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

Re: Proposed Priorities for 2013-2014

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. § 944(o), offer the following suggestions for the Commission's consideration this year.¹ Many of our suggested priorities are directed at recurring problems with guidelines that lack empirical evidence, create disproportionately severe sentences, or result in inconsistent application. We encourage the Commission to:

- 1) be prepared to respond to immigration reform legislation, which, if passed, will require a substantial rewrite of the guidelines for immigration offenses;
- 2) encourage Congress to amend the good time credit statute so that it at least conforms to the assumptions underlying the Sentencing Table, i.e., defendants would serve 85% of the sentence imposed;
- 3) encourage Congress to provide for a Federal Defender ex officio on the Sentencing Commission so that the Commission's decision-making is more fully informed;

¹ We assume that the Commission will continue its work on mandatory minimum penalties, child pornography, recidivism, and economic crimes.

- 4) study and revise the drug guidelines or, at a minimum, revise the rules for calculating the offense levels for mixtures or substances containing methamphetamine, amphetamine, certain List I chemicals, for MDMA;
- 5) simplify the fraud guideline at USSG §2B1.1;
- 6) narrow the scope of the career offender guideline at USSG §4B1.1;
- 7) amend the definitions for crime of violence, aggravated felony, and drug trafficking offense;
- 8) modify the relevant conduct rules in USSG §1B1.3 to prohibit the use of acquitted conduct and suppressed evidence and to prohibit or limit the use of uncharged, dismissed or non-criminal conduct;
- 9) amend USSG §6A1.3 so it discourages reliance upon undisclosed evidence and unreliable hearsay;
- 10) amend USSG §1B1.8 so that it protects against the use of statements made before the parties entered into a proffer agreement, permits a court to depart downwardly in cases where prosecutors refuse to offer §1B1.8 protection, and applies to information the defendant gives about his own activities when seeking to satisfy the safety-valve requirements.

Many of our positions on these issues have been set forth in past submissions. Here, we provide a brief summary and an update of why we believe the issues are important. Last year, the Commission's agenda was largely driven by congressional directives, new legislation, circuit splits, and the Department of Justice's (DOJ) priorities. This year, we hope that the Commission returns to an agenda that begins to address the problem of mass incarceration rather than adding to it. As Attorney General Holder recently stated: "Too many people go to too many prisons for far too long for no good law enforcement reason."²

I. Immigration Reform

Pending before Congress is an immigration reform bill that, if passed, will significantly change the criminal penalty structure for certain immigration offenses, including unlawful entry under 8 U.S.C. § 1325 and illegal reentry under 8 U.S.C. § 1326. The legislation would necessitate a major rewrite of USSG §2L1.2. Among other things, it would replace the overly

² Attorney General Eric Holder, *Attorney General Eric Holder Speaks at the 15th Annual National Action Network Convention* (Apr. 4, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130404.html>.

complex and severe definition of “aggravated felony” with a penalty structure that turns on the number of prior convictions and length of the term of imprisonment for the prior offense. For example, a person who reenters after being convicted of a felony for which the person was sentenced to a term of imprisonment of not less than 30 months would face a maximum penalty of 15 years. If the term of imprisonment was not less than 60 months, the statutory maximum penalty would increase to 20 years. *See* S. 744, 113th Cong., 1st Sess. (Apr. 17, 2013). Only a select number of violent crimes against persons would qualify for an enhanced penalty. All prior convictions would be elements of the offense. The proposed bill would also increase from 6 months to 12 months the maximum penalty for unlawful entry under 8 U.S.C. § 1325(a), thus making the offense a Class A misdemeanor subject to the guidelines. USSG §§1B1.2(a) & 1B1.9.

Passage of immigration reform legislation would compel long overdue amendments of USSG §2L1.2. The failure of §2L1.2 to provide easily applicable rules that result in fair sentences is a longstanding problem that affects tens of thousands of offenders each year and that consumes substantial resources of defense counsel, probation, and the court. Section 2L1.2 was the primary guideline in 25.7% of cases in FY2012.³ Immigration cases make up the bulk of the caseload in several districts: Arizona, Southern District of Texas, Western District of Texas, Southern District of California, and New Mexico. Defense lawyers and probation officers in those districts spend hours sorting through criminal history records so that they can determine whether a prior offense falls within any of the offenses included within §2L1.2(b)(A) and (B) or otherwise meets the definition of “aggravated felony.” If, as contemplated by S. 744, the seriousness of the offense turned on the number of convictions and term of imprisonment as in §4A1.1, rather than on the nature of the conviction, the adjudicatory process would be more fair, less costly, and less prone to error. As Defenders observed three years ago at the Commission’s regional hearings, using Chapter Four criminal history calculations in determining offense levels under §2L1.2 “would avoid the unnecessary complexity that arises from multiple determinations based on multiple definitions.”⁴

If an immigration reform package becomes law, we encourage the Commission to open its decision-making process before considering proposed amendments. A public roundtable format that allows for the free exchange of ideas between Commissioners and interested stakeholders would provide the Commission with insights from practitioners and others that it would not necessarily acquire otherwise. Untethered from any set of proposed amendments, a

³ USSC, *2012 Sourcebook of Federal Sentencing Statistics* tbl. 17 (2012) (hereinafter *2012 Sourcebook*).

⁴ Statement of Henry Bemporad, Before the U.S. Sentencing Comm’n, Phoenix, Arizona, at 14 (Jan. 1, 2010).

roundtable would allow for a robust exploration and discussion of potential options for amending the guidelines related to immigration offenses.

II. Good Time Credits

The Commission should make a report and recommendation to Congress that it increase the amount of good time credits an inmate may earn. Such legislation would fix the erroneous assumption in the guidelines that defendants would serve 85% of their prison sentence. When the Commission structured the Sentencing Table, it assumed that an inmate could earn a maximum of 54 days good time credits per year of sentence imposed, and thus would serve 85% of the sentence.⁵ As the Commission is aware, that premise is incorrect. BOP's formula for calculating good time credits results in a maximum of only 47 days of good time credit earned per year of sentence imposed.⁶ Under BOP's formula, a defendant must serve 87.1% of the sentence. As a result, defendants serve prison sentences that are greater than what the Commission determined necessary to accomplish the purposes of sentencing. While BOP's formula has been upheld by the Supreme Court,⁷ BOP has supported amending 18 U.S.C. § 3624(b) "such that 54 days would be provided for each year of the term of imprisonment originally imposed by the judge, which would result in inmates serving 85 percent of their sentence."⁸ Such a legislative fix would calibrate sentences served with the assumptions underlying the Sentencing Table. It would have the additional benefits of saving "untold millions of dollars"⁹ and easing prison overcrowding. The BOP provided estimates to the Government Accountability Office (GAO) showing that if good time credits were increased by seven days, 3,900 incarcerated inmates would be released in the first fiscal year after the change, saving approximately \$40 million in that year alone.¹⁰ Over the next several years, the savings would amount to hundreds of millions of dollars.

⁵ USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 23 (1987).

⁶ Government Accountability Office, *Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison* 23 (Feb. 2012) (hereinafter *GAO BOP Report*).

⁷ *Barber v. Thomas*, 130 S. Ct. 2499 (2010).

⁸ *GAO BOP Report*, at 24. In recent years, several bills have been introduced in Congress to change the award of good time credits so that inmates earn more than 47 days per year. See, e.g., S. 1231, 112th Cong. (2011); H.R. 2344, 112th Cong. (2011). See also Statement of Harley Lappin, Director of the Federal Bureau of Prisons, Before the U.S. Sentencing Comm'n, at 3-4 (Mar. 17, 2011).

⁹ *Barber*, 130 S. Ct. at 2512 (Kennedy, J., dissenting).

¹⁰ *GAO BOP Report*, at 25.

At a minimum, the Commission should encourage Congress to amend the good time credit statute so that inmates who receive the maximum credits serve no more than 85 percent of their sentence.

III. Defender Ex Officio

For years we have asked the Commission to recommend to Congress that it amend the Sentencing Reform Act to provide for a Federal Defender ex officio member of the Sentencing Commission. The Judicial Conference of the United States, upon recommendation of the Committee on Criminal Law, voted to support such a change almost a decade ago. We believe the Commission should proactively encourage Congress to adopt legislation authorizing a Federal Defender ex officio.

The absence of a Federal Defender ex officio continues to deprive the Commission of valuable advice and input at crucial stages of the decision-making process. The Commission consistently commends the Defenders for their public comments, but those comments could be significantly more helpful if Defenders were placed on the same footing as the DOJ ex officio, who can supplement information provided to the Commission and rebut Defender positions without Defenders having an opportunity to be heard. The presence of a DOJ ex officio on the Commission also gives DOJ witnesses before the Commission a significant advantage because they are able to gain access to non-public information relevant to the Commission's decision-making process, including staff memos, data analysis, the results of special coding projects, and information on Commission discussions.

The Commission is among a small minority of sentencing commissions that do not have a representative from the public defender system or the defense bar. After two and one-half decades of being deprived of the breadth and experience of a representative of the Federal Defender system, it is time for the Commission to have the benefit of Defender knowledge at all stages of the decision-making process. Federal Public and Community Defender organizations represent a sizable number of defendants in criminal proceedings throughout the country. In 2012, federal prosecutors filed cases against 94,121 defendants.¹¹ In the same period, Federal Defender organizations opened 86,142 criminal representations, not including appeals, revocation proceedings, and motions to reduce sentence.¹² Given that Federal Defenders represent the bulk of federal criminal defendants, Defenders and DOJ should have an equal voice in setting sentencing policy and should be equal partners in improving the guideline system. For

¹¹ Administrative Office of U.S. Courts, *Judicial Caseload Indicators* (2013), <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/judicial-caseload-indicators.aspx>.

¹² Administrative Office of U.S. Courts, *Representations by Federal Defender Organizations During the 12-Month Periods Ending September 30, 2008 through 2012, Table S-21*, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/tables/S21Sep12.pdf>.

these reasons, we ask that the Commission recommend to Congress that it amend the Sentencing Reform Act to provide for a Federal Defender ex officio representative to the Sentencing Commission.

