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Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 2002-8002

Re: Proposed Priorities for 2011-2012

Dear Judge Saris:

As the Commission begins to set its priorities for the upcoming amendment cycle, the Federal Public and Community Defenders, pursuant to 28 U.S.C. § 994(o), offer some suggestions for the Commission's consideration this year. We have very much appreciated the Commission's outreach to us during the past several years and welcome additional opportunities to meet with the Commission and its staff during this cycle. Last year, the Commission's agenda was driven largely by congressional directives and the Department of Justice's desire to increase sentences for certain firearms offenses, but the Commission nonetheless also took some steps to reduce sentences and provide judges with greater flexibility in imposing sentences consistent with 18 U.S.C. § 3553(a). We greatly appreciate the Commission's efforts in that regard.

This year, some of our suggestions call for a comprehensive look at a particular guideline, which may warrant a multi-year review, but many focus on discrete changes that can be implemented in one amendment cycle. We urge the Commission to consider the following:

1) modify the relevant conduct rules in USSG §1B1.3 to prohibit the use of acquitted conduct and prohibit or limit the use of uncharged or dismissed conduct;

2) amend USSG §1B1.8 so that it protects against the use of statements made before the parties enter into a proffer agreement, protects against use of a defendant's statements about his own unlawful activities, and permits a court to depart downward in cases where prosecutors refuse to offer §1B1.8 protection;

3) revisit USSG §2B1.1 with an eye toward simplifying it and limiting the piling on of specific offense characteristics that provide multiple enhancements for essentially the same offense conduct;

4) amend USSG §2D1.1 by reducing by 2 the offense levels in the drug quantity table, revising the rules on calculating the offense level for MDMA, and striking from USSG §2D1.1, comment. (n.28) (maintaining a premise) language that was added this past amendment cycle, *i.e.*, "including storage of a controlled substance for the purpose of distribution";

5) continue working on its report to Congress on the child pornography guideline while making modest changes this year that would limit the use of specific offense characteristics that occur in a vast majority of cases;

6) revise USSG §3B1.1 (aggravating role) to curtail inconsistent application of the role adjustment for individuals who do nothing more than enlist the help of one individual, *e.g.*, a girlfriend, in a drug trafficking offense, and continue its efforts to clarify operation of USSG §3B1.2;

7) narrow the scope of the career offender guideline at USSG §4B1; and

8) strengthen USSG §6A1.3 so that it affords better procedural protections against the use of undisclosed evidence and unreliable hearsay.

Many of our positions on these issues have been set forth in past amendment cycles and at the Commission's regional hearings. Here, we provide a brief summary of why we believe these are important issues to consider this amendment cycle.

Relevant Conduct, USSG §1B1.3

The Commission's survey shows that a sizable majority of judges believe that it is not appropriate to consider dismissed (69% of judges), uncharged (68%) or acquitted conduct (84%).[1] These views are not surprising. The "relevant conduct" rules work great mischief at

[1] *See* USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, at Question 5 (June 2010) (hereinafter *2010 Judicial Survey*). Both district and appellate court judges have issued sharply worded opinions criticizing the use of acquitted conduct. *See, e.g., United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) ("the unfairness perpetuated by the use of "acquitted conduct" at sentencing in federal district courts is uniquely malevolent"); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, B., J., dissenting) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment."); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) ("I strongly believe ... that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."); *United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) (Kelley, J.) ("Sentencing a defendant to time in prison for a crime that the jury found he did not commit is a Kafka-esque result."), *vacated by*, 271 Fed. Appx. 298 (4th Cir. 2008); *United States v. Pimental*, 367 F. Supp.

sentencing: they contribute to unwarranted disparity, undue severity, and disrespect for the law.[2] They create hidden disparities because of their complexity and inconsistent application among prosecutors, courts and probation officers. Lax evidentiary standards only compound the disparity and the unfairness of the relevant conduct rules.[3] *See* Discussion, Resolution of Disputed Factors, USSG §6A1.3, *infra*.

The relevant conduct rules give prosecutors "indecent power"[4] over sentencing and enormous leverage during plea negotiations, allowing them to inflate guideline ranges with the use of uncharged, dismissed, and acquitted conduct.[5] Prosecutors need only provide information

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2d 143, 153 (D. Mass. 2005) (Gertner, J.) ("To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense-as a matter of law or logic."). *See also State v. Cote*, 530 A.2d 775, 784 (N.H. 1987) ("disingenuous at best to uphold the presumption of innocence . . . while at the same time punishing a defendant based upon charges in which that presumption has not been overcome").

[2] The relevant conduct rules conflict with an essential provision of the Sentencing Reform Act, which directed the Commission to take into account "the circumstances under which the *offense was committed*," the "nature and degree of the harm caused by the *offense*." 28 U.S.C. § 994(c)(2), (3) (emphasis added). It was also to provide "certainty and fairness" and "avoid[] unwarranted sentencing disparities among defendants . . . who have been *found guilty* of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B) (emphasis added).

[3] *See* USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 50, 87 (2004) (hereinafter *Fifteen Year Review*) (relevant conduct rule is inconsistently applied because of ambiguity in the language of the rule, law enforcement's role in establishing it, and untrustworthy evidence); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline §1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent'g Rep. 16 (1997) (sample test administered by researchers for the Federal Judicial Center to probation officers resulted in widely divergent guideline ranges for three similar defendants); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 857 (1992) ("interaction of quantity-driven Guidelines with the relevant conduct standard can produce enormous [sentence increases] for virtually any drug defendant" resulting in manipulation of guidelines; "judicial acquiescence in such manipulation must be understood against the backdrop of this special feature in drug cases"). *See also United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant).

[4] Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (2008).

