



July 15, 2024

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

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

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

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.

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

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,

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

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 lkomar@sentencingproject.org 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.