IV. The Drug Quantity Table, Methamphetamine and MDMA

A. Drug Quantity Table

In past submissions, we have asked that the Commission take the modest step of reducing by two the offense levels in the Drug Quantity Table.¹³ We continue to believe that this is an important priority. The drug trafficking guideline has had a substantial impact on the federal prison population and is largely responsible for the severe overcrowding that has plagued the Bureau of Prisons for years.¹⁴ The guideline does not track the offender's role in the offense, culpability, or the harm associated with various drugs. As Judge Weinstein put it: "[t]he drug trafficking guideline was born broken." *United States v. Diaz*, 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013). "We must never lose sight of the fact that real people are at the receiving end of these sentences. Incarceration is often necessary, but the unnecessarily punitive extra months and years the drug trafficking offense guideline advises us to dish out matter: children grow up; loved ones drift away; employment opportunities fade; parents die." *Id.* Because the drug guidelines too often result in sentences that are greater than necessary to comply with the purposes of sentencing, we continue to believe that restructuring §2D1.1 should be a top priority of the Commission.¹⁵

B. Methamphetamine, Amphetamine, and Related List I Chemicals

The Commission also should reexamine the drug equivalencies for Methamphetamine, Amphetamine, and List I Chemicals relating to the manufacture of amphetamine or methamphetamine (ephedrine, pseudoephedrine, phenylpropanolamine). These drugs carry marijuana equivalency ratios that are out-of-sync with their harm. The marijuana equivalency for various drugs is set forth below.

¹³ Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 9 (June 6, 2011).

¹⁴ Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed. Sent'g Rep. 29 (1990); John Scalia, *The Impact of Changes in Federal Law and Policy on the Sentencing of, and Time Served in Prison By, Drug Defendants Convicted in Federal Courts*, 14 Fed. Sent'g Rep. 152 (2002).

¹⁵ In addition to those identified in our previous submissions, another commentator has recently criticized the manner in which the drug guidelines consider statutory mandatory minimum penalties and place too much emphasis on drug quantity. See Kevin Bennardo, *Decoupling Federal Offense Guidelines From Statutory Limits on Sentencing*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197126 (Missouri Law Review forthcoming).

Drug	Marijuana Equivalency Ratio in grams
Cocaine powder	200:1
MDMA	500:1
Heroin	1000:1
Methamphetamine	2000:1
Amphetamine	2000:1
Cocaine base	3571:1
List I Chemicals (ephedrine, phenylpropanolamine, pseudoephedrine)	10,000:1
Methamphetamine (actual)	20,000:1
Amphetamine (actual)	20,000:1
LSD	100,000:1

As the chart shows, methamphetamine (actual) and amphetamine (actual) have replaced crack cocaine as one of the most harshly punished drugs under the guidelines, carrying a 100:1 cocaine powder to methamphetamine (actual) ratio.¹⁶

A review of the data shows that the drug quantity table results in sentences that are often too high in cases involving methamphetamine. In FY2012, 21.5% of methamphetamine cases received a non-government sponsored below range sentence.¹⁷ That is above the 17.8% rate for all non-government sponsored below range sentences¹⁸ and a 69.3% increase in the rate of below range sentences from FY2008 to FY2012.¹⁹ As the chart below shows, the percentage of non-government sponsored below range sentences has steadily increased from 12.7% in FY2008 to 21.5% in FY2012.²⁰

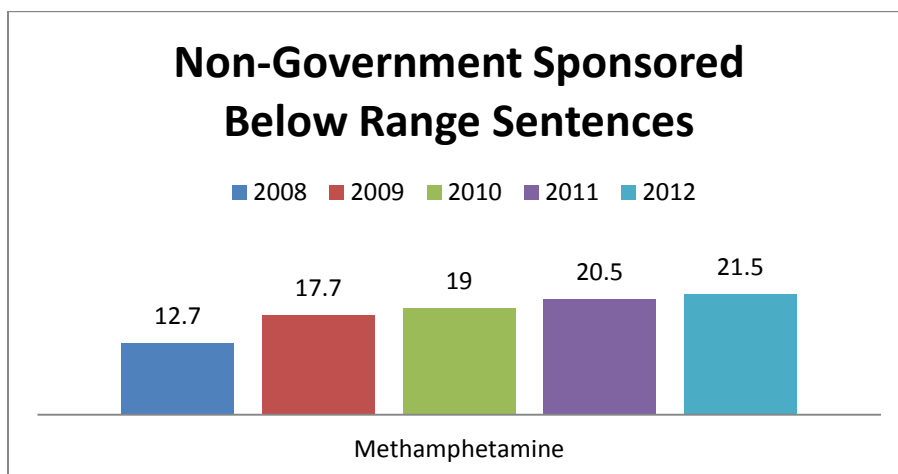
¹⁶ The ratio of powder to LSD is 500:1.

¹⁷ 2012 Sourcebook, at tbl. 45.

¹⁸ 2012 Sourcebook, at tbl. N.

¹⁹ *Id.* at tbl. 45; USSC, 2008 Sourcebook of Federal Sentencing Statistics, at tbl. 45 (2008).

²⁰ This data is drawn from table 45 of the Sourcebook of Federal Sentencing Statistics for fiscal years 2008 through 2012.



Rates of government sponsored below-guideline sentences have also increased over time.²¹ At the same time, the average guideline minimum has changed little, indicating that the general nature of methamphetamine offenses has remained the same. Whereas the average guideline minimum sentence since 2008 has been around 121 months (low end of 121-151 month range), the average non-government sponsored below range sentence has been 91 months²² (middle of 87-108 month range), i.e., three offense levels lower than the average guideline minimum range. In short, as the Commission itself has acknowledged, the available data show that the influence of the guidelines in methamphetamine cases has diminished over time.²³

The methamphetamine guidelines are losing their influence because they result in overly harsh sentences for many first time offenders and lack empirical evidence.²⁴ Approximately fifty percent of offenders involved in methamphetamine offenses fall within Criminal History Category I.²⁵ Yet, they face substantial prison sentences under the guidelines, which undermine the purposes of sentencing. Prison sentences for low-risk drug offenders increase their risk of

²¹ USSC, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (hereinafter *Booker Report*): Part C: Drug Trafficking Offenses, Methamphetamine 8 (2012).

²² *Id.* at 6.

²³ *Id.* at 8.

²⁴ *Gall v. United States*, 552 U.S. 38, 46 n.2 (2007) (noting that Commission departed from empirical approach when setting guideline range for drug offenses).

²⁵ *Booker Report*, Part C: Drug Trafficking Offenses, Methamphetamine, at 4.

recidivism²⁶ and long prison sentences are not necessary to deter non-violent drug offenders with little criminal history.²⁷

The history of the methamphetamine guideline shows that the guidelines increased over time, not because of evidence showing that methamphetamine was more dangerous than other drugs, but because of the Commission's response to congressional actions and for political reasons. The original Drug Quantity Table did not include methamphetamine offenses because the 1986 Anti-Drug Abuse Act did not include mandatory minimums for methamphetamine. Instead, based on information from the DEA, the Commission assigned methamphetamine a marijuana equivalency twice that of cocaine.²⁸ This meant that 250 grams of methamphetamine triggered a base offense level 26. Over the next decade, the methamphetamine guidelines underwent three substantial revisions that increased the marijuana equivalency ratio.²⁹ The changes in the amounts of methamphetamine necessary to trigger a base offense level 26 are set forth in the table below.

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²⁶ See Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent'g Rep. 22 (1994).

²⁷ U.S. Dep't of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (1994).

²⁸ The Commission did not base the original guidelines on methamphetamine on past practices or publicly vetted information, but on information from the DEA. USSC, *Methamphetamine – Final Report of the Methamphetamine Policy Team*, at 7 (1999) (hereinafter *Methamphetamine Report*).

²⁹ See generally *Booker Report, Part C: Drug Trafficking Offenses*.

Amendment Date	Meth Actual BOL 26	Meth Mix BOL 26	Relevant Statutes
1987	250g	250g	
1989	10g	100g	Anti-Drug Abuse Act of 1988 ³⁰ established mandatory minimum penalties for methamphetamine, which the Commission incorporated into the Drug Quantity Table
1997	10g	50g	Comprehensive Methamphetamine Control Act ³¹ of 1996 general directive to review and amend guidelines
2000	5g	50g	Methamphetamine Trafficking Penalty Enhancement Act of 1998 ³² changed mandatory minimum penalty for methamphetamine (actual)

This history, which ended with methamphetamine (actual) having the same equivalency of crack cocaine,³³ is tainted with exaggerated fears and political considerations just as is the history of the crack cocaine guideline. The Commission was well aware of the political ramifications of its decisions. Indeed, in 2000, when the Commission “conformed” the methamphetamine guidelines for actual meth to the mandatory minimum quantities established by Congress, the policy team reported that “un-linking the Drug Quantity Table from the mandatory minimum quantities established by Congress in a manner that reduces sentences would vary from past practice of the Commission and may prove politically unwise.”³⁴

That same report discusses trafficking and use patterns associated with methamphetamine, but, unlike the Commission’s reports on cocaine,³⁵ it does not examine in any

³⁰ Pub. L. No. 100-690, 102 Stat. 4181 (1988).

³¹ Pub. L. No. 104-237, 110 Stat. 3099 (1996).

³² Pub. L. No. 105-277, § E, 112 Stat. 2691 (1998).

³³ The Methamphetamine Report notes: “[t]he triggering quantities for the methamphetamine substance itself are now equal to those for crack cocaine, an overt objective noted and apparently sought by some sponsors of the legislation.” *Methamphetamine Report*, at 12.

³⁴ *Id.* at 18.

³⁵ USSC, *Special Report to the Congress – Cocaine and Federal Sentencing Policy – February 1995* (1995); USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (1997); USSC,

detail the effects of methamphetamine or its relative harm compared to other drugs.³⁶ Without such data, the Commission's decision to punish methamphetamine more severely than other drugs was poorly informed and lacked empirical support. Also lacking empirical support was the decision to treat methamphetamine (actual) more severely than a methamphetamine (mix). As one judge found: "there is no empirical data or study to suggest that actual purity should be punished more severely by arbitrary increase of the four levels in this case or at the higher level. It seems to be black box science, as best I can determine. . . . It seems to me that this is not even a rough approximation to comply with 3553, and is not really based on any consultation or criminal justice goals or data."³⁷

Currently available data show that methamphetamine and other stimulants are not as harmful as other drugs that are punished less severely. Any meaningful attempt to measure the harm caused by a drug based on drug type and quantity should take into account the typical dosage amounts. Listed below are the average dose amounts for cocaine, methamphetamine, and heroin and the corresponding dosage yield at offense level 26.