[5] American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463 (2001); Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 140, 159 (1998); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 524-54 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 Stan. L.

about uncharged or acquitted conduct to a probation officer to include in the presentence report. Even though the information may be nothing more than rank hearsay, in some circuits it is enough to shift the burden to the defense to disprove.[6] When defense counsel challenge relevant conduct, they run the risk of having the court deny the defendant a reduction for acceptance of responsibility even though the defendant pled guilty and accepted responsibility for the charged conduct.[7]

The relevant conduct rules also deprive defendants of their basic trial rights by permitting prosecutors to circumvent a defendant's Sixth Amendment trial rights[8] and undermine the legitimacy of the presumption of innocence by permitting the use of acquitted conduct. Cross-references based upon acquitted or uncharged conduct are a particularly egregious example of how the rules work an end-run around fundamental constitutional rights. Under USSG §2K2.1(c)(1)(B), a defendant convicted of nothing more than possessing a firearm after being convicted of a felony can be sentenced as a murderer even though he may have had a viable defense in front of a jury.[9] Justice Scalia has characterized the guidelines approach of punishing a defendant for such uncharged conduct as producing an "absurd result."[10]

Rev. 523, 524 (1993); Paul J. Hofer, *Implications of the Relevant Conduct Study for the Revised Guideline*, 4 Fed. Sent'g Rep. 334 (May/June 1992).

[6] *See* Discussion, Resolution of Disputed Factors, USSG §6A1.3, *infra*.

[7] *See* Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. Rev. 2103, 2111 (2003); *see also* Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 Stan. L. Rev. 309, 310 (2005) (hereinafter *First Principles*).

[8] Although appellate courts have generally upheld the use of acquitted conduct after *United States v. Booker*, 543 U.S. 220 (2005), serious questions remain about whether it violates the Sixth Amendment to sentence a defendant on the basis of such conduct. The Court in *United States v. Watts*, 519 U.S. 148 (1997), held only that the use of acquitted conduct did not violate the Double Jeopardy Clause. *See generally* Eang Ngov, *Jury Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. Law Rev. 235 (2009).

[9] *See* Statement of Alan DuBois Before the U.S. Sentencing Comm'n, Atlanta, GA, at 24 (Feb 10, 2009) (describing case in Eastern District of North Carolina where defendant would have had excellent argument for self-defense had he been tried for murder before a jury).

[10] *Blakely v. Washington*, 545 U.S. 296, 306 (2004). A district court offered the following comment about cross-references based upon relevant conduct rules: "As the Queen of Hearts said, 'Sentence first-verdict afterwards.' *See* L. Carroll, *Alice's Adventures in Wonderland* 146 (Random House, 1946). Federal offenders deserve better justice than that meted out in the court of the King and Queen of Hearts." *United States v. Carroll*, 798 F. Supp. 291, 294 (D. Md. 1992) (Smalkin, J.,), *vacated*, 3 F.3d 98 (4th Cir. 1993).

The Commission has been aware of problems with the relevant conduct guidelines for many years. In 1996, the Commission announced as a priority for the 1996-97 amendment cycle "developing options to limit the use of acquitted conduct at sentencing," and for future amendment cycles, "[s]ubstantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence."[11] Commission staff began to "investigate ways of incorporating state practices; *e.g.*, using an offense of conviction system for base sentence determination; providing a limited enhancement for conduct beyond the offense of conviction; or limiting acquitted conduct to within the guideline range."[12] Proposals to abolish the use of acquitted conduct were published for comment at various times.[13] Notwithstanding the known problems with the guideline, and various proposals to fix it, the Commission has declined to act.

The Commission should revisit the issue. John Steer, former General Counsel and Vice-Chair of the Commission, once defended the use of relevant conduct as a "cornerstone" of the guidelines. While continuing to believe relevant conduct is important, Mr. Steer has since revisited his earlier position. In a 2008 interview, Mr. Steer unequivocally stated that the Commission should exclude "acquitted conduct" from the guidelines and permit its use only as a discretionary factor.[14] In addition to the disparity created by the use of acquitted conduct, Mr. Steer noted that the "federal guideline system is alone among sentencing reform efforts in using acquitted conduct to construct the guideline range."[15] Mr. Steer also recommended that the Commission "decrease the weight given to unconvicted counts that are part of the same course of conduct or scheme under 1B1.13(a)(2) and (3)."[16]

We agree with Mr. Steer that the Commission should prohibit the use of acquitted conduct. Its use undermines respect for the law in many quarters.[17] We also encourage the

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[11] *See* 61 Fed. Reg. 34,465 (July 2, 1996).

[12] *See* Phyllis J. Newton, Staff Director, U.S. Sentencing Comm'n, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent'g Rep. 68, 1995 WL 843512 *3 (Sept./Oct. 1995).

[13] S*ee* 62 Fed. Reg. 152,161 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832 (1992).

[14] *An Interview with John R. Steer*, 32 Champion 40, 42 (2008).

[15] *Id.*

[16] *Id.*

[17] Courts have commented on this issue on more than one occasion. *See, e.g., United States v. Magallanez*, 408 F.3d 672, 683 (10th Cir. 2005) (defendant "might well be excused for thinking that there is something amiss" with using acquitted conduct to increase his sentence by 43 months); *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) ("most people would be shocked to find out that even

Commission to revisit the use of uncharged or dismissed conduct and either eliminate it or limit its effect on the calculation of the guideline range.

Use of Certain Information, USSG §1B1.8

At the Commission's regional hearings, Defenders repeatedly testified about several problems that arise with application of USSG §1B1.8: (1) the disparity in sentencing created from the unwillingness of some prosecutors to use §1B1.8 to protect against the use of certain information at sentencing; (2) the failure of §1B1.8 to protect against the use of statements the defendant made at arrest or during negotiations, but before the parties reach a formal cooperation or plea agreement.[18] Additional problems arise when the defendant's statements about his own unlawful activities are used to enhance his sentence.[19] The Commission could remedy the disparity and unfair use of a defendant's statements by amending §1B1.8 in the following manner:

- provide for a downward departure where the government refuses to exercise its discretion to negotiate a use immunity agreement under §1B1.8[20] or state in the

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United States citizens can be (and routinely are) punished for crimes of which they are acquitted"), *vacated and remanded*, 271 Fed. Appx. 298 (4th Cir. 2008).

