



# **MEMORANDUM OF PUBLIC INTEREST**

**BY THE PENNSYLVANIA ASSOCIATION FOR  
RATIONAL SEXUAL OFFENSE LAWS (PARSOL)<sup>1</sup>**

**TO**

**THE UNITED STATES SENTENCING COMMISSION**

**RE: PROPOSED 2023-2024 PRIORITIES**

**OPEN COMMENT SUBMISSION**

**JULY 30, 2023**

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<sup>1</sup> The Pennsylvania Association for Rational Sexual Offense Laws (PARSOL) believes all sexual abuse is unacceptable and that prevention, treatment, and healing are possible. We take a person-first approach to criminal justice reform that cultivates a fair and just society, honors inherent dignity, and promotes respect and fairness. People can and do change. As such, PARSOL advocates for sexual offense public safety measures and resources that work for all through prevention-based, treatment-informed, and healing-focused legislative and public policy initiatives that respect our Constitution and all people's dignity. [PARSOL.org]

## INTRODUCTION

During her confirmation hearings, now Supreme Court Justice Ketanji Brown Jackson and former vice-chair of the USSC commission said, reflecting the Commission's stance on sexual offenses and sentencing:

*“The statute doesn't say, “Look only at the guidelines and stop.”  
The statute doesn't say, “Impose the highest possible penalty for this sickening and egregious crime.”  
The statute says, “Calculate the guidelines, but also look at various aspects of this offense and impose a sentence that is sufficient but not greater than necessary to promote the purposes of punishment.”  
[The Statute] is not doing the work of differentiating who is a more serious offender in the way that it used to. The commission has taken that into account, and more importantly, courts are adjusting their sentences to the changed circumstances but say[s] nothing about the judge's view of the seriousness of these offenses.”*

Justice Brown Jackson referenced that current sentencing guidelines, specifically around possession and distribution of child sexual abuse materials, were developed when receiving 1,000 images of child pornography was done via postal mail for extreme fees. The manufacture involved significant physical media, not the click and download of one zip file within seconds.

Like Justice Brown Jackson, the **Pennsylvania Association for Rational Sexual Offense Laws** (PARSOL) believes all sexual abuse is unacceptable and that physical, mental, and emotional healing is possible by focusing on prevention-based, rehabilitative, and trauma-informed programs rooted in healing rather than lifetime, shame-centered punishment.

In addition, we know many federal laws and sentencing recommendations unfairly discriminate against people with sexual offenses.

To that end, we present the following background information and recommendations for the United States Sentencing Commission to consider during its 2023-2024 session.

## BACKGROUND INFORMATION

### **SORNA REGISTRATION PUNISHES HOMELESS/TRANSIENT INDIVIDUALS BECAUSE OF THEIR ECONOMIC STATUS**

Many jurisdictions require that homeless and transient individuals required to register under SORNA (“Megan’s Law”) do so monthly and in person at a designated location. If they fail to register due to indigency, incarceration results. 10.5% of adults in America walk in poverty, and registration facilities, especially in rural areas, are difficult or impossible to reach solely by public transit. These individuals are further punished because of their economic status.<sup>2</sup>

### **PA SUPREME COURT CHIEF JUSTICE: MAKE [SORNA] FAILURE TO REGISTER A CONTEMPT OF COURT CHARGE**

In the *Commonwealth of Pennsylvania v. Williams*, 574 Pa. 487, 527 (Pa. 2003), then-Chief Justice of the Supreme Court of Pennsylvania, Thomas G. Saylor, stated that “As noted, the [Megan’s Law II] penalty provisions provide an enforcement mechanism for the registration and verification mandates. They do so by erecting an enormous disincentive for failing to comply. ... Moreover, even absent the penalty provisions, enforcement is possible. Because registration and verification are statutorily required, the district attorney could implicate the judicial process through an enforcement proceeding in which failure to comply with the resulting order would be punishable by the court's contempt powers.”<sup>3</sup>

### **LEGISLATION AIMED AT REDUCING INCARCERATION AND HARM REDUCTION EXCLUDES INDIVIDUALS WITH SEXUAL OFFENSES**

The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003<sup>4</sup> excluded persons with sexual offenses from obtaining downward variances, declaring their crimes “aberrant behavior and diminished capacity.”<sup>5</sup>

