

July 15, 2024

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Proposed Priorities for 2024 – 2025 Amendment Cycle

Dear Judge Reeves:

The Brennan Center for Justice at New York University School of Law welcomes the opportunity to share our views on sentencing matters that we believe merit the United States Sentencing Commission’s serious consideration this year.¹ We offer our suggestions in light of a litany of major operational challenges that beset the federal Bureau of Prisons, such as severe understaffing, persistent overcrowding, and aging infrastructure.² These grim conditions threaten the safety and lives of both incarcerated people and correctional staff alike, and they show few signs of abatement.³ These circumstances also undermine critical access to programming and

¹ The recommendations we state here are based on the in-person remarks we proffered in person on June 27, 2024 to Commission staff.

² For staffing shortages, see U.S. Dep’t of Just., Office of the Inspector General, *Evaluation of Issues Surrounding Inmate Deaths in Federal Bureau of Prisons Institutions* 64-69 (2024), <https://oig.justice.gov/sites/default/files/reports/24-041.pdf>. For overcrowding challenges, see Fed. Bureau of Prisons, *Program Fact Sheet 2*, May 13, 2024, https://www.bop.gov/about/statistics/docs/bop_fact_sheet.pdf?v=1.0.10. For infrastructure problems, see U.S. Dep’t of Just., Office of the Inspector General, *Audit of the Federal Bureau of Prisons’ Efforts to Maintain and Construct Institutions* 5, 2023, <https://oig.justice.gov/reports/federal-bureau-prisons-efforts-maintain-and-construct-institutions>.

³ For effects of poor BOP conditions on incarcerated individuals and BOP staff, see, e.g., U.S. Gov’t Accountability Off., *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure* 25 (2012), <https://www.gao.gov/assets/gao-12-743.pdf>. Regarding projections concerning BOP challenges, see U.S. Dep’t of Just., Fed. Bureau of Prisons, *FY 2024 Performance Budget: Congressional Submission 7*, https://www.justice.gov/d9/2023-03/bop_se_fy_2024_pb_narrative_omb_cleared_3.23.2023.pdf (stating that the BOP projects that its incarcerated population will exceed capacity by 10 percent in 2024); and *The Nation’s Correctional Staffing Crisis: Assessing the Toll on Correctional Officers and Incarcerated Persons*, Hearing Before the Subcommittee on Criminal Justice and Counterterrorism, Senate, 118th Cong. 2024 (statement of Brandy Moore White), https://www.judiciary.senate.gov/imo/media/doc/2024-02-28_pm_-_testimony_-_white.pdf (noting that BOP staffing levels for correctional officers are, despite numerous hiring initiatives undertaken by the agency, 40 percent below what BOP leadership has deemed minimally necessary safe and proper operation of facilities).

services that are fundamental to successful reintegration into society upon release, such as job training, education, and substance-abuse and mental-health treatment.⁴

Under 28 U.S.C. § 994(g), in promulgating the United States Sentencing Guidelines, the Commission must work to “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.” The Commission, then, has a statutory obligation through its critical Guidelines work to alleviate overcrowding within BOP facilities which could allay the outside impact of myriad other operational shortcomings like staffing shortages. Thus, pursuant to 28 U.S.C. § 994(o), we offer suggestions that, if adopted, would reduce unnecessary incarceration in the nation’s federal prisons and jails.

I. To better determine culpability in drug-trafficking cases, amend U.S.S.C. § 2D1.1 to focus a defendant’s role in an offense.

When establishing the Guidelines for drug-trafficking offenses, the Commission did not use its characteristic empirical approach; instead, it employed the weight-driven scheme of the Anti-Drug Abuse Act of 1986.⁵ This approach to sentencing policy, coupled with overly harsh federal drug laws enacted in the 1980s, led to “historically unprecedented” imprisonment rates for low-level drug crime.⁶ While the Commission over the past two decades has taken several steps to mitigate the severity of federal drug sentencing policy — including giving retroactive effect to many of its amendments which has doubtless helped reduce the federal prison population — the Commission can and should go still further.⁷ And one way is by updating U.S.S.C. § 2D1.1 and making those changes retroactive.

Under § 2D1.1, to arrive at a base offense level and sentencing ranges, judges look to the type and quantity of controlled substances attributable to a defendant. Simply put, the higher quantity of a controlled substance associated with a defendant — no matter that defendant’s culpability in fact — the more severe the potential sentence. Quantity is, however, a poor proxy for culpability; it often results in disproportionate and unfair sentences.

⁴ See, e.g., *The Nation’s Correctional Staffing Crisis: Assessing the Toll on Correctional Officers and Incarcerated Persons*, Hearing Before the Subcommittee on Criminal Justice and Counterterrorism, Senate, 118th Cong. 2 2024 (statement of Sen. Cory Booker), <https://www.judiciary.senate.gov/committee-activity/hearings/the-nations-correctional-staffing-crisis-assessing-the-toll-on-correctional-officers-and-incarcerated-persons> (highlighting the nexus between inadequate access to treatment in federal prisons and difficulties reentering society).