- Cocaine
 - average user dose of 1g or less a day³⁸; minimum quantity at OL 26 is 500 g = minimum of 500 daily doses
- Heroin
 - average user dose of 300-500mg a day³⁹; minimum quantity at OL 26 is 100g = 200 to 333 daily doses

Report to the Congress: Cocaine and Federal Sentencing Policy (2002); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (2007).

³⁶ Information that showed a decline in incidents involving methamphetamine from 1997 to 1998, and which would not have supported an increase in the guidelines for methamphetamine, received mention in a footnote in the report. *Methamphetamine Report*, at 7 n.17.

³⁷ Transcript of Sentencing, *United States v. Santillanes*, No. 07-619 (D.N.M. Sept. 19, 2009).

³⁸ Independent Drug Monitoring Unit, *Cocaine in the UK: IDMU Submission to the House of Commons Home Affairs Select Committee* 7 (June 2009), http://www.idmu.co.uk/images/stories/idmu_cocaine_uk.pdf.

³⁹ National Traffic Highway Safety Administration, *Drugs and Human Performance Fact Sheets: Morphine (and Heroin)*, <http://www.nhtsa.gov/People/injury/research/job185drugs/morphine.htm>.

- Methamphetamine (actual)
 - o average user dose of 100-1000mg a day⁴⁰; minimum quantity at OL 26 is 5g = 5 to 50 daily doses

If the policy is to punish higher level traffickers in a large market more severely than lower-level ones in a smaller market,⁴¹ then the drug equivalency for methamphetamine is too high. An offender with enough meth (actual) to supply 10 persons with 5 days worth of methamphetamine is punished the same as the offender with enough cocaine to supply 100 persons with 5 days worth of cocaine. Yet, a far greater number of persons report dependence or abuse of cocaine (821,000) than of any other stimulant, including methamphetamine (329,000).⁴²

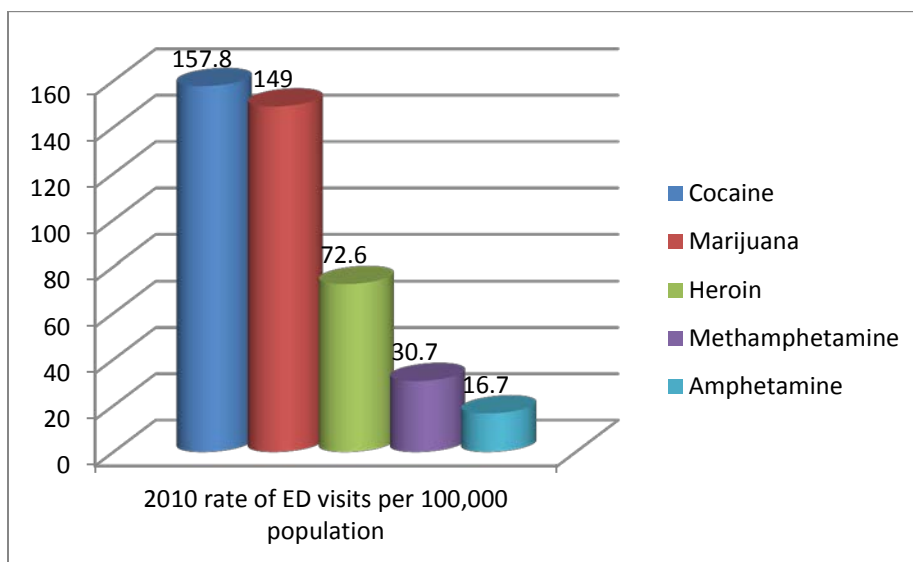
Other measures of harm and prevalence likewise show that methamphetamine does not present nearly the same problem as some other drugs of abuse. 2010 data from the Drug Abuse Warning Network (DAWN) show that more emergency department visits occurred for cocaine, heroin, and marijuana than for amphetamine/methamphetamine.⁴³

⁴⁰ National Traffic Highway Safety Administration, *Drugs and Human Performance Fact Sheets: Methamphetamine (And Amphetamine)*, <http://www.nhtsa.gov/People/injury/research/job185drugs/methamphetamine.htm>.

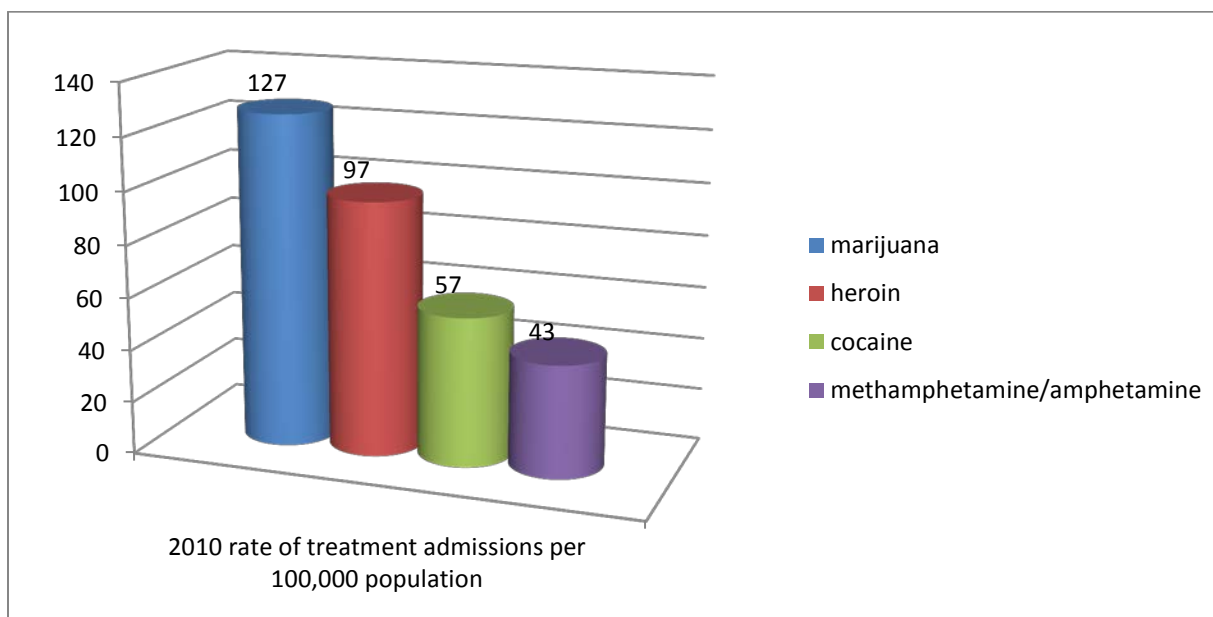
⁴¹ According the Commission's most recent analysis, the majority of methamphetamine trafficking offenders are concentrated in seven states, with none in the East. *Booker Report, Part C: Drug Trafficking Offenses, Methamphetamine*, at 1. Substance Abuse and Mental Health Services Administration, *Treatment Episode Data Set 2000-2010* 18 (2010) (treatment admissions for methamphetamine greatest in Arizona, California, Nevada, Nebraska, New Mexico, and Utah), <http://www.samhsa.gov/data/2k12/TEDS2010N/TEDS2010NWeb.pdf>.

⁴² Substance Abuse and Mental Health Services Administration, *Results from the 2011 National Survey on Drug Use and Health: Summary of National Findings*, Fig. 7.2 (2012), <http://www.samhsa.gov/data/nsduh/2k11results/nsduhresults2011.htm>.

⁴³ Substance Abuse and Mental Health Services Administration, *Drug Abuse Warning Network, 2010: National Estimates of Drug-Related Emergency Department Visits*, tbl. 5 (2010), <http://www.samhsa.gov/data/2k13/DAWN2k10ED/DAWN2k10ED.htm>.



Similarly, more treatment admissions occurred for heroin, cocaine, and marijuana than for methamphetamine and amphetamine.⁴⁴



In short, the available data and judicial feedback show that the current guidelines for methamphetamine are too high and should be revisited. The experience with crack cocaine

⁴⁴ Substance Abuse and Mental Health Services Administration, *Treatment Episode Data Set (TEDS) 2000-2010 State Admissions to Substance Abuse Treatment Services*, tbl. 2.3 (2010), <http://www.samhsa.gov/data/2k13/TEDS2010/TEDS2010StWeb.pdf>.

sentencing shows that reducing penalties for methamphetamine is likely to increase the rate of within guideline sentences.⁴⁵

C. MDMA

The scientific findings relied on by the Commission to change the marijuana-to-MDMA equivalency from 35-to-1 to 500-to-1, have been discredited and should be revisited.

Several courts have rejected the 500-to-1 ratio. In *United States v. McCarthy*, Judge Pauley in the Southern District of New York considered the defendant's request, pursuant to *Booker*,⁴⁶ *Kimbrough*,⁴⁷ and *Spears*,⁴⁸ to reject the 500-to-1 marijuana equivalency because the scientific basis regarding MDMA's harms has been either entirely repudiated or seriously undercut by more recent research, and to structure a downward variance by replacing it with a 1-to-1 equivalency, or at most, a 35-to-1 equivalency. *United States v. McCarthy*, 2011 WL 1991146, at *1-2 (S.D.N.Y. May 19, 2011). The court held an evidentiary hearing at which it heard from four expert witnesses (two for the defense and two for the government) regarding the current state of scientific research and other data regarding MDMA and its harms relative to other drugs. *Id.* at *2-3.

After considering the evidence and expert testimony, the court found that MDMA's physical harms are less severe than previously believed, and that the Commission's analysis of its harms, "particularly as compared to cocaine – was selective and incomplete." *Id.* Considering the same factors that the Commission considered when it decided to set MDMA penalties lower than for heroin, the court found that "much of the evidence indicates that MDMA is less harmful than cocaine." *Id.* at *4 n.2 (emphasis added). According to the court, the Commission's selective "focus[] on the few ways in which MDMA is more harmful than cocaine," while disregarding "several significant factors suggesting that it is in fact less harmful," amounted to "opportunistic rummaging" that is "incompatible with the goal of uniform sentencing based on empirical data." *Id.* at *4.

