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May 12, 2014

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 2014-2015**

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.<sup>1</sup> We encourage the Commission to:

- continue examining the drug guideline and how it might be amended to better capture the statutory purposes of sentencing; consider the proposals we set forth in our March 13, 2014, hearing testimony and our March 18, 2014, letter commenting on the drug guidelines; amend §3B1.2 to make clear that couriers and those who perform other low-level functions in drug trafficking organizations should receive a mitigating role adjustment; revise the drug guidelines for calculating the offense levels for mixtures or substances containing methamphetamine, amphetamine, and certain List I chemicals;
- amend the guideline for unlawfully entering or remaining in the United States at USSG §2L1.2;
- simplify the fraud guideline at USSG §2B1.1;
- narrow the scope of the career offender guideline at USSG §4B1.1;

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

- amend the definitions for crime of violence, aggravated felony, and drug trafficking offense;
- 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;
- continue to encourage Congress to: reduce the current mandatory minimum penalties for drug trafficking, as well as other offenses; make the Fair Sentencing Act retroactive; expand the safety-valve; and 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;
- 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.

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.

## **I. Revise the Drug Guidelines**

When the Commission voted unanimously to amend the Drug Quantity Table, the Commission took an important, yet modest step in revising a guideline that does not capture the statutory purposes of sentencing and that remains unnecessarily tethered to a mandatory minimum penalty scheme that the Commission has found lacking. More amendments to the drug guideline are needed. We believe that the drug guideline can, and should, be delinked from mandatory minimum penalties that the Commission has acknowledged need revision because they apply to many lower-level drug defendants, including couriers and street-level dealers. The best way to accomplish such a delinking is for the Commission to “start from scratch” and not feel compelled to consider drug quantity in the same manner as mandatory minimum penalty statutes.<sup>2</sup> For example, it might generally decide the relevance of various factors present in every drug trafficking case, including the defendant's functional role in the offense, drug quantity, purity, drug type, and relative harms of each drug type. It could then conduct empirical

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<sup>2</sup> The Commission has a variety of options in carrying out its duties under 28 U.S.C. § 994 and to account for mandatory minimum penalties within the guideline structure. For example, rather than set the base offense level at or above the mandatory minimum, the Commission may set the base offense level below the mandatory minimum and rely on adjustments to reach the mandatory minimum in appropriate cases, or select a base offense level without regard to a mandatory minimum. In cases where the guideline calculation does not reach the mandatory minimum, §5G1.1(b) would make the mandatory minimum term the guideline sentence. See USSC, *The History of the Child Pornography Guidelines* 44-47 (2009).

research to determine what weight should be given to each of those factors and revise the guidelines accordingly.

In the interim, the Commission should make additional amendments to the drug guideline. As we explained in our March testimony and comment letter, we encourage the Commission to:

- (1) lower the upper limit of the drug quantity table to no greater than base offense level 36;
- (2) lower the minimum offense level floors set forth in various guideline provisions contained in USSG §§2D1.1, 2D1.2, 2D1.5, 2D1.10;
- (3) lower the mitigating role cap at USSG §2D1.1(a)(5) and better account for situations where drug quantity over represents the defendant's role in the offense in cases where the base offense level falls below the mitigating role cap;
- (4) revisit how the guidelines treat the weight of the mixture or substance and do not appropriately account for the purity of a controlled substance;
- (5) better account for situations where the drug quantity over represents the defendant's role in the offense.

In addition to these changes discussed in our March submissions, the Commission should:

- (1) clarify in USSG §3B1.2, comment. (n.2) that drug trafficking typically involves more than one participant who need not be identified for the defendant to receive a mitigating role adjustment, and that brokers, couriers, and mules should generally receive a mitigating role adjustment;
- (2) revise the drug guidelines for calculating the offense levels for mixtures or substances containing methamphetamine, amphetamine, and certain List I chemicals.

First, even though the Commission in 2011 amended §3B1.2 to remove some language that "may have the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances," USSG App. C, Amend. 755 (Nov. 1, 2011), some courts still decline to apply the adjustment in cases where the Commission contemplated it would apply.<sup>3</sup> At the Commission's March hearing, some Commissioners questioned whether

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<sup>3</sup> The data show that the amended commentary did not increase the rate of mitigating role adjustments. In FY 2010, mitigating role adjustments were applied to only 7.6% of individuals sentenced that year, and in FY 2013, mitigating role adjustments were applied to only 7.3% of individuals sentenced that year. See

the guidelines were properly applied in the case of “Oscar” who was a first-time, non-violent, low-level courier, but who did not receive a role adjustment because he was a single defendant responsible for a high quantity of drugs. Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 112-114, 117 (Mar. 14, 2014). Unfortunately, we see too many cases like Oscar’s, where defendants are not receiving the mitigating role adjustment even though they should.

The requirement that there be other known participants, and the absence of a specific policy statement providing that street-level dealers and couriers should generally receive a mitigating role adjustment, may explain why mitigating role adjustments are given so infrequently, and even less frequently in crack and methamphetamine cases, even though the government is not targeting kingpins. Courts continue to rule that low-level, easily replaceable individuals do not qualify for a minor role adjustment.<sup>4</sup>

The Commission’s 2007 Cocaine Report noted: “As in 2000, the function category with the largest proportion of powder cocaine offenders remains couriers/mules (33.1%) and for crack cocaine offenders, street-level dealers (55.4%).” USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* 19 (2007); see also *id.* at 19-21, figs. 2-4 through 2-6. In 2011, the Commission reported that only 3.1% of drug defendants were actually organizers or leaders and only 10.9% were importers or high-level suppliers.<sup>5</sup> The most common role was courier (23%) and the third most common was street-level dealer (17.2%),<sup>6</sup> which the Commission has recognized is a role “many steps down from high-level suppliers and leaders of drug

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USSC, *2010 Sourcebook of Federal Sentencing Statistics* tbl. 18; USSC, *2013 Sourcebook of Federal Sentencing Statistics* tbl. 18 (2013 Sourcebook).

<sup>4</sup> See, e.g., *United States v. Perez-Solis*, 708 F.3d 453, 471-72 (5th Cir. 2013) (defendant who picked up cooler full of methamphetamine denied minor role adjustment); *United States v. Cavazos*, 487 F. App’x 834, 835 (5th Cir. 2012) (defendant who transported drugs over large geographic area was not a minor participant because his “transportation of the methamphetamine was essential to the completion of the crime”); *United States v. Williams*, 505 F. App’x 426, 428 (6th Cir. 2012) (reiterating view that court could deny a role adjustment because defendant’s “role as courier was critical to the success of the drug trafficking”); *United States v. Skinner*, 690 F.3d 772, 783 (6th Cir. 2012) (same); *United States v. Otabor*, 477 F. App’x 593, 595 (11th Cir. 2012) (defendants who smuggled large amount of high purity heroin not entitled to role reduction even though they qualified for safety-valve and had been threatened after attempting to back out of the plan); *United States v. Alfaro-Martinez*, 476 F. App’x 11, 11 (5th Cir. 2012) (court was not required to give role reduction to defendant who transported 100 kilograms or more of marijuana because his role as a courier was “indispensable”).

<sup>5</sup> USSC, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* app. D, fig. D-2 (2011) (*Mandatory Minimum Report*).

<sup>6</sup> *Id.*

organizations.”<sup>7</sup> Nearly one-half (48.1%) of all defendants fell within the four lowest functional roles: street-level dealer, broker, courier, and mule.<sup>8</sup> Notwithstanding those findings, drug defendants receive mitigating role adjustments at lower rates than what would be expected. In FY 2009 – the year in which the Commission sampled functional role – only 19.7% of all drug defendants received mitigating role adjustments.<sup>9</sup> Close to half of all couriers (46%) did not receive a mitigating role adjustment.<sup>10</sup> Nor did 52.1% of mules, 96.5% of street level dealers, or 72.7% of brokers receive a mitigating role adjustment.<sup>11</sup> Accordingly, the Commission should make additional changes to §3B1.2 to further clarify when the adjustment should apply. For example, it should amend the guideline commentary to make clear that couriers with limited knowledge deserve a lesser role, even if they are driving drugs across the border or performing an “indispensable” role. Without such amendments, drug quantity will continue to override other relevant considerations.

Second, in the Defenders letter to the Commission last May, a copy of which is attached, we discussed the myriad problems with the marijuana equivalency ratios for various drugs, including methamphetamine, amphetamine, and related List I chemicals. We continue to believe that the Commission should revisit how the guidelines treat these, as well as other drugs. As the Commission’s *Quick Facts: Methamphetamine Trafficking Offenses* shows, the rate of within range sentences for such cases has “decreased substantially over the last five years (from 46.3% in fiscal year 2008 to 34.1% in fiscal year 2012)” and the rate of non-government sponsored below range sentences for methamphetamine traffickers has increased substantially (from 12.8% in fiscal year 2008 to 21.6% in fiscal year 2012).<sup>12</sup> Data from FY 2013 show that the trend continues, with a rate of within guideline sentences of only 32.6% – the lowest within range rate of all major drug types – and a non-government sponsored below range rate of 21.8%.<sup>13</sup>

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<sup>7</sup> *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences, Hearing Before the Committee on the Judiciary, United States Senate*, at 5 (Sept. 18, 2013) (statement of Judge Patti B. Saris, Chair U.S. Sentencing Comm’n), attached to Letter from The Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, to Senator Patrick Leahy, Chairman, Senate Committee on the Judiciary, and Senator Chuck Grassley, Ranking Member, Senate Committee on the Judiciary (Nov. 26, 2013).

<sup>8</sup> *Mandatory Minimum Report*, at app. D, fig. D-2.

<sup>9</sup> USSC, *2009 Sourcebook of Federal Sentencing Statistics* tbl. 40.

<sup>10</sup> *Mandatory Minimum Report*, at app. D, fig. D-4.

<sup>11</sup> *Id.*

<sup>12</sup> USSC, *Quick Facts: Methamphetamine Trafficking Offenses* (2013).

<sup>13</sup> *2013 Sourcebook*, at tbl. 45.

## **II. Amend the Guidelines for Immigration Offenses**

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 defendants each year and that consumes substantial resources of defense counsel, probation, and the court. Section 2L1.2 was the primary guideline in 18,658 (25.8%) of cases in FY2013.<sup>14</sup> Immigration cases continue to make up the bulk of the caseload in five 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.” Many defendants face longer periods of imprisonment than are necessary to serve the purposes of sentencing. Four years ago, Defenders presented the Commission with preliminary draft proposals for revising §2L1.2 and submitted testimony at the Commission’s January 2010 regional hearings in Phoenix, Arizona, which outlined the problems with §2L1.2.<sup>15</sup> A copy of that testimony is attached. While the Commission has made a few amendments to §2L1.2 since that time, some of the core problems with the guideline remain: (1) the 16- and 12-level enhancements for certain prior felony convictions in §2L1.2(b)(1)(A) are too great and should be changed to 12- and 8-level enhancements; (2) the felony offenses that result in enhancements under §2L1.2(b)(1)(A) and (B) sweep too broadly and should be narrowed; and (3) the 8-level enhancement for a conviction for an aggravated felony in §2L1.2(b)(1)(C) should be changed to a 6-level enhancement.

Our proposals to amend §2L1.2 are preliminary and our support for them would depend upon what the Commission’s data analysis reveals about the impact of these changes on actual cases. We offer these proposals as a starting point for a more extensive discussion about how to amend §2L1.2 to reflect the purposes of sentencing. Just as it did with the Symposium on Economic Crime, the Commission could 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 roundtable would allow for a robust exploration and discussion of potential options for amending the guidelines related to immigration offenses.

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<sup>14</sup> *Id.*, at tbl. 17.

<sup>15</sup> Statement of Henry J. Bemporad, Federal Public Defender for the Western District of Texas, Before the U.S. Sentencing Comm’n, Phoenix, Arizona, at 9-15 and addendum (Jan. 21, 2010).

### **III. Amend the Fraud Guideline**

We understand that the Commission's review of the fraud guideline is a multi-year project. In November 2013, we submitted to the Commission a letter highlighting many of the problems we see with §2B1.1 as it applies to cases with lower loss amounts and lower-level defendants.<sup>16</sup> We also suggested amendments to §2B1.1.<sup>17</sup> A copy of our letter is attached. We encourage the Commission to make amending §2B1.1 a priority for the 2014-2015 amendment cycle.

### **IV. Amend the Career Offender Guideline**

The time has come for the Commission to correct the injustices caused by the career offender guideline. The current career offender guideline is much broader than Congress required in the Sentencing Reform Act.<sup>18</sup> And the Commission now has more than ample evidence from the *Fifteen Year Review*, the *Booker Report*, the recent *Quick Facts* publication, and beyond, that the career offender guideline at §4B1.1 should be amended to narrow its scope.

As the Commission has known for ten years, the career offender guideline – particularly as applied to defendants who qualify based on prior drug convictions – dramatically overstates the risk of recidivism.<sup>19</sup> The Commission has also known for ten years, that the guideline has an adverse impact on Black individuals convicted in federal court.<sup>20</sup> Recent data from the Commission reveals the adverse impact has only grown worse. In FY 2012, 20.4% of

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<sup>16</sup> Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 1-8 (Nov. 20, 2013).

<sup>17</sup> *Id.* at 9-14.

<sup>18</sup> Amy Baron-Evans et al., *Deconstructing the Career Offender Guideline*, 2 Charlotte L. Rev. 39, 51 (2010); USSC, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing (Booker Report): Part C: Career Offenders* 4 (discussing 1989 amendment, which substantially broadened the definition of "controlled substance offense") (2012).

<sup>19</sup> 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) (*Fifteen Year Review*). Offenders qualifying for the career offender guideline had a 52 percent recidivism rate, and the rate for those qualifying on the basis of prior drug offenses was only 27 percent. *Id.*

<sup>20</sup> *Id.* at 133 ("Although Black offenders constituted just 26 percent of the offenders sentenced under the guidelines in 2000, they were 58 percent of the offenders subject to the severe penalties required by the career offender guideline.").

individuals sentenced under the guidelines were Black,<sup>21</sup> but 61.9% of individuals subject to the severe penalties of the career offender guideline were Black.<sup>22</sup>

In addition, as the Commission has acknowledged, the influence of the career offender guideline has diminished.<sup>23</sup> Earlier this year, the Commission noted that the “rate of within range sentences for career offenders has decreased over the last five years from 44.0% in fiscal year 2008 to 30.2% in fiscal year 2012.” In the earlier *Booker Report*, which also reported a decreased rate of within guideline sentences, the Commission attributed the decrease, in part, to the “increasing rates of both government and non-government sponsored below range sentences in career offender cases.”<sup>24</sup> Looking at the past five years, the Commission reported an increase in the rate of non-government sponsored below range sentences under the career offender guideline “from 22.1% in fiscal year 2008 to 27.6% in fiscal year 2012.”<sup>25</sup> In addition, there has been an increase in the rate of government sponsored below range sentences for reasons other than substantial assistance and early disposition, “from 5.7% in fiscal year 2008 to 13.9% in fiscal year 2012.”<sup>26</sup>

This evidence, combined with the substantial financial cost of this incarceration policy,<sup>27</sup> call for the Commission to quickly and clearly narrow the scope of the career offender guideline.

## **V. Amend the Definitions for Crime of Violence, Aggravated Felony, and Drug Trafficking Offense**

We continue to support the Commission’s multi-year study of the statutory and guideline definitions of “crime of violence,” “aggravated felony,” “violent felony,” and “drug trafficking offense.” We remain concerned about the overly expansive definitions of these terms, and have discussed in the past how these definitions lack empirical basis, produce arbitrary distinctions, and result in grossly unjust sentences that contribute to the problem of over-incarceration. In response to the Commission identifying this study as a priority in 2012, we submitted a letter that

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<sup>21</sup> 2013 *Sourcebook*, at tbl. 4.

<sup>22</sup> USSC, *Quick Facts: Career Offenders* (2014) (*Quick Facts: Career Offender*).

<sup>23</sup> *Booker Report, Part A*, at 6; *id.*, *Part C: Career Offenders*, at 2, 14.

<sup>24</sup> *Booker Report, Part A*, at 59.

<sup>25</sup> *Quick Facts: Career Offender*.

<sup>26</sup> *Id.*

<sup>27</sup> According to the Bureau of Prisons, in Fiscal Year 2012, the average cost of incarceration for a Federal inmate was \$29,027.46. Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. 49770 (Aug. 15, 2013).

called for reexamining the definitions of “crime of violence” and “violent felony” in light of current empirical research which undermines the original assumptions underlying the definitions.<sup>28</sup> The letter is attached. That letter also reviewed the many problems with the residual clause, and offered reasons why “crime of violence” or “violent felony” should be limited to those particularly serious felonies that have as an element the use, attempted use, or threatened use of physical force against the person of another.<sup>29</sup> We believe consistent, narrow definitions would best help maintain uniformity and ensure that only those truly violent offenders are subject to enhanced penalties.

