussc.gov/about/news/press-releases/december-11-2007 (http://www.ussc.gov/about/news/press-releases/december-11-2007); Kim Steven Hunt and Andrew Peterson, "Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment" (2014), U.S. Sentencing Commission, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

[vi] University of Pennsylvania, Wharton Public Policy Initiative, "The Economic Impact of Prison Rehabilitation Programs," August 17, 2017, https://publicpolicy.wharton.upenn.edu/live/news/2059-the-economic-impact-of-prison-rehabilitation/for-students/blog/news.php

[vii] Welsh-Huggins, Andrew, Associated Press, "Prison Staff in 2 States Treated for Exposure to Drugs," August 29, 2018, https://www.usnews.com/news/best-states/ohio/articles/2018-08-29/report-prison-guards-inmates-treated-for-exposure

[viii] Hartney, Elizabeth, PhD, "A Guide to DSM 5 Criteria for Substance Use Disorders," September 26, 2018, https://www.verywellmind.com/dsm-5-criteria-for-substance-use-disorders-21926

[ix] CBS 60 Minutes Presents: Behind Bars, https://www.cbsnews.com/news/60-minutes-presents-behind-bars-prison/

[x] The Marshall Project, "Prison Without Punishment," September 25, 2015, https://www.themarshallproject.org/2015/09/25/prison-without-punishment

[xi] *See also* Hogenboom, Melissa, BBC, "Locked up and vulnerable: When prison makes things worse," April 16, 2018, http://www.bbc.com/future/story/20180411-locked-up-and-vulnerable-when-prison-makes-things-worse, discussing how women who are victims of trauma are re-victimized by prison.

[xii] Jarrett, Christian, BBC, "How Prison Changes People," May 1, 2018, http://www.bbc.com/future/story/20180430-the-unexpected-ways-prison-time-changes-people

[xiii] *Id.*

[xiv] Kozlowska, Hanna, *The Atlantic*,"Should the U.S. Bring Back Psychiatric Asylums," January 27, 2015, https://www.theatlantic.com/health/archive/2015/01/should-the-us-bring-back-psychiatric-asylums/384838/

[xv] *Id.*

[xvi] *Id.*

[xvii] Cornell University Legal Information Institute, "Insanity defense," https://www.law.cornell.edu/wex/insanity_defense

[xviii] Cornell University Legal Information Institute, "Model Penal Code Insanity Defense," https://www.law.cornell.edu/wex/model_penal_code_insanity_defense

TRULINCS [redacted] - SARNELLI, CARMINE A - Unit: OTV-C-A

FROM: [redacted]
TO:
SUBJECT: Mandatory Minimum's
DATE: 06/13/2024 06:17:19 PM

Chairman of the U.S. Sentencing Commission
One Columbus Circle NE Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs-Priorities Comment

Dear Honorable U.S. District Judge Carlton Reeves - Chairman of the U.S. Sentencing Commission,

I hope all is well, I am writing in response to the request regarding the input regarding changes to the guidelines. I am hoping that you will take these into consideration.

1) Mandatory Minimum's should be waved or eliminated for non-violent first offender drug crimes. As an inmate in a camp I have spoke to many of my inmates and none were aware while they were offending had no idea about the Mandatory Minimum associated with there crimes, therefore it does not seem to be as strong as a deterrent as intended. Especially for inmates that were addicted to drugs during committing the crime as now it is legally considered a disease being a drug addict.

2) All amendments made by the U.S. Sentencing guidelines should be made retroactive.

3) Guidelines for Methamphetamine are too high and should be lowered.

Thank you for your time and consideration in this matter.

Warmest Regards,
Carmine Sarnelli
[redacted]
[redacted]

To The Hon. Carlton W. Reeves, Chair, U.S. Sentencing Commission,

My name is Connor Sheehan, I'm a rising 3L at the University of Wisconsin Law School. I spent the last year interning at a Federal Defender office in Madison, and I never quite got over how the federal sentencing guidelines punish people for using a computer in the commission of an offense.

The Chair has expressed a desire to "infuse the federal criminal justice system with knowledge of human behavior as it relates to the criminal justice process." As such, I recommend striking all enhancements arising from the use of "a computer" or an "interactive computer service" from the federal sentencing guidelines. I would also develop a metric other than the flat number of "computer or computer-generated image[s]" to assess the severity of offenses like those addressed by § 2G2.2.

