

**Length of Incarceration and Recidivism: What You Need to Know About the USSC's Flawed Report<sup>1</sup>**

**What the Report Considers “Recidivism”:** this Report defines recidivism *broadly*—

Recidivism = *any rearrest* after being released into the community on probation or after serving a term of imprisonment. Rearrest *includes arrests for alleged violations of supervised release*—including technical violations.

**No determination of guilt is required** for the Commission to consider a rearrest recidivism.

**What the Report Claimed to Look at:** 3 potential causal relationships between the length of incarceration and recidivism:

1. Deterrent effect: as length of incarceration ↑, likelihood of recidivism ↓
2. Criminogenic effect: as length of incarceration ↑, likelihood of recidivism ↑
3. Neutral effect: no statistically significant relationship between incarceration length and likelihood of recidivism.

**What the Report Claimed to Find:**

1. Incarceration lengths of more than 120 months had a deterrent effect.
2. Incarceration lengths between 60 and 120 months yielded *inconsistent results*.
3. *No effect* was found for incarceration lengths of 60 months or less.

**The Five Points to Know About This Report**

**Point 1:** The Report cherry-picks and misrepresents prior research on sentence lengths and recidivism.

- The Commission claims that prior research on sentence lengths and recidivism is “limited and insufficient,” but it cites only 4 studies and ignores much of the relevant literature.<sup>2</sup> Two studies cited are decades old and none study federal sentences. One study was unable to control properly for age.<sup>3</sup>
- The Commission ignores two studies that issued findings inconsistent with the Commission’s: (1) a 2014 review by the National Research Council finding that “insufficient evidence exists to justify predicating policy choices on the general assumption that harsher punishments yield measurable deterrent effects,”<sup>4</sup> and (2) a highly-sophisticated 2018 study of 300,000 federally sentenced individuals, which found that a 28% increase in prison time would reduce recidivism by only 1%.<sup>5</sup>

**Point 2:** The Commission’s methodology is relatively weak for inferring causation.

- It’s difficult to prove that sentence differences *cause* differences in recidivism. Defendants who receive different sentences differ in many ways other than sentence length.
- To attempt to isolate the effect of incarceration length, the Commission created three different models. Each model compared groups that differed in lengths of incarceration but were as similar as possible on many other factors that are known to affect recidivism.<sup>6</sup> This matching method cannot control for unknown factors that may affect recidivism (e.g. role in the offense, demeanor at sentencing, attorney representation, family and community support, etc.)
- The Report used Criminal History Category (CHC) to control for criminal history but included career offenders (COs) and armed career criminals (ACCAs) within CHC VI.
  - Commission research shows that while COs and ACCAs are placed in CHC VI pursuant to §§ 4B1.1 and 4B1.4, the recidivism rate for these defendants is *lower* than rates for CHCs IV, V, or VI.<sup>7</sup>
  - Because COs and ACCAs receive long sentences, it seems likely they were over-represented in the groups receiving lengthier incarceration. If so, the lower recidivism of some of these groups might be due to this pre-existing lower risk of recidivism, *not* the lengthier incarceration. The full extent of this problem is unknown without the underlying data (Point 5).

**Point 3:** The Report and its findings are presented in a misleading and exaggerating way.

- The percentage differences in recidivism presented in the Report are *not rates of recidivism*; they are percentage differences in odds.
  - When the Report says, “individuals incarcerated for more than 120 months were approximately 45% less likely to recidivate,” this *does not mean* the recidivism *rate* for this group was 45% less. The real difference in actual recidivism rates is far less. The Commission did not provide any information on recidivism rates, and actual differences in recidivism rates cannot be determined without the underlying data (Point 5).
- The pattern of findings does not support a “dose-response relationship;” that is, that the longer the incarceration “dose” the greater the reduction in recidivism.
- The Report is slanted towards justifying longer sentences. It highlights findings that sentence lengths greater than 120 months had a deterrent effect, while downplaying evidence that longer sentences in other test groups had no effect.

**Point 4:** The Report says nothing about whether *reductions* in sentence length affect recidivism.

- This Report only evaluates the differences in recidivism among defendants who received different sentence lengths—it does not say anything about how *sentencing reductions* affect recidivism.
- Previous Commission research, not mentioned in this report, found that sentencing reductions *do not* lead to increased recidivism.<sup>8</sup>

**Point 5:** Independent evaluation of the Report is impossible because the Commission refuses to release the underlying data.

- The Commission has refused to provide information on COs and ACCAs or release the data underlying this Report. Without it, independent review and validation cannot be conducted.

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<sup>1</sup> See USSC, *Length of Incarceration and Recidivism* (2020) (“USSC Report). For a complete critique of the USSC Report, see the [Federal Defender Fact Sheet: Flawed U.S. Sentencing Commission Report Misstates Current Knowledge](#).

<sup>2</sup> USSC Report, at 3, nn. 11-16.

<sup>3</sup> See *id.* at 3 (citing Benjamin Meade et al., *Estimating a Dose-Response Relationship Between Time Served in Prison and Recidivism*, 50 J. Res. Crime & Delinq. 525, 542 (2013). The study was unable to control for defendant age at release from imprisonment, instead using defendant age at commitment. The Commission also cites a 2009 research review for the proposition that existing research is “insufficient for developing federal sentencing policy.” *Id.* at n.11 But the Commission omits that “a key finding of our review is that the great majority of studies point to a null or criminogenic effect on the prison experience on subsequent offending.” See Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 Crime & Just. 115, 178 (2009).

<sup>4</sup> Nat’l Res. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 154 (Jeremy Travis et al., eds. 2014).

<sup>5</sup> See William Rhodes, et al., *Relationship Between Prison Length of Stay and Recidivism: A Study Using Regression Discontinuity and Instrumental Variables With Multiple Break Points*, 17 Criminology & Pub Pol’y 731, 754 (2018).

<sup>6</sup> The Commission matched the groups on: age-at-release, high school completion, gender, race, criminal history category (CHC), primary sentencing guideline, whether the instant offense was violent or involved a weapon, and whether the defendant received a substantial assistance departure or safety valve adjustment. See USSC Report, at 9-10, tbl. 2. Each model varied in the number and precision of the matches. *Id.* at 10-13, 16-17, 20-22, 24-25.

<sup>7</sup> See USSC, *Recidivism Among Federal Offenders* 19, figs. 7B & 7A (2016).

<sup>8</sup> See USSC, *Recidivism Among Federal Offenders Receiving Retroactive Sentencing Reductions: The 2011 Fair Sentencing Act Guideline Amendment* 3 (2018).