



**STATEMENT OF KRISTINE LUCIUS, EXECUTIVE VICE PRESIDENT FOR POLICY
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS**

**HEARING ON “PROPOSED AMENDMENT: FIRST OFFENDERS/ALTERNATIVES TO
INCARCERATION”**

UNITED STATES SENTENCING COMMISSION

March 14, 2018

Judge William H. Pryor, and Members of the U.S. Sentencing Commission: I am Kristine Lucius, Executive Vice President for Policy for The Leadership Conference on Civil and Human Rights. The Leadership Conference is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. Thank you for the opportunity to testify about the Proposed Amendment to the Commission’s Sentencing Guidelines regarding “first offenders” and alternatives to incarceration.

Today’s hearing addresses a crucial problem within the United States criminal justice system. Over the past 40 years, the U.S. incarceration rate has ballooned to a level we can no longer maintain. Despite accounting for less than five percent of the world’s total population,ⁱ the U.S. incarcerates more than 20 percent of people imprisoned worldwide.ⁱⁱ With over 2.2 million people currently incarcerated, the U.S. imprisons more people than any other country in the world.ⁱⁱⁱ This is *not* a record we should be proud of.

The explosion of the American prison population has had a disproportionate impact on communities of color. African Americans make up 13.3 percent of the U.S. population^{iv}—but nearly 38 percent of the federal prison population.^v Hispanics account for 17.8 percent of the U.S. population^{vi}—but nearly 33 percent of federal inmates.^{vii} Prison facilities at all security levels are operating over capacity as a result of the overwhelming influx of people, disproportionately people of color, being funneled into the system.^{viii} In fact, the most recent data shows the federal Bureau of Prisons (BOP) is currently operating at between 14 and 24 percent over its intended capacity, depending on prison security level.^{ix} Overcrowding threatens prison security, risks the safety of prisoners and guards, and leads to potentially dangerous and unhealthy living conditions.^x It also undermines the BOP’s capacity to facilitate vital rehabilitation programs that help people successfully reenter society and reduce their likelihood of recidivating upon release.^{xi} Furthermore, billions of dollars in taxpayer money have been spent over the past two decades to accommodate the growing number of inmates, whereas much of that money can – and should – be returned to taxpayers or reinvested in vital reentry programming.^{xii}

The Commission’s proposed amendments offer a step forward toward realistically addressing these issues. The proposed amendments expand the availability of sentencing alternatives to more individuals with low level offenses and implement changes that comport with the findings of the Commission’s

comprehensive multi-year study of recidivism.^{xiii} The Leadership Conference joins the widespread, nonpartisan support of the Commission’s efforts to minimize costs, reduce overcrowding, and promote the effectiveness of reentry programs, and offers this testimony to complement the Commission’s proposed amendments on first offenders and sentencing alternatives.

Recommendations Regarding Part A First Offenders

First offenders pose a substantially lower threat of recidivism so it makes good sense to focus on this category for amendments to reduce costs, reduce overcrowding, and promote the effectiveness of reentry program.^{xiv} Expanding the availability of alternatives to incarceration for low-level first offenders appropriately balances the Commission’s responsibility to guide courts to sentences that are “sufficient, but not greater than necessary” and that “afford adequate deterrence to criminal conduct.”^{xv}

We urge the Commission to adopt a broader definition of “first offenders” than Option 1 or Option 2 as proposed^{xvi}, to include any offender in Category I (one or fewer criminal history points). While offenders with zero criminal history points have the lowest recidivism rates, the recidivism rate for individuals with one criminal history point are similarly low.^{xvii} The Commission’s Recidivism Study showed people with zero or one criminal history points were far less likely to offend again; specifically, 33.8 percent of people with zero or one criminal history points were rearrested within eight years of release – compared to 56 percent of people with two criminal history points.^{xviii} The reconviction rate for offenders with one or fewer criminal history points is even lower; only 19.9 percent of those offenders are reconvicted in eight years. By contrast, offenders with two or three criminal history points are reconvicted at a rate of 33.0 percent.^{xix} The drastically lower recidivism and conviction rates of offenders with one or fewer criminal history points show that they are deserving of the “first offender” relief that the Commission is proposing.