## **VI. Relevant Conduct**

We were pleased that the Commission voted this year to curtail the use of relevant conduct in the cross-reference at §2K2.1(c) by requiring that the firearm or ammunition at least be “cited in the offense of conviction.” Nevertheless, as in years past,<sup>30</sup> we remain gravely concerned about the use of cross-references and relevant conduct, particularly the use of acquitted, uncharged, and dismissed counts. We remain hopeful that the Commission takes up Commissioner Barkow’s invitation to make these issues a priority for the upcoming amendment cycle.

In addition to curtailing the use of relevant conduct, the Commission should amend the commentary to §3E1.1 to protect defendants whose counsel contest the sufficiency of the evidence to prove relevant conduct. The commentary to §3E1.1 states: “a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.” §3E1.1, comment. (n. 1(A)). That language chills litigation over relevant conduct because it encourages a court to deny an adjustment for acceptance of responsibility whenever a relevant conduct objection is overruled. To ensure that relevant conduct is subject to adversarial testing, the Commission should be encouraging objections, not thwarting them.

## **VII. Encourage Congress to Make Necessary Sentencing Reforms**

Defenders support the Commission’s recommendations that Congress make statutory changes to (1) reduce the current statutory mandatory minimum penalties for drug trafficking and other offenses; (2) make retroactive the provisions of the Fair Sentencing Act of 2010;

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<sup>28</sup> 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).

<sup>29</sup> *Id.* at 17-18.

<sup>30</sup> Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 24-31 (May 17, 2013).

(3) expand the safety-valve; and (4) amend the good time credit statute to specify that defendants are eligible for 54 days of good time credit per year of sentence imposed.<sup>31</sup> We urge the Commission to continue its efforts to encourage Congress to make these critical sentencing reforms. While all of these statutory changes are necessary, because less has been written about it in other places, here we provide a little more information on why we think it is important for the Commission to 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.<sup>32</sup> 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.<sup>33</sup> 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,<sup>34</sup> 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."<sup>35</sup> Such a legislative fix would calibrate sentences served with the assumptions underlying the Sentencing Table. It would have the additional benefit of saving "untold millions of dollars"<sup>36</sup> 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

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<sup>31</sup> See Letter from The Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, to Senator Patrick Leahy, Chairman, Senate Committee on the Judiciary, and Senator Chuck Grassley, Ranking Member, Senate Committee on the Judiciary (Nov. 26, 2013), and attachment.

<sup>32</sup> USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 23 (1987).

<sup>33</sup> Government Accountability Office, *Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison* 23 (Feb. 2012) (GAO BOP Report).

<sup>34</sup> *Barber v. Thomas*, 130 S. Ct. 2499 (2010).

<sup>35</sup> 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).

<sup>36</sup> *Barber*, 130 S. Ct. at 2512 (Kennedy, J., dissenting).

that year alone.<sup>37</sup> Over the next several years, the savings would amount to hundreds of millions of dollars.

This change to the good time statute, and the other areas identified above, would reduce costs and allow for sentences that better reflect the purposes of sentencing. We urge the Commission to continue its work to encourage Congress to make these important changes.

### **VIII. 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. Many times in public hearings Commissioners refer to the Commission's data analysis when questioning witnesses. Defenders would be much better equipped to answer those questions if the information was made available through the ex officio process, just as it is for DOJ.

The Commission stands out 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 the bulk of federal criminal defendants throughout the country. Defenders and DOJ should have an equal voice in setting sentencing policy and should be equal partners in improving the guideline system. For these reasons, we ask that the Commission recommend to

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<sup>37</sup> *GAO BOP Report*, at 25.

Honorable Patti B. Saris

May 12, 2014

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Congress that it amend the Sentencing Reform Act to provide for a Federal Defender ex officio representative to the Sentencing Commission.

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

Enclosures

cc (w/encl.): Hon. Ricardo H. Hinojosa, Vice Chair  
Hon. Ketanji Brown Jackson, Vice Chair  
Hon. Charles R. Breyer, Vice Chair  
Dabney Friedrich, Commissioner  
Rachel E. Barkow, Commissioner  
Hon. William H. Pryor, Commissioner  
Isaac Fulwood, Jr., Commissioner *Ex Officio*  
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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.<sup>1</sup> 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;

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<sup>1</sup> 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."<sup>2</sup>

## **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

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<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup>

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

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

<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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,<sup>7</sup> 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."<sup>8</sup> 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"<sup>9</sup> 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.<sup>10</sup> Over the next several years, the savings would amount to hundreds of millions of dollars.

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

<sup>6</sup> 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*).

<sup>7</sup> *Barber v. Thomas*, 130 S. Ct. 2499 (2010).

<sup>8</sup> *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).

<sup>9</sup> *Barber*, 130 S. Ct. at 2512 (Kennedy, J., dissenting).

<sup>10</sup> *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.<sup>11</sup> In the same period, Federal Defender organizations opened 86,142 criminal representations, not including appeals, revocation proceedings, and motions to reduce sentence.<sup>12</sup> 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

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

<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

##### **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.

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<sup>13</sup> 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).

<sup>14</sup> 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).

<sup>15</sup> 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197126) (Missouri Law Review forthcoming).

| <b>Drug</b>                                                        | <b>Marijuana Equivalency Ratio in grams</b> |
|--------------------------------------------------------------------|---------------------------------------------|
| 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.<sup>16</sup>

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.<sup>17</sup> That is above the 17.8% rate for all non-government sponsored below range sentences<sup>18</sup> and a 69.3% increase in the rate of below range sentences from FY2008 to FY2012.<sup>19</sup> 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.<sup>20</sup>

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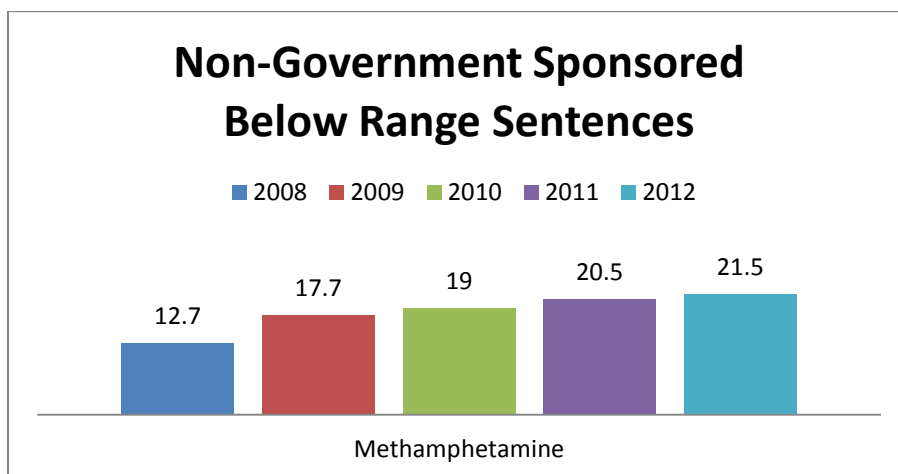
<sup>16</sup> The ratio of powder to LSD is 500:1.

<sup>17</sup> 2012 Sourcebook, at tbl. 45.

<sup>18</sup> 2012 Sourcebook, at tbl. N.

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

<sup>20</sup> 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.<sup>21</sup> 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 months<sup>22</sup> (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.<sup>23</sup>

The methamphetamine guidelines are losing their influence because they result in overly harsh sentences for many first time offenders and lack empirical evidence.<sup>24</sup> Approximately fifty percent of offenders involved in methamphetamine offenses fall within Criminal History Category I.<sup>25</sup> 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

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<sup>21</sup> 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).

<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Id.* at 8.

<sup>24</sup> *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).

<sup>25</sup> *Booker Report*, Part C: Drug Trafficking Offenses, Methamphetamine, at 4.

recidivism<sup>26</sup> and long prison sentences are not necessary to deter non-violent drug offenders with little criminal history.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup> 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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<sup>26</sup> See Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent'g Rep. 22 (1994).

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

<sup>28</sup> 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*).

<sup>29</sup> See generally *Booker Report, Part C: Drug Trafficking Offenses*.

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

This history, which ended with methamphetamine (actual) having the same equivalency of crack cocaine,<sup>33</sup> 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.”<sup>34</sup>

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

<sup>30</sup> Pub. L. No. 100-690, 102 Stat. 4181 (1988).

<sup>31</sup> Pub. L. No. 104-237, 110 Stat. 3099 (1996).

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

<sup>33</sup> 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.

<sup>34</sup> *Id.* at 18.

<sup>35</sup> 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.<sup>36</sup> 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."<sup>37</sup>

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 day<sup>38</sup>; minimum quantity at OL 26 is 500 g = minimum of 500 daily doses
- Heroin
  - average user dose of 300-500mg a day<sup>39</sup>; minimum quantity at OL 26 is 100g = 200 to 333 daily doses

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

<sup>36</sup> 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.

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

<sup>38</sup> 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](http://www.idmu.co.uk/images/stories/idmu_cocaine_uk.pdf).

<sup>39</sup> 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 day<sup>40</sup>; 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,<sup>41</sup> 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).<sup>42</sup>

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.<sup>43</sup>

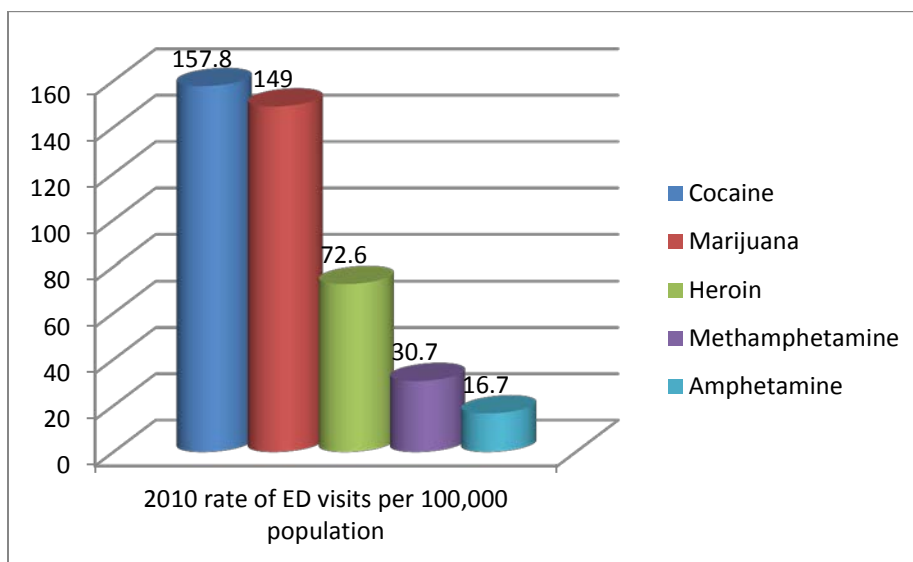
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<sup>40</sup> National Traffic Highway Safety Administration, *Drugs and Human Performance Fact Sheets: Methamphetamine (And Amphetamine)*, <http://www.nhtsa.gov/People/injury/research/job185drugs/methamphetamine.htm>.

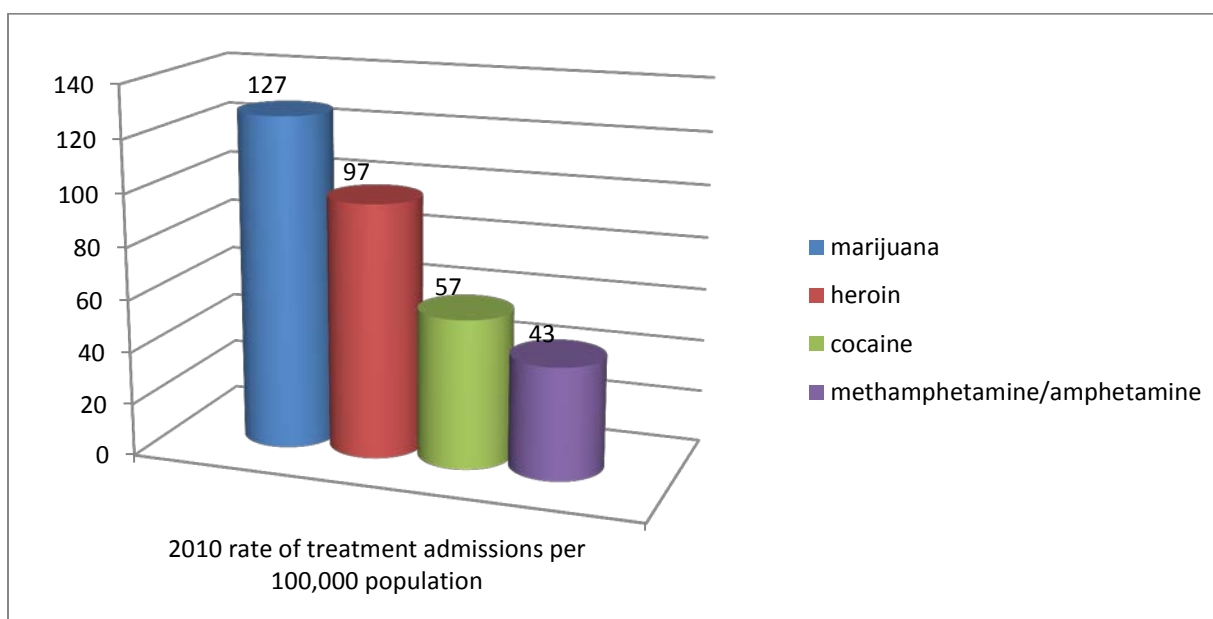
<sup>41</sup> According the Commission's most recent analysis, the majority of methamphetamine trafficking offenders are concentrated in seven states, with none in the East. *Booker Report, Part C: Drug Trafficking Offenses, Methamphetamine*, at 1. Substance Abuse and Mental Health Services Administration, *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>.

<sup>42</sup> 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>.

<sup>43</sup> 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.<sup>44</sup>



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

<sup>44</sup> 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.<sup>45</sup>

### 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*,<sup>46</sup> *Kimbrough*,<sup>47</sup> and *Spears*,<sup>48</sup> 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

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<sup>45</sup> *Booker Report, Part C: Drug Trafficking Offenses, Methamphetamine*, at 7.

<sup>46</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>47</sup> *Kimbrough v. United States*, 552 U.S. 85 (2007).

<sup>48</sup> *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.”<sup>49</sup> 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.<sup>50</sup> As a judge from the Southern District of New York, the district with the second highest number of fraud sentencings in 2011,<sup>51</sup> recently expressed, they should “be scrapped in their entirety.”<sup>52</sup> Below we examine some of what is

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<sup>49</sup> *Kimbrough*, 552 U.S. at 108.

<sup>50</sup> 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.

<sup>51</sup> *Booker Report, Part C: Fraud Offenses*, at 4.

<sup>52</sup> 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/](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."<sup>53</sup> The evidence shows no difference between probation and imprisonment when it comes to deterring white collar offenders.<sup>54</sup> The deterrent effect is achieved through the certainty of getting caught and punished, not in the severity of punishment.<sup>55</sup>

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."<sup>56</sup> 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.<sup>57</sup> That contrasts to an overall non-government-

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<sup>53</sup> 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").

<sup>54</sup> 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).

<sup>55</sup> 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.

<sup>56</sup> *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.

<sup>57</sup> See *2012 Sourcebook*, at tbl. 28.

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

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,<sup>60</sup> 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.<sup>61</sup> 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.”<sup>62</sup> And “blind

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<sup>58</sup> *Id.* at tbl. N.

<sup>59</sup> *Id.* at tbl. 28.

<sup>60</sup> 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).

<sup>61</sup> “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.

<sup>62</sup> *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.”<sup>63</sup> Yet the severity of the loss table has been repeatedly increased by the Commission over the years, for reasons unsupported by empirical evidence.<sup>64</sup> 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.<sup>65</sup>

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.<sup>66</sup> 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.<sup>67</sup> Also troubling is the rule that intended loss

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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.”).

<sup>63</sup> 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/](http://newsandinsight.thomsonreuters.com/Legal/News/2013/03_-_March/Rakoff_says_sentencing_guidelines_should_be_scrapped/).

<sup>64</sup> 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).

<sup>65</sup> *Id.*

<sup>66</sup> 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).

<sup>67</sup> 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.”<sup>68</sup> 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.”<sup>69</sup> 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.<sup>70</sup> And, similarly, the amendments have not been supported by empirical evidence.<sup>71</sup> The victim table also overstates the seriousness of the offense and the culpability of offenders. For example, people who were fully reimbursed by

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

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

<sup>70</sup> 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).

<sup>71</sup> 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 Identify 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.<sup>72</sup>

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.<sup>73</sup> 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.”<sup>74</sup> This produces a “piling-on effect” that “often smack[s] of double counting.”<sup>75</sup> “[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.”<sup>76</sup> Such “factor creep, makes it “increasingly difficult to ensure that the interactions among [the SOC’s], and their cumulative effect, properly track offense seriousness.”<sup>77</sup>

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<sup>72</sup> 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.”).

<sup>73</sup> 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](http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20130430_RF_Amendments.pdf).

<sup>74</sup> 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”).

<sup>75</sup> 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).

<sup>76</sup> Bowman, *supra* note 62, at 170.

<sup>77</sup> *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.”<sup>78</sup> 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.”<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup>

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.

