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July 15, 2024

The Honorable Carlton Reeves, Chair  
United States Sentencing Commission  
One Columbus Circle NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

**RE: Request for Public Comment on Proposed 2024 Amendments to Sentencing Guidelines (89 FR 48029)**

Dear Judge Reeves,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 240 national organizations to promote and protect the civil and human rights of all persons in the United States, we write to provide comments on possible priorities for the U.S. Sentencing Commission's ("Commission") 2024-2025 amendment cycle ending May 1, 2025. We applaud the Commission for specifically asking for input on how it can make the federal sentencing system fairer and more just from a civil rights perspective. The Leadership Conference believes in public safety that respects the dignity and human rights of all people. This requires policies with upfront investments in non-carceral social supports and community-based programs, instead of policies that continue investment in overcriminalization, overincarceration, and excessive sentencing practices.

Currently, the United States leads the world in imprisoning or supervising nearly 5.5 million people, imprisoning people at a higher rate than any other nation.<sup>1</sup> As of 2022, 700 of every 100,000 adults in the United States were behind bars.<sup>2</sup> This number is due to the status quo of criminalization in this country, in tandem with the egregiously long sentences imposed on people who are convicted of crimes.<sup>3</sup> In 2019, nearly one in five of people in the prison system had served at least 10 years in prison, with 56 percent of the population serving a sentence of 10 years or longer.<sup>4</sup> Additionally, Black people make up 14 percent of the U.S. population, but in 2019 made up 46 percent of the prison population who had already served

<sup>1</sup> "Correctional Populations in the United States, 2022-Statistics Table." *Bureau of Justice Statistics*. May 2024. [https://bjs.ojp.gov/document/cpus22st\\_sum.pdf](https://bjs.ojp.gov/document/cpus22st_sum.pdf); "States of Incarceration: The Global Context 2024." *Prison Policy Initiative*. June 2024. <https://www.prisonpolicy.org/global/2024.html>.

<sup>2</sup> "Correctional Populations in the United States, 2022-Statistics Table," *supra* note 1.

<sup>3</sup> "How Many People Are Spending Over A Decade in Prison?" *The Sentencing Project*. Sep. 2022. <https://www.sentencingproject.org/app/uploads/2022/10/How-Many-People-Are-Spending-Over-a-Decade-in-Prison.pdf>

<sup>4</sup> *Ibid.*

at least 10 years.<sup>5</sup> The criminal legal system is rife with racial disparities. In state prisons, Black people are five times more likely to be incarcerated than White people.<sup>6</sup> Additionally, Black men receive sentences 13.4 percent longer, and Hispanic men receive sentences 11.2 percent longer, than White men. Similarly, Hispanic women receive sentences 27.8 percent longer than White women. Overall, people of color make up 39 percent of the U.S. population,<sup>7</sup> but are greatly overrepresented in prisons, making up nearly 70 percent of the prison population.<sup>8</sup> It is clear that current sentencing practices perpetuate racial and ethnic disparities that take place at the front end of the criminal legal system.

Current sentencing practices prioritize excessive punishment and retribution over proportional, equitable, and fair punishment. There are many overarching sentencing policies and practices that must be extensively reformed in our lifetime. However, our comment focuses on the specific areas we believe the Commission should prioritize in the 2024-2025 amendment cycle in order to improve the fairness and proportionality in the sentencing guidelines; promote individualized review of specific offense conduct; be inclusive of people who have been directly impacted by the sentencing guidelines promulgated by the Commission; and mitigate excessively punitive provisions that have promoted racial disparities in sentencing and sustained the extremely high number of individuals in the federal penal system.