The Commission already groups offenders with one and zero criminal history points together in “Category I” in the Sentencing Table for a reason: Chapter 4 makes clear that the differences between those with one or zero criminal history points is minimal. Under §4A1.1, an offender will receive more than one criminal history point if he has failed to satisfy past commitments to the state, has been convicted of a violent crime, has more than one unexcluded conviction within the past ten years, or has a prior conviction that resulted in a 60-day (or more) term of imprisonment.^{xx} The label “first offender” should not stand in the way of making these offenders eligible for relief under proposed §4C1.1, because the same could be said of an offender who has zero criminal history points because of convictions that do not yield points under Chapter 4. For these reasons, making offenders with one criminal history point eligible for the same “first offender” relief as those with zero criminal history points is consistent with the Commission’s practice of treating these two cohorts as part of one criminal history category.

Including Category I offenders with one criminal history point as a “first offender” could also have a significant impact on prison overcrowding. Category I offenders currently make up the largest group of people who are incarcerated, accounting for 31.7 percent of the population.^{xxi} Expanding the definition of “first offender” to include all Category I offenders would give judges the tools to provide non-incarceration alternatives to up to one third of the federal prison population.

Second, we support the Commission's proposed amendment to §4C1.1 recommending that first offenders with an offense level under 16 (as determined under Chapters 2 and 3) receive a two-level reduction, and all other first offenders receive a one-level reduction. A two-level reduction in offense level is better than a one-level reduction because it better serves the Commission's stated goals of reducing costs and overcrowding. Providing judges with sentencing length flexibility will reduce the overcrowded federal prison population. Furthermore, contrary to the claims made by the National Association of Assistant United States Attorneys (NAAUSA) and the U.S. Department of Justice (DOJ), a two-level reduction will not risk a decrease in the deterrent effect of the law,^{xxii} because the length of a sentence has no effect on the likelihood of recidivism, as evidenced by the Recidivism Study.^{xxiii} While we support the Commission's proposed two level reduction, we would also encourage the Commission to go a step farther and extend the offense level reduction along the full offense level scale and apply multiple offense level reductions to all first offenders sentenced to 24 months or less.^{xxiv}

Third, we recommend that the Commission create a rebuttable presumption in §5C1.1 that "first offenders" who have a guideline range in Zones A or B should ordinarily receive a sentence other than imprisonment.^{xxv} This presumption would substantially advance the Commission's goals to "provide the defendant...correctional treatment in the most effective manner"^{xxvi} and to reduce costs, reduce overcrowding, and promote effectiveness of reentry programs.^{xxvii} As the Commission determined in the Recidivism Study, Category I offenders are only rearrested at a rate of 33.8 percent in the eight years after their release (although this statistic covers individuals that are in Zone D and not just current Zones A, B and C, or Zones A and B, post consolidation).^{xxviii} The Recidivism Study further found that individuals who received probationary sentences had significantly lower recidivism rates (31.5 percent) than individuals who received an incarceration sentence (52.5 percent).^{xxix} Keeping these first offenders out of prison will allow them to keep their employment and maintain their relationships with their family and community, both of which have been shown to decrease the likelihood of recidivism.^{xxx}

NAAUSA and the DOJ oppose the Commission's proposal, arguing that judges already have discretion under the current guidelines to impose sentence alternatives and vary downward under some circumstances. However, the Commission itself found that judges have been exercising that discretion *less and less* over the past three decades.^{xxxi} Our recommendations would increase access to alternatives to incarceration (i.e. probation) for a greater number of individuals and provide judges with additional tools to better tailor a sentence to the circumstances at hand. The resulting impact – enhanced judicial discretion, more appropriate sentences, reduced prison overcrowding, and lower cost to taxpayers – speak in strong favor of adopting these amendments. Further, NAAUSA and the DOJ raise concerns that the proposed amendments will undermine the purpose of deterrence by resulting in shorter or alternative sentences for certain offenders, such as "child molesters,"^{xxxii} "robbers,"^{xxxiii} and "straw purchasers" (people who supply firearms to individuals with felony convictions),^{xxxiv} as well as individuals convicted of white-collar and public corruption offenses.^{xxxv,xxxvi} The DOJ states that it "is concerned that the resulting sentences will be insufficient to provide even a modicum of deterrence,"^{xxxvii} and NAAUSA claims that the changes "would effectively result in no specific or general deterrence of these precursor offenses to crimes of violence" and would "unnecessarily weaken the deterrent value of the Sentencing Guidelines for offenders who are already subject to sentencing at the lowest range available for their offense conduct."^{xxxviii} However, neither NAAUSA nor DOJ provided any statistical data in their comments demonstrating that the changes would actually have the sort of devastating impact they expect

will occur. Without further proof, it cannot be concluded that the changes will inevitably have a negative impact on deterring such crimes. It is also important to note that the current makeup of federal prisoners is overwhelmingly (nearly 50 percent), individuals incarcerated for drug offenses.^{xxxix} Furthermore, 45 percent of these individuals fall within the lowest two criminal history categories, having minimal conviction history and more than a quarter have no prior criminal history.^{xl} The proposed changes will likely have the most impact on people with zero to minimal conviction history, including those convicted of low-level drug offenses, rather than those convicted of offenses that are of particular concern to NAAUSA and DOJ.