Computers' use in chambers, in law offices, and by law enforcement is taken for granted. They are ubiquitous. It is neither responsive nor democratic for the federal criminal justice system to heap punishment upon people for using them in the commission of an offense.

Thank you for your consideration.

Sincerely yours,

Connor Edwards Sheehan
[redacted]

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Oronde Shelton

Topics:

Career Offender

Miscellaneous Issues

Comments:

I am writing in response to the United States Sentencing Commission's request for public comments on how to create a fairer, more just sentencing system.

1. Addressing Sentencing Disparities

One of the most critical steps towards a fairer sentencing system is addressing the persistent racial and socioeconomic disparities in sentencing outcomes. My own experience has shown me the stark reality of these disparities. For example, minor drug offenses from decades ago continue to haunt individuals today, leading to disproportionately severe sentences. This is particularly evident in cases like mine, where a small street-level drug conviction from 32 years ago for a twenty-dollar piece of crack cocaine, combined with another drug conviction of two twenty-dollar pieces of crack cocaine, result in classification as serious drug offenses. Consequently, under the Armed Career Criminal Act, these convictions mandated a 15-year sentence. How can this be considered fair when three twenty-dollar pieces of crack cocaine from decades ago are used to impose such harsh penalties in 2024? How is that (FAIR)?

Submitted on: June 11, 2024

I am writing in response to the request from the public to address sentencing guidelines. I have several thoughts on the guidelines, having been subject to them myself. While you may think someone like me wants to be more lenient. However, I am more concerned with being fair, and keeping the right people inside, while letting out those who pose little threat. I will also note that I intend to run for president in 2028, so these changes may be implemented during my term anyhow.

My first concern is the sentencing table itself. Specifically the legality of using a persons criminal history to increase the sentencing range. While this did not apply to me, I believe that this may constitute double jeopardy. Since the increased ranges are specifically due to the defendants history, it is in essence, being punished again for previous crimes. While I understand the desire to keep repeat offenders in for longer, I do believe it likely violates the law. Once a sentence is served, it needs to be done with, no increases for points.

On the legality issue, giving different points to different age groups amounts to age discrimination. While defendants are not afforded all the rights a normal person is, I believe age discrimination would still apply in this case, as it isn't something explicitly stated as a rights loss.

Currently, while awaiting trial, you have two options. Wait in prison, or be released and be on supervised release. According to the guidelines, time served in prison while awaiting trial is counted toward sentencing, but supervised release is not. I strongly believe this should be changed. I myself spent more than 3 years awaiting trial, and had the standard 3 years post trial supervised release. The supervision is nearly identical. I was not allowed to travel, even when my best friends mother died, and even though it was only slightly outside my travel range. To make things worse, I had a 7 month sentence, and served 5 months 10 days. This means that my supervision time is nearly 7 times longer than my sentence. Credit should be given to time spent on supervision, as it is just as restrictive as post release.

We have a problem with prison over crowding, and because we are putting felons with felons, and they have nothing better to do than talk to one another, many people come out of prison with a criminal education. This is not the same as people who have a support system on the outside who happen to include felons. Most independent groups say that around 1 in 20 to 1 in 25 people in prison are not guilty of the crimes they have been incarcerated for, and that is almost exactly the amount of people in prison who claim innocence. Inmates are very forward about being guilty. With that in mind, we are putting innocent people in with felons, who now have no faith in the system, and learn to be criminals. Because of this, I think that there should be more than one sentencing guidelines chart. One for violent offenders, and one for non-violent offenders. The violent offenders should be held for longer, while there should be a much larger range for house arrest in non-violent offenders. House arrests should last longer in these cases, and violations should then be given the full sentence in prison. By doing this, we can lower the prison population, and the cost associated with housing, feeding, clothing, and caring for an inmate, while at the same time allowing them to work and begin to pay fines and restitution years sooner than otherwise possible.

I was convicted of being on the wrong medicaid program, but was sent to a prison of around 80% sex offenders. Because of this, I know a lot about them, and they are treated differently. Sometimes rightly so, and other times not so much. I have read case files of people who should never have been in prison to start with, and have a minimum of 10+ years. Others, I feel shouldn't ever get out. There needs to be a lot more flexibility with sex offenders. Allow me to tell you about two stories.