#### I. Ban the use of uncharged and dismissed conduct

We commend the Commission for limiting the use of acquitted conduct.<sup>9</sup> The Commission should extend this limitation to uncharged and dismissed conduct, eliminating the consideration of this conduct as relevant conduct under USSG § 1B1.3. The relevant conduct rule allows “relevant conduct”—or actions defendants performed in preparation of the offense, during the offense, or after in order to avoid detection of the offense for which they have been convicted—to be used to determine the guideline range.<sup>10</sup> Relevant conduct can be behavior the defendant counseled, commanded, induced, procured, or willfully caused.<sup>11</sup> Furthermore, under a “real offense” approach, relevant conduct can include acts for which charges were filed but where there was ultimately no finding of guilt or charges were never filed. Therefore, judges are able to consider “uncharged” and “dismissed” conduct when determining certain

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<sup>5</sup> Ibid. See also Wang, Leah. “Updated charts show the magnitude of prison and jail racial disparities, pretrial populations, correctional control, and more.” *Prison Policy Initiative*. April 1, 2024. <https://www.prisonpolicy.org/blog/2024/04/01/updated-charts/> (“the national incarceration rate of Black people is six times the rate of white people and more than twice the rate in every single state”).

<sup>6</sup> Nellis, Ashley. “The Color of Justice: Racial and Ethnic Disparity in State Prisons *The Sentencing Project*, Oct. 13 2021. <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>

<sup>7</sup> Jones, Nicholas, et al., “2020 Census Illuminates Racial and Ethnic Composition of the Country.” *United States Census Bureau*. Aug. 12, 2021. <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>.

<sup>8</sup> Nellis, Ashley. “Mass Incarceration Trends.” *The Sentencing Project*. May 21, 2024. <https://www.sentencingproject.org/reports/mass-incarceration-trends/>.

<sup>9</sup> “Amendments to the Sentencing Guidelines.” *U.S. Sentencing Comm’n*. April 30, 2004. [https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202405\\_Amendments.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202405_Amendments.pdf).

<sup>10</sup> U.S. Sentencing Guidelines Manual § 1B1.3 (2024).

<sup>11</sup> “U.S. Sentencing Guidelines: Annotated 2023, Chapter 1.” *United States Sentencing Comm’n*. <https://www.ussc.gov/guidelines/2023-guidelines-manual/annotated-2023-chapter-1>.

base offense levels, specific offense characteristics, cross references, and adjustments, in the calculation of a sentence for a crime or crimes for which a defendant was actually convicted.<sup>12</sup>

The consideration of uncharged and dismissed conduct in sentencing decisions is a practice that is neither fair or just. Without notice or a greater burden of proof, defendants can be punished with a separate or greater crime(s) during sentencing.<sup>13</sup> Factoring uncharged and dismissed conduct into sentencing decisions results in harsher penalties and longer sentences<sup>14</sup> for actions the prosecution has not proven that a defendant committed. To be clear, one should not be punished for conduct that has not been proven beyond a reasonable doubt. Though the consideration of uncharged and dismissed conduct has been permitted by the courts, the practice raises serious constitutional concerns and undermines the judicial process. The Fifth Amendment of the U.S. Constitution prohibits the deprivation of life, liberty, or property without due process of law.<sup>15</sup> The use of uncharged and dismissed conduct, where a judge can base sentencing on a standard of preponderance of the evidence, inhibits true due process. As a jury never deliberated on the criminal charge(s) and made a decision on guilt beyond a reasonable doubt, the use of this conduct in sentencing is inherently violative of the Fifth Amendment. Furthermore, while the Supreme Court has ruled that the preponderance-of-the-evidence standard at sentencing satisfies due process,<sup>16</sup> uncharged and dismissed sentencing is at odds with the fundamental fairness that is also guaranteed by the due process clause. The practice undermines the trust in the legal system — a trust that is necessary for the system to function.

## II. Eliminate the double counting of criminal history, especially for drug and firearm offenses.

The Commission should prioritize eliminating the practice of double counting criminal histories in sentencing determinations. Under USSG § 4A1.1, judges are able to consider the criminal record of defendants to determine their sentence. Defendants are assigned to one of six criminal history categories based on the content of their past misconduct.<sup>17</sup> The justification for considering criminal history in sentencing is to protect the public from the likelihood of recidivism and criminal behavior, through harsher and longer sentences for the individual.<sup>18</sup> However, this approach does not acknowledge the systemic bias and injustice that comes with considering criminal histories in sentence calculation.

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<sup>12</sup> Ibid.

