

A PROPOSAL FOR AMENDING THE UNITED STATES
SENTENCING GUIDELINES

Submitted by

The Project for Older Prisoners (POPS)
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The Project for Older Prisoners of George Washington University's National Law Center respectfully requests an opportunity to appear before the United States Sentencing Commission ("Commission") at its scheduled February 25, 1992, public meeting. On January 2, 1992, the United States Sentencing Commission invited public comment on proposed amendments to the federal sentencing guidelines, pursuant to 28 U.S.C. 994 (a), (o), (p), (x). The Commission asked for comment on "any aspect of the sentencing guidelines, policy statements and commentary, whether or not the subject of a proposed amendment." 57 Fed. Reg. 90 (1992). Among the issues for comment set forth in the Federal Register, the Commission listed a series of changes relating to the application of age as a relevant offender characteristic.¹ The Commission further invited comment on lower

¹ Notice of Proposed Amendments, 57 Fed. Reg. 90 (1992). Among the issues for comment was:

[D] Issue for Comment: The Commission requests comment on whether Chapter Five, parts H and K, should be amended to authorize a downward departure where a court finds that the defendant's advanced age (e.g., age 60 or older) has reduced the defendant's risk of recidivism, provided that the defendant (1) serves a substantial portion of his sentence, (2) is not a major drug trafficker, and (3) has no current or past history of violent offenses. Comment is also requested on how such a departure, if authorized, might be structured to provide for consistency in application.

sentencing procedures for cases of "extraordinary physical impairment."² The following proposals focus on the applicability of age and geriatric illness to the guidelines and policy statements of the Commission. Following a short statement of institutional identification, the proposal will discuss a range of options for the Commission in light of a growing scarcity of federal prison resources and the rapidly rising older prison population.

I. INSTITUTIONAL IDENTIFICATION

The Project for Older Prisoners (POPS) is a nationally recognized pro bono organization focusing on issues related to older and geriatric offenders. Founded by Professor Jonathan Turley in 1988 in New Orleans, POPS was developed to address a growing national problem: the aging of America's prison population. The number of older offenders has been rising exponentially in the United States due to longer sentencing and elimination of parole and pardon opportunities. In 1987, a

² Notice of Proposed Amendments, 57 Fed. Reg. 90 (1992). Among the listed potential amendments is a new policy statement:

Section 5K2.17. Extraordinary Physical Impairment
(Policy Statement).

If a defendant suffers from an extraordinary physical impairment, a sentence below the applicable guideline range may be warranted; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

conservative estimate of the number of prisoners over the age 55 was 20,000. By the year 2000, there will be over 125,000 older prisoners in this country. These prisoners occupy badly needed cell space and will on average cost much more to maintain than a younger prisoner.

Since its formation, POPS has become a national leader in developing new policies and legislation pertaining to the incarceration of older prisoners. With offices in New Orleans, Louisiana, and Washington, D.C., POPS works with prisons and legislators to adapt prison policies and facilities to better deal with the costs and needs of this emerging population. Among these policy changes are preventative medical care and alternative forms of incarceration. With the use of volunteer law students, POPS also evaluates particular prisoners to determine their likely recidivism. If a prisoner is statistically low risk, POPS locates housing and support for the prisoner before moving the case forward for a pardon or parole hearing.

POPS is composed primarily of law students working under Professor Turley's direct supervision. After learning of a particular prisoner, Professor Turley will usually interview the prisoner by telephone or in person. If the prisoner is a good candidate for release, a student is assigned to the prisoner to complete an extensive background report to help determine the prisoner's recidivist potential. This background material tracks recognized recidivist studies by focusing on high predictors like

age, chemical dependencies and criminal pattern. POPS has garnered a great deal of bipartisan political support precisely because the organization does not argue for the general release of older prisoners. POPS is highly conservative in actual recommendations for release and will often recommend for an alternative form of incarceration such as electronic bracelets or prison nursing homes, over actual release. Therefore, developing alternative forms of incarceration has been an emphasis in POPS legislation.

POPS comes before the Commission as a recognized leader on prison geriatric policy. After working with legislators and parole boards in various states, POPS hopes to assist the Commission in exploring the possible relevance of age and recidivism to the federal guidelines. As an organization centered on risk-assessment and the maximization of prison resources, POPS is closely aligned with the statutory purposes behind the creation of the Commission under 28 U.S.C. § 991(b) (1) (B)-(C) (1986). It is in that spirit that POPS offers the following assessment of the importance of age to the federal sentencing and prison system.

