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Before the United States Sentencing Commission

Public Hearing on Proposed Amendments to the Sentencing Guidelines

First Offenders/Alternatives to Incarceration

————— March 14, 2018 —————

INTRODUCTION

Prison Fellowship® is the nation's largest Christian nonprofit serving prisoners, former prisoners, and their families, and a leading advocate for criminal justice reform. The organization was founded in 1976 by Charles Colson, a former aide to President Nixon who served a seven-month sentence for a Watergate-related crime. For over 40 years, our ministry has shared the new hope and life purpose available through Christ to men and women in prison. Those who once broke the law are transformed and mobilized to serve their community, replacing the cycle of crime with a cycle of renewal.

Our prison events, classes, and programs reach more than 365,000 prisoners each year. Our Angel Tree program provides Christmas gifts to over 300,000 children on behalf of their incarcerated moms and dads. All of this work is made possible by over 11,200 Prison Fellowship volunteers across the United States. Located in 78 prisons in 26 states, Prison Fellowship Academies are our most intensive programs, designed to address criminogenic needs including anti-social cognition, anti-social companions, anti-social personality and temperament, family and marital relationships, substance abuse, employment, education, and recreation activities. One hundred and thirty-one federal prisons participate in our Angel Tree program and 36 federal prisons have non-intensive Prison Fellowship rehabilitative programs.

ADDRESSING HOW ALTERNATIVES TO INCARCERATION ALIGN WITH THE PURPOSES OF PUNISHMENT

Prison Fellowship is encouraged by the Sentencing Commission's focus on the use of alternatives to incarceration. Our federal prison system is currently exceeding its capacity by 114 percent, so the need is certainly a practical consideration in terms of prison safety and taxpayer expense.¹ However, alternatives to incarceration also promote human dignity and restoration by increasing active accountability.

Prison Fellowship acknowledges the value of a retributivist approach to punishment. Crime demands a response that will validate victims, protect the public, and provide accountability that is commensurate with the offense. While retribution is contemplated as a component of the purposes of punishment, we believe the greatest goal of the criminal justice system should be restoration for all involved: the affected community,

¹ E. Ann Carson, Prisoners in 2016, Bureau of Justice Statistics (January 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

the victim, and the person responsible for the crime. In a recent Barna Group poll commissioned by Prison Fellowship, we that found 87 percent of Americans agree.²

Too often in the United States, our default punishment is incarceration and too seldom do we sufficiently appreciate the benefits of thinking outside the bars. We would urge the Sentencing Commission not to associate alternatives to incarceration with “lenient” punishment. Alternative-to-incarceration court programs in particular can provide just punishment for people with first-time and low-level offenses, and in some cases, more serious offenses. These alternative programs, when implemented correctly, can be even more effective than the traditional justice process and incarceration.

The Sentencing Commission has pointed out the “collegial” nature of alternative-to-incarceration court programs as one of their key differences from the traditional “adversarial” system. Defendants can reframe their view of the justice system as working with them rather than against them. However, another key difference should be noted: the acceptance of responsibility. Defendants are required to admit their guilt prior to participating. This process solicits the defendant’s reflection on their personal actions and choices, and the harm they have caused to their victims and community. The traditional adversarial process does not require such acceptance or reflection. Incarceration, while the ultimate loss of liberty, is arguably a passive form of accountability. Compelling someone to make amends for the harm they have caused by living differently day-by-day in the context of a specialty court or through intensive community supervision is active and arguably, more difficult. Finally, community supervision and other alternatives to incarceration avoid the greater fiscal and human costs of incarceration.

PROVIDING ALTERNATIVES TO INCARCERATION FOR PEOPLE WITH FIRST-TIME OFFENSES

While there may be concerns about the application of alternatives to incarceration within the legal framework of current federal sentencing, the United States Sentencing Commission rightly acknowledges in its report that Congress intended alternatives to incarceration to apply to people with lower-level and first-time offenses.³ Though Prison Fellowship would support a broader application, this population is sensible for the United States Sentencing Commission to target for specialty court programs, community supervision, and other alternatives to incarceration under both the legal framework and the recidivism data.