Furthermore, in §5C1.1, the Commission specifically addresses several of NAAUSA and the DOJ's concerns already under each of its proposed options, explaining that incarceration would still be available for first offenders if their current offense is a crime of violence or involves violence, threats of violence, or possession of a firearm.^{xli}

Recommendations Regarding Part B Alternatives to Incarceration

Providing alternatives to imprisonment enables offenders to remain productive in society while serving out their sentences. For example, probation and supervised release may enable a defendant to continue working and to receive better medical or psychiatric monitoring, if needed.^{xlii} In the Recidivism Study, the Commission notes that longer prison sentences neither reduce crime nor increase public safety.^{xliii}

In particular, creating flexibility within the new Zone B would ensure that prison capacity is reduced, that sentencing disparities are curtailed, and that offenders are rehabilitated to become productive members of society. To allow greater sentencing flexibility for offenders whose guidelines ranges are currently in Zone C, we encourage the Commission to consolidate Zones B and C without exempting white-collar or public corruption offenders and refrain from providing additional guidelines for former Zone C offenders.

We support the Commission's proposal to consolidate Zones B and C of the Sentencing Table to create a new, expanded Zone B.^{xliv} Consolidating the two zones would create more judicial discretion by increasing the number of offenders eligible for non-incarceration sentences. While the DOJ claims it is "aware of no reason why it is necessary, once again, to expand Zones B and C so that more defendants are eligible for non-prison sentences,"^{xlv} the reason is clear: this flexibility would help reduce the federal prison population, curtail sentencing disparities, and rehabilitate individuals with lower-level offenses.

We believe that the consolidation of Zones B and C is also appropriate because it would achieve several objectives. First, sentencing flexibility would reduce the overcrowded federal prison population.^{xlvi} Second, providing individuals who currently fall into Zone C with alternative sentencing options would help reduce racial and economic disparities in sentencing. Currently, a disproportionate number of inmates are African-American, Hispanic, and low-income.^{xlvii} Finally, individuals who currently fall into Zone C would have rehabilitative opportunities, which could reduce the likelihood of recidivism.

In addition, the Commission should not exempt from consolidation current Zone C offenders convicted of white-collar and other public corruption offenses. Racial and ethnic disparities exist even within white-

collar sentencing. One study found that African-American and Hispanic white-collar defendants receive longer prison sentences than whites because white offenders are more often able to pay the fine to reduce their time in prison, whereas Hispanic and African-American defendants are usually unable to do so.^{xlviii} Moreover, individuals who did not graduate high school or who are not U.S. citizens receive longer prison sentences,^{xlix} an outcome that reinforces the racial disparity. Overall, the study found that African Americans and Hispanics, on average, receive 10 percent longer sentences than white defendants.¹ Through consolidation, racial and ethnic minorities who commit white-collar and public corruption crimes would have sentencing alternatives otherwise not available to them in Zone C.

Finally, we urge the Commission to refrain from providing additional guidelines for any new Zone B offenders (i.e. those who are currently in Zone C). Establishing such guidance would run counter to the Commission's proposal to consolidate Zones B and C. Accordingly, the same reasons that argue in favor of zone consolidation argue against the creation of such restrictive guidance.

Conclusion

We remain committed to working with the Commission to create more comprehensive and effective sentencing guidelines that operate to reduce incarceration rates for individuals with low-level offenses and promote rehabilitation. We believe that the proposed priorities discussed above represent a step toward establishing fair and effective policies, which are vital to ensuring the effective administration of our country's justice system. The U.S. Sentencing Commission is integral to addressing the widespread disparity that exists in federal sentencing. These changes represent an opportunity to mitigate excessively punitive provisions that have not only promoted racial disparities in sentencing, but have also sustained a costly explosion in the number of individuals in the federal penal system. We stand ready to work with you to ensure that the voices of the civil and human rights community are heard in this important, ongoing national conversation. Thank you for your dedication and commitment to these critical issues, and thank you for the opportunity to speak before you on behalf of The Leadership Conference and the communities we represent.

ⁱ See "U.S. and World Population Clock." *United States Census Bureau*. February 27, 2018.

<https://www.census.gov/popclock/>.