II. THE GRAYING OF THE FEDERAL PRISON POPULATION

As the Commission is aware, the federal prison population has been undergoing the most significant growth phase in its

entire history.³ In 1986, there were 33,132 offenders confined in federal prisons.⁴ By the end of 1990, the number of offenders in federal institutions increased to 59,123. This number is expected to grow to 100,000 by 1995, and to 127,000 by the turn of the century.⁵ In 1990, the federal prison population increased by 10.7 percent, adding an additional 6,355 prisoners to an already overcrowded system.⁶

It is common knowledge that the average age in the country is rising and, as a consequence, public health care and support are being stretched to extreme limits. What is less commonly known is that the nation's prison population is experiencing an even greater demographic shift upward in terms of age. Older prisoners comprised only 11.3 percent of the federal prison population in 1986⁷, a number which increased to 26 percent of the federal prison population by 1989. A projected one-third of

³ Moritsugu, Kenneth, Assistant Surgeon General and Medical Director, Federal Bureau of Prisons. Inmates Chronological Age vs. Physical Age. Forum on Issues in Correction, Record of the proceeding, "Long Term Confinement and the Aging Inmate Population", Page 41, December 7, 1990.

⁴ Statistical Report for the Fiscal Year 1986. U.S. Department of Justice, Federal Bureau of Prisons.

⁵ Quinlan, J. Michael, Director of the Federal Bureau of Prisons. Forum on Issues in Corrections. December 7, 1990.

⁶ Cohen, Robyn L. Prisoners in 1990, Bureau of Justice Statistics Bulletin, May, 1991.

⁷ Statistical Report for the Fiscal Year 1986. U.S. Department of Justice, Federal Bureau of Prisons.

the prison population will be 50 or older by the year 2010.⁸ Overall, the number of prisoners in the federal system over the age of 50 has doubled in 5 years, increasing from 3,349 in 1986 to over 7,000 in 1991. It is estimated that approximately 17,000 federal prisoners will be over the age of 50 age by the year 2000.⁹

The stark reality of the graying of the federal prison population is that increasing resources must be expended to adequately care for the unique needs of older prisoners. The primary expense for incarcerating the older population has been rising medical and maintenance costs. Such costs for older prisoners are three times the cost for younger prisoners.¹⁰ In 1986, the cost to maintain an older inmate in federal prison was estimated at an average of \$39,486 a year.¹¹ In 1990, the average cost for the medical care and maintenance of inmates over the age of 50 was between \$50,000 and \$60,000 a year in some states.¹² Since 1980, individual inmate medical costs have

⁸ Moritsugu, Kenneth, Assistant Surgeon General and Medical Director, Federal Bureau of Prisons. Inmates Chronological Age vs. Physical Age. December 7, 1990.

⁹ Id.

¹⁰ Zorn, Eric. "Natural life" a crime itself, Chicago Tribune, Chicagoland; Pg 1; Zone: C, January 30, 1992.

¹¹ Benning, Victoria. Elderly Inmates Pack Prisons; Cause Concern about Cost, Care, Gannett News Service, May 17, 1990.

¹² Foster, Mary. Prisons' Costly Dilemma: Caring for elderly prisoners; Punishment: Younger, more dangerous men are released while aging inmates sentenced to life without parole cost the system millions, Los Angeles Times, Part A; Page 2; Column 1, May 6, 1990.

doubled, while in the same time period, prison budgets allocated towards health care have increased only three percent.¹³

Under the pressure of both expanding prison populations and rising health care costs, the American prison hospital system is barely able to keep pace with required and essential services. In 1990, ninety percent of the country's 600 prison hospitals were not certified as meeting the standards established by the institutional medical profession. Prison hospitals are forced to care for inmates in facilities that are scarcely adequate to serve half the number of current prisoners. On average, prisons are operating at sixty percent above capacity while the prison hospitals are operating with only sixty percent of the rated staff.¹⁴

Designed for young, healthy, dangerous prisoners, most federal facilities lack any specialized support for a geriatric population and thereby fuel higher medical and maintenance costs of preventable geriatric illnesses. To properly care for older inmates, the ideal geriatric unit would need to provide many costly services to the older inmate such as special diet and nutrition monitoring; special exercises for bone deterioration; modified work schedules; monitoring of special health problems; modification of the physical environment to facilitate walkers, wheelchairs, and other physical aids; and for some inmates,

¹³ Jonathan Turley, "Why Prison Health Care is a Crime", Chi. Trib., March 19, 1991.