Chris Z. was an alcoholic and drunk pretty much 24/7. He was trading pictures of woman who were 100% legal aged. Some night, without him requesting this material, someone sent him a folder with 6 pictures of an under aged girl. He opened the first picture, went "Nope" closed it and passed out drunk. He didn't think about the pictures again, and didn't report it because he was drunk. Forensic

evidence shows he never opened any of the other photos, and that the one he did open that night was only opened that one time. Later, a warrant would be issued for his picture trading, when he traded a legal aged photo, and the cop he was speaking with decided she might have been under age. They found the photos he never opened or requested, and Chris Z. got 10 years.

Jason L. is a schizophrenic who was on medications that were not working for him. His voiced told him it was OK to arrange to have sex with a 9yo boy and 12yo girl and start an incest family. Note that his voices didn't tell him to do it, they gave him it was OK to do. Jason was given 11 years 3 months. However, he is getting out in December after only about 5 years. Jason should be going to a hospital until he is cleared safe for the public.

Chris Z. is an asshole. I say that because I am not an advocate of him personally, but as a contrast as to how the sentencing guidelines are applied. He will be serving a longer sentence for receiving something he didn't request, didn't view, and didn't want, than Jason L. Jason L. is one of the nicest people in prison, and calls my mother several times a week. However, he is serving far less time, and is much more likely to re-offend than Chris Z.

When reading about the different cases in prison, there are far more people like Chris Z. than there are Jason L. Anthony A. had transcripts of an undercover cop badgering him for under age images and him saying he was not into that stuff over and over, until he finally broke down, went and found the cop a link, and sent it to him. Forensics show he never opened the link himself, and deleted it right after he sent it. I forget the name or the guy who was targeted by mistake. The cops wanted access to his computer, so they told him they were legal aged on a dating app, sent him a photo of an under aged girl, then arrested him for having the photo. They had the wrong person, and his only conviction was for receiving the photo the cops sent him unrequited. J.D. Was sentenced for having a video of his 3yo grand child playing getting out of a pool, and she (as kids do) stripped off to change out of her went clothing. He didn't think anything of it.

Again, there are far more Chris Z. inmates than there are Jason L's. Part of your public request is big picture issues. The issues in these cases, and even in my white collar case, is that prosecution seems to be about winning and not about what is right, or what protects the public. At my arraignment and my sentencing the prosecutor told the judge I qualified for the benefits I received, and then asked for me to be sent to prison. For them, it is more about winning, than truth, justice, or doing what is right. If we are going to sentence people for these things, let's get it right. These things should somehow be taken into account. Jason L should have a far longer sentence than any of the other people I have told you about, and I say that knowing that I like Jason L. a lot better than any of the other people I mentioned.

Sentencing is far too long. Now most people convicted think they got way more time than they deserved (with the notable exception of Michael Scott Polston who is the only person in prison who believes he got what he deserved). The question we have to ask is, is prison a punishment intended to detour future offenses, or is it intended to rehabilitate? I don't think anyone in our system will say it rehabilitates anyone. Lifetime recidivism rates topping 80% (note: sex offenders lifetime rates is lower than the one year rate for everyone else at 25%) means that there is no rehabilitation happening. Therefore the sentencing guidelines are only a tool of punishment. I can tell you that for most crimes a 3-5 year sentence is enough to detour anyone from ever wanting to commit a crime again. If a crime needs something above that, they need lifetime supervision. Anything in the middle is just excess, and contributes to the likelihood of offending again. Past that time frame, people lose social skills, and the world moves past to the point they can't fit in, making recidivism the only way they know how to do things.

Something I suggest looking into is the recidivism rate in correlation to the amount of time served. I

am guessing the sweet spot is in the 2-3 year mark. This can then be taken into account when developing sentencing guidelines.

Some of these things I have said should already be in the guidelines when a judge is supposed to set aside the guidelines and consider the personal aspects of the case and the person themselves. However, most judges don't seem to deviate or very from the guidelines sentencing ranges at all. Over all, either judges don't know how to use that area, or don't actually consider it unless a lawyer brings it up, and even then, they are largely ignored. That presents a specific problem in that these are important factors to consider, but if they make no difference in sentencing, then the section of the guidelines where you set them aside is useless. I feel it is still important to have that option, but the only fix is to have most of those aspects somehow incorporated into the points system.

Alternative sentencing should be encouraged. I have a policy I intend to campaign on that will specifically deal with this, but it will take new laws. Since that is not in your power, there should be something in the guidelines that is a list of alternative sentences, and maybe how much time off a prison sentence each thing can be. For example a sentence of 12 months could be reduced to say 6 months and 500 hours of community service, plus classes and participate in victim offender dialog.

