



July 15, 2024

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

Re: Comments to the US Sentencing Commission on Proposed 2024-2025 Priorities

Dear Judge Reeves:

The National Association of Criminal Defense Lawyers (NACDL), with its diverse membership of 10,000 spanning state, federal, and military practice, wishes to express its views on preferred Commission priorities. We concur with other advocates and stakeholders that current sentences are excessively long, and certain sentencing factors disproportionately affect racial minorities within the criminal legal system. Whatever issues the Commission determines to prioritize, these flaws should be foremost in considering potential amendments.

Priority 1: Address the Trial Penalty. We appreciate the Commission's research into the impact of the Sentencing Guidelines on the trial penalty, an issue that has raised concerns among NACDL and several other groups. As the Commission is aware, NACDL's own extensive research comparing sentences imposed after trials with sentences imposed after guilty pleas, which used Sentencing Commission data, showed that for most primary offense categories, the average trial sentence in the federal system is three times higher than a plea sentence for the same crime.¹

Furthermore, this trial penalty is a major contributor to the dearth of criminal trials in the federal system. The Commission's statistics show that less than 3% of convictions result from trials.² A

¹ NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), <https://www.nacdl.org/TrialPenaltyReport>.

² U.S. Sent'g Comm'n, *2023 Sourcebook of Federal Sentencing Statistics*, at tbl. 11 (2023). Figures have been very similar in other recent years. *See* U.S. Sentencing Comm'n, *2022 Annual Report and Sourcebook of Federal Sentencing Statistics*, at tbl. 11 (showing that 97.5% of federal criminal convictions in fiscal year 2022 were the result of guilty pleas); U.S. Sentencing Comm'n, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics*, at tbl. 11, (showing that 98.3% of federal criminal convictions in fiscal year 2021 were the result of guilty pleas).

broad coalition committed to fighting the trial penalty has formed comprised of defense lawyers, prosecutors, academics, and advocacy groups from across the political spectrum.³

We very much appreciated the Commission's willingness to arrange a meeting with research staff recently to discuss research avenues on this important issue. We encourage the Commission to publish a comprehensive and public report in an alacritous manner.

While we assume that this research may be the impetus for the consideration of possible future Guideline amendments to address the trial penalty, we also urge the Commission to consider some incremental, but important amendments that clearly do impact the constitutional right to trial. First, the Acceptance of Responsibility Guideline, § 3E1.1(b), should be amended to authorize courts to award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial. Second, the Obstruction of Justice Guideline, § 3C1.1, should be amended to clarify that this adjustment should not be assessed solely for the act of an accused testifying in her or his defense. Like the right to trial, the right to testify in one's own defense is also constitutionally protected. While Application Note 2 states that the "provision is not intended to punish a defendant for the exercise of a constitutional right," clarification that this includes the right to testify in one's own defense would be welcome. Finally, we laud the Commission's action to limit the use of acquitted conduct as relevant conduct in sentencing.

In short, we encourage the Commission to consider amendments to these Guidelines that clearly disincentivize the exercise of the right to trial and impose a penalty on those few in the system who do exercise that right. We also urge the Commission to complete its much needed research on this issue and utilize those analyses and conclusions as a possible basis for other amendments to ameliorate the trial penalty.

Priority 2: Revisit the Fraud Guidelines. The current guideline disproportionately emphasizes loss amount, with increasing weight given to larger loss frauds. In November 2014, the American Bar Association's Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes proposed an alternative framework. This so-called "shadow guidelines" significantly reduces the focus on loss amount while emphasizing a defendant's culpability. The fraud guidelines are one area where the guidelines overemphasize quantitative over qualitative factors, with drug trafficking being another. A structural review of the fraud guidelines could pave the way for changes in other areas.

Priority 3: Revisit the Drug Guidelines. The Sentencing Commission - as a necessary extension of its long-standing opposition to mandatory minimum sentencing - must reassess the drug sentencing guidelines. Aside from unnecessary deference to Congress, the reason for erecting imprisonment levels above the mandatory minimum floors was to create a smooth continuum of punishments. But by focusing almost exclusively on this objective, the drug guidelines inflict inordinately severe punishment and also produce disparate sentencing outcomes. To accommodate but not compound the mandatory minimum statutes, the

³ See End the Trial Penalty, <https://www.endthetrialpenalty.org/who-we-are>.

Commission should consider scrapping the quantity distinctions that do not directly correspond to the mandatory minimum levels. Alternatively, the Commission could independently establish guideline ranges and encourage greater reliance on culpability factors other than drug quantity.

Priority 3: Expand Alternatives to Incarceration. We propose systemic changes to the guidelines to facilitate and encourage non-custodial sentences. This includes a presumption of probation for first-time, non-violent offenders, offense-level reductions for first-time offenders, and either the elimination of the zones in the Sentencing Table or a significant expansion of Zones A, B, and C. In some districts, expanding Zone B (and Zone C) may be the only way judges will begin to sentence people to probation or split sentences. Conversely, in some districts, judges rely on being in Zone D to refuse probation in cases where it is appropriate.

Priority 4: Refine the “Sophisticated Means” Specific Offense Characteristic. In our high-tech world, the term “sophisticated means” has become meaningless and is often automatically applied to computer or financial crimes. We propose either eliminating this specific offense characteristic or providing a clearer definition.

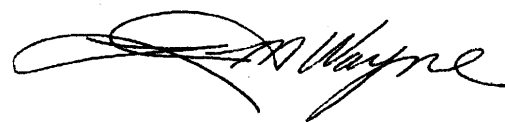
Priority 5: Narrow the Managerial Role Adjustment. It is crucial to reassess the application of the managerial role enhancement, which is applied too frequently and inconsistently. This enhancement often targets individuals whose roles may not be managerial or supervisory in nature, leading to disproportionately severe sentences. The broad interpretation of what constitutes a “managerial” role can encompass individuals who merely have a marginal level of influence or control over others involved in the crime. Furthermore, there is a significant disparity in its application across different jurisdictions.

While we welcome discussions on major structural changes to the guidelines, we propose a more incremental approach to reform. The Commission is not starting from scratch and attempts to revisit the guidelines from a “first principles” approach could potentially backfire. However, we believe there is a smart, gradual way to initiate the simplification process, starting particularly with the overemphasis on quantifiable factors, such as loss and drug weight, over factors that more accurately reflect culpability.

Respectfully Submitted,



Michael P. Heiskell
President, NACDL



Lisa M. Wayne
Executive Director, NACDL