¹⁴ Id.

constant bed care and intensive medical supervision.¹⁵ .

Medical diagnosis and treatment also become more difficult for older prisoners, as the elderly are more likely to suffer side-effects from medicine and to be poor candidates for surgery.¹⁶ Due to the fact that current prison medical and nursing staff have only a limited knowledge of the special needs of the elderly prisoner, inappropriate diagnosis and treatment efforts have a profound impact on expenditures as well as a noted increase in civil actions.¹⁷

Aging results in a myriad of changing physical, physiological, and mental needs of the inmate. As the inmate ages, his ability to produce antibodies to fight disease declines dramatically, his overall muscular strength is diminished, his kidney filtering capacity is reduced, and his blood pressure increases. These predictable physiological consequences of aging create difficult medical demands for the existing understaffed, underfunded system. These costs are exacerbated by increased accidents due to declining eyesight, arthritis, reduced coordination and balance, medicative disorientation, poor

¹⁵ Kratcoski, Peter C., "Federal Bureau of Prisons Programming for Older Inmates", Federal Probation, June 1989.

¹⁶ Lipson, Steven, M.D., M.P.H., Medical Concerns for the Elderly, Forum on Issues in Corrections, Record of the Proceedings, Long Term Confinement and the Aging Inmate Population, December 7, 1990, Page 120.

¹⁷ Id.

physical conditioning and mental depression.¹⁸

As the population and institutional costs of older offenders rise exponentially, the federal system will find it increasingly difficult, if not dangerous, to ignore this unique segment of its prison population. This is not to suggest the need for some categorical release policy for high cost older prisoners but rather a recognition of the peculiar offender characteristics presented by this insular group. Age is clearly significant but not determinative for sentencing. Only a balancing of age with recidivism can guarantee all of the institutional objectives expressed in the statutory mandate of the Commission. Few of these objectives, however, can be guaranteed for the future without a more comprehensive approach to the graying of the federal prison population.

III. PROPOSALS FOR CHANGES TO THE UNITED STATES SENTENCING GUIDELINES AND PRACTICES RELATING TO OLDER OR GERIATRIC OFFENDERS

A. Redefining the Relevance of Age and Recidivism under Chapter Five, Parts H and K.

In its Guidelines Manual, the Sentencing Commission

¹⁸ Moritsugu, Kenneth, Assistant Surgeon General and Medical Director, Federal Bureau of Prisons. Inmates Chronological Age vs. Physical Age. Forum on Issues in Correction, Record of the proceeding, "Long Term Confinement and the Aging Inmate Population," Page 42, December 7, 1990.

commented that

Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. Age may be a reason to go below the guidelines when the offender is elderly and infirm and where a form of punishment (e.g., home confinement) might be equally efficient as and less costly than incarceration.

United States Sentencing Comm'n, Guidelines Manual, § 5H1.1.

This policy statement suggests that age alone is not a satisfactory basis for a downward sentence. Indeed, the fact that a prisoner is elderly does not provide absolute assurances that he or she is no longer a threat. When considered with other factors, however, age is a valuable predictor of recidivism: generally as age rises recidivism falls. To the detriment of the system, the policy guidelines do not adequately allow for recidivism to be factored into the sentencing decision. Presently, age may be considered as a reason to depart from the sentencing guidelines only when the offender is elderly and infirm and where another form of punishment might be used. A more equitable sentencing system and a more effective use of prison space would be accomplished if a downward departure from the sentencing guidelines were permitted when the offender is "elderly or infirm or where a form of punishment might be equally efficient and less costly than incarceration." By amending section 5H1.1 in this manner and establishing clear guidelines, sentencing judges would be given the discretion to use age in their sentencing decisions subject to strict recidivist standards. An older offender would not be sentenced to less than

the statutory requirement unless he or she satisfied all of the risk assessment guidelines.

