



Submitted Electronically

July 31, 2023

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: The Sentencing Project Comment on the Commission's Proposed Policy Priorities

Dear Judge Reeves:

The Sentencing Project appreciates the opportunity to comment on the Commission's proposed priorities for the amendment cycle ending May 1, 2024. 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 and equitable sentencing policies. We write to comment on several of the Commission's proposed priorities and to suggest an additional priority.

Across all of these topics we urge the Commission to consider that fifty years ago, the United States embarked on the path to mass incarceration.¹ To ensure that our country does not experience another fifty years of mass incarceration's harms, we urge you to take bold, evidence-based steps to decrease incarceration.

In 1980, federal prisons held 25,000 people, now they hold almost 160,000.² The toll of that increase on individuals and communities has been profound. Mass incarceration tears apart families, creates lasting trauma, harms the health of individuals and communities, and deepens poverty.³ And those harms are disproportionately borne by Black, Latinx, and Native American communities. We are approaching the third annual increase in the federal prison population, following seven years of decline.⁴ The need for change is urgent. We applaud the Commission's work thus far to decrease excess incarceration and we urge you to continue to build on that progress.

¹ Ghandnoosh, N. (2023). [Ending 50 years of mass incarceration: urgent reform needed to protect future generations](#). The Sentencing Project.

² Federal Bureau of Prisons (2023). [Statistics](#).

³ Travis, J., Western, B., & Redburn, S. (2014). [The growth of incarceration in the United States](#). National Academy of Sciences.

⁴ Federal Bureau of Prisons (2023), see note 2.

Topic 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).

Congress has instructed courts to impose a sentence sufficient, but not greater than necessary to meet four purposes: (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. Persistent inhumane conditions and insufficient services in federal prisons interfere with these purposes.

Federal prisons are plagued by inadequate medical care, overcrowding, staff shortages, unsanitary conditions, violence, and abuse, which are well-documented in Office of Inspector General⁵ and Bureau reports,⁶ media coverage,⁷ and congressional testimony.⁸ Education and vocational training is often lacking and falls far short of the requirements of the First Step Act and rehabilitative needs. Inadequate medical care may turn a brief sentence for a medically vulnerable individual into a death sentence. Pervasive sexual violence at institutions like FCI Dublin subjects the individuals incarcerated there to sexual abuse that can have lifelong traumatic effects.

Under 28 U.S.C. § 994(g), the Commission is charged with making “recommendations concerning any change or expansion in the nature or capacity of [correctional] facilities and services that might become necessary as a result of the guidelines promulgated.” We urge you to use this power to make recommendations that will assist the Bureau in reducing over-incarceration and crowding, improving access to rehabilitative services, and bettering conditions. For example, the Bureau has historically made next to no use of its ability to grant compassionate release – the Commission could recommend otherwise. Chief Deputy Federal Public Defender for the District of Oregon Stephen Sady has also advanced several other recommendations the Commission could adopt to encourage the Bureau to make better use of programs and statutes which could lessen incarceration.⁹ The Commission should consider these potential recommendations and others and embrace its statutorily mandated role in providing guidance to the Bureau.

⁵ See, e.g., Office of the Inspector General (2023). [The Federal Bureau of Prisons’ efforts to maintain and construct institutions](#); Office of the Inspector General (2021). [Management advisory memorandum: Impact of the failure to conduct formal policy negotiations on the Federal Bureau of Prisons’ implementation of the First Step Act and closure of Office of the Inspector General recommendations](#).

⁶ See, e.g., Federal Bureau of Prisons (2019). [After action report: partial electrical and reported heating outage civil disturbance](#).

⁷ See, e.g., Willson, C. (2022). [Inmates at Oregon’s only federal prison report dire medical care](#). OPD; Lacey, A. (2022). [Federal prison officials knew of misconduct, corruption, and abuse, senate investigation finds](#). The Intercept; Thompson, C. (2022). [How the newest federal prison became one of the deadliest](#). NPR.

⁸ See, e.g., Homeland Security and Governmental Affairs Permanent Subcommittee On Investigations (July 26, 2022), [Witness Opening Statements in PSI Hearing Investigating Corruption, Abuse, & Misconduct at U.S. Penitentiary Atlanta](#).

⁹ Sady, S. (2022). [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.

Topic 2: Promotion of court-sponsored diversion and alternatives-to-incarceration programs, including possible workshops and seminars sharing best practices for developing, implementing, and assessing such programs.

The Sentencing Project encourages the robust use of diversion and restorative justice programs as an alternative to incarceration (ATI). Some federal districts have strong diversion and ATI programs while others have few opportunities. We encourage the Commission to use this topic as a means to lift up the work of successful programs, as well as to advise on how to remedy limited access to diversion and ATI programs in some districts, including potentially by permitting sentencing judges greater latitude to consider evidence of post-conviction rehabilitation.

We also urge the Commission to expand this topic to include the consideration of potential amendments to the guidelines concerning alternatives to incarceration. Currently, the guidelines recommend non-custodial sentences for individuals convicted of low-level offenses with no criminal history. A far broader swath of individuals could benefit from ATI programs. A growing body of research indicates that categorical exclusions from ATI programs based on offense type, criminal history, or the need for drug or substance use treatment run the risk of excluding those who may most benefit from such programs and disproportionately exclude people of color.¹⁰

We encourage the Commission to consider amending the guidelines to both encourage the broader use of diversion and ATI programs and to incentivize their successful completion by adopting guidelines that grant appropriate adjustments in §3E1.1 (Acceptance of Responsibility), or departures in Chapter 5F (Sentencing Options) or Chapter 5H (Specific Offender Characteristics) for successful completion of an ATI program.

