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SENTENCING GUIDELINES COMMITTEE

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August 1, 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: Defender Comment on the 2023–2024 Proposed Priorities

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide our comments on the Commission's 2023–2024 proposed priorities.[1] We appreciated working with the Commission last year, were encouraged by our July meeting, and hope the Commission will continue and expand its commitment to "operate in a deliberative, empirically based, and inclusive manner" this year.[2]

Indeed, operating inclusively is particularly important this year, as the Commission's proposed priorities list could have a significant, far-reaching impact on federal sentencing. Priorities like simplifying the guidelines (Priority 3) and addressing the commentary's validity and enforceability (Priority 4) target the foundations of our sentencing guidelines system, having the potential to change the way the system operates. Other priorities, like continued career offender guideline review (Priority 5) and potential amendments to youthful offense treatment (Priority 6) could ameliorate longstanding racial inequities and result in fairer sentences better reflecting the advancement of scientific, psychological, and sociological knowledge. And Priorities 1 (assessing the Bureau of Prisons (BOP)) and 2 (promoting

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[1] *See* USSC Proposed Priorities for Amendment Cycle, 88 Fed. Reg. 39907-01 (June 20, 2023) ("USSC Proposed Priorities"), https://tinyurl.com/2hu7cv83.

[2] Remarks of Carlton W. Reeves, Chair of the U.S. Sent'g Comm'n, Washington, D.C., at 4 (Oct. 28, 2022), https://tinyurl.com/92746mhp.

alternatives to incarceration (ATI) and diversion programs) could impact how much time our clients serve in prison—and how they spend that time. Defender involvement and insight on these priorities, related research, and proposed amendments are critical.[3]

Below are our comments on the Commission's proposed priorities. We also encourage the Commission to revisit our May 24, 2023 Annual Letter and reconsider prioritizing the issues we raised there.[4]

[3] As mentioned, our Commission Liaison Subcommittee appreciated the opportunity to meet with the Commission last month. Working with the Commission to identify ways to increase Defender involvement during this, and future, amendment cycles is a long-time goal.

[4] *See* Letter from Michael Caruso, Chair, Fed. Defenders Sent'g Guidelines Comm. to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (May 24, 2023) ("Defenders' 2023–2024 Annual Letter").

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I. Proposed Priority No. 1: Bureau of Prisons

Defenders are pleased the Commission proposed prioritizing an assessment of whether BOP practices effectively meet the purposes of sentencing and is considering recommendations and amendments to ensure individuals sentenced to prison serve no more BOP time than necessary.[5] The Defenders have long litigated and advocated for greater availability of community corrections and against sentence calculation and programming rules that extend sentences.

The relevant BOP history and the Commission's statutory directive are set out in Stephen R. Sady's October 2022 Federal Sentencing Reporter article, attached to this letter.[6] The Commission should consider and adopt each of the article's proposed recommendations; each is already authorized by statute. BOP's failure to fully implement congressionally approved measures has inevitably resulted in over-incarceration: greater prison time than needed to accomplish the goals of federal sentencing. The specific recommendations include greater access to and availability of community corrections (reentry centers and home confinement), permitting full calculation of time in pretrial custody for immigration detention and concurrent sentences, and full eligibility for mitigating programs such as the residential drug abuse program. BOP's failure to fully utilize ameliorative statutes results in wasted and expensive time behind bars and limitations on the reach of rehabilitative programs. The Commission should act decisively to counteract the skewing of guidelines sentences toward longer and harsher prison time by using its resources and expertise to recommend execution of sentences with full implementation of available ameliorative statutes.

In addition, the Commission should explore possible amendments to ensure that prison conditions and BOP mismanagement are considered on the front

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[5] *See* USSC Proposed Priorities, at 39907.

[6] *See* Stephen R. Sady, *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*, 35 Fed. Sent'g Rep. 12 (2022).

end.[7] From overcrowded, understaffed, and crumbling facilities[8] to insufficient medical care[9] and instances of sexual and physical abuse,[10]

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[7] For instance, the Commission could lower the ranges on the sentencing table, amend §5G1.3 to better encourage judges to account for all time in custody, or create a downward departure to account for the conditions under which a sentence to BOP custody would be served.

[8] *See, e.g.*, Fed. Bureau of Prisons, *Federal Bureau of Prisons Factsheet* (May 12, 2023), https://tinyurl.com/2p93eut9 (reporting BOP's population increased in FY 2021 and BOP "continues to experience substantial crowding in medium and high security facilities"); Glenn Thrush, *Short on Staff, Prisons Enlist Teachers and Case Managers as Guards*, N.Y. Times (May 1, 2023), https://tinyurl.com/52njy3h8 (reporting a "staffing crisis" in many federal prisons and that, as of March 2023, 21 percent of Congressionally-funded correctional officer positions remain unfilled); Dep't of Justice Office of Inspector Gen., *The Federal Bureau of Prisons' Efforts to Maintain and Construct Institutions* 5, 26 (May 3, 2023), https://tinyurl.com/227b39zb (recognizing BOP facilities are aging and deteriorating, and all 123 institutions require maintenance, with three in critical stages of disrepair).

[9] *See, e.g.*, Statement of Heather E. Williams, Before the U.S. Sentencing Comm'n, Washington D.C. at 4, n.11 (Feb. 24, 2023) (collecting Inspector General reports of BOP's catastrophic response to the COVID-19 Pandemic); U.S. Dep't of Justice, Office of the Inspector Gen., *Audit of the Federal Bureau of Prisons Comprehensive Medical Services Contracts Awarded to the University of Massachusetts Medical School* i (2022), https://tinyurl.com/mr32k98f ("BOP did not have a reliable, consistent process in place to evaluate timeliness or quality of inmate healthcare"); U.S. Dep't of Justice, Office of the Inspector Gen., *Review of the Federal Bureau of Prisons' Management of Its Female Inmate Population* i–ii (2018), https://bityl.co/GxND (identifying failure to provide appropriate care to women in custody); U.S. Dep't of Justice, Office of the Inspector Gen., *Review of the Federal Bureau of Prisons' Use of Restrictive Housing for Inmates with Mental Illness* i–ii (2017), https://bityl.co/GxN9 (identifying BOP's failure to provide adequate treatment for incarcerated people with mental illness); U.S. Dep't of Justice, *Department of Justice Efforts to Ensure that Restrictive Housing in Federal Detention Facilities is Used Rarely, Applied Fairly, and Subject to Reasonable Constraints, and to Implement Other Legal Requirements and Policy Recommendations* 6 (2023), https://bit.ly/3S99999 (finding that "restrictive housing placements have increased by 29% since . . . 2016. . . .").

[10] *See, e.g.*, Williams Statement, at 2–6 (describing reported abuse in BOP); Washington Lawyers' Comm. for Civil Rights & Urban Affs., *Cruel and Usual: An Investigation into Prison Abuse at USP Thomson* 3 (2023), https://tinyurl.com/3rv5ybux (exposing "extreme physical and psychological abuse" and "abusive and obstructive staff behavior" at USP Thomson and recognizing "similar issues are pervasive in the other [BOP] facilities"). *See also* Staff Rep. S.

evidence of BOP mismanagement is plentiful. This Commission—and sentencing judges—cannot identify a sentence that is "sufficient but not greater than necessary" without knowing the conditions under which the individual's time will be served.[11]

Defender involvement in this priority is essential. We represent the vast majority of individuals who serve BOP time. Among Defender ranks are attorneys with expertise in BOP computation, its administrative policies and procedures, and BOP-related litigation. We are eager to share our insights and our clients' experiences with the Commission as it assesses BOP's effectiveness, identifies areas needing improvement, and develops recommendations and amendments.

II. Proposed Priority No. 2: Promotion of ATI and Diversion Programs

Defenders appreciate the Commission's proposal to promote alternative sentences by increasing access to information pertaining to ATI and diversion programs.[12] As we explained last year,[13] alternative sentences are far too rare—in Fiscal Year 2022, less than 7 percent of sentences were to probation or fine only.[14] Yet "[t]he case for use of community punishments in a rational

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Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov't Affs., *Sexual Abuse of Female Inmates in Federal Prisons* at 1 & Ex. 1 (2022), https://bityl.co/H9sF; U.S. Dep't of Justice, *Report and Recommendations Concerning the Department of Justice's Response to Sexual Misconduct by Employees of the Federal Bureau of Prisons* 4 (2022), https://bityl.co/GxJW.

[11] *See* 18 U.S.C. § 3553(a). Indeed, while imprisonment conditions are relevant to all purposes of sentencing, § 3553(a)(2)(D) explicitly requires sentencing courts identify the need for the sentence imposed to provide the convicted person "with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

[12] *See* USSC Proposed Priorities, at 39907.

[13] *See* Letter from Michael Caruso, Chair, Fed. Defenders Sent'g Guidelines Comm. to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n at 18 (Oct. 17, 2022).

[14] *See* USSC, *FY 2022 Sourcebook of Federal Sentencing Statistics*, fig. 6 (2023), https://tinyurl.com/5n6p6y3y.

society is a no-brainer."[15] Community-based corrections are more effective than prison at rehabilitation and reducing recidivism.[16]

Defenders remain eager to work with the Commission on this priority, including any workshop, seminar, or assessment development and presentation related to these important programs. We also ask the Commission to consider amending the guidelines to encourage alternative sentences for anyone demonstrating presentence rehabilitation, regardless of their ATI or diversionary program participation.[17]

III. Proposed Priority No. 3: Simplification of the Guidelines

Defenders support any efforts to make the guidelines fairer and better aligned to our advisory guideline scheme, including those simplifying guidelines applications. A great place to start is amending Chapter 5 to better reflect modern, post-*Booker* sentencing practices. For instance, the tension between Chapter 5's restrictive policy statements and the sentencing court's expansive duty under § 3553(a) to consider our client's history and characteristics causes confusion about how the sentence should account for personal mitigation.[18] And, as noted in our Annual Letter, some of Chapter

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[15] Michael Tonry, *Community Punishments*, in 4 Reforming Criminal Justice: Punishment, Incarceration, and Release 187 (2017), https://bityl.co/HTae.

[16] *See* Federal Public and Community Defenders Comment on Alternatives-to-Incarceration Programs (Proposal 10), at 1–2 & accompanying notes (Mar. 14, 2023).

[17] *See id.* at 3–5.

[18] *See, e.g.*, Letter from Hon. Robert Holmes Bell, U.S. District Court for the Western District of Michigan, to the U.S. Sent'g Comm'n, at 1–2 (Mar. 1, 2010) (noting that Chapter 5H has been "troubling" from its inception as it conflicts with § 3553(a) and recounting a pre-*Booker* sentencing over which he presided and experienced "difficulties . . . attempting to bring the factor found in §5H1.11 in line with [the individual's] 'history and characteristics'"); *cf. United States v. Eversole*, 487 F.3d 1024, 1036 (6th Cir. 2007) (Merritt, J., dissenting) ("The sentencing courts should forget about the Guidelines when they conflict with the clear statutory rules. It is clear that the statutory rule limiting punishment to a sentence 'not greater than necessary,' combined with the language of rehabilitation contemplating 'medical care or other correctional treatment' has been cast aside and not even considered in this case.").

5's policy statements conflict with one another[19] and with policies contained elsewhere in the guidelines.[20] This further complicates and confuses guidelines application.