An alternative section which could be amended to reach these objectives is Part K of Chapter Five of the guidelines. That section describes various circumstances which might suggest to a sentencing court that a departure from the sentencing guidelines is warranted. Section 5K1.1 allows for a downward departure where the defendant has provided substantial assistance in the investigation or prosecution of another. Other grounds for a downward departure include circumstances where the victim's conduct provoked the offense;¹⁹ where the defendant committed the offense to avoid a perceived greater harm;²⁰ where the defendant committed the offense because of coercion, blackmail or duress;²¹ or where the defendant committed the offense while suffering from reduced mental capacity.²² Like diminished capacity, old age and low recidivism risk are personal characteristics of the defendant which warrant consideration at sentencing. An amendment could be crafted to state that, "if the defendant is elderly and has been determined to be at low risk for recidivism, the court may decrease the sentence below the applicable guideline range." This amendment would be in line with the underlying policies of

¹⁹ United States Sentencing Comm'n, Guidelines Manual, § 5K2.10 (Nov. 1991) (hereinafter [Guidelines]).

²⁰ Guidelines § 5K2.11.

²¹ Guidelines § 5K2.12.

²² Guidelines § 5K2.13.

Part K and allow for situations in which a reduced sentence better serves justice and the needs of the community.

Amending the guidelines to enable judges to consider the age of the offender would satisfy the policy requirements articulated in the Sentencing Reform Act. (See 18 U.S.C. §§ 3551-3673 (1990) and 28 U.S.C. §§ 991-998 (1990).) The possibility that age might impact sentences was recognized in the enabling statute creating the United States Sentencing Commission. In establishing categories of defendants as well as policy statements, the Commission was directed to consider whether any factor listed had "any relevance to the nature, extent, place or service, or other incidents [sic] of an appropriate sentence." Heading the list of factors to be considered was "age." (28 U.S.C. § 994(d)(1) (1990).) While the Commission chose not to establish a "category of defendants" to be given special sentencing consideration solely on the basis of age, the importance of age as one factor which might impact sentences has been manifest from the beginning, and the guidelines should be amended to allow age to be taken into account as it relates to recidivism.

Further policy guidelines are suggested in 28 U.S.C. § 991, which states that the purpose of the United States Sentencing Commission is to develop sentencing policies and practices which avoid

unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and [which]

reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.

28 U.S.C. §§ 991(b)(1)(B)-(C) (1986). Amending either Part H or Part K of Chapter Five to allow courts to consider early release for older, low-risk offenders is in line with the mandate against sentencing disparities. Under either proposed amendment, the older prisoner who has a low risk for recidivism but who is not physically ill will be treated similarly to the older, infirm prisoner who has committed the same crime. As the guidelines presently stand, the former would be ineligible for early release or alternative confinement, while the latter might have his sentence reduced. See, United States v. Doe, 921 F.2d 340 (1st Cir. 1990) (360 month sentence on a 54 year old man upheld despite the fact that, because of defendant's age, the sentence amounted to life imprisonment, because, at the time of sentencing, the defendant was neither elderly nor infirm).

The present guidelines also fail to reflect fully "the advancement in knowledge of human behavior as it relates to the criminal justice system," because they do not reflect the considerable data showing that older prisoners have a lower rate of recidivism. In this sense, the current guidelines do not adequately "take into account the nature and capacity of the penal, correctional, and other facilities and services available," nor do they "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." 28 U.S.C. § 994(g) (1990). An amendment to the

federal sentencing guidelines which allows age to be used as an indicator of recidivism will enable sentencing judges to give due weight to more of the policy considerations reflected in the Federal Sentencing Act by allowing them to take advantage of alternate forms of incarceration such as less restrictive facilities and home monitoring. Such alternative forms of incarceration are particularly effective for securing older prisoners.

Furthermore, the enabling statute indicates a preference for judicial discretion at the time of sentencing. Section 3553 allows a judge to consider not only the existence of aggravating and mitigating circumstances, but also mandates consideration of "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1); "the need for the sentence imposed to protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(C); the need "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 U.S.C. § 3553(a)(2)(D); and "the kinds of sentences available." 18 U.S.C. § 3553(a)(3). Amending section 5H1.1 or Part K to provide judges with more opportunities to impose alternative sentences for older prisoners complies with clear relevance of offender characteristics when making sentencing decisions under the federal law. The Courts of Appeals have recognized the discretion granted to sentencing judges and upheld their authority to grant downward departures from the sentencing

guidelines. See, e.g., United States v. Rukllox, 919 F.2d 95 (8th Cir. 1990) (reversed and remanded where district court erroneously underestimated its authority to consider a downward departure based on defendant's diminished capacity); United States v. Lara, 905 F.2d 599 (2nd Cir. 1990) (district court acted within its discretion in departing downward based upon defendant's personal characteristics that made him particularly vulnerable to in-prison victimization).

