CHAPTER 9

FEDERAL SENTENCING

THE ISSUE

Sentencing policies enacted over the past 30 years have turned the United States from the land of the free into the home of the incarcerated. One in every 31 Americans is either in prison or jail, on probation or on parole, according to the Pew Center on the States, and there are 2.3 million people in prison.[1] That number represents 25 percent of the world's prison population and yet the United States is home to just five percent of the world's population.[2] This mass incarceration comes with an extraordinarily high price for both state budgets as well as for families. Financially, prison budgets have become the fastest growing segment of state budgets, outpacing investments in education and transportation.[3] Socially, families are being torn apart as more and more parents are behind bars. And, morally, communities are becoming fractured by a criminal justice system that fails to treat all people alike.

While the high costs to society of incarceration might be tolerable were more effective and less expensive alternatives to reducing crime not available--but they are. Thirty years of academic research and real-world experience have demonstrated that incarceration is valuable for removing the most dangerous, violent individuals from our streets, but counterproductive to efforts to rehabilitate those who commit less serious offenses before they re-enter society. Community corrections, treatment and rehabilitation, and other alternatives to prison have proven to be far more effective at reducing recidivism rates and at less cost to taxpayers.[4]

Criminal justice reformers from across the ideological spectrum are working together to promote smarter sentencing solutions. Blue states, like New York, and red states, such as South Carolina, have led the way by either repealing or significantly reforming their costly and ineffective mandatory minimum sentencing regimes.[5] In 2010, Congress showed that bipartisan sentencing reform is possible at the federal level, too. An overwhelming majority approved legislation to

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[1] PEW PUBLIC SAFETY PERFORMANCE PROJECT, ONE IN 100: BEHIND BARS IN AMERICA 2008. (Pew Center on the States February 2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

[2] Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES, Apr. 23, 2008, *available at*: http://www.nytimes.com/2008/04/23/us/23prison.html.

[3] National Association of State Budget Officers, Expenditure Reports 2005 – 2009, *available at :* http://nasbo.org/Publications/StateExpenditureReport/StateExpenditureReportArchives/tabid/107/Default.aspx (last visted Jan. 24, 2011).

[4] *See, e.g.,* Joan Persilia, *A Crime Control Rationale for Community Corrections* 74 PRISON J. 479 – 496, *available at:* http://tpj.sagepub.com/content/75/4/479.abstract.

[5] Press release, Families Against Mandatory Minimums, Historic Agreement to Reform Rockefeller Drug Laws (Mar. 27. 2009), *available at:* http://www.famm.org/NewsandInformation/PressReleases/HistoricAgreementtoReformRockefellerDrugLaws.aspx ; *Prisons Full, Coffers Empty*, ECONOMIST (July 22, 2010), *available at:* http://www.economist.com/node/16636019 (last visited Jan. 24, 2011).

repeal a mandatory minimum for the first time since the Nixon Administration.[6] It also reduced the infamous 100:1 disparity between crack and powder cocaine sentences.

The new Congress and administration should continue to work together to improve our federal sentencing system in ways that protect the public, reduce crime rates, and save taxpayers money. Specifically, Congress should repeal all mandatory minimums or, in the alternative, expand the federal safety valve, which authorizes judges to avoid imposing a mandatory minimum in certain circumstances. Moreover, Congress and the administration should expand alternatives to incarceration in the federal sentencing guidelines. Finally, Congress should act to expand the Residential Drug Abuse Program (RDAP), provide more good time credit for model prisoners, and expand the release program for elderly inmates.

HISTORY OF THE PROBLEM

There are two types of federal sentencing laws addressed in this chapter: (1) mandatory minimum sentencing laws, enacted by Congress, and (2) 18 U.S.C. § 3553(a). A mandatory minimum sentence is a required minimum term of imprisonment. When it applies, a judge is forced to impose it, even if the circumstances of the offense or the culpability of the defendant warrant a lower sentence. In cases where mandatory minimums do not apply, judges are directed by the sentencing statute, 18 U.S.C. § 3553(a), to impose a sentence "sufficient but no greater than necessary" to comply with the enumerated purposes of sentencing. Judges are directed to consult the advisory sentencing guidelines (promulgated by the U.S. Sentencing Commission) as well as undertake a step-by-step inquiry into such things as the circumstances of the offense and the history and characteristics of the offender. The resulting sentence is more likely to be a better fit than the one-size fits all mandatory sentence.

Mandatory minimums were created as part of a larger effort to create more uniform sentencing. Mandatory minimums first appeared only a few years after Congress created the U.S. Sentencing Commission (USSC) in 1984.[7] This expert body wrote and implemented the Federal Sentencing Guidelines (Sentencing Guidelines), with the mandate that equally blameworthy offenders get similar sentences.[8] At the same time, the guidelines also gave courts some flexibility to tailor sentences to fit individuals or special circumstances.[9] The discretion exercised by judges was not extinguished, but simply transferred to prosecutors. Prosecutors now have control over sentencing through their charging decisions.

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[6] Molly M. Gill, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums*, 21 FED. SENT'G REP. 55 - 2008) *available at:* http://www.famm.org/Repository/Files/11.FSR.21.1_55-68%5B1%5D.pdf.
[7] Pub. L. No. 98-473, 98 Stat. 2017 (codified as amended at 28 U.S.C. § 991 (2007)).
[8] *See* 28 U.S.C. § 991(b)(1)(B) (2007); *See also* Pub. L. No. 98-473, 98 Stat. 2019 (codified as amended at 28 U.S.C. § 994 (2007)) (describing the Commission's duties and powers).
[9] *See, e.g.*, U.S.S.G. § 5K2.0 (2008) (describing when a sentence may be increased or decreased based on factors "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines").

In the mid-1980s, Congress responded to concerns about crime by adopting mandatory minimums of five or more years for a variety of drug and gun offenses.[10] These were expanded in following years to apply to a growing number of offenses, including gun offenses, sex crimes, identity fraud, and some crimes of violence.[11] In 1988, they were expanded to include conspirators.[12] Sentence triggers were simple, for example, drug type and weight or presence of a gun. Some judges found they could not impose appropriate sentences in many cases because such simplistic factors did not account for culpability and distorted the criminal sentencing process.[13] But, their hands were tied by these mandatory minimums. One size fits all penalties have extracted a heavy economic and social price without providing results.

Mandatory minimum sentencing policies come with billions in direct costs. In 2008, American taxpayers spent over $5.4 billion on federal prisons,[14] a 925 percent increase since 1982.[15] This explosion in costs is driven, in part, by the expanded use of prison sentences for drug crimes and longer sentences required by mandatory minimums. The federal prison population has increased nearly five-fold since mandatory minimums were enacted in the mid-80s and mandatory guidelines became law.[16] The major cause is the increase in sentence length for drug trafficking from 23 months[17] before mandatory minimums to 83.2 months in 2008.[18] About 75 percent of the increase was due to mandatory minimums and 25 percent due to guideline increases above mandatory minimums.[19] Despite more than 50 years of experimenting with mandatory minimums, however, backers can point to no conclusive studies that demonstrate any positive impact of

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[10] Gill, *supra* note 6, at 59.
[11] *Id.*
[12] *Id.*
[13] For example, the policy body of the federal judiciary expressed its view in testimony by Judge Vincent Broderick on mandatory minimums in 1993 before the Crime subcommittee of the House Judiciary Committee "I warrant that there is no single issue affecting the work of the federal courts with respect to which there is such unanimity: most federal judges . . . whatever their background, believe – and this is predicated on their experience – that mandatory minimums are the major obstacle to the development of a fair, rational, honest and proportional federal criminal justice sentencing system." *Federal Mandatory Minimum Sentencing: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. of the Judiciary*, 103rd Cong. 104 (1993) (statement of the Honorable Vincent L. Broderick, Chair of the Conference Committee on Criminal Law of the Judicial Conference of the United States), *available at* http://www.archive.org/stream/federalmandatory00unit#page/n0/mode/2up
[14] U.S. DEP'T OF JUST., FY 2009 BUDGET AND PERFORMANCE SUMMARY, FEDERAL PRISON SYSTEM, *available at* http://www.usdoj.gov/jmd/2009summary/html/127_bop.htm.
[15] BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003 (2006), at 3, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeus03.pdf.
[16] U.S. Bureau of Prisons, A Brief History of the Bureau of Prisons, http://www.bop.gov/about/history.jsp.
[17] U.S. SENT'G COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING (2004), at 48, *available at* http://www.ussc.gov/15_year/15year.htm [hereinafter FIFTEEN YEAR REVIEW]; U.S. SENT'G COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL GUIDELINES AND POLICY STATEMENTS (1987), at 69-70.
[18] U.S. SENT'G COMMISSION, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2008), at Table 14, *available at* http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm
[19] FIFTEEN YEAR REVIEW, *supra* note 19, at 54.

federal mandatory minimum sentences on the rate at which drugs are being manufactured, imported, and trafficked throughout the country.[20]

Furthermore, mandatory minimums aren't always appropriate. Because courts cannot tailor these sentences to fit the individual, many people get punishments that are too harsh for the crimes they committed. For example, drug mandatory minimums are based on only the type and weight of the drug, which prevents courts from considering other important facts, such as whether the offender is nonviolent or a drug addict, played a minor role in the crime, or is not dangerous to the community. Additionally, many mandatory minimum-bearing statutes overlap with state criminal code provisions, effectively federalizing these crimes. This federalization of crime is inconsistent with the long-standing principle that law enforcement and crime prevention are largely state functions.