Defenders would potentially also support other simplification endeavors better promoting sentences "sufficient, but not greater than necessary."[21] We look forward to working with the Commission to identify guideline system areas needing improvement and ways to improve them.

IV. Proposed Priority No. 5: Career Offender

In its proposed priorities, the Commission lists three potential areas of "[c]ontinued examination of the career offender guidelines," including:

> (1) updating the Commission's 2016 report to Congress,
>
> (2) spearheading workshops and discussions on the career offender guideline and possible alternatives to the categorical approach, and
>
> (3) consideration of appropriate amendments.[22]

We commend the Commission for charting a cautious, thoughtful, inclusive, and data-driven approach to any further career offender guideline amendments, and address each of these three areas below.

A. Updating the data analyses and statutory recommendations set forth in the Commission's 2016 Career Offender Report.

The 2016 Career Offender Report is broadly cited for: (a) concluding that those in a drug-trafficking-only pathway to career offender status have a significantly lower recidivism rate than other career offenders, and (b) recommending Congress amend 28 U.S.C. § 994(h) to exclude these

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[19] *See* Defenders' 2023–2024 Annual Letter, at 20 n.91 (observing that a disadvantaged upbringing is "not relevant" in determining whether a departure is warranted, §5H1.12, but mental and emotional conditions—which could be related to a disadvantaged childhood—"may be relevant," §5H1.3).

[20] *See id.* at 18 n.80 (addressing the disconnect between the family circumstances policy statement, §5H1.6, and the Commission's recently adopted policy statement on reductions in sentence, §1B1.13).

[21] 18 U.S.C. § 3553(a).

[22] *See* USSC Proposed Priorities, at 39907.

individuals.[23] We welcome any narrowing of the directive. But years of data demonstrate the career offender guideline is overly punitive, lacks a principled basis, and exacerbates racial disparity in federal sentencing—whether triggered by "controlled substance offenses" or "crimes of violence."[24]

In § II.B of Defenders' Comment on the Commission's 2023 guideline amendment Proposals 4B and 6, we encouraged the Commission to update its 2016 Report by:

> (1) articulating the justification for the career offender guideline,
>
> (2) identifying the category of individuals, if any, for which a near-maximum career-offender sentence would be the least punishment necessary under the articulated justification, and
>
> (3) striving toward a guideline that captures only individuals in the identified category.[25]

If there is no principled justification for imposing near-maximum sentences based on criteria the career offender directive identifies, the Commission should say so.[26] We are eager to discuss these and other suggestions with the Commission.

One can read the 2016 Report's emphasis on relief for those in the drug-trafficking-only pathway to suggest that data support near-maximum career-offender sentences for those in the mixed and violent-only pathways.[27] The

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[23] *See* USSC, *Report to Congress: Career Offender Enhancements* 25–45 (2016) ("*Career Offender Report*"), https://tinyurl.com/bdz8cfdb.

[24] *See* Statement of Juval O. Scott Before the U.S. Sent'g Comm'n, Washington, D.C., at 1, 3–12 (Mar. 8, 2023) ("J. Scott Statement").

[25] *See* Federal Public and Community Defenders Comment on Circuit Conflict re: Controlled Substance Offense (Proposal 4B) and Proposals to Amend Career Offender Guideline (Proposal 6), at 4–10 (Mar. 14, 2023) ("Defenders' 2023 Career Offender Comment").

[26] *See id.* at 10.

[27] *See Career Offender Report*, at 41 (reporting "drug trafficking only offenders" had the "lowest rate of recidivism," and explaining how this supports "the Commission's conclusion that they should not be subjected to the same recidivist enhancements as the other career offenders").

Commission can take steps to examine this assumption. Two specific points bear repeating here.

First, for those convicted of crimes of violence, the Commission can compare the recidivism rates between those assigned career offender status with those not assigned such status.[28] As our recent Comment noted, the Commission's 2022 report on recidivism of persons committing violent offenses reported that, as a group, those placed in CHC VI based on their career-offender or armed-career-criminal status had a 65 percent recidivism rate—lower than the CHC III group's 66.3 percent rate.[29]

Second, given the broad academic consensus that longer sentences do *not* serve as either a specific or general deterrent, the Commission can study how incarceration interacts with crime-prevention goals.[30] The Commission's 2022 report concluding incarceration sentences of longer than five years have a preventative effect is an outlier conclusion in the academic literature.[31] We encourage the Commission to collaborate with other experts to explore a more comprehensive understanding of the interactions between incarceration and crime prevention.

B. Devising and conducting workshops to discuss the career offender guideline's scope and impact, including discussing possible alternative approaches to the "categorical approach."

Defenders look forward to consulting with the Commission as it devises workshops to discuss the career offender guideline's scope and impact. No

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[28] *See* Defenders' 2023 Career Offender Comment, at 7–8.

[29] *See id.* at 8 & n.15 (citing, *inter alia*, USSC, *Recidivism of Federal Violent Offenders Released in 2010* 29 fig. 14 (2022), https://tinyurl.com/2mwju7xt).

[30] *See* Statement of Michael Carter Before the U.S. Sent'g Comm'n, Washington, D.C., at 13–14 (Mar. 7, 2023); Defenders' 2023 Career Offender Comment, at 9–10 & accompanying notes.

[31] *See* USSC, *Length of Incarceration and Recidivism* (2022); Tina Woehr & Allison Bruning, *Limitations of the Commission's 'Length of Incarceration and Recidivism' Report*, 35 Fed. Sent'g Rep. 43, 43–46 (2022), https://bit.ly/3ZEBo2y; *see also* J. Scott Statement & accompanying notes.

such discussion would be complete without hearing from those most directly affected by the guideline:

- individuals sentenced under the guideline, their families and community members, and their attorneys,
- jurists who have thought deeply about this guideline who could provide insight into the 20 percent judicial compliance rate,[32] and
- criminologists who could help tease out what, if any, principled penological purpose this guideline serves.

As for workshops discussing possible alternative approaches to the Supreme Court's categorical approach, such workshops ideally would permit federal judges, attorneys, and probation officers to discuss frankly, in a problem-solving environment, why the categorical approach stirs controversy and what alternatives would look like. Workshops should include state court practitioners to discuss why much of the presentence report's information—information derived from arrest reports, court records, and other documents—is unreliable for imposing draconian sentencing enhancements.[33]

As we suggest in our Comment, the categorical approach may, like democracy, be the worst system except for all the other systems.[34] Frank discussions may uncover solutions other than abandoning the approach the Supreme Court has long mandated for statutory criminal enhancements and immigration matters. Perhaps, for example, probation officers could be relieved of the obligation to perform this analysis. The Commission could devise and provide additional training and resources for judges and attorneys. We do not pretend to know the answers but are eager to help the Commission find solutions.

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[32] *See* USSC, *Quick Facts: Career Offenders* (July 2023), https://tinyurl.com/mcwwfwf2 (reporting 20.2 percent of sentences within range).

[33] *See, e.g.,* Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 106–07 (Mar. 8, 2023) (Susan Lin).

[34] *See* Defenders' 2023 Career Offender Comment, at 11; *see also* J. Scott Statement, at 3–12.

C. Possible consideration of other appropriate amendments.

As we expressed, the career offender guideline should be contracted, not further expanded, given its role in our federal criminal legal system as an unjustified driver of mass incarceration and racial disparity.[35] Again, Defenders stand ready to explore with the Commission avenues to narrow the guideline consistent with § 994(h)[36] and explore what it can recommend to Congress to achieve real reform.

V. Proposed Priority No. 6: Offenses Committed by Youths

Defenders commend the Commission for considering amendments to the guidelines' treatment of youth-committed offenses.[37] Reforming the guidelines' treatment of both current and prior youth-committed offenses is critical to reflect significant advancements in human knowledge and to avoid unwarranted disparities.

Research on brain development confirms the guidelines' treatment of youth offenses is outdated and unfair. Years ago, this Commission recognized the

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[35] *See* Defenders' 2023 Career Offender Comment, at 2–4. -

[36] *See, e.g., id*. at 22–26; Statement of Michael Caruso Before the U.S. Sent'g Comm'n, Washington D.C., at 22–23, 25–28 (Mar. 7, 2023) (proposing contracting the definition of "controlled substance offense" to those offenses enumerated in 28 U.S.C. § 994(h)); Letter from Natasha Sen & Patrick Nash, Practitioner's Advisory Group, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 22 & n.2 (Mar. 14, 2023); Letter from Natasha Sen & Patrick Nash, Practitioner's Advisory Group, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 2 (Sept. 23, 2023) (recommending the Commission conform the "career offender" definitions to the First Step Act's definitions of "serious drug felony" and "serious violent felony").

[37] The Guidelines Manual does not define "youth." However, in its 2017 report on youth-committed offenses, the Commission defined youth as "25 years old or younger at the time of sentencing." In adopting this definition, the Commission's decision was informed by "recent case law and neuroscience research in which there is a growing recognition that people may not gain full reasoning skills and abilities until they reach age 25 on average." USSC, *Youthful Offenders in the Federal System* 5 (2017) ("*Youth Offense Report*"), https://tinyurl.com/5n8v62ah. For this letter, and consistent with the research, "offenses committed by youths" refer to offenses committed by people in mid-20s or younger.

available research indicates youths are simply different than adults.[38] In fact, decades of developmental neuroscience and behavioral psychology research evinces young people are less culpable than older people whose brains and character traits are more fully formed. Neuroscientific studies reveal "the areas of the brain that govern impulse control, planning, and foresight of consequences mature slowly over the course of adolescence and into early adulthood, while the arousal of the limbic system around puberty increases sensation seeking in early adolescence."[39] Consistent with these findings, "[a] large body of behavioral research confirms that adolescents are more impulsive, risk-seeking, subject to peer influence, and inclined to focus on immediate consequences of their choices than are adults."[40]

Strong policy reasons exist to change the guidelines' treatment of youth-committed offenses as well. As we explained in previous letters, treating youthful offenses—particularly those committed by people younger than age 18—like adult offenses results in numerous unwarranted disparities and perpetuates racial and ethnic inequities.[41]

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[38] *See Youth Offense Report*, at 5–7 (summarizing case law and neuroscience research).

[39] Elizabeth S. Scott, "*Children are Different": Constitutional Values and Justice Policy*, 11 Ohio St. J. Crim. L. 71, 87 (2013); Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 Psychol. Pub. Pol'y & L. 410, 414–15 (2017) (describing brain imaging studies evidencing immaturity in the young person's brain regions critical to executive function and heightened responsiveness in the socioemotional incentive-processing system, which taxes the capacities for self-regulation)*; see also Graham v. Florida*, 560 U.S. 48, 68 (2010) ("[P]arts of the brain involved in behavior control continue to mature through late adolescence.").

[40] Scott, *supra* note 39, at 87; *see also* Steinberg, *supra* note 39, at 413–14 (discussing behavioral studies revealing that compared to adults, youth are more impulsive, more likely to engage in sensation-seeking, more likely to succumb to peer pressure, and more likely to consider immediate gratification than the future consequences of their actions); Elizabeth Cauffman et al., *How Developmental Science Influences Juvenile Justice Reform*, 8 UC Irvine L. Rev. 21, 28–29 (2018) (same); *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (recognizing three behavioral "gaps" between adolescents and adults that illustrate the reduced culpability of adolescents who commit crime).