Full consideration of age as an offender characteristic is further supported by § 3577, which states that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." This concept is echoed in § 3552, which allows the court to order a study of the defendant if it desires more information than is otherwise available in order to determine the sentence. That the guidelines require courts to consider all relevant information prior to sentencing suggests that discretion at this stage of the proceedings is acceptable and, so long as it is used judiciously, may contribute to more balanced and equitable sentencing.

Permitting a judge to consider an offender's age without the burden of establishing infirmity will not enlarge the courts' discretion to the point of creating sentencing disparities. Infirmity of the offender and availability of alternative methods of punishment would still remain important in the determination

of a downward sentence, but they would not be determinative on the issue of recidivism. The offender's age will simply be used as a means to initiate a recidivism analysis. The discretion of the court in sentencing decisions, therefore, will not be so great as to conflict with the policies of the guidelines. Furthermore, § 3553(b)(2) would naturally continue to apply to any departure from the guidelines, requiring the court to articulate the specific reason for the imposition of the lesser sentence. A simple statement by the court saying, in effect, "the offender is old therefore he will not commit any more crimes," will not suffice as a satisfactory rationale under the proposed amendment anymore than it does now. An example of the importance of articulating the reasons for a downward departure from the sentencing guidelines can be seen in United States v. Carey, 895 F.2d 318 (7th Cir. 1990). In Carey, the court of appeals vacated a judgment by the district court which departed downward from the applicable sentencing range. The lower court stated that "the combination of the defendant's age (62) and the fact that he has had several operations as a result of a brain tumor are significant enough to allow the Court some flexibility in a downward departure." Id. at 324. The court of appeals held that "without more particularized findings and analysis we cannot conclude that the district court's reliance on Carey's age and physical condition in departing from the applicable sentencing range was reasonable." Id. An amendment to 5H1.1 or to Part K will not alter the requirement that a judge who departs from the

sentencing guidelines on the basis of age will have to clearly articulate his or her reasons for so doing.

Because age is one of the most reliable predictors of recidivism, its relevance in sentencing decisions cannot be overlooked. By amending section 5H1.1 or Part K to enable judges to consider old age independent of infirmity, the Commission can maximize resources by making use of less expensive, alternative forms of punishment. It will also provide more space in already overcrowded prisons for offenders likely to have a high rate of recidivism. Finally, sentencing disparities would be minimal, as age would be used as only one factor in a recidivism analysis, and judges sentencing decisions would remain subject to stringent scrutiny.

B. REDEFINING THE MEANING OF "EXTRAORDINARY AND COMPELLING"
UNDER 18 U.S.C. § 3582(C)(1)(A)

While the focus of the listed issues for comments centered on amended parts H and K of Chapter 5, age can also be considered at a post-sentence reduction stage with a new policy statement from the Commission. Under the guidelines,

the court may not modify a term of imprisonment once it has been imposed except that -

(1) in any case -

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(1)(A) (1990). A direct amendment could be drafted to allow a prisoner's advanced age and low risk of recidivism to constitute "extraordinary and compelling reasons" for a sentencing reduction.²³ Alternatively, rather than amend § 3582(c)(1)(A) directly, the Commission could, under § 994(a)(2)(C)²⁴ and § 994(t),²⁵ issue a policy statement declaring a combination of old age and a low likelihood of recidivism to be an "extraordinary and compelling" reason to

²³ An amendment of 18 U.S.C. § 3582(c)(1)(A) could take several forms, including the addition of a clause qualifying "extraordinary and compelling" to include cases of old age when coupled with low risk assessments. Another approach might be to add a separate subsection to 18 U.S.C. § 3582(c)(1) which states that the court may reduce the term of imprisonment "if it finds that an older or geriatric offender's age and low recidivist predictor warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." While POPS is prepared to pursue such amendments, the current proposals will focus instead on a policy statement change that redefines "extraordinary and compelling."

²⁴ This section provides in part:

- (a) The Commission shall promulgate and distribute to all courts ...-
- (2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of-
- (C) the sentence modification provision set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18.