<sup>13</sup> Hoy, Christine E. "Uncharged Conduct and Disproportionate Impact: Amending the Guidelines to Protect Due Process Interests at Sentencing." *Seton Hall Journal of Legislation and Public Policy*. Vol. 48: Iss. 3, Article 11. 2024. <https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1979&context=shlj>.

<sup>14</sup> Ibid. ("Using uncharged conduct, a potential imprisonment term of two to eight months can be increased to 84 to 105 months (about nine years). In other words, a sentence of less than a year can be increased to seven, almost nine years, based on conduct a person was never arrested for, charged with, pleaded guilty to, or convicted of by a jury beyond a reasonable doubt, so long as the sentence does not exceed the otherwise applicable statutory maximum. Worse yet, prosecutors could still charge someone for this uncharged conduct, and the Double Jeopardy Clause would not prohibit it").

<sup>15</sup> U.S. CONST. amend. V.

<sup>16</sup> *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

<sup>17</sup> "Primer on Criminal History 2023." *United States Sentencing Comm'n*. [https://www.ussc.gov/sites/default/files/pdf/training/primers/2023\\_Primer\\_Criminal\\_History.pdf](https://www.ussc.gov/sites/default/files/pdf/training/primers/2023_Primer_Criminal_History.pdf).

<sup>18</sup> "U.S. Sentencing Guidelines: Annotated 2023, Chapter 4." *United States Sentencing Comm'n*. <https://www.ussc.gov/guidelines/2023-guidelines-manual/annotated-2023-chapter-4>.

Utilizing criminal history in sentencing has a disparate impact on Black and Brown people, who tend to have more contact with the criminal legal system.<sup>19</sup> Thus, they are more likely to receive additional points for criminal history, resulting in Black and Brown men having longer prison sentences than their White counterparts.<sup>20</sup> This practice of considering criminal history in sentencing of new offenses highlights the ways in which people with criminal convictions can be disadvantaged well beyond the completion of their sentence(s).

People with these convictions are further disadvantaged when their criminal history is “double counted” toward the sentencing for a current offense. Double counting occurs when an enhancement is applied in the adjustments section of the guidelines for conduct already accounted for in the defendant's criminal history.<sup>21</sup> In those situations, a judge is considering the offense the defendant is being sentenced for, a prior conviction(s), and that same prior conviction(s) as an adjustment that can increase the sentence level. This type of calculation makes disproportionate and excessive sentences more likely. The guidelines have explicitly prohibited double counting in certain situations, but some firearm and drug charges still permit double counting. Double counting only adds to the problem of mass incarceration in this country.

### III. Eliminate the consideration of juvenile offenses

The Commission should prioritize eliminating the consideration of juvenile offenses in sentencing. USSG §4A1.2(d) 18 U.S.C.A permits an individual’s criminal history to include juvenile adjudications and adult criminal convictions a defendant received when under the age of eighteen. The points added to the defendant's overall criminal history score are determined by the duration of the sentence(s). Like all criminal history considered in sentencing, the justification for lengthening the sentence of a current offense because of a prior juvenile conviction is to protect the public from the likelihood of recidivism and criminal behavior through a harsher and longer sentence.<sup>22</sup>

In their comments on the Commission’s proposed 2024 amendments to the Guidelines, the Juvenile Law Center, the Sentencing Project, and others presented a thorough overview of why it is imperative that the Commission remove all consideration of youthful offenses from the criminal history score.<sup>23</sup> The comment cites the reasoning behind this demand as including “(1) the purpose of the Guidelines, (2) the

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<sup>19</sup> “Racial and Ethnic Disparities in the Criminal Justice System.” *National Conference of State Legislatures*. May 24, 2022. <https://www.ncsl.org/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-criminal-justice-system>.

<sup>20</sup> See “2023 Demographic Differences in Federal Sentencing.” *United States Sentencing Comm’n*. <https://www.ussc.gov/research/research-reports/2023-demographic-differences-federal-sentencing>.

<sup>21</sup> Swearingen, Gary. “Proportionality and Punishment: Double Counting under the Federal Sentencing Guidelines.” 68 Wash. L. Rev. 715. 1993. <https://digitalcommons.law.uw.edu/wlr/vol68/iss3/7>.