For the first time in our nation's history, more than one in 100 adults are imprisoned.[21] The United States now imprisons its citizens at a rate roughly five to eight times higher than the countries of Western Europe, and twelve times higher than Japan.[22] Approximately one-quarter of all persons imprisoned in the entire world are imprisoned in the United States.[23] The federal sentencing scheme has contributed to these statistics. In the past 25 years since the advent of the Sentencing Guidelines and the mandatory minimum sentences for drug offenses, the average federal sentence has roughly tripled in length.

1. **Crack Cocaine Sentencing**

Until recently, the disparity in sentencing between crack cocaine violations and other cocaine violations was 100:1. On August 3, 2010, the Fair Sentencing Act (FSA) was signed into law, reducing the longstanding disparity in cocaine sentencing to 18:1, such that possession with intent to distribute 28 grams of crack now triggers a five-year mandatory minimum and 280 grams of crack triggers a 10-year mandatory minimum .[24] Although the crack sentencing disparity was not completely eliminated, the new 18:1 sentencing ratio means relief for about 3000 defendants a year, a reduction of the typical crack sentence by nearly 30 months and, a savings to the federal government of $42 million over a five-year period.[25]

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[20] All sides in the debate agree that proving causality between longer mandatory sentences and crime rates is difficult. Yet the burden falls on the proponents of mandatory minimums to provide evidence that they are working. The proponents have shown none.

[21] THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

[22] William Sarbol, et al., *Prisoners in 2008*, NCJ 228417 (Dec. 2009), *available at* . http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf.

[23] Roy Walmsley, *World Prison Population List. (Eighth Edition)*, INT'L CENTRE FOR PRISON STUD., SCH. OF L., KING'S COLLEGE LONDON. http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf.

[24] Pub. L. No. 111-220, 124 Stat. 2372..

[25] CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE: FAIR SENTENCING ACT OF 2010 (2010), *available at:* http://www.cbo.gov/ftpdocs/114xx/doc11413/s1789.pdf.

Under the FSA, the U.S. Sentencing Commission (USSC) was granted emergency authority to amend the crack sentencing guidelines to ensure that the guidelines are consistent with the new law.[26] The temporary amendment took effect on November 1, 2010, and established the base offense level at 26 and without retroactive application of the guideline amendment. The USSC will promulgate its permanent guideline amendment in May 2011. The Commission should act to set its permanent guidelines for crack at offense levels 24 and 30, rather than 26 and 32, and make the guideline applicable to persons sentenced for offenses that took place prior to enactment of the FSA.

Senators Richard Durbin and Patrick Leahy, the lead sponsors of the Senate-passed FSA, urged that prosecutorial discretion be exercised by the Department of Justice (DOJ) such that the new sentencing guidelines be applied to all defendants who have not yet been sentenced, including those whose conduct predates the legislation's enactment.[27] In the words of Senators Durbin and Leahy, "justice requires that defendants not be sentenced for the next five years under a law that Congress has determined is unfair."[28] Any other interpretation of the law ensures extensive, costly federal litigation, and will likely ensure disparate sentencing outcomes in different parts of the country for many years.

Many federal judges agree with the position taken by Senators Durbin and Leahy. Judges are starting to apply the FSA to pending cases over the Government's objection. George H.W. Bush appointee Judge D. Brock Hornby has held that the FSA's reduced mandatory minimums apply to defendants who have not yet been sentenced. In his opinion, Judge Hornby wrote, "what possible reason could there be to want judges to continue to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs? … I would find it gravely disquieting to apply hereafter a sentencing penalty that Congress has declared to be unfair."[29] As of January 10, 2011, at least 16 courts had followed Judge Hornby's lead.[30]

2. **Federal Safety Valve**

In recognition of the constraints placed on judges' ability to impose appropriate sentences by mandatory minimums, Congress installed a statutory safety valve in 1994, which applies only to

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[26] *Id.* § 8.
[27] Letter from Richard Durbin and Patrick Leahy, United States Senators, to Eric Holder, Attorney General of the United States (November 17, 2010).
[28] *Id*. at 1.
[29] United States v. Douglas, 2010 WL 4260221 (D. Me. 2010).
[30] *See, e.g.*, United States v. Johnson, No. 6:08-cr-270 (M.D. Fla. 2011); United States v. Cox, No. 3:10-cr-85 (W.D. Wis. 2011);United States v. Jones, No. 4:10 CR 233 (N.D. Ohio 2011); United States v. English, No. 3:10-cr-53 (S.D. Iowa 2010). For full list of district court cases applying the ameliorative changes to the Fair Sentencing Act of 2010 to defendants whose conduct occurred before its passage but who had not yet been sentenced, see also http://www.fd.org/pdf_lib/District%20courts%20applying%20FSA.pdf.

drug mandatory minimums.[31] The safety valve directs the court to waive the mandatory minimum in drug cases if the defendant meets five statutory criteria. The defendant must have: (i) been a low-level participant, (ii) not used a weapon, (ii) been involved in a violence-free crime, (iv) little or no criminal history, and (v) told the government the truth about his or her involvement in the instant and related offenses – the so-called "tell-all" requirement.[32] Today, the safety valve is used to lower the sentences of 25% of all deserving drug defendants otherwise subject to mandatory minimums of five, 10 or more years.[33]

3. **Sentence Stacking Provisions**

Federal law requires judges to impose a mandatory minimum sentence of five, seven or 10 years on defendants who, during and in relation to or in furtherance of a crime of violence or drug trafficking, possess, brandish, or fire a firearm, respectively.[34] This mandatory sentence is imposed on top of any other sentence in the case. Second and subsequent convictions under the law trigger a consecutive 25-year mandatory minimum sentence.

Though the 25-year recidivism enhancement appears designed to punish true repeat offenders -- that is, people convicted and who have served their sentence for using a firearm who then re-offend – it is also used on true first offenders.[35] In 1993, the Supreme Court ruled that the 25-year enhancement applies to defendants convicted of two or more separate instances of possessing a firearm, even when the defendant sustains the two convictions in the same court proceeding. Because the sentences are mandatory and consecutive, first offenders who are convicted in their first appearance in court of possessing a gun three times in violation of § 924(c) will be sentenced to 55 years. That is five years for the first possession conviction and 25 years each for the other two incidents. This results in unduly severe sentences that bear no relation to deterring true recidivists. Perversely, a true recidivist can serve a shorter sentence than a true first offender.

4. **Alternative Sentencing**

Federal judges currently have little authority to impose sentences other than jail or incarceration, even when the offense is relatively minor. As a result, while the federal justice system authorizes probation as an alternative to incarceration, the use of probation has declined since the

[31] 18 U.S.C. § 3553(f).
[32] *Id.*
[33] U.S. SENT'G COMMISSION, OVERVIEW OF STATUTORY MANDATORY MINIMUM SENTENCING 8, tbl. 4 (July 10, 2009), *available at* http://www.ussc.gov/MANMIN/man_min.pdf.
[34] 18 U.S.C. § 924(c).
[35] Recidivists in criminal law are generally only considered such after they have had an opportunity to reflect on their conduct following apprehension, prosecution and punishment. For example, the recidivist provisions in 18 U.S.C. § 841 only kick in after a conviction has been finalized, as do most other recidivist and two and three strike provisions in state and federal law.

advent of the Sentencing Guidelines. In 1984, more than 30% of defendants were sentenced to probation without any term of imprisonment; by 2006, that figure had declined to 7.5%. [36]

Alternative sentences to incarceration under the Sentencing Guidelines should be expanded. Virtually every state criminal justice system makes use of a various forms of punishment short of pure incarceration, such as probation, home detention, intermittent confinement, and community services. In the federal criminal justice system, these alternatives have been greatly curtailed since the adoption of the Guidelines.

