

## **Prison Reform Trust response to Sentencing Council: Burglary offences guideline consultation - Aug 2021**

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families
- promoting equality and human rights in the criminal justice system.

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### **General remarks**

We welcome the fact that the Council is conducting this consultation on a revised guideline in response to its evaluation of the existing guideline which found that the guideline had contributed to an unintended increase in sentence severity. Given the potential for other guidelines to have a similar impact, we would encourage more priority and resource to be given to conducting similar assessment of existing guidelines, and other guidelines in future, in accordance with the Council's remit to assess the impact of guidelines on sentencing practice.

### **Non-domestic burglary**

#### **1. Do you have any comments on the culpability factors? Are there any that should be removed or added?**

We welcome revision of the guideline to a stepped format, with three culpability and harm levels to attempt to mitigate effects of increasing sentence severity, and to ensure only the most serious cases go into the higher culpability and harm categories. We recommend the Council regularly review the new guideline to establish any effect this new stepped format is having on sentence lengths.

#### ***Equipped for burglary (where not in high culpability)***

We are concerned about the Council's remarks that an increase in the proportion of offenders being classified in the higher culpability and greater harm categories may in part be due to 'more factors to choose from in the greater harm and higher culpability boxes'. Therefore, we would question the need for the inclusion of

'Equipped for burglary (where not in high culpability)', given that the degree of planning is already a factor indicating culpability. Being equipped for a burglary is evidence of a degree of planning, and therefore there is no need to include it as a separate culpability factor. Indeed, doing so poses a risk of double counting. We note the welcome removal of 'equipped to commit a burglary' for an aggravated burglary offence. We are unsure as to why it has been retained for other forms of burglary when this is the case. We would recommend removing this factor from this and all other burglary offences for the sake of consistency.

### ***Involved through coercion, intimidation or exploitation***

We welcome the addition of 'involved through coercion, intimidation or exploitation' as a mitigating factor in assessing lower culpability. However, it is important to recognise that apparent involvement at a high level of culpability may also be a result of coercion, intimidation, or exploitation, which may be less apparent. We would refer the Council to our previous response to the proposed Modern Slavery Guideline.<sup>1</sup>

Individuals whose offending is a result of coercion, intimidation or exploitation are afforded specific protection under provisions of the Modern Slavery Act. Furthermore, the UK has obligations under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially to women and children (United Nations 2000). Despite this, evidence from police and Crown Prosecution Service (CPS) inspectorate reports, as well as research by PRT and Hibiscus Initiatives suggest a continuing failure to ensure victims of trafficking are identified, protected and supported.

Whilst recognising the multiple and complex needs which often surround offending, we would urge the Council to make clear that the above culpability factors include those driven to commit an offence in order to pay off a drug debt. Drug debt can be a very real form of intimidation and may drive an individual to commit acquisitive crimes if they see this as their only option. There are direct relationships between acquisitive crime and drug use, a study found 69% of burglaries are attributed to heroin and crack cocaine users.<sup>2</sup>

A failure to identify if an individual has been engaged in offending through coercion, intimidation or exploitation may also result in them being assigned a higher level of culpability. If the individual has previously been a victim of a modern slavery offence, for example, they have the right to be recognised as such, and failure to identify this may also result in assigning them a higher level of culpability. At the very least, factors indicating greater or lesser role culpability should always be addressed in a pre-sentence report (PSR). Sentencers should also have a clear understanding of the complexities of these factors and have training and guidance on the subject. For instance, the guideline should include clear links to the relevant sections of the Equal Treatment Bench Book.

### ***Recommendations***

- The guideline should make clear that when coercion, intimidation or exploitation are suspected as factors indicating greater or lesser role culpability, these issues should always be addressed in a PSR.

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<sup>1</sup> See

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Consultation%20responses/Sentencing%20Council%20modern%20slavery%20guidelines%20PRT%20response.pdf>

<sup>2</sup> The Centre for Social Justice (2018) Desperate for a fix: Using shop theft and a Second Chance Programme to get tough on the causes of prolific drug-addicted offending, London: CSJ

- Alongside the guideline, better training should be provided for judges and magistrates in relation to modern slavery and how to respond appropriately in cases where this has been identified as a factor.