[18] *See* Statement of Nicholas T. Drees Before the U.S. Sentencing Comm'n, Denver, CO, at 9-10 (Oct. 2009) (describing disparate use of 1B1.8 in N.D. Iowa); Statement of Nicole Kaplan Before the U.S. Sentencing Comm'n, Atlanta, GA, at 33 (Feb. 2009) (describing how defendants who provide statements after arrest and who later enter into cooperation agreements receive no protection against use of pre-agreement statements); Statement of Henry Bemporad Before the U.S. Sentencing Comm'n, Phoenix, AZ, at 8-9 (Jan. 2010) (proposing amendment to §1B1.8 that "expressly recognize[s] that the parties may agree to exclude information that the defendant provides before entering into formal cooperation); Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Phoenix, AZ, at 47-50 (Jan. 21 2010) (Henry Bemporad) (describing how a defendant may make a good faith effort to cooperate upon arrest, but the cooperation dos not proceed because the client fears for the safety of his family or himself, or the government decides not to pursue the matter). *See United States v. Buckendhal*, 251 F.3d 753, 748 (8th Cir. 2001) (reversing district court's decision to depart downwardly as a result of district-by-district disparity created by differing prosecutorial practices); *United States v. Blackford*, 469 F.3d 1218, 1220 (8th Cir. 2006) (sentencing court's disagreement with USSG §1B1.8's requirement that the government agree not to use self-incriminating information against defendant is not proper grounds for variance).

[19] *See United States v. Jarman*, 144 F.3d 912, 915 (6th Cir. 1998) (defendant's disclosure of information about his own drug use, which raised his offense level under §2K2.1, was "completely extraneous to 'information concerning the unlawful activities of other persons'").

[20] *Cf*. USSG, App. C, Amend. 365 (amending guideline "to reduce the disparity resulting from the exercise of prosecutorial discretion)"; USSC, App. C, Amend. 506 (amending guideline to avoid "unwarranted disparity associated with variations in the exercise of prosecutorial discretion").

commentary that it does not have a policy of approving unwarranted disparity created by the government's disuse of this guideline

- include within the scope of §1B1.8 any statements the defendant made in the course of good faith negotiations for a cooperation or plea agreement, but that do not result in such an agreement[21]

- include within the scope of §1B1.8 any statements the defendant makes prior to entering into a cooperation agreement [22]

- provide §1B1.8 protection when the defendant agrees to provide information about the extent of his own unlawful activities.

Economic Offenses, USSG §2B1.1

In its January 2011 Notice of Proposed Amendments and Request for Public Comment, the Commission indicated that it was considering undertaking a comprehensive review of USSG §2B1.1 and related guidelines. For the reasons expressed in our regional hearing testimony, we agree that the fraud guideline should be reviewed with an eye toward comprehensive revisions.[23] Spanning five full pages, followed by an additional seventeen pages of commentary, § 2B1.1 is far too complex and often requires the parties and the court to waste time on technical disputes. The fraud guideline is driven primarily by intended loss – a rough proxy in the Commission's view for the defendant's level of culpability and mens rea. Loss, however, as has been illustrated over and over again, is often a poor indicator of culpability. Under the loss rules, for example, a health care fraud defendant involved in treating actual patients, but who substitutes the wrong billing code, is treated the same as a defendant who sets up a completely fictitious medical clinic and provides no treatment at all.

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[21] Notwithstanding the commentary's reference to Rule 11(f) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence, USSG §1B1.8, comment. (n.3), those rules do not restrict the use of a defendant's statements at a sentencing proceeding. Rule 11(f) merely references Rule 410 of the Federal Rules of Evidence. The Rules of Evidence, however, do not apply at a sentencing proceeding. Fed. R. Evid. 1101(d)(3). *See also United States v. Upton*, 91 F.3d 677, 688 (5th Cir. 1996) (rules do not prohibit statements made during plea negotiations to be used during sentencing).

[22] *United States v. Maxie*, 89 Fed. Appx. 180, 184 (10th Cir. 2004) ("cooperation agreement created after incriminating information has been furnished" cannot "retroactively shield that information"); *United States v. Hopkins*, 295 F.3d 549 (6th Cir. 2002) (no protection for statements defendant made at time of arrest); *United States v. Holden*, 2011 WL 1624979, at *1 (4th Cir. April 29, 2011) (USSG §1B1.8 permitted government to use statements that were provided before defendant signed the agreement).

[23] Statements of Alan DuBois and Nicole Kaplan Before the U.S. Sentencing Comm'n, Atlanta, GA, at 30-31 (Feb. 10, 2009).

The guideline also includes numerous specific offense characteristics that replicate or overlap with loss, with one another, and with upward adjustments that appear elsewhere in the Guidelines. Section 2B1.1 is an excellent example of what has come to be known as "factor creep," where "more and more adjustments are added" to account for some discrete harm thereby making it "increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness."[24] For example, a defendant who uses a magnetic credit card swiper to commit fraud may well be subject to the two-level increase for sophisticated means under §2B1.1(b)(9)(C) and the two-level increase for possession or use of device-making equipment under §2B1.1(b)(10), based on essentially the same conduct.[25]

An area of particular concern for Defender clients involves aggravated identity theft under 18 U.S.C. § 1028A. The interaction of the Aggravated Identity Theft guideline at §2B1.6 and §2B1.1(b)(10) creates disparity that is difficult to justify. A defendant who is convicted of aggravated identify theft may not have the offense level on the underlying offense increased under §2B1.1(b)(10) for the "transfer, possession, or use of a means of identification." USSG §2B1.6, comment. (n.2). Yet a defendant who does anything that can be remotely construed as "producing" a "means of identification" may be subject to the enhancement for production of a counterfeit device under§2B1.1(b)(10). *See, e.g., United States v. Jones*, 551 F.3d 19, 26 (1st Cir. 2008) (defendant's sentence increased under §2B1.1(b)(10) because she used a pin to pop air bubbles on the laminate of a counterfeit driver's license to make it look more convincing). Similarly, a defendant who possessed the device-making equipment, but who did not produce a means of identification, is subject to the §2B1.1(b)(10) enhancement. *See, e.g., United States v. Sharapka*, 526 F.3d 58, 62 (1st Cir. 2008).