In 1984, more than 30% of defendants received sentences of probation without any term of incarceration.[37] This reflected the considered judgment of the judiciary as a whole that in nearly one-third of cases, the purposes of sentencing could be fully achieved without a period of imprisonment. By fiscal year 2008, only 7.4% percent of federal defendants received probationary sentences, 6.2% received "split" sentences of both imprisonment and home or community confinement, and the remaining 86.4% of defendants received sentences of straight incarceration.[38] At the same time, utilization of community confinement has been curtailed and shock incarceration ("boot camp") programs have been eliminated.

The current federal criminal justice system, in which a prison sentence is the default and alternative sentences remain the relatively rare exception, is not what Congress envisioned in 1984 when it instructed the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 18 U.S.C. § 994(j). The current Guidelines treat nearly every case as "otherwise serious" – in fiscal year 2008, 92.6% of offenders were sentenced to imprisonment.[39]

5. **Residential Drug Abuse Program**

The Residential Drug Abuse Program (RDAP) is a voluntary six-to-twelve-month program of individual and group therapy for federal prisoners with substance abuse problems. Authorized by 18 U.S.C. § 3621, it directs the Federal Bureau of Prisons (BOP) to provide "residential substance abuse treatment and make arrangements for aftercare ... for all eligible prisoners," giving priority to

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[36] *See* BUREAU OF JUST. STAT, , SPECIAL REPORT: TIME SERVED IN PRISON BY OFFENDERS*, 1986-97*; BUREAU OF JUST. STAT., FEDERAL CRIMINAL JUSTICE TRENDS (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fcjt03.pdf; U.S. SENT'G COMMISSION, SOURCEBOOKS, *available at* http://www.ussc.gov/annrpts.htm.

[37] FIFTEEN YEAR REVIEW, *supra* note 19, Fig. 2.2 at 43.

[38] SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 20, Fig. D, at 27.

[39] *Proposed Amendments to the Federal Sentencing Guidelines Regarding Alternatives to Incarceration: Hearing Before the U.S. Sentencing Comm.,* Mar. 17, 2010 (statement of James E. Felman, Co-Chair, American Bar Assoc. Criminal Justice Section Committee on Sentencing), *available at:* http://www.abanet.org/crimjust/docs/felman.pdf.

eligible prisoners closest to their release dates. As an incentive to participate, Congress authorized, in 1995, a sentence reduction of up to one year for prisoners convicted of a non-violent offense.[40]

By unilateral BOP rule, the one-year sentence reduction is not available to certain classes of prisoners who are eligible under the statute, including those with immigration or state court detainers (eliminating 26.2 percent of prisoners who are removable aliens) and those who BOP classifies as having committed a "crime of violence," which includes an offense that involves the mere possession of a weapon.[41]

RDAP is proven to reduce the likelihood of recidivism and drug abuse relapse, as well as reduce prison costs.[42] However, as a result of the rigid eligibility requirements, only a small percentage of prisoners who could take advantage of the incentive are allowed to receive it.

Among those who do qualify, few receive the maximum benefit Congress authorized. As of January 2009 there was a waiting list for RDAP that exceeded 7,600 prisoners.[43] Because priority is given to those who are closest to their release dates (without regard to whether they are RDAP participants), and there are a limited number of openings, few prisoners complete the program in time to receive the maximum sentence reduction of one year. As of January 2009, the average RDAP participant received a sentence reduction of only 7.6 months.[44]

6. **Good Time Credit**

Good time credit is earned for good behavior, described in the law as "exemplary compliance with institutional disciplinary regulations."[45] Good time credit reduces a prisoner's sentence such that prisoners serving a term of imprisonment of more than a year may "receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days a year."[46]

Since 1988, BOP has awarded good time credit based on the time actually served by the prisoner, not the sentence (or "term of imprisonment") imposed by the judge. As a result, based on the way BOP calculates good time, prisoners only earn a maximum of 47 days of good time for each year to which they are sentenced, instead of the 54 days per year contemplated by the statute. The decision results in unnecessary increases in prison sentences at significant cost to BOP.

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[40] 18 U.S.C. § 3621(e)(2).
[41] *Id.*
[42] U.S. BUREAU OF PRISONS, ANNUAL REPORT ON SUBSTANCE ABUSE TREATMENT PROGRAMS, FISCAL YEAR 2008, REPORT TO CONGRESS (2009).
[43] U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF PRISONS, STATE OF THE BUREAU 2009 (2009), *available at:* http://www.bop.gov/news/PDFs/sob09.pdf.
[44] *Id.*
[45] 18 U.S.C. § 3624(b).
[46] *Id.*

In 2010, The United State Supreme Court upheld BOP's interpretation of good time in a 6-3 decision, with strong dissent by Justice Kennedy, joined by Justices Stevens and Ginsburg.[47] It is up to Congress to address the problem.

Studies show that prisoner participation in educational, vocational, and job training, work skills development and drug abuse, mental health and other treatment programs, all reduce recidivism significantly. Thus, proposals that reward good behavior and efforts by prisoners to improve themselves have the potential not only to reduce victimization, but to significantly reduce taxpayer's burden, by reducing time served in prison, reducing recidivism, and saving policing and prosecution costs.

7. **Sentence Reductions for Extraordinary and Compelling Circumstances**

The Sentencing Reform Act includes provisions for a second look at federal sentences to account for certain kinds of changed circumstances or events. [cite] As illustrated by the recent retroactive crack cocaine amendments, the sentencing court has discretion to reduce a sentence where the USSC determines that a guideline should be reduced and the reduction should apply retroactively. Congress also provided for discretion by the sentencing judge to reduce a prison term where later changes of fact make the sentence too harsh, if the court finds that "extraordinary and compelling reasons warrant such a reduction."[48] Congress realized that a wide variety of circumstances, including but not limited to "cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction . . . ." could fit into the description of "extraordinary and compelling" circumstances and delegated to the Sentencing Commission the task of setting criteria and providing examples, which it did in 2007.[49]

The statute contemplates that BOP would perform a gatekeeper function, but that sentencing discretion would be exercised by the sentencing judge. This is where practice has broken down. Essentially ignoring the USSC's guidelines, BOP has persisted in following a policy that defense practitioners have called the "Death Rattle Rule."[50] Under this rule, the only circumstance that can be considered "extraordinary and compelling" is imminent proximity to death. Because BOP has sole authority to bring a sentence reduction motion to the courts, courts have no jurisdiction to consider any case, however extraordinary and compelling, that is not initiated by a BOP motion. BOP has filed fewer than 20 motions each year for the past two decades, though its prisoner population has swelled to over 210,000.[51]

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[47] Barber v. Thomas, 560 U.S. ____ (2010)
[48] 18 U.S.C. § 3582(c)(1)(A).
[49] See USSG 1B1.13.
[50] Margaret Colgate Love, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable* 216, 21 FED. SENT'G REP. 211 – 225 (February 2009), *available at:* http://www.pardonlaw.com/materials/12.FSR.21.3_211-226.pdf.
[51] *Id.* at 224.

8. **Growing Population of Elderly Prisoners**

The nation's state and federal prison systems are confronting the complicated and costly problem of a growing population of elderly prisoners. Mandatory minimum sentencing, the abolition of parole, and advent of truth-in-sentencing laws ensure the number of elderly prisoners will continue to rise. The Bureau of Justice Statistics reports that between 1999 and 2007 the population of inmates aged 55 or older grew 76.9% to 76,600.[52] Elderly prisoners may someday soon make up fully one third of our prison populations.[53]

The average cost of housing elderly prisoners is approximately twice that of those in the general population.[54] Gross functional disabilities, impaired movement, mental illness, hearing loss, vision impairment, arthritis, hypertension, and dementia are common as is the need for more frequent dental care and assistive devices. Inmates older than 55 suffer from an average of three chronic health conditions and 20 percent suffer from some form of mental illness. The increased costs stem in large measure from their significant physical and mental health treatment needs and prison systems spend two to three times more for geriatric prisoners than younger inmates, on average, $70,000.[55]

At the same time, research has conclusively shown that aging is correlated with diminishing risk of recidivism: 9.5% of former federal inmates 50 years or older reoffended within two years of release compared with 35.5 percent of their under-20 counterparts.[56] The incarceration of older prisoners who represent the smallest threat to public safety but the largest cost to taxpayers, exemplifies failed public and fiscal policy. Forty-one states offer some kind of early limited release program for elderly inmates.[57]

9. **United States Sentencing Commission**

Congress established the USSC with the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984[58]. USSC was designed to be "an ongoing, independent agency within the judicial branch. The seven voting members on USSC are appointed by the

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[52] TINA CHIU, IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE (Vera Institute of Justice, April 2010), *available at:* http://www.vera.org/download?file=2973/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf.
[53] Molly Fairchild James, *The Sentencing of Elderly Criminals*, 29 AM. CRIM. L. REV. 1025, 1026 (1992).
[54] Chiu, *supra* note 52.
[55] *Id.*
[56] *Id.*
[57] Anthony Sterns *et al., A National Survey of Older Prisoner Health, Mental Health, and Programming,* CORRECTIONS TODAY (Aug. 2008), *available at:* http://www.aca.org/fileupload/177/ahaidar/Stern_Keohame.pdf.
[58] 18 U.S.C. 5041 (1984) (repealed).