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

<sup>79</sup> *Id.*

<sup>80</sup> 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).

<sup>81</sup> 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”).

<sup>82</sup> *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.<sup>83</sup> 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.<sup>84</sup> Offenders qualifying for the career offender guideline based on one or more prior offenses had a 52 percent recidivism rate.<sup>85</sup> The rate for those qualifying on the basis of prior drug offenses was only 27 percent.<sup>86</sup> The Commission also found that the guideline has an adverse impact on Black offenders.<sup>87</sup> 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.<sup>88</sup> “The within range rate for career offenders has decreased substantially since *Booker*.”<sup>89</sup> 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.”<sup>90</sup>

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.

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<sup>83</sup> 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”).

<sup>84</sup> 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).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 133.

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

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

<sup>90</sup> *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.<sup>91</sup> The average guideline minimum sentence for those persons has been 225 months.<sup>92</sup> An overwhelming number of persons subject to these lengthy sentences are drug offenders, not violent offenders.<sup>93</sup> Nearly two-thirds of these persons are Black.<sup>94</sup>

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.<sup>95</sup> That is enough money to pay for substance abuse treatment for 4.1 million people.<sup>96</sup>

## **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.<sup>97</sup> 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

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

<sup>92</sup> *Booker Report, Part C: Career Offenders*, at 75.

<sup>93</sup> *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.

<sup>94</sup> *Booker Report, Part C: Career Offenders*, at 10.

<sup>95</sup> 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).

<sup>96</sup> 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](http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/investing_in_treatment_5-23-12.pdf).

<sup>97</sup> 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.<sup>98</sup>

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.<sup>99</sup> 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.<sup>100</sup> A majority also believe that it is not appropriate to consider dismissed conduct (69%) and uncharged

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<sup>98</sup> *Id.* at 17-18.

<sup>99</sup> *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).

<sup>100</sup> *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%).<sup>101</sup> Judges in the districts and on the courts of appeal, have also expressed their concern in written opinions.<sup>102</sup>

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.<sup>103</sup> 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).”<sup>104</sup>

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

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<sup>101</sup> *Id.*

<sup>102</sup> 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.”).

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

<sup>104</sup> *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.<sup>105</sup> 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.”<sup>106</sup> 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.<sup>107</sup>

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

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<sup>105</sup> 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).

<sup>106</sup> 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).

<sup>107</sup> 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).

<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup> 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,”<sup>112</sup> 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.<sup>113</sup> We urge the Commission to change the relevant conduct rules to address this problem.

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<sup>109</sup> 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.

<sup>110</sup> 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).

<sup>111</sup> 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).

<sup>112</sup> 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.”).

<sup>113</sup> 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 judges<sup>114</sup> and commentators<sup>115</sup> believe it is inconsistent with the Sixth Amendment.<sup>116</sup> Sentencing guidelines “that require judges to increase sentences on the basis of conduct for which the defendant has

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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.

<sup>114</sup> 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”).

<sup>115</sup> 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”).

<sup>116</sup> 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.”<sup>117</sup> 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,”<sup>118</sup> 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).<sup>119</sup>

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.<sup>120</sup> 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.

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<sup>117</sup> *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.

<sup>118</sup> *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).

<sup>119</sup> *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).

<sup>120</sup> 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 space<sup>121</sup> and cost tax payers as much as \$86,680.<sup>122</sup>

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.”<sup>123</sup> This is particularly true when the evidence relied upon was suppressed because of unconstitutional conduct by law enforcement.<sup>124</sup> 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.”<sup>125</sup> Adopting a “real offense” model was

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<sup>121</sup> “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>.

<sup>122</sup> 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).

<sup>123</sup> *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.’”).

<sup>124</sup> *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).

<sup>125</sup> Barkow, *supra* note 104, at 1628.

not directed by Congress.<sup>126</sup> 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.”<sup>127</sup> The federal guidelines are the only guidelines in the United States that require increased sentences for uncharged or acquitted conduct.<sup>128</sup>

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.”<sup>129</sup> “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.”<sup>130</sup>

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.<sup>131</sup> The current guideline has been so loosely interpreted that it permits prosecutors to provide

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

<sup>127</sup> 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)).

<sup>128</sup> 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).

<sup>129</sup> Barkow, *supra* note 104, at 1629.

<sup>130</sup> *Id.*

<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup>

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."<sup>134</sup> When

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<sup>132</sup> *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").

<sup>133</sup> 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).

<sup>134</sup> *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.<sup>135</sup>

#### **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.<sup>136</sup> 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;<sup>137</sup> and

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<sup>135</sup> 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).

<sup>136</sup> 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).

<sup>137</sup> 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).<sup>138</sup>

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 §1B1.8<sup>139</sup>
- include within the scope of §1B1.8 any statements the defendant made in the course of good faith negotiations for a cooperation or plea agreement, but that do not result in such an agreement<sup>140</sup>
- include within the scope of §1B1.8 any statements the defendant makes prior to entering into a cooperation agreement<sup>141</sup>

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<sup>138</sup> 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'").

<sup>139</sup> 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").

<sup>140</sup> 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

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<sup>141</sup> *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).

**Statement of**  
**Henry J. Bemporad**  
**Federal Public Defender, Western District of Texas**  
**Before the**  
**United States Sentencing Commission**  
**Public Hearing on “The Sentencing Reform Act of 1984: 25 Years Later”**  
**Phoenix, Arizona**  
**January 21, 2010**

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I thank the Commission for inviting me to testify on behalf of the Federal Public and Community Defenders. This is the last of seven regional hearings that the Commission has held on the twenty-fifth anniversary of the Sentencing Reform Act. Defenders have enjoyed the opportunity to testify at each of these hearings, and I endorse the comments of my colleagues on the variety of topics they have previously addressed.<sup>1</sup> I will try not to repeat those comments, but instead to build upon them as they relate to sentencing guideline issues in the southwest border districts, particularly the Western District of Texas.

I have spent my entire 22-year legal career observing the impact of the guidelines in the Western District. My first job after graduating from law school in 1988 was a clerkship with then-U.S. District Judge Edward C. Prado. The guidelines had gone into effect less than a year earlier; both pre-guideline and guideline cases came before the court, and I saw firsthand the enormous impact the guidelines could have on individual sentences. In 1990, when I went to work for the Federal Public Defender’s Office, I was given the task of establishing a separate appellate section, a change in practice made necessary by the substantial increase in the number of appeals that had resulted from the enactment of 18 U.S.C. § 3742. I served as the chief of the appellate section for 18 years; during that time the vast majority of the appeals we handled involved guideline and other sentencing issues. This remains true today, even under the advisory guideline system created by the Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005).

With regard to the system *Booker* created, I share the view of my colleagues, and the majority of others who have testified before the Commission in these regional hearings: as a general matter, the advisory guideline system works. It provides a “healthy balance”

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1. The Defenders are required to “submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful.” 28 U.S.C. § 994(o).

between the unbridled discretion of pre-guidelines sentencing and the arbitrarily mechanical sentencing practice of the mandatory guideline system.<sup>2</sup> And it has “greatly improved fairness, honesty and transparency in sentencing.”<sup>3</sup> But although the advisory system is working, particular guidelines need significant improvement. After more than two decades, there are still areas of federal practice in which the guideline do not accomplish the Commission’s mandates: meeting the goals of 18 U.S.C. § 3553(a)(2), achieving certainty and fairness in sentencing, and avoiding unwarranted disparity while maintaining sufficient flexibility to permit individualized sentences.<sup>4</sup>

I will focus my testimony on two guideline issues that have been touched upon in previous Defender testimony, but are of special concern to those involved in the criminal justice system on the southwest border: (1) disparity in guideline application, and (2) the need to balance simplicity and fairness in the guideline sentencing process. These two issues arise in a variety of contexts, but I would like to discuss them as they often arise in two of the most common Western District of Texas offenses: drug importation and felony illegal reentry. I would also like to comment on the need to revise recency, status, and revocation rules to help alleviate unfair treatment of deported aliens who make up a large portion of the defendants in the Western District and along the border in general.

### **The Western District of Texas**

As the Commission’s data shows, the Western District of Texas is the busiest sentencing district in the nation.<sup>5</sup> Of the sentencings in the district, approximately 85 percent are for drug and immigration offenses.<sup>6</sup> This is not surprising, since the district shares 800 miles of international boundary with the Republic of Mexico. In fiscal year

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2. Written Statement of Jacqueline A. Johnson, Public Hearing Before the U.S. Sentencing Commission, Chicago, Illinois, at 1 (Sept. 10, 2009) (hereinafter Johnson Statement).

3. Written Statement of Nicholas T. Drees, Public Hearing Before the U.S. Sentencing Commission Denver, Colorado, at 1 (Oct. 21, 2009) (hereinafter Drees Statement).

4. 28 U.S.C. § 991(b)(1).

5. See U.S. Sentencing Commission, *Preliminary Quarterly Data Report*, tbl. 2 (Fourth Quarter 2009) (hereinafter USSC FY 2009 Report). The Western District of Texas reported 8,278 cases, more than any other district and more than the total cases reported for 10 of 12 federal circuits. *Id.* By itself, the Western District accounted for more than 10 percent of all the cases reported to the Commission nationwide. Together, the five southwestern border districts accounted for more than 35 percent of the cases in the country. *Id.*

6. U.S. Sentencing Commission, *Statistical Information Packet, Fiscal Year 2008, District of Western Texas*, tbl. 1, at 2 (hereinafter WDTX 2008 Packet).

2009, the three Western District divisions along the border handled 5,885 felony criminal defendants, approximately 71 percent of the district total.<sup>7</sup>

Compared to others, the Western District is a guideline district. Our courts sentence within the guideline range 79.2 percent of the time, the highest percentage of any border district, and the fourth highest in the nation.<sup>8</sup> The combination of the high guideline-sentence rate and our heavy caseload means that more within-guideline sentences are imposed in the Western District of Texas than in any other district or any other *circuit* in the nation. Moreover, the guidelines are typically applied just as they are written, without adjustment for plea-bargaining, cooperation, or “fast-track” disposition. While 98 percent of defendants plead guilty in the Western District, more than 60 percent of them do so without a plea agreement the highest percentage of any district in the nation.<sup>9</sup> Accordingly, there are relatively few cases in which the guideline range is the subject of bargaining between the parties. Our clients also tend to receive fewer substantial-assistance departures than elsewhere (6.3 percent, about half the national average), and far fewer fast-track departures (1.7 percent, compared to 9.2 percent nationally and an average 31.7 percent in the other southwestern border districts).<sup>10</sup>

Given these circumstances, the Commission’s decisions in drafting commonly applied drug and immigration guidelines take on exceptional importance in the everyday practice of Western District defense attorneys, and in the lives of our clients. The guideline amendments I propose below could benefit hundreds of defendants who are currently receiving unfair, disparate treatment under the guidelines.

### **Guideline Application Disparity: Drug Couriers**

When the Commission promulgated the guidelines, it envisioned a modified “real offense” system in which a number of “important, commonly occurring real offense elements” would be taken into account regardless of the charges brought against the defendant.<sup>11</sup> Even when charges did not limit the conduct to be considered, however, the

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7. Western District of Texas, *2009 Fiscal Year Statistics*, at 4. These statistics were originally provided to the Commission by U.S. District Judge Kathleen Cardone at the November regional hearing in Austin, Texas.

8. USSC FY 2009 Report, tbl. 2, at 2–6 (showing Western Texas behind only Southern Mississippi, Western Oklahoma, and the Northern Mariana Islands). By comparison, the other southwestern border districts average less than half of sentences imposed within the guideline range. *Id.*

9. *Id.*, tbl. 27.

10. *Id.*, tbl. 1.

11. *See* U.S.S.G. Ch.1, Pt.A(4)(a).

proof would: “the defendant’s actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor’s ability to increase a defendant’s sentence.”<sup>12</sup> But for at least one very common border offense, the available proof does not set the natural limit on the sentence imposed, and an important mitigating real-offense characteristic is inconsistently applied. That offense is drug importation.

In the border divisions of the Western District, the typical drug case involves a courier hired to transport a load of drugs, usually from Mexico into the United States. Such “mules” are usually low-level players that have been recruited into a larger drug organization; they almost never know any of the inner workings of the organizations, or the relationships among its members. Couriers are typically provided with pre-loaded vehicles and paid a per-trip fee that is unrelated to the value of the load they are carrying. They often do not know what drug they are carrying, where it is hidden, where it came from, or where it is ultimately destined for once it is delivered across the border. Couriers typically confess upon arrest, and the vast majority plead guilty to charges of importation or possession with intent to distribute.

One would think that for such a minor, commonplace crime with uncomplicated facts, the guideline application in these cases would be straightforward and relatively uniform. Similar offense levels and guideline ranges would be applied in each case, subject to variation for the type and weight of drugs involved and the defendant’s criminal history. Not so. Sentences in such cases can vary widely, based not on the circumstances of the offense or the history of the defendant, but upon the judge’s (or the probation officer’s) attitude towards common guideline calculations.

As a not-so-hypothetical example, take a defendant who is arrested at the international bridge with 125 pounds (57 KG) of marijuana hidden in a pickup he was given to drive.<sup>13</sup> He freely admits that he suspected the truck carried a hidden load of contraband, though he did not know what it was or where it was hidden. He tells the agents that, although he has never been arrested before, he has previously driven other vehicles across the border for the same recruiter four times, each time for \$500. The defendant has no actual knowledge whether or not the vehicles were loaded on those occasions, or if so what type or amount of contraband was involved. Due to the limited information the defendant can provide, the arresting agents make no effort to find his recruiter or otherwise corroborate his statement. The defendant is charged with importation of more than 50 KG of marijuana – an offense carrying a statutory sentencing range of 0 to 20 years in prison. He pleads guilty without a plea agreement, and, although he is cooperative, no substantial-assistance motion is filed because of his limited knowledge.

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12. *Id.*

13. Marijuana offenses make up more than 70 percent of the drug cases in the Western District. WDTX 2008 Packet, fig. A, at 1.

Depending on the division where the arrest occurs (and sometimes the probation officer or judge to whom the case is assigned), the guideline range for such a defendant could vary by as many as 13 offense levels. In some divisions, before some judges, the defendant's uncorroborated reference to prior trips would be viewed as too speculative a basis upon which to add relevant conduct, and he would be seen as having played a mitigating role in the overall drug-importation scheme. This view would lead to a base offense level of 20 (corresponding to 40 to 60 KG of marijuana), downward adjustments for mitigating role (2 to 4 levels), acceptance of responsibility (3 levels), and safety-valve (2 levels), resulting in an offense level of 13 to 15 and a guideline range (at criminal history category I) of between 12 to 18 months and 18 to 24 months.

In other divisions, or even before other judges in the same division, the guidelines would be viewed very differently. There, the defendant's relevant conduct would be 57 KG multiplied by 5 trips, starting the guideline sentence at base offense level 26 (100 to 400 KG of marijuana).<sup>14</sup> The defendant would receive no adjustment for role in the offense,<sup>15</sup> and if he objected to the relevant conduct calculation, he could risk denial of the safety-valve adjustment and (in a few courts) denial of acceptance of responsibility.<sup>16</sup> These determinations would set his guideline range (at criminal history category I) at 63 to 78 months.

As this example shows, inconsistent guideline calculations in common border drug cases cause significant unwarranted sentencing disparity. On the same facts, a defendant in one court could face a minimum guideline sentence more than 680 percent higher than a defendant in another court. This disparity does not arise from disparate charging decisions or plea-bargaining practices, or from the decision to impose a non-guideline

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14. *Cf. United States v. Saucedo-Valverde*, 255 F. App'x 796 (5th Cir. 2007) (per curiam) (seized load multiplied by three); *United States v. Perez*, 183 F. App'x 477, 478 81 (5th Cir. 2006) (per curiam) (same); *cf. United States v. Betancourt*, 422 F.3d 240, 246 48 (5th Cir. 2005) (multiplying estimated distribution amount by 12 recipients, based on defendant's out-of-court statement). Of course, similarly unjustified extrapolation can be based on other information besides an uncorroborated confession. *See, e.g., United States v. White*, 360 F.3d 718, 720 (7th Cir. 2004) (per curiam) (in multiplying witness estimate, "the sentencing court may credit testimony that is totally uncorroborated and comes from an admitted liar, convicted felon, or large scale drug-dealing, paid government informant") (internal quotation marks and citations omitted).

15. *Cf. Perez*, 183 F. App'x at 481 82; *United States v. Buenrostro*, 868 F.2d 135, 137 38 (5th Cir. 1989). *Cf. Joint Written Testimony of Alan Dubois and Nicole Kaplan*, Public Hearing Before the U.S. Sentencing Commission, Atlanta, Georgia at 32 (Feb. 10, 2009) (hereinafter Dubois/Kaplan Testimony) (commenting on denial of mitigating-role adjustments in courier cases).

