

**Written Testimony of Catherine Ševčenko,
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to
The United States Sentencing Commission**

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Introduction

The National Council for Incarcerated & Formerly Incarcerated Women and Girls began in the prison yard at FCI Danbury. A group of women who believed that policy makers instituting criminal justice reform must hear the voices of formerly incarcerated people decided to start a non-profit. More than a decade later, The National Council is led by formerly incarcerated women – those who understand the harm the current system inflicts and have the expertise to create an alternative system that recognizes each person’s humanity. Today I am their messenger.

The National Council’s mission is simple: end the incarceration of women and girls. This is long-term work which requires stopping the flow of women into prisons, shortening their sentences, and making sure that once they come home, they never go back. Through our national “Reimagining Communities” project,¹ we are supporting community organizing, economic development, and participatory budgeting to expand opportunities for those in low-income communities to keep people out of the criminal legal system. We have also passed Primary Caretaker legislation in several states, mandating that judges consider alternate sanctions for primary caretakers of children – generally women – and provide a written justification if they order

¹ <https://www.nationalcouncil.us/reimagining-communities/>

incarceration.² We are addressing conditions of confinement for those still living inside prisons. We support women seeking compassionate release and advocate for clemency. Finally, we help women get back on their feet when they are released and support them throughout their reentry.

Sentencing Policy Must Balance Public Safety and the Costs of Incarceration

The National Council is an abolitionist organization. We look at incarceration through the lens of harm. Fulfilling the purposes of sentencing — punishment, deterrence, protecting the community, and rehabilitation — is expensive. Incarcerating people, especially women, exacts a high price. For FY 2022, the Federal Bureau of Prisons (BOP) calculated that it cost \$42,672 (\$116.91 per day) to house a single adult in custody.³ The Prison Policy Initiative assessed federal spending on prisons alone to be \$81 billion in 2017.⁴ The BOP currently has a budget of \$8.3 billion.⁵ There are also less visible losses: removal of taxpayers from the community and decrease of family income. According to a survey by the Ella Baker Center, roughly 65% of families with a loved one in prison experience financial hardship. The average debt due to court-related fines

² Human Impact Partners, *Keeping Kids and Parents Together: A Healthier Approach to Sentencing in MA, TN, LA*, <https://humanimpact.org/hiprojects/primary-caretakers/>

³ 88 FR 65405.

⁴ Prison Policy Initiative, *Economics of incarceration*, https://www.prisonpolicy.org/research/economics_of_incarceration/

⁵ Walter Pavlo, *Bureau of Prisons: 2024 Year in Review And Outlook for 2025*, Forbes (Dec. 28, 2024), <https://www.forbes.com/sites/walterpavlo/2024/12/28/bureau-of-prisons-2024-year-in-review-and-outlook-for-2025/>

and fees is over \$13,000.⁶ The Prison Policy Initiative estimated that families spend \$2.9 billion per year on phone and commissary costs, causing 1 in 3 families to go into debt.⁷

Financial problems snowball quickly. People who cannot make bail due to poverty are likely to be fired as they sit in jail despite being presumed innocent. They work for pennies during incarceration while faced with inflated prices for commissary and phone calls home. After release, they must turn over a large portion of their wages to the halfway house, finally facing costs for supervised release.⁸ These calculations do not take into consideration the human toll such as broken marriages and trauma to family members, especially children.

One other critical factor regarding drug crimes is often overlooked: anyone serving a sentence for conspiracy is, by definition, being punished for things that they did not do. It is common to be sentenced to decades in prison for drug conspiracy without ever having touched an illegal substance. Another variation is “ghost dope,” in which an informant claims that the defendant handled drugs that in reality never existed at all. Put the financial harm together with the reality that people are incarcerated for the actions of others, and the harm caused by conspiracy law comes into sharp focus.

⁶ Ella Baker Center, *Who Pays? The True Cost of Incarceration on Families*, (Sept. 2015), <https://ellabakercenter.org/wp-content/uploads/2022/09/Who-Pays-FINAL.pdf>

⁷ Prison Policy Initiative, *Economics of incarceration*, https://www.prisonpolicy.org/research/economics_of_incarceration/

⁸ Eric Seligman and Brian Nam-Sonenstein, *10 ways that mass incarceration is an engine of economic injustice*, Prison Policy Initiative (Aug. 27, 2024) https://www.prisonpolicy.org/blog/2024/08/27/economic_justice/

U.S. Sentencing Commission Should Cap Base Offense Levels at 30 — or less.