The interaction of the victim adjustments is another area that can result in dramatic sentence escalation. For example, if the offense involved 250 or more victims, the defendant may receive a 6- level enhancement under §2B1.1(b)(2)(C), and if the defendant knew or should have known that just one of those victims was a vulnerable victim, he is subject to an additional 2- level enhancement under §3A1.1(b)(1).[26]

For these reasons, we urge the Commission to undertake a careful review of §2B1.1 and, where appropriate, simplify it. As it stands, the loss calculation rules, the numerous specific

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[24] *Fifteen Year Review, supra* note 3, at 137 (citing Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 742 (2001) (complexity of the guidelines has created a "façade of precision" which "undermines the goals of sentencing.")).

[25] *See, e.g., United States v. Abulyan*, 380 Fed. Appx. 409, 412 (5th Cir. 2010).

[26] USSG §2B1.1, comment. (n. 4(D)) only forbids application of §3A1.1 (b)(2) where the defendant has received an enhancement under §2B1.1(b)(2)(B) or (C). It does not prohibit application of §3A1.1(b)(1).

offense characteristics, and related guideline provisions interact with each other to produce sentences that are much too often greater than necessary to accomplish the purposes of sentencing.

Drug Offenses

The Drug Quantity Table. We also again urge the Commission to reduce by two the offense level for all drug offenses. Under the current guidelines, the drug quantity thresholds triggering mandatory minimums correspond to ranges above the statutory minimum.[27] This way of accounting for mandatory minimum sentence is not required.[28] The guidelines may account for mandatory minimum statutes in a number of ways. For example, the Commission may set the base offense level to include but not exceed the mandatory minimum, as it did with crack offenses in 2007. It may set the base offense level below the mandatory minimum and rely on Chapter Two and Three adjustments to reach the mandatory minimum. If the guideline range still fails to reach the mandatory minimum, USSG §5G1.1(b) accommodates the mandatory minimum by trumping the guideline range.

Lowering the quantity thresholds is an effective means of furthering the purposes set forth in 18 U.S.C. § 3553(a)(2) and 28 U.S.C. § 991(b). The drug guidelines are responsible for a sizable percentage of the prison population and contribute substantially to overcrowding without any real concomitant reduction in crime. For example, drug offenders comprise almost one third of the federal docket,[29] and "[m]ost of the inmates in Bureau [of Prisons] facilities are serving sentences for drug trafficking offenses."[30] Currently, the Bureau of Prisons is overcrowded, resulting in double bunking 94 percent of high security inmates, and triple bunking (or housing in space not originally designed for inmate housing) 16 percent of medium security inmates and almost 82 percent of low security inmates.[31] With a change in the drug quantity

[27] More than half of the judges surveyed (58%) believe that the sentencing guidelines should be "delinked" from the statutory mandatory minimum sentences. *2010 Judicial Survey*, *supra*, note 1, at Question 3.

[28] *See* USSG App. C., Amend. 706 (Nov. 1, 2007); USSC, *The History of the Child Pornography Guidelines* at 44-47 (Oct. 2009); *see also Kimbrough v. United States*, 552 U.S. 85, 102-105 (2007); *cf. Neal v. United States*, 516 U.S. 284 (1996) (approving amendment of LSD guideline to use presumptive-weight methodology instead of statute's "mixture or substance" methodology); *see also* Statement of Jacqueline A. Johnson Before the U.S. Sentencing Comm'n, Chicago, Illinois, at 17 (Sept. 10, 2009).

[29] USSC, *2010 Sourcebook of Federal Sentencing Statistics* fig. A.

[30] Statement of Harley G. Lappin Before the U.S. Sentencing Comm'n, Washington, D.C., at 2 (March 17, 2011).

[31] *Id.* at 2-3.

table, the Commission could help relieve the burden on federal prisons while also protecting public safety and meeting the other purposes of sentencing.[32]

MDMA ("Ecstasy"). The drug equivalency table sets forth a 500:1 MDMA-to-marijuana equivalency. This equivalency was set after the Commission issued a *Report to Congress: MDMA Drug Offenses, Explanation of Recent Guideline Amendments* (2001). Research over the past decade has shown that some of the conclusions in the Commission's report are inaccurate. A district court in the Southern District of New York recently conducted an extensive hearing on the dangers associated with MDMA. *United States v. McCarthy*, 2011 WL 1991146, at *3 (S.D.N.Y. May 19, 2011). After a careful review of the evidence, which included expert testimony, the court concluded that it would treat MDMA the same as cocaine under the guidelines, *i.e.*, a MDMA-to-marijuana equivalency of 200:1. The court left open the possibility that a lower ratio may be warranted in the future.

Given the strong record developed in *McCarthy* and the court's conclusion, we urge the Commission to reexamine the current 500:1 MDMA-to-marijuana ratio.

Storage of drugs for distribution. In promulgating the permanent amendments implementing the Fair Sentencing Act, the Commission added language to USSG §2D1.1, comment. (n. 28) that did not appear in the emergency amendment or the proposed permanent amendment. That language added a clause (italicized) to the first sentence in note 28: "Subsection (b)(12) applies to a defendant who knowingly maintains a premise (i.e., a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, *including storage of a controlled substance for the purpose of distribution*."