### ***Age and/or lack of maturity***

We appreciate that the Council has recognised the important role of age and maturity throughout the new guideline, including in mitigation at step two. However, we are unsure why the Council has not included age and/or lack of maturity as a factor indicating lower culpability at step one. As outlined in previous responses to the Council's consultations on new guidelines, it is important to recognise the impact that maturity has in assessing the level at which a person is culpable for their actions. Where maturity is linked to the commission of an offence, it should be recognised as a factor indicating lower culpability.

For burglary offences, the case for recognising age and/or lack of maturity as a factor indicating lower culpability is compelling. Neurological and psychological evidence shows that the development of the frontal lobes of the brain does not cease until around 25 years old. It is this area of the brain which helps to regulate decision-making and the control of impulses that underpin criminal behaviour.<sup>3</sup> In terms of brain physiology, the development of traits such as maturity and susceptibility to peer pressure appear to continue until at least the mid-twenties.<sup>4</sup>

At the very least, maturity should be taken into account through requiring a PSR for any offender aged 18-25 when considering a custodial or community sentence. This, in turn, should contain a mandatory maturity assessment so the sentence can be tailored to the individual.

We note this approach to include maturity as a relevant factor in both step one and step two has already been accepted by the Council in its child cruelty offences sentencing guidelines and recommend that this is adopted within burglary guidelines as well. We also recommend the Council include a breakdown by age when evaluating the new guideline.

### ***Severe financial hardship***

We would recommend the addition of 'severe financial hardship when linked to the commission of the offence' as a factor indicating lower culpability. People from lower socio-economic groups are over-represented in the criminal justice system<sup>5</sup>, and individuals released from prison are often released with debts which have built up during their sentence, adding to the problems they face on release.<sup>6</sup> This is especially relevant given how many individuals committing burglary offences are repeat offenders. Often acquisitive crime is seen as necessary for survival.

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<sup>3</sup> Blakemore S-J., Choudhury, S. (2006) Development of the adolescent brain: implications for executive function and social cognition. *Journal of Child Psychology and Psychiatry*, 47:3, 296–312; and Prior, D. et al (2011) Maturity, young adults and criminal justice: A literature review, University of Birmingham: Birmingham

<sup>4</sup> Royal College of Psychiatrists (2015) Written evidence submitted by the Royal College of Psychiatrists to the House of Commons Justice Committee inquiry into young adult offenders, HC 937, 13 October 2015. Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justicecommittee/the-treatment-of-young-adults-in-the-criminal-justice-system/written/22190.html>

<sup>5</sup> ICP (2021) Is it a crime to be poor? Briefing Paper <https://crimetobepoor.files.wordpress.com/2021/01/is-it-a-crime-to-be-poor-briefing-paper2-2.pdf>

<sup>6</sup> Prison Reform Trust (2021) Bromley Briefings Prison Factfile: Winter 2021, London: PRT

## **2. Do you agree with the approach to assessing harm? Are there any factors you think should be removed or included?**

In category one, we would recommend amending 'context of public disorder' to 'context of public disorder (when linked to the commission of the offence)'. Without this addition, it is unclear what 'context' may be relevant. The defendant could be penalised for public disorder which they had no involvement in or may not be aware of. For example, violence after a football match which had taken place nearby.

We are concerned that the current draft guideline does not distinguish between when violence is used or threatened against the victim. There is clearly a difference in terms of level of harm caused between violence used or violence threatened. We would recommend the Council revise this factor to 'violence used against the victim' which would remain in category one. We would then suggest the addition of 'violence threatened but not used against the victim' as a factor in category 2, in order to better reflect the difference in harm levels.