President and confirmed by the Senate, and serve six-year terms." The Attorney General and the Parole Commission are non-voting, ex officio members of the Commission.[59]

Current law requires a representative of the Federal Public Defenders to submit a report at least annually to USSC concerning USSC's work, and USSC can invite Federal Public Defenders to testify at open USSC meetings. However, USSC has no official representative of the defense bar to balance the official representation of the Attorney General. This means that one interested adversary, the prosecution, can influence the outcome of guidelines in non-public meetings, where the real business of USSC takes place. DOJ has access to the USSC's internal information, is permitted to communicate its own information and proposals to USSC and its staff ex parte, and attends non-public meetings where final decisions are made. The Defenders do not have access to the USSC's internal information, and do not receive notice of proposals submitted by DOJ or developed by staff unless they are published for comment. Some proposals are never published for comment, but are adopted by the USSC and forwarded to Congress. In this way, the USSC is deprived of balanced input and debate at the relevant time. Its decisions thereby suffer, just as a judge could not fairly or accurately decide a case without the issues being joined, argued and tested by both sides. The presence of a Defender ex officio would ensure that all relevant issues are raised and receive timely and balanced consideration, much as the adversary system functions, and would thereby improve the quality of, and public confidence in, the USSC's work.

10. **Unnecessarily High Drug Sentencing Guidelines**

The passage of the Anti-Drug Abuse Act of 1986,[60] introducing mandatory minimum sentencing, interrupted the USSC's development of drug offense guidelines. Striving to keep the new sentencing guidelines and their more nuanced considerations effective,[61] USSC correlated the guideline range to the new mandatory minimums, but in all cases indexed the applicable range *above the applicable mandatory minimum*, thus providing for longer guideline sentences than called for even by the applicable mandatory minimums. This twin attack on drug offenses caused the unprecedented and disproportionate incarceration of first-time and low-level drug offenders, characterized by the Justice Kennedy Commission as "far beyond historical norms." [cite?] Because of this grim reality, USSC has urged Congress to revise mandatory minimums and the guidelines, without avail. In 2007, USSC acted on its own to redress the lengthy and unjust sentences being

[59] *See* 28 U.S.C. § 991(a); Public Law No. 98-473 § 235.
[60] H.R. 5484, 99th Cong. (1986).
[61] In its 1991 report on mandatory minimum sentencing, USSC wrote: "[F]rom a structural standpoint, the Sentencing Commission found that , while it theoretically could design a structure that would equate the lowest guideline sentence with the mandatory minimum, adherence to that approach would produce in typical cases sentences that would reach or exceed the statutory maximum and thus, there would be little if any opportunity for consideration of aggravating factors. The Sentencing Commission therefore concluded that a more reasonable, rational, and proportional approach to the sentencing of drug trafficking offenders would use the mandatory minimum penalties as starting points to determine the base offense levels." U. S. SENT'G COMMISSION, SPECIAL REPORT TO THE CONGRESS, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Aug. 1991) at 29, *available at* http://www.ussc.gov/r_congress/MANMIN.PDF.

served by crack offenders, calling the problem "urgent and compelling." USSC correlated the guideline to encompass the mandatory minimum at its high end, instead of its low end—an enormously beneficial change.[62]

The "dramatic increase in time served by federal drug offenders" includes all drug offenders and USSC admits that "relative harmfulness" of different drugs was not necessarily reflected by the guideline sentences.[63] There is no reason to maintain the guidelines at levels above those required by the drug mandatory minimums. Reducing them would have an immediate and salutary effect on the length of sentences for drug trafficking which have, in USSC's words, "in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes."[64]

RECOMMENDATIONS

1. **Crack Cocaine Sentencing Reform**

A. ***Crack Cocaine Sentencing Reform Only Partially Done***

Despite significant improvements to sentencing disparity made by the FSA, the FSA is not retroactive and those incarcerated pursuant to the previous flawed sentencing scheme will receive no relief. The FSA must be strengthened by retroactive application of its provisions, and by completely eliminating the sentencing disparity.

B. ***Make Changes Retroactive***

Legislative

Congress should enact legislation to make the FSA retroactive. The Fair Sentencing Clarification Act (FSCA), introduced in the 111th Congress by Robert "Bobby" Scott (D-VA),[65] would extend the application of the FSA to those whose crimes were committed prior to its enactment by permitting people incarcerated under the old crack cocaine mandatory minimums to seek a reduction of their sentence consistent with the FSA lower mandatory minimums from the sentencing court. Congress should reintroduce and pass FSCA.

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[62] Following passage of the Fair Sentencing Act of 2009, the Commission raised the crack cocaine guidelines to their pre-November 1, 2007 levels. *See* S. 1789, 111th Cong. (2010) (enacted).
[63] PAUL J. HOFER ET AL., FIFTEEN YEARS OF GUIDELINES SENTENCING (U.S. Sentencing Commission, Nov. 2004), *available at:* http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf.
[64] *Id.*. at 49.
[65] H.R. 6548, 111th Cong. (2010).

Executive

The U.S. Sentencing Commission (USSC) should, in setting its permanent guidelines, restore the crack cocaine base offense levels at 24 and 30, rather than 26 and 32.[66] Restoring the base offense levels to 24 and 30 more accurately reflects the stated goals of Congress, which are to reduce racial disparity in drug sentencing; increase trust in the criminal justice system; reduce overincarceration; and shift federal enforcement focus from low-level offenders to kingpins.[67] Moreover, the FSA did not require the base offense levels to be set at 26 and 32. Indeed, Sen. Richard Durbin (D-Ill.) and Rep. Scott, champions of the legislation, advised the Commission of their intent that crack base offense levels not be increased.[68]

Additionally, USSC should make changes to the new crack cocaine sentencing guideline retroactive. For almost two decades in four separate reports, USSC has urged Congress to address the disparities in federal cocaine sentencing policy and eliminate the statutory mandatory minimum for simple possession of crack cocaine.[69] Although the FSA is silent on retroactive application of the new sentencing structure, the USSC has authority to apply its changes to the Sentencing Guidelines retroactively. Those sentenced under the guidelines in effect prior to November 1, 2010 are the very people whose cases inspired passage of the FSA. They deserve to receive justice as well.

In implementing the FSA, DOJ should issue guidance to federal prosecutors, instructing them to seek sentences consistent with the FSA's reduced mandatory minimums for defendants who have not yet been sentenced, regardless of when their conduct took place. At a minimum, DOJ should issue a policy allowing prosecutors to support, or not oppose, defense motions to apply the FSA to such "pipeline" cases. This would be consistent with congressional intent, would further the goal of sentencing consistency, and would conserve prosecutorial and judicial resources in addressing piecemeal dispositions.

Finally, executive clemency should be granted to those whose crack cocaine sentences are unaffected by the FSA. Presidential commutations can ensure fair application of the principles embodied in the FSA. The President should appoint a clemency commission or other effective process to promptly and comprehensively identify cases that are not affected by the FSA, and grant

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[66] U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1, 2D1.14, 2D2.1, 2K2.4, 3B1.4, 3C1.1 (2010).
[67] FAIRNESS IN COCAINE SENTENCING ACT, H.R. REP. No. 111 – 670 (2010).
[68] Letter from Richard Durbin and Patrick Leahy, United States Senators, to William K. Sessions, Chairman, United States Sentencing Commission (October 8, 2010), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20101013/SenDurbin_comment_100810.pdf ; Letter from John Conyers and Robert Scott, United States Representatives to William K. Sessions, Chairman, United States Sentencing Commission (October 8, 2010), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20101013/House_CrimeSubcomte_100810.pdf .
[69] U.S. SENT'G COMM., REPORT TO CONGRESS: FEDERAL COCAINE SENTENCING POLICY (May 2007); U.S. SENT'G COMM., REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002); U.S. SENT'G COMM., SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Apr. 1997); U.S. SENT'G COMM., SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Feb. 1995).

relief where appropriate. For example, many individuals sentenced to life in prison under the "three strikes" provision of 21 USC 841(b) were not drug kingpins, did not engage in violence, and would be subject to a term of years if sentenced under the FSA. There should be an opportunity at some point to give a "second look" to these "three strikes" life sentences to determine whether they are just and necessary in particular cases.