ⁱⁱ See Walmsley, Roy. "World Prison Population List." *World Prison Brief*. 11th Edition. Pg. 2.

http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf.

ⁱⁱⁱ See "Trends in U.S. Corrections." *The Sentencing Project*. June 2017. Pg. 2. <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

^{iv} See "United States QuickFacts." *United States Census Bureau*. Accessed March 2, 2018.

<https://www.census.gov/quickfacts/table/PST045215/00>.

^v See "Statistics: Inmate Race." *Federal Bureau of Prisons*. Last Updated January 27, 2018.

https://www.bop.gov/about/statistics/statistics_inmate_race.jsp.

^{vi} See "United States QuickFacts." *U.S. Census Bureau*. Accessed March 2, 2018.

<https://www.census.gov/quickfacts/table/PST045215/00>.

^{vii} See "Statistics: Inmate Ethnicity." *Federal Bureau of Prisons*. Last Updated January 27, 2018.

https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp.

^{viii} See "FY 2017 Performance Budget, Congressional Submission, Federal Prison System, Buildings and Facilities." *U.S. Department of Justice*. Pgs. 3-4. <https://www.justice.gov/jmd/file/821371/download>.

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- ^{ix} See "U.S. Department of Justice FY 2019 Performance Budget Congressional Submission, Federal Prison System, Buildings and Facilities." *U.S. Department of Justice*. December 28, 2017. Pg. 2. <https://www.justice.gov/jmd/page/file/1034401/download>.
- ^x *Ibid.* Pgs. 2-4.
- ^{xi} *Ibid.* Pg. 2.
- ^{xii} According to the Pew Center on the States, state and federal spending on corrections has grown 400 percent over the past 20 years, from about \$12 billion to about \$60 billion.
- ^{xiii} KIM STEVEN HUNT, U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW, 19 (2016) [hereinafter *Recidivism Study*].
- ^{xiv} Final Priorities for Amendment Cycle, 81 Fed. Reg. 58004 (5)(B) (Aug. 24, 2016).
- ^{xv} See 28 U.S.C. § 991 (2008) (referencing the purposes of sentencing established in 18 U.S.C. § 3553(a)).
- ^{xvi} See "Proposed Amendments to the Sentencing Guidelines." *U.S. Sentencing Commission*. Aug. 25, 2017. https://www.uscc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20170824_rf_proposed.pdf.
- ^{xvii} KIM STEVEN HUNT, U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW, 19 (2016) [hereinafter *Recidivism Study*].
- ^{xviii} *Id.* The study also reveals a clear distinction between offenders with one criminal history point, 46.9 percent of whom are rearrested within eight years of release, as compared with 56.0 percent of those with two criminal history points.
- ^{xix} *Id.* at A-2 (2016). Note that there is also a substantial difference between the reconviction rates of offenders with one criminal history point (28.8%) and those with two criminal history points (34.5%).
- ^{xx} See U.S. SENTENCING GUIDELINES MANUAL §4A1.1 (U.S. SENTENCING COMM'N 2016).
- ^{xxi} See "Quick Facts, Federal Offenders in Prison – February 2017." *U.S. Sentencing Commission*. 2016. Pg. 1. https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_Feb2017.pdf.
- ^{xxii} Final Priorities for Amendment Cycle, 81 Fed. Reg. 58004 (5)(B) (Aug. 24, 2016).
- ^{xxiii} *Recidivism Study*, *supra* note 5, at 22.
- ^{xxiv} See "Public Comment on USSC's "First Offenders/ Alternatives to Incarceration Proposed Amendment." *The Sentencing Project*. Oct. 11, 2017. <https://www.sentencingproject.org/publications/public-comment-usscs-first-offendersalternatives-incarceration-proposed-amendment/>.
- ^{xxv} See "Proposed Amendments to the Sentencing Guidelines." *U.S. Sentencing Commission*. Aug. 25, 2017. https://www.uscc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20170824_rf_proposed.pdf.
- ^{xxvi} See 18 U.S.C. 3553(a)(2)(D).
- ^{xxvii} See Final Priorities for Amendment Cycle, 81 Fed. Reg. 58004 (5)(B) (Aug. 24, 2016).
- ^{xxviii} *Recidivism Study*, *supra* note 5, at 19.
- ^{xxix} See Hunt, Kim Steven and Dumville, Robert. "Recidivism Among Federal Offenders: A Comprehensive Overview." *U.S. Sentencing Commission*. March 2016. Pg. 22. https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.
- ^{xxx} See M. T. Berg & B. M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUSTICE QUARTERLY 383 (2011).
- ^{xxxi} See "Federal Alternative-to-Incarceration Court Programs." *U.S. Sentencing Commission*. September 2017. Pg. 1. https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf. See also "Alternative Sentencing in the Federal Criminal Justice System." *U.S. Sentencing Commission*. May 2015. Pg. 1. https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf.
- ^{xxxii} See Bolitho, Zachary C. "Public Comment on Proposed Amendment to Federal Sentencing Guidelines." *U.S. Department of Justice*. October 10, 2017. Pg. 12. <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-comment/20171010/DOJ.pdf>.
- ^{xxxiii} *Ibid.*
- ^{xxxiv} See Leiser, Lawrence. "Public Comment on Proposed Amendment to Federal Sentencing Guidelines." *National Association of Assistant United States Attorneys*. October 10, 2017. Pg. 2. <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-comment/20171010/NAAUSA.pdf>. See also Bolitho, Zachary C. "Public Comment on Proposed Amendment to Federal Sentencing Guidelines." *U.S.*