## **3. Do you agree with the additional wording relating to consideration of a community order with an alcohol treatment requirement order?**

We are concerned that the resource assessment shows a 'substantial decline in the proportion of offenders receiving community orders'. Community orders offer a viable alternative to custody, and the Ministry of Justice's own evidence shows lower reoffending rates following community orders than for short prison sentences.<sup>7</sup>

We welcome addition of 'community order with an alcohol treatment requirement' to be considered instead of a short/moderate custodial sentence. However, we question why a mental health treatment requirement has not also been included. This is contrary to the Community Sentence Treatment Requirement (CSTR) protocol, which includes drug, alcohol and mental health treatment requirements, and the Council's guidelines should be consistent with this protocol to ensure clarity in options for sentencers.

It might be helpful to include specific mention of the CSTR protocol, as well as the addition of mental health treatment requirement options here, to highlight where sentencers can look for appropriate sentencing disposals, and to highlight the aim of flexible and appropriate use of orders.

Although outside the remit of the Sentencing Council, the aim of producing this draft guideline is to improve consistency in sentencing practice. However, unless reliable availability of CSTRs is assured in each area, sentencers will not have appropriate option to sentence to. The Target Operating Model for the new probation arrangements calls for greater use of mental health, alcohol, and drug treatment requirements as part of community services<sup>8</sup>, but full coverage is needed. The role of liaison and diversion could also be emphasised here, as an important service to identify people who have mental health conditions or disorders when they first come

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<sup>7</sup> Hillier, J. and Mews, A. (2018) Do offender characteristics affect the impact of short custodial sentences and court orders on reoffending?, London: Ministry of Justice

<sup>8</sup> HMPPS (2021) The Target Operating Model for probation services in England and Wales: Probation reform programme

into contact with the criminal justice system. Data should be collected on the availability of statutory disposals at a local level to find out where provision is lacking.

Caution must be given to potential up tariffing from low level community orders in the imposition of these treatment requirements. When issued, the community order must be proportionate, with appropriate conditions attached. The guideline should be evaluated regularly to see what effect the broader treatment requirement remit is having on the use of community orders.

We would also suggest the Council includes a link to the relevant sections of the Equal Treatment Bench Book [here](#).

#### **4. Do you agree with the proposed sentence table for this offence? If not, please tell us why.**

We welcome discharge replacing band B fine.

We also welcome the removal of wording relating to cases of particular gravity and the removal of previous convictions. As noted by the Council, the inclusion of previous convictions was likely to result in an upwards shift from the starting point. This is especially important change given the number of people convicted of this offence who have previous convictions.

We would suggest that, since the starting point for all categories where custody is the starting point would include the possibility of a suspended sentence, this should be outlined explicitly in the guidance.

We would welcome any additional scope for alternatives to custody, including the wider availability of a range of community orders, especially as an alternative to short prison sentences. Short prison sentences have some of the worst outcomes in achieving the purposes of sentencing. These sentences do little to reduce crime; reduce reoffending; protect the public; and fail to make any attempt of achieving restitution. The impact of placing someone into custody for short periods of time can cause significant damage and is well documented.<sup>9</sup>

#### **5. Do you agree with the proposed aggravating and mitigating factors?**

##### ***Sole or primary carer for dependent relatives***

We strongly support the inclusion of 'sole or primary carer for dependent relatives' as a mitigating factor. Where the offender is known or suspected to have sole or primary care responsibilities the court must request a PSR; where the offender is a woman the court should be aware that it is particularly likely she has primary care responsibilities, and that there may be barriers to her disclosing this.<sup>10</sup>

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<sup>9</sup> Hillier, J. and Mews, A. (2018) Do offender characteristics affect the impact of short custodial sentences and court orders on reoffending?, London: Ministry of Justice

<sup>10</sup> Prison Reform Trust (2018) What about me? The impact on children when mothers are involved in the criminal justice system

As outlined in our response to the 'What next for the Sentencing Council' consultation<sup>11</sup> we propose that the Council consider issuing a new 'Overarching Principle – Sentencing Sole or Primary Carers' to provide clear guidance to the court at the outset regarding its duty to investigate caring responsibilities of defendants and to take these into account in sentencing decisions. This would set out the duty of the court to:

- Determine, as an essential step in the sentencing process, whether the offender has dependent children and whether he or she has sole or primary caring responsibilities.
- Specify how the child's rights and best interests are being taken into consideration in the decision on sentence.
- Ensure that it has all the information relevant to such a determination, if necessary, adjourning the sentencing decision in order to obtain this.

