

United States Senate
WASHINGTON, DC 20510

December 5, 2022

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Commissioner Reeves,

We write regarding the Bipartisan Safer Communities Act (BSCA) and its directive to the United States Sentencing Commission. As the first meaningful federal gun safety legislation in decades, we believe that it can and will save lives. But to achieve that outcome, it is essential that the implementation of the law avoids the mistakes of the past. The Commission has an important role in ensuring fair sentencing and preventing unjust outcomes in criminal sentences. The process that the Commission undertakes will impact individuals and communities for years to come. We respectfully urge the Commission to remain steadfast in its goals to establish fair sentencing policies and practices that meet the purposes of 18 U.S.C. § 3553(a)(2) through careful research, collection and analysis of data, and input from the criminal justice community. We are mindful that this approach takes a great deal of time and effort, but it is imperative that the process be thorough to avoid any unintended consequences that result in unfair or unjust sentencing policies.

In the Commission's Notice of Final 2022-2023 Priorities, the Commission included the consideration of possible amendments to § 2K2.1 to implement the BSCA and make any other changes that may be warranted to appropriately address firearms offenses.¹ We appreciate the Commission's prioritization of BSCA-related issues, in part because the BSCA contains a directive to the Commission.² That directive instructs the Commission to ensure increased penalties for straw purchasers and gun traffickers, and to review and amend the guidelines to reflect Congress' intent that individuals convicted of certain offenses and individuals associated with gangs, cartels, or organized crime rings should be subject to higher penalties than unaffiliated individuals. However, Congress balanced those instructions with a directive to the Commission to consider appropriate amendments to its guidelines for straw purchasers without significant criminal histories while also providing adequate consideration of other mitigating factors, including role, culpability, coercion, and domestic violence survivor history. Taken as a whole, this directive reflects our deep concern about the severity and danger of gun trafficking while also acknowledging that mitigating factors should inform each sentencing decision.

¹ U.S. Sentencing Comm'n, Federal Register Notice of Final 2022-2023 Priorities, <https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-final-2022-2023-priorities>.

² Pub. L. No. 117-159, § 12004, 136 Stat. 1313, 1328 (2022).

It should be made clear that the legislative intent of the BSCA is to end the flow of illegal guns into communities and reduce gun violence. The directive's attention to both sentencing enhancements and mitigating factors reflects this focus, as it seeks to punish suppliers of the large numbers of firearms diverted from lawful commerce, while avoiding unnecessarily long sentences for people with less culpability or without significant criminal histories. The directive's instruction to the Commission to consider sentences for straw purchasers "that are sufficient to deter participation in such activities and reflect the defendant's role and culpability" should not be interpreted more broadly than intended. It was our intent that the instruction that sentences be "sufficient to deter participation" reflects an intent that the recommended sentences for straw purchasing be enough to achieve this goal but not excessive or unnecessary.

We are aware that the Department of Justice has relied on the "sufficient to deter" language to recommend that the Commission adopt a four-level increased base offense level for a variety of offenses.³ We urge the Commission to reject that approach here. Such a recommendation would be contrary to the intent of the BSCA which seeks to hold accountable those most culpable in the firearm trafficking chain, and it would ignore the Commission's role and process—to review data and devise evidence-based sentencing policies that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."⁴

We are closely attuned to the BSCA's implementation not only because we seek to ensure proper interpretation of this landmark legislation but also because we are concerned that enforcement of the Stop Illegal Trafficking in Firearms Act could disproportionately impact low-income people and people of color. As the Commission itself acknowledged in its July 2022 report, federal firearms sentences continue to be associated with demographic factors—in fiscal year 2021, 54.5 percent of people sentenced for firearms offenses under § 2K2.1 were Black, whereas only 16.9 percent of people sentenced under other guidelines were Black.⁵ It is not difficult to see how longstanding cycles of arrests and convictions could result in an outsized and unjust impact on individuals and communities of color. People of color may be more likely to have "significant criminal histories" due to historically higher levels of police activity and arrest rates in their communities. As the Commission noted in its July 2022 report, 27.5 percent of firearms offenders were arrested following a routine police patrol, such as a street patrol or traffic stop—yet 73 percent of those arrested following a street patrol and 66.9 percent of those arrested following a traffic stop were Black.⁶ There is reason to fear the effects of these troubling trends may persist in revised sentencing recommendations under § 2K2.1 unless the Commission interprets the instruction to consider "other mitigating factors" broadly. We encourage the Commission to do so.

In light of the way in which racially disparate effects can compound, it is essential that the Commission approach amending § 2K2.1 with full awareness of the inequities that may result

³ U.S. Dep't of Just., Office of the Deputy Attorney General, Public Comment on Proposed Priorities (Oct. 17, 2022), Appendix A, <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/doj-dag.pdf>.

⁴ 28 U.S.C. § 991(b)(1)(C).

⁵ Matthew J. Iaconetti, et al., U.S. Sentencing Comm'n, *What Do Federal Firearms Offenses Really Look Like?* (July 2022) at 9, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf.

⁶ *Id.* at 33.

from any misguided sentencing policy. This will require developing evidence-based, data-driven sentencing guidelines that consider these inequities, as intended by the legislation. Accordingly, we ask the Commission to give special consideration to the primary purposes of the BSCA and to the consequences which the Commission's guidelines may have for communities of color. We appreciate the attention which the Commission has already given to the BSCA and its attendant issues, and we hope to see the Commission provide guidance that ensures fairness and justice for all.

Sincerely,

A handwritten signature in blue ink, appearing to read 'C. Booker', written over a horizontal line.

Cory A. Booker
United States Senator

A handwritten signature in blue ink, appearing to read 'C. Murphy', written over a horizontal line.

Christopher S. Murphy
United States Senator