16. *See, e.g., United States v. Driver*, 255 F. App'x 918 (5th Cir. 2007).

sentence. Instead, it arises almost entirely from different attitudes of probation officers and judges in applying the guidelines to a common set of facts. This unwarranted disparity is hidden, since both sentences are counted as within the guideline range. It is difficult to address through the appellate process, since deferential standards of review are applied to what are considered highly fact-dependent determinations.<sup>17</sup> And it results in sentences far greater than necessary to achieve the purposes of sentencing. *See* 18 U.S.C. § 3553(a).

The Commission could help address this disparity in guidelines application with simple amendments to the commentary to guidelines §2D1.1, §3B1.2, and §3E1.1.<sup>18</sup> It should tighten the rules for approximating unseized drugs, clarifying that sentencing courts must err on the side of caution when multiplying or otherwise estimating drug amounts,<sup>19</sup> and recommending that determinations not be based on speculative extrapolation from a defendant's uncorroborated confession.<sup>20</sup> Current language in the commentary to guideline §2D1.1<sup>21</sup> and policy statement §6A1.3<sup>22</sup> that allows for, or even

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17. *See* U.S.S.G. §3E1.1, comment. (n.5) (acceptance-of-responsibility determination “entitled to great deference on review”); *United States v. Jenkins*, 487 F.3d 279, 282 (5th Cir. 2007) (deferential clear-error standard applied to role determination); *Betancourt*, 422 F.3d at 246 (same, drug-amount estimate).

18. Proposed amended language is appended to my testimony.

19. *See, e.g., United States v. Culps*, 300 F.3d 1069, 1076 (9th Cir. 2002); *United States v. Shonubi*, 998 F.2d 84, 89–90 (2d Cir. 1993); *United States v. Sims*, 975 F.2d 1225, 1243 (6th Cir. 1992).

20. *See Shonubi*, 998 F.2d at 90 (rejecting multiple estimate because it was predicated on “speculation . . . surmise and conjecture”).

21. *See* U.S.S.G. §2D1.1, comment (n.12) (requiring courts to approximate the quantity of a controlled substance when “the amount seized does not reflect the scale of the offense”).

22. *See* §6A1.3, p.s., comment. (for guideline determinations, setting the standard of proof as a preponderance of evidence of “sufficient indicia of reliability to support its probable accuracy,” and requiring corroboration only when sentencing information is drawn from “an unidentified informant”); *United States v. Cook*, 550 F.3d 1292, 1296 & n.4 (10th Cir. 2008) (“minimal” indicia of reliability sufficient); *United States v. Houston*, 217 F.3d 1204, 1209 (9th Cir. 2000) (same).

calls for, speculation from minimally reliable information should be amended or deleted.<sup>23</sup>

The Commission should also expand the impact of guideline §3B1.2 by removing language in the commentary that unduly restricts its application. The commentary currently invites courts to deny mitigating-role adjustments when the only evidence available on the defendant's role comes from the defendant himself.<sup>24</sup> This language is out of place in many bridge cases, where the defendant provides all the information regarding the circumstances of the offense, and the government does no additional investigation after the load is seized. The Commission should also amend the guideline commentary to make clear that paid-by-the-trip couriers with limited knowledge deserve a lesser role, even if they are driving drugs across the border or performing some other "indispensable part" of the offense.<sup>25</sup> As Judge Raggi long ago explained, the main importance of couriers in importation cases *is* their minimal role: "They are generally illiterate, impoverished individuals," whose "value to those orchestrating the importation is precisely their expendability."<sup>26</sup>

In addition to amending the commentary to §2D1.1 and §3B1.2, the Commission should amend the commentary to guideline §3E1.1 to expressly protect defendants whose counsel contest the sufficiency of the evidence offered to prove relevant conduct. While false denials of proven conduct may bear on the defendant's acceptance, current language that suggests denial of the adjustment for "frivolously contest[ing] relevant conduct that the judge determines to be true" can be read to place acceptance in jeopardy every time a

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23. See Tr. of Public Hearing Before the U.S. Sentencing Commission, Stanford, California, at 78–79 (May 28, 2009) (Testimony of Judge B. Lynn Winmill) (calling for narrower view of relevant conduct in drug cases); Written Statement of Jason D. Hawkins, Public Hearing Before the U.S. Sentencing Commission, Austin, Texas, at 18 (Nov. 19, 2009) (hereinafter Hawkins Statement) (discussing need to limit drug quantity determinations made possible by §6A1.3); Statement of William P. Gibbens, Public Hearing Before the U.S. Sentencing Commission, Austin, Texas, at 6 (Nov. 19, 2009) (hereinafter Gibbens Statement) (discussing burden of proof under §6A1.3).

24. See U.S.S.G. §3B1.2, comment. (n.3(C)).

25. See *Buenrostro*, 868 F.2d at 138. Cf. Dubois/Kaplan Testimony at 32; Johnson Statement at 28. Language along these lines was included in the commentary before its amendment in 2001. See U.S.S.G. App. C, amend. 635 (Nov. 2001). Proposed language in the Appendix reinserts this language in expanded form.

26. Hon. Reena Raggi, *Local Concerns, Local Insights: Further Reasons for More Flexibility in Guideline Sentencing*, 5 FED. SENT'G REP. 306, 306–07 (1993).

relevant-conduct objection is overruled.<sup>27</sup> The Commission should encourage, not discourage, relevant-conduct objections, to ensure sentences are based on accurate information that has been the subject of thorough adversarial testing.<sup>28</sup>

The safety-valve adjustment presents special problems, problems that often arise in conjunction with the operation of guideline §1B1.8. Section 1B1.8 provides that self-incriminating information disclosed as part of a cooperation agreement will not be used in determining the guideline range. Protection is limited to information that is disclosed as part of a formal agreement under which the government has promised not to use the information.<sup>29</sup> By its terms, §1B1.8's valuable protection is unavailing in the common drug-courier scenario. As described above, a cooperative courier defendant typically discloses all the information he has shortly after his arrest. In such cases, §1B1.8 does not apply, because the information has become "known to the Government prior to entering the cooperation agreement."<sup>30</sup> Thus, §1B1.8 cannot protect even a cooperating defendant from extrapolation based on his uncorroborated, post-arrest confession.

Guideline §5C1.2 further exacerbates this problem. As noted above, a defendant risks denial of the safety-valve adjustment if he disputes extrapolation based on his post-arrest statement.<sup>31</sup> By contrast, when a defendant delays giving any statement until he obtains a lawyer and can provide information under §1B1.8, not only is he protected from the inflated offense level, he is also not required under §5C1.2 to admit to the extrapolation to obtain safety-valve relief.<sup>32</sup>

The disparity among defendants caused by the combined operation of these two guidelines is unjustifiable.<sup>33</sup> It provides an incentive to withhold information from the

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27. See U.S.S.G. §3E1.1, comment. (n.1(a)); cf. Hawkins Statement at 19.

28. *Rita v. United States*, 551 U.S. 338, 351 (2007); see also U.S.S.G. §6A1.3, p.s., comment. (parties must be given adequate opportunity to contest relevant facts).

29. U.S.S.G. §1B1.8(a).

30. U.S.S.G. §1B1.8(b)(1).

31. See U.S.S.G. §5C1.2(a)(5) & comment. (n.7).

32. See *id.*, comment. (n.7).

33. In the Fifth Circuit and others, where uncharged drug amounts can be used to set the statutory mandatory minimum, the combined effect of these guidelines can be especially unfair: the defendant receives a mandatory minimum sentence, and is not eligible for safety-valve relief. See, e.g., *United States v. Keith*, 230 F.3d 784, 786–87 (5th Cir. 2000) (per curiam); *United States v. Ramirez*, 43 F. App'x 358, 362–63 (10th Cir. 2002).

arresting agents at the time when the information is likely to be the most valuable. Often, the only useful assistance a courier can provide is to cooperate in an attempted controlled delivery, which typically must occur immediately after arrest. The guidelines should not provide a disincentive to such cooperation.

The Commission can address this problem by amending §1B1.8 to expressly recognize that the parties may agree to exclude information that the defendant provides before entering into formal cooperation. Such an amendment would reward, rather than punish, defendants who voluntarily disclose information soon after their arrest.<sup>34</sup> It would preserve prosecution bargaining flexibility, while encouraging the parties to agree that cooperation be rewarded when it occurs before lawyers get involved in the case.

Sometimes, the parties ultimately do not enter into a cooperation agreement in border transportation cases, even when the defendant is cooperative and willing to talk to agents. This sometimes occurs because the courier has such limited information; other times, he resists a formal agreement because he fears for his safety or the safety of his family in Mexico. Guideline §1B1.8 addresses this situation by noting that Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f) restrict the use of information conveyed during plea negotiations.<sup>35</sup> Considering that the rules of evidence do not directly apply to sentencing proceedings, *see* FED. R. EVID. 1101(d)(3), the §1B1.8 commentary should be amended to clarify that plea-negotiation statements are protected.

### **Balancing Fairness and Simplicity of Application: Illegal Reentry**

Since the initial promulgation of the guidelines, the Commission has been concerned with finding practical ways “to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process.”<sup>36</sup> Reconciling these two aims requires the Commission to establish simple rules of guideline application that are fair in the mine-run case. Despite the Commission’s efforts, however, some guidelines do not achieve these aims. The illegal-reentry guideline, §2L1.2, is one of them. The failure of §2L1.2 to provide easily applicable rules leading to fair sentences is a longstanding problem, the impact of which has grown as the number of sentencings under the guideline has dramatically risen.

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34. This point has been repeatedly made by my fellow Defenders. *See, e.g.*, Dubois/Kaplan Testimony at 33; Johnson Statement at 28–29; Drees Statement at 9–10; Written Statement of Alexander Bunin, Public Hearing Before the U.S. Sentencing Commission, New York City, New York at 18–19 (July 9, 2009) (hereinafter Bunin Statement).

35. *See* U.S.S.G. §1B1.8, comment. (n.3).

36. U.S.S.G. Ch.1, Pt.A(4)(a)

Illegal reentry after deportation has become a major focus for federal prosecution in the past 20 years,<sup>37</sup> nowhere more so than in the Western District of Texas.<sup>38</sup> The facts of these offenses are typically simple and relatively benign—there is rarely any violence or danger to the public associated with the defendant’s reentry. The vast majority of defendants raise no defense and plead guilty. As with the drug courier case described above, one would think the guideline determination would be relatively straightforward, and the resulting punishment relatively mild.

As the Commission well knows, this is not the case. Section 2L1.2 includes multiple upward adjustments based on past convictions. These past convictions can double or triple the defendant’s offense level, even when the previous sentence does not qualify for criminal history points under Chapter Four. The adjustments rely on a confusing litany of difficult-to-apply definitions that can turn on arcane subtleties in decades-old state statutes, or on state record-keeping practices that have nothing to do with the defendant or his offense. The result is that, for illegal reentry, there has been a common refrain from

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37. In 1992, there were only 652 defendants sentenced for this offense, accounting for less than 2 percent of the total federal criminal docket. *See* Statement of John R. Steer, Vice-Chair, U.S. Sentencing Commission, Before the Subcommittee on Criminal Justice Oversight, U.S. Senate Judiciary Committee, Exhibit 8 (Oct. 13, 2000). By 2002, the number of cases had increased tenfold, and by 2008 illegal reentry offenses accounted for 13,575 defendants, or more than 18 percent of the total docket. *See* U.S. Sentencing Commission, *2002 Sourcebook of Sentencing Statistics*, tbl. 17, at 40; *id.*, 2008 *Sourcebook of Sentencing Statistics* tbl. 50, at 123 (hereinafter 2008 Sourcebook). Immigration prosecutions jumped by approximately 20 percent in FY 2009 alone. *See* Chief Justice John Roberts, *2009 Year-End Report on the Federal Judiciary* at 4 (Dec. 31, 2009).

38. *See* WDTX 2008 Packet, fig. A., at 1 (showing that immigration cases account for 47.2 percent of the district’s sentencing docket); *id.*, tbl. 1, at 2 (3,403 immigration cases in the Western District). To place these numbers in perspective: In FY 08, there were more immigration cases in the Western District of Texas than there were murder, manslaughter, kidnapping, sexual abuse, assault, robbery, arson, burglary, and racketeering/extortion in all the federal courts in the nation, *combined*. *Id.* tbl. 1, at 2.

guideline users: §2L1.2 is too complex,<sup>39</sup> and the sentences it produces are too high.<sup>40</sup> The Commission could achieve its sentencing purposes with a simpler, less draconian guideline. Such a guideline would be a great help to judges and practitioners in the Western District of Texas and throughout the country.

I make three suggestions for removing unnecessary severity and complexity from §2L1.2: (1) reduce the offense levels associated with the maximum enhancements under the guideline; (2) redefine and narrow those enhancements, using determinations already required elsewhere in the sentencing process; and (3) retain, and expand, guideline commentary to encourage downward departures when the sentence called for does not account for mitigating circumstances present in of a defendant's reentry offense.<sup>41</sup> Implementing these suggestions would help simplify the sentencing process for probation officers and judges, reduce unnecessarily high guideline sentences, and obviate some of the need for appellate review in these cases.<sup>42</sup>

I understand that full revision of §2L1.2 is not on the Commission's priorities list for this cycle, but I urge the Commission to consider amendments to the guideline in the near future, and I hope that the suggestions below will provide a basis for discussion.

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39. See, e.g., U.S. Sentencing Commission, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines*, at 24 (January 20, 2006) (hereinafter *Interim Staff Report*) (guideline users raise concerns regarding complexity of guideline); Tr. of Public Hearing Before the U.S. Sentencing Comm'n, Stanford, California at 159 (May 27, 2009) (testimony of Chief U.S. Probation Officer Marilyn Grisham) (hereinafter Grisham Testimony) (§2L1.2 determinations are "very time consuming," and the resulting sentences "are just too high").

40. See e.g., Tr. of Public Hearing Before the U.S. Sentencing Commission, Stanford, California, at 57, 63-65, 114-15 (May 28, 2009) (Testimony of Judge Edward F. Shea). (criticizing length of § 1326 sentences under cost-benefit analysis); Grisham Testimony at 159 (May 27, 2009); Hawkins Statement at 10; Bunin Statement at 15-16; Joint Written Statement of Thomas W. Hillier II and Davina Chen, Public Hearing Before the U.S. Sentencing Commission, Stanford, California, at 27 (May 27, 2009) (hereinafter Hillier/Chen Statement); Written Statement of Raymond Moore, Public Hearing Before the U.S. Sentencing Commission Denver, Colorado, at 32-33 (Oct. 21, 2009) (hereinafter Moore Statement).

41. I have drafted language for an amended guideline that would accomplish these goals, and submitted it to Commission staff for analysis.

42. I note that, in fiscal year 2008, the Western District had the highest number of sentencing appeals of any district in the nation. *2008 Sourcebook*, tbl. 56, at 138. In our office, the vast majority of appeals challenge the application, or the reasonableness, of the illegal-reentry guideline.

**1. Reduce the severity of the enhancements.** As others have fully explained, the enhancements in guideline §2L1.2 are simply too high. I suggest that, at a minimum, the Commission consider reducing the enhancements in subsections (b)(1)(A) and (B) by four levels each, and the enhancement in subsection (b)(1)(C) by two levels. This would have the effect of equalizing offense levels for illegal-reentry defendants and firearm-possession defendants with similar prior convictions.<sup>43</sup> I do not mean to suggest that illegal-reentry defendants should be incarcerated at the same level as armed felons to the contrary, illegal-reentry defendants are typically deserving of less punishment.<sup>44</sup> But there is certainly no reason that illegal-reentry defendants should be punished *more* severely.

**2. Narrow the maximum §2L1.2 enhancement provisions, using determinations that are already made by the court elsewhere in the sentencing process.** Before its amendment in 2001, guideline §2L1.2 provided a 16-level enhancement for any prior aggravated felony conviction. As the Commission recognized, this across-the-board enhancement was both unnecessary and unfair due to the breadth of the definition of aggravated felony.<sup>45</sup> The Commission sought to respond to this problem by providing graduated sentencing enhancements “depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant.”<sup>46</sup> In attempting to differentiate among aggravated felonies, however, the Commission made the guideline far more complex. Now, the sentencing court not only has to determine if the defendant has previously been convicted of an aggravated felony so as to increase the statutory maximum under 8 U.S.C. § 1326(b)(2), but it also has to determine whether any of the bases for the guideline enhancement applies, even if § 1326(b)(2) does not. Meanwhile, the 16-level enhancement continues to apply to some offenses that clearly do not deserve it.<sup>47</sup>

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43. Cf. U.S.S.G. §2K2.1(a)(4)(A) (level 20 for firearm-possession defendant with felony conviction for crime of violence or controlled substance offense), §2K2.1(a)(6) & comment (n.3) (level 14 for defendant whose firearm possession was illegal because of prior felony conviction).

44. See Joint Written Testimony of Marjorie A. Meyers and Lucien B. Campbell before U.S. Sentencing Commission, Public Hearing on Proposed Immigration Amendments, San Antonio, Texas, at 7 (Feb. 21, 2006) (hereinafter Meyers/Campbell Testimony).