In addition, in all cases where the defendant has dependent children and a custodial sentence is imposed, the sentencing court should be required to provide reasons for imprisonment and set out the consideration that has been given to dependent children. This would contribute to greater consistency and transparency in sentencing decisions that have consequences far wider than for the individual offender and would enable more systematic monitoring and feedback in this area.

Detailed arguments for this proposal are set out in our 2015 Sentencing of mothers: Improving the sentencing process and outcomes for women with dependent children briefing.<sup>12</sup>

### ***Commission of offence whilst under the influence of alcohol/drugs***

The link between the use of alcohol and drugs and crime is already well-established. However, we do not agree with the Council's assessment that the presence of alcohol or drugs is indicative that a more serious offence has been committed. The presence of such factors is more likely to indicate a need for treatment than a justification for more severe punishment.

A recent survey by HM Inspectorate of Prisons revealed that one in seven men (15%) and nearly two in five women (38%) reported an alcohol or drug problem on arrival to prison.<sup>13</sup> The Alcohol and Crime Commission revealed that 70% of people in prison with a self-identified alcohol problem said they had been drinking when they committed the offence for which they were in prison.<sup>14</sup>

The relationship between substance misuse and mental ill health is complex, and this should be better reflected. For example, people may self-medicate because they find it hard to access services, and dependence can hide underlying mental health conditions or disorders.

People from black and minority ethnic communities, and women who have histories of abuse and trauma can find it particularly problematic to access medical advice and maintain contact with mental health services. Consequently, individuals may self-

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<sup>11</sup> See

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Consultation%20responses/What%20next%20for%20the%20Sentencing%20Council.pdf>

<sup>12</sup> Prison Reform Trust (2015) Sentencing of mothers: Improving the sentencing process and outcomes for women with dependent children

<sup>13</sup> HM Chief Inspector of Prisons (2020) Annual Report 2019-20, London: HMSO

<sup>14</sup> Alcohol and Crime Commission (2014) The alcohol and crime commission report, London: Addaction

medicate by using drugs and alcohol. Many local areas have a reduced availability and long waiting lists for drug and alcohol services (due to significant public health and funding cuts, for which offenders should not be penalised), especially for people with co-occurring mental health problems and/or learning disabilities. Unless these social realities are recognised, sentencing decisions are bound to have unintended unfair consequences on vulnerable and disadvantaged individuals.

Therefore, the inclusion of 'commission of offence whilst under the influence of alcohol/drugs' will only disadvantage these individuals further. The inclusion is also contradictory to the provision of alcohol and drug treatment requirements outlined previously in the guidelines. The previous question makes clear the importance of sentencers recognising the need to treat drug and alcohol misuse, yet here it is being considered as an aggravating factor more likely to lead to a harsher sentence.

We would urge the Council to remove this from the list of aggravating factors.

### ***Established evidence of community impact***

We are concerned at the inclusion of 'established evidence of community impact' as an aggravating factor. We accept that burglaries have some negative community impact, but this is already factored into the reasons why the offence carries substantial penalties. Left as is, there is a risk of double counting this element of offence seriousness, which may lead to sentence increases for reasons of mere prevalence.

### ***Financial pressure***

We recommend inclusion of 'extreme financial pressure (when not linked to the commission of the offence)' as an additional mitigating factor. Financial pressures facing former offenders can be considerable, often through no fault of their own. While the discharge grant for people released from prison has recently been raised from £46 to £76, they still face significant bureaucratic obstacles and delays to accessing benefits payments, and regrettably, for some ex-prisoner's acquisitive crime is seen as a matter of survival. We would also refer back to our reasoning for the suggested inclusion of 'severe financial hardship' in question one.

## **6. Do you have any other comments on the non-domestic burglary guideline?**

No.