[41] *See, e.g.*, Letter from Michael Caruso, Chair, Fed. Sent'g Guidelines Comm., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Guidelines Comm'n at 21–22 & accompanying notes (Sept. 14, 2022); Letter from Marjorie Meyers, Chair, Fed. Def.

The Commission should start with amending §4A1.2(d). Defenders have repeatedly requested that the Commission amend the criminal history rules to exclude all offenses committed prior to age 18 from the criminal history score.[42] The Commission might even consider based on the recognized research whether prior convictions committed by persons ages 18 to mid-20s also deserve amended treatment.

In addition to amending the guidelines' treatment of prior youth-committed offenses, the Commission should reconsider its treatment of *instant* offenses committed by youths.[43] The guidelines should account for recognized brain development research and the Commission should encourage courts to consider this research when calculating the guidelines and imposing appropriate sentences for offenses committed by people in their mid-20s or younger.

VI. Proposed Priority No. 9: Other Issues the Commission Should Prioritize

A. Technical Amendment Correcting §2D1.1(a)(1) and (a)(3).

The Commission should add to this cycle's priorities a technical amendment to §§2D1.1(a)(1) and (3) to correct a longstanding application problem, the impact of which will be exacerbated by the Commission's 2023 §2D1.1

Sent'g Guidelines Comm., to the Hon. William H. Pryor, Jr., Acting Chair, U.S. Sent'g Comm'n 2–3, 20–34 (Feb. 20, 2017); *see also* United States Commission on Civil Rights, *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, 48 (2019), https://tinyurl.com/fd6spcwb (discussing data showing Black and multiracial students with disabilities were overrepresented in school-related arrests and referrals to law enforcement in two different academic years); American Civil Liberties Union, *School-to-Prison Pipeline Infographic* (2016), https://tinyurl.com/3jwn3ucu (noting "[z]ero-tolerance" policies that "criminalize minor infractions of school rules" have "resulted in Black students facing disproportionately harsher punishment than white students in public schools").

[42] *See, e.g.*, Letter from Marjorie Meyers, Chair, Fed. Def. Sent'g Guidelines Comm., to the Hon. William H. Pryor, Jr., Acting Chair, U.S. Sent'g Comm'n 2–3, 20–34 (Feb. 20, 2017); Defenders' 2022–2023 Annual Letter at 20–22; Defenders' 2023–2024 Annual Letter. At a bare minimum the Commission should revise Chapter 4 to exclude juvenile adjudications from the criminal history score.

[43] *See generally* §5H1.1.

Amendment.[44] As amended, §2D1.1(a)(1)(B) is likely to be interpreted to recommend a guideline sentence of life in cases where the statutory minimum sentence is not life, but twenty years.[45]

We understand §2D1.1(a)(1) and (3) base offense levels are intended to "apply only in the case of a conviction under circumstances specified in the statutes cited."[46] Thus, for example, §2D1.1(a)(1) should recommend a life sentence only for an individual convicted of distribution resulting in death or serious-bodily injury, where the government filed a § 851 information, and the court sustained it. This understanding comports with the language of these guidelines and their amendment history and purpose.[47] But courts have long applied those elevated base offense levels regardless of whether the offense of conviction established the death- or serious-bodily-injury resulting element, and even where the government declined to seek the statutorily specified § 851 enhancement.[48] That is to say, courts apply §2D1.1(a)(1) base offense level 43 (which calls for a guideline life sentence for all criminal history categories) even in cases where the "circumstances specified in the statutes cited" are *not* met. This is a longstanding problem impacting a small number of individuals—but that impact is severe.[49]

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[44] *See* USSC Notice of Submission to Congress of amendments to the sentencing guidelines effective November 1, 2023, 88 Fed Reg. 28254-01, 28263 (May 3, 2023), https://tinyurl.com/3fmtwhdk (2023 Adopted Amendments).

[45] *See id.*; Federal Public and Community Defenders Comment on First Step Act—Drug Offenses (Proposal 2), at 1–2 (Mar. 14, 2023) (Defenders' 2023 Comment on FSA—Drug Offenses); Statement of Michael Caruso, Before the U.S. Sent'g Comm'n, Washington D.C. at 9–14 (Mar. 7, 2023) ("Caruso Statement on FSA—Drug Offenses").

[46] USSC App. C, Amend. 123, Reason for Amendment (Nov. 1, 1989); *see also* USSC App. C, Amend. 727, Reason for Amendment (Nov. 1, 2009).

[47] *See* Caruso Statement on FSA—Drug Offenses, at 12.

[48] *See, e.g., United States v. Johnson*, 706 F.3d 728, 732–33 (6th Cir. 2023); *see also* Caruso Statement on FSA—Drug Offenses, at 12–13 (explaining that, of the 107 individuals assigned enhanced base offense levels under §2D1.1(a)(1) or (a)(3) in the last five years, only 30 were subject to § 851 informations).

[49] *See* Caruso Statement on FSA—Drug Offenses, at 12–13.

The 2023 §2D.1.1 Amendment will exacerbate this problem because it incorporates an anomaly from the First Step Act setting a *lower* bar to trigger a mandatory-life sentence for those convicted of trafficking only a detectable amount of Schedule I and II controlled substances, than for those convicted of a mandatory-minimum-triggering quantity.[50] In clear terms: those convicted of the least drug amount will more easily be subject to a mandatory-life sentence than those convicted of mandatory minimum amounts.

The Department of Justice recognizes "Sections 841(b)(1)(C) and 960(b)(3) [now] prescribe a mandatory sentence of life imprisonment upon a lesser showing than that required under Section 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), and 960(b)(2)."[51] And "to promote consistency in sentencing under Sections 841(b)(1) and 960(b), the Department" has thus directed prosecutors, "as a matter of policy not to seek a mandatory sentence of life imprisonment under Section 841(b)(1)(C) or 960(b)(3) unless a defendant's prior conviction meets the statutory definition of a 'serious drug felony' or 'serious violent felony.'"[52] Simply put, the Department will not seek a mandatory life sentence for § 841(b)(1)(C) offenses if a similarly-situated individual would not be eligible for that sentence if convicted of §§ 841(b)(1)(A) or (B). But, as amended, §2D1.1(a)(1)(B) will still recommend a life sentence for these individuals.

B. Reform the Drug Trafficking Guidelines.

Defenders strongly encourage the Commission to reconsider prioritizing reforms to §2D1.1, as set forth in our Annual Letter.[53] For the reasons articulated there, section §2D1.1 should be delinked from the statutory mandatory minimums and should focus instead on role-based culpability. At a bare minimum, the Commission should lower the guidelines for methamphetamine (actual) and "Ice" to eliminate the irrational purity-based distinctions in methamphetamine offense levels.

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[50] *See* 2023 Adopted Amendments, at 28263.

[51] U.S. Dep't of Justice, *First Step Act Annual Report* 50 (Apr. 2022), https://tinyurl.com/22b4hm6a.

[52] *Id.*

[53] *See* Defenders 2023–2024 Annual Letter, at 3–13.

C. Prohibit Acquitted Conduct.

The right to trial by jury has deep-rooted, historical foundations. In *Apprendi v. New Jersey*, the Supreme Court recognized:

> "To guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of our civil and political liberties," trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours."[54]

Using acquitted conduct to increase the sentencing guidelines range under §1B1.3 ("acquitted conduct sentencing") is antithetical to this important principle. The Commission considered eliminating or limiting acquitted conduct sentencing at least four times in the past, dating back over thirty years.[55] Regretfully, it has not yet done so. But this Commission can remedy the injustice of acquitted conduct sentencing now.

One month ago, when the Supreme Court denied certiorari in *McClinton v. United States*, Justices Sotomayor, Kavanaugh, Gorsuch, and Barrett explained their denial should not be misinterpreted to signal the Court's lack of concern over the "important questions" raised by acquitted conduct sentencing.[56] Instead, these Justices denied certiorari precisely because this Commission committed itself to resolving questions around acquitted conduct

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[54] 530 U.S. 466, 477 (2000) (alteration in original) (first quoting 2 J. Story, Commentaries on the Constitution of the United States 540–41 (4th ed. 1873); and then quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)).

[55] *See* 88 Fed. Reg. 7180, 7224–7225 (2023); 62 Fed. Reg. 152, 161–62 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832, 62,832, 62,848 (1992).

[56] *McClinton v. United States*, 600 U.S. ----, 143 S. Ct. 2400, 2401 (2023) (Sotomayor, J., statement respecting denial of cert.) ("As many jurists have noted, the use of acquitted conduct to increase a [person's] Sentencing Guidelines range and sentence raises important questions that go to the fairness and perceived fairness of the criminal justice system."); *id.* at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., statement respecting denial of cert.) ("The use of acquitted conduct to alter a [person's] Sentencing Guidelines range raises important questions.").

sentencing "in the coming year."[57] Defenders hope to see acquitted conduct sentencing on the Commission's final priority list and remain eager to work with the Commission to eliminate or restrict acquitted conduct sentencing during the upcoming amendment cycle.

D. *Mens Rea* Reform.

This year the Commission should also prioritize *mens rea* reform throughout the Guideline Manual: it should remove strict liability or negligence enhancements and heighten the mental intent required under the relevant conduct provision for jointly undertaken criminal activity.[58]

At a minimum, the Commission should finish what it started earlier this year by reforming §2K2.1(b)(4). While Defenders were disappointed by the newly added privately manufactured firearms (PMFs) enhancement, we were pleased to at least see the Commission recognize the importance of *mens rea* in that enhancement.[59] But the reasons for adding a *mens rea* requirement to that enhancement apply equally to stolen firearms and firearms with an altered or obliterated serial number.[60] Indeed, in its *Reason for Amendment*, the Commission indicated it added PMFs to §2K2.1(b)(4) because "there is no meaningful distinction between a firearm with an obliterated serial number . . . and a firearm not marked with a serial number."[61] Recognizing this, the Commission should add a knowledge or willful blindness requirement to the rest of §2K2.1(b)(4).

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[57] *Id.* at 2403 (Sotomayor, J., statement respecting denial of cert.); *see also id.* (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., statement respecting denial of cert.) ("[T]he Sentencing Commission is currently considering the issue [of the use of acquitted conduct to raise the guideline range]. It is appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant certiorari in a case involving the use of acquitted conduct.").

[58] *See* Defenders' 2022–2023 Annual Letter, at 9–12.

[59] *See* 2023 Adopted Amendments, at 28267 ("[S]ubsection (b)(4)(B)(ii) only applies if the defendant knew or had reason to believe that the firearm involved in the offense was not otherwise marked with a serial number . . . or was willfully blind to or consciously avoided knowledge of such fact.").

[60] *See* Defenders' 2023–2024 Annual Letter, at 27.

[61] 2023 Adopted Amendments, at 28269.

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As always, the Defenders appreciate the Commission considering our viewpoints, experience, and unique knowledge, and look forward to working with the Commission this year.

Very truly yours,

Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

Attachment

cc (w/ attach.): Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex Officio*
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

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

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I. Introduction

As the U.S. Sentencing Commission revives after years without a quorum, a top priority should be addressing a statutory duty that has been neglected since the Commission's inception: the mandatory obligation, under 28 U.S.C. § 994(g), to "make 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." In 1987, when the Federal Sentencing Guidelines came into effect, there were fewer than 50,000 prisoners in the federal system; since then, that number has tripled to more than 150,000 federal prisoners. Although Congress has repeatedly provided options and directives that would reduce the time defendants spend in prison, the Federal Bureau of Prisons (BOP) has failed to implement the full scope of the available authority, resulting in expensive and pointless overincarceration.