The U.S. Sentencing Commission’s proposal to lower prison sentences for drug charges is an important step towards reducing the societal cost of the War on Drugs. Although reducing sentences for possession of large quantities of drugs is a welcome initiative, The National Council urges the Commission to continue lowering sentences beyond Base Offense Level 30. As important as it is to shorten sentences that stretch into decades, it is also crucial to reduce the number of people going to prison for small amounts of drugs. The consequences of incarceration, even for a short time, can destroy a person’s earning potential, disrupt family ties, and leave the person no choice but to recidivate.⁹ A 2018 study found that the unemployment rate for formerly incarcerated people was over 27% — higher than during the Great Depression.¹⁰

Given the costs of incarceration, reducing drug amounts and the sentences associated with them down to the lowest levels of the Sentencing Table would be very beneficial. It would save the federal government a significant amount of money and reduce family debt. It would also ameliorate the generational trauma of children being separated from their parents. A reduction in the prison population would also help ease the staffing shortage that the BOP has complained about for years.¹¹ It would answer well-founded concerns about augmentation, allow the BOP to

⁹ Lucius Couloute and Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, Prison Policy Initiative (Jul. 2018) <https://www.prisonpolicy.org/reports/outofwork.html>

¹⁰ *Id.*

¹¹ Statement of Kathleen Toomey, The Subcommittee on Commerce, Justice, Science, and Related Agencies, at 1-2 (Feb. 25, 2025), <https://docs.house.gov/meetings/AP/AP19/20250226/117920/HHRG-119-AP19-Wstate-ToomeyK-20250226.pdf>; U.S. Department of Justice Office of the Inspector General, *Challenge*

continue incentive pay which they have recently stopped due to budget cuts, and reallocate money to desperately needed prison maintenance.

Allowing the possibility of a non-carceral sentence up to base offense level 12 would not be a major shift in policy. For example, that base level covers up to 5 kg of marijuana. 25 states and D.C. have legalized growing a limited number of marijuana plants, with the average being 6 plants per adult or household.¹² Each marijuana plant can produce roughly 1 pound of finished product at the end of its life.¹³ The lifecycle of the plants allows for at least 2 growing seasons per year indoors, which means that home growers could feasibly produce 12 pounds or 5.4 kilograms of marijuana per year for personal use, slightly more than the current threshold for a sentence of 10-16 months.¹⁴ Giving judges the *option* of a non-carceral sentence for relatively small amounts of contraband will allow the court to take the individual's circumstances into account and balance the needs of the defendant, their family, and society at large.

1: The Ongoing Crisis Facing the Federal Corrections System,
<https://oig.justice.gov/tmpec/challenge-1>

¹² Wikipedia, *Legality of cannabis by U.S. jurisdiction*, Accessed March 1, 2025.
https://en.wikipedia.org/wiki/Legality_of_cannabis_by_U.S._jurisdiction

¹³ Alex, *How much weed can you get from one plant?* The Budgrower (Oct. 13, 2022)
https://thebudgrower.com/how-much-weed-can-you-get-from-one-plant/?srsId=AfmBOooWfTCHVdsgB2tpz1M_R3zZZhfmz0clawiGJPVPSDv1mxoCJM68

¹⁴ Of course, other controlled substances listed in the Drug Sentencing Table have not been decriminalized, but the amounts of all the drugs listed are comparable and thus considered small.

Reducing Base Levels for Those Convicted only of Conspiracy is Particularly Urgent

Reducing drug amounts for base levels below 30 would mitigate the harm that conspiracy convictions have caused for decades and finally reflect each person's culpability accurately.¹⁵ In order to do this, The Commission should also consider adding a third category to the existent minor and minimal participant: bystander. The proposed list of low-level functions that determine the level of participation in the conspiracy assume affirmative actions that further the drug operation. This approach does not consider the lack of culpability of relatives and significant others who get caught up in a drug operation simply through proximity. These people may not be entirely blameless: perhaps they have ignored the activity around them or benefitted from the ill-gotten gains of a partner or family member. But the fact remains that they have literally done nothing.