2. **Improving and Expanding the Federal Safety Valve**

A. ***The Safety Valve is Inadequate***

The safety valve is inadequate to address the tension between the mandate of parsimony in the federal sentencing statute and mandatory minimums in individual statutes other than drug statutes, and should be replaced with a more general waiver that can be used when necessary to mediate between conflicting demands in federal sentencing law. Barring that, the safety valve itself can be amended to address correctable structural problems. First, it defines low-level offenders much too narrowly, relying on a rigid criminal history point system in the Sentencing Guidelines.[70] Second, the safety valve's "tell-all" requirement is confusing and has been interpreted in many courts as requiring that defendants provide information about other offenders, beyond the scope of related offenses.[71] Finally, there is no sound reason to limit the application of the safety valve, which allows courts to fashion appropriate punishment for qualified offenders, to only those convicted of drug offenses.

B. ***Enlarge the Safety Valve***

Legislative

i. ***Amend the Safety Valve to Bypass Mandatory Minimums when Necessary to Comply with Federal Sentencing Law***

Congress should amend 18 U.S.C. § 3553 to bypass mandatory minimums when necessary to comply with federal sentencing law. Congress, should pass legislation similar to the Ramos and Compean Justice Act, a bipartisan bill introduced by Reps. Robert "Bobby" Scott (D-VA) and Ted Poe (R-TX), [72] would amend the federal criminal code to authorize a federal court to impose a sentence below a statutory minimum if necessary to avoid violating the parsimony mandate of 18 U.S.C. § 3553(a). It would also require the court to give the parties notice of its intent to impose a lower sentence and to state in writing the factors requiring such a sentence. The Ramos and Compean Justice Act was the subject of a hearing in the House Judiciary Committee in 2009, and was successfully marked up that year by the House Judiciary Subcommittee on Terrorism, Crime and Homeland Security.

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[70] U.S. Sentencing Guidelines Manual § 4A1.2.

[71] Molly N. Van Etten, *The Difference Between Truth and Truthfulness: Objective Versus Subjective Standards in Applying Rule 5C1.2* 56 VAND. L. REV. 1265 (2003).

[72] H.R. 834, 111th Cong. (2009).

ii. ***Broaden the Safety Valve***

Congress should amend 18 U.S.C. § 3553(f) to broaden the safety valve and properly account for criminal history The intent of the Safety Valve is to allow courts to recognize offenders with limited or no criminal history. At present, the law permits only defendants with no more than one criminal history point to benefit from the safety valve. Due to peculiarities of the Sentencing Guidelines' criminal history provisions, people who have been convicted of more than one even very minor offense, such as driving on a suspended license or passing a bad check, can accumulate too many criminal history points to qualify, even though they pose very little threat of serious criminal conduct.

Congress should change the criminal history criteria by eliminating the requirement that defendants have only one criminal history point. Instead, Congress can specify in the Safety Valve criteria that defendants who fall into the Sentencing Commission's Criminal History Category I can qualify. Defendants qualify for Category I either because they have no more than one criminal history point or because the sentencing judge has reduced their criminal history from a higher category to Category I. Judges do this when they think that the calculated criminal history points overstate the defendant's true criminal background and risk of recidivism.

iii. ***Eliminate the "Tell All" Requirement***

Congress should amend 18 U.S.C. § 3553(f) to eliminate the "tell all" requirement.[73] The "tell-all" requirement is confusing to judges, defense attorneys, and prosecutors, and has been interpreted to require defendants to provide information about other offenders, not just their own conduct.[74] It has been a hotly litigated issue, as defense counsel and prosecutors argue about how much information is enough, whether it was provided in a timely fashion, and how far beyond the offense of conviction a defendant must go in the admission. There is already a separate provision in criminal law that rewards cooperators with mandatory minimum waivers.[75]

Congress should replace the "tell all" requirement with one that the defendant accept responsibility for the offense. Acceptance of responsibility means that the defendant acknowledges his or her role in the offense. If done early in the process, it can save significant resources. Substituting acceptance of responsibility will eliminate the sometimes time-and resource-consuming process of determining whether a defendant has provided enough or timely information about his offense, as well as settle the law about just how much about other criminal conduct the defendant must reveal to qualify for the safety valve. Acceptance of responsibility standards are well established as they have been a longstanding feature of the Sentencing Guidelines calculations.

[73] 18 U.S.C. § 3553(f)(5).
[74] U.S. v. Johnson, 375 F.3d 1300.
[75] U.S. SENT'G COMMISSION, FIFTEEN YEARS, *supra* note 17, at 50.

iv. ***Apply the Safety Valve to All Mandatory Minimum Offenses***

Congress should amend 18 U.S.C. § 3553(f) to apply the safety valve to all mandatory minimum offenses. Federal mandatory minimums apply to over 700 offenses, including a number of inherently non-violent offenses. The safety valve, however, only applies to drug offenses. The problems associated with mandatory minimums drug sentences are replicated in other offenses to which such sentences apply. There is no sound reason to limit the application of the safety valve, which seeks to recognize and fashion appropriate sentences for first time, low-level, non-violent offenders who recognize and accept responsibility, to only those defendants convicted of drug crimes. Congress should thus amend 18 U.S.C. § 3553(f) to ensure that it applies to all statutes that include a mandatory minimum provision.

3. **Create a Sunset Provision on New and Existing Mandatory Minimums**

A. ***Lack of Data Regarding Effectiveness of Mandatory Mimimums***

Currently, there is no sunset provision or statutory review process for federal mandatory minimums once they have been enacted. This lack of data, transparency, and reviews limits the ability to Congress to assess the effectiveness of these laws.

B. ***Create a Sunset Provision for Mandatory Minimums***

Legislative Changes

Congress should make all new mandatory minimum laws subject to a five-year sunset provision. Congress may create such a sunset provision on new mandatory minimums through either: (i) passing legislation containing a sunset provision, or (ii) creating a sunset commission to offer recommendations to Congress ahead of reauthorization of mandatory minimum legislation. A sunset commission would review and provide recommendations to retain, refine, or end a mandatory minimum. The commission would provide recommendations based on analysis of whether a mandatory minimum has achieved its goals.

4. **Ensure that 18 U.S.C. § 924(c) Recidivism Provisions Apply Only to Repeat Offenders**

A. ***Sentence Stacking Provisions Over-punish First Offenders***

Federal "sentence stacking" provisions result in unduly severe sentences that bear no relation to deterring true recidivists. Perversely, a true recidivist can serve a shorter sentence than a true first offender.

B. ***Apply Stacking Provision to True Recidivists and Provide Predictability in Recidivist Sentencing***

Legislative

Congress should pass the Firearm Recidivist Sentencing Act of 2009.[76] Introduced by Congressman Robert "Bobby" Scott, the Firearm Recidivist Sentencing Act of 2009 would amend 18 U.S.C. § 924(c) to ensure that individuals who carry a firearm while committing a violent crime or drug trafficking offense face the 25-year mandatory minimum for repeat offenses only if they have been previously convicted and served a sentence for a §924(c) offense.

This bill would ensure that the recidivist enhancement is only used on true recidivists, by requiring that a previous conviction must be final before the 25-year mandatory minimum may be sought. Finally, the bill amends Part 1 of Title 18 of the United States Code to require the government to file notice with the court when it intends to invoke the enhanced recidivism penalties in the gun statutes.

5. **Expand Authority to Defer Adjudication to Avoid a Conviction Record**

A. ***Federal Judges have Only Narrow Authority to Expunge Criminal Convictions for Low-Level Offenders***

Under current law, federal judges have very little authority to expunge criminal convictions. Given the collateral consequences associated with a felony conviction, such as public assistance and employment licensing exclusions, the lack of availability of punishment options that allow for eventual expungement of criminal records may serve to increase recidivism. Defendants who are not charged with offenses other than very serious offenses, such as predatory crime; a crime involving substantial violence; a crime in which the defendant played a leadership role in large-scale drug trafficking; or a crime of equivalent gravity, should be eligible for community placement, community-based treatment programs, and diversion and deferred adjudication.