Enhancements and adjustments are out of control and are starting to be so common that they need to now be part of the guidelines in a more normal way. Instead of saying that X offense is Y range of months PLUS an enhancement for computer use, it should be either the same set of months for with or without the enhancement, or there should be a different category for when a common enhancement is committed. Computers are part of every day life now to the point that making them an enhancement is like saying someone was breathing when they offended. At this point, it needs to be part of the normal sentence. In addition, there should be more downward adjustments for minor roles than there are currently based on circumstances.

We have lost the war on drugs. We are not even stopping them in the prisons. When I was in prison, someone was so high he fell unconscious into a vat of frying oil. Mind you the vat was a homemade and stolen item, but it illustrates that there are serious issues with drugs, and we can't get rid of them in prison. Prison programming is so absurd that they tell inmates what there is in prison to get high off of. Inmates go to it to take notes. Prison programming is less than subpar, and sometimes totally irrelevant. For dyslexia, they use "Hooked on Phonics" (not a joke). I would like to suggest required programming for drug abuse, and that taking that programming should be mandatory and take time off a sentence for staying clean, I also think it is ineffective. Did you know that in the RDAP program, you are allowed to use drugs, so long as you admit to it? Every day you can stand up and tell the guard, during your programming time, that you "slipped" and used last night. Do it every day if you want, and so long as you did so, you can't be busted for testing positive on a drug test. Drugs are everywhere, and when street drugs are not available, K2 or even over cleaner are used. There should be some reduction built in for staying clean, but maybe that is beyond your scope. I do think that there can be things built into the guidelines that can support staying clean in prison. For example, a sentence of a range instead of a specific time. 24-36 months, where the inmate receives 24 months if they do not test positive for drugs during their time in prison, and 36 if they do test positive. Build the punishment right into the sentencing.

The big problem with that is that guards know how to manipulate the testing. K2 is not illegal. When they want to punish someone they don't like, and they know that person uses K2, they test them for another drug. I believe it is meth, but I have never actually used drugs, so I am slightly out of the loop. Regardless, it gives a false positive, and then they charge the inmate with possession and use of meth (or whatever hard drug it is). What I am saying is that this has to be done carefully and with a keen eye on it's potential for abuse by guards.

Something else we need to look at is what is not helping. As I said, longer sentences are really not helpful, to the point they make a more dangerous society through recidivism, but all aspects should be looked at for effects that are detrimental, or costing the tax payers money, without positive effect. Megan's law is a good example, though not related to sentencing guidelines directly. Since it came into effect, it has had zero impact on sex offenses. It has not reduced them in the slightest. Yet, we continue to publish lists and make people register for tracking. All ir really means is that those people who are convicted keep getting harassed by the public, and can never live a normal life. While that may even be appropriate for some, think about the 1 in 20 people who are not guilty, and the Chris Z's out there who should never have been prosecuted to start with. We are making more criminals than we are preventing, and creating a revolving door. It helps no one, so every aspect should be seen through the lens of it it actually helps the problem.

I am not saying a 25 year sentence isn't appropriate for some people, and I am not saying that some people shouldn't get longer sentences, and maybe never get out. I am saying that some people should be sentenced to years in a hospital for mental health, and that some people can be sentenced to shorter sentences, house arrest, or alternative sentencing for much better effect. I am saying that the guidelines should look at getting people home to start making amends, rather than lock them up for years so they don't know how to cope. The longer someone is inside, the less support they have on the outside. Support is the number one indicator if someone will offend again, and we cut it when we send people to prison.

On support in regards to shorter and alternative sentencing, I will say this. The less time a person is in prison rather than home confinement, the less support they will have. I lost my relationship in 36 days and had only one friend after 54 days. That is how fast a person will lose everyone. Now I am the exception to the rule. More than 3 years supervised release before prison, 5 months 10 days in prison, and 2 years and 5 months out so far on supervised release, and I have never had a violation. That being said, what little support I still have is unwavering, and I can count on them far more than most people can a spouse. I digress, shorter sentencing is important for those not spending life in prison, and a much larger range for home confinement is needed to continue to support these relationships to help people not get back into things.

Ultimately, the guidelines can't just be about punishment anymore. They have to have a long term public good undertone to them. Every aspect has to be considered with the idea that these people are going to get out one day and have to integrate into society and live normal lives regardless of their crime. Punishments can go too far, and two wrongs don't make a right. While some crimes can never be healed, and some victims can never be made whole, a mistake can't be punished forever based on the time the victim has to suffer. Not if we want to live in a better world.