45. See U.S.S.G. App. C, amend. 632 (Nov. 1, 2001).

46. *Id.*

47. See, e.g., Tr. of Public Hearing Before the U.S. Sentencing Commission, Stanford, California, at 54 (testimony of Judge Shea) (even after 2001 amendment, judge still struggled with the undue severity of sentences); *id.* at 116 (testimony of Judge Winmill) (discussing cases where the 16-level enhancement “is just out of whack”); Hawkins

Basing enhancements on prior convictions will always result in some complexity and unfairness, because of the vast array of prior convictions possible and the wide variety of state sentencing practices. However, I believe that undue complexity and severity can be removed from §2L1.2 while still achieving the Commission’s salutary goal of distinguishing more serious aggravated felonies from less serious ones. This can be accomplished by using a combination of the aggravated-felony and criminal-history determinations, determinations that are already made during the sentencing process. In every illegal-reentry sentencing, the court must “inevitably” determine if the defendant has a prior conviction for an aggravated felony, so as to select the appropriate statutory penalty.<sup>48</sup> Similarly, the court will make a criminal-history computation at sentencing in virtually every federal case.<sup>49</sup> Using these same determinations, the Commission could identify a limited subset of convictions for especially serious aggravated felonies for which the defendant received a substantial sentence. Aggravated felonies that are not as serious, or for which a lesser sentence was imposed, would be subject to lesser penalties.

The Commission has long used both the aggravated-felony definition and Chapter Four criminal history calculations in determining some offense levels under §2L1.2, though only in limited circumstances<sup>50</sup> Using these determinations more broadly would avoid the unnecessary complexity that arises from multiple determinations based on multiple definitions. Equally important, it would rectify the situation where the guideline recommends a maximum enhancement for an offense that does not meet the “aggravated felony” definition applicable to § 1326(b)(2).<sup>51</sup> Limiting the maximum enhancement to a

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Statement at 12–13 (discussing case of Cesar Tlatanchi-Enriquez, who received 16-level increase based on statutory rape conviction for living with underage girlfriend). *Cf. United States v. Zapata-Trevino*, 378 F. Supp. 2d 1321, 1326–27 (D.N.M. 2005) (Vasquez, J.) (holding that although 16-level enhancement applied, defendant’s actual conduct underlying prior conviction was “innocuous” and “relatively trivial”).

48. Interim Staff Report at 24. Normally, this determination is made in advance of sentencing, at the time of the defendant’s plea. *See* FED. R. CRIM. P. 11(b)(1)(H) (requiring court to advise defendant of maximum statutory penalty).

49. *See* U.S.S.G. §1B1.1(f).

50. *See* U.S.S.G. §2L1.2(b)(1)(C) and comment. (n.3(A)) (using aggravated-felony definition of § 1101(a)(43)); §2L1.2(b)(1)(A)(ii), (b)(1)(B), and comment. (n.1(B)(vii)) (distinguishing between drug-trafficking felonies based on the sentence imposed, as defined in guideline §4A1.2).

51. *See, e.g.,* Interim Staff Report at 25; Hawkins Statement at 12. Currently, the offenses in this category under the guideline include not only crimes of violence, but also firearms and aiding-and-abetting offenses. *Compare* U.S.S.G. §2L1.2, comment. (nn.1(B)(iii), 1(B)(v), and 5) *with* 8 U.S.C. § 1101(a)(43)(C), (E), (F) and (U).

predetermined subset of aggravated felonies would ensure that the defendants who receive the greatest guideline enhancement are those Congress intended to punish more severely. And using the Chapter Four calculations would have the benefit of eliminating enhancements based on offenses so old that they do not score criminal history points. I agree with others who have previously testified that remote convictions should not be considered for the maximum enhancement.<sup>52</sup> It makes no more sense to consider a stale conviction to enhance a sentence for an illegal-reentry defendant than it does for a firearms offender under §2K2.1 or a career drug or violent offender under §4B1.2.<sup>53</sup>

This proposal would most significantly impact “crime of violence” enhancements under guideline §2L1.2. Currently, the guideline uses a complicated formula that requires the court to determine the generic, contemporary meaning of a host of undefined, enumerated offenses.<sup>54</sup> The result has been protracted litigation and appeal, with the propriety of a massive enhancement often turning on arcane questions of state law that have little to do with the defendant or his instant offense.<sup>55</sup> Some such litigation is inevitable as long as the statute and guideline use the complex aggravated-felony definition for enhancement purposes. But there is no reason to add to this complexity in setting rules for determining the appropriate sentence. Instead, the “crime of violence” definition used for the maximum enhancements under §2L1.2 should be limited to a subset of particularly serious aggravated-felony crimes of violence: crimes that have as an element the use, attempted use, or threatened use of physical force against the person of another. This definition is already used in the commentary to §2L1.2,<sup>56</sup> and it is consistent with (though narrower than) the statutory definition used for the § 1326(b)(2) enhancement. It also tracks the career-offender definition in §4B1.2(a)(1), and the

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52. See, e.g., Hillier/Chen Statement at 28; Hawkins Statement at 13.

53. Cf. U.S.S.G. §4B1.2, comment. (n.3) (Chapter Four criminal history computation rules apply to drug and violent crimes used in career-offender determination); U.S.S.G. §2K2.1, comment. (n.1) (same, firearms offenses). Cf. *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055 (9th Cir. 2009) (holding that within-guideline §2L1.2 sentence was substantively unreasonable because of age of prior conviction).

54. See, e.g., *United States v. Garcia-Caraveo*, 586 F.3d 1230, 1233 (10th Cir. 2009); *United States v. Aguila-Montes*, 553 F.3d 1229, 1233 (9th Cir. 2009); *United States v. Fierro-Reyna*, 466 F.3d 324, 326–27 (5th Cir. 2006).

55. See, e.g., *Fierro-Reyna*, 466 F.3d at 326–30; *United States v. Cervantes-Blanco*, 504 F.3d 576, 578–87 (5th Cir. 2007).

56. See U.S.S.G. §2L1.2, comment. (n.1(B)(iii)) (using this definition, but also adding a list of 12 other specific offenses).

statutory definition of violent felony in the Armed Career Criminal Act.<sup>57</sup> By using this single definition, confusing references to other offenses or definitions could be eliminated.

**3. Retain and expand departure grounds under the guideline.** Some have argued against amendment of the definition of crime of violence under §2L1.2 for fear that a defendant with a particularly serious prior offense would not receive an appropriate enhancement. But the Commission has already responded to such concerns by including a departure provision for those cases in which the applicable offense level is substantially understated (or overstated).<sup>58</sup> I believe that this provision should be retained.

As Judge Kathleen Cardone, Judge Michaela Alvarez,<sup>59</sup> and others<sup>60</sup> have testified, I also believe that the guideline should take account (by departure or other mechanism) of defendants whose illegal return to the United States is not connected to any other criminal activity, but instead based on a desire to reunite with family or some other benign motive.<sup>61</sup> Encouraged departures could also help account for the fact that, for someone with deep ties to this country, deportation is an especially severe sanction.<sup>62</sup>

I propose that the Commission consider, at a minimum, adding the following language to the guideline commentary encourage such departures:

*There may be cases in which the defendant's motives for reentering the United States are unconnected to any other criminal activity, or where the defendant's ties to family, employment or community in the United States mitigate the*

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57. See 18 U.S.C. §924(e)(2)(B)(i). The statutory definition is likely to receive controlling interpretation by the Supreme Court in *Johnson v. United States*, No. 08-6925 (argued Oct. 6, 2009).

58. See U.S.S.G. §2L1.2, comment. (n.7); App. C. amend. 722 (Nov. 1, 2008).

59. Judge Cardone and Alvarez testified at the Austin hearing. A transcript of their testimony is not yet available on the Commission website.

60. See, e.g., Hawkins Statement at 12.

61. See, e.g., *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 960 (E.D. Wis. 2005) (motive for reentry mitigates seriousness of § 1326 offense, supports below-guideline sentence); see generally 1 Wayne R. LaFare, *Substantive Criminal Law* § 5.3(b) (2d ed. 2003) (“Motives are most relevant when the trial judge sets the defendant’s sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives . . . .”)

62. See *Costello v. INS*, 376 U.S. 120, 128 (1964) (“deportation is a drastic measure, at times the equivalent of banishment or exile”) (citations omitted).

*reentry offense or make deportation an especially harsh additional sanction. In such cases, a departure may be warranted.*<sup>63</sup>

I note that, when the Department of Justice pushed for the addition of an aggravated-felony enhancement in §2L1.2 in 1991, it suggested that circumstances of these sort could support a downward departure.<sup>64</sup> Nineteen years later, the suggestion remains a sound one.

The combined effect of these revisions would be to simplify greatly the sentencing process in illegal reentry cases, reducing the guidelines for defendants not deserving of more significant punishment while retaining the flexibility necessary for judges to deal with the individual circumstances of each case. I urge the Commission to consider them.

### **Double Counting, Recency, and Status: The Problems Caused by “Unsupervised” Release of Deported Aliens**

Finally, I want to join my colleagues who have decried the double- and triple-counting that §2L1.2 authorizes.<sup>65</sup> This is an especially troubling problem in border districts like ours, where there are many prosecutions for illegal reentry against defendants who have no other felony convictions, but who reenter the United States repeatedly due to long residence in and ties to this country. For these defendants, the effect of multiple counting of the prior reentry offense can be especially severe, in part because returning to the United States is typically punished both as a new offense and as a violation of supervised release.

In recent years, prosecution trends in the Western District of Texas have led to the arrest of many illegal-reentry defendants with little or no criminal history but significant ties to the United States. Judges are generally lenient in these cases; defendants often receive time-served sentences of less than 6 months’ imprisonment. They also typically receive one year of “unsupervised release,” a term long used in the Western District of Texas and elsewhere on the border to describe a supervised release term with no supervision and the only condition that the defendant not reenter the United States.<sup>66</sup> These defendants are deported to Mexico soon after sentencing; lacking community or

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63. I understand that the Commission is currently considering an additional departure ground to reflect the fact that, due to their status, illegal-immigrant defendants face harsher conditions and receive fewer benefits in prison. I support such a departure ground, and believe that it should apply both in illegal-reentry and other types of cases.

64. *See* U.S. Dep’t of Justice, Statement of Joe Brown Before the U.S. Sentencing Commission, at 8 (March 5, 1991).

65. *See, e.g.*, Hawkins Statement at 14. *Cf.* Interim Staff Report at 28–29 (noting concerns regarding double-counting under §2L1.2).

66. *See, e.g., United States v. Garcia-Garcia*, 939 F.2d 230, 231 (5th Cir. 1991).

family ties (or even the ability to speak Spanish), they return to the United States, often to reunite with citizen parents, siblings, spouses and children.

When such a defendant is again prosecuted for illegal reentry, he can have the prior reentry conviction counted as many as *six* times:

- (1) to increase the statutory maximum penalty from 2 to 10 years under 8 U.S.C. § 1326(b)(1);
- (2) to increase the offense level by four under §2L1.2(b)(1)(D);
- (3) to increase the criminal history score by two points under §4A1.1(b);
- (4) to increase the criminal history score by another two points under §4A1.1(d) because the defendant returned to the United States while on supervised release for his reentry first offense;
- (5) to increase the criminal history score by yet another point under §4A1.1(e) because the defendant returned within two years of his release; and
- (6) to revoke the supervised release term, a revocation for which the guidelines recommend a consecutive imprisonment sentence under policy statement §7B1.3(f).<sup>67</sup>

While it is hard to understand why any of this multiple counting is justified,<sup>68</sup> I believe the least justifiable increased penalties involve supervised release. “Supervised” release is a misnomer when it comes to deported defendants. They receive no supervision at all – no opportunities for training, education programs, drug or alcohol addiction or psychiatric treatment, or any of the other benefits regularly available to U.S.-citizen releasees as they attempt to re-enter society. Deported defendants are simply dropped on the other side of the border and told not to return – even if, as Judge Cardone and Judge Alvarez noted, they have spent virtually their entire lives in the United States, and their family, friends, and coworkers are all in this country. Given the lack of support, the imposition of supervised release in these cases does nothing but establish a basis for additional punishment.<sup>69</sup> For these reasons, I would urge the Commission to amend the

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67. See also U.S.S.G. §5G1.3, comment. (n.3(C)).

68. “Although it is sound policy to increase a defendant’s sentence based on his prior record, it is questionable whether a sentence should be increased twice on that basis.” *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 963 (E.D. Wis. 2005 ).

69. The threat of additional punishment is not necessary for its potential deterrent effect. Many other punishment threats already perform this purpose. A defendant who returns to the United States after a prior reentry offense faces an increase in the maximum statutory penalty from 2 to 10 years. He faces a significantly increased offense level under §2L1.2(b)(1), and an increased criminal history score under §4A1.1(b) and (e).

language of §2L1.2 and §5D1.1 to recommend against automatic imposition of “unsupervised” supervised release on aliens facing deportation.

More generally, the Commission could consider one or more of the following measures to alleviate unnecessary multiple counting in illegal reentry and other cases:

- Eliminate either the recency or status points in §4A1.1(d) and §4A1.1(e), or combine them so that a defendant receives no more than 2 points total under these provisions;
- Make §4A1.1(d), §4A1.1(e), and §4A1.2(k) inapplicable to prior convictions for which the defendant receives an offense-level enhancement under §2L1.2(b) or similar provisions (*see, e.g.,* §2K2.1);
- Amend policy statement §7B1.3(f) and the commentary to guideline §5G1.3(c) to remove the requirement that a consecutive sentences be imposed for a federal offense when the defendant is also subject to a federal revocation sentence;
- Add commentary to guideline §5G1.3 and policy statement §7B1.3(f) to suggest that, when a defendant’s offense level or criminal history score is increased because of a pending federal supervised release term, any consecutive revocation sentence be adjusted to account for the increased punishment the defendant will serve on the new offense.

Each of these provisions could help alleviate the unfairness associated with multiple-counting of prior convictions.

In closing, I wish to thank the Commission for its commitment to fairness in sentencing and its continuing work to improve the advisory guideline system. For twenty years, the guidelines have had tremendous importance in sentencing in the Western District of Texas and throughout the country, and they continue to be of tremendous importance in the advisory system. The Commission’s efforts to improve the guidelines are greatly appreciated by all of us who work with them every day.

## **DRAFT PROPOSALS FOR REVISING SENTENCING GUIDELINE §2L1.2**

*Below are two preliminary draft proposals for revising guideline §2L1.2. Neither proposal is intended to resolve all potential application issues under the guideline; however, they address some application problems that guidelines users commonly encounter. I submit the proposals them with the hope that Commission staff will be able to perform data analysis to gauge the impact they would have on actual cases. The Defenders' support of either proposal is necessarily contingent on what that analysis shows.*

*Version 1 tracks the suggestions made in my written testimony. It is generally intended to narrow application of the guideline enhancements in the current guideline. However, the proposed enhancements may be slightly broader than those in the current guideline in at least two instances: (1) aggravated-felony firearms offenses (compare proposed subsection (b)(1)(A)(i) below with current application note 1(B)(v)); and (2) misdemeanor offenses that qualify for enhancement under § 1326(b)(1) (compare proposed subsection (b)(4) with current subsection (b)(1)(E)). These expansions are included for the sake of simplifying the guideline. Data analysis is necessary to determine how many cases they would affect.*

*Version 2 does not track the proposals made in my testimony. Instead, it is based on the Defenders' proposal when amendments were being contemplated in 2006. This version is generally intended to make guideline §2L1.2 parallel to the felon-in-possession-of-a-firearm guideline, §2K2.1. It has the benefit of providing consistency across the Guidelines Manual; however, it does not remove as much complexity from application of the guideline, and I believe it may overstate the seriousness of reentry offenses (which generally do not present the dangers associated with firearm possession).*

*Please provide any feedback to me, Jon Sands, or Amy Baron-Evans. The Defenders appreciate the Commission's consideration of these proposals.*

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## VERSION 1

### §2L1.2. Unlawfully Entering or Remaining in the United States

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic (apply the greatest):  
If the defendant previously was deported after a conviction for
  - (1) (A) an offense that is
    - (i) defined as an aggravated felony by 8 U.S.C. § 1101(a)(43)(A), (B), (E)(i), (E)(iii), (I), (J) (K), (L), or
    - (ii) defined as an aggravated felony by 8 U.S.C. § 1101(a)(43)(F) and as a crime of violence against the person under 18 U.S.C. § 16(a); and
  - (B) that qualifies for criminal history points under §4A1.1(a), increase by **12** levels;
- (2) an aggravated felony offense included in (b)(1)(A) that does not qualify for criminal history points under §4A1.1(a), increase by **8** levels;
- (3) any other aggravated felony offense, increase by **6** levels; or
- (4) any other felony conviction, or any three or more convictions for misdemeanor offenses that qualify for enhancement under 8 U.S.C. § 1326(b)(1), increase by **4** levels.

#### Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Notes:

##### *1. Definitions. For purposes of subsection (b):*

- (A) “Conviction” has the meaning given the term in section 101(a)(48)(A) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(48)(A)).