B. ***Expand Federal Statutory Authority for Deferred Adjudication***

Legislative

Congress should enact a statute permitting individuals charged with certain federal crimes to avoid a conviction record by successfully completing a period of probation. Congress could do this in one of two ways. First, it could pass the Federal First Offender Improvement Act[77], introduced by Rep. Pedro Pierluisi in July 2010. The Act would expand the Federal First Offender

[76] H.R. 2933, 110th Cong. (2009).
[77] H.R. 6059, 111th Cong. (2010).

Act[78] to allow (but not require) a judge to place certain first-time drug offenders on probation without entering a judgment of conviction. A drug defendant would qualify who (i) did not use violence, a firearm or other weapon, or cause death or serious bodily injury; (ii) was not an organizer, leader, manager, or supervisor of others; (iii) had not previously benefited from this provision; and (iv) had not previously been convicted of a crime of violence or other offense punishable by more than one year in prison. If, at the end of the probation term, the defendant has not violated a condition of his or her probation, the court may dismiss the proceedings.

Alternatively, Congress could reinstate the set-aside authority in the Youth Corrections Act,[79] and extend it to all first felony offenders eligible for probation. In addition, for persons with a federal conviction, Congress should enact an expungement/sealing remedy that would be available after a waiting period (e.g., five years for misdemeanors, 10 years for felonies).

6. Expand Alternatives to Incarceration in Federal Sentencing Guidelines

A. *Judges Have Insufficient Discretion to Impose Alternative Sentences*

Under the Sentencing Guidelines, federal judges currently have little authority to impose sentences other than jail or incarceration, even when the offense is relatively minor. As a result, while the federal justice system authorizes probation as an alternative to incarceration, the use of probation has declined since the advent of the Sentencing Guidelines. In 1984, more than 30% of defendants were sentenced to probation without any term of imprisonment; by 2006, that figure had declined to 7.5%.[80] Alternative sentences to incarceration under the Guidelines should be expanded.

B. *Expand Alternatives to Incarceration in the Federal Sentencing Guidelines*

Judicial

The USSC, the independent federal agency created by Congress to promulgate sentencing guidelines for use by federal judges in criminal cases and to advise Congress on federal sentencing, should amend the Sentencing Guidelines to broadly expand the availability of alternatives to incarceration. In 2010, the USSC did adopt an amendment to modestly expand the availability of alternative sentences.[81] However, the USSC should adopt at least two further expansions: (i)

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[78] 18 U.S.C. § 3607.
[79] 18 U.S.C. **§** 5005 et seq. (repealed in 1984).
[80] *See* SPECIAL REPORT: TIME SERVED IN PRISON BY OFFENDERS, *supra* note 39; FEDERAL CRIMINAL JUSTICE TRENDS, *supra* note 39; U.S. SENT'G COMMISSION SOURCEBOOKS, *supra* note 39.
[81] *Commission Promulgates Amendments; Sends Package to Congress*, GUIDELINES (United States Sent'g Comm'n, Washington, DC), Spring 2010, at 1, *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Commission_Newsletters/2010_05_GuideLines_optimized.pdf.

eliminating the distinction between Zones B and C of the Sentencing Table and (ii) creating a Criminal History Category 0 for first offenders.

By merging Zone C into Zone B, the Sentencing Table would include more ranges in which a non-prison sentence is an option. This would more accurately capture the individualized sentencing processes through which judges must first determine whether any term of imprisonment is necessary to satisfy the purposes of sentencing.

The USSC should also create a new Criminal History Category 0 for true first offenders. As presently constructed, Criminal History Category I includes both first offenders and offenders who have minimal criminal records. The USSC's extensive study of criminal history and recidivism demonstrates that true first offenders are simply different—they have a significantly lower risk of recidivism than those with prior criminal experience.[82] This reflects Congress' intuitively correct determination in the enabling legislation that first time offenders are peculiarly suited for non-imprisonment sentences. This difference between first offenders and those with prior criminal history should thus be reflected in the Guidelines.

The USSC should also further expand the option of the use of alternative sentences for offenders whose crimes are associated with substance abuse or mental illness and who pose no substantial threat to the community. Alternative sentencing programs in other jurisdictions indicates that such programs are often associated with reduced recidivism rates.[83] The USSC should eliminate any offense level ceiling on treatment alternatives or, at a minimum, set offense level 16 rather than Zone C of the Sentencing Table as the ceiling for eligible offenders.

7. **Prison Incentives and Management: Expand the Residential Drug Abuse Program (RDAP)**

A. ***RDAP Requirements Are Too Restrictive***

Despite the fact that the Residential Drug Abuse Program (RDAP) is proven to reduce the likelihood of recidivism and reduce prison costs, rigid eligibility requirements result in only a small percentage of eligible prisoners being able to take advantage of the program. BOP rules excluding certain classes of prisoners from RDAP, as well as delayed RDAP eligibility determinations, limit the effectiveness of RDAP by excluding prisoners who would benefit from the program. For example, by unilateral BOP rule, the one-year sentence reduction for successful RDAP completion is not available to certain classes of prisoners who are eligible under the statute, including those with immigration or state court detainers (eliminating 26.2 percent of prisoners who are removable

[82] UNITED STATES SENTENCING COMMISSION, RECIDIVISM AND THE "FIRST OFFENDER" 13-14 (May 2004), *available at* http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_First_Offender.pdf.
[83] *See*, *e.g.*, PEW CENTER ON THE STATES, WHAT WORKS IN COMMUNITY CORRECTIONS: AN INTERVIEW WITH DR. JOAN PETERSILIA (Nov. 2007), *available at* http://www.pewcenteronthestates.org/uploadedFiles/Petersilia-Community-Corrections-QandA.pdf ("[W]e know that intensive community supervision combined with rehabilitation services can reduce recidivism between 10 and 20 percent.").

aliens[84]) and those who the BOP classifies as having committed a "crime of violence," which includes an offense that involves the mere possession of a weapon.[85]

B. ***Expand RDAP to Include More Offenders***

Executive

The BOP should remove limitations on RDAP eligibility, and make RDAP available to those with immigration or state court detainers, as well as more non-violent offenders. Under current rules, anyone who is not eligible for placement in a federal halfway house is not eligible for the RDAP. Thus, those with immigration or state court detainers are ineligible for RDAP. The Attorney General should issue a memorandum directing the BOP to administer the sentence reduction incentive consistent with federal law, such that it be made available to all prisoners with detainers, and that planning be done far enough in advance to ensure that qualified prisoners receive the full benefit Congress intended to bestow. The cost incurred in expanding the RDAP program are outweighed by the benefits in terms of costs saved by shortening sentences as well as lower recidivism rates.[86]

Additionally, the BOP should expand eligibility for RDAP to more non-violent offenders. In 2000, the BOP issued a permanent rule that categorically excluded eligibility for a sentence reduction to anyone whose "current offense is a felony... [t]hat involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives [.]"[87] By using this definition, the BOP disqualifies from RDAP prisoners who had merely possessed a firearm. However, 18 U.S.C. § 924(c) defines a "crime of violence" as an offense that is a felony and either (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[88] The BOP should change the definition that is uses to determine who is excluded from RDAP, and use the definition of "crime of violence" found in 18 U.S.C. § 924(c) in determining eligibility for the program. This would allow those who had merely possessed a firearm to benefit from RDAP.

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[84] David Leonhardt, *Immigrants and Prison*, N.Y. TIMES (May 30, 2007) ("According to the Department of Justice[,] [i]n 2000, 27 percent of the inmates in federal prisons were noncitizens."), *available at* http://www.nytimes.com/2007/05/30/business/30leonside.html.

[85] 28 C.F.R. § 550.58; *see also* FAMILIES AGAINST MANDATORY MINIMUMS, FREQUENTLY ASKED QUESTIONS ABOUT THE RESIDENTIAL DRUG ABUSE PROGRAM (RDAP), *available at* http://www.famm.org/Repository/Files/FINAL%20RDAP%20FAQs%209.9.pdf.

[86] Office of National Drug Control Policy, Drug Policy Information Clearinghouse Fact Sheet, Drug Treatment in the Criminal Justice System (Mar. 2001), http://whitehousedrugpolicy.gov/publications/factsht/treatment/index.html (last visited Jan. 24, 2011).

[87] 28 C.F.R. § 550.58.

[88] 18 U.S.C. § 924(c)(3).

Finally, when calculating proximity to release for purposes of who should take part in the overall drug program, BOP should consider that a successful participant will be closer to release by one year than prisoners who are ineligible for the sentence reduction. Priority for RDAP participation is given to those prisoners who are closest to their release date. However, currently, BOP does not make eligibility determinations early enough to ensure that prisoners who qualify receive the full year credit. Thus, prisoners who are eligible for the reduction see prisoners who are not eligible for a one-year reduction take their places in programs based on release dates that do not include the one-year reduction.