⁵ *Kimbrough v. United States*, 552 U.S. 85, 96 (2007) (“The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act’s weight-driven scheme.”).

⁶ See Jeremy Travis et. al., Nat’l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 120, 152 (2014); see generally Lauren-Brooke Eisen, *Excessive Punishment: How the Justice System Creates Mass Incarceration* (New York: Columbia University Press, 2024); Jed Rakoff, *Why the Innocent Plead Guilty and the Guilty Go Free: And Other Paradoxes of Our Broken Legal System* (2021).

⁷ See, e.g., USSG, App. C., Amends. 706 (Nov. 1, 2007), 750 (Parts A & C) (Nov. 1, 2011), 782 (Nov. 1, 2014).

United States v. Dossie proves the point.⁸ In that sentencing action out of the Eastern District of New York, the defendant was “a young, small time, street-level drug dealer’s assistant” — far from a key, essential player in a drug-trafficking organization.⁹ And yet his advisory Guidelines range was 57-71 months. That range is, as the sentencing judge correctly put it, “too severe for a low-level addict selling drugs on the street.”¹⁰ Individuals who are essential to narcotics trafficking operations and retain a great deal of the profits are typically not the ones who carry, manufacture, or sell the drugs; rather, those people sit atop the drug enterprise, organizing it and managing its financial details.¹¹ No matter, because the judge could not exercise discretion or depart from the Guidelines, the judge was forced to hand down a sentence within the excessive sentencing range.¹² Accordingly, we urge the Commission to shift the focus of Section 2D1.1 to the role a defendant played in an offense, which would function as a better yardstick for culpability, and apply its amendment retroactively to shorten terms of imprisonment and thereby reduce the federal prison population.

II. Pursuant to the policy statement for U.S.S.G. § 1B1.10, eliminate the bar on retroactive sentence reductions for below-guidelines sentences.

According to federal law, “a judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment and may not be modified.”¹³ But 18 U.S.C. § 3582(c) contains an exception: Judges may resentence individuals who received a term of imprisonment based on a sentencing range that the Commission has subsequently reduced.¹⁴ In 2011, the

⁸ *United States v. Dossie*, 851 F. Supp. 2d 478 (E.D.N.Y. 2012).

⁹ *Id.* at 481.

¹⁰ *Id.*

¹¹ *Id.* Another problem with U.S.S.C. § 2D1.1 is that it turns upside-down one of the fundamental principles of sentencing, proportionality, the idea that the severity of a punishment should match the seriousness of the offense. That important sentencing object is reflected in the 18 U.S.C. § 3553(a) factors that judges use in meting out sentences as well as 28 U.S.C. § 991(b)(1)(A) which instructs the Commission to establish sentencing policies that fulfill the goals of sentencing which include the need for sentences to reflect the seriousness of the offense. And yet Section 2D1.1 fails to advance proportionality for judges are effectively precluded from differentiating between defendants of differing, actual culpability. So the result of this weight-driven scheme has been, and is, that the street-level dealers, mules, couriers and the like receive long, harsh sentences, while narcotics trafficking flourishes.

¹² *Id.* at 483 (E.D.N.Y. 2012) (explaining that the court could not deviate from the Guidelines because the defendant had already received a reduction for accepting responsibility for the offense, not to mention the defendant’s criminal history).

¹³ *Dillon v. United States*, 560 U.S. 817, 824 (2010) (citation omitted).

¹⁴ See U.S.S.G. § 1B1.10 (“In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant’s term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).”); *see also* 18 U.S.C. § 3582(c)(2) (“In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”).

Commission changed its policy statement regarding resentencings triggered by changes to the Guidelines to bar courts from applying retroactive amendments that could result in sentence reductions for individuals who had received a below-guidelines sentence.¹⁵

That seems misguided twice over. First, the plain text of 18 U.S.C. § 3582(c) provides that a defendant who receives a sentence “based on a sentencing range” can be eligible for a sentence reduction. The question whether a defendant may be eligible for a sentence reduction, therefore, turns on whether a below-guidelines sentence is a sentence “based on a sentencing range” and we contend it is.¹⁶ When courts sentence a defendant bearing in mind the Guidelines — even if they dole out a sentence with variances or departures in either direction — courts are necessarily basing their decision on the Guidelines sentencing ranges within the meaning of 18 U.S.C. § 3582(c).¹⁷