- (B) *“Felony” means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*
- (C) *“Aggravated felony” has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)).*
- (D) *“Three or more convictions” means at least three convictions for offenses that are not counted as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).*

2. Application of Subsection (b).

- (A) In General. *For purposes of subsection (b):*
  - (i) *A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.*
  - (ii) *A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.*
  - (iii) *Subsection (b) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*
- (B) Aggravated Felonies Subject to Additional Enhancement. *Subsections (b)(1) and (b)(2) provide additional enhancement for defendants who were deported after convictions for particularly serious aggravated felonies:*
  - (i) *Subsection (b)(1)(A)(i) provides additional enhancement for the prior aggravated felony offenses of murder, rape, or sexual abuse of a minor (see 8 U.S.C. § 1101(a)(43)(A)); drug trafficking (see 8 U.S.C. § 1101(a)(43)(B)); specified weapons offenses (see 8 U.S.C. § 1101(a)(43)(E)(i) and (E)(iii)); child pornography (see 8 U.S.C. § 1101(a)(43)(I)); specified racketeering offenses (see 8 U.S.C. § 1101(a)(43)(J)); specified prostitution- and peonage-related offenses (see 8 U.S.C. § 1101(a)(43)(K); and specified national defense offenses (see 8 U.S.C. § 1101(a)(43)(L)). The applicable definitions for these offenses are the same as is used in the statutory aggravated-felony definition.*
  - (ii) *Subsection (b)(1)(A)(ii) provides additional enhancement for specified aggravated felony crimes of violence. To be subject to enhancement under*

*this subsection, the crime of violence must both meet the definition of an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), and qualify as a crime of violence against the person under 18 U.S.C. § 16(a). To qualify as a crime of violence against the person under that statute, the offense must have, as an element, the use, attempted use, or threatened use of physical force against the person of another.*

(iii) *If a prior offense identified in subsection (b)(1)(A) resulted in a sentence that qualifies for three criminal history points under guideline §4A1.1(a), the defendant receives a 12-level enhancement. If a prior offense did not receive criminal history points under §4A1.1(a), but otherwise meets the definition in subsection (b)(1)(A), the defendant receives an 8-level enhancement under subsection (b)(2).*

(C) *Conspiracies, and Attempts.* *Prior aggravated felony convictions counted under subsection (b) include the aggravated felony offenses of conspiring and attempting to commit such offenses. See 8 U.S.C. §1101(a)(43)(U).*

(D) *Computation of Criminal History Points.* *A conviction taken into account under subsection (b)(2), (3), or (4) is not excluded from consideration regardless of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*

3. *Departure Considerations:*

(A) *There may be cases in which the applicable offense level in subsection (b) substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted.*

(B) *There may be cases in which the defendant's motives for reentering the United States are unconnected to any other criminal activity, or where the defendant's ties to family, employment or community in the United States mitigate the reentry offense or make deportation an especially harsh additional sanction. In such cases, a departure may be warranted.*

\* \* \* \*

**VERSION 2:**

**§2L1.2. Unlawfully Entering or Remaining in the United States**

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic (apply the greatest):

- (1) If the defendant previously was deported after conviction for an aggravated felony, and subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense, increase by **[16]** levels;
- (2) If the defendant previously was deported after conviction for an aggravated felony, and subsequent to sustaining one felony conviction for either a crime of violence or a controlled substance offense, increase by **[12]** levels;
- (3) If the defendant previously was deported after conviction for an aggravated felony offense, increase by **6** levels;
- (4) If the defendant previously was deported after conviction for any other felony conviction, or any three or more convictions for misdemeanor crimes of violence or controlled substance offenses, increase by **4** levels.

Commentary

*Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).*

Application Notes:

1. Definitions. For purposes of subsection (b):

- (A) “Conviction” has the meaning given the term in section 101(a)(48)(A) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(48)(A)).
- (B) “Felony” means any federal, state, or local offense punishable by imprisonment for a term exceeding one year, without regard to the date of conviction for the felony.
- (C) “Aggravated felony” has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

- (D) *“Controlled substance offense” has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).*
- (E) *“Crime of violence” has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2. (Definitions of Terms Used in Section 4B1.1).*
- (F) *“Three or more convictions” means at least three convictions for offenses that are not counted as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).*

2. Application of Subsection (b).

- (A) In General. *For purposes of subsection (b):*
  - (i) *A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.*
  - (ii) *A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.*
  - (iii) *Subsection (b) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*
- (B) Application of subsections (b)(1) and (b)(2). *For a defendant to receive enhancement under subsections (b)(1) or (b)(2), he must have been deported after at least one aggravated felony conviction and one or more convictions for a crime of violence or controlled substance offense. For purposes of enhancement, a conviction that is treated as an aggravated felony for purposes of these subsections may also be considered as a crime of violence or controlled substance offense.*

3. Departure Considerations:

- (A) *There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction or convictions. In such a case, a departure may be warranted.*

- (B) *There may be cases in which the defendant's motives for reentering the United States are unconnected to any other criminal activity, or where the defendant's ties to family, employment or community in the United States mitigate the reentry offense or make deportation an especially harsh additional sanction. In such cases, a departure may be warranted.*

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November 20, 2013

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: Economic Offenses**

Dear Judge Saris:

Thank you for inviting representatives of the Federal Public and Community Defenders to participate in the 2013 Symposium on Economic Offenses. We understand that the Commission is aware of criticism of USSG §2B1.1 in cases with high loss amounts.<sup>1</sup> As the Commission moves forward in its work on economic offenses, the Defenders want to be clear about the significant problems with §2B1.1 as it applies to cases with lower loss amounts and lower-level offenders. Here we highlight those problems. In addition, we offer recommendations for change aimed at addressing the current problems with §2B1.1 across all loss amounts.

Our interest and experience in this topic runs deep. Defenders represent a significant number of the individuals charged with federal economic offenses. Our caseloads include a wide range of fraud charges, from those involving millions of dollars in securities, to social security fraud, to credit card theft, to false statements in Section 8 housing applications. Many of our clients are lower-level offenders and many of the cases involve lower loss amounts. Commission data indicate that more than half (53.9%) of all cases sentenced under §2B1.1 involve loss amounts of \$120,000 or less, and the vast majority, 83%, involve loss amounts of \$1

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<sup>1</sup> See, e.g., Transcript of U.S. Sentencing Comm'n Symposium on Economic Offenses, New York, NY, at 80 (Sept. 19, 2013) (Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n); Remarks of Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n at 12th Annual Compliance and Ethics Institute, Washington, DC, at 16 (Oct. 7, 2013).

million or less.<sup>2</sup> Sentences in these lower-level cases – not just in those at the top end of the loss table – routinely fall outside of the guideline recommended range. For example, in FY 2012, in cases involving loss amounts of more than \$30,000 and up to \$70,000, almost half (49.9%) of sentences fell outside of the guideline recommended range.<sup>3</sup> And in each of the next 4 loss categories, up to \$1 million, sentences fell outside the guideline recommended range well over half of the time (ranging from 59.7% to 65.6%).<sup>4</sup> Significantly, across all of these loss amounts, approximately one-third of the cases involved non-government sponsored sentences below the guideline range (ranging from 28.3% to 35.3%).<sup>5</sup> This is well above the national rate of non-government sponsored below guideline sentences for all offenses, which in FY 2012 was only 17.8%.<sup>6</sup> These statistics reflect our experience that for our clients – and for most of the fraud offenders – the current guideline often recommends unduly severe sentences. The problems with §2B1.1 are not limited to offenses involving high loss amounts.

### **A. Concerns With The Current Guidelines**

In past submissions to the Commission we have identified aspects of the guideline that have the most troubling impact on our clients, producing sentences that are greater than necessary for many low-level, non-violent fraud offenses.<sup>7</sup> We briefly highlight some of those issues below, and raise several new points, before addressing possible solutions.

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<sup>2</sup> USSC, Sentencing and Guideline Application Information for §2B1.1 Offenders, Symposium on Economic Crime, Sept. 18-19, 2013, at 6, [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Projects/Economic\\_Crimes/20130918-19\\_Symposium/Sentencing\\_Guideline\\_Application\\_Info.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Projects/Economic_Crimes/20130918-19_Symposium/Sentencing_Guideline_Application_Info.pdf) (“*Symposium Guideline Application Information*”).

<sup>3</sup> *Id.* at 8.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> USSC, *2012 Sourcebook of Federal Sentencing Statistics* tbl. N (2012) (*2012 Sourcebook*).

<sup>7</sup> Previous Defender submissions include: 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); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 15-21 (May 17, 2013).

## 1. Deterrence

The fraud guideline continues to rest on false assumptions about deterrence. The original Commission justified setting fraud sentences higher than past practice by asserting that “the definite prospect of prison, though the term is short, will act as a deterrent to many of these crimes.”<sup>8</sup> The evidence, however, shows no difference in deterrent effect between probation and imprisonment.<sup>9</sup> As mentioned by the experts at the Commission’s Recidivism Roundtable last month, it is well-supported and widely-accepted that deterrence is not linked to the severity of the penalty. Instead, the greatest deterrent effect is achieved through the certainty of getting caught and punished, not the severity of the punishment.<sup>10</sup> A good overview of the criminological research on certainty versus severity is available in an article by Valerie Wright, Ph.D., entitled *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* (Nov. 2010).<sup>11</sup>

## 2. Loss

**Loss table.** The loss table, which applies in the vast majority of §2B1.1 cases (85.3% in FY 2012<sup>12</sup>), significantly contributes to the problem of sentences that are greater than necessary for non-violent fraud offenders. First, it places too much emphasis on loss. The guideline should encourage more consideration of the real pecuniary harm done to victims, the gains

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<sup>8</sup> 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) (Commission sought to ensure that white collar offenders faced “short but definite period[s] of confinement”).

<sup>9</sup> 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).

<sup>10</sup> 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.

<sup>11</sup> <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>.

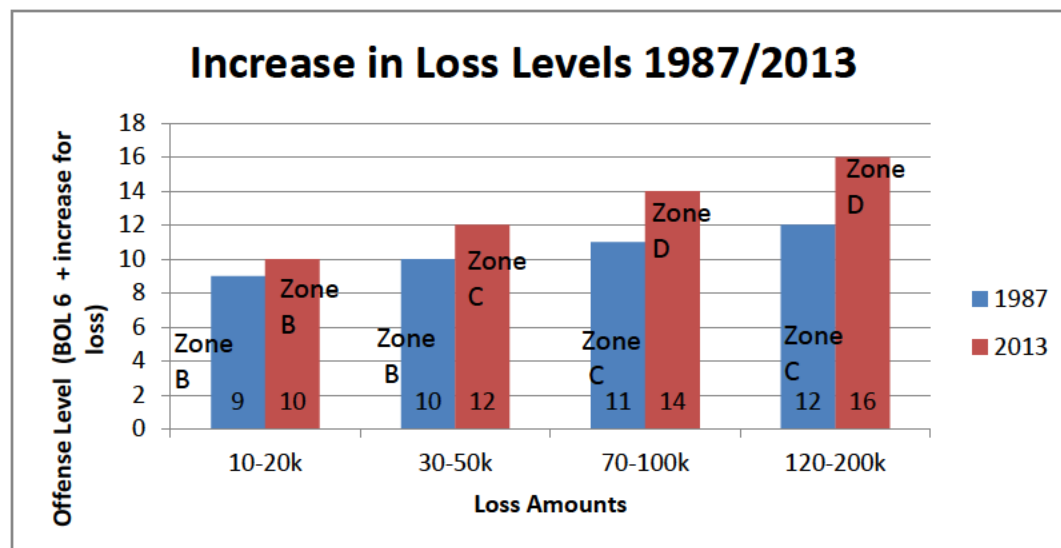
<sup>12</sup> *Symposium Guideline Application Information* at 6.

reaped by defendants, the defendant's motive in committing the offense, and other factors relevant to the defendant's culpability.

Second, for reasons unsupported by empirical evidence, the Commission repeatedly has increased the offense levels for various amounts. This is true across the entire loss table – for lower and higher loss amounts.

For example, in the bottom half of the loss table, as reflected below in Table A,<sup>13</sup> in 1987, a loss amount of more than \$10,000 and up to \$20,000 carried an increase of 3 levels, but now carries an increase of 4 levels. A loss amount of more than \$30,000 and up to \$50,000 carried an increase of 4 levels in 1987, but now carries an increase of 6 levels, pushing even first time offenders into Zone C. A loss amount of more than \$70,000 and up to \$100,000 has increased from 5 to 8 levels. A loss amount of more than \$120,000 and up to \$200,000 has increased from 6 to 10 levels.<sup>14</sup>

**Table A.**



<sup>13</sup> Table A shows the increase in offense levels for various loss amounts by comparing the 1987 and 2013 guidelines. The Zone references reflect available sentencing options for offenders in Criminal History Category I.

<sup>14</sup> The increases are even more extreme in the top half of the loss table. For example, loss amounts of more than \$2.5 million up to and including \$5 million have increased 8 levels since 1987. Loss amounts of more than \$7 million and up to and including \$20 million have increased by 9 levels, and loss amounts of more than \$100 million have increased by 15 levels. These increases in the top half of the loss table are so extreme that in comparison, the increases in the bottom half of the loss table could look negligible. But increases of 2, 3 and 4 levels in the bottom half of the loss table are significant. Every single level increase affects a person's liberty by increasing the guideline recommended sentence, and at these levels, can mean the difference between probation and imprisonment.

And, accepting the premise of the loss table, that loss is a proxy for offense seriousness, inflation has worked to further increase penalties. Since \$35,000 is worth less today than it was in 1987, a fraud involving an offense of \$35,000 is less severe today than it was in 1987, yet it is punished more severely than it was in 1987. But instead of adjusting the offense levels down to account for inflation, the Commission has only increased them, making punishments significantly more severe today than they were for comparable offenses in 1987, without any evidence that such increases are necessary to serve the purposes of sentencing.

**Intended loss.** Intended loss rules can be particularly unfair, increasing loss amounts well beyond the actual loss or the culpability of the defendant. First, when intended loss rules are combined with relevant conduct rules, loss amounts easily and quickly climb beyond the loss actually intended by the defendant to include greater amounts intended by co-conspirators (over whom our clients often have no control). Second, special rules, such as those for credit cards, drive up loss amounts in an arbitrary manner that is not sufficiently connected to the individual defendant's culpability. The guideline commentary provides that "loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 *per access device*." USSG §2B1.1, comment. (n. 3(F)(i)) (emphasis added). Some courts calculate intended loss as the credit *limit* of the credit card. These rules drive up loss amounts even if no evidence shows the defendant planned to reach either \$500 or the credit limit. Third, it makes no sense to say intended, but impossible-to-obtain loss amounts provide an accurate reflection of offender culpability, yet the current definition of "intended loss" includes "pecuniary harm that would have been impossible or unlikely to occur." USSG §2B1.1, comment. (n.3(A)(ii)). Before the 2001 amendments, some courts limited intended loss to that which was possible,<sup>15</sup> and the guidelines specified that a downward departure may be warranted when, for example, a defendant attempted "to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it." USSG §2F1.1, comment. (n.11) (1987).<sup>16</sup> The guideline's current use of impossible-to-obtain loss amounts to

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<sup>15</sup> See, e.g., *United States v. Watkins*, 994 F.2d 1192, 1196 (9th Cir. 1993) (loss in check kiting scheme was the \$13,100 defendant obtained, not the \$42,600 face amount on the checks).

<sup>16</sup> This example was included in the original guideline, §2F1.1, comment. (n.11) (1987), and remained until the amendments of 2001, at which point this example was omitted, USSG App. C., Amend. 617 (Nov. 1, 2001). No explanation was given for removing this example. At the same time, the Commission amended the guidelines to provide that "intended loss" includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)." The reason given for this new definition was that the "amendment resolves the [circuit] conflict to provide that intended loss includes unlikely or impossible losses that are intended, because their inclusion better reflects the culpability of the offender.... Accordingly, concepts such as 'economic reality' or 'amounts put at risk' will no longer be considerations in the determination of intended loss." USSG, App. C, Amend 617 (Nov. 1, 2001).

increase the guideline range, rather than mitigate it, does not accurately reflect offender culpability.<sup>17</sup>

### 3. Victims

The often-applied victim table also leads to guideline-recommended sentences that are greater than necessary. The victim adjustment began as a way of capturing offenses that were not “isolated crime[s] of opportunity,” and was not designed to account for financial harm to any victim. USSG §2F1.1 (backg’d) (Nov. 1, 1987). Due to a series of amendments, the victim adjustment has become untethered from this original purpose and serves to double count the pecuniary harm already captured in the loss table. In doing so, it overstates the seriousness of the offense.