8. **Clarify and Expand Good Time Credit**

A. ***The BOP's Administration of Good Time Credits Limits its Effectiveness***

The BOP's method of calculating good time credit may only reduce a prisoner's sentence to a maximum credit of 47 days—well below the 54 days specifically mentioned in the authorizing statute.[89] This decision results in unnecessary increases in prison sentences at significant cost to the BOP and the incarcerated individuals. As the U.S. Supreme Court has upheld BOP's method of calculating good time[90], it is now up to Congress to ensure the BOP complies with the intent of the statute, and reward good behavior and efforts by prisoners to improve themselves, thereby significantly reducing taxpayers' burden by reducing time served in prison, reducing recidivism, and saving policing and prosecution costs.

B. ***Clarify and Expand Good Time Conduct Credit***

Legislative

Congress should pass the Prisoner Incentive Act.[91] First introduced in December 2009 by Rep. Robert "Bobby" Scott (D-VA), the bill would rewrite the good time statute to make clear that a prisoner serving a sentence of over one year may earn up to 54 days of good time credit per every year of his sentence. The bill would also change the law to permit the BOP to "subsequently restore any or all" credit previously denied the prisoner, based on his good behavior as determined by BOP.

Congress should also pass the Literacy, Education, and Rehabilitation Act[92], introduced in the 111th Congress by Rep. Robert "Bobby" Scott (D-VA), which would provide credit toward service of sentence for satisfactory participation in a designated prison program. Under the bill, the director of the BOP may grant up to 60 credit days per year, in addition to the good conduct credit currently awarded, to a prisoner for successful participation in literacy, education, work training, treatment, and other developmental programs. The BOP Director would determine the number of

[89] 18 U.S.C. § 3624(b).
[90] *Barber v. Thomas*, 130 S. Ct. 2499 (Jun. 7, 2010).
[91] H.R. 4327, 111th Cong. (2009).
[92] H.R. 4328, 111th Cong. (2009).

days of credit to be applied for any given program, based on its difficulty, required time, responsibility requirements, rehabilitative benefits, and benefit to the BOP.

9. **Sentence Reductions for Extraordinary and Compelling Circumstances**

A. ***BOP Prevents Consideration by Judges of Release for Changed Circumstances***

Contrary to the provisions of the Sentencing Reform Act (SRA) that granted sentencing judges the discretion to retroactively reduce sentences for certain kinds of changed circumstances or events (and granted BOP merely a gate-keeping function in the process), the BOP has effectively taken over the role of exercising this discretion. By applying the so-called "Death Rattle Rule," the BOP has limited the sentence reduction cases that come before sentencing courts to only those with imminent proximity to death, rather than the broader "extraordinary and compelling circumstances" standard articulated by the statute.[93] BOP has not ensured that the courts are able to consider petitions for early release from prisoners whose conditions—medical, terminal or otherwise—might merit it.

B. ***Expand BOP Motions to Consider Sentence Reductions***

Executive

The Attorney General should signal his intention that the statute be used as intended by providing a guidance memorandum laying out his support for use of the power to reduce a sentence for extraordinary and compelling circumstances consistent with that intended by Congress in the SRA and by the Commission in its recent conforming guideline amendment. This memo should instruct that BOP bring motions before the sentencing judge in all cases where the petitioner's circumstances meet the criteria laid out in U.S.S.G. § 1B1.13. The memo may specify additional factors that may be considered by BOP in approving a motion to be filed with the court.

10. **Expand the Elderly Release Provision Program**

A. ***Prisons Challenged by Caring for Growing Population of Elderly Prisoners***

The nation's state and federal prison systems are confronting the complicated and costly problem of a growing population of elderly prisoners. The average cost of housing elderly prisoners is approximately two to three times that of younger prisoners.[94] At the same time, aging is

[93] *See* William W. Berry III, *Extraordinary and Compelling: A Re-examination of the Justifications for Compassionate Release*, 68 MARYLAND L. REV. 850, 852-53 (2009).

[94] *See* NATIONAL INSTITUTE OF CORRECTIONS, UNITED STATES DEPARTMENT OF JUSTICE, CORRECTIONAL HEALTHCARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 11 (2004), *available at* http://nicic.gov/pubs/2004/018735.pdf ("The annual cost of incarcerating this population has risen dramatically to an average of $60,000 to $70,000 for each elderly inmate compared with about $27,000 for others in

correlated with diminishing risk of recidivism.[95] The incarceration of older prisoners who represent the smallest threat to public safety but the largest cost to taxpayers exemplifies failed public and fiscal policy.

B. *Extend and Expand Elderly Prisoner Home Confinement Release Program*

Legislative

In 2008, Congress authorized a pilot program through the Second Chance Act providing for the release to home confinement of some geriatric federal inmates.[96] The Elderly and Family Reunification for Certain Nonviolent Offenders (later renamed the Elderly Offender Home Detention Pilot Program) provision gave BOP authority to set up demonstration projects at BOP facilities for certain prisoners who were age 65 or older.[97] The qualified inmates must have served at least ten years or 75% of their sentence, among other criteria. Only a handful of prisoners benefitted from the early release program. That pilot program has expired. It should be extended and expanded. The Judiciary Committee should hold hearings and invite BOP to testify about its experience with the program with an eye toward expansion and improvement. Also invited to testify should be lawmakers or correctional experts from states that have implemented successful elderly release programs.

11. Add a Federal Public Defender as *Ex Officio* Member of the United States Sentencing Commission

A. *The United States Sentencing Commission Lacks Representation of the Defense Community*

The addition of a federal public defender as an *ex officio* member of the USSC would improve the quality and accuracy of USSC's work and the transparency and neutrality of its proceedings. The executive branch has two *ex officio* representatives on the USSC: the Attorney General and the Parole Commission. However, the defense community is not represented on the USSC, which means that one interested adversary, the prosecution, can influence the outcome of guidelines in non-public meetings, where the real business of the USSC takes place. The presence of a defender *ex officio* would ensure that all relevant issues are raised and receive timely and balanced consideration, much as the adversary system functions, and would thereby improve the quality of and public confidence in the USSC's work.

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the general population.").

[95] TIMOTHY A. HUGHES ET AL., TRENDS IN STATE PAROLE, 1990-2000 (Bureau of Justice Statistics 2001).

[96] 42 U.S.C. § 17541.

[97] *Id*.; *see also* FAMILIES AGAINST MANDATORY MINIMUMS, FREQUENTLY ASKED QUESTIONS ABOUT THE BOP'S ELDERLY OFFENDER HOME DETENTION PILOT PROGRAM, *available at* http://www.famm.org/Repository/Files/Elderly_Offender_Program_FAQs_03_20_09FINAL.pdf.

B. ***Add a Federal Defender as an* Ex Officio *USSC Member***

Legislative

Congress should amend 28 U.S.C. § 991(a) by replacing "one nonvoting member" with "two nonvoting members" at the end of the first sentence, and by inserting before the last sentence: "a representative of the Federal Public Defenders, appointed by the Judicial Conference of the United States, shall be an ex officio, nonvoting member of the commission."

12. **Reduce All Drug Guideline Levels by Two Offense Levels**

A. ***Drug Guideline Sentences Are Set Unnecessarily High in Relation to Corresponding Mandatory Minimums***

The twin attack on drug offenses in the form of the contemporaneous passage of mandatory minimum drug laws by Congress and the USSC's issuance of drug offense guidelines indexed to mandatory minimums caused the unprecedented and disproportionate incarceration of first-time and low-level drug offenders. Because of this grim reality, the USSC has urged Congress to revise mandatory minimums and the guidelines, without avail. There is no sound reason to maintain the USSC drug offense guidelines at levels above those required by the drug mandatory minimums.

B. ***Reduce all Drug Guidelines Indexed to Mandatory Minimums by Two Levels.***

Judicial

The USSC should propose to reduce all drug guideline range triggers by two levels so that the corresponding mandatory minimum floats at the top of the range for any given drug, not below it. This will ensure that the guideline ranges correspond with the mandatory minimums while providing additional flexibility to judges in cases where the mandatory minimum is not at issue. The Commission should hold a hearing to take testimony about the proposed change and promulgate a final amendment for submission to Congress.

APPENDICES

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Further Resources

Crack Cocaine Sentencing Reform

U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm.

U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: FEDERAL COCAINE SENTENCING POLICY (2007), *available at* http://www.ussc.gov/r_congress/cocaine2007.pdf.

U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004), *available at* http://www.ussc.gov/15_year/15year.htm.