Second, the Commission’s exclusion of individuals who obtained a below-guidelines sentence from consideration for lighter sentences can also result in unwarranted sentencing disparities.¹⁸ For example, it is entirely conceivable that two defendants convicted of the same offense with similar criminal histories and identical guidelines ranges could receive different final sentences.¹⁹ That could be because one defendant, to a court’s mind, has mitigating personal circumstances that qualify for a downward departure under 18 U.S.C. § 3553(a), while the other defendant does not.²⁰ Yet if the Commission promulgates an amendment retroactively applicable to both defendants, because of its policy statement to § 1B1.10, only the defendant without the mitigating personal characteristics would be eligible for a reduced sentence, while the other defendant would not be eligible at all.²¹

This sort of disparity is irrational, and one way the Commission could address this is by reverting to its original rule pertaining to sentence modifications in light of Guidelines amendments: “In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c), the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time.” In other words, judges should be able to lower sentences consistent with federal statutory law irrespective of whether an original sentence was below a newly changed guideline range. Shifting to this

¹⁵ “Notice of Final Action Regarding Amendment to Policy Statement 1B1.10,” *United States Sentencing Commission*, November 1, 2011, https://www.usc.gov/sites/default/files/20110707_FR_Amendment_on_Retroactivity.pdf.

¹⁶ See generally 18 U.S.C. § 3582(c).

¹⁷ The Supreme Court appears to share our reading of Section 3582(c). In *United States v. Hughes*, in addressing retroactive amendments to the Guidelines, the Court explained: “A district court imposes a sentence that is ‘based on’ a Guidelines range if the range was a basis for the court’s exercise of discretion in imposing a sentence. 584 U.S. 675, 686 (2018).”

¹⁸ See generally Stephen R. Sady, *Retroactive Guidelines Amendments Must Apply to Individuals Who Receive Below-Guidelines Sentences to Protect the Individualized Sentencing Required by Federal Sentencing Statutes*, 36 Fed. Sent. Rep. 153 (2024).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

position would prove more faithful to the plain text of federal statutory law, limit the likelihood of unwarranted sentencing disparities, and lead to more rational and just sentencing outcomes. Critically, it would also result in more sentence reductions which would limit the number of people in federal prison.

III. Amend U.S.S.G. § 5D1 and related policy statements to limit unnecessary terms of supervised release post-incarceration.

In 1984, Congress replaced parole with supervised release primarily to facilitate rehabilitation and reintegration into society after a federal prison term “for those, and only those, who need[] it.”²² Today it is required of most people confined to federal prisons and jails upon release.²³ Supervision can be revoked if a person either fails to comply with the associated conditions or if they are arrested for committing a new criminal offense. Relevant here, when a person fails to comply with release conditions — committing what is commonly called a “technical violation” — they can be sent back to prison. Technical violations encompass a broad array of conduct such as failing a drug test, although it does not include the commission of a new crime.

In 2021, over 10,000 people serving terms of federal supervision were reincarcerated and technical violations made up most cases, around 60 percent.²⁴ Especially given the BOP’s operational shortcomings, federal incarceration should be reserved for people who pose genuine threats to public safety. Judges should therefore make individualized assessments of the necessity of supervision post-release. And when courts do find it proper to place a person on post-incarceration supervision, they should be required to provide on-the-record explanations for their decisions; currently judges offer scarcely little insight into these crucial determinations.²⁵

Moreover, judges should have greater flexibility in responding to technical violations, and there should be a presumption of early termination of supervision for individuals who demonstrate compliance and do not risk public safety after a certain time period. These changes could diminish

²² *Johnson v. United States*, 529 U.S. 694, 709 (2000). See also 18 U.S.C. § 3553; Comm. on the Judiciary, Comprehensive Crime Control Act of 1983, S. Rep. No. 98-225, at 124 (1983); *United States v. Johnson*, 529 U.S. 53, 54 (2000) (recognizing that supervision is intended to “fulfill rehabilitative ends, distinct from those served by incarceration”).

²³ See, e.g., United States Sentencing Commission, 2022 Sourcebook of Federal Sentencing Statistics, (2023) Table 18, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Table18.pdf>.

²⁴ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Probation and Parole in the United States 2021*, <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus21.pdf>; Administrative Office of the U.S. Courts, *Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes 2022*, <https://www.uscourts.gov/news/2022/06/14/just-facts-revocations-failure-comply-supervision-conditions-and-sentencing-outcomes>.

²⁵ “Federal Probation and Supervised Release Violations,” *United State Sentencing Commission*, July 2020, 30, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf.

the near-automatic approach of courts to imposing terms of supervision after a term of incarceration. And importantly, these changes would limit unnecessary incarceration that is bloating the federal prison population, reserving scarce law enforcement resources for the individuals who present the gravest risks to the nation's public safety.

In closing, the Brennan Center, again, appreciates the opportunity to offer our thoughts to the Commission as the agency discharges its important duties, and we would be pleased to discuss any of our suggestions with the Commission.

Respectfully,

/s/ Hernandez D. Stroud
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