The court rejected the 500-to-1 equivalency as unsupported by relevant empirical evidence, and determined that a 200-to-1 equivalency, the same as that for cocaine, was better supported by the evidence. *See also United States v. Qayyem*, 2012 WL 92287 (S.D.N.Y. Jan. 11, 2011). Although the court concluded that Mr. McCarthy had not submitted "sufficient evidence that the harm posed by MDMA is equal to that of marijuana," *McCarthy*, at 4, "an even

⁴⁵ *Booker Report, Part C: Drug Trafficking Offenses, Methamphetamine*, at 7.

⁴⁶ *United States v. Booker*, 543 U.S. 220 (2005).

⁴⁷ *Kimbrough v. United States*, 552 U.S. 85 (2007).

⁴⁸ *Spears v. United States*, 555 U.S. 261 (2009).

lower equivalency may be appropriate given a sufficient factual foundation in a later case.” *Id.* at *4 n.2. Other courts have followed the guideline ratio, but acknowledge “that considerable uncertainty exists as to the science and policies underlying the marijuana-to-MDMA ratio.” *See, e.g., United States v. Thompson*, 2012 WL 1884661 (S.D. Ill. May 23, 2012); *United States v. Kamper*, 860 F. Supp. 2d 596 (E.D. Tenn. 2012); Transcript of Sentencing 2-4, 6-8, 14-16, *United States v. Phan*, No. CR10-27 (W.D. Wash. Mar. 3, 2011).

The Commission’s congressional mandate is to “constantly refine national sentencing standards” based on “empirical data and national experience.”⁴⁹ The empirical evidence shows that the 500-to-1 ratio for MDMA is too high and overstates the seriousness of the offense. We encourage the Commission to revisit the ratio and construct a guideline that more appropriately considers the harm associated with MDMA.

V. Fraud

Defenders commend the Commission for engaging in a multi-year study of USSG §2B1.1 and related guidelines. The problems with the current guidelines for economic offenses run deep and, accordingly, we urge the Commission to start over, and resist the temptation to continue to tinker with the current guidelines.⁵⁰ As a judge from the Southern District of New York, the district with the second highest number of fraud sentencings in 2011,⁵¹ recently expressed, they should “be scrapped in their entirety.”⁵² Below we examine some of what is

⁴⁹ *Kimbrough*, 552 U.S. at 108.

⁵⁰ Defenders have previously urged the Commission to “resist unnecessary tinkering with a guideline that is ‘rapidly becoming a mess,’ and instead conduct a multi-year comprehensive review of what is arguably ‘the most complex of all the sentencing guidelines.’” Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 2 (Aug. 26, 2011) (quoting Allan Ellis, John R. Steer, & Mark H. Allenbaugh, *At a ‘Loss’ for Justice: Federal Sentencing for Economic Offenses*, 25 *Crim. Just.* 34, 34-35 (2011)). *See also* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 7 (July. 23, 2012) (repeating the same request). Unfortunately, in the past two amendment cycles, the Commission continued to tinker with amendments that unnecessarily increase the complexity of the guidelines. In 2012, the Commission made five additions to the commentary to §2B1.1, added to §2B1.4 a new specific offense characteristic (SOC) with a corresponding application note directing courts to consider a non-exhaustive list of eight factors in deciding whether to apply the SOC, and another addition to the commentary. In 2013, the Commission added new SOC’s to both §2B1.1 (for certain offenses related to pre-retail medical products and trade secret offenses) and §2B5.3 (for counterfeit drugs and counterfeit military goods), as well as an additional invited upward departure under §2B1.1.

⁵¹ *Booker Report, Part C: Fraud Offenses*, at 4.

⁵² Nate Raymond, *Rakoff Says Sentencing Guidelines Should Be Scrapped*, Thomson Reuters News & Insight, Mar. 11, 2013, http://newsandinsight.thomsonreuters.com/Legal/News/2013/03_-_March/Rakoff_says_sentencing_guidelines_should_be_scrapped/.

wrong with the current structure so as to demonstrate the need for wholesale changes to the fraud guideline. As the Commission's process moves forward, we are eager to provide feedback and ideas for amendment as appropriate.

The fraud guideline rests on the false assumption that "the definite prospect of prison, though the term is short, will act as a deterrent to many of these crimes."⁵³ The evidence shows no difference between probation and imprisonment when it comes to deterring white collar offenders.⁵⁴ The deterrent effect is achieved through the certainty of getting caught and punished, not in the severity of punishment.⁵⁵

Piled upon this faulty premise is USSG §2B1.1, the heart of the guidelines on economic offenses, a guideline that is so complex it currently requires more than 20 pages in the manual to explain its application, and a history that is marked by increasing severity unsupported by empirical evidence. Thus, two observations in the Commission's recent Booker Report are not at all surprising: In recent years, "[o]verall for fraud offenses, average sentence length has almost doubled," and "the influence of the guidelines has declined in fraud offenses."⁵⁶ In FY2012, only 50.1% of §2B1.1 sentences were within the guideline range. The rate of below-range sentences imposed under §2B1.1 is striking. The rate of non-government-sponsored below-range sentences was 25.3% in FY2012.⁵⁷ That contrasts to an overall non-government-

⁵³ USSG, ch. 1, intro., pt. 4(d) (1987); see also USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 56 (2004) (hereinafter *Fifteen Year Review*) (Commission sought to ensure that white collar offenders faced "short but definite period[s] of confinement").

⁵⁴ See David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 *Criminology* 587 (1995); Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 *Cardozo J. Conflict Resol.* 421, 448-49 (2007).

⁵⁵ See Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both be Reduced?*, 10 *Criminology & Pub. Pol'y* 13, 37 (2011) ("The key empirical conclusions of our literature review are that at prevailing levels of certainty and severity, relatively little reliable evidence of variation in the severity of punishment having a substantial deterrent effect is available and that relatively strong evidence indicates that variation in the certainty of punishment has a large deterrent effect, particularly from the vantage point of specific programs that alter the use of police."), <http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9133.2010.00680.x/pdf>. A 2010 review of deterrence research concluded that there is "no real evidence of a deterrent effect for severity." Raymond Pasternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 *J. Crim. L. & Criminology* 765, 818 (2010). "[I]n virtually every deterrence study to date, the perceived certainty of punishment was more important than the perceived severity." *Id.* at 817.

⁵⁶ *Booker Report, Part C: Fraud Offenses*, at 11. In recent years, "the average sentence has not increased as quickly as the average guideline minimum," *id.*, and "the rate of within range sentences for fraud offenses has generally decreased." *Id.* at 10.

⁵⁷ See *2012 Sourcebook*, at tbl. 28.

sponsored below-range rate of 17.8%.⁵⁸ The rate of government-sponsored below-range sentences was 22%.⁵⁹

For a variety of reasons, USSG §2B1.1 does not reliably capture the seriousness of the offense or the culpability of the offender. To do so, the guideline needs to encourage a focus on the real pecuniary harm done to victims, the gains reaped by defendants, the defendant's motive in committing the offense, and other factors relevant to the defendant's culpability. Currently, however, the loss calculations and victim table overstate the seriousness of the offense and culpability of the defendant, and the numerous specific offense characteristics replicate or overlap with loss, with one another and with upward adjustments that appear elsewhere in the guidelines.

Because Defenders have addressed these issues in detail in previous submissions to the Commission,⁶⁰ below we provide only a brief summary and urge the Commission to review our prior submissions as well.

The fraud guideline is driven primarily by loss – a rough proxy for the Commission's view of the defendant's level of culpability and mens rea.⁶¹ Loss, however is often a poor indicator of culpability. In many cases, loss “is a kind of accident” and thus “a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.”⁶² And “blind

⁵⁸ *Id.* at tbl. N.

⁵⁹ *Id.* at tbl. 28.

⁶⁰ See, e.g., Statement of Kathryn N. Nester Before the U.S. Sentencing Comm'n, Washington, D.C., at 1-16 (Mar. 14, 2012); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 7-9 (Aug. 26, 2011); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 7-10 (July. 23, 2012).

⁶¹ “A fraud offender's offense level is determined in large part by the amount of loss associated with the offense.” *Booker Report, Part C: Fraud Offenses*, at 3.

⁶² *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004). Numerous courts have recognized this flaw with the guideline. See, e.g., *United States v. Lauersen*, 362 F.3d 160, 164-65 (2d Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005); *United States v. Mueffelman*, 400 F. Supp. 2d 368, 372 (D. Mass. 2005) (same), *aff'd*, 470 F.3d 33 (1st Cir. 2006); *United States v. Watt*, 707 F. Supp. 2d 149, 155 (D. Mass. 2010) (sometimes loss is an effective “proxy for evaluating culpability,” “sometimes it is not”); *United States v. Faulkenberry*, 759 F. Supp. 2d 915, 928 (S.D. Ohio 2010) (“As has become common among district courts sentencing white-collar offenders in financial fraud cases, the Court finds that the loss calculation substantially overstates the gravity of the offense here and declines to impose a within-Guidelines sentence.”), *aff'd*, 461 Fed. App'x 496 (6th Cir. Feb. 15, 2012). See also Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent'g Rep. 167 (2008) (“[S]ince *Booker*, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near

emphasis on the loss calculation to the exclusion of everything else leads to bizarre results in case after case.”⁶³ Yet the severity of the loss table has been repeatedly increased by the Commission over the years, for reasons unsupported by empirical evidence.⁶⁴ Indeed, the loss table alone, without consideration of the many other specific offense characteristics that have been added over the years, went from adding a maximum of 11 levels to a defendant’s offense level in 1998, to a maximum of 30 levels today.⁶⁵

The rules governing intended loss can be particularly unfair. When intended loss is combined with the relevant conduct rules, a defendant who subjectively intends a lesser amount of loss may be held accountable for a substantially greater amount intended by co-conspirators if that greater amount is reasonably foreseeable.⁶⁶ In addition, intended loss amounts may be driven up by questionable inferences and special rules. For example, in some credit card cases, courts calculate intended loss as the credit *limit* of the credit card, even if there is no evidence the defendant consciously planned to reach that limit.⁶⁷ Also troubling is the rule that intended loss

unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines [in these cases] and the fundamental requirement of Section 3553(a) that judges impose sentences ‘sufficient, but not greater than necessary’ to comply with its objectives.”); Alan Ellis et al., *At a “Loss” for Justice: Federal Sentencing for Economic Offenses*, 25 Crim. Just. 34 (2011) (“While the fraud guideline focuses primarily on aggregate monetary loss and victimization, it fails to measure a host of other factors that may be important, and may be a basis for mitigating punishment, in a particular case.”).