This phenomenon even has a name: the Girlfriend Problem.¹⁶ It has been an overlooked issue for decades.¹⁷ As then ACLU Legislative Counsel Jesslyn McCurdy explained: "In the war on drugs, an unintended casualty are women and their families. . . . Current laws disproportionately hurt those whose only crime was to be in the wrong place at the wrong time - mainly women."

¹⁵ "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." *Gall v. United States*, 552 U.S. 38, 52, 128 S. Ct. 586, 598, 169 L. Ed. 2d 445 (2007) (quotation omitted).

¹⁶ Matt Alston, *Mandatory Minimum Sentencing Might Have a 'Girlfriend Problem,'* *Rolling Stone* (Nov. 18, 2018) <https://www.rollingstone.com/culture/culture-features/mandatory-minimum-sentencing-girlfriend-problem-757690/>

¹⁷ ACLU Press Release, "*Girlfriend Problem*" *Harms Women and Children, Impacted Families Call Mandatory Sentences Unfair and Destructive*, ACLU (Jun. 14, 2005), <https://www.aclu.org/press-releases/girlfriend-problem-harms-women-and-children-impacted-families-call-mandatory>

Because women have no information to exchange for a lenient sentence, they end up locked up for harsh mandatory minimum sentences that commonly stretch 20 years and beyond.

The Girlfriend Problem is really an entire family problem. Mothers, sisters, and children can also be charged for the actions of their relatives. Defendants can also be coerced into plea deals because prosecutors can credibly threaten to indict innocent relatives under broad sweeping conspiracy laws. One National Council member was told that if she didn't plead guilty, they would indict her sister because her name was on the utility bill of the apartment where drugs were found.¹⁸

The National Council started surveying incarcerated women who had conspiracy charges in 2018. Since then, we have collected more than 350 surveys, of which 133 come from women with drug conspiracy charges. Of that group, 20 or 15%, encountered the Girlfriend Problem. Seven of them reported that prosecutors pressured them to plead guilty by threatening to indict other relatives, including children. Nearly all (16) said they were not given leniency because they had no information to trade for a lower sentence. Women who were involved in other types of conspiracies also reported confronting both aspects of the Girlfriend Problem: pleading guilty to protect loved ones or receiving a lengthy sentence because they were not directly involved and thus had no information to share.

After many years of naming this problem, it is time to start solving it. In 2023, Representatives Kamlager-Dove and Mace introduced legislation in which Title IV was called "Fixing the Girlfriend Problem." It would have limited incarceration for associates with no direct

¹⁸ Conspiracy Survey #32, available from the author.

involvement in the drug conspiracy to five years.¹⁹ It also would have allowed departure from the mandatory minimum if lack of cooperation was based on fear of bodily injury or ignorance.²⁰

Even if The Commission opts to limit its base level offense reforms to levels 38 to 32 for defendants who personally engage illegal drug activity, there is no reason not to reduce all the base levels for those who are only convicted of drug conspiracy. The National Council believes that being related to, or loving, someone who deals drugs should not result in a prison sentence. The way to solve the Girlfriend Problem within the existing Guidelines framework is to lengthen the guideline sentencing range back to zero for larger amounts of drugs. By keeping the low end of the guideline range zero until level 14, the harm caused by the broad reach of conspiracy laws would be mitigated. It would also reduce the injustices caused by false testimony and “ghost dope.”

The Commission Should Make Eligibility for the Base Level Reduction as Flexible as Possible and Remove the Firearm Exemption

Section §2D1.1(b)(17) lists specific offense characteristics which attempt to capture “low-level trafficking functions” which would result in base offense level decreases. As currently drafted, the section does not capture the full range of activities that trigger liability for participation in a drug conspiracy. For instance, The National Council has clients who were convicted of drug conspiracy charges for sending money orders or picking up a new car for a drug dealer. Neither activity is currently listed in the draft amendment. Procuring new cars or remitting payments are

¹⁹ *Women in Criminal Justice Reform Act* HR 2954 118th Congress, introduced April 27, 2023 <https://www.congress.gov/bill/118th-congress/house-bill/2954/text#toc-HF74928A025384BD18ED478A529FD2C41>

²⁰ *Id.* Sec. 402(2).

nevertheless typical activities for a drug organization, but they do not involve the sale or handling of controlled substances. Accordingly, The National Council believes that the Commission should add a catch-all provision if it opts for Option 1, i.e. a definitive list of qualifying actions. The catch-all would state that any other activity of “a similarly administrative nature” would fall under the provision. Alternatively, Option 2, which provides examples of activities that would be considered low-level trafficking functions, would give the system needed flexibility.