My name is Ki Souron, and I am happy to discuss this topic with anyone who wants to correspond further, or wants an opinion on something I have not covered. I did try and stay to basics that are broken.

Thank you for your time
Ki Souron [redacted]

TRULINCS [redacted] - SPINA, JAMES - Unit: OTV-C-A

FROM: [redacted]
TO:
SUBJECT: CP FSA March 2024
DATE: 06/11/2024 12:12:21 PM

Chairman of the U.S. Sentencing Commission
One Columbus Circle NE Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs - Priorities Comment

Dear U.S. District Judge Carlton Reeves - Chairman of the U.S. Sentencing Commission,

I am writing in response to the request regarding the input regarding changes to the guidelines. These suggestions are in line with the goals set forth by the B.O.P. to reduce the inmate population and reduce costs to taxpayers.
The goals you outlined were as follows:

1- To ease the overcrowding in the Federal Bureau of Prisons
2- To reduce the overall financial costs of ballooning Federal Prison population costs specifically higher wage commitments and medical costs for growing inmate population
3- To return those non violent eligible inmates to society at the earliest possible time in order that they become lawful productive, tax paying citizens paying their own housing, medical expenses, food and other financial obligations

These goals can achieved in several different ways:

1- Following and adhering to the BOP First Step Act with FSA credits earned as outlined in my attached copy of my BP-10 which would allow the total FSA credits to be earned applied toward the eligibility date toward transfer to Halfway House
2- Modify and reinstate the Elderly Pilot Program that expired in September 30, 2023 allowing the elderly non violent first time offenders to serve 50% of their sentence including FSA and GTC applied. For the 5 years it was in effect it was a hugely successful program and there is no reason why it cannot be modified and re instated and implemented once again.
3- The Cares Act (serving 25% of your sentence) was another successful program and could be reinstated under another name but to serve a similar purpose of reducing the inmate population while cutting costs and saving taxpayers money.
4- The federal Bureau of Prisons conducted a recent study (April 2024) on the provisions of the CARES ACT and The Director of the BOP, Ms. Peters, is quoted as saying "The study suggest that reducing incarceration for appropriate people through measures like early and extended home confinement does not compromise public safety and in fact, suggests it may contribute to successful reintegration into society."
5- Many inmates have earned FSA credits and are due for release to halfway house. Yet there is no room in the half way houses and therefore they remain in prison passed their release date. These inmates can be released to home confinement much like those under the now expired Cares Act.

Anyone of the above programs would help you accomplish the goals the B.O.P. listed above while saving taxpayers money and still providing public safety, and returning non violent first time elderly offenders to their family, community, having them be a productive law abiding citizen and returning to society.

I am writing you with the hopes that one or several of these programs can be implemented in order to help you achieve the goals set out by the B.O.P. which allows the elderly non violent first time offenders some type of early release program while providing additional savings of taxpayer money that can be used for more useful and effective programs.

Thank you for your time and consideration in this matter.

Sincerely yours,

James Spina Reg [redacted]

[redacted]

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Jeffrey Stone

Topics:

Policymaking Recommendations

Comments:

Dear Chair Reeves and Members of the U.S. Sentencing Commission,

I appreciate the opportunity to contribute to the discussion on how we can create a fairer and more just sentencing system. As we mark the 40th anniversary of the Commission's creation, it is imperative to consider the substantial body of evidence that indicates harsh sentencing often leads to greater recidivism and fails to address the root causes of criminal behavior.

Evidence on Harsh Sentencing and Recidivism:
Research consistently shows that harsh sentencing, including long prison terms, can increase the likelihood of reoffending. A study by the National Institute of Justice found that individuals who serve longer sentences are more likely to commit future crimes compared to those who serve shorter sentences. This phenomenon, known as the "criminogenic effect," suggests that incarceration, especially in harsh conditions, can exacerbate criminal behavior rather than mitigate it .

Lack of Skills and Crime:
Many individuals who commit crimes do so because they lack the necessary skills to integrate into society effectively. This includes educational deficiencies, lack of vocational training, and limited access to mental health and substance abuse treatment. According to a report by the American Psychological Association, addressing these underlying issues through rehabilitation programs can significantly reduce recidivism rates .