⁶³ Nate Raymond, *Rakoff Says Sentencing Guidelines Should Be Scrapped*, Thomson Reuters News & Insight, Mar. 11, 2013, (quoting Judge Rakoff) http://newsandinsight.thomsonreuters.com/Legal/News/2013/03_-_March/Rakoff_says_sentencing_guidelines_should_be_scrapped/.

⁶⁴ See Statement of Kathryn N. Nester Before the U.S. Sentencing Comm’n, Washington, D.C., at 3-4 (Mar. 14, 2012) (regarding the history of the loss table).

⁶⁵ *Id.*

⁶⁶ See, e.g., *United States v. Sliman*, 449 F.3d 797, 803 (7th Cir. 2006) (defendant who subjectively intended loss amount of \$4 million in counterfeit checks was held responsible for \$26 million in intended loss).

⁶⁷ Compare *United States v. Harris*, 597 F.3d 242, 259 (5th Cir. 2010) (district court did not err in calculating the defendant’s intended loss as being equal to the credit limits of the credit cards compromised) with *United States v. Manatau*, 647 F.3d 1048, 1056–57 (10th Cir. 2011) (“a court cannot simply calculate ‘intended loss’ by totaling up credit limits without any finding that the defendant intended to inflict a loss reasonably approaching those limits”; intended loss means “a loss the defendant *purposely* sought to inflict”) and *United States v. Diallo*, 710 F.3d 147, 152-54 (3d Cir. 2013) (rejecting that aggregate credit limit is alone sufficient basis for loss amount, and remanding for resentencing where sentence was based on loss amount of \$1.6 million from aggregate credit limit, even though only \$160,000 in fraudulent activity by defendant, where loss difference would mean 6-level difference in total offense level from 27 to 21).

includes “pecuniary harm that would have been impossible or unlikely to occur.” USSG §2B1.1, comment. (n.3(A)(ii)). It simply makes no sense to say that intended, yet impossible-to-obtain, loss amounts provide an accurate reflection of offender culpability. Persons “who devise ridiculous schemes (1) do not ordinarily have the same mental state and (2) do not create the same risk of harm as those who devise cunning schemes. In short, they are not a dangerous. Thus it is entirely proper to mitigate their sentences.”⁶⁸ But the current guidelines encourage no such mitigation.

The guidelines also overstate the culpability of defendants by failing to limit the impact of the loss amount in situations where the gain to the defendant is small compared to the loss. “There is a difference in culpability between an employee who goes along with a fraud simply to keep his job and earn his ordinary salary and an employee who conceives and executes a fraud with the purpose of putting its proceeds into his pocket.”⁶⁹ When the defendant gains nothing, but the guidelines hold him accountable for the full amount of loss (intended or actual), regardless of the circumstances, the loss amount overstates the culpability of the defendant.

The problems created by the loss table are only amplified by the victim table, which like loss, counts pecuniary harm in most cases because the greater the number of victims, the greater the loss. In other words, pecuniary harm is counted twice under the current guidelines. As with the loss table, the victim table has been amended multiple times over the years in a manner that only ratchets up sentences in fraud cases.⁷⁰ And, similarly, the amendments have not been supported by empirical evidence.⁷¹ The victim table also overstates the seriousness of the offense and the culpability of offenders. For example, people who were fully reimbursed by

⁶⁸ *United States v. Roen*, 279 F. Supp. 2d 986, 991 (E.D. Wis. 2003).

⁶⁹ James Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 Fed. Sent’g Rep. 138, 141 (2010).

⁷⁰ See Statement of Kathryn N. Nester Before the U.S. Sentencing Comm’n, Washington, D.C., at 10-11 (Mar. 14, 2012) (regarding the history of the victim table).

⁷¹ For example, in 2009, the Commission amended the commentary to §2B1.1 to count as a victim “any individual whose means of identification was used unlawfully or without authority.” USSG §2B1.1 comment. (n.4(E)). This amendment expanded application of the victim table to cover persons who suffered no actual loss. At the time, the “Commission determined that such an individual should be considered a ‘victim’ for purposes of subsection (b)(2) because such an individual, even if fully reimbursed, must *often spend significant time* resolving credit problems and related issues, and such lost time may not be adequately accounted for in the loss calculations under the guidelines.” USSG App. C, Amend. 726, Reason for Amendment (Nov. 1, 2011) (emphasis added). But research has subsequently shown that the assumptions underlying the determination were wrong. According to a 2010 survey by the Department of Justice, “[f]or each type of identity theft, the greatest percentage of victims resolved the problem in a day or less.” Lynn Langton & Michael Planty, Dep’t of Justice, *Victims of Identity Theft*, 2008 5 (2010). Only about 20% of victims spent more than a month trying to clear up problems. *Id.*

their banks, and may not have even known about the fraud, are counted as victims for purposes of applying the victim table.⁷²

Yet another area for serious concern with the fraud guideline is the vast number of specific offense characteristics that have a piling-on effect and also fail to distinguish between more and less serious offenders. The fraud guideline began with only two specific offense characteristics. Including the amendments effective November 2013, the guideline contains eighteen cumulative specific offense characteristics, with many alternatives, in addition to loss.⁷³ This ninefold increase in offense characteristics occurred because, “over time,” the guidelines have “tease[d] out many of the factors for which loss served as a rough proxy and ... give[n] them independent weight in the offense-level calculus.”⁷⁴ This produces a “piling-on effect” that “often smack[s] of double counting.”⁷⁵ “[M]any factors for which loss was already a proxy not only have been given independent weight but also impose disproportionate increases in prison time because they add offense levels on top of those already imposed for loss itself and do so at the top of the sentencing table where sentencing ranges are wide.”⁷⁶ Such “factor creep, makes it “increasingly difficult to ensure that the interactions among [the SOC’s], and their cumulative effect, properly track offense seriousness.”⁷⁷

⁷² See *United States v. States v. Stepanian*, 570 F.3d 51, 56 (1st Cir. 2009); *United States v. Panice*, 598 F.3d 426, 433 (7th Cir. 2010) (fact that account holder was reimbursed does not negate victim status). Also counted are victims whose losses may have been counted toward the loss calculation, but who were otherwise made whole. See *United States v. Armstead*, 552 F.3d 769, 783 n.13 (9th Cir. 2008) (“Losses that are subsequently credited are still part of the initial loss calculation, and thus persons who suffered those losses are victims.”).

⁷³ See USSG §2F1.1 (1987); USSG §2B1.1 (2012) and Proposed Amendments (as Promulgated) (Apr. 10, 2013), http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20130430_RF_Amendments.pdf.

⁷⁴ Bowman, *supra* note 62, at 170; see also, Ellis, et al., *supra* note 62, at 37 (noting that in addition to the problem of a loss table which “often overstates the harm suffered by the victim” the fraud guideline suffers from “[m]ultiple, overlapping enhancements [that] have the effect of ‘double counting’ in some cases,” as well as failing “to take into account important mitigating offense and offender characteristics”).

⁷⁵ Felman, *supra* note 69, at 141. See also *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006) (concerned with the “piling-on” of 20 points for adjustments sought by the government above and beyond the 28 points the government sought for loss, and concluding that the fraud guidelines have “so run amok that they are patently absurd on their face”); *United States v. Parris*, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (guidelines in security fraud cases “are patently absurd on their face” due to the “piling on of points” under §2B1.1).

⁷⁶ Bowman, *supra* note 62, at 170.

⁷⁷ *Fifteen Year Review*, 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 “facade of precision” that “undermines the goals of sentencing.”)).

Because of the overlap of specific offense characteristics with one another, and with the loss table, and the broad reach of many of the specific offense characteristics, the current guideline does not adequately distinguish the more culpable offenders from the less. “[T]he overkill of the current economic crime guideline is not limited to the most culpable offenders in the most exceptional cases.”⁷⁸ For example, “[t]he over-quantification of closely related factors is so extreme that a corporate officer, stockbroker, or commodities trader engaged in a stock fraud causing a loss as low as \$2.5 million could be subject to a guidelines sentence of life imprisonment.”⁷⁹ And, to provide an example that we see more regularly in our work representing the indigent: a defendant who uses a magnetic credit card swiper to commit fraud can 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 the same conduct.⁸⁰ This problem of overlapping and piling-on is exacerbated by the broad range of conduct that is covered by many of the specific offense characteristics. For example, the “sophisticated means” enhancement has been applied to a broad range of conduct, only some of which is highly sophisticated.⁸¹ In one recent case, addressing the “sophisticated means” enhancement in §2T1.1(b)(2), which is similar to the one in §2B1.1(b)(10)(C), the Ninth Circuit affirmed the application of the enhancement based on evidence that the defendants opened a bank account with a deceptive name, even though they used the real name and social security number of one of the defendants when they opened the account.⁸²

For all of these reasons we support the Commission’s commitment to reviewing the guidelines addressing economic offenses, and urge the Commission to consider a wholesale revision of the fraud guideline, and resist further tinkering until such a revision is complete.

⁷⁸ Frank O. Bowman, *Economic Crimes: Model Sentencing Guidelines §2B1*, 18 Fed. Sent’g Rep. 330, 334 (2006).

⁷⁹ *Id.*

⁸⁰ See, e.g., *United States v. Podio*, 432 Fed. App’x 308 (5th Cir. 2011); *United States v. Abulyan*, 380 Fed. App’x 409, 412 (5th Cir. 2010).

⁸¹ See, e.g., *United States v. Connor*, 537 F.3d 480, 492 (5th Cir. 2008) (it was “not the most sophisticated fraud” but “aspects” of the fraud of using fake IDs to obtain goods that were sold on ebay, “indicate that the district court did not clearly err in finding that the crime involved sophisticated means”).

⁸² *United States v. Jennings*, 711 F.3d 1144 (9th Cir. 2013).