In 2016, the Sentencing Commission found that almost one-half of those convicted of crimes in the federal system will be rearrested for a new crime or violation of their supervision conditions within eight years.⁴ This figure is slightly below the more than three-quarters of state prisoners that will be rearrested within five years, according to the Bureau of Justice Statistics.⁵ As the Sentencing Commission’s reports demonstrate, prior criminal conduct is a strong predictor of recidivism and future criminal conduct and individuals with lower total criminal history scores have lower recidivism rates.⁶

² Barna & Prison Fellowship, *Executive Summary: Justice Reform Survey*, Prison Fellowship (June 14, 2017), https://www.prisonfellowship.org/site/wp-content/uploads/2018/02/BarnaResults_FINAL.pdf.

³ Brent E. Newton, *Federal Alternative-to-Incarceration Court Programs*, United States Sentencing Commission (September 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf.

⁴ Kim Steven Hunt & Robert Dumville, *Recidivism Among Federal Offender: A Comprehensive Overview*, United States Sentencing Commission (March 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

⁵ Matthew R. Durose, et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, Bureau of Justice Statistics (April 2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

⁶ Tracey Kyckelhahn & Trishia Cooper, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders*, United States Sentencing Commission (March 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-CH.pdf.

Individuals who have no prior criminal convictions, resulting in zero criminal history points, have a recidivism rate of only 25.7 percent, compared to the overall recidivism rate of 49.3 percent and a rate of 85.7 percent for those with fifteen or more criminal history points.⁷ In fact, the divergence in recidivism rates for those with no history within the criminal justice system and those with only one criminal history point is 21.1 percent, showing that people convicted of a first time offense are significantly less likely to be arrested for future criminal behavior than those with even just one criminal history point.⁸ This same result has been found in a number of other studies confirming that criminal history is a significant predictor of future criminal behavior or justice system involvement.⁹ This population presents the least risk to public safety and stands to greatly benefit from the ability to maintain work and family ties that will be available to them as they are held accountable in the community.

PROMISING ALTERNATIVES TO INCARCERATION

While the proposed amendment specifically mentions alternatives to incarceration in the form of fines and community supervision, the United States Sentencing Commission should also encourage other alternatives such as specialty courts. These types of court programs allow judges to identify individuals with behavioral, mental, or substance abuse issues and offer them a method of accountability designed to address the underlying cause of the criminal behavior in question. When implemented properly, these diversion court programs result in lower recidivism rates than incarceration alone.¹⁰ Drug courts are an excellent example, with over 3,100 court programs having been implemented across the country.¹¹ This type of diversionary program has been found to reduce recidivism among participants by 13 percent, and the average taxpayer savings are between \$5,680 and \$6,208 per drug court participant.¹²

As noted in the Sentencing Commission report, the federal system has a very limited number of specialty courts compared to the states and limited data about the outcomes of people who have matriculated through these programs.¹³ We agree with the United State Sentencing Commission that greater resources are needed to invest in research and evaluate the outcomes of these programs.

RESTORATIVE JUSTICE PROGRAMS

Additionally, although we acknowledge that the federal system has a unique population compared to state systems and often the relevant offenses do not have clearly defined victims (such as in the case of white collar

⁷ Kyckelhahn, *supra* note 4 at 7; Hunt, *supra* note 2 at 15.

⁸ Kyckelhahn, *supra* note 4 at 5.

⁹ See Jay P. Singh & Seena Fazel, *Forensic Risk Assessment: A Metareview*, 37 *Crim. Just. Behav.* 965 (2010); Paul Gendreau, et al., *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 *Criminology* 575 (1996); David F. Greeberg, *Modeling Criminal Careers*, 29 *Criminology* 17 (1991); Alfred Blumstein, David P. Farrington, & Soumyo Moitra, *Delinquency Careers: Innocents, Desisters, and Persisters*, 6 *Crime Delinq.* 187 (1985); Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, Bureau of Justice Statistics (June 2002), <https://www.bjs.gov/content/pub/pdf/rpr94.pdf>.