Another way in which the victim table works to overstate the seriousness of the offense and culpability of the offenders is through the expanded definition of “victim” which, as of 2009, includes “any individual whose means of identification was used unlawfully or without authority,” even if those individuals suffered no loss and even if they were unaware that their identifying information had been obtained or misused. USSG §2B1.1, comment. (n.4(E)). The Commission expanded the definition because it determined that a victim of identity theft, “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 calculation under the guidelines.” USSG App. C, Amend. 726, Reason for Amendment (Nov. 1, 2009). Research has since revealed that the Commission’s determination was wrong. According to a 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.”<sup>18</sup> Only about 20% of victims spent more than a month trying to clear up problems.<sup>19</sup> But the guideline’s broad definition of victim increases offense levels at the same rate, with unfair uniformity, whether the victims were some of the few who

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<sup>17</sup> See, e.g., *United States v. Corsey*, 723 F.3d 366, 378-79, (2d Cir. 2013) (Underhill, D.J., concurring) (“This was a clumsy, almost comical, conspiracy to defraud a non-existent investor of three billion dollars.... Appellants’ conduct was not dangerous because they had absolutely no hope of success.... This conspiracy to defraud involved no actual loss, no probable loss, and no victim. The scheme was treated as sophisticated, but could be more accurately described as a comedic plot outline for a “Three Stooges” episode. Because the plan was farcical, the use of intended loss as a proxy for seriousness of the crime was wholly arbitrary: the seriousness of this conduct did not turn on the amount of intended loss any more than would the seriousness of a scheme to sell the Brooklyn Bridge turn on whether the sale price was set at three thousand dollars, three million dollars, or three billion dollars. By relying unquestioningly on the amount of the intended loss, the District Court treated this pathetic crime as a multi-billion dollar fraud—that is, one of the most serious frauds in the history of the federal courts.”).

<sup>18</sup> Lynn Langston & Michael Planty, Dep’t of Justice, *Victims of Identity Theft*, 2008 5 (2010).

<sup>19</sup> *Id.*

had to spend over a month resolving the problem, or were never notified or otherwise aware of the theft.

The combination of this expanded definition of victim with the special loss rules can create recommended sentences in credit card cases that far exceed what is appropriate for the seriousness of the offense and the culpability of the offender. As mentioned above, whether the access device is used or not, the guidelines set the minimum loss amount of \$500 per access device, and many courts count the loss amount as the maximum credit limit on the card. On top of that, every person linked to a stolen access device counts as a victim, even if that person was unaffected or unaware of the theft. The cumulative impact of these rules can be sizable, even for low- or mid- level offenders, who operate skimmers or run errands for little remuneration.

#### **4. Other Specific Offense Characteristics**

Other specific offense characteristics operate to further increase penalties beyond what is necessary and just in many cases.

**Sophisticated means.** The enhancement in §2B1.1(b)(10) for offenses involving sophisticated means has proven to be particularly troubling. The enhancement fails to narrowly capture more serious offenses and is often interpreted in a way that sets the bar for sophistication so low it could apply in every fraud case. For example, in a case where the defendant pled guilty to false use of a social security number, probation applied the sophisticated means enhancement where the defendant, who suffered from bipolar disorder, in an effort to obtain a student loan, presented an obviously torn and taped together Social Security card with her name and her son's Social Security number, and a letter purporting to be from the Social Security Administration confirming that her son's number belonged to her. The student loan organization saw right through this, confirmed the defendant's actual Social Security number, and denied the loan application.<sup>20</sup>

The enhancement is also overbroad because it applies whenever the scheme is sophisticated, even though a particular defendant may have no knowledge of the sophisticated scheme and is performing an unsophisticated role, such as driver or errand runner. Finally, although this enhancement is often unduly severe on its own, it becomes even more so when, for the same conduct, it is piled on top of the enhancement for possession or use of device-making equipment.<sup>21</sup>

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<sup>20</sup> The sentencing court, accepting the parties Rule 11(c)(1)(C) plea agreement, did not address whether the enhancement applied in this case.

<sup>21</sup> 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).

**Substantial part of scheme committed outside United States.** The enhancement in §2B1.1(b)(10) for offenses where “a substantial part of the scheme was committed from outside the United States” also produces guideline recommended sentences that overstate the seriousness of the offense and the culpability of the offender. This enhancement was added to “provide[ ] an increase for fraud offenses that involve conduct . . . that makes it difficult for law enforcement authorities to discover or apprehend the offenders.” USSG App. C, Amend. 577, Reason for Amendment (Nov. 1, 1998). At the time of the amendment the Commission was “informed that fraudulent telemarketers increasingly are conducting their operations from Canada and other locations outside the United States.” *Id.* Thus, the enhancement was designed to reflect increased seriousness and culpability where an offender has taken steps to make it difficult to be detected and captured. But now it is being applied more broadly than this, to less serious offenses, with less culpable offenders, where activities outside the United States do not reflect increased seriousness or culpability. We have seen this enhancement applied in cases where the defendant lived abroad, and the offense conduct targeted people both within and outside the United States. For example, in one case, the court applied this enhancement where the defendant was in the United Kingdom, not to evade U.S. law enforcement, or to make it difficult for law enforcement to detect the fraud, but because that is where he lived, having recently relocated there from Nigeria seeking education and work.<sup>22</sup> The charged fraud was operating in the United Kingdom, targeting people there as well as in the United States. And the United Kingdom investigated and prosecuted the fraud, until the United States reached out and extradited the defendant to face charges in the United States as well. A defendant’s residence in a different country at the time of the offense is not an offense characteristic that warrants the enhancement that applies to offenses where there has been an effort to avoid detection and capture.

**Floors.** We are also concerned that the floors or minimums that accompany the specific offense characteristics often overstate the seriousness of the offenses and culpability of the offenders. They set high floors for non-violent offenses, particularly when compared with the offense levels for violent offenses. For example, under §2A2.3, for an assault where physical contact is made, or use of a dangerous weapon is threatened, the guidelines provide for an offense level of 7, and even if there is bodily injury, the guidelines provide for an offense level of 9, well below the minimum offense level of 12 that accompanies the non-violent specific offense characteristics in §2B1.1(b)(10)-(12). This floor of 12 that applies to many of the non-violent fraud offenses is the same offense level that applies to someone who has obstructed an officer where the victim sustained bodily injury. See USSG §2A2.4. It is also the same as the offense level for involuntary manslaughter that involved criminally negligent conduct. See USSG §2A1.4.

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<sup>22</sup> *United States v. Olumuyiwa*, 406 Fed. Appx. 243 (9th Cir. Dec. 21, 2010).

## **B. Suggestions For Possible Changes To The Guidelines**

Over the years, on multiple occasions, the Commission has considered changes that would improve the guideline for economic offenses by addressing some of the concerns raised above.<sup>23</sup> The Commission has not yet implemented any of these changes. The time has come. The Commission's data shows that sentencing courts find the recommended guidelines too high, not just for cases at the top end of the loss table, but across all loss amounts. Sentencing courts have also provided feedback that the current guideline does not adequately capture the myriad factors relevant to the purposes of sentencing economic crime offenders. Consistent with that data and feedback, we offer a few suggestions below that would move the guideline in the right direction without fundamentally changing its structure.

### **1. Deterrence and Alternatives**

Because the current fraud guidelines do not serve the purposes of deterrence, and under 28 U.S.C. § 994(g), the Commission has an obligation to consider costs of incarceration and overcapacity of prisons, we urge the Commission to (1) encourage the use of alternatives to incarceration and (2) reduce the recommended terms of imprisonment.

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<sup>23</sup> See, e.g., Notices, United States Sentencing Commission, Sentencing Guidelines, 62 Fed. Reg. 152, 173 (Jan. 2, 1997) (inviting comment on whether loss should be “based primarily on actual loss, with intended loss available only as a possible ground for departure” and whether “the magnitude of intended loss should be limited by the amount that the defendant realistically could have succeeded in obtaining”); *id.* at 174 (inviting comment on “whether to specify that where the loss amount included through §1B1.3 (Relevant Conduct) is far in excess of the benefit personally derived by the defendant, the court might depart down to an offense level corresponding to the loss amount that more appropriately measures the defendant's culpability. Alternatively, the Commission invites comment on whether to provide a specific offense characteristic or special rule to reduce the offense level in such cases.”); Notices, United States Sentencing Commission, Sentencing Guidelines 63 Fed. Reg. 602, 620 (Jan. 6, 1998) (inviting comment on downward departure or specific offense characteristic where loss amount is “far in excess of the benefit personally derived (or intended) by the defendant”); *id.* (inviting comment on “whether and in what circumstances gain should be used in lieu of loss, whether gain should play a part in the loss calculation, and whether there should be some adjustment or departure if gain differs significantly from the loss figure”); *id.* (inviting comment on whether loss should be based on actual loss, “with intended loss available only as a possible ground for departure, or whether some downward adjustment for defendants whose actual loss is greater than their intended loss is warranted”); Notices, United States Sentencing Commission, Sentencing Guidelines, 66 Fed. Reg. 7962, 7995 (Jan. 26, 2001) (proposing downward departure where “primary objective of the offense was a mitigating, non-monetary objective” and where loss exceeds defendant’s actual or intended personal gain); *id.* at 8005 (proposing consideration of several mitigating factors).

## 2. Loss and mitigating factors

**Loss table.** The loss table should be reduced at least as low as its original levels established in 1987. As noted, those levels were set to produce sentences higher than past practice. No evidence shows that the subsequent increases are necessary to serve any of the purposes of sentencing. And, due to inflation, even if the offense levels had remained constant over the years, the penalties would be substantially more severe today than in 1987 for similarly serious conduct.

**Intended loss.** For the reasons discussed above, intended loss should be eliminated from the definition of loss, so that only actual loss is counted for purposes of applying the loss table. If, however, the Commission decides to keep this troublesome aspect of the guideline, at a minimum, the definition should be narrowed, so that intended, yet impossible-to-obtain loss amounts are not counted, and an example should be added to Application Note 19(C) making clear that a downward departure is warranted if intended loss greatly exceeds actual loss. In addition, if the Commission declines to exclude impossible-to-obtain loss from the definition of loss, Application Note 19(C) should be amended to specify that a downward departure may be warranted in such circumstances. For example, §2F1.1 used to provide that a downward departure may be appropriate where the “defendant attempts to pass a negotiable instrument so obviously fraudulent that no one would seriously consider honoring it.” USSG §2F1.1, comment. (n.11) (2000).

**Mitigating factors.** Even after the table is adjusted and intended loss is excluded, loss amounts need to be mitigated by a variety of factors. Below are a few ideas on how this could be accomplished within the structure of the current guideline.

- Clarify and/or expand the mitigating role adjustment in §3B1.2. Defenders recommend the following change to §3B1.2, which would affirmatively encourage use of the adjustment:

Likewise, an adjustment under this guideline should generally be considered for a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense and who had limited knowledge of the scope of the scheme ~~is not precluded from consideration for an adjustment under this guideline.~~ For example, a defendant in a health care fraud scheme, whose role in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, ~~is not precluded from~~ should generally be considered ~~for an adjustment under this guideline.~~ Similarly, a defendant who received little personal gain relative to the loss amount, and whose role was limited to such tasks as running errands, making

deliveries, and other similar activities, with little or no control over the loss amount, should generally be considered for an adjustment under this guideline.

- Impose an offense level cap of 10 and encourage courts to consider alternatives to incarceration for offenders within Criminal History Category I, where mitigating circumstances exist. Common mitigating factors include (but are not limited to):
  - Mitigating role (with suggested revisions to §3B1.2);
  - Defendant received little personal gain relative to loss;
  - Defendant's motive was to retain a job and/or defendant gained nothing other than a salary;
  - Defendant committed the offense to supplement a meager income and/or to meet basic needs;
  - Defendant did not actively participate in fraudulent misrepresentations;
  - Defendant began with good intentions, such as a real investment plan, or an intent to repay the loan;
  - Defendant's conduct was anomalous, and followed a stressful life event;
  - Defendant's conduct was due to mental health problems and/or addiction;
  - Defendant was coerced or under duress;
  - External factors, such as market forces significantly increased loss;
  - Victim was negligent or otherwise significantly contributed to the loss amount;
  - Defendant has taken steps to mitigate the harm and/or has stopped participating in the offense;
  - Intended loss greatly exceeds actual loss (this example is only necessary if the Commission rejects Defenders' suggestion to eliminate "intended loss");
  - Defendant's conduct was so obviously fraudulent, no one would have seriously considered it real, and/or the intended loss would have been impossible to obtain (this example is

only necessary if the Commission rejects Defenders' suggestion to eliminate or at least narrow the definition of "intended loss").

- Specify in Application Note 19(C) that, whether or not the defendant qualifies for the offense level cap, mitigating factors like those listed for the cap, may warrant a downward departure.

### **3. Victim table**

We recommend eliminating the victim table. Its application is confusing – resulting in a much higher rate of appellate reversals than occurs for other §2B1.1 enhancements<sup>24</sup> – and it produces unfair sentences by often double counting pecuniary harm, and by sometimes counting as victims those who have not suffered any adverse consequences. Enhancing sentences due to the number of victims is simply not necessary to further the purposes of sentencing. When there are adverse consequences for some or all of the victims, this is not captured by ticking off the number of victims, but instead can be addressed by deciding where within the range to sentence the defendant, and application of the vulnerable victim adjustment, §3A1.1, when appropriate. In addition, in serious cases where the offense substantially endangered the solvency or financial security of 100 or more victims, §2B1.1(b)(15)(B) already provides for a 4-level increase with a minimum offense level of 24. And, when there is an otherwise serious impact on victims, the guideline already provides for an upward departure when the offense level “substantially understates the seriousness of the offense.” USSG §2B1.1, comment. (n.19(A)). Finally, because retributive punishment can only go so far in vindicating victims’ interests, restitution may be a better mechanism than prison time for addressing pecuniary harm to victims.

If the Commission declines to eliminate enhancements based on only the number of victims, the Commission should, at minimum, limit their application to cases where there is evidence that the offense substantially endangered the solvency or financial security of the counted victims. It simply makes no sense to count as victims people who were fully reimbursed or who never suffered even a temporary monetary loss. In addition, to reflect the original intent of the enhancement, the Commission should provide that it does not apply if the offense was an isolated crime of opportunity. If the enhancements remain, we also encourage the Commission to provide an invited downward departure where application of the victim table double counts loss.

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<sup>24</sup> 2012 *Sourcebook* tbl. 59 (Affirmance rate for challenges to the number of victims was 79% compared with 93.3% for challenges to loss amount/calculation, 93.6% for challenges to sophisticated means enhancement, and 96.5% for other fraud and deceit issues.).

#### 4. Other Specific Offense Characteristics

**Sophisticated means.** We recommend eliminating the enhancement for sophisticated means. It is too ambiguous and subjective to meaningfully and consistently distinguish more serious offenses and offenders. In addition, sufficient sentencing options exist within the ranges and through Chapter Three adjustments to address the relative sophistication of a defendant's actions. For example, as the background to §2B1.1 makes clear, this enhancement is targeted primarily at addressing efforts to conceal and difficulty of detection, so may be addressed with the adjustment for Obstruction, §3C1.1. Similarly, truly aggravated circumstances can be sufficiently addressed with the adjustments for Aggravating Role, §3B1.1, and Abuse of Position of Trust or Use of a Special Skill, §3B1.3.

While we believe "sophisticated means" is too ambiguous for meaningful application, if the Commission insists it be a part of the guideline, it would be a step in the right direction to replace the specific offense characteristic with two departure provisions: an invited upward departure where the defendant used particularly sophisticated means, and a companion downward departure where the lack of sophistication is notable. But if the concept remains, as either a specific offense characteristic or a departure, it must be narrowed. First it should apply only where a *defendant* uses sophisticated means, rather than the current, broader enhancement where the *offense* involved sophisticated means. Second, the commentary needs to be amended because the current definition does not provide sufficient guidance that this enhancement applies only to a subset of offenders – those who engage in highly sophisticated conduct that is not common in fraud offenses.<sup>25</sup> Finally, it should provide that it does not apply when the device-making enhancement at §2B1.1(b)(11) is applied.

**Substantial part of scheme committed outside United States.** We recommend the Commission amend §2B1.1(b)(10) to exclude what are largely foreign offenses, and that are not as serious as those where the location reflects an intent to avoid detection and capture. We propose amending the enhancement as follows:

If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) **the defendant committed a substantial part of a fraudulent scheme ~~was committed~~ from outside the United States to evade United States' law enforcement or regulatory officials and targeted a substantial number of persons located in the United States;** or (C) the offense otherwise involved sophisticated means, increase by 2 levels.

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<sup>25</sup> The difficulty of this task supports our position that the enhancement needs to be eliminated because it cannot reliably distinguish more serious offenses and offenders.

**Floors and caps.** We urge the Commission to cap the cumulative effect of the enhancements in §2B1.1(b)(3)-(19), to avoid disproportionate cumulative adjustments. In addition, for the reasons discussed above, Defenders recommend that the floors be eliminated for the non-violent offenses.

## **5. Safety-Valve**

The Commission may also wish to consider crafting a safety-valve for fraud cases. The Commission took this step in the drug guideline to mitigate the harsh effects of using drug quantity as the measure of culpability. The Commission could likewise amend the guidelines to better account for the mitigating factors present in fraud cases. Such a “safety-valve” could apply to low-level defendants who disclose to the government the names of other participants of the scheme in exchange for a reduction in their offense level.