The newly constituted Commission's role in making recommendations to the BOP is informed by history: the thirty-five years since the effective date of the Sentencing Reform Act. Congress "intended that the Commission make recommendations as to any changes in th[e correctional system's] capacity that it believes to be necessary in light of its sentencing guidelines."[1] Nevertheless, to date, the Commission has done little to exercise its recommendation mandate, despite the need to balance the greater length of guidelines sentences with full availability of ameliorative programming.

With a new BOP Director coming aboard, now is the time to exercise that authority. The Commission should prioritize making recommendations based on the practical realities of how the BOP carries out its responsibilities. A decade ago, the Government Accountability Office and the Federal Public and Community Defenders provided information regarding a wide range of simple and fair reforms that could be implemented without new legislation to close the huge gap between what sentencing statutes allow and how the BOP carries out its authority,[2] yet little change resulted. Many of those same simple reforms remain available today, with additional ameliorative statutes now in play.

This Article looks first to the history that demonstrates the urgent need for the Commission to act now to provide specific programmatic advice to the BOP. Setting out the statutory bases and history of implementation under each ameliorative statute, it then offers thirteen specific recommendations that the Commission should make to the BOP, regarding six ameliorative programs: community corrections, the Residential Drug Abuse Program (RDAP), sentence computation rules, consecutive/concurrent sentencing rules, boot camp, and earned time credits. Each of the suggested recommendations calls for simple administrative fixes, without any new legislation, and each recommendation could conserve millions in taxpayer dollars and permit men and women to return to their families days, weeks, and months earlier. The key recommendations can be summarized as follows:

- Increase the availability of community corrections commensurate with repeated statutory directives for greater use of residential reentry centers and home confinement (18 U.S.C. § 3624(c)).
- Expand eligibility and availability of sentence reductions under RDAP by (1) allowing individuals with detainers to both participate in the program and receive sentence reductions, (2) maximizing the length of sentence reductions and community corrections for those who successfully complete the residential program, and (3) eliminating mere firearm possession as a disqualification for sentence reductions (18 U.S.C. § 3621(e)).
- Eliminate three sentence computation rules that create longer sentences: (1) pretrial custody credit should include time in immigration detention (18 U.S.C. § 3585(b)); (2) state concurrent sentences should receive either pretrial custody credit or nunc pro tunc designation to avoid creating de facto consecutive sentences (18 U.S.C. §§ 3584(a) and 3585(b)); and (3) good time credits should be awarded for time in state custody on partially concurrent sentences (18 U.S.C. §§ 3585(b), 3584(a), and 3624(b)).

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- Implement broader statutory and guideline standards to file compassionate release motions any time extraordinary and compelling reasons exist, leaving to the sentencing judge the decision whether the sentence reduction should be granted (18 U.S.C. § 3582(c)(1)(A)(i)).
- Revive the boot camp program to provide nonviolent offenders sentence reductions and expanded community corrections (18 U.S.C. § 4046(a) and 28 C.F.R. § 524.31(b)).
- Fully implement the First Step Act's earned time credit program (18 U.S.C. §§ 3632(d) and 3624(g)).

II. The Need for Commission Action and the Existing Statutory Bases for Reform

A. In the Absence of the Sentencing Commission Exercising Its Statutory Obligation to Make Recommendations Regarding Correctional Resources and Programs, Individuals Have Served More Time Than Necessary in Prison

The Commission has defined itself, for the most part, by developing the Sentencing Table's offense levels and criminal history categories, amending the guidelines, and studying the effects of guidelines and sentencing statutes. Although these front-end functions guide the sentences imposed, the execution of sentences—back-end policies and practices—has largely been ignored. But Congress understood connection between the sentences imposed and how those sentences are carried out. It directed that the Commission "shall make recommendations concerning any change or expansion in the nature or capacity of [penal, correctional, and other] facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter."[3]

The Commission's statutory role in providing recommendations is essential. Prisoners themselves are virtually voiceless regarding their conditions of confinement. Advocacy groups' suggestions can be administratively shrugged off. Litigation carried out by the few attorneys with the expertise to make their way through the procedural quagmire of administrative law face the limitless resources of a multi billion-dollar agency that takes advantage of every procedural obstacle. The Commission has unique power to offer insight and influence, given its institutional expertise and statutorily conferred authority.

As the United States has achieved notoriety for its rates of incarceration,[4] the Commission has occasionally taken steps to offset overly punitive sentencing, such as its work against the discriminatory and irrational 100:1 crack to powder cocaine ratio and the general reduction of Drug Quantity Table offense levels in Amendment 782. But on back-end resources and programs, the Commission has been mostly silent. Meanwhile, federal prisoners' sentences are de facto increased by the BOP's weak or nonexistent implementation of ameliorative statutes.

For example, the Commission developed the Sentencing Table's months in prison assuming, based on 18 U.S.C. § 3624(b), that individuals would receive good time credits at the rate of fifty-four days per year, or 15% of the sentence imposed.[5] In implementing the same statute, however, the BOP provided only forty-seven days for every year of the term of imprisonment, or 12.8% good time credits, by granting credit based on the time actually served rather than the sentence imposed.[6] Despite years of controversy over good time credits, the Commission did nothing to either adjust its own sentencing tables or recommend that the BOP implement the good time credit statute consistently with the Commission's calibration. Finally, in the First Step Act of 2018, Congress clarified that the Commission's means of calculating good time credit was correct.[7] But in the meantime, for thirty-one years, well-behaved prisoners have been over-serving time in prison by days, weeks, and months—with millions of taxpayer dollars wasted.[8]

In deciding whether to act on its congressional power to make recommendations to the BOP, the reanimated Commission may ask itself: Why would the BOP be stinting in providing inmates with sentence reductions, community corrections, credit for time served, and good time credit authorized by statute? After years of litigating against the BOP, I cannot provide the "why," but I can attest to the existence of a deeply entrenched institutional bias that—despite overcrowded prisons and dangerous staff-to-inmate ratios—always bends toward greater prison time. The history of each recommendation demonstrates the BOP's institutional resistance to ameliorative reform and the need for Commission advocacy.

B. Each Recommendation Has the Potential to Reduce Unnecessary Prison Time Through Administrative Action Based on Existing Statutory Language

Since the effective date of the guidelines era, the problem of overincarceration has been well known but ineffectively addressed. Even the Department of Justice, in a 1994 study that led to the RDAP and boot camp programs, recognized that sentences for nonviolent offenders were too long, and even longer for noncitizens.[9] Yet, while ameliorative statutes exist, the history of each back-end program discussed in this Article—from community corrections, to sentence reductions and sentence calculations, to compassionate release—illustrates the same pattern of unnecessary prison time served due to BOP inaction or stinting implementation. Thus, each of the suggested recommendations the Commission should make to the BOP originates in the statutes enacted as part of the Sentencing Reform Act or by later amendments, and each can be administratively implemented to reduce prison time without the need for any new legislation.

III. Suggested Sentencing Commission Recommendations to the Bureau of Prisons

A. The Sentencing Commission Should Recommend Greater Use of Community Corrections Under 18 U.S.C. § 3624(c)

When Congress abolished parole in the Sentencing Reform Act, the statute left in place a mechanism for "prerelease custody," also known as "community corrections"—placing federal prisoners in the community for a period of adjustment near the end of their terms of imprisonment and before the commencement of their terms of supervised release. Persons in community corrections—residential reentry centers and home confinement—continue to be in the custody of the BOP serving their terms of imprisonment. The determination of transfer to community corrections is based on the same individualized factors listed in 18 U.S.C. § 3621(b) that guide institutional placement. Congress has consistently placed increasing emphasis on the importance of community corrections to promote rehabilitation, to bring down prison populations, and to save taxpayer money on incarceration ($120.59 per prisoner per day for federal prison, $97.44 for residential reentry centers, $55.00 for home confinement).[10] But the BOP has not followed the congressional lead on greater access to residential reentry centers, even cutting back in recent years on their limited availability. The Commission should recommend expansion of residential reentry centers and home confinement and the adoption of rules maximizing their use.

Recommendation 1. The BOP should expand its capacity for community corrections by providing more funding for existing resources and contracting with more reentry centers to house individuals closer to their permanent residences.

The Sentencing Reform Act originally said very little about what constituted pre-release custody, but it required that the BOP "shall"—to the extent practical—assure that "a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry."[11] In 1990, Congress added home confinement as an authorized component of prerelease custody.[12] And for almost twenty years, community corrections received little congressional attention.

Since then, Congress has consistently ramped up the expected use of community corrections. In April 2008, with strong bipartisan support, Congress passed the Second Chance Act, which doubled the permissible time for prerelease custody to community corrections from six months to one year.[13] The new one-year maximum includes both placement in a residential reentry center and home confinement of up to six months or 10% of the sentence, whichever is less.[14]

In a separate section of the Second Chance Act, Congress created a "Federal prisoner reentry initiative," confirming its goal to expand the use of community corrections.[15] The initiative directed the Attorney General and the BOP, subject to available appropriations, to use "the maximum allowable period in a community confinement facility" as an incentive for participation in programming.[16] The initiative also directed the Attorney General "to modify the procedures and policies" to improve transition to the community.[17]

Following the Second Chance Act, Congress continued to encourage expanded use of community corrections. In the First Step Act, Congress amended § 3621(b) to require that the BOP place defendants in facilities, which include residential reentry centers, "as close as practicable to the prisoner's primary residence,"[18] and amended § 3624(c)(2) to direct that the BOP "shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement *for the maximum amount of time* permitted under this paragraph."[19] Most directly, Congress stated, "The Director of the Bureau of Prisons shall ensure there is sufficient prerelease custody capacity to accommodate all eligible prisoners."[20] Then, in response to the nationwide coronavirus pandemic, Congress passed the CARES Act, which expanded the potential time a prisoner may spend on home confinement during the emergency.[21]

Despite Congress's authorization of more and longer use of community corrections, the BOP has cut back on contracts and defunded reentry centers. As documented in submissions to the BOP and to Congress, the BOP's practices have shrunk the ability to provide community corrections by

- failing to renew contracts with reentry centers and doing so without consulting the chief judge of the judicial district affected;
- decreasing the number of reentry beds and significantly reducing the minimum number of beds for which it will guarantee payment; and
- decreasing the amount of pre-release time, with the average length "likely to decline to about 120–125 days."[22]

As a consequence, many people are left without adequate reentry services. In Oregon, after the Lane County Sheriff ended its contract with the BOP to provide reentry services, the BOP withdrew its solicitation for a new reentry center, eliminating beds for men and women coming home to central Oregon. Similarly, the BOP cut the number of beds under contract at Portland's Northwest Regional Reentry Center in its last contract revision, from 120 beds to 76 beds, reducing services by more than a third. Oregon is just one example of the nationwide failure to provide local resources for the critical task of transitioning citizens from prisons to our communities.[23]

The BOP's reduced support of community corrections runs exactly opposite to congressional policies expanding the availability of rehabilitative resources that return individuals to their families and communities sooner. The Commission should strongly recommend increased use of community corrections as individuals complete their terms of imprisonment.