<sup>22</sup> “U.S. Sentencing Guidelines: Annotated 2023, Chapter 4,” *supra* note 18.

<sup>23</sup> Juvenile Law Center, The Sentencing Project, The Gault Center, National Youth Justice Network, and Citizens for Juvenile Justice. “Comment on Proposed 2024 Amendments.” *The Sentencing Project*. Feb. 22, 2024. <https://www.sentencingproject.org/app/uploads/2024/03/2024.02.22-Ltr-Comments-to-Sent-Guidelines-Amends-FINAL.pdf>.

unique history, purpose, and practice of the juvenile justice system, (3) racial disparities in the adjudication and sentencing of youth, (4) the impact of juvenile records laws, and (5) disparities in laws governing how and when youth are transferred for prosecution and sentencing in adult court.”<sup>24</sup> Overall, the juvenile system purports to prioritize rehabilitation and responding to a child’s needs over punishment,<sup>25</sup> and therefore it is contrary to the purpose of the juvenile system to then increase adult sentences based on the sentences a defendant received when they were under the age of eighteen.

Similar to all criminal history, factoring juvenile offenses into an individual’s criminal history for the purposes of sentencing creates deep racial disparities. Black, Brown, and Indigenous children are disproportionately represented at every stage of the juvenile system, with Black youth being 4.4 times and Indigenous youth being 3.2 times as likely to be incarcerated in comparison to their White counterparts.<sup>26</sup> Due to a number of factors, including overpolicing,<sup>27</sup> Black, Brown, and Indigenous children have a higher likelihood of being involved in the juvenile system,<sup>28</sup> and are more likely to attend schools where the investment in police presence creates a school-to-prison pipeline.<sup>29</sup>

#### IV. Make changes to supervised release.

We urge the Commission to help promote equity in supervised release and probation. Under 28 U.S.C. § 994(a)(3), the Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release.<sup>30</sup> Under 28 U.S.C. § 994(a)(2)(B), the Commission can create general policy statements on the conditions of probation and supervised release. Probation and supervised release are both forms of supervision that allow people with criminal convictions to reenter society earlier or to carry out their sentence in society in lieu of incarceration, but both are also forms of carceral control that can result in reincarceration. Supervised release can be beneficial when it leads to a decrease in the incarcerated population. However, it can be harmful when judges rely on community supervision, advertently “net widening” and placing people on supervision who could receive a lesser form of punishment, or causing people to remain in the criminal legal system for longer periods of time.<sup>31</sup> The longer someone is on supervision, the longer they are at risk of incarceration due to a violation. Currently, fewer than half of people on community supervision complete their sentence, with about 56

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Rovner, Josh. “Youth Justice by the Numbers.” *The Sentencing Project*. May 16, 2023.

<https://www.sentencingproject.org/policy-brief/youth-justice-by-the-numbers/>.

<sup>27</sup> Ghandnoosh, Nazgol, & Barry, Celeste. “One in Five: Disparities in Crime and Policing.” *The Sentencing Project*. Nov 2, 2023. <https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing/>.

<sup>28</sup> “Racial and Ethnic Disparity in Juvenile Justice Processing.” *Office of Juvenile Justice and Delinquency Prevention*. March 2022. <https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity>.

<sup>29</sup> Bacher-Hicks, Andrew, et al. “Proving the School-to-Prison Pipeline: Stricter Middle Schools Raise the Risk of Adult Arrest.” 21 *Educ. Next*. Pgs. 52-57. 2021. <https://www.educationnext.org/proving-school-to-prison-pipeline-stricter-middle-schools-raise-risk-of-adult-arrests/>.

<sup>30</sup> “U.S. Sentencing Guidelines: Annotated 2023, Chapter 4.” *United States Sentencing Comm’n*. <https://www.ussc.gov/guidelines/2023-guidelines-manual/annotated-2023-chapter-7>.