VI. Career Offender, USSG §4B1.1

The career offender guideline is much broader than Congress required in the Sentencing Reform Act.⁸³ Nine years ago, the Commission found that the career offender guideline – particularly as applied to defendants who qualify based on prior drug convictions – dramatically overstates their risk of recidivism.⁸⁴ Offenders qualifying for the career offender guideline based on one or more prior offenses had a 52 percent recidivism rate.⁸⁵ The rate for those qualifying on the basis of prior drug offenses was only 27 percent.⁸⁶ The Commission also found that the guideline has an adverse impact on Black offenders.⁸⁷ Notwithstanding those findings, the Commission has done nothing to narrow the career offender guideline.

Over the past several years, the Commission has received ample feedback from judges that the career offender guideline results in sentences greater than necessary to serve the purposes of punishment. Recently, the Commission concluded that the influence of the career offender guideline has diminished.⁸⁸ “The within range rate for career offenders has decreased substantially since *Booker*.”⁸⁹ The Commission attributes this decrease, in part, to the “increasing rates of both government and non-government sponsored below range sentences in career offender cases.”⁹⁰

Numerous judges have written about problems with the career offender guideline. Just recently, Judge Bennett added to the chorus of judicial criticism. In *United States v. Newhouse*, ___ F. Supp. 2d ___, 2013 WL 346432, *14 (N.D. Iowa Jan. 20, 2013), the court found that the career offender guideline, as applied to low-level non-violent drug offenders, along with the criminal history category cap on departures under §4A1.3(b)(3)(A), is inconsistent with the Commission’s own research.

⁸³ Amy Baron-Evans et al., *Deconstructing the Career Offender Guideline*, 2 Charlotte L. Rev. 39, 51 (2010); *Booker Report, Part C: Career Offenders*, at 4 (discussing 1989 amendment, which substantially broadened the definition of “controlled substance offense”).

⁸⁴ USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 133.

⁸⁸ *Booker Report, Part A*, at 6; *id.*, *Part C: Career Offenders*, at 2, 14.

⁸⁹ *Booker Report, Part A*, at 74; *id.*, *Part C: Career Offenders*, at 41.

⁹⁰ *Booker Report, Part A*, at 59.

The time has come for the Commission to correct the injustices caused by the career offender guideline. Under the guideline, too many people go to prison for too long for no good reason. Over the past decade, 18,775 persons have been sentenced as career offenders.⁹¹ The average guideline minimum sentence for those persons has been 225 months.⁹² An overwhelming number of persons subject to these lengthy sentences are drug offenders, not violent offenders.⁹³ Nearly two-thirds of these persons are Black.⁹⁴

The costs of this incarceration policy are enormous. Career offenders in the past ten years faced a combined minimum sentence of 225,300 years imprisonment at a cost of \$6.5 billion in today's dollars.⁹⁵ That is enough money to pay for substance abuse treatment for 4.1 million people.⁹⁶

VII. Definitions of Crimes of Violence, Violent Felony, Aggravated Felony, and Drug Trafficking Offense

Last year, the Commission identified as a priority a multi-year study of the statutory and guideline definitions of “crime of violence,” “aggravated felony,” “violent felony,” and “drug trafficking offense.” We support that endeavor and remain concerned about the overly expansive definitions of these terms. As we have discussed in the past, these definitions lack empirical basis, produce arbitrary distinctions, and result in grossly unjust sentences that contribute to the problem of over incarceration. Last year, we discussed the need for the Commission to reexamine the definitions of “crime of violence” and “violent felony” in light of current empirical research, which undermines the original assumptions underlying the definitions.⁹⁷ We also discussed myriad problems with the residual clause and offered reasons why a “crime of violence” or “violent felony” should be limited to those particularly serious felonies that have as

⁹¹ See *Booker Report, Part C: Career Offenders*, at 75; *2012 Sourcebook*, at tbl. 22.

⁹² *Booker Report, Part C: Career Offenders*, at 75.

⁹³ *2012 Sourcebook*, at tbl. 22 (drug trafficking was the primary offense for 73.5% of defendants sentenced as career offenders); *Booker Report, Part C: Career Offenders*, at 7.

⁹⁴ *Booker Report, Part C: Career Offenders*, at 10.

⁹⁵ According to the Bureau of Prisons, in Fiscal Year 2011, the average cost of incarceration for a Federal inmate was \$28,893.40. Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. 16711 (Mar. 18, 2013).

⁹⁶ Office of National Drug Control Policy, *Fact Sheet: Cost Benefits of Investing Early in Substance Abuse Treatment* (2012) (“[o]n average, substance abuse treatment costs \$1,583 per patient”), http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/investing_in_treatment_5-23-12.pdf.

⁹⁷ Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 11-17 (July 23, 2012).

an element the use, attempted use, or threatened use of physical force against the person of another.⁹⁸

Consistent, narrow definitions would help maintain uniformity and ensure that only those truly violent offenders are subject to enhanced penalties. Possession of a short-barreled shotgun is just one example of an offense that is treated as a crime of violence under the guidelines, USSG §4B1.2, but may or may not be treated as a “violent felony” for purposes of the Armed Career Criminal Act (“ACCA”). *See, e.g., United States v. McGill*, 618 F.3d 1273, 1277 (11th Cir. 2010) (possession of an unregistered sawed-off shotgun is not a violent felony); *United States v. Hall*, 2013 WL 1607612 (11th Cir. April 16, 2013) (possession of sawed-off shotgun is crime of violence); *United States v. Hood*, 628 F.3d 669, 671-73 (4th Cir. 2010) (noting difference between guideline and ACCA definitions), *cert. denied*, 131 S.Ct. 2138 (2011). *But see United States v. Lillard*, 685 F.3d 773 (8th Cir. 2012) (unlawful possession of short shotgun qualified as a violent felony under ACCA), *cert. denied*, 133 S. Ct. 1242 (2013).

We look forward to working with the Commission as it continues to study the many problems with these definitions.

VIII. Relevant Conduct, USSG §1B1.3

We encourage the Commission to consider a comprehensive review of relevant conduct under USSG §1B1.3. Over the years, Defenders have repeatedly urged the Commission to prohibit the use of acquitted conduct, and either eliminate the use of uncharged and dismissed conduct or significantly limit its impact on the guideline range.⁹⁹ The problems with the relevant conduct rules persist, so we again ask that the Commission review the issue during the 2013-2014 amendment cycle.

The Defenders are not alone in the belief that the current relevant conduct rules present a critical and long-standing problem. The Commission’s recent survey of District Judges shows that 84% of judges believe that it is not appropriate to consider acquitted conduct.¹⁰⁰ A majority also believe that it is not appropriate to consider dismissed conduct (69%) and uncharged

⁹⁸ *Id.* at 17-18.

⁹⁹ *See, e.g.,* Statement of Alan DuBois & Nicole Kaplan Before the U.S. Sentencing Comm’n, Atlanta, Ga., at 24-26 (Feb. 20, 2009); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 2-6 (June 6, 2011); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 33-36 (July 23, 2012).

¹⁰⁰ *See USSC, Results of Survey of United States District Judges January 2010 through March 2010*, at Question 5 (2010).

conduct not presented at trial or admitted by the defendant (68%).¹⁰¹ Judges in the districts and on the courts of appeal, have also expressed their concern in written opinions.¹⁰²

Other federal sentencing experts similarly have criticized the current rules governing uncharged, dismissed, and acquitted conduct. For example, John Steer, former General Counsel and Vice-Chair of the Commission, has called for the Commission to exclude “acquitted conduct” from the guidelines and permit its use only as a discretionary factor.¹⁰³ He also stated that uncharged conduct “is the aspect of the guideline that [he] finds most difficult to defend” and accordingly recommended that the Commission “decrease the weight given to unconvicted counts that are part of the same course of conduct or scheme under 1B1.3(a)(2) and (3).”¹⁰⁴

The Commission has long been aware of the problems with the relevant conduct guidelines. Proposals to abolish the use of acquitted conduct have been published for comment

¹⁰¹ *Id.*

¹⁰² 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. Pimental*, 367 F. Supp. 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.”).

¹⁰³ See *An Interview with John R. Steer*, 32 *Champion* 40, 42 (2008).

¹⁰⁴ *Id.* See also Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. Pa. L. Rev. 1599, 1627 (2012) (“Allowing sentencing courts to consider conduct for which the defendant has been acquitted disregards the constitutional role of the jury.”); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 *Tenn. L. Rev.* 235 (2009) (objecting to the use of acquitted conduct on both constitutional and policy grounds); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 *S. Cal. L. Rev.* 289, 313-14 (1992) (“If Congress’ goals were to eliminate disparity and to have the punishment fit the crime, the modified real-offense system does not serve them well.”); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 *Minn. L. Rev.* 403 (1993). The American College of Trial Lawyers formally proposed the following changes: (1) eliminate the use of acquitted conduct; (2) substantially discount the rate of uncharged and acquitted conduct under subsection (a)(2); (3) revise the definition of relevant conduct to eliminate cross-references to more serious offenses; and (4) clarify that sentencing liability for jointly undertaken activity encompasses only those acts “which are in furtherance of the specific conduct and objectives embraced by the defendant’s specific agreement.” See *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 *Am. Crim. L. Rev.* 1463 (2001).

at various times beginning more than twenty years ago.¹⁰⁵ More than fifteen years ago, the Commission decided that one of its priorities for the 1996-97 amendment cycle was to “develop[] options to limit the use of acquitted conduct at sentencing,” and also declared its intent to explore in the future “substantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence.”¹⁰⁶ Thus far, however, the Commission has declined to act. We urge the Commission to do so now.

This persistent and resounding call to change the relevant conduct rules under §1B1.3 exists because the current rules present numerous and serious problems. Critically, the relevant conduct rules work directly against the goal of eliminating unwarranted disparity. The rules produce unwarranted disparity because they are complex, they rely on untrustworthy evidence, and their application is inconsistent – varying from prosecutor to prosecutor, probation officer to probation officer, and judge to judge.¹⁰⁷

The relevant conduct rules also provide prosecutors with “indecent power.”¹⁰⁸ They give prosecutors the twin benefits of (1) increased punishment through inflating guideline ranges on

¹⁰⁵ See 57 Fed. Reg. 62, 832 (Dec. 31, 1992) (proposing amendment to §1B1.3 “to provide that conduct of which the defendant has been acquitted after trial shall not be considered in determining the defendant’s offense level but may, in an exceptional case, provide a basis for an upward departure”). See also 58 Fed. Reg. 67,522, 67,541, 62 (Dec. 21, 1993); 62 Fed. Reg. 152,161 (Jan. 2, 1997).