## **Domestic burglary**

## **7. Do you have any comments on the culpability factors? Are there any that should be removed or added?**

We would refer to our answers to question 2.

We are particularly concerned about the shift towards more severe sentences for domestic burglary and welcome the intention of the new guideline to remedy this unintended outcome. We recommend continued evaluation of the new guideline and its impact on sentencing practice.

**8. Do you agree with the approach to assessing harm? Are there any factors you think should be removed or included?**

We are concerned that the subjectivity involved in assessing 'emotional impact' makes it difficult to consistently measure. While we appreciate the need for this to be considered in the assessment of harm, it might be helpful for the Council to provide additional guidance on how the extent of emotional impact might be assessed in a more objective manner. For instance, whether the victim required mental health treatment as a result of the impact of the offence, or whether the impact of the crime resulted in the victim having to leave their home.

**9. Do you agree with the additional wording relating to consideration of a community order with an alcohol treatment requirement order?**

We would refer to our answers to question 3.

**10. Do you agree with the proposed sentence table for this offence? If not, please tell us why.**

We are concerned about the changes to the minimum term provisions in the Police, Crime, Sentencing and Courts (PCSC) Bill. We strongly recommend the Council should consult again on any changes to be made in light of the bill.

Community orders are a better alternative to short custodial sentences, as we have outlined above. They can be appropriate for certain category two offences and are appropriate for many category three offences. We recommend the sentencing table be expanded to include this wider provision of community sentence options. There should also be an explicit reference to suspended sentences as an option for custodial sentences of two years or less to give clarity on sentencing options and encourage more widespread use of suspended sentences.

**11. Do you agree with the inclusion of wording regarding cases of particular gravity above the sentence table? If not, please tell us why.**

We are concerned with inclusion 'for cases of particular gravity, sentences above the top of the range may be appropriate'. The Council needs to explicitly outline what 'particular gravity' means. In the current form there is a danger of inconsistency in how sentencers interpret the term. We would also recommend that the wording is amended, to read 'for cases of exceptional gravity...' this would better reflect the fact this provision is only required in extremely rare cases and may help to avoid increased sentence severity.

**12. Do you agree with the proposed aggravating and mitigating factors?**

We would refer to our answers in question 5.



**13. Do you have any other comments on the domestic burglary guideline?**

No.

**Aggravated burglary**

**14. Do you have any comments on the culpability factors? Do you agree that the factor relating to a weapon has been moved from culpability to step two?**

We welcome moving the factor relating to a weapon to step two to aid the avoidance of double counting. However, more consideration should be given to explicitly distinguishing between weapon types and whether the weapon was circumstantial in the commission of the offence. Individuals carry weapons for numerous and complex reasons, often including the perception it is necessary for self-protection. For example, an individual may be entering the property with a weapon they believe they are carrying more widely for self-protection purposes, but with no intention to use it when carrying out the offence. In the current guidance, there is no distinction between this, and an individual who enters the property with a weapon and with the intention to use it. So, this consideration is particularly important for the fair and proportionate sentencing of offences where possession of a weapon was purely circumstantial and there was no intention to use it.

We would also refer to our answers to question one. However, we note the welcome removal of 'equipped to commit a burglary' for an aggravated burglary offence. We are unsure as to why it has been retained for other forms of burglary when this is the case. We would strongly recommend removing this factor from all burglary offences for the sake of consistency.

**15. Do you agree with the approach to assessing harm? Are there any factors you think should be removed or included?**

We would refer to our answers in question 8.

**16. Do you agree that it is helpful to include a link to the Imposition guideline?**

We agree that it is helpful to include a link to the Imposition Guideline. We would argue that the Council might like to consider, at the lower level, whether there should be scope for a high-level community order which recognises the seriousness of the offence, as the starting point of the sentence, and so link to the relevant section in the Imposition Guideline.

**17. Do you agree with the proposed sentence table for this offence? If not, please tell us why.**

As above, a high-level community order, which recognises the severity of the offence may be appropriate for offenders falling the lower culpability/harm sentencing categories. For example, if possession of a weapon was purely circumstantial and there was no intention to use it.