Congress specifically carved out for this enhancement (among all the acts prohibited under 21 U.S.C. § 856) only the maintaining of an "establishment" for the "manufacture" or "distribution" of a controlled substance. Pub. L. No. 111-120, § 6(2). Congress did not direct the Commission to enhance sentences for maintaining a premises for "storage of a controlled substance for the purpose of distribution."

The Commission should act now to narrow the scope of the provision to what Congress intended.

[32] The Commission's recidivism study of offenders released as a result of the 2007 crack amendments shows that sentences can be reduced without fear that longer sentences are necessary to reduce recidivism or protect public safety. Kim S. Hunt & Andrew Peterson, *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* (May 31, 2011).

Child Pornography, USSG §2G2.2

We encourage the Commission to continue its review of the child pornography guidelines and to make recommendations to Congress on appropriate sentences for these offenses. Here, we make several observations and suggestions for more immediate changes to the pornography guidelines.

The widespread dissatisfaction with the guideline governing the receipt and possession of child pornography, USSG §2G2.2, is manifest in the Commission's data. According to the Commission's latest release of data, the percentage of below guideline sentences under USSG §2G2.2 stands at 63.7%. The government sponsored non-5K below guideline sentences in 14% of cases. Courts imposed non-government sponsored departure and/or variance sentences in 46% of the cases.[33] Notwithstanding the high rate of sentences below the advisory guideline range, the average sentence for child pornography offenses, including possession, receipt, and distribution, is sizable – 122.5 months.[34]

Judicial opinions provide additional evidence of the dissatisfaction with this guideline. Since last year, more courts have commented on the unsound empirical basis of the child pornography guidelines.[35] And of course, the Commission is aware that 69-70% of federal

[33] USSC, *Preliminary Quarterly Data Report: 2nd Quarter Release, Preliminary Fiscal Year 2011 Data Through March 31, 2011*, Table 5 (2011).

[34] *Id*., Table 19.

[35] *See, e.g., United States v. Henderson*, ___ F.3d ___, 2011 WL 1613411, at *7 (9th Cir. April 29, 2011) (remanding for reconsideration of sentence in child pornography case, noting that most of the guideline was "not the result of empirical study"); *see also id*. at *8 (Berzon, J., concurring) (with common enhancements, "an ordinary first-time offender could easily face a guideline range of 108 to 135 months – in other words, a guideline range at, and extending beyond, the extreme upper edge of the statutory range"); *United States v. Grober*, 624 F.3d 592, 608 (3d Cir. 2010) (affirming below-guideline sentence for possession of child pornography and noting that guideline was not based upon empirical evidence); *United States v. Stark*, 2011 WL 555437, at *7 (D. Neb. Feb 8, 2011) (Bataillon, CJ) (criticizing enhancements for use of computer and number of images, noting that "the number of images a defendant possess is meaningless as an indicator of any position in a pornography distribution system); *id*. at 9 ("sentence of a purveyer or distributor of child pornography should be proportional to and significantly lower than a sentence for an exploitative crime that involves acts of abuse by a defendant); *United States v. Tapp*, 2010 WL 4386523, at *6 (N.D. Ind. Oct 28, 2010) (Springman, J.) (enhancements for use of computer and number of images "lead to an inaccurate indication of the severity of the offense and do not serve to promote the goals of punishment"); *United States v. Polouizzi*, 2011 WL 118217, at *1 (E.D.N.Y. Jan 14, 2011) (Weinstein, J.) (finding guideline range of 135 to 168 months "grossly excessive" and imposing mandatory minimum sentence of 60 months).

judges surveyed expressed the view that the child pornography guideline produces unreasonably high sentences for possession and receipt cases.[36]

As we have stated in the past, much of the dissatisfaction with USSG §2G2.2 stems from the enhancements for use of a computer, §2G2.2(b)(6), and number of images, §2G2.2(b)(7). These enhancements are arbitrary and fail to account for the realities of internet use and the ease with which large numbers of files may be downloaded without the defendant even knowing about it.[37] Because they apply in so many cases, they fail to provide any meaningful basis to distinguish among offenders of various levels of culpability.

We urge the Commission to eliminate these enhancements from the guidelines.[38] The Commission could also take some first steps toward mitigating other unjust effects of this guideline by changing the base offense level for receipt and possession;[39] redefining how a court determines the number of images under USSG §2G2.2, comment. (n.4(B)); and removing language in note 4(B)(ii) that each video or similar depiction "shall be considered to have 75 images."

The Commission can lower sentences for the receipt and possession of child pornography without any threat to public safety. Significant empirical research shows that few child pornography offenders commit contact offenses against children.[40]

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[36] *2010 Judicial Survey*, *supra* note 1, at Question 8.

[37] *See* USSC, *Report to Congress, Sex Offenses Against Children* 29-30 (1996) (recognizing problems with the computer enhancement and suggesting that the enhancement should be omitted or narrowed).

[38] We recognize that the enhancements were added pursuant to congressional directives. *See* Pub. L, 104-71 (Dec. 23, 1995); Pub. L. 108-21, Title V, § 401 (Apr. 30, 2003), *see also* USSG App. C, Amends 537 and 649.

[39] The Commission could, for example, lower the base offense levels from 22 and 18 to 15 and 13 – the levels that applied to receipt and possession before the 2004 amendment. *See* USSG App. C, Amend 664.