## **C. Conclusion**

We thank the Commission for its attention to economic offenses, and for considering our concerns about the application of the current guidelines in cases with lower loss amounts and lower-level offenders. Defenders are hopeful improvements can be made to the current guidelines that will address the problems that exist for a wide variety of offenses and offenders, not just those who fall at the high end of the loss table. We look forward to working with the Commission as it moves forward on its work on economic offenses.

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

Enclosures

cc (w/encl.): Hon. Ricardo H. Hinojosa, Vice Chair  
Hon. Ketanji Brown Jackson, Vice Chair  
Hon. Charles R. Breyer, Vice Chair  
Dabney Friedrich, Commissioner  
Rachel E. Barkow, Commissioner  
Hon. William H. Pryor, Commissioner  
Jonathan J. Wroblewski, Commissioner *Ex Officio*  
Isaac Fulwood, Jr., Commissioner *Ex Officio*  
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July 23, 2012

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

Attention: Public Affairs – Priorities Comment

**Re: Public Comment on USSC Notice of Proposed Priorities for Amendment  
Cycle Ending May 1, 2013**

Dear Judge Saris:

On behalf of the Federal Public and Community Defenders, and pursuant to 28 U.S.C. § 994(o), we offer the following comments on the Commission's Proposed Priorities for the 2013 amendment cycle. In this letter, we also encourage the Commission to revisit the Career Offender guideline, abolish the use of acquitted conduct in calculating the guideline range and eliminate or reduce the impact of uncharged conduct, and recommend to Congress that it amend the Sentencing Reform Act to provide for a representative of the Federal Public and Community Defenders to serve as an *ex officio* Commissioner.

**I. Proposed Priorities #1 and 3: Mandatory Minimum Sentences and Child  
Pornography Report**

The Commission has proposed continuing its work on mandatory minimum penalties, studying the effect of *Booker*, and reviewing child pornography offenses. We have previously offered extensive comment on each of these issues, which we will not repeat here. We offer the following additional information for the Commission's consideration.

The Commission's latest data release shows continued widespread dissatisfaction with the child pornography guideline. For those defendants for whom USSG §2G2.2 served as the primary offense guideline, 46.8% received a non-government sponsored sentence below the

guideline range.<sup>1</sup> Another 13.7% received a non-5K government-sponsored below range sentence.<sup>2</sup> By comparison, only 17.2% of all defendants received a non-government sponsored below guideline range sentence, and only 4.9% received a non-5K government sponsored below range sentence.<sup>3</sup>

Since the Commission's hearing on child pornography in February 2012, more judges have discussed the flaws with the child pornography guidelines. Judge Zouhary of the N.D. Ohio recently commented on the child pornography guidelines and how "[e]xcessive prison terms not only raise concerns regarding the expenditure of public monies and other resources, but they also compromise fundamental notions of fairness and justice." *United States v. Marshall*, \_\_ F. Supp. 2d \_\_, 2012 WL 2510845, \*1 (N.D. Ohio June 29, 2012). Judge Zouhary went on to reject the presumption in the guidelines that "those who view child pornography are indistinguishable from those who actually abuse children," finding instead that the "[e]mpirical data strongly suggests that viewing child porn does not equate to child molestation." *Id.* at \*2.

Judge Black in the District of New Mexico reached a similar conclusion, rejecting the government's suggestion that a higher sentence for receipt of child pornography was in order "because of the chance that [the defendant] will molest children in the future, or that he has in the past." *United States v. Kelly*, \_\_ F. Supp. 2d \_\_, 2012 WL 2367084 \*5 (D.N.M. June 20, 2012). The court concluded that "[a]ny Guideline based on unsupported fears, rather than actual evidence, is far more likely to render unreasonable sentences." *Id.* The court also criticized the guideline for enhancing sentences based upon factors that are inherent in the crime, including use of a computer, number of images, depictions of sadistic or masochistic conduct, and images of children under the age of twelve. *Id.* at \*7.

We also note that some members of Congress believe that because judges impose below-range sentences in child pornography cases at a high rate, these offenders are not being substantially punished.<sup>4</sup> But sentence length in these cases has continued to grow every quarter. Average sentence length in child pornography cases has skyrocketed from 29.1 months in 1996 (including production cases) to 134 months as of the second quarter of 2012 (not including

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<sup>1</sup> USSC, *Preliminary Quarterly Data Report: 2d Quarter Release, Preliminary Fiscal Year 2012 Data Through March 31, 2012* tbl. 1 (2012) (hereinafter *2d Quarter Release*).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*, tbl. 1.

<sup>4</sup> At the Commission conference in June, the Staff Director and Chief Counsel for the majority of the House Judiciary Committee stated that members of Congress would be "surprised to know" that sentences for child pornography have continued to grow and are still concerned that sentences in these cases are too low.

production cases).<sup>5</sup> Given the volatile nature of this issue, we urge the Commission to ensure that Congress understands the facts.

## **II. Proposed Priority #2: Booker Report and Data Collection and Dissemination**

### **A. Booker Report**

We have provided exhaustive comments and evidence regarding how the Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), and later Supreme Court decisions have affected federal sentencing practices, appellate review, and the role of the guidelines. The evidence does not justify legislation that would constrain judicial discretion, transfer sentencing power to prosecutors, create unwarranted and hidden disparities, and stifle the feedback from judges that has been so useful to the Commission in recent years. The Commission should devote its energy and expertise to fixing guidelines that are clearly broken rather than promoting constitutionally suspect legislation that would lead to disruptive litigation and undermine confidence in the Commission. We hope that the Commission carefully considers the comments that we and many others have provided when it makes recommendations to Congress and considers guideline amendments.

At the Commission's hearing in February, Commissioners and many witnesses acknowledged the significant constitutional problems with the Commission's proposals and the extensive and costly litigation they would engender, and were unable to identify any benefit that would outweigh these problems.<sup>6</sup> Judge Sessions offered no evidence that his proposal is necessary, acknowledging instead that there has been "no dramatic change" and that judges had accepted the guidelines across the country.<sup>7</sup> He provided no assurance that his proposal would not create serious problems.<sup>8</sup>

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<sup>5</sup> See U.S. Sent'g. Comm'n, Sourcebook of Federal Sentencing Statistics, tbl. 13 (1996-2009 versions), *2d Quarter Release*, tbl. 19.

<sup>6</sup> See, e.g., Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 62 (Feb 16, 2012) (Judge Barbadoro); *id.* at 88-89, 95 (Associate Deputy Attorney General Matthew Axelrod); *id.* at 94-95 (Commissioner Friedrich); *id.* at 108-09, 167-69 (Professor Klein); *id.* at 166-67 (Judge Howell); *id.* at 169-71 (Judge Lynch); *id.* at 171 (Judge Davis); *id.* at 116-20, 171-73 (Federal Defender Henry Bemporad); *id.* at 363-72 (David Debold, Chair, Practitioners' Advisory Group); *id.* at 380-93 (James Felman, American Bar Association); Statement of Chief United States Circuit Judge Theodore McKee on Behalf of the Judicial Conference Before the U.S. Sent'g Comm'n, Washington, D.C., at 6-19 (Feb. 16, 2012).

<sup>7</sup> *Id.* at 227.

<sup>8</sup> Neither Judge Sessions nor Professor Bowman has offered any credible safeguard against a one-way upward ratchet if the guidelines were made mandatory. Congressional staff from both parties at the

The fact remains that there is no “radical undermining” of sentencing policy.<sup>9</sup> The rate of non-government sponsored below range sentences for the first two quarters of 2012 combined is 17.2%, down from 17.4% in 2011.<sup>10</sup> The rate of below range sentences for the second quarter is 16.9%, the lowest since the first quarter of 2010.<sup>11</sup> This alone refutes the notion that a *Booker* “fix” is needed. Instead, it should inspire confidence that the feedback loop made possible by *Booker* works: As the Commission fixes broken guidelines, judges follow them more often.

We note that the rate of government-sponsored below-range sentences has reached an all-time high in the most recent quarter, at 27.9%.<sup>12</sup> If the Commission is concerned that judges sentence below the guidelines for reasons grounded in the sentencing statute in only 17% of cases, we fail to see why it is not cause for concern that prosecutors seek below-range sentences in nearly 28% of cases.<sup>13</sup>

As to the notion that the judicial discretion allowed under *Booker* has caused racial disparity, important new studies further undermine that claim. Studies from the University of Virginia and the University of Michigan show that if disparity remains after *Booker*, it is because of prosecutorial charging decisions and the fact that mandatory minimums are applied more frequently to black offenders than white offenders, thus preventing judges from reducing the sentences of black offenders more often than they otherwise would.<sup>14</sup> Racial minorities are

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Commission’s conference in New Orleans agreed that Judge Sessions’ hope that his proposal would somehow result in reduced sentences is unfounded. For a full discussion of the problems with Judge Sessions’ proposal, see Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. Penn. L. Rev. 1631, 1713-29 (2012).

<sup>9</sup> *Id.* at 169-170 (Judge Lynch).

<sup>10</sup> USSC, 2011 Sourcebook of Federal Sentencing Statistics; *2d Quarter Release*, tbl. 1.

<sup>11</sup> *Id.*, tbl. 4.

<sup>12</sup> *Id.*

<sup>13</sup> The answer cannot be that government-sponsored departures are part of the guidelines framework. First, the Commission could have encouraged downward departures based on the mitigating factors judges consider in imposing variances. Second, nearly 5% of government-sponsored below range sentences are for reasons other than cooperation or fast track.

<sup>14</sup> See Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities, Judicial Discretion, and the United States Sentencing Guidelines* 3 (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Research Paper Series No. 2012-02, 2012), <http://ssrn.com/abstract=1636419>; M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences* (Univ. of Mich. Law & Econ. Working Paper No. 12-002, 2012), <http://ssrn.com/abstract=1985377>.

treated more fairly as a result of *Booker*. Making the guidelines more mandatory would harm racial minorities.

Much has been made of differences in rates of judicial below-guideline sentences among districts but the Commission has not yet made an effort to understand or explain these differences. Further, although the difference between the highest and lowest rates of government sponsored below-range sentences by district has been consistently higher than the difference between the highest and lowest non-government sponsored rates by district, the Commission has made no mention of this fact. We urge the Commission to look closely at the reasons for differences in rates among districts, taking into account the kinds of cases and the severity of the guideline ranges, the lengths of sentences imposed, and the interaction between government and judicial practices in different districts. Charging and other prosecutorial practices interact with judicial sentencing practices and drive differences among districts. Further, inter-district variation in sentence lengths is likely to be a more relevant measure than inter-district variation in rates of whether there really has been any significant growth in differences among districts. Thus far, the Commission's presentation to Congress has focused narrowly on rates of below-guideline sentences imposed by judges, and has neglected other important parts of the picture, including sentence lengths, extent of variances and departures, reasons for judicial variances and departures, and rates and reasons for government-sponsored departures and variances.

We also urge the Commission not to pursue a stricter standard of review that is likely to be struck down as unconstitutional based on the notion that appellate judges are "frustrated" by the current standard of review.<sup>15</sup> First, the appellate judges who have spoken or testified at the Commission's hearings and conferences do not support a stricter standard of review.<sup>16</sup> Second,

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<sup>15</sup> Remarks of Commissioner Friedrich, New Orleans, June 2012.

<sup>16</sup> Appellate judges speaking in New Orleans expressed no frustration with the appellate standard of review and did not encourage the Commission to seek a stricter standard of review. Appellate judges at the February hearing advised the Commission not to seek a stricter standard of review. See Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C. at 170-71 (Feb 16, 2012) (Judge Lynch) ("[I]n going from the district court to the court of appeals, my sense of the desirability of more appellate review of sentences has drooped . . . because now I see it also from that perspective, and I see that we don't have the same degree of information, the same of feel for the case. I think appellate judges are very reluctant to get pushed into this. . . . But it's going to be a tough sell to appellate judges to get them to scrutinize any but outlier sentences."); *id.* at 171 (Judge Davis) ("I really agree with Judge Lynch, and . . . we really have settled into a comfort level I think in the Fourth Circuit. It ain't broke. . . . And I think the court is really quite comfortable with where we are."); Letter from Hon. Myron H. Bright, U.S. Circuit Judge, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n (Jan. 10, 2012). Appellate judges testifying at the regional hearings did not support statutory change when pressed to agree with such a proposal, and recognized that sentencing judges are more competent than they are to impose sentences and most often get it right. See Statement of Raymond Moore, Federal Public Defender for the District of Colorado, Before the U.S. Sentencing Comm'n, Washington, D.C., at 53-58 (Feb. 16, 2012) (quoting and discussing testimony of appellate judges at regional hearings).

courts of appeals have no trouble reversing sentences that are out of bounds while exercising appropriate restraint given the superior vantage point and experience of district court judges. Third, even if some appellate judges would like to return to enforcing the guidelines, that is not an option. We therefore urge the Commission not to recommend legislation that is constitutionally suspect based on the notion that some appellate judges are frustrated.

Finally, there appears to be no political will by either party to enact a *Booker* “fix,” in part because the crime rate is at an all-time low, in part because there is no evidence that such legislation is actually needed and substantial evidence that *Booker* has improved sentencing, and in part because such legislation would be difficult to enact and lead to disruptive litigation.<sup>17</sup> The Commission can best maintain the support of Congress and all other stakeholders by acting as the neutral expert body Congress created it to be, in recognition that Congress itself lacked those attributes.<sup>18</sup>

## **B. Data Collection and Dissemination**

We welcome the Commission’s proposal to “work with the judicial branch and other interested parties to develop enhanced methods for collecting and disseminating information and data about the use of variances and the specific reasons for imposition of such sentences under 18 U.S.C. § 3553(a).” We have previously commented on the need for the Commission to better capture and report the reasons judges give for the sentences they impose, and have explained how the current statement of reasons form fails to elicit relevant information.<sup>19</sup> Our concerns have not changed.

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<sup>17</sup> At the Commission’s conference in June, on a panel moderated by Commissioner Jackson, the Staff Director and Chief Counsel to the majority of the House Judiciary Committee said that there was no political will for significant change because the crime rate is at an all-time low. The minority continues to oppose a *Booker* “fix” because *Booker* has improved federal sentencing and there is no credible countervailing evidence that a “fix” is needed. See, e.g., Robert C. “Bobby” Scott, *Booker Is the Fix*, 24 Fed. Sent. Rep. 340 (June 2012).

<sup>18</sup> See Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 Wake Forest L. Rev. 291, 297 (1993) (Special Counsel to the Senate Judiciary Committee from 1975 through 1980 explaining that considerations that “commanded” the decision to delegate promulgation of guidelines to a sentencing commission were that Congress lacked the time, expertise, and political neutrality for the task).

<sup>19</sup> Statement of Nicole Kaplan & Alan Dubois Before the U.S. Sentencing Comm’n, Atlanta, Ga., at 13 (Feb. 10, 2009); Statement of Thomas Hillier & Davina Chen Before the U.S. Sentencing Comm’n, Stanford, Cal., at 41-47 (May 27, 2009); Statement of Henry Bemporad, Federal Public Defender for the Western District of Texas, Before the U.S. Sentencing Comm’n, Washington, D.C., at 18 (Feb. 16, 2012);

As it begins to work with “the judicial branch and other interested parties,” we encourage the Commission to establish a task force that includes representatives of the Defender community, the Department of Justice, academicians, researchers, and the private defense bar. A task force that includes a cross-section of organizations and individuals who use the Commission’s data will help ensure that this important issue and possible solutions are examined from all sides.<sup>20</sup> We look forward to working with the Commission in the coming months as it takes up this priority.

### **III. Proposed Priority #4: Economic Crimes**

Defenders commend the Commission for including in its list of proposed priorities a multi-year study of §2B1.1 and related guidelines. We are pleased this study will include an examination of the loss table and the definition of loss. Defenders have recently submitted lengthy comments on why we believe it is important for the Commission to address the definition of loss and the loss table.<sup>21</sup> We will not repeat those comments here. Instead, we raise the concern that the problems with the current guidelines for economic crimes are not limited to the loss table and the definition of loss. Because the problems run deep, we urge the Commission to start over, and write on a clean slate, rather than continue to tinker with the current guideline structure for economic offenses.<sup>22</sup> We understand a wholesale reworking of the guidelines for economic crimes is a major project, and we stand ready to help in whatever way we can. For now, however, to illustrate the need to start anew, we briefly highlight some of the problems with the current guidelines for economic crimes.

One of Defenders’ primary concerns with the current fraud guideline is that it includes numerous specific offense characteristics that replicate or overlap with loss, with one another,

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<sup>20</sup> Close to three dozen researchers and scholars suggested a similar task force in an *Open Letter to the United States Sentencing Commission from Scholars and Researchers Who Study Federal Sentencing*, April 20, 2009, [http://sentencing.typepad.com/files/open\\_letter\\_to\\_ussc\\_april\\_20.pdf](http://sentencing.typepad.com/files/open_letter_to_ussc_april_20.pdf).

<sup>21</sup> Statement of Kathryn N. Nester, Federal Public Defender for the District of Utah, Before the U.S. Sentencing Comm’n, Washington, D.C., at 3-16 (Mar. 14, 2012).

<sup>22</sup> Last year we 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-WTR Crim. Just. 34, 34-35 (