Topic 5: Categorical approach and other “career offender” guideline issues.

During the 2022-2023 Commission amendment cycle, The Sentencing Project joined several other criminal justice reform and civil rights organizations in commenting on potential changes to the “career offender” guidelines.¹¹ We incorporate those comments by reference and reiterate our concerns that the current “career offender” guidelines already drive over-incarceration and racial inequity in federal sentencing without any evidence that they enhance public safety. Modifications should be carefully considered to avoid subjecting more individuals to extreme sentences and deepening racial disparities.

Topic 6: Examination of the treatment of “youthful offenders” under the guidelines Manual, including possible consideration of amendments that might be appropriate.

As the Commission found in its 2017 report on “youthful offenders” in the federal system, between 2010 and 2015, youth and emerging adults 25 years and younger accounted for about

¹⁰ Adler, J. & Barrett, J. (2023). [*Plenty of science, just not enough passion: Accelerating the pace of felony decarceration.*](#) Center for Justice Innovation.

¹¹ FAMM et al (2023). [*Comment: Proposed amendments to the career offender and criminal history guidelines.*](#)

18% of the federal prison population.¹² The majority were Latinx, and overwhelmingly, they were convicted of non-violent offenses. Their offenses were similar to their mature adult counterparts, but they were significantly more likely to recidivate.¹³ This higher recidivism rate illustrates the failure of the current approach in the guidelines, which offer judges little leeway to consider the unique characteristics, needs, and experiences of youth and emerging adults.

That approach is inconsistent with the growing body of research and jurisprudence recognizing that youth and young adults are different and deserving of distinct sentencing treatment. The development from adolescence to “late adolescence” or emerging adulthood is marked by lower levels of emotional control and higher levels of impulsive actions.¹⁴ The Supreme Court has recognized these qualities in minors and thus the need to sentence them differently in a way that reflects their diminished culpability and great potential for growth.¹⁵ Emerging adults share many of the same qualities as teenagers below 18, and the same sentencing principles should apply.¹⁶

In 2016, the Tribal Issues Advisory Group recognized the guidelines’ failure to reflect this body of evidence and recommended that the Commission amend USSG §5H1.1 regarding the “age” policy statement, add a departure concerning youth and emerging adults as USSG §5K2.25, and the expansion of opportunities for diversion.¹⁷

Similarly, we urge the Commission to amend the guidelines to permit greater consideration of the needs and characteristics of emerging adults, including cognitive development, the mental health impact of incarceration, the availability of appropriate services and educational opportunities, and the importance of maintaining and developing pro-social community-based ties and behaviors.

Additional suggested topic: Life sentences for Base Level 43 offenses, especially for individuals with limited criminal history.

Finally, we urge the Commission to consider an additional priority: potential amendments to the guidelines regarding the imposition of life sentences for Base Level 43 offenses, especially for those with little or no criminal history. As Jason Hernandez, a clemency recipient who was sentenced at 21 to life without parole plus 320 years for drug-related offenses that were committed mostly in his teens, 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.¹⁸

¹² U.S. Sentencing Commission (2017). [Youthful offenders in the federal system](#).

¹³ U.S. Sentencing Commission (2017), see note 12.

¹⁴ Nellis, A. & Monazzam, N. (2023). [Left to die in prison: Emerging adults 25 and younger sentenced to life without parole](#). The Sentencing Project.

¹⁵ *Miller v. Alabama*, 567 U.S. 460 (2012).

¹⁶ Nellis, A. & Monazzam, N. (2023), see note 14.

¹⁷ U.S. Sentencing Commission (2016). [Report of the Tribal Issues Advisory Group](#).

¹⁸ 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](#).

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.¹⁹ 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 mandated regardless of whether an individual has a criminal history.²⁰

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 43.²¹ Other offenses, including non-violent drug offenses, may be aggravated to a base level of 43 based on an individual’s role in the offense and other factors.

Such a sentencing structure, however, 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.²² The vast majority of individuals age out of crime.²³ Individuals with little or no criminal history are also less likely to recidivate.²⁴

As such, we recommend that the Commission amend the guidelines to remove the recommendation that all offenses with a base level of 43 should result in life sentences and institute sentencing ranges for such offenses, especially for those with little to no criminal history.

Thank you for this opportunity to comment. We look forward to working with the Commission to advance justice in federal sentencing.

Sincerely,



Kara Gotsch
Acting Executive Director
The Sentencing Project

¹⁹ U.S. Sentencing Commission (2022). [Life sentences in the federal system](#).

²⁰ U.S. Sentencing Commission (2022), see note 19.

²¹ U.S. Sentencing Commission (2022), see note 19.

²² Nellis, A. (2021). [No end in sight: America’s enduring reliance on life sentences](#). The Sentencing Project.

²³ 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.

²⁴ U.S. Sentencing Commission (2016). [Recidivism among federal offenders: A comprehensive overview](#).