[40] *See, e.g.*, Michael C. Seto et al., *Contact Sexual Offending by Men with Online Sexual Offenses*, 23 Sex Abuse: J. of Research & Treatment 124, 136 (2011) ("Online offenders rarely go on to commit detected contact sexual offenses."); Michael C. Seto & Anglea W. Leake, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 Sexual Abuse 201, 208 (2005) (finding that 1.3 percent of internet offenders recidivated with contact sex offenses, a finding that "does contradict the assumption that all child pornography offenders are at very high risk to commit contact sexual offenses involving children"); L. Webb, J. Craissati & S. Keen, *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, 19 Sexual Abuse 449, 463 (2007) (finding internet-only offenders "significantly less likely to fail in the community than child molesters" and concluding that "by far the largest subgroup of internet offenders would appear to pose a very low risk of sexual recidivism"). *See also* Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offense*,

Role in the Offense, USSG §§ 3B1.1 and 3B1.2

Aggravating Role. We are concerned about disparate application of USSG §3B1.1(c), particularly as it applies to defendants who do nothing more than enlist the help of one other participant.[41] Section 3B1.1(c) requires a 2- level increase "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b) [*i.e.*, organizer, leader, manager, supervisor of activity that involves five or more participants or was otherwise extensive]. In some cases, a defendant who does nothing more than enlist the help of a friend is subject to the 2-level enhancement. *See United States v. Jiminez*, 257 Fed. Appx. 204, 205 (11th Cir. 2007) (fact that defendant's girlfriend had to consult with him before selling methamphetamine warranted role adjustment). In other cases, the courts have more narrowly construed what it means to be an organizer, leader, manager, or supervisor. *See United States v. McGregor*, 11 F.3d 1133, 1138 (2d Cir. 1993) (enhancement did not apply where defendant directed wife to give two packages of cocaine to buyers who were coming to their home); *United States v. Mankiewicz*, 122 F.3d 399, 406 (7th Cir. 1997) (defendant's recruitment of father to help unload marijuana did not warrant role adjustment). We encourage the Commission to tighten the requirements for application of USSG §3B1.1(c) so that it is clear that enlisting the help of another or providing an accomplice with simple instructions is not enough to trigger the adjustment.

We are especially concerned about the broad reach of §3B1.1(c) in light of the new enhancement at USSG §2D1.1(b)(14)(A) (super-aggravating role for using friendship or affection to involve another individual). Under those two provisions, a defendant could well receive a significant 4-level increase for the exact same conduct – recruiting a friend or family member to help in the offense. Nothing in the history of the Fair Sentencing Act or the Commission's work on aggravating role suggests that such a draconian consequence was ever intended.

Mitigating Role. We appreciate the Commission's work on minor and minimal role adjustments during this past amendment cycle, but believe that there is still work to be done on this guideline. We encourage the Commission to further clarify the adjustments to ensure that they effectuate the Commission's finding that "those who played a minor or minimal role" in drug trafficking offense should receive a lesser sentence than higher-level offenders.[42] As the

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9 BMC Psychiatry 43 (2009), available at http://www.biomedcentral.com/content/pdf/1471-244X-9-43.pdf.

[41] *See generally* Thomas W. Hutchison, et al., *Fed. Sent. L. & Prac.* §3B1.1 (2011) (setting forth differing appellate court interpretations of 3B1.1).

[42] USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 7 (May 2007).

Commission recognized in a recent publication, courts continue to "disagree" regarding the meaning of the current language, "sometimes inconsistently appl[y]" it to couriers and mules, and disagree on whether someone who plays a peripheral role qualifies for a four-level minimal-role-adjustment, or only a two-level minor-role-adjustment.[43] Because the role adjustments still lack clarity, "[s]imilar offenders are likely to receive different sentences not because they are warranted by different facts, but because the same facts are interpreted in different ways by different decision makers."[44]

We encourage the Commission to clarify the minor role adjustments in the ways set forth in the Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable William K. Sessions, III, Chair, U.S. Sentencing Comm'n, at 18-22 (Aug. 18, 2010).

Career Offender, USSG §4B1.1

In the past, we have offered extensive comment on the career offender guideline, including how it fails to reflect national experience and empirical data, how it can be fixed to better capture truly repeat violent offenders and serious drug traffickers, and how it has a disproportionate impact on African-Americans and other people of color. Letter from Jon Sands, Chair, Federal Defender Guideline Committee to the Honorable Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n (July 19, 2006). While the data the Commission makes available on below guideline sentences in career offender cases is limited, the data that is available shows that the guideline is fundamentally flawed. According to the Commission's March 2006 *Booker* report, the rate of below guideline sentences in career offender cases climbed in the year after *Booker* to 21.5%.[45] The numerous cases where courts depart or vary from the career guideline provide additional evidence that the guideline is not working.[46]

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[43] USSC, *Aggravating and Mitigating Role Adjustments Primer §§ 3B1.1 & 3B1.2* 9-12 (Apr. 2011).

[44] Barbara Vincent, *Informing a Discussion of Guideline Simplification*, 8 Fed. Sent'g Rep. 36, 37 (Aug. 1995).

[45] *See* USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 137 (2006).

[46] Numerous courts have sentenced below the career offender guideline because the guideline resulted in a sentence greater than necessary, particularly in light of the actual severity of the defendant's criminal record, and the need for deterrence and incapacitation. *See, e.g., United States v. MacKinnon*, 401 F.3d 8, 10 (1st Cir. 2005) (remanding for *Booker* error where district court stated career offender sentence was an "unjust, excessive, and obscene sentence"); *United States v. Williams*, 435 F.3d 1350, 1353 (11th Cir. 2006) (district court found difference between non-career offender guideline range and career offender range "too disparate to ignore" and could not "in good conscience" impose 188 months imprisonment); *United States v. Malone*, 2008 WL 6155217, at *4 (E.D. Mich. Feb. 22, 2008) (imposition of career offender sentence would have "unwarranted impact on [the] minority groups (of which he is a member) without clearly advancing a purpose of sentencing") (quoting *Fifteen Year Report* at 133); *United States v. Fernandez*, 436 F. Supp. 2d 983, 990 (E.D. Wis. 2006) (defendant's prior convictions for selling small

Among other flaws, the career offender guideline (1) overstates the risk of recidivism when the defendant's predicate offenses are drug offenses – a fact that the Commission itself has acknowledged;[47] (2) it sets forth a definition for "crime of violence" that is overly broad and empirically unjustified; (3) it employs a definition of controlled substance offense that fails to distinguish serious from non-serious offenders – it treats kingpins exactly the same as street-dealers, and it treats distributors of counterfeit substances the same as those who distribute real drugs;[48] and (4) it counts as career offender predicates misdemeanor convictions that resulted in only minimal punishment in state court.[49]

We continue to believe that the Commission should fix this guideline. Our priorities letter dated July 1, 2010 contains additional recommendations on how the Commission might change the career offender guideline to ameliorate its harsh effect in some cases. Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable William K. Sessions, III, Chair, U.S. Sentencing Comm'n, at 18-22 (July 1, 2010).