Hearing on Cocaine and Federal Sentencing Policy: *Hearing Before the U.S. Sentencing Commission* (November 15, 2006), *available at*
http://ftp.ussc.gov/hearings/11_15_06/AGD11_15_06.HTM.

AMERICAN CIVIL LIBERTIES UNION, CRACKS IN THE SYSTEM: 20 YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW (2006), *available at*
http://www.aclu.org/pdfs/drugpolicy/cracksinsystem_20061025.pdf.

THE SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING (Oct. 2010), *available at*
http://sentencingproject.org/doc/publications/dp_CrackBriefingSheet.pdf.

The Federal Safety Valve

U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

U.S. SENTENCING COMM'N, OVERVIEW OF STATUTORY MANDATORY MINIMUM SENTENCING (2009).
AMERICAN BAR ASS'N, JUSTICE KENNEDY COMM'N, REPORT WITH RECOMMENDATIONS (2004), *available at* www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf.

FAMILIES AGAINST MANDATORY MINIMUMS, CORRECTING COURSE: LESSONS FROM THE 1970 REPEAL OF MANDATORY MINIMUMS (2008), *available at* http://www.famm.org/NewsandInformation/PressReleases/CorrectingCoursereportandpollrelease.aspx.

The Sentencing Reform Act of 1984: 25 Years Later, Hearing Before the U.S. Sentencing Commission (July 9, 2009) (testimony of Michael Nachmanoff, Federal Public Defender, Eastern District of Virginia), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709/Nachmanoff_testimony_updated.pdf..

U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010 (2010).

Mandatory Minimum Sentences: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary, 111th Cong. 8 (2009) (statement of the Honorable J. Julie E. Carnes, Chair of the Criminal Law Comm. on behalf of the Judicial Conference of the United States), *available at* http://judiciary.house.gov/hearings/pdf/Carnes090714.pdf.

THE CONSTITUTION PROJECT, PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS: A BACKGROUND REPORT (2005), *available at* http://www.constitutionproject.org/pdf/35.pdf.

Sunset Provisions for New and Existing Mandatory Minimums

FAMILIES AGAINST MANDATORY MINIMUMS/STRATEGY ONE, POLL ON MANDATORY MINIMUMS (August 2008), *available at* http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf.

FAMILIES AGAINST MANDATORY MINIMUMS, CORRECTING COURSE: LESSONS FROM THE 1970 REPEAL OF MANDATORY MINIMUMS (2008), *available at* http://www.famm.org/Repository/Files/8189_FAMM_BoggsAct_final.pdf

U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

AMERICAN BAR ASS'N, JUSTICE KENNEDY COMM'N, REPORT WITH RECOMMENDATIONS (2004), *available at* www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf.

THE CONSTITUTION PROJECT, RECOMMENDATIONS FOR FEDERAL CRIMINAL SENTENCING IN A POST-*BOOKER* WORLD (2006). *available at* http://www.constitutionproject.org/pdf/33.pdf.

THE CONSTITUTION PROJECT, PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS: A BACKGROUND REPORT (2006), *available at* http://www.constitutionproject.org/manage/file/34.pdf.

Recidivism Provisions s

Mandatory Minimum Sentencing Laws: The Issues: Hearing before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. (2007) (statement of the Honorable Paul Cassell, Chair of the Criminal Law Comm. on Behalf of the Judicial Conference), *available at* http://judiciary.house.gov/hearings/June2007/Cassell070626.pdf.

THE CONSTITUTION PROJECT, PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS: A BACKGROUND REPORT (2005), *available at* http://www.constitutionproject.org/pdf/35.pdf.

Deferred Adjudication Statute

Joint policy statement adopted by the American Bar Ass'n, the National Ass'n of Criminal Defense Lawyers, and the National District Attorneys Ass'n (Feb. 2007) (supporting deferred adjudication and endorsing a range of alternatives to incarceration), *available at* http://www.abanet.org/leadership/2007/midyear/docs/journal/hundredthreea.doc.

MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (2006), *available at* http://sentencingproject.org/doc/File/Collateral%20Consequences/execsumm.pdf.

Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT. REP. 6 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1570205.

Alternatives to Incarceration in the Sentencing Guidelines

Alternatives to Incarceration, Hearing Before the U.S. Sentencing Commission (March 17, 2010) (testimony of James A. Felman, American Bar Association), *available a*t http:// www.abanet.org/poladv/letters/crimlaw/2010mar12_ussc_t.pdf.

Remarks at the Symposium on Alternatives to Incarceration at the U.S. Sentencing Commission (July 14-15, 2008) *available at*

http://www.ussc.gov/Research/Research_Projects/Alternatives_to_Incarceration/NSATI_0.htm.

Residential Drug Abuse Program

Federal Bureau of Prisons Oversight: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 111th Cong. (2009), (statement of Stephen R. Sady, Fed. Pub. Def., Dist. of Or.), *available at* http://judiciary.house.gov/hearings/pdf/Sady090721.pdf.

Stephen R. Sady & Lynn Deffebach, THE SENTENCING COMMISSION, THE BUREAU OF PRISONS, AND THE NEED FOR FULL IMPLEMENTATION OF EXISTING AMELIORATIVE STATUTES TO ADDRESS UNWARRANTED AND UNAUTHORIZED OVER-INCARCERATION (June 2008), *available at* http://or.fd.org/symp2.final%20for%20pdf.pdf.

Good Time Credit Calculations

Barber v Thomas, 130 S.Ct. 2499 (June 7, 2010).

Stephen R. Sady, *Too Much Time In Prison*, NAT'L LAW J., August 30, 2010, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202471121126&Too_much_time_in_prison&slreturn=1&hbxlogin=1.

Stephen R. Sady & Lynn Deffebach, THE SENTENCING COMMISSION, THE BUREAU OF PRISONS, AND THE NEED FOR FULL IMPLEMENTATION OF EXISTING AMELIORATIVE STATUTES TO ADDRESS UNWARRANTED AND UNAUTHORIZED OVER-INCARCERATION (June 2008), *available at* http://or.fd.org/symp2.final%20for%20pdf.pdf.

FAMILIES AGAINST MANDATORY MINIMUMS, FREQUENTLY ASKED QUESTIONS ABOUT FEDERAL GOOD TIME CREDIT (June 7, 2010), *available at* http://www.famm.org/Repository/Files/Federal%20Good%20Time%20FAQs%206.7.10.pdf.

THE CONSTITUTION PROJECT, RECOMMENDATIONS FOR FEDERAL CRIMINAL SENTENCING IN A POST-*BOOKER* WORLD (2006), *available at* http://www.constitutionproject.org/pdf/33.pdf.

THE CONSTITUTION PROJECT, PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS: A BACKGROUND REPORT (2006), *available at* http://www.constitutionproject.org/manage/file/34.pdf.

Sentence Reductions for Extraordinary and Compelling Circumstances

Letter from Denise Cardman, Governmental Affairs Office, American Bar Association, with Proposed Policy Statement to Honorable Ricardo H. Hinojosa (March 12, 2007).

Mary Price, *The Other Safety Valve: Motions Under 18 U.S.C. § 3582(1)(A)*, 13 FED. SENT. REP. 188 (2000).

Reduction in Sentence Based on BOP Motion: Hearing Before the U.S. Sentencing Commission (Mar. 20, 2007) (testimony of Mary Price, Families Against Mandatory Minimums), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20070320/price-testimony.pdf.

Reduction in Sentence Based on BOP Motion: Hearing Before the U.S. Sentencing Commission (Mar. 20, 2007) (testimony of Stephen Saltzburg, American Bar Association), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20070320/Saltzburg-testimony.pdf.

THE CONSTITUTION PROJECT, RECOMMENDATIONS FOR FEDERAL CRIMINAL SENTENCING IN A POST-*BOOKER* WORLD (2006), *available at* http://www.constitutionproject.org/pdf/33.pdf.

THE CONSTITUTION PROJECT, PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS: A BACKGROUND REPORT (2006), *available at* http://www.constitutionproject.org/manage/file/34.pdf.

Elderly Release Provision Program

NATIONAL INSTITUTE OF CORRECTIONS, CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES (2004), *available at* www.nicic.org/library/018735.

VERA INSTITUTE OF JUSTICE, IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE (2010), *available at* http://www.vera.org/download?file=2973/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf.

ANTHONY A. STERNS, GRETA LAX, ET AL., THE GROWING WAVE OF OLDER PRISONERS: A NATIONAL SURVEY OF OLDER PRISONER HEALTH, MENTAL HEALTH AND PROGRAMMING (2008), *available at* http://www.aca.org/fileupload/177/ahaidar/Stern_Keohame.pdf.

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