The First Step Act (FSA) of 2018, formerly known as the “Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person [FIRST STEP] Act,” discriminates against persons with sexual offenses. Under FSA, an inmate is “ineligible to receive time credits if they are serving a sentence for a conviction under certain provisions of law,” including sexual offenses. This prohibits them

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<sup>2</sup> <https://federalsafetynet.com/poverty-statistics/>

<sup>3</sup> *Com. v. Williams*, 574Pa.487,527 (Pa03), <https://casetext.com/case/com-v-williams-224>

<sup>4</sup> <https://www.congress.gov/bill/108th-congress/senate-bill/151/text>

<sup>5</sup> [https://www.justice.gov/archive/opa/pr/2003/April/03\\_ag\\_266.htm](https://www.justice.gov/archive/opa/pr/2003/April/03_ag_266.htm)

from receiving good time credits for completing rehabilitative programming, even though they have the lowest rate of recidivism and the lowest incidence of disciplinary infractions in prison<sup>6</sup>. This statutory discrimination discourages sex offenders from engaging in treatment programs, which have shown to be highly effective in preventing re-offense and recidivism. In contrast, drug offenders with much higher recidivism rates are provided with this benefit. They are more likely to have discipline problems in prison (i.e., contraband, cell phones, substance abuse, fighting, etc.)<sup>7</sup>

**UMASS LAW REVIEW: PRE-TRIAL DIVERSION FOR NON-PRODUCTION CHILD PORNOGRAPHY OFFENSES INCREASES TREATMENT SUCCESS AND HARM-REDUCTION**

*The Case for Extending Pretrial Diversion to Include Possession of Child Pornography*, an article published in the January 2014 University of Massachusetts Law Review, proposed including child pornography offenders in pretrial diversion programs. Given the statistics on these specific offenders, doing so would decrease the prison population/incarceration cost burdens. The article proposes that implementing such a program and offering early release to qualifying offenders would achieve such goals and increase the likelihood of treatment program success.<sup>8</sup>

**PENNSYLVANIA DEPT. OF CORRECTIONS: RECIDIVISM RATES FOR SEXUAL OFFENSES ARE THE LOWEST OF ANY CRIME CLASSIFICATION, WITH TWO-THIRDS RECIDIVATING DUE TO TECHNICAL VIOLATIONS**

A 2022 report from the Pennsylvania Department of Corrections, PA DOC: Recidivism, found that recidivism rates for property crime (59.9%), Public Order (52.1%), and Drug Offenses (50.1%) were significantly higher than those with sexual offenses (28.9%). Note: All rates reflected a combination of reoffense and technical violations, with two-thirds of individuals reincarcerated within three years of release being returned for technical violations.<sup>9</sup>

**INDIVIDUALS WITH AUTISM SPECTRUM DISORDER REQUIRE SPECIAL TREATMENT PROGRAMS AND CONSIDERATIONS**

Both a 2017 study, *A Psycho-Legal Perspective on Sexual Offending in Individuals with Autism Spectrum Disorder*, published in the International Journal

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<sup>6</sup> <https://parsol.org/wp-content/uploads/2020/05/Fact-Sheet-Ineffectiveness-Recidivism-v2.pdf>

<sup>7</sup> <https://www.bop.gov/inmates/fsa/overview.jsp>

<sup>8</sup> <https://scholarship.law.umassd.edu/cgi/viewcontent.cgi?article=1041&context=umlr>

<sup>9</sup> <https://www.cor.pa.gov/About%20Us/Statistics/Pages/Reports.aspx>

of Law and Psychiatry, and *Autism, Sexual Offending, and the Criminal Justice System*, published by The Journal of Intellectual Disabilities and Offending Behavior (2016), state that there are innate vulnerabilities that increases the risk of an individual with an autistic spectrum disorder (ASD), predominantly those defendants diagnosed with Asperger's Syndrome, being charged and convicted of a sexual offense. Judicial officers must consider the fact that Autism-related social impairments, including an individual's difficulty with the capacity to develop appropriate and consenting sexual relationships because of impaired social cognition, is a factor in ASD sexual offending.<sup>10</sup>

**ARIZONA LAW REVIEW: FEDERAL SENTENCING GUIDELINES AROUND NON-PRODUCTION CHILD PORNOGRAPHY OFFENSES ARE LESS EFFECTIVE IN FUTURE HARM-REDUCTION, MAY DO MORE DAMAGE**