Focus on Rehabilitation:
Sentencing should be focused on rehabilitation rather than purely punitive measures. Programs that provide education, job training, and therapeutic services have been shown to reduce recidivism and help individuals reintegrate into society successfully. For example, the RAND Corporation found that inmates who participated in educational programs while incarcerated were 43% less likely to return to prison compared to those who did not .

Recommendations for the Sentencing Commission:

- Revise Sentencing Guidelines: Consider incorporating guidelines that emphasize rehabilitation over incarceration, especially for non-violent offenses.
- Data Collection and Research: Invest in collecting data on the long-term impacts of rehabilitation programs versus punitive measures, and use this data to inform future guidelines.
- Workshops and Seminars: Conduct workshops focused on the benefits of rehabilitation and the importance of addressing the underlying causes of criminal behavior.
- Public Awareness: Increase public awareness about the effectiveness of rehabilitation programs through public hearings and advisory groups.

By shifting our focus from punishment to rehabilitation, we can create a more just and effective sentencing system that not only reduces crime but also supports individuals in becoming productive members of society.

Thank you for considering my comments. I look forward to seeing the Commission's continued efforts in this critical area.

Sincerely,

Jeffrey "Gent" Stone

Submitted on: June 9, 2024

Lorenzo L. Suttles
[redacted]

Date: June 17, 2024

U.S. Sentencing Commission
Attn: Public Affairs - Priorities Comment
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

In Re: Priorities Comment

Dear Honorable Sentencing Commission:

My name is Lorenzo Suttles. I have written to the United States Sentencing Commission in the past concerning it's previous public comments, and I welcome the opportunity to submit the current comment in relation to the invitation extended by the Honorable Chairman Judge Reeves, on behalf of the Commission.

I would first like to start by thanking this Honorable Commission for all of it's hard work. You have accomplished such an immense task in such a short period of time, and I believe that I can sincerely speak on behalf of those of us incarcerated in the federal prison system and our families, in thanking you for a job well done! However, there is still much remaining to be done. . .

To date, I have been incarcerated for the past 23 years since the age of 22, for conspiracy to commit two armed robbery offenses, in which no one was physically injured. My co-defendants, who were equally culpable, received lesser sentences in exchange for their testimonies, and were released over a decade ago, while I still have over a decade remaining on my sentence. In service of a 41 year sentence; as virtually a first-time offender who has never served a day of incarceration prior to the instant offense, I have long since compensated for my crimes both penally, morally, and financially.

Since my incarceration, I have made it my business to rectify my wrongs and pursue rehabilitation at all cost while only receiving one minor disciplinary infraction in 23 years, maintaining a consistent work history for the past 15 calendar years, completing over 5,000 educational credit hours, and securing pre-release savings which will assist me in re-integrating back into society upon my release.

During my incarceration I've lost my father (2017), my step-father (2016), and a host of other close family members and loved ones. Unfortunately, my mother is currently in the hospital clinging to life, and due to my incarceration, I may never see her again in this life.

In committing these crimes I realize that I've made some serious and foolish errors for which I am apologetic and deeply remorseful! I agree that I should be punished for the wrong that I have done, but how much punishment is enough?

People like myself are the model for what is wrong with the federal criminal justice system.

One of the greatest measures ever introduced concerning the United States Sentencing Guidelines is §1B1.13(b)(6). However, this "extraordinary" measure; which would create the "fair and more just sentencing system" for which the Commission is currently seeking comment, is in danger of derailment due to callous "politics" fixated on technical indifferences which have no regard for the human lives impacted thereby.

In relation to the Commissions inquiry of how to create a fairer, more just sentencing system, I submit recommendations to include but not limited to the following:

- The Commission should conduct studies and create guidelines which take into account the impact of harsh and extensive penalties for certain categories of criminal defendants, to include the impact that prison conditions and other unforeseen circumstances will have on the defendant during the duration of any extensive penalty which may be imposed;
- No criminal defendant should receive an "excessively" greater penalty than equally culpable co-defendants for simply exercising the right to a trial by jury and being found guilty, versus a guilty plea. Also, "trial penalties" should be completely eliminated;
- More consideration for reduction of sentence should be given to defendants (for both non-violent and serious offenses) who have served lengthy sentences, with minimal disciplinary infractions, and a history of evidenced based recidivism reduction rehabilitation. Furthermore, the 18 U.S.C. §3553 sentencing factors should be revised to reflect the same;

- The Commission should communicate more to and impress upon Congress the urgency to legislate and expand upon criminal justice reform "legislation," and the importance of the retroactivity of new laws;
- The Commission should periodically visit and host town halls with both the staff and inmates of the Federal Bureau of Prisons, and encourage The White House and Congress to do so as well. As was the case with former president Barak Obama and the Office of the Pardon Attorney. This would give the Commission the opportunity to relate to criminal defendants as human beings, and to witness the unforeseen conditions which accompany a sentence of imprisonment;
- The Commission should encourage and support the executive clemency power of the President to commute the lengthy, harsh, and disproportionate sentences of similarly situated defendants presented herein.