**18. Do you agree with the proposed aggravating factors? Do you think the proposed text to be provided in a drop down box for 'weapon carried when entering premises' is helpful?**

We welcome the intention of the Council not to double count a weapon being carried. We would refer back to our previous points in reference to carrying weapons.

**19. Do you agree with the proposed mitigating factors?**

We would refer to our answers for questions 5 and 11. We would again highlight the particularly welcome introduction of 'sole or primary carer for dependent relatives' and 'age and/or lack of maturity' as mitigating factors.

**20. Do you have any other comments on the aggravated burglary guideline?**

No.

**Equality and diversity**

**21. Do you consider that any of the factors in the draft guidelines, or the ways in which they are expressed could risk being interpreted in ways which could lead to discrimination against particular groups?**

We recommend clear links to relevant sections of the Equal Treatment Bench Book being made available throughout the guideline.

***Overrepresentation of Black, Asian and minority ethnic people***

Black offenders are over-represented in all three types of burglary offences, particularly aggravated burglary offences. We note the Council's evidence that this overrepresentation is due to factors earlier in the system. We urge the Council not just to pay attention to individual factors or how they are expressed, but to actively work with criminal justice partners such as the judicial college to ensure that the possible factors underlying disproportionate outcomes are properly addressed, for instance through the delivery of better training and guidance to sentencers. We question what work has been done with other agencies to pursue this to date.

The work should be undertaken in relation to all protected characteristics and should include consideration of intersectional discrimination and foreign national status (foreign nationals being significantly over-represented in prison) – for example

against Black, Asian and minority ethnic women (see our Counted Out report<sup>15</sup>, which found that Black women were 25% more likely than white women to receive a custodial sentence following conviction). We would particularly encourage the Council to ensure it has adequate procedures and data to assess the impact of guidelines according to age, and on young adults in particular.

We ask that the Council seeks to ensure that its own procedures for recording and analysing data meet the standards set by the Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System, and that it works with criminal justice partners to ensure a consistent approach to capturing data religion and ethnicity, as well as other protected characteristics including disability.

We recommend that the default position should be for the Ministry of Justice and criminal justice agencies to publish all datasets held on ethnicity, while protecting the privacy of individuals. Each time the Race Disparity Audit exercise is repeated, the criminal justice system should aim to improve the quality and quantity of datasets made available to the public.

### ***Disability***

We are concerned about the lack of consistent reliable data collection on disability, particularly with regards to mental health and learning disability. For instance, there is currently insufficient data to identify how many people are remanded in custody pending a psychiatric report, how many are assessed as having a mental health problem, and how many are so unwell that they require transferring out of custody for treatment.

## **22. Do you have any other comments on the proposed guideline which have not been captured elsewhere?**

As raised in the PRT's response to the 'expanded explanations in Sentencing Guidelines consultation'<sup>16</sup>, we are concerned that an extended determinate sentence (EDS) could be imposed for a domestic or non-domestic burglary which involved damage to a property, even in cases where no physical harm was caused to a victim in the commission of the offence. Given the significant impact of the growing number of EDS prisoners on prison and parole resources, it is concerning that the resource assessment of the guidelines contains no analysis of the resource impact of this. While the EDS differs from the indeterminate sentence for public protection (IPP) by having a definite release date, it still resembles the IPP in many respects, not least in the involvement of the Parole Board in determining release, as well as having an extended period on license.

In order to avoid the EDS having similar unintended consequence as the IPP, these changes require a proper impact assessment which is realistic in the way that the impact assessments for the IPP legislation was not. Otherwise, there is a risk that we simply replace the catastrophe of the IPP with a new EDS version.

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<sup>15</sup> Prison Reform Trust (2017) Counted Out: Black, Asian and minority ethnic women in the criminal justice system, London: PRT

<sup>16</sup> See

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Consultation%20responses/Sentencing%20Council%20Expanded%20Explanations%20in%20Sentencing%20Guidelines%20consultation.pdf>