The Arizona Law Review provides a deep-dive into the USSC's work around sentencing guidelines for child pornography offenses in its 2021 article, *The Condemnation of Scopophilia: How the Federal Sentencing Guidelines Perpetuate Rather Than Discourage Child Pornography Offenses*, stating that in 1987, the U.S. Sentencing Commission created its first federal sentencing guideline for child pornography offenses. As Congress grappled with dynamic technological advances that changed the child pornography landscape, the Commission continually revised and amended these guidelines, creating the last significant amendment in 2009. Since then, federal judges have utilized these guidelines when tasked with sentencing child pornography offenders, yet little has been done to determine whether these guidelines diminish the number of children victimized by child pornography. While acknowledging that child pornography victimizes and harms children in countless ways and must be criminalized to account for these egregious harms, this article argues that the sentencing guidelines fail to deter the production, distribution, and consumption of child pornography and do not fulfill congressional goals of protecting children from victimization. Rather, the guidelines have resulted in the mass incarceration of child pornography offenders and a system that punishes viewers of child pornography more severely than it does child rapists. If the government truly wants to protect children from being victimized through child pornography, then the sentencing guidelines, as written, cannot stand. They must be replaced by a system that allows child pornography offenders to access rehabilitative resources

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<https://www.sciencedirect.com/science/article/abs/pii/S0160252716302461?via%3Dihub>

both inside and outside of the federal prison system.<sup>11</sup>

**USSC: NON-PRODUCTION CHILD PORNOGRAPHY REPORT  
SUPPORTS AN OVERHAUL OF RELATED SENTENCING**

The 2021 report Federal Sentencing of Child Pornography Non-Production Offenses<sup>12</sup>, by the USSC under the chairmanship of Charles R. Breyer, reported:

- Facilitated by advancements in digital and mobile technology, non-production child pornography offenses increasingly involve voluminous quantities of videos and images that are graphic, often involving the youngest victims.
- Constrained by statutory mandatory minimum penalties, congressional directives, and direct guideline amendments by the PROTECT Act of 2003, Section G2.2 contains a series of enhancements that have not kept pace with technological advancements. Four of the six enhancements – accounting for a combined 13 offense levels - cover conduct that has become so ubiquitous that they now apply in most cases sentenced.
- Because enhancements initially intended to target more severe and more culpable offenders apply in most cases, the average guideline minimum and average sentence imposed for non-production offenses have increased by more than 38%. (Average sentences increased by 13%)
- When tracking 1,093 non-production child pornography offenders released from incarceration or placed on probation in 2015, 27.6% were rearrested within three years, but only 4.3% were arrested for a sex offense. 8.1% were rearrested for failure to register under SORNA.

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<sup>11</sup> <https://arizonalawreview.org/the-condemnation-of-scopophilia>

<sup>12</sup> <https://www.ussc.gov/research/research-reports/federal-sentencing-child-pornography-non-production-offenses>

## OUR RECOMMENDATIONS

We, therefore, urge The Commission to seek the following modifications to the Federal Sentencing Guidelines in response to the requested topic areas from the call for public comment priorities<sup>13</sup> as follows:

- 1. Re: (2) Alternatives to Incarceration and Court Diversion Programs, (3) Simplification/Structural Reform, and (7) Crime Legislation**  
Barring congressional action to change the mandatory minimum assigned, we recommend that the Court’s sentencing of individuals under 34 U.S.C. §20913(e) of “Registry Requirements for Sex Offenders” under subchapter I, par. (a) ‘Failure to Register,’ a Felony offense with a penalty including a penalty of imprisonment of one year, considers the individual’s circumstances. We recommend allowing for a downward discharge toward a Summary offense with a sentence commensurate with 18 U.S.C. § 402.9, Contempt of Court constituting a criminal offense, wherefore “the term of imprisonment shall not exceed six months, and the amount of any fine paid to the United States shall not exceed \$1,000.”
- 2. Re: (3) Simplification/Structural Reform, (7) Crime Legislation, and (9) Miscellaneous Guideline Application Issues**  
Eliminate the Mandatory Minimums around Child Sexual Abuse Material (Child Pornography) cases, as suggested in the Congressional Research Service Report R42386 as follows:

Two-thirds of the federal trial judges responding to a U.S. Sentencing Commission survey questioned the severity of the mandatory minimum penalties required for receipt of child pornography (5 years; 15 years for repeat offenders). The Commission’s report suggested that the perception may lead to inconsistent sentencing in child pornography cases.<sup>14</sup>

We suggest that in the USSC's review of the guidelines, examine ways to reduce all sentences in line with Executive Order 14074, which states "no individual should serve an excessive prison sentence." The President's order intends to relieve individuals from unfair and unduly harsh

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<sup>13</sup> <https://www.ussc.gov/policymaking/federal-register-notice/federal-register-notice-proposed-2023-2024-priorities>

<sup>14</sup> <https://crsreports.congress.gov/product/pdf/R/R42386/4>

sentences, including those driven by mandatory minimums and those excluded from downward variances under the PROTECT Act. Implementing E.O. 14074 falls squarely on the shoulders of the USSC in re-examining the guidelines, particularly with non-production CSAM (Child Sexual Abuse Material) offenses.

**3. Re: (3) Simplification/Structural Reform, (9) Miscellaneous Guideline Application Issues, and (10) Research Topics**

Amend the Commission’s guidelines for *Departures and Variances* for sexual offenses committed by people with decreased mental capacity or underdeveloped cognition, including those with Autism Spectrum Disorder, Impulse Control Disorder, and other relevant paraphilic mental health disorders and diagnoses. This should also apply to youth offenders.<sup>15</sup>

**4. Re: (7) Crime Legislation and (9) Miscellaneous Guideline Application Issues**

We suggest the USSC recommend to Congress to pass legislation that amends the law awarding time credits towards time served under pretrial home confinement where conditions are equal to or more severe than home confinement conditions at the end of a defendant's sentence. This will provide immediate and substantial relief to the BOP and thousands of individuals whose liberties were suspended during their period of pretrial supervision. In many cases, these individuals completed rehabilitative programming to reduce their recidivism and made substantial efforts to rehabilitate themselves. These efforts should be encouraged and rewarded with credit towards a sentence under 18 U.S.C. 3553(b)(2).<sup>16</sup> The cost to keep an individual in federal prison is roughly \$130/day compared to roughly \$10/day for that same individual to be under the care of the court and the U.S. Probation Office.

**5. Re: (1) Bureau of Prisons Practices**

Ensure that the programs and services offered by the Federal Bureau of Prisons and related administrative entities align with the desired sentencing and program goals and deliverables intended by the sentencing Court. Testimony from PARSOL members references that this is frequently not the case and, in one instance, “None of us are getting programs we need here. The programs are superficial, focusing on shame-based, demoralizing punishment instead of trauma-informed shame

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<sup>15</sup> <https://caselaw.findlaw.com/court/us-8th-circuit/2077237.html>

<sup>16</sup> <https://guidelines.ussc.gov/ab/18U.S.C.%C2%A73553>



reduction and [dialectical and cognitive behavioral] therapeutic healing. Society loses because prisons release un-reformed people back into the population.”<sup>17</sup>

Members also report that inmates with sexual offenses, especially contact offenses, are frequently denied access to, or restricted from participating in educational, recreational, and harm reduction/treatment programs available to individuals with non-sexual offenses. The USSC’s and Bureau of Prison’s existing Sex Offender Treatment Programs (SOTP-R) policies confirm these reports.<sup>18</sup>

Were the United States Sentencing Commission (USSC) to enact these recommendations during their 2023-2024 strategic work, they would advance the fair, non-discriminatory treatment of justice-involved individuals while also helping to foster safe communities across the United States.

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<sup>17</sup> Personal interview with inmate Jon Frey [BOP #13317-509], conducted 7/12/2023.

<sup>18</sup> [https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2015/BOP\\_slides.pdf](https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2015/BOP_slides.pdf)

## **About PARSOL**

The Pennsylvania Association for Rational Sexual Offense Laws (PARSOL) believes all sexual abuse is unacceptable and that prevention, treatment, and healing are possible. We take a person-first approach to criminal justice reform that cultivates a fair and just society, honors inherent dignity, and promotes respect and fairness. People can and do change. As such, PARSOL advocates for sexual offense public safety measures and resources that work for all through prevention-based, treatment-informed, and healing-focused legislative and public policy initiatives that respect our Constitution and all people's dignity.

PARSOL is also the Pennsylvania affiliate of the National Association for Rational Sexual Offense Laws (NARSOL).



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