¹⁰ Ojmarrh Mitchell, et al., *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-Traditional Drug Courts*, 40 *J. Crim. Just.* 60 (February 2012); Christine M. Sarteschi, et al., *Assessing the Effectiveness of Mental Health Courts: A Quantitative Review*, 39 *J. Crim. Just.* 12 (February 2011); Elizabeth K. Drake, et al., *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State*, 4 *Victims and Offenders* 170 (2009), http://www.wsipp.wa.gov/ReportFile/1033/Wsipp_Evidence-Based-Public-Policy-Options-to-Reduce-Crime-and-Criminal-Justice-Costs-Implications-in-Washington-State_Full-Report.pdf; Nancy Wolff & Wendy Pogorzelski, *Measuring the Effectiveness of Mental Health Courts: Challenges and Recommendations*, 11 *Psychol. Pub. Pol'y L.* 539 (December 2005); Steven Belenko, *Research on Drug Courts: A Critical Review 2001 Update*, Columbia University (June 2001), <https://pdfs.semanticscholar.org/1450/f4776d89877366bd93b1a696c1040c30adae.pdf>.

¹¹ Office of Justice Programs, *Drug Courts*, U.S. Department of Justice (May 2017), <https://www.ncjrs.gov/pdffiles1/nij/238527.pdf>.

¹² Office of Justice Programs, *supra* note 9 at 1.

¹³ Newton, *supra* note 3 at 4.

crimes or drug trafficking), we request that the United States Sentencing Commission explore the use of restorative justice as an additional model where appropriate and feasible.

The modern restorative justice movement began around 30 years ago, but it draws from much older forms of justice in early Middle Eastern and Mediterranean civilizations that shaped Western culture. Restorative justice approaches crime differently than traditional criminal justice systems, recognizing that the significance of crime goes beyond the law that has been broken and placing emphasis on the harm that has been caused.

Restorative justice programs can be applied at a variety of stages, including as a preventative program before the crime occurs, as an alternative to the traditional criminal justice sentencing, as a mediation process post-sentencing where desired by the victim, and even as a dispute resolution method between prisoners in correctional facilities. Prison Fellowship International's Special Advisor on Restorative Justice Dan Van Ness estimates that restorative processes are being used in at least 80 and likely over 100 countries, sometimes within the criminal or juvenile justice system, but also applied in other contexts such as school discipline.

When used as an alternative to the traditional criminal justice sentencing, the case is referred by the police officer, prosecutor, or judge at some point in the process to a trained, impartial restorative justice facilitator. The facilitator explains the restorative process to the victims and person responsible for the crime and invites them to participate. If they agree to do so, they meet together with the facilitator to discuss what happened and how to respond. Participation in restorative justice is always voluntary. The purpose of the meeting is to provide a safe environment in which those directly impacted by the crime can talk about what happened, what the injustice was, and how the responsible party can make things right.

The agreements reached by victims, the person responsible for the crime, and the other participants demonstrate a recognition that the person who committed the crime has harmed the victim and community and that he or she must accept responsibility. There are a variety of ways for the responsible person to make amends:

- Apologies, when voluntary and genuine, can be very powerful and meaningful to victims. Restorative justice meetings often begin with a formal apology by the responsible party, but after listening to the victim about the impact of their actions, the responsible person often extends a second, more significant and personal apology.
- An agreement to change future behavior. For example, returning to school, participating in drug treatment, etc. Victims participating in restorative justice meetings often want both an apology and changed behavior.
- Compensation or restitution, which involves the responsible person agreeing to pay for providing services, returning or replacing property, or in any other lawful way the parties agree.

Parties to restorative justice may also develop additional ways of making amends that are unique to their circumstances and needs. Some of the above-listed forms of amends can be ordered by a judge. The judge may send the case to the restorative justice process and request the parties provide suggestions of what the restorative outcomes should be. As long as the parties' proposal advances the public interest, it may be incorporated into the judge's sentence.