In closing, I pray that this Honorable Commission can relate to the aforementioned recommendations, and will continue to do everything within it's power to create the fair and just sentencing system which it envisions through it's current request for public comment. Thank you for your time and consideration of these request. "God-speed" and God bless!

Respectfully submitted,

Lorenzo L. Suttles

Lorenzo L. Suttles

6-12-24

Dear Honorable Mr. Judge Carlton Reeves,

I think the Commission should tackle the big picture issue on the Disparity between Methamphetamine Mixture and ICE. There has been study's already showing that there is no Meth in these days and time that is not 80% pure or purer. There has not been in along time. There is no difference in the Meth that your Major Drug Dealer or your local addict is getting. Everything is ICE. The Guidelines should sentence everybody under the Meth-Mixture guideline. Instead of giving higher sentences because your Meth is considered ICE.

Also, the guidelines should be changed so that if you just got a Two-point gun-enhancement you can still get the Two-points off your sentence guideline for having a Zero Criminal History Score. You should have to have had actuall possession of the gun to disqualify you. from getting the Two-points off. Constructive Possession of the gun should not keep you from getting the Two-points off you ~~Criminal History~~ Sentene Guideline. Thanks for taking the Time to. listen.

Sincerely

Jason Terrell

US Sentencing Commission
One Columbus Circle – NE
Suite 2-500
Washington, DC 20002-8002

ATTN: Public Affairs – Priorities Comment

Dear Commission,

Greetings. Your office recently sent out to the public a request for suggestions on how you can create a fairer and more just sentencing system. Thank you for your openness and your reception of ideas. The need is great in this area.

I am currently incarcerated in the BOP under a sentence of 45 years for non-violent, victimless crimes. This is my first time being in prison. The majority of my sentence is due to mandatory minimums and "stacked" §924(c) charges. I would receive 25 years less if sentenced today due to the First Step Act, but I'm ineligible for relief because it was not made retroactive. I was 31 years old when arrested and am now 52 years old (serving all 20 years with good conduct) with a scheduled release age of 70 years old.

Multiple crisis inflict the federal penal system (BOP). Among those are overcrowding, understaffing (with a reduction in recruitment), major budget cuts, institution disrepair, inability to provide medical care for an aging population, and many others. My suggestion of simple solutions to resolve these problems are:

- Make the First Step Act changes **retroactive** (not doing so has created disparities in those sentenced prior to the FSA's enactment), and/or
- Bring back **parole** [This would also create jobs (parole officer board members, probation officers, etc.) that would be funded by parolees through supervision fees (which requires employment from parolees, and additionally helps alleviate the communities' current deficiency in workers)].

Every prisoner has a family, so this affects many lives. If these solutions are outside your ability to implement, perhaps you could influence those who can. Any and all efforts will be greatly appreciated. Thank you kindly for your consideration.

Sincerely,

Gregory Truette

Gregory Truette [redacted]
[redacted]

Public Comment - 2024-2025 Proposed Priorities

Submitter:

Linda Vaughn

Topics:

Career Offender

Comments:

My daughter was sentenced under the career criminal guidelines this year. She is a nonviolent drug offender and being so qualified for the safety valve bringing her sentence to 70 months. She has 2 prior drug charges; the first from 2004, 17 years ago, that was used against her. This enhancement took her sentence to 262 months. My daughter struggles with addiction. In fact the only criminal history she has had stemmed from her addiction. The prosecution, probation, and lawyer were all caught off guard by this enhancement. They all agreed on a departure and gave my daughter 126 months. This is still 56 months over the normal sentence. I am asking you to please make amendments to career criminal. It over exaggerates a persons criminal history by maxing them out and the penalties are across the board too extreme. Research shows that most judges across all districts are departing from these stiff penalties. This is an outdated approach that should not apply across the board to all individuals, especially non violent offenders. Thank you

Submitted on: June 10, 2024

From: Sudhama Gibbons
Sent: Tuesday, June 25, 2024 4:55 PM
[redacted]
Subject: Reply to your plea for help on Sentencing Guidlines

Timothy Walker

6/24/2024

Honorable Judge Carlton W. Reeves
Chair, U.S. Sentencing Commission

RE: Reply to your plea for help

Dear Judge Reeves,

The following information and suggestions are in response to your June 5, 2024 pleas for help in re to what can you do this year and the years to come to make the sentencing guidelines better. I pray that what I have said in my reply helps you help me and the thousands of other Career Offenders trapped in the federal system.