<sup>31</sup> Wang, Leah. “Punishment Beyond Prisons 2023: Incarceration and Supervision by State.” *Prison Policy Initiative*. May 2023. <https://www.prisonpolicy.org/reports/correctionalcontrol2023.html>.

percent of people having their supervision revoked.<sup>32</sup> An estimated 3.7 million adults in the United State are under community supervision and at risk of incarceration.<sup>33</sup>

The terms of probation and supervised release can be severely restrictive due to their onerous requirements, including requirements on meeting with probation and parole officers, detailing comings and goings and other life changes, paying steep fines and fees, and others.<sup>34</sup> Staying in compliance with all of these conditions is difficult and necessitates financial, mental, and community support that may be in short supply. Additionally, the community supervision system is not free of disparities by any means. Black people are overrepresented in the system at 30 percent of the population, and are more likely to have their probation revoked than similarly-situated White and Hispanic people.<sup>35</sup> These statistics demonstrate the harms perpetuated by the onerous community supervision system.

The time has come to dramatically rein in this system of mass supervision and free people from the control of the carceral state. One way to improve community supervision is by limiting the possibility of revocation and minimizing the possibility of reincarceration. The Commission should seek to set clearer and fairer criteria for reincarceration due to a violation of probation or supervision conditions and eliminate reincarceration for technical violations of supervision conditions. For example, the Commission could write a policy statement on supervision that advises supervisors not to seek incarceration for behaviors that are legal, but impermissible under supervision, or that advises supervisors not to seek revocation over minor offenses.

V. Create a directly impacted persons advisory group.

It is imperative that the opinions and knowledge of directly impacted people are centered when system reforms are being considered. Under 28 U.S.C. § 994(o), the Commission must consult with “authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system” as part of its periodic review and revision of the guidelines.<sup>36</sup> Currently, the Commission is advised by practitioner, probation officer, tribal issue, and victims advisory groups. These groups are recognized as authorities on the criminal legal system and provide counsel, observations, feedback, and other guidance from their perspective to help the commission carry out its statutory responsibilities. In this spirit, the Commission should also establish a standing advisory group consisting of people who have been directly impacted by the criminal legal system, as they, too, are authorities on the system. People who have been sentenced or who have a loved one who has been sentenced have a special insight into the unfairness and inequities in the system, and play an essential role when considering the impacts of the Commission’s work on defendants.

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> “Revoked: How Probation and Parole Feed Mass Incarceration in the United States.” *American Civil Liberties Union & Human Rights Watch*. July 31, 2020. <https://www.aclu.org/publications/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states>.

<sup>35</sup> “Punishment Beyond Prisons,” *supra* note 31.

<sup>36</sup> 28 U.S.C. § 994(o).

VI. Conduct periodic visits of federal correctional facilities.

The Commission should prioritize conducting periodic visits to correctional facilities to improve its knowledge and better inform its decisions. Under 28 U.S.C. 994(o), the Commission is required to review and revise sentencing guidelines “in consideration of comments and data coming to its attention.”<sup>37</sup> Additionally, 28 U.S.C. 994(q) requires the Commission and the Bureau of Prisons to provide recommendations “concerning maximum utilization of resources to deal effectively with the Federal prison population” including “the modernization of existing facilities.”<sup>38</sup> To better inform these recommendations and to collect data firsthand, the Commission should consider making regular site visits to federal correctional facilities. The authority that creates guidelines on sentencing policies and practices should have a firsthand idea of the facilities that an individual is sent to when they are sentenced according to the guidelines. Periodic facility visits would improve the Commission’s knowledge of correctional facilities and properly inform the Commission as it seeks to carry out its statutorily required responsibilities.

**Conclusion**

There are numerous areas in which the Commission could make sentencing fairer and ameliorate biases and injustices in our criminal legal system. There is a long road ahead to fully eradicate racial and other disparities within the system, but the changes mentioned in this comment present the Commission with several opportunities to correct these injustices and strive towards a more equitable system. Please direct any questions about these comments to Chloé White, senior counsel, justice, at [white@civilrights.org](mailto:white@civilrights.org).

Sincerely,



Jesselyn McCurdy  
Executive Vice President of Government Affairs

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<sup>37</sup> Ibid.

<sup>38</sup> 28 U.S.C. § 994(q).