Restorative justice is often more effective than the results of the traditional criminal justice processes. Researchers reviewing hundreds of studies that compared restorative justice with traditional criminal justice found the following:

- Restorative justice lowers repeat offending for many people, particularly individuals involved in violent crime and adults;
- Restorative justice reduces post-traumatic stress in victims,
- Restorative justice costs the government less when used as a diversion from prison;
- Restorative justice leaves victims and individuals responsible for crime more satisfied that justice was done; and
- Restorative justice doubles the number of cases brought to justice because it is much faster than the traditional justice system.¹⁴

Because of these outcomes, more and more countries are relying on restorative justice as a key part of their response to crime. For example, the first country to have used restorative justice as a major part of its justice system was New Zealand. For 25 years, New Zealand has handled all of its youth cases through restorative justice except for those involving serious violence. As a result, the country has been able to close courts and detention centers and youth crime rates have not risen during that time. New Zealand has now extended restorative justice as an integral option for judges to choose when appropriate in the adult criminal justice system.

In the United States, Colorado is a jurisdiction that has comprehensively embraced the restorative justice approach. The state's adoption of restorative justice principles began in 2007, with the adoption of legislation which created The Colorado Coordinating Council of Restorative Justice.¹⁵ Since this time, the Council has supported the development of restorative justice programs across the state financially and by acting as a repository of best practices.¹⁶ One such program at Colorado State University has achieved a 99 percent satisfaction rate in addressing the harm caused by the responsible party's actions.¹⁷ In 2013, the state adopted legislation which created pilot restorative justice programs in four judicial districts. A limited sample of young people completed the program, which resulted in an eight percent recidivism rate one year later.¹⁸ This is significantly lower than the 57.6 percent of young people who receive a new criminal filing within two years after release from the state's traditional juvenile justice system.¹⁹

¹⁴ Lawrence W. Sherman & Heather Strang, *Restorative Justice: The Evidence*, The Smith Institute (2007), available at http://www.iirp.edu/pdf/RJ_full_report.pdf.

¹⁵ H.R. 1129, 63rd Gen. Assemb., Reg. Sess. (Colo. 2007).

¹⁶ Colorado Judicial Branch, *Restorative Justice Overview*, Colorado Judicial Branch (2017), <https://www.courts.state.co.us/Administration/Unit.cfm?Unit=rj>.

¹⁷ Student Resolution Center, *Restorative Justice Program*, Colorado State University (2017), <https://resolutioncenter.colostate.edu/conflict-resolution/restorative-justice/#1455044416678-8d87f49f-b7ab>.

¹⁸ Colorado Department of Public Safety & Restorative Justice Coordinating Council, *Annual Report on Implementation of HB 2013-1254*, Colorado Department of Public Safety & Restorative Justice Coordinating Council (September 15, 2016), https://cdpsdocs.state.co.us/oajja/Restorative_Justice/2016_Annual_Report_HB13-1254.pdf.

¹⁹ Linda Harrison, et al., *Evaluation of the Youthful Offender System (YOS) in Colorado: A report of findings per C.R.S. 18-1.3-407(10)(b)*, Colorado Department of Public Safety (December 2016), http://cdpsdocs.state.co.us/ors/docs/reports/2016-12_YOSRpt.pdf.

RECOMMENDATIONS

Prison Fellowship recommends the following:

- In reference to Part A of the Proposed Amendment, adopt Option 1 with respect to the definition of “first offender” so that more effective alternatives are available to the sentencing judge for defendants with no criminal history points, who should not burden the already overcrowded federal prison system; adopt Option 2 with respect to the decrease of offense level for people with first-time offenses.
- In reference to Part B of the Proposed Amendment, maintain application to all offenses and advance the consolidation of Zones B and C.
- Within the context of your mission to advise the Administration and Congress, urge greater resources to expand, measure, and create a scalable model for alternative-to-incarceration court programs in the federal system. In order to avoid unwarranted disparities across jurisdictions, provide objective guidelines addressing participant eligibility.
- Highlight promising alternative-to-incarceration programs and practices across the country, offering delegations with relevant federal government officials to tour state alternative-to-incarceration sites, programs, and specialty courts for the purpose of sharing ideas, challenges, and best practices across jurisdictions.
- Expand the Sentencing Commission’s research of alternative-to-incarceration programs to include the use of restorative justice programs and the feasibility of piloting such programs for appropriate cases in the federal system.