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- Department of Justice*. October 10, 2017. Pgs. 12-13. <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20171010/DOJ.pdf>.
- ^{xxxv} See Bolitho, Zachary C. “Public Comment on Proposed Amendments to the Federal Sentencing Guidelines.” *U.S. Department of Justice*. October 10, 2017. Pgs. 13-14. <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20171010/DOJ.pdf>.
- ^{xxxvi} See Leiser, Lawrence. “Public Comment on Proposed Amendments to the Federal Sentencing Guidelines.” *U.S. Department of Justice*. October 10, 2017. Pg. 2. <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20171010/NAAUSA.pdf>.
- ^{xxxvii} See Bolitho, Zachary C. “Public Comment on Proposed Amendments to the Federal Sentencing Guidelines.” *U.S. Department of Justice*. October 10, 2017. Pg. 13. <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20171010/DOJ.pdf>.
- ^{xxxviii} See Leiser, Lawrence. “Public Comment on Proposed Amendments to the Federal Sentencing Guidelines.” *U.S. Department of Justice*. October 10, 2017. Pg. 2. <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20171010/NAAUSA.pdf>.
- ^{xxxix} See “Inmate Statistics: Offenses.” Federal Bureau of Prisons. Accessed March 5, 2018. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.
- ^{xl} See “Who Gets Time for Federal Drug Offenses? Data Trends and Opportunities for Reform.” *Urban Institute*. Nov. 12, 2015. <https://www.urban.org/sites/default/files/publication/72971/2000513-Who-Gets-Time-for-Federal-Drug-Offenses-Data-Trends-and-Opportunities-for-Reform.pdf>.
- ^{xli} See “Proposed Amendments to the Sentencing Guidelines.” *U.S. Sentencing Commission*. December 19, 2016. Pg. 8. https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20161219_rf_proposed.pdf.
- ^{xlii} See “Chapter 3: Intermittent Confinement (Probation and Supervised Release Conditions).” *U.S. Courts*. <http://www.uscourts.gov/services-forms/intermittent-confinement-probation-supervised-release-conditions>.
- ^{xliii} See Hunt, Kim Steven and Dumville, Robert. “Recidivism Among Federal Offenders: A Comprehensive Overview.” *U.S. Sentencing Commission*. March 2016. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.
- ^{xliiv} Additionally, Zone B would encompass all guideline ranges that have a minimum of at least one month imprisonment but not more than twelve months. Zone C would disappear, and Zone D would remain labeled as such. See *Sentencing Guidelines for United States Courts*. 81 Fed. Reg. at 92006.
- ^{xliv} See Bolitho, Zachary C. “Public Comment on Proposed Amendment to Federal Sentencing Guidelines.” *U.S. Department of Justice*. October 10, 2017. Pg. 16. <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20171010/DOJ.pdf>.
- ^{xlvi} As previously mentioned, the U.S. imprisons more people than any industrialized nation, and federal prisons are currently operating between 14 and 24 percent over capacity.
- ^{xlvii} See Inouye, Shin. “Civil and Human Rights Coalition Commends Bipartisan Action on Sentencing Reform.” *The Leadership Conference on Civil and Human Rights*. January 30, 2014. <https://civilrights.org/civil-and-human-rights-coalition-commends-bipartisan-action-on-sentencing-reform/>.
- ^{xlviii} See Schanzenbach, Max and Yaeger, Michael L. “Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity.” *96 Journal of Criminal Law and Criminology* 757. 2006. Pg. 764.
- ^{xlix} *Ibid.* Pg. 781.
- ¹ *Ibid.*