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quantities of crack cocaine did not warrant career offender sentence); *United States v. Person*, 377 F. Supp. 2d 308, 310 (D. Mass. 2005) (imposing 84 month term of imprisonment rather than the 262 months called for under the career offender guideline; defendant had only one scorable prior drug conviction for which he served 12 months and a minor resisting arrest conviction for which he received probation); *United States v. Whigham*, 754 F. Supp. 2d 239, 248 (D. Mass. 2010) (petty drug dealer not the kind of person Congress had in mind when it directed Sentencing Commission to promulgate career offender guideline).

[47] *Fifteen Year Review*, *supra* note 3, at 134 ("career offender guideline thus makes the criminal history category a *less* perfect measure of recidivism than it would be without the inclusion of offenders qualifying only because of prior drug offenses"); *see also Malone*, 2008 WL 6155217, at *4 (relying on the Commission's findings that when the priors are drug offenses, the career offender guideline is not justified by increased recidivism or deterrence and creates racial disparity, combined with individual characteristics, to conclude that a higher sentence "would be following a 'statutory directive' for the sake of the directive, *i.e.*, to exalt form over substance.").

[48] In a recent case in the Northern District of Iowa, a defendant was sentenced as a career offender based on two convictions for delivery of a "simulated controlled substance." Neither offense involved any controlled substance. *United States v. Brown*, 638 F.3d 816, 818 (8th Cir. 2011).

[49] *United States v. Colon*, 2007 WL 4246470, at *6 (D. Vt. 2007) (Sessions, J.) (departing downward where defendant was classified as career offender on the basis of two state misdemeanor convictions for which he never served time in state prison system); *United States v. Ennis*, 468 F. Supp. 2d 228, 234 (D. Mass. 2006) (definition of career offender predicates covers misdemeanors that are punishable in Massachusetts by more than one year, resulting in more Massachusetts offenders convicted of assault being classified as career offenders than elsewhere in the country).

Resolution of Disputed Factors, USSG §6A1.3

Procedural fairness is critically important to promote respect for the law. Its absence has a profound impact on the defendant's liberty interest and "affects the public's view of the legitimacy of the law."[50] The weak procedural protections in USSG §6A1.3 undermine the legitimacy of the sentencing process, serve as a source of disparity in application of the guidelines,[51] and lead to the imposition of "enhanced punishment based on unreliable evidence."[52] As one commentator put it:

> The absence of procedural safeguards at sentencing has led to an under examined form of disparity. Evidentiary and procedural rules – such as burdens of proof, standards of proof, exclusions of evidence, hearsay rules, and the like – attempt to instill a certain equilibrium or parity between the parties in an adversarial system. Their elimination undermines the credibility of the adversarial process and creates a disparity based more on the inequitable positions of the parties than on the reliability or relevance of the evidence presented.

First Principles, supra note 7, at 310.

The disparity created by insufficient procedural safeguards is perhaps most apparent in the presumption afforded hearsay statements included in presentence reports[53] in many circuits. This presumption has the effect of shifting the burden of proof to the defense to disprove the existence of aggravating factors.[54] In these circuits, the government may satisfy its burden of proving relevant conduct, specific offense characteristics, criminal history, or other enhancements by simply providing to the probation officer hearsay from undisclosed sources,

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[50] *See generally* Ngov, *supra* note 8, at 299.

[51] *See* Susan N. Herman, *Procedural Due Process in Guidelines Sentencing*, 4 Fed. Sent'g Rep. 295, 295 (1992); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161, 165 (1991).

[52] Mark Allenbaugh, *Stop Wagging the Dog: A Plea for the New Commission to Incorporate Due Process and Higher Standards of Proof into the Sentencing Hearing*, 23 Fed. Sent'g Rep. 253 (2011) (citing American College of Trial Lawyers, *The Law of Evidence in Federal Sentencing Proceedings* 19 (1997)); *see also First Principles*, *supra* note 7, at 316 (2005) ("absence of evidentiary requirements for sentencing factors, including those relating to relevant conduct, greatly empower the prosecutor to increase the offender's sentence").

[53] Justice Scalia has described presentence reports as "bureaucratically prepared, hearsay-riddled" documents. *United States v. Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting).

[54] *See generally* Hutchison, *supra* note 41, at §6A1.3 (discussing split in circuits on whether district court may treat allegations in PSR as evidence).

unreliable witnesses, or cooperating witnesses with obvious motives to lie. The probation officer then incorporates the hearsay into the presentence report, which is presumed reliable.[55]

The defendant's objection to the information in the report is not sufficient to keep the burden on the government to show the reliability of the evidence or to prove the ultimate fact. Rather "the defendant has an affirmative duty to make a showing that the information in the presentence report is unreliable, and articulate the reasons why the facts contained therein are untrue or inaccurate."[56] Such burden shifting gives prosecutors a significant advantage at sentencing, allowing them to prove aggravating factors and relevant conduct with the rankest of hearsay – the source of which may not even be disclosed to defense counsel. In many cases, the presumption of reliability of hearsay in a presentence report, combined with the relevant conduct rules, increases the sentence far beyond what it would have otherwise been.[57] Moreover, when a defendant seeks to challenge the evidence, he runs the risk of losing a reduction for acceptance of responsibility[58] and of having his sentence increased for obstruction of justice.