Section 17(B) that bars people from benefitting from the low-level reductions based on possessing firearms should be deleted. The provision reintroduces a vague standard with a low level of proof which could be used to deny people who are otherwise eligible the benefit of a lower sentence. The exemption is triggered if a person “posses[es]” a firearm or other dangerous weapon. According to the USSG Primer, that means the government “ must prove, by a preponderance of the evidence, that the weapon was “present.”²¹ Then the defendant must prove a negative: that it was “clearly improbable that the weapon was connected with the offense.”²² Even more troubling, if the parallel reasoning in Section 2D1.1(b)(1)(Dangerous Weapons) is followed, then the enhancement can be applied to constructive possession, including possession of weapons by a co-defendant of which the Defendant is unaware.²³ The Commission should make sure that these broad and vague standards do not serve as a way to bar access to the reductions contained in the

²¹ USSG, *Primer on Drug Offenses*, at 32 (2023) (quoting USSG §2D1.1, comment. (n.11(A))).

²² *Id.* at 33 (citing cases).

²³ *Id.* at 33-4 (citing *See, e.g., United States v. Hernández*, 964 F.3d 95, 105 (1st Cir. 2020)).

rest of section 17. Proving a negative — that it was improbable that the gun would be used — is difficult, whereas proving that someone else’s gun would not be misused is essentially impossible.

Defendants Should Not Be Responsible for Personal Use or Retail Sale Quantities

User-level quantities of controlled substances should not be counted. The National Institute of Drug Addiction defines addiction “as a chronic, relapsing disorder characterized by compulsive drug seeking and use despite adverse consequences” that is considered “a brain disorder.”²⁴ Treating drug use as a crime disproportionately harms “Black people and other communities of color.”²⁵ By omitting personal or retail amounts, the Commission will signal understanding that punishment will not end drug addiction. Omitting personal and retail use amounts will only benefit the low-level and bystander participants that the Commission is trying to help, meaning the mitigating factor is embedded in the exemption. Whether leaders and organizers are included or not makes no difference because the amount of the drugs in question is so small that it is unlikely to lower their base offense level and result in an unwarranted sentence reduction.

Commentary Should State That a Reduction is Warranted Even if the Defendant Is Convicted of a Lesser Charge

The National Council believes that including guidance taking away the lower offense level if the person was “convicted of a significantly less serious offense than warranted” is a loophole

²⁴ National Institute on Drug Abuse, *Drug Misuse and Addiction*, NIDA (Jul. 2020), Accessed Feb. 21, 2025. <https://nida.nih.gov/publications/drugs-brains-behavior-science-addiction/drug-misuse-addiction>

²⁵ Nora D. Volkow, *Addiction should be treated, not penalized*, *Neuropsychopharmacology* volume 46, pages 2048-2050 (2021). doi: 10.1038/s41386-021-01087-2 (citing Ojmarrh Mitchell and Michael S. Caudy, *Examining racial disparities in drug arrests*” *Justice Quarterly* volume 32, pages 288-313 (2015). doi: 10.1080/07418825.2012.761721.)

that will undermine the Commission’s reform efforts. Last cycle, the Commission worked hard to remove acquitted conducted from sentencing consideration. This commentary creates the exact same problem. Who is to determine whether conviction for a “significantly less serious offense” was warranted and based on what evidence and standard of proof? By definition, the record will contain no information about this ghost charge. The National Council joins the Seventh Circuit in expressing deep concern that this approach may “permit[] prosecutors to indict defendants on relatively minor offenses and then seek enhanced sentences later by asserting that the defendant has committed other more serious crimes for which, for whatever reason, the defendant was not prosecuted and has not been convicted.”²⁶

The National Council for Incarcerated and Formerly Incarcerated Women & Girls appreciates this opportunity to share its views. We are grateful to the Commission for its efforts to lower drug sentences, provide relief to those entangled in conspiracy charges, and for its willingness to consider all views.

²⁶ *United States v. Draheim*, 958 F.3d 651, 660 (7th Cir. 2020) (quoting *United States v. Ortiz*, 431 F.3d 1035, 1040 (7th Cir. 2005)).