Title 4B1.1 is in desperate need of a complete overhaul to make the sentencing enhancement more justly. The United States Supreme Court for the last Twenty-plus years has overhauled the Armed Career Criminal Act ("ACCA") with the following favorable decisions: *Shepard v. U.S.*, 125 S.ct. 1254 (2005); *Begay v. U.S.*, 553 U.S. 137 (2008); *Chambers v. U.S.*, 129 S. ct. 687 (2009); *Curtis Johnson* v. U.S. 130 S. ct. 1265 (2010); *Descamps v. U.S.*, 133 S. ct. 2276 (2013); *Johnson v. U.S.*, 135 S. ct. 2251 (2015); *Mathis v. U.S.*, 136 S. ct. 2243 (2016); *Sessions v. Dimaya,* 138 S. ct. 1204 (2018); *U.S. v. Davis*, 139 S. ct. 2319 (2019), etc. Unfortunately, no favorable decisions handed down by the Supreme Court for career offenders.

For the last Thirty-plus years the U.S. Sentencing Commission has not amended the guidelines in favor of the career offenders. Amendments 750, 706, 782, 798, and 821, all excluded the career offender. To add insult to injury, Amendment 798, which revised 4B1.2, eliminating the residual clause to confirm with the U.S. Supreme Court decision in Johnson of 2015 was not made retroactively applicable to Career Offenders.

Previous Sentencing Commission panels and other research agencies (e.g., Quick Facts) have studied the Career Offender data and determined that most career offenders have non-violent qualifying offenses (i.e. Drug convictions). It has also been studied by the sentencing commission and other agencies that the career offender enhancement is racially bias.

Some states label non-violent crimes as felonies (e.g. Philadlphia PA), which classifies pickpocketing as a robbery. Under 4B1.1 or 4B1.2, robbery is listed as a qualifying offense to receive the career offender enhancement. Justice Sotomayor acknowledged that pickpocketing is not a crime of violence. See Stokeling v. U.S., 139 S.ct. 544.

In certain career offender cases a defendant can be found of having two qualifying convictions and receive the career offender enhancement, however, the defendant may have never even went to prison for either conviction. The defendant could have received probation on both convictions.

In some career offender cases a defendant career offender designation did not produce his offense level when his sentencing range was calculated, instead the defendant was sentenced pursuant to 2D1.1 (the drug table). However, the career offender designation still does not allow him to qualify for a sentence reduction under amendment 782 (drug minus two), because the defendant automatically goes to the career offender table if the defendants new 2D1.1 offense level is lower than the career offender offense level.

Some courts have held in career offender cases, only the offense level matters not the defendants original Criminal History Category. See U.S. v. Walker, Case no. 5:19HC02071 (E.D. N.C. 2019).

I would like to suggest that 4B1.1 should be revised to match section 401 of the First Step Act (FSA). 401 of the FSA replaced “felony drug offense” with “serious drug offense”. Under the statute as now written, a “serious drug felony” is an offense for which “the offender served a term of imprisonment of more than 12 months.” See First Step Act of 2018, Pub. L. No. 115-391 132, 401(a) (1) (57), 132 stat 5194, 5220 (2019).

The same should be applied to some of the enumerated offenses in 4B1.2. See 802 (58). Judge Reeves if you decide to adopt this of any other amendments please make them retroactive.

An overhaul is very much needed to this antiquated guideline enhancement. The time to act is now, so that the years come the defendants will have a fair shake. Career offenders have been hearing about reform, however none has come. Even this sentencing panel has put off reforming career offender enhancement. Your plea for help seems like you are ready to put the peddle to the medal. This gives me and the thousands of other career offenders hope that retroactive change will come.

Your time and patience in reading my reply is very, very much appreciated.

Sincerely,

Timothy Walker

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