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[55] Where the government does not bring the pertinent facts to the probation officer or the court, the system relies on probation officers to conduct investigations and report the "facts." Stith, *supra* note 4, at 1436-38.

[56] *United States v. Terry*, 916 F.2d 157, 160-64 (4th Cir. 1990), *cited in United States v. Powell*, __ F.3d __, 2011 WL 1797893, at *5 (4th Cir. May 12, 2011)). *See also United States v. Turner*, 604 F.3d 381, 385 (7th Cir. 2010) ("defendant's bare denial of information in a presentence report is insufficient to challenge its accuracy and reliability"); *United States v. Mustread*, 42 F.3d 1097, 1101-02 (7th Cir. 1994) ("Generally, where a court relies on a PSR in sentencing, it is the defendant's task to show the trial judge that the facts contained in the PSR are inaccurate."); *United States v. Fuentes*, 2011 WL 501306 (5th Cir.) (defendant bears burden of showing information in presentence report is materially unreliable) (quoting *United States v. Ford*, 558 F.3d 371, 377 (5th Cir. 2009)), *cert. denied*, __ S. Ct. __ (May 23, 2011) (No. 10-10092); *United States v. Carbajal*, 290 F.3d 277, 287 (5th Cir. 2002) (information in the presentence report is "presumed reliable and may be adopted by the district court without further inquiry if the defendant fails to demonstrate by competent rebuttal evidence that the information is materially untrue, inaccurate or unreliable") (citations omitted).

[57] *See, e.g., United States v. Vigers*, 220 Fed. Appx. 265, 266-67 (5th Cir. 2007) (in applying enhancement for restraint of victims, district court did not err in relying on statements of co-conspirators reported in PSR where defendant failed to offer rebuttal evidence to refute it; information was presumed reliable and court was free to adopt it "without further inquiry"); *United States v. Garcia*, 202 Fed. Appx. 825, 826 (5th Cir. 2006) (district court properly relied on hearsay of co-defendants set forth in PSR in calculating drug quantity).

[58] *United States v. Taylor*, 376 Fed. Appx. 411, 413 (5th Cir. 2010) (speculative statement in PSR about intended use of explosive device was presumed reliable and provided sufficient basis upon which to find that defendant lied about his intended use and therefore was not entitled to reduction for acceptance of responsibility); *United States v. Harris*, 2000 WL 1657963, at *2 (7th Cir. Nov. 3, 2000) (defendant denied acceptance of responsibility because he challenged accuracy of drug quantity reported in PSR). *But see United States v. Jimenez-Oliva*, 82 Fed. Appx. 30, 34 (10th Cir. 2003) (no error in giving

Other circuits, in contrast, do not permit a court to rely on the presentence report to make findings on contested issues of fact. In those circuits, when a defendant objects to findings in the presentence report, the government retains the burden to prove the disputed facts by a preponderance of the evidence.[59]

To remedy a gross procedural flaw, and the disparity generated by the absence of sound guidance, the Commission should amend the commentary to USSG §6A1.3 to make clear that a "presentence report is not evidence and is not a legally sufficient basis for making findings on contested issues of fact."[60] When a defendant challenges a factual statement in a presentence report that is used to determine the applicable guideline range, the government must introduce evidence to establish that fact by the appropriate standard of proof consistent with due process.

The Commission also should strike from the commentary to §6A1.3 the last sentence, which states: "The Commission believes that the use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." This standard of due process is not sufficient and the Supreme Court has not resolved the issue.[61]

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defendant reduction for acceptance of responsibility after he objected to presentence report and put government to its burden of proof on aggravating role adjustment). *See generally* Nancy Glass, *The Social Workers of Sentencing? Probation Officers, Discretion, and the Accuracy orf Presentence Reports under the Federal Sentencing Guidelines*, 46 Crim. L. Bull., Art. 2 (Jan./Feb. 2010) ("costs associated with making objections deter defendants from contesting factual assertions in presentence reports").

[59] *See United States v. Ramos-Colin*, 2011 WL 1900718, at *1 (11th Cir. May 20, 2011). *See also United States v. Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005) ("by placing the burden on [the defendant] to disprove the factual statements made in the PSR, the district court improperly shifted the burden of proof to [the defendant] and relieved the government of its burden of proof to establish the offense level"); *United States v. Wise*, 976 F.2d 393, 404 (8th Cir. 1992) (en banc) (PSR "is not evidence and is not a legally sufficient basis for making findings on contested issues of material fact"; discussing how court that presumes hearsay in PSR reliable has "turned the general approach to hearsay on its head").

[60] *United States v. Stapleton*, 268 F.3d 597, 598 (8th Cir. 2001); *United States v. Sorrells*, 432 F.3d 836, 839 (8th Cir. 2005) (remanding for resentencing where defendant objected to allegations in presentence report about uncharged conduct but district court relied on presentence report in making factual findings).

[61] *See United States v. Henry*, 472 F.3d 910, 920-21 (D.C. Cir. 2007) (Kavanaugh, J., concurring) (noting inconsistency between lower standard of proof and *Booker's* constitutional opinion); *United States v. Pimental*, 367 F. Supp. 2d 143, 154 (D. Mass. 2005) (if guidelines continue to be important, due process requires "procedural safeguards and a heightened standard of proof, namely, proof beyond a reasonable doubt"). *See generally* Allenbaugh, *supra* note 52, at 253.

Conclusion

As the Commission decides upon its priorities for the 2011-2102 amendment cycle, we remain hopeful that it will propose priorities that are rooted in empirical research, responsive to judicial feedback, ameliorate the undue severity of the guidelines, and reduce unwarranted disparity in guideline application.

Again, we look forward to working with the Commission during the upcoming amendment cycle.

Very truly yours,
/s/ *Marjorie Meyers*
Marjorie Meyers
Federal Public Defender
Chair, Federal Defender Sentencing
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