²⁵ The provision provides in part:

- (t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18 shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.

modify a term of imprisonment. It is expected that such a policy statement would include strict guidelines and commentary on the interpretation of "extraordinary and compelling," thereby limiting the discretion of the courts.

Before a court may modify a term of imprisonment under § 3582(c)(1)(A), it must first consider those factors listed in § 3553(a), which apply to the imposition of a sentence. This suggests that the court has a certain degree of discretion, even when modifying a term of imprisonment, to consider factors such as the personal characteristics of the defendant. Low recidivism, which is indicated in part by a prisoner's advanced age, should be considered a characteristic relevant to the early release of an older prisoner under § 3553(a)(1). It is particularly relevant to an overcrowded system burdened by high cost, low risk prisoners.

A new interpretation of § 3582(c)(1)(A) would also advance public safety, a policy underlying § 3553(c). Reducing a term of imprisonment on the basis of the prisoner's old age and low likelihood of recidivism is intended to ensure that only the least dangerous offenders are released at a time of limited resources. Furthermore, because a modification of a term of imprisonment might include placing low risk prisoners in alternative forms of incarceration, such as home confinement, the ultimate effect is to protect the public at the lowest cost, furthering the goals of the sentencing guidelines. The use of alternative means of punishment also satisfies the requirement of

§ 3553(a)(3), that courts consider the kinds of sentences available. Although a form of punishment other than imprisonment might not have been applicable at the time of sentencing, the offender's advanced age might bring added significance to that provision after a person has been incarcerated for a number of years.

Section 3553(a)(1)(D) states that when imposing a sentence, the court should consider that medical care is to be provided in the "most effective manner." Allowing for a reduction for some elderly offenders is the most direct means by which to satisfy this goal. Because elderly prisoners are most likely to suffer from health problems, removing them from conventional incarceration can dramatically reduce medical costs by placing older prisoners in settings equipped and experienced to deal with and prevent geriatric illness.

Finally, section 3553(a)(2)(A) provides that potential offenders be deterred from criminal conduct. The possibility of a reduced sentence for older prisoners will not detract from this important policy. Because prisoners will only have their terms reduced if they are both elderly and have a low risk of recidivism, sentences will be reduced only after the propensity or ability to commit a repeat offense has passed. Furthermore, a shortened term of imprisonment does not necessarily mean freedom. The possibility of home confinement, confinement to a prison nursing home, or a form of supervised release is still very real. Moreover, an amendment to section 3582 or the applicable policy

statements in no way suggests that all, or even a majority of older prisoners will go free. Only a few older prisoners who meet strict recidivist guidelines will be eligible for a reduction in the term of imprisonment, and only when courts act within the strict policy guidelines set down by this Commission.

CONCLUSION

The suggested proposals outlined above are direct measures that the Commission can take to develop a policy for older offenders. The relationship of old age and recidivism is well-documented and widely recognized. This body of knowledge will be essential to the federal system as it struggles with a rising population of older prisoners. Under its statutory mandate, the Commission is uniquely qualified to respond to the changing demographics of the prison population and to incorporate new ideas on the most efficient use of prison resources.

POPS stands ready to assist the Commission in exploring possible modifications to the federal sentencing laws, guidelines or policy statements considering the relevance of age and recidivism. Accordingly, POPS would be amenable to a joint short-term study with the Commission on the federal system and the aging prison population. In addition to the proposals discussed, this study could include an evaluation of a possible pilot program of electronic monitoring for older offenders that would reduce maintenance costs and relieve overcrowded

conditions. Such a study could also explore a possible guideline for risk-based releases for prisons under serious or chronic overcrowding conditions. While the federal system has utilized "rental cells" from state jurisdictions and has moved prisoners long distances to available cells, this practice has created a bidding practice for cell space that at least one federal judge has attempted to halt. *Williams v. McKeithen*, 1990 WL 265971 (M.D. La.; July 20, 1990) (No. Civ. A. 71-98-B) rev'd, 939 F.2d 1100 (5th Cir. 1991). The sentencing guidelines can create a "safety valve" for chronic conditions that would permit a selective release under 18 U.S.C. § 3582(c) or other provisions. While their application to older offenders is novel, these ideas are not new and can be found in various forms among the state systems. The viability of such approaches to the federal system should be of great interest and certainly merits greater attention by the Commission and this organization.

POPS appreciates this opportunity to address the Commission and looks forward to a full exchange of ideas on older offenders at the public hearing on February 25, 1992.