Recommendation 2. The BOP should promulgate a regulation guiding community corrections placement pursuant to 18 U.S.C. § 3624(c)(6) that includes: (a) the presumptive maximum use of pre-release community corrections; (b) earlier placement in reentry centers followed by home confinement if, in the absence of the CARES Act emergency, home confinement is limited to six months; and (c) clear directives to eliminate the informal six-month-or-less norm for community corrections.

In the Second Chance Act, when Congress expanded community corrections authority from six months to one year, it also directed the BOP to promulgate regulations within ninety days regarding the "sufficient duration" of community placements:

> The Director of the Bureau of Prisons *shall issue regulations* not later than 90 days after enactment, which shall ensure that placement in a community correctional facility is
>
> (A) conducted in a manner consistent with § 3621(b) of this title;
>
> (B) determined on an individual basis; and
>
> (C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.[24]

On October 21, 2008, "well past" the ninety-day deadline, the BOP issued an interim rule that did little more than repeat the statutory language.[25] The actual practice on the ground remained unchanged, as informal rules maintained the pre–Second Chance Act six-month limit on community corrections absent exceptional circumstances.[26] In any event, the interim rule was deemed invalid because the BOP did not provide notice-and-comment required by the Administrative Procedure Act.[27]

Over a decade after the mandatory ninety-day deadline, the BOP still has not promulgated a valid final regulation as required by 18 U.S.C. § 3624(c)(6). Although advocacy groups criticized the BOP's proposed interim rule for its failure to provide greater access to community corrections,[28] little has changed.

The Commission should recommend that the BOP adopt the main themes of the 2011 comments on its interim rule. First, the individualized decision regarding transfer to community corrections should begin with a presumption of the maximum available community corrections, with considerations for delay informed by the individual designation considerations in § 3621(b). Second, in the absence of the pandemic emergency, the time in community corrections should contemplate stacking the residential reentry component on available home confinement to reach the maximum available pre-release custody. Third, the rule should explicitly reject the pre–Second Chance Act six-month limit to community corrections.

B. The Sentencing Commission Should Recommend Greater Use of Sentence Reductions and Community Corrections Under the Residential Drug Abuse Program Authorized by 18 U.S.C. § 3621(e)

In 1990, Congress mandated the creation of BOP programs to address prisoners' needs for substance abuse treatment, which included in-prison residential treatment: RDAP.[29] But few prisoners enrolled in the rigorous residential program. In 1994, Congress enacted 18 U.S.C. § 3621(e)(2)(B) to incentivize participation in RDAP by offering a sentence reduction of up to one year for nonviolent offenders.[30] Congress explicitly recognized reduction of prison overcrowding as a benefit of the program: "To the greatest extent possible, BOP shall prioritize the participation of nonviolent offenders in [RDAP] in a way that maximizes the benefit of sentence reduction opportunities for reducing the inmate population."[31]

The Commission has found RDAP effective at reducing recidivism.[32] But the BOP has systematically underutilized the statutory authority to reduce sentences in three basic ways: (1) by failing to allow prisoners with detainers to participate; (2) by only allowing participation at the end of the sentence, resulting in shorter sentence reductions; and (3) by disqualifying individuals with mere gun possession from early release.

Recommendation 3. The BOP should allow all statutorily eligible prisoners, including those with detainers, to participate in RDAP and receive the § 3621(e) sentence reduction.

Beginning in 1997, Congress required the BOP to provide residential treatment to "all eligible prisoners."[33] Congress defined the term "eligible prisoner" with only two criteria: a documented substance abuse problem and a willingness to participate in residential treatment.[34] The statute also defined "residential substance abuse treatment" as in-prison individual and group treatment, set apart from the general prison population, lasting at least six months.[35] The statutory early release incentive is available to a subset of eligible prisoners: those with nonviolent offenses who successfully complete the residential program.[36]

As first implemented, the BOP permitted all "eligible prisoners" to participate in RDAP and to receive the early release incentive if they met the statutory nonviolent offense criteria, regardless of detainers.[37] Since then, however, the BOP has administratively disqualified individuals with detainers—either for an immigration hold or due to a pending state case—from participating in RDAP and receiving the available sentence reduction, despite the mandatory statutory language regarding participation.[38]

How did this happen? Although the statute clearly defines residential treatment as *in-prison* treatment, the BOP added a new community-based component, to be completed during pre-release custody. This effectively excluded from RDAP participation anyone ineligible for community corrections—those with immigration holds or

state detainers. The BOP based its new requirement on a misconstrued comment from the American Psychiatric Association (APA) that favored more than one monthly session during the *transitional* component of RDAP—the time in BOP custody between residential treatment and release.[39] Although the APA corrected the BOP's erroneous understanding of its comment, explaining that all eligible prisoners should benefit from RDAP, regardless of detainers,[40] the BOP's regulation continues to exclude thousands of prisoners with detainers from eligibility for the sentence reduction by adding a third requirement for sentence reduction eligibility found nowhere in the statute: the ability to participate in community corrections.[41] For citizens of other countries, the disqualification not only precludes participation in a beneficial treatment program, but prevents them from receiving sentence reductions available to similarly situated U.S. citizens whose sentences can be reduced by up to a year.

The BOP had an institutional incentive to adopt this narrower and statutorily suspect definition of "all eligible prisoners." After originally reporting shortfalls in RDAP availability, the BOP simply redefined "eligible prisoners" to exclude those who could not be transferred to community corrections because of detainers.[42] Thus, the BOP administratively cut, with no statutory basis, the 33.6% of the 56,926 defendants sentenced in 2021 who were not U.S. citizens, plus those with state detainers, from the ability to even participate in RDAP.[43]

The Commission should strongly recommend that all eligible prisoners be able to participate in RDAP and to receive the sentence reduction incentive for successful completion of the in-prison residential and transitional components, if statutorily eligible, regardless of detainers. The Commission's recommendation not only would address overincarceration and rehabilitation but would carry out the statutory duty to avoid unwarranted disparities, especially disparities that frequently involve harsher treatment for racial minorities from other countries.

Recommendation 4. The BOP should encourage maximum sentence reductions and community corrections for successful completion of RDAP through earlier entry and greater availability of the program.

The sentence reduction authorized by Congress for successful completion of RDAP is "up to one year." But the BOP has consistently granted less than one year. The main reason for this insufficient utilization of statutory relief is that prisoners are not placed in RDAP until close to their projected release date. The lack of beds available in the program often results in a glut of need as sentences approach expiration.

Failing to fully implement the § 3621(e) sentence reduction program is inconsistent with Congress's aim for the program to "maximize[] . . . opportunities for reducing the inmate population."[44] In *Close v. Thomas*, the Ninth Circuit commented that the BOP's stinting administration of RDAP and the program's "insufficient capacity" had "created a troubling situation that calls for a legislative or regulatory remedy."[45]

By delaying entry and having insufficient beds, the BOP not only shortens sentence reductions but also limits time in community corrections. Even before the First Step Act, BOP rules favored maximum community corrections for RDAP participants.[46] Under the First Step Act's earned time credit program, RDAP is an evidence-based recidivism reduction program that authorizes even earlier community corrections.[47] And in-prison transitional programming is available when completion of the residential component results in additional time before community corrections placement or release. By following its own policies on community corrections, the BOP can increase the length of RDAP sentence reductions and decrease time behind prison walls.

The regulatory fix is easy: expand the availability of this excellent program and do not delay entry. The Commission should recommend that the BOP fund sufficient beds for all eligible prisoners, that participants should be able to enter RDAP earlier in their terms of imprisonment, and that the BOP should improve the in-prison transition program after the residential component is completed.

Recommendation 5. The BOP should not categorically disqualify nonviolent offenders from § 3621(e) sentence reductions based on the mere possession of firearms.

The sentence reduction statute broadly authorizes sentence reductions to any "prisoner convicted of a nonviolent offense" who successfully completes RDAP. But the BOP has greatly narrowed eligibility by treating the mere possession of a firearm as a disqualification.[48] The BOP has had trouble administratively articulating a reason for this disqualification, and there is no empirically based justification for the disqualification.

The initial litigation regarding gun possessors established that they are statutorily eligible nonviolent offenders within the meaning of § 3621(e). In May 1995, the BOP promulgated a regulation that defined the statutory term "nonviolent offense" as the converse of "crime of violence" as defined in 18 U.S.C. § 924(c).[49] At the same time, through a program statement, the BOP deemed individuals to be statutorily ineligible for a sentence reduction based on convictions involving the mere possession of a firearm, including being a felon in possession of a firearm (18 U.S.C. § 922(g)) or drug trafficking with a two-level specific offense characteristic for possession of a weapon.[50] The courts generally held that the program statement was inconsistent with the statute because, under the relevant statutes, gun possession and drug trafficking are nonviolent offenses.[51]

After the first wave of litigation, the BOP conceded that gun possessors were statutorily eligible for sentence reductions but published an interim rule and accompanying program statement that modified the crime of violence construct by substituting the Director's discretion to disqualify § 922(g) offenders and drug offenders with

a gun enhancement.[52] Ultimately, the Supreme Court upheld the BOP's discretionary authority to disqualify additional classes of statutorily eligible prisoners from the sentence reduction incentive.[53] But the lower courts, over years of litigation, found the interim rule invalid for violation of notice-and-comment under § 553(b) of the Administrative Procedure Act,[54] and a later iteration of the same rule was deemed arbitrary and capricious under § 706(2)(A) because the BOP "failed to set forth a rationale for its decision[.]"[55] This litigation history explains why, from 1995 to 2012,[56] hundreds of gun-possessing defendants were deemed eligible through court orders and BOP Operations Memorandums that implemented Ninth Circuit decisions.

The BOP has generated empirical evidence that prisoners who successfully complete RDAP have lower rates of recidivism.[57] The same appears to be true regarding prisoners who were initially disqualified from the § 3621(e) sentence reduction solely on the basis of gun possession and then successfully completed RDAP. The BOP should change its rule to establish that mere gun possessors, who are nonviolent within the meaning of the statute, should be deemed categorically eligible for sentence reductions for successful completion of RDAP.

C. The Sentencing Commission Should Recommend That the BOP Eliminate Sentence Computation Rules That Increase Prison Time

The BOP administers sentences through the Sentence Computation Manual.[58] For years, the Manual has increased sentences by failing to count time in official detention, by creating de facto consecutive sentences, and by failing to provide good time credits for the concurrent portion of federal sentences served in state custody. The BOP's practices, which appear to be inconsistent with the relevant statutes, are amenable to administrative correction to reduce overincarceration and to administer sentences fairly.

Recommendation 6. The BOP should provide pretrial custody credit for post-arrest time in immigration detention because it constitutes official detention under 18 U.S.C. § 3585(b).

Congress specifically instructed that all pretrial time in "official detention" after the offense should be credited against the federal term of imprisonment, as long as the time is not credited against another sentence.[59] Defendants can spend days, weeks, and sometimes months in immigration custody before their first appearance in federal court. Although immigration detention involves the same lost liberty as other pretrial custody,[60] the Manual instructs sentence calculators to refuse to count that time as "official detention."[61] The Ninth Circuit explicitly addressed the BOP program statement and found it to be inconsistent with the statute.[62] Nevertheless, the BOP continues to follow its Manual, creating dead time that prolongs incarceration for citizens of other countries.

Under the plain meaning of "official detention," defendants should receive credit for time served in U.S. Immigration and Customs Enforcement (ICE) custody. Failure to provide credit perpetuates unwarranted disparity of similarly situated defendants. For example, a person who robs a bank, who is first held in state custody for thirty days before being released to federal custody when the state case is dismissed, will receive full credit for the thirty days spent in state custody against the federal bank-robbery sentence. But a citizen of another country who spends thirty days in ICE custody before being charged in federal court will not receive credit against any later federal sentence. The Commission should strongly recommend that the BOP delete Manual language on immigration custody and explicitly identify immigration custody as "official detention" for the purposes of computing pretrial custody credit.

Recommendation 7. The BOP should eliminate de facto consecutive sentences under 18 U.S.C. § 3584(b).

The BOP's regional counsel once called the interaction between state and federal concurrent and consecutive sentences one of the "most confusing and least understood" areas of federal sentencing law.[63] The origin of that complexity is the BOP's interpretation of the pretrial custody statute (§ 3585(b)) to treat a state concurrent sentence, even one explicitly imposed to run concurrently with the prior federal sentence, as "another sentence" that forecloses federal credit. The following scenario is not unusual:

- A state arrest places a person in the state's primary jurisdiction.
- The federal prosecutor then files a writ of habeas corpus ad prosequendum to pursue a federal prosecution against the same person.
- The federal judge imposes a sentence that is silent on whether the federal sentence should run concurrently or consecutively with the yet-to-be-imposed state sentence.
- After the federal prosecution is complete, the person returns to state court, where the state judge orders the state sentence to run concurrently with the federal sentence.

In this scenario, under the BOP's existing policies, all of the time in primary state custody is credited only against the state sentence, even while the defendant is physically in federal custody during the execution of the writ of habeas corpus ad prosequendum. And the federal sentence does not commence until the state sentence is fully satisfied. Thus, the BOP executes such sentences as de facto consecutive, even though no judge ever ordered the sentence to run consecutively and the state judgment explicitly intends concurrency. This administrative decision increases time in custody by months and years.

There are two simple solutions that would allow the sentences in the above scenario to be executed concurrently, both as to pretrial credit and once the sentences are imposed. First, the BOP should administratively deem an

expressly concurrent sentence as not "another sentence" within the meaning of § 3585(b).[64] Then, the pretrial custody would be credited as any other sentence. Second, the BOP should not make the quintessential judicial decision of concurrency. Currently, once the federal sentence is imposed, the BOP conducts its own evaluation of whether the federal sentence should be allowed to commence while the individual remains in state custody serving the state sentence, through the discretionary nunc pro tunc (retroactive) designation of the state facility for service of the federal sentence. The constitutional problems with an executive-branch agency usurping the judicial role of deciding the concurrency questions are substantial.[65] And when the federal judgment is silent, respect for the state judge's concurrency decision avoids defendants serving more time than any judge determined was necessary to accomplish the purposes of sentencing.

The Commission should recommend that the BOP revise its sentence calculation procedures to avoid de facto creation of consecutive sentences. Instead, when the federal judgment is silent and the state judgment orders concurrency, the BOP should execute the sentences to run concurrently by not treating the state sentence as "another sentence" for pretrial credit purposes or by requiring nunc pro tunc designation to the state facility.

Recommendation 8. The BOP should provide good time credits on time adjusted to achieve concurrency under 18 U.S.C. § 3624(b).

The BOP's interpretation of § 3584(b) also creates problems when, after a state sentence has been imposed, the federal judge exercises authority under 18 U.S.C. § 3584(a) to run the sentence concurrently. Because the BOP treats the state judgment as "another sentence," despite the federal judge's concurrency order, the time in state custody prior to arriving in federal court will not be credited under § 3585(b). From the multiple amendments to U.S.S.G. § 5G1.3, the general work-around, under the guidelines, has been for the federal sentencing judge to adjust the term of imprisonment down by the amount of time in state custody prior to the federal sentencing, with a notation in the judgment that the adjustment is to achieve concurrency due to the manner in which the BOP forecloses prior custody credits under § 3585(b).[66]

This awkward way of achieving full concurrency routinely creates unwarranted disparity because the BOP does not consider the credited time in state custody to be part of the federal sentence and refuses to award good time credits under 18 U.S.C. § 3624(b) to well-behaved prisoners for that time. This is different than how the BOP treats other types of pre-sentence custody credit. For time credited under 18 U.S.C. § 3585(b), the BOP awards good conduct time credit, even when that time is served in state custody. In response to litigation regarding the disparities caused by forcing the concurrent portion of a federal sentence—which can be months or years long—to be served day-for-day, the BOP asserted that sentencing judges may grant a further variance to provide the good time credits: "A defendant whose federal sentencing has been long delayed may seek a variance based on the lost opportunity for good conduct time credit, which the sentencing court has the discretion to grant."[67]

But variances are an inappropriate and inadequate way of achieving full concurrency including good time credits. Defendants would first need to be aware that they were not going to receive good time credits, then realize, despite no mention in the Guidelines Manual, that a variance should be requested, then depend on discretion rather than the BOP's normal awarding of earned good time credits. And the wholesale loss of good time credits can create large unwarranted disparities by treating similarly situated defendants differently in terms of actual custody, particularly because the amount of time in state custody often depends on whether the individual exercised various pretrial and trial rights. Thus, similarly situated defendants end up serving varying times of actual custody based on the failure to grant good time credits, even when the total sentence intended by the judge is identical, based on the arbitrary timing of sentencing.[68]

The Commission should recommend that the BOP revise its sentence calculation rules to award good time credits earned during the concurrent part of an adjusted sentence.

D. The Sentencing Commission Should Recommend That the BOP Revise Its Rule on Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A)(i) and Submit Motions on Behalf of Eligible Prisoners, Leaving Solely to the Judge the Decision Whether the Motion Should Be Granted

The Sentencing Reform Act included the compassionate release statute that, as originally written, authorized the sentencing judge, only upon motion of the BOP, to reduce the term of imprisonment after considering the factors set forth in 18 U.S.C. § 3553(a), if "extraordinary and compelling reasons" warrant such a reduction.[69] Congress viewed § 3582(c) as a mechanism to fill the "substantial void in the sentencing system" left by the repeal of discretionary judicial review of sentences under old Rule 35(b) while providing a "safety valve" otherwise unavailable.[70] "The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations."[71]

Congress expressly delegated to the Commission the task of describing and providing examples of "extraordinary and compelling reasons."[72] Until 2007, however, the Commission failed to do so, leaving the BOP to create and apply its own criteria. The BOP's policies created in that gap time were so restrictive that motions were rarely filed and many individuals died before the agency even decided whether to file.[73] Federal defenders and advocacy groups pointed out the numerous ways in which the BOP rules thwarted congressional intent, particularly because the BOP's policies allowed it to assess other factors, besides the

existence of extraordinary and compelling reasons, and to refuse to exercise its motion-filing authority when it thought the motion should be denied (which was almost always).[74] The BOP's implementation of compassionate release was recognized as a miserable failure, resulting in needless and expensive incarceration.[75]

In 2016, the Commission expanded the definition of "extraordinary and compelling reasons" and "encouraged" the BOP in its gatekeeper role to bring motions for reduction in sentence more frequently, whenever a person met the Commission's criteria.[76] The Commission also noted that the BOP could find that extraordinary and compelling reasons existed beyond those explicitly identified by the Commission.[77] But the BOP's rules, although updated, did not adopt all of the Commission's standards and continued to include prejudging whether the motion should be granted, not simply whether extraordinary and compelling reasons existed.[78]

Then the First Step Act changed everything by providing an avenue for defendant-initiated compassionate release motions.[79] As the Commission has recognized, the courts have developed a robust area of law construing "extraordinary and compelling reasons" in the absence of an applicable policy statement and have applied those standards during the coronavirus pandemic, resulting in thousands of reduced sentences.[80] But only 1% of the compassionate release motions originated with the BOP, despite the First Step Act's mechanisms encouraging such filings.

Recommendation 9. The BOP should file compassionate release motions when it factually identifies potential extraordinary and compelling reasons, without prejudging the merits of the sentence reduction, and it should adopt Commission standards while expanding potential reasons for compassionate release.

The Commission should recommend that the BOP administer its part of the compassionate release statute in three ways that assume its proper role while keeping sentencing discretion with the judge.

First, the BOP should act quickly on reduction in sentence requests. The amended statute permits persons in prison to file their own motions directly with the sentencing court thirty days after having submitted a request to the warden. For cases of terminal illness, Congress specifically required even swifter action. The BOP must "notify the defendant's attorney, partner, and family members that they may prepare and submit" a request for compassionate release on the defendant's behalf within seventy-two hours of the diagnosis, and the BOP must process sentence reduction requests in those cases within fourteen days.[81] These provisions should result in the BOP making decisions whether or not to file sentence reduction motions without waiting for exhaustion of prisoners' requests.

Second, the BOP should eliminate the policies under which it prejudges the merits of a compassionate release motion instead of simply identifying the potential factual bases for extraordinary and compelling reasons. As the Commission and Congress recognize, whether a motion to reduce sentence *should* be granted is purely a judicial question. The BOP's current rules—that require it to assess, for example, whether release would "minimize" the severity of the offense—usurp the judicial role in deciding whether a sentence reduction is warranted under the § 3553(a) factors.

Third, the BOP should incorporate the Commission's examples of "extraordinary and compelling reasons" into its program statement, consistently with Congress's delegation of that authority to the Commission. And the BOP should expand its criteria to include additional factors favoring a finding of extraordinary and compelling reasons for compassionate release, such as the district court's failure to anticipate developments that take place after the first sentence that "produces unfairness to the defendant[.]"[82]

E. The Sentencing Commission Should Recommend That the BOP Revive the Boot Camp Program, with Sentence Reduction and Expanded Community Corrections as Benefits for Completion

Both Congress and the Commission determined that, to avoid overincarceration of defendants with little criminal history, a sentence to thirty months or less could be served by six months of boot camp, a six-months sentence reduction, and the remaining time in community corrections.[83] The boot camp program, also known as "shock incarceration," provided not only substantially less time in prison but a disciplined environment for job training, education, substance abuse treatment, and counseling.[84] In 2004, with no prior notice, the BOP defunded the program, purportedly for fiscal reasons.[85] But the slapdash fiscal assessment included no accounting for the huge savings from decreased prison time or for the enormous difference in the lives of individuals with scant criminal history and convictions for low-level offenses who returned to their communities months and years earlier. The BOP should reinstitute this alternative to prison because of the rehabilitative benefits, the reduction of incarceration rates, and the long-term fiscal savings.[86]

Recommendation 10. The BOP should reinstate the boot camp program in accordance with its congressional authorization and the implementing regulation, which include both a six-month sentence reduction and expansion of community corrections.

The Commission promulgated a guideline addressing the boot camp program that is still on the books: U.S.S.G. § 5F1.7. This sentencing option, now illusory, should be available in the real world. The Commission should recommend that the BOP reinstate the boot camp program for people with qualifying offenses who want to participate. By doing so, the BOP would reduce prison costs in the long run and prevent overincarceration.

The program "has the benefit of returning very low risk offenders sooner to their families and their jobs,"

contributing to "inmate family stability, which criminological research shows to be a key element in reducing juvenile delinquency and crime among future generations."[87] The boot camp program was well received by almost all participants in the federal system. The Commission should recommend that the BOP both revive and expand the program, identifying eligible inmates upon designation and providing them the opportunity to participate immediately upon the commencement of their sentences, both to offer an incentive for good behavior and to allow earlier placement in residential reentry centers.

F. The Sentencing Commission Should Recommend That the BOP Fully Implement the First Step Act's Earned Time Credit Program (18 U.S.C. § 3632)

A major innovation of the First Step Act was the new earned time credit program, which allowed eligible individuals in BOP custody to earn earlier transfer to pre-release custody or earlier supervised release by participation in "evidence-based recidivism reduction programming or productive activities."[88] The groundbreaking aspect of the new program was its call for a new "risk and needs assessment system" to gauge each person's recidivism risk and assign them to individualized recidivism-reducing programming based on their "specific criminogenic needs."[89] By incentivizing programming, Congress aimed to promote public safety while reducing time behind bars.[90] The program's anticipated cost savings from shorter sentences could then be "reinvested" into further recidivism reduction programming.[91]

But the BOP's rollout of the earned time credit system was not smooth: for years, the BOP delayed the implementing regulation and included restrictions that undermined the program's intent.[92] The risk assessment tool was also plagued by errors.[93] Fortunately, some early glitches have been corrected, and the regulations promulgated in January 2022 take a more expansive approach to awarding and applying credits. However, three areas should be the subject of Commission recommendations.

Recommendation 11. The BOP should expand funding for the rehabilitative programs that result in lower PATTERN scores.

PATTERN, the risk assessment tool adopted by the BOP to assess each individual's risk of recidivism, is a key part of the earned time credit program. PATTERN uses both static and dynamic factors to score individuals into four categories of recidivism risk: minimum, low, medium, and high.[94] Those categories are critical to earning time credits and receiving the intended benefits. Minimum- and low-risk individuals earn more credits for every thirty days of programming, and they receive the benefit of an actual sentence reduction when sufficient credits are accrued.[95] Medium- and high-risk individuals, by contrast, earn fewer credits, they can only receive earlier pre-release custody, not an actual sentence reduction, and there are additional barriers to obtaining that benefit.[96]

As a result, it is critically important that individuals have a realistic opportunity to reduce their recidivism risk category while they are serving their sentences. In fact, Congress required that the risk assessment system be "dynamic," such that scores "can reasonably be expected to change" on the basis of progress and regression in prison.[97] Thus, PATTERN scores go down when individuals complete rehabilitative, educational, and vocational programming. But prisoners can receive those score reductions only when programming is available—and, too often, the types of programs recognized as effective are either overcommitted or nonexistent in certain facilities.[98] Full implementation of the First Step Act should include strong recommendations in favor of expanded availability of the types of programs that reduce recidivism.[99]

Recommendation 12. The BOP should promulgate rules for transferring individuals with medium- and high-risk scores to pre-release custody so long as they have maintained good institutional conduct and have productively engaged in available programming.

By statute, individuals assessed as minimum- or low-risk under PATTERN can easily apply their credits to obtain earlier release or transfer to pre-release custody.[100] By contrast, those assessed as medium- or high-risk must satisfy additional criteria. Specifically, they must have shown a "demonstrated recidivism risk reduction," and they must have a transfer petition approved by the warden after the determination that

(aa) the prisoner would not be a danger to society if transferred to pre-release custody or supervised release;

(bb) the prisoner has made a good faith effort to lower recidivism risk through participation in recidivism reduction programs or productive activities; and

(cc) the prisoner is unlikely to recidivate.[101]

At present, the BOP has no existing policy or regulation governing the exercise of this "warden exception." Instead, the BOP has treated those with medium and high PATTERN scores as categorically ineligible for transfer to pre-release custody. In other words, only those prisoners who are both eligible to earn time credits based on their offense of conviction *and* assessed as minimum- or low-risk are currently receiving any benefit from the First Step Act's programming incentive. That amounts to just one in five prisoners (20.49%).[102] This is particularly problematic given that the PATTERN scoring system is not racially neutral. Well over half of African American men in custody (57%) are scored as medium- or high-risk, compared to just one-third of white men (35%).[103]

But there are many prisoners who, despite scoring higher on PATTERN, have demonstrated through good prison conduct, completion of prison programming, and individualized evaluations that they do not constitute a significant risk in the community. The BOP should adopt a policy for exercising the warden discretion identified in

the statute that includes factors evidencing efforts to reduce recidivism risk, such as no disciplinary write-ups for the previous twelve months, responsible prison job performance, and completion of rehabilitative programs.

Recommendation 13. The BOP should revoke its informal rule that purports to categorically exclude persons with detainers and eighteen months or less remaining on their sentences from eligibility for sentence reductions based on earned time credits.

On September 8, 2022, the BOP, in an informal inmate message, announced the categorical exclusion of two groups from sentence reductions based on earned time credits: (1) persons with eighteen months or less remaining on their sentences and (2) persons with detainers.[104] Both groups were statutorily eligible for sentence reductions before the BOP adopted the general disqualifications. These dramatic new restrictions, issued in violation of the Administrative Procedure Act's notice-and-comment requirements, promote unwarranted sentencing disparity, undermine congressional policies, and probably violate the underlying provisions of the First Step Act. The Commission should recommend that the informal rule be dropped.

IV. Conclusion

Congress instructed the Sentencing Commission to recommend changes to the nature or capacity of the BOP. These recommendations should include that the BOP administratively change practices that are resulting in defendants spending too much time in prison, receiving less rehabilitative programming, and wasting millions in taxpayer dollars. Right now, sentenced persons are spending more time in prison than is necessary to accomplish the legitimate goals of sentencing, often resulting in unwarranted sentencing disparities. Through greater funding of rehabilitative programs, which can lower the time in prison for some, the BOP's long-term fiscal interests are served while assuring that statutory rehabilitative goals and methods are not shortchanged or abandoned. At this critical juncture, with both a newly constituted Commission and a newly installed BOP Director, the Commission should offer the BOP a full range of statutorily permitted recommendations that will ameliorate the overuse of prison and promote the greater use of community corrections.

Notes

1 S. Rep. No. 98–225, at 175 (1983).

2 Government Accountability Office, Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison (Feb. 2012); Thomas W. Hillier III et al., Federal Public and Community Defenders, GAO Report Reveals Multiple Ways to End the Waste of Millions on Unnecessary Overincarceration (Apr. 4, 2012).

3 28 U.S.C. § 994(g).

4 "The United States has less than 5 percent of the world's population, yet nearly 25 percent of its prisoners." American Bar Association, ABA Ten Principles to Reduce Mass Incarceration (Aug. 2022) (adopted by the House of Delegates in Revised Resolution 604).

5 Recognizing that the statutory fifty-four days in 18 U.S.C. § 3624(b) is almost exactly 15% of 365, the Commission adjusted the ranges in the Sentencing Table for good time credit "that would be earned under the guidelines" by adding 15% to the baseline. U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 23 (1987).

6 Max Hellman, *Barber v. Thomas: The Supreme Court's Interpretation of the Federal Good Time Credits Statute is Undermining Sentencing Reform*, 42 McGeorge L. Rev. 873, 879–80 (2011).

7 First Step Act of 2018, Pub. L. No. 115–391, § 102(b)(1)(B), 132 Stat. 5194, 5210–13 (Dec. 21, 2018); Staff of S. Comm. on the Judiciary, 115th Cong., S.3649, The First Step Act Section-by-Section Summary 3 (Nov. 15, 2018) ("Amends Section 3624 of title 18 of the U.S. Code *to clarify* congressional intent behind good time credit[.]") (emphasis added).

8 "And if the only way to call attention to the human implications of this case is to speak in terms of economics, then it should be noted that the Court's interpretation comes at a cost to the taxpayers of untold millions of dollars." Barber v. Thomas, 560 U.S. 474, 494 (2010) (Kennedy, J., dissenting).

9 U.S. Dep't of Justice, An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories 4 (Feb. 1994).

10 Annual Determination of Average Cost of Incarceration Fee, 86 Fed. Reg. 49060 (Sept. 2, 2021); Home Confinement Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 87 Fed. Reg. 36787 (Aug. 31, 2021).

11 18 U.S.C. § 3624(c) (1987). The statute also institutionalized cooperation with the probation office during this transition, now codified as 18 U.S.C. § 3624(c)(3): "The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such prerelease custody."

12 Crime Control Act of 1990, Pub. L. No. 101–647, § 2902, 104 Stat. 4789, 4913; 18 U.S.C. 3624(c) (1990) ("The authority provided by this subsection may be used to place a prisoner in home confinement.").

13 18 U.S.C. § 3624(c) (2008).

14 18 U.S.C. § 3624(c)(1) and (2) (2008).

15 34 U.S.C. § 60541.

16 34 U.S.C. § 60541(a)(2)(A).

17 34 U.S.C. § 60541(c)(2).

18 First Step Act of 2018, Pub. L. No. 115–391, § 601, 132 Stat. 5194, 5237 (2018); 18 U.S.C. § 3621(b) (2018).

19 18 U.S.C. § 3624(c)(2) (2018) (emphasis added).

20 18 U.S.C. § 3624(g)(11).

21 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, § 12003(b)(2), 134 Stat. 281, 516 (2020).

22 Statement of David E. Patton, Before the Judiciary Committee of the House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security, Oversight Hearing on "The Federal Bureau of Prisons and Implementation of the First Step Act," at 10–11 and Exhibit B (Oct. 17, 2019)

23 *Id.*, Exhibit B at 4–6.

24 18 U.S.C. § 3624(c)(6) (2008) (emphasis added).

25 Sacora v. Thomas, 628 F.3d 1059, 1063 (9th Cir. 2010) (citing Pre-Release Community Confinement, 73 Fed. Reg. 62440-01 (Oct. 21, 2008) (codified at 28 C.F.R. §§ 570. 20–.22)).

26 *See Sacora*, 628 F.3d at 1063–64 (describing the informal rules).

27 *Id.* at 1065 ("The district court granted the petition [for class of federal habeas petitioners] with respect to the BOP's formal regulations, 28 C.F.R. §§ 570.20–.22, finding that the BOP's failure to use notice-and-comment provisions in promulgating those regulations violated the [Administrative Procedure Act], and enjoined the BOP from considering inmates for placement in RRCs pursuant to those regulations.").

[28] *See* Pre-Release Community Confinement, 76 Fed. Reg. 58197-01 (Sept. 20, 2011).

[29] Crime Control Act of 1990, Pub. L. No. 101–647, § 2903, 104 Stat. 4789, 4913 (codified at 18 U.S.C. § 3621(b)).

[30] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 32001, 108 Stat. 1796, 1897 (codified at 18 U.S.C. § 3621(e)).

[31] Conf. Rep. to Consolidated Appropriations Act of 2010, 155 Cong. Rec. H13631 03, at H13887 (daily ed. Dec. 8, 2009), Pub. L. 111–117, 123 Stat. 3034 (Dec. 16, 2009)

[32] U.S. Sentencing Comm'n, Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010 5 (May 2022).

[33] 18 U.S.C. § 3621(e)(1)(C).

[34] 18 U.S.C. § 3621(e)(5)(i) and (ii).

[35] 18 U.S.C. § 3621(e)(5)(A).

[36] 18 U.S.C. § 3621(e)(2).

[37] BOP Program Statement 5330.10, Drug Abuse Programs Manual, Inmate, Ch. 6 at 2 (May 25, 1995) (completion of applicable transitional services programs required for sentence reduction).

[38] Drug Abuse Treatment Programs: Early Release Consideration, 61 Fed. Reg. 25121-01 (May 17, 1996); BOP Program Statement 5330.10, Change Notice, Ch. 6 at 7.3 (May 17, 1996).

[39] Letter from Melvin Sabshin, M.D., Medical Director, American Psychiatric Association, to Kathleen Hawk, Director, Bureau of Prisons (July 18, 1995); Drug Treatment and Intensive Confinement Center Programs: Early Release Consideration, 65 Fed. Reg. 80745-01, 80746 (Dec. 22, 2000) ("The comment by the American Psychiatric Association on the adequacy of transitional services became the basis for the second interim rule.").

[40] Letter from Steven M. Mirin, M.D., Medical Director, American Psychiatric Association, to Kathleen M. Hawk Sawyer, Director, Bureau of Prisons, at 2 (June 21, 2000).

[41] BOP Program Statement 5330.11, Early Release Procedures Under 18 U.S.C. § 3621(e), § 2.5.1(b) (Mar. 16, 2009).

[42] Drug Abuse Treatment Program: Subpart Revision and Clarification and Eligibility of D.C. Code Felony Offenders for Early Release Consideration, 74 Fed. Reg. 1893 (Jan. 14, 2009). The Commission itself adopted this statistical illusion in its description of RDAP in the May 2022 report on RDAP.

[43] U.S. Sentencing Comm'n, Annual Report and Sourcebook of Federal Sentencing Statistics tbl.9 (2021); *see* Fed. Bureau of Prisons, Inmate Citizenship (Aug. 2022) (16% of the prison population are from other countries).

[44] Conf. Rep. to Consolidated Appropriations Act of 2010, *supra* note 30.

[45] 653 F.3d 970, 976 (9th Cir. 2011).

[46] 28 C.F.R. § 550.54(a)(1)(ii) (Incentives for RDAP participation).

[47] *See* 18 U.S.C. § 3632(d)(4)(A); 18 U.S.C. § 3624(g).

[48] 28 C.F.R. § 550.55(b)(5)(ii).

[49] 28 C.F.R. § 550.58 (May 1995).

[50] BOP Program Statement No. 5162.02 (July 24, 1995).

[51] The initial decisions from the Ninth Circuit held that gun possessors were statutorily eligible. Downey v. Crabtree, 100 F.3d 662, 663 (9th Cir. 1996); Davis v. Crabtree, 109 F.3d 566, 569 (9th Cir. 1997). The Circuits came to conflicting conclusions, with the majority following the Ninth Circuit's lead.

[52] Jacks v. Crabtree, 114 F.3d 983, 985 n.2 (9th Cir. 1997) ("Here, the Bureau concedes that petitioners are eligible under section 3621(e)(2)(B), but argues that they are ineligible under the Bureau's regulation creating an additional eligibility requirement."); BOP Program Statement No. 5330.10 Ch. 6 at 1 (Oct. 9, 1997); 62 Fed. Reg. 53690-01 (Oct. 15, 1997).

[53] Lopez v. Davis, 531 U.S. 230, 244 (2001)

[54] Paulsen v. Daniels, 413 F.3d 999, 1005–06 (9th Cir. 2005); Bohner v. Daniels, 243 F. Supp. 2d 1171, 1174–76 (D. Or. 2003).

[55] Arrington v. Daniels, 516 F.3d 1106, 1114 (9th Cir. 2008).

[56] Peck v. Thomas, 697 F.3d 767, 773 (9th Cir. 2012).

[57] U.S. Sentencing Comm'n, *supra* note 31.

[58] BOP Program Statement 5880.28 (July 19, 1999).

[59] 18 U.S.C. § 3585(b).

[60] Megan Shields Casturo, Comment, *Civil Immigration Detention: When Civil Detention Turns Carceral*, 122 Penn. St. L. Rev. 825, 835 (2018) ("[I]mmigration detention facilities are notorious for their carceral conditions.").

[61] BOP Program Statement 5880.28, at 1–15A (Sept. 20, 1999).

[62] Zavala v. Ives, 785 F.3d 367 (9th Cir. 2015).

[63] Henry J. Sadowski, Interaction of Federal and State Sentences When the Federal Defendant Is Under State Primary Jurisdiction 1 (Nov. 18, 2009).

[64] Stephen R. Sady, *State Sovereignty and Federal Sentencing: Why De Facto Consecutive Sentencing by the Bureau of Prisons Should Not Survive Bond v. United States*, 27 Fed. Sent'g Rep. 56, 59 (Oct. 2014).

[65] The concurrency decision "concerns a matter of discretion traditionally committed to the Judiciary," and therefore, should not "be left to employees of the same Department of Justice that conducts the prosecution." Setser v. United States, 566 U.S. 231, 236, 242 (2012) (*citing* Oregon v. Ice, 555 U.S. 160, 168–69 (2009)).

[66] U.S.S.G. §§ 5G1.3(b), (d); 5K2.23; *see also* U.S.S.G. § 5G1.3, Application Note 4(E) ("[A]void confusion with the [BOP]'s exclusive authority under" § 3585(b) by noting in the judgment that departure to achieve concurrency not be described as credit for time served).

[67] Brief of Respondent, Schleining v. Thomas, 642 F.3d 1242 (9th Cir. 2011) (No. 10-35792), 2011 WL 991513, *30; *accord* Brief of Respondent, Lopez v. Terrell, 654 F.3d 176 (2d Cir. 2011) (No.10-2079), 2011 WL 680803, *8. In *Lopez*, the court reversed the district court based on deference to the BOP; in *Schleining*, the court noted the lack of BOP rules directly addressing the question.

[68] In *Witte v. United States*, the Court noted § 5G1.3's overall purpose of avoiding disproportionate sentencing by seeking to "approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time (i.e., had all of the offenses been prosecuted in a single proceeding)." 515 U.S. 389, 404–05 (1995); *see* United States v. Wilson, 503 U.S. 329, 334 (1992) (no reason for pre-sentence detention credit "to depend on the timing of sentencing").

[69] 18 U.S.C. § 3582(c)(1)(A)(i) (1987).

[70] Comprehensive Crime Control Act of 1983, Hearing on S. 829 before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary, 98th Cong., at 491 (1983); Sen. Comm. on Judiciary, S. Rep. 98–225, 98th Cong., 1st Sess., at 121 (1983), 1984 U.S.C.C.A.N. 3182, 3304.

[71] 1984 U.S.C.C.A.N. at 3304.

[72] 28 U.S.C. § 994(t).

[73] *See generally* Hum. Rts. Watch & Fams Against Mandatory Minimums, The Answer Is No: Too Little Compassionate Release in US Federal Prisons (Nov. 2012); Mary Price, *A Case For Compassion*, 21 Fed. Sent'g Rep. 170 (2009); Stephen Sady & Lynn Deffebach, *Second Look Resentencing Under 18 U.S.C. § 3582(c) As an Example of Bureau of Prisons Policies That Result in Overincarceration*, 21 Fed. Sent'g Rep. 167 (2009).

[74] *See* Comments on Docket No. BOP 1168, 28 CFR part 571, Compassionate Release, at 4 (Feb. 3, 2014) ("[T]he structure and legislative history of the sentence reduction authority, 18

U.S.C. § 3582(c)(1)(A), leave little doubt that Congress intended that the Bureau's role be limited to identifying prisoners with extraordinary and compelling circumstances and of bringing their cases to the courts.").

75 U.S. Dep't of Justice, Evaluation & Inspection Div., I-2013-006, The Federal Bureau of Prisons' Compassionate Release Program 11 (2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered.").

76 U.S.S.G. § 1B1.13 (2016).

77 U.S.S.G. § 1B1.13, Application Note 1(D).

78 BOP Program Statement 5050.50, *Compassionate Release/Reduction in Sentences* (Jan. 17, 2019). For example, Section 7 of the current program statement requires the BOP to consider the individual's "personal history," the individual's age at the time of the offense, and "whether release would minimize the severity of the offense."

79 First Step Act of 2018, Pub. L. No. 115–391, § 603(b), 132 Stat. 5194, 5239 (2018).

80 U.S. Sentencing Comm'n, Compassionate Release Data Report, Fiscal Year 2020 to 2021 (2022).

81 18 U.S.C. § 3582(d)(2)(A). For cases of a physical or mental disability, the amended statute includes requirements of family notification and assistance, but it does not require the same swift timeline. 18 U.S.C. § 3582(d)(2)(B).

82 *Setser*, 566 U.S. at 243.

83 18 U.S.C. § 4046; 28 C.F.R. § 524.31(b); U.S.S.G. § 5F1.7.

84 18 U.S.C. § 4046(b).

85 Serrato v. Clark, 486 F.3d 560, 569–70 (9th Cir. 2007).

86 *See* Miles D. Harer & Jody Klein-Saffran, U.S. Dep't of Justice, Fed. Bureau of Prisons, Evaluation of Post-Release Success for the First 4 Classes Graduating from the Lewisburg Intensive Confinement Center 6–7 (1996) (the federal boot camp program had "demonstrated success regarding low rearrest rates" and resulted in "substantially lower" recidivism rates than similar state programs).

87 *Id.* at 2.

88 18 U.S.C. § 3632(d)(4).

89 18 U.S.C. § 3632(a).

90 H.R. Rep. No. 115–699, at 22 (2018) (recognizing that "the vast majority of federal prisoners will one day be released from BOP custody" and that it is in "the fiscal interest of the government to reduce recidivism [and] in the public safety interest as well[.]"

91 *Id.*

92 *See* Cazares v. Hendrix, 575 F. Supp. 3d 1289, 1299–1302 (D. Or. 2021) (granting partial habeas corpus relief based on the BOP's failure to implement statutory language in a timely manner).

93 U.S. Dep't of Justice, Office of Justice Programs, 2020 Review and Revalidation of the First Step Act Risk Assessment Tool 5–7 (Jan. 2021).

94 U.S. Dep't of Justice, Office of Justice Programs, 2021 Review and Revalidation of the First Step Act Risk Assessment Tool 28 (Dec. 2021).

95 *See generally* 18 U.S.C. § 3632(d)(4)(A); 18 U.S.C. § 3624(g).

96 *Id.*

97 18 U.S.C. § 3631(b)(4)(C).

98 *See* First Step Act Independent Review Comm., Report of the Independent Review Committee Pursuant to the Requirements of Title I Section 107(g) of the First Step Act (FSA) of 2018 (P.L. 115–391) 2–3 (Dec. 21, 2020) (finding insufficient program availability both during the pandemic and after an anticipated return to pre-pandemic levels).

99 Although PATTERN was validated by a small list of programs that existed before the First Step Act, the current version of PATTERN score reduction should also account for all types of rehabilitative programs now deemed eligible for earned time credit.

100 18 U.S.C. § 3624(g).

101 18 U.S.C. § 3624(g)(1)(D)(II).

102 U.S. Dep't of Justice, Office of the Att'y Gen., First Step Act Annual Report 26 (Apr. 2022).

103 *Id.*

104 Walter Palvo, *Bureau of Prisons' Interpretation of First Step Act Will Leave Thousands of Inmates Incarcerated*, Forbes (Sept. 9, 2022).