



The Honorable William H. Pryor, Jr., Acting Chair
United States Sentencing Commission
1 Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-8002

July 27, 2017

Attn: Public Affairs – Priorities Comment

Dear Judge Pryor:

On behalf of The Sentencing Project, a national research and advocacy organization dedicated to a fair and proportionate criminal justice system, I am writing to submit public comments to the United States Sentencing Commission (USSC) regarding its policy priorities for the amendment cycle ending May 1, 2018. For over a decade the USSC has taken critical steps to amend the sentencing guidelines, particularly in federal cases involving drugs, to ensure greater fairness and to address racial disparity and excessive sentencing. The USSC's ongoing attention to mandatory sentencing and commitment to studying the effects of these changes is laudable.

The population in the custody of the Bureau of Prisons reached a peak in 2013, with 219,000 people. By 2016, this figure had declined by 12%, reaching 192,000. There is little doubt that the USSC's adjustments to the sentencing guidelines as well as its decisions to retroactively apply these changes made a substantial contribution to this reduction. The decline has resulted in a lower scale of overcrowding and substantial cost savings, as well as in reuniting thousands of families with loved ones serving harsh punishments.

Nonetheless, the federal prison population is 700% higher than in 1980, incurs substantial costs which hamstring the Department of Justice's overall law enforcement obligations, and still results in dangerous overcrowding and conditions of confinement. This growth is the result of a number of factors, including: a dramatic escalation of federal drug prosecutions since the mid-1980s; the adoption of a range of mandatory sentencing policies by Congress; the elimination of parole; and a guideline structure that sets sentencing ranges higher than necessary to achieve the USSC goals of just punishment, deterrence, incapacitation, and rehabilitation.

Nationally, the population growth of recent decades has been due to changes in policy, not crime rates. At the state level, the National Research Council's 2014 report, *The Growth of Incarceration in the United States*, concluded that the tripling of the prison population between 1980 and 2010 was entirely due to increased prison admissions and time served in prison. Similar trends can be seen in the federal system. According to findings of the Charles Colson Task Force on Federal Corrections, "between 1985 and 2014, the probability of receiving a

prison sentence as opposed to probation for a federal crime increased dramatically, from 50 percent to 90 percent. The number of convictions in US courts nearly doubled, from 40,924 to 76,835, and average time served for drug and weapon crimes each went up from about two years to almost five.”

A number of developments and research findings of recent years suggest that it would be timely for the Commission to take a fresh look at the guidelines structure to determine if sentence lengths are “sufficient, but *not greater than necessary* (emphasis added),” to achieve the goals of sentencing. Such an exploration would be particularly important for long sentences, as described below, but would be beneficial for all offenses and sentence lengths. International comparisons of prison terms show that sentence lengths in the United States are generally considerably longer than in comparable nations, with little criminological justification. Indeed, other nations have maintained dramatically lower rates of incarceration than the U.S., with no adverse effects on public safety. The Commission’s careful consideration of this evidence is essential to maintain a fair and effective guideline system. For example:

- **The deterrent effect of the justice system on crime is produced by the certainty of punishment, not its severity.** Most people contemplating criminal behavior are not thinking they will be caught, and so are not focused on the scale of punishment. They are also generally unfamiliar with statutory penalty structures, and frequently criminally offend with their judgment compromised by substance abuse or mental health problems. Moreover, incarcerating people for low-level drug selling, in particular, merely results in their being replaced by other sellers willing to fill their roles for economic gain, and does not address the substance abuse problems that users and some sellers struggle with.
- **Long sentences that extend beyond an individual’s crime-prone-years result in diminishing returns for public safety, and come at great cost to taxpayers.** In the life course the prevalence of criminal behavior increases in late childhood, peaks in the teenage years, and begins to decline in the early 20s. During adolescence and into early adulthood, young people are still learning to self-regulate by controlling their impulses, considering the impact of their actions on others, delaying gratification, and resisting the influence of peers. Criminal behaviors fade during adulthood because of greater maturity, and because individuals acquire other forms of social control that promote desistance from crime, such as family responsibilities.
- **Excessive terms of sentence fail to incorporate the potential for rehabilitation and redemption.** More than two-thirds of federal prisoners serving life or virtual life sentences – terms of 50-years or more - have been convicted of nonviolent crimes, including 30 percent for a drug crime. Among those serving life without parole sentences almost half (49.1%) have been convicted of a drug crime. Individuals convicted of drug offenses and sentenced to life or virtual life at the state level comprise only two percent of these sentences overall. People serving these long sentences are often lowest on the priority list for critical prison programming and treatment. Without the option of parole within the federal system, and the often distant placement of prisoners from home, the familial bonds which are so crucial to successful reintegration suffer. Former President Obama’s clemency initiative, which reduced sentences for 1,700 people, 500 of whom

expected to die in prison, is a small but important example of the need to allow all individuals an opportunity at redemption.

- **Efforts to reduce prison sentences and downsize the prison population have not harmed public safety.** Indeed, the USSC’s own study determined that individuals who had served reduced sentences following the 2007 crack cocaine guideline adjustment and retroactive application did not have higher recidivism rates than their counterparts who had served longer sentences for crack cocaine. Moreover, the states making the most dramatic cuts in incarceration levels, including New Jersey, New York, and California which downsized their prison populations by over 25% in recent years, outperformed the nationwide crime drop in most categories.
- **Sentencing law experts recommend a more ambitious sentencing reform agenda.** The American Law Institute (ALI) earlier this year approved its model penal code for sentencing for federal and state governments after years of deliberations among dozens of legal scholars and experts. ALI members considered the deterrence, incapacitation and rehabilitation research described above and proposed noteworthy changes to current law to reduce sentence severity. For instance, ALI concludes that “terms for single offenses in excess of 20 years are rarely justified on proportionality grounds, and are too long to serve most utilitarian purposes...” In response, they proposed a mid-course review for long sentences that could be instructive to the USSC. The ALI recommends that a “judge or judicial panel revisit the sentence of any prisoner who has served 15 years or more in prison, and decide if, under present circumstances, the sentence originally imposed or a different sentence better serves the purposes of sentencing.” The “second look” would examine changed circumstances since sentencing, which may mean changed societal assessments of offense gravity, new technologies of risk assessment or treatment, or major changes in the individual or their family circumstances, the crime victims or the community.

The Sentencing Project supports ALI’s recent conclusion that “public safety can be safeguarded more efficiently, and at far less human cost, through evidence-based policies that are wielded carefully and are continuously tested and improved.” We applaud the Commission’s thoughtful initiatives to reduce guideline sentences up until this point. However, in the decades since the creation of the USSC, its guidelines and most of the mandatory minimum sentences authorized by Congress, a wealth of research about effective punishment demonstrates that more adjustments to excessive sentences with diminishing public safety benefits are needed.

I appreciate your consideration of this proposal and look forward to collaborating with the Commission as you explore policy priorities during the upcoming amendment cycle.

Sincerely,

A handwritten signature in black ink that reads "Marc Mauer". The signature is written in a cursive, flowing style.

Marc Mauer
Executive Director