¹⁰⁶ 61 Fed. Reg. 34,465 (July 2, 1996). Commission staff began to “investigate ways of incorporating state practices; e.g., using an offense of conviction system for base sentence determination; providing limited enhancement for conduct beyond the offense of conviction; or limiting acquitted conduct to within the guideline range.” Phyllis J. Newton, Staff Director, U.S. Sent’g Comm’n, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent’g Rep. 68, 69 (Sept./Oct. 1995); see also USSC, *Guidelines Simplification Draft Paper on Relevant Conduct and Real Offense Sentencing* (Nov. 1996).

¹⁰⁷ See *Fifteen Year Review*, at 50, 87 (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, 106-7 (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).

¹⁰⁸ Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (2008).

the basis of uncharged, dismissed and acquitted conduct, a lower standard of proof and inadmissible evidence; and (2) increased power to coerce guilty pleas, because they can obtain the same sentence even if no charge is filed or conviction obtained.¹⁰⁹ All a prosecutor must do is provide information about uncharged or acquitted conduct to a probation officer to include in the presentence report. Even though the information is nothing more than hearsay, in some circuits it is enough to shift the burden to the defense to disprove.¹¹⁰ And, when a defense attorney challenges such “relevant conduct,” the defendant runs the risk of having the court deny a sentence reduction for acceptance of responsibility even though the defendant pled guilty and accepted responsibility for the charged conduct.¹¹¹ Thus, although one of the reasons the first Commission adopted the “real offense” system was to “curb the ability of prosecutors to manipulate sentences through their decisions on charging,”¹¹² in practice it has increased the power of prosecutors to control sentences. The Commission has been aware for quite some time that this “real offense” model transferred power to prosecutors and created unwarranted disparity.¹¹³ We urge the Commission to change the relevant conduct rules to address this problem.

¹⁰⁹ See, e.g., 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, 442, 449-50 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 Stan. L. Rev. 523, 550 (1993) (“Implementation of a conviction-offense system [rather than a ‘real offense’ system] places a burden on prosecutors to file and prove, or bargain for, conviction charges that reflect the seriousness of an offenders’ criminal behavior. If, with respect to certain nonconviction crimes, this is an obligation they cannot discharge, then we should have grave doubts that the imposition of punishment is justified.”). The use of acquitted conduct “also allows prosecutors to avoid the restrictions of the Double Jeopardy Clause by essentially giving them a second try at inflicting punishment for the same offense.” Barkow, *supra* note 104, at 1629.

¹¹⁰ See Thomas W. Hutchison, et al., *Fed. Sent. L. & Prac.* §6A1.3, cmt. 5(e) (2013 ed.) (discussing split in circuits on whether district court may treat allegations in PSR as evidence).

¹¹¹ 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, 318-19 (2005).

¹¹² Barkow, *supra* note 104, at 1629. Of course, such concerns are not even theoretically implicated – then or now – with respect to acquitted offenses because an acquitted offense is charged in an indictment and tried to a jury. *Id.* (“But that justification does not account for the Guidelines’ use of acquitted conduct because, in cases where acquitted conduct is relevant, prosecutors have brought the relevant charges out into the open already.”).

¹¹³ See Federal Courts Study Committee, *Report of the Federal Courts Study Committee* 138 (Apr. 2, 1990) (“We have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system.”); United States General Accounting Office: *Central Questions Remain Unanswered* 14-16 (Aug. 1992) (suggesting that the way prosecutors plea-bargain with defendants may

In addition, the relevant conduct rules deprive defendants of their Sixth Amendment right to a jury trial and undermine the legitimacy of the presumption of innocence by permitting the use of acquitted conduct. Although appellate courts have generally upheld the use of acquitted and uncharged conduct after *United States v. Booker*, 543 U.S. 220 (2005), many judges¹¹⁴ and commentators¹¹⁵ believe it is inconsistent with the Sixth Amendment.¹¹⁶ Sentencing guidelines “that require judges to increase sentences on the basis of conduct for which the defendant has

adversely impact Black defendants and interfere with the Commission’s mission of eliminating disparity based on race); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 557 (1992) (arguing that circumvention of the guidelines through plea bargaining, while not “necessarily bad,” is “hidden and unsystematic,” suggests “significant divergence from the statutory purpose” of the guidelines, and “occurs in a context that forecloses oversight and obscures accountability”). Later, in 2004, the Commission itself acknowledged that real offense sentencing shifted sentencing power to prosecutors and created hidden and unwarranted disparities. See *Fifteen Year Review*, at 50, 86, 92.

¹¹⁴ See, e.g., *Faust*, 456 F.3d at 1349 (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.”); *Mercado*, 474 F.3d at 658 (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.”); *Canania*, 532 F.3d at 776 (Bright, J., concurring) (writing separately to “express [his] strongly held view that the consideration of ‘acquitted conduct’ to enhance a defendant’s sentence is unconstitutional,” and explaining that “[p]ermitting a judge to impose a sentence that reflects conduct the jury expressly disavowed through a finding of ‘not guilty’ amounts to more than mere second guessing of the jury—it entirely trivializes its principal fact-finding function”).

¹¹⁵ See, e.g., Ngov, *supra* note 104, at 241, 244-69 (concluding that “use of acquitted conduct to enhance sentences, even under the advisory Guidelines, violates the Sixth Amendment because judges are permitted to find facts that enhance a defendant’s sentence beyond that authorized by the jury’s verdict”); see also *Recent Case: Criminal Law-Federal Sentencing-Ninth Circuit Affirms 262-Month Sentence Based on Uncharged Murder-United States v. Fitch*, 659 F.3d 788 (9th Cir. 2011), 125 Harv. L. Rev. 1860, 1863-64 (2012) (discussing case where sentence relied on finding regarding uncharged conduct, and explaining that “because substantive reasonableness review may produce sentences that would not be upheld as reasonable but for judge-found facts, it implicates the *Apprendi* rule – and defendants should be able to bring as-applied Sixth Amendment challenges raising this very claim”).

¹¹⁶ The Supreme Court has not squarely addressed the issue. The Court’s decision 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. In *United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc), six dissenting judges concluded that *Watts* did not govern the Sixth Amendment issue and “[b]ecause the sentence cannot be upheld as reasonable without accepting as true certain judge-found facts, the sentence represents an as applied violation of White’s Sixth Amendment rights.” *White*, 551 F.3d at 387, 392 (Merritt, J., dissenting). In addition, “the Court has not foreclosed as-applied constitutional challenges to sentences. The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.” *Gall v. United States*, 552 U.S. 38, 60, 128 S. Ct. 586, 602-03 (2007) (Scalia, J., concurring).

been acquitted” is “one of the starkest threats to the jury’s role.”¹¹⁷ Cross-references based on acquitted or uncharged conduct provide a particularly egregious example of how the rules work an end-run around fundamental rights. While the Supreme Court has called it “an absurd result” that a person could be sentenced “for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it,”¹¹⁸ that is precisely what is authorized under the guidelines, and what has happened in many cases, including one that was affirmed by the Eighth Circuit just last year. *See, e.g., United States v. Stroud*, 673 F.3d 854 (8th Cir. 2012) (affirming the sentence where, after being acquitted of murder in state court, Mr. Stroud was convicted of being a felon-in-possession of a firearm in federal court, and the sentencing court “found” that Mr. Stroud had committed murder, and applied the cross-reference in §2K2.1(c), thus increasing his offense level from 22 to 43, and resulting in a sentence of 120 months, the statutory maximum, even though his guideline range without the cross-reference was 46-57 months), *cert. denied*, 133 S.Ct. 1581 (2013).¹¹⁹

The rules come at a great cost. They contribute to undue severity, which unjustly deprives individuals of their liberty, and unnecessarily consumes limited resources and tax payer dollars.¹²⁰ Take, for example, a typical drug case like *United States v. Curtis*, 96 Fed. App’x 223 (5th Cir. 2004). The conduct of conviction in 2002 involved 45.36 kg of marijuana. At sentencing, the court relied on “relevant conduct,” holding the defendant accountable for 511.55 kg based on conduct that occurred as far back as 1996. As a result of this “relevant conduct,” Mr. Curtis was sentenced to 60 months imprisonment. Had his sentence been based on the conduct underlying the count of conviction, his guideline range would have been 24-30 months.

¹¹⁷ *See* Barkow, *supra* note 104, at 1627, 1628. Professor Barkow further explained her position on this issue: “Advising judges to increase a sentence on the basis of relevant conduct, even when a jury acquitted a defendant of that conduct, may no longer violate the Constitution in fact, but it stands in sharp tension with the jury’s constitutional role because judges continue to comply with the Guidelines and the Guidelines continue to instruct judges to consider relevant conduct in sentencing.” *Id.* at 1628.

¹¹⁸ *Blakely v. Washington*, 542 U.S. 296, 306 (2004). One district judge compared the rules governing cross-references based upon relevant conduct rules to the strange occurrences in Lewis Carroll’s *Wonderland*: “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).

¹¹⁹ *See also* Statement of Alan Dubois and Nicole Kaplan 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).

¹²⁰ One study “concluded that one half of all sentences imposed in the districts studied had been increased, sometimes doubled or tripled, by uncharged conduct.” Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 289, 311-12 (1992).

The additional 30-36 months took up limited bed space¹²¹ and cost tax payers as much as \$86,680.¹²²

The rules also lead to disrespect for the law because they are contrary to what ordinary citizens take for granted. The rules encourage punishment on the basis of allegations that are not subject to the basic rudiments of due process assumed to apply in our criminal justice system and on information that is often unreliable. “It would only confirm the public’s darkest suspicions to sentence a man to an extra ten years in prison for a crime that a jury found he did not commit.”¹²³ This is particularly true when the evidence relied upon was suppressed because of unconstitutional conduct by law enforcement.¹²⁴ When prosecutors can manipulate charges and sentences to suit them, and can rely at sentencing on suppressed evidence they could not use to obtain a conviction, it removes incentives for law enforcement to respect and follow the law, which only further erodes the moral authority of the criminal justice system.

The Commission can and should address these problems by changing the rules governing relevant conduct. “Instructing judges to consider ‘real’ conduct was a discretionary decision by one set of Commission members [from the first Commission] who seemed to believe the Guidelines could and should occupy the entire field.”¹²⁵ Adopting a “real offense” model was

¹²¹ “System wide, the Bureau [of Prisons] is operating at 37 percent over rated capacity. Crowding is of special concern at higher security facilities, with 54 percent crowding at high security facilities and 44 percent at medium security facilities.” *Federal Bureau of Prisons FY2013 Budget Request Before the Subcommittee on Commerce, Justice, Science and Related Agencies of the Committee on Appropriations* (Apr. 17, 2013) (statement of Charles E. Samuels, Jr., Director of The Federal Bureau of Prisons), <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-samuelsc-20130417.pdf>.

¹²² The average cost of incarceration for a Federal inmate is \$28,893.40. Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. 16711 (Mar. 18, 2013).

¹²³ *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) (“[M]ost people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were acquitted.”), *vacated*, 271 Fed. App’x 298 (4th Cir. 2008). Numerous judges have agreed. *See, e.g., Canania*, 532 F.3d at 778 & n.4 (Bright, J., concurring) (quoting a letter from a juror as evidence that the use of acquitted conduct is perceived as unfair and “wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of ‘not guilty’ for practical purposes may not mean a thing”); *United States v. Coleman*, 370 F. Supp. 2d 661, 670 n.14 (S.D. Ohio 2005) (“A layperson would undoubtedly be revolted by the idea that, for example, a ‘person’s sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.’”).

¹²⁴ *See, e.g., United States v. Gonzalez*, 290 Fed. App’x 80 (10th Cir. 2008) (sentencing court relied on evidence suppressed from a previous seizure to increase the sentence from offense level 26 to 28, resulting in an additional 14 months imprisonment).

¹²⁵ Barkow, *supra* note 104, at 1628.

not directed by Congress.¹²⁶ Indeed, it is “arguably contrary to the [Sentencing Reform Act’s] most basic instructions,” which directed the Commission to take into account the circumstances under which the “offense was committed.”¹²⁷ The federal guidelines are the only guidelines in the United States that require increased sentences for uncharged or acquitted conduct.¹²⁸

No compelling reason justifies the current rules. The experiences in the states – none of which requires that courts consider a defendant’s acquitted conduct – “show that a real offense sentencing scheme is not necessary for maintaining low crime and incarceration rates.”¹²⁹ “No evidence” suggests that the states’ decisions not to “mandate the consideration of a defendant’s acquitted conduct has led to increased crime rates. Further, many states have experienced decreases in their incarceration rates since they passed their guidelines.”¹³⁰

For all of these reasons, Defenders renew their request that the Commission review the relevant conduct rules.

IX. Resolution of Disputed Factors, USSG §6A1.3

We reiterate our request that the Commission resolve a Circuit split about the reliability of information set forth in presentence reports and strengthen USSG §6A1.3 so that it provides greater procedural protections against the use of undisclosed evidence and unreliable hearsay.¹³¹ The current guideline has been so loosely interpreted that it permits prosecutors to provide

¹²⁶ *Id.* at 1626. “Nor is there any evidence in the Sentencing Reform Act’s legislative history that suggests Congress even intended the outcome.” *Id.*

¹²⁷ Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1661 & n.157 (2012) (“The Commission was to take into account ‘the circumstances under which the *offense was committed*’ and ‘the nature and degree of the harm caused by the *offense*.’ SRA, Pub. L. No. 98-473, tit. II, ch. 2, sec. 217(a), §994(c)(2)-(3), 98 Stat. 1987, 2020 (codified at 28 U.S.C. §994(c)(2)-(3) (2006).”) (emphasis added)).

¹²⁸ See Barkow, *supra* note 104, at 1626. State guideline systems, before and after the Federal Sentencing Guidelines, have never required or allowed the use of uncharged or acquitted crimes in calculating the guideline range. See Newton, *supra* note 106, at 69 (“Virtually all states, in contrast to the federal system, have adopted an offense of conviction system under which uncharged conduct generally remains outside the parameters of the guidelines.”). While some state guideline systems permit the use of *some* facts – in the nature of details *about* the offense of conviction, the federal guidelines require that separate offense of which the defendant was never charged or convicted add to the sentence at the same rate as if the defendant was charged and convicted. See USSC, Guidelines Simplification Draft Paper on Relevant Conduct and Real Offense Sentencing (Nov. 1996).

¹²⁹ Barkow, *supra* note 104, at 1629.

¹³⁰ *Id.*

¹³¹ Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 16-18 (June 6, 2011).

probation officers with the rankest hearsay from undisclosed sources and otherwise unreliable witnesses to support guideline calculations. In many circuits, once the prosecutor's information is incorporated into the presentence report, the burden shifts to the defendant to disprove it.¹³² As the Seventh Circuit recently put it: "Only when the defendant creates 'real doubt' does the burden shift to the government to demonstrate the accuracy of the information." *United States v. Meherg*, ___ F.3d ___, 2013 WL 1395702, *1 (7th Cir. Apr. 8, 2013). This burden shifting gives prosecutors a significant advantage at sentencing, allowing them to prove aggravating factors and relevant conduct with the thinnest of evidence – the source of which may not even be known or disclosed to defense counsel. Other Circuits, however, hold the government to its burden when the defendant objects to allegations set forth in a presentence report.¹³³

This circuit split creates unwarranted disparity. Defendants in circuits where allegations in the presentence report are presumed reliable are deprived of basic procedural protections afforded defendants in other circuits. Defendants in circuits like the Fourth, Fifth, and Seventh are exposed to higher sentences than their counterparts in circuits like the Eighth, Ninth, and Eleventh because they have less opportunity to subject the prosecution's case to adversarial testing.

To remedy the disparity created by different procedural rules, the Commission should amend the commentary to §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 material fact."¹³⁴ When

¹³² *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990) (defendant's "mere objection" to information in a presentence report is insufficient to challenge its accuracy and reliability) (cited in *United States v. Powell*, 650 F.3d 388, 394 (4th Cir. 2011); *United States v. Mustread*, 42 F.3d 1097, 1101 (7th Cir. 1994) ("[g]enerally, 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*, 411 Fed. App'x 737, 738 (5th Cir. 2011) (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)); *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").

¹³³ See *United States v. Ramos-Colin*, 426 Fed. App'x 874 (11th Cir. 2011). See also *United States v. Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005) (en banc) ("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"); *United States v. Hammer*, 3 F.3d 266, 268 (8th Cir. 1993) (same).

¹³⁴ *Wise*, 976 F.2d at 404. This has long been the law in the Eighth Circuit. See, e.g., *United States v. Stapleton*, 286 F.3d 597, 598 (8th Cir. 2001).

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 should also strike from the commentary 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 statement is not consistent with the rule in the Ninth Circuit that the standard of proof should be higher in some circumstances.¹³⁵

X. Use of Certain Information, USSG § 1B1.8

Both the Federal Public and Community Defenders and the Commission’s Practitioner’s Advisory Group have requested in the past that the Commission consider amending USSG §1B1.8 so that it provides more uniform protection against the use of adverse information that a defendant discloses during proffer sessions with the government – whether the statements are part of a cooperation agreement or a safety-valve proffer.¹³⁶ We have repeatedly pointed out several problems with §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;¹³⁷ and

¹³⁵ See e.g., *United States v. Pineda-Doval*, 692 F.3d 942, 944 (9th Cir. 2012) (“district court is required to apply the clear and convincing standard of proof to a finding of malice aforethought because application of the murder Guidelines will have a disproportionate impact on the sentence imposed”); *United States v. Fitch*, 659 F.3d 788, 797 (9th Cir. 2011) (“where a severe sentencing enhancement is imposed on the basis of uncharged or acquitted conduct, due process may require clear and convincing evidence of that conduct”), *cert. denied*, 133 S.Ct. 175 (2012).

¹³⁶ Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 6 (June 6, 2011); Letter from, David Debold and Eric Tirschwell, U.S. Sentencing Comm’n, Practitioner’s Advisory Group to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 1-2 (July 23, 2012).

¹³⁷ See Statement of Nicholas T. Drees, Hearing Before the U.S. Sentencing Comm’n (Oct. 2009) (describing disparate use of §1B1.8 in N.D. Iowa); Statement of Nicole Kaplan, Hearing Before the U.S. Sentencing Comm’n (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, Hearing Before the U.S. Sentencing Comm’n (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 47-50 (Jan. 2010) (Henry Bemporad) (describing how a defendant may make a good faith effort to cooperate upon arrest, but the cooperation does not proceed because the client fears for the safety of his family or himself, or the government decides not to pursue the matter).

(3) the absence of protections for defendants who seek to satisfy the requirements of the safety-valve under USSG §5C1.2, but would not qualify for a substantial assistance departure (often through no fault of their own but because they know little about the activities of others, or the government is not interested in their cooperation).¹³⁸

Section 1B1.8 creates unwarranted disparity because the protection it provides to defendants against the use of incriminating information depends upon the individual prosecutor's willingness to negotiate an agreement under §1B1.8, the timing of the defendant's cooperation, the defendant's ability to obtain a lawyer quickly enough to negotiate a proffer agreement, and whether he is fortunate enough to have information about the unlawful activities of others that the prosecutor finds a sufficiently useful basis for a cooperation agreement.

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 §1B1.8¹³⁹
- 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 agreement¹⁴⁰
- include within the scope of §1B1.8 any statements the defendant makes prior to entering into a cooperation agreement¹⁴¹

¹³⁸ 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'").

¹³⁹ See *United States v. Buckendahl*, 251 F.3d 753 (8th Cir. 2001) (divided opinion over whether disparities in sentencing resulting from prosecutor's use of §1B1.8 warrants departure); *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). 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").

¹⁴⁰ 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).

- delete §1B1.8 comment. (n.6) and provide §1B1.8 protection when the defendant agrees to provide information about the extent of his own unlawful activities.

XI. Conclusion

As the Commission decides upon its priorities for the 2013-2104 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.

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
Guidelines Committee

cc: Hon. Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa, Commissioner
Dabney Friedrich, Commissioner
Isaac Fulwood, Jr., Commissioner *Ex Officio*
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel

¹⁴¹ *United States v. Maxie*, 89 Fed. App'x 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*, 426 Fed. App'x 163, 164-65 (4th Cir. 2011) (§1B1.8 permitted government to use defendant's statements about his involvement in four handgun sales that were provided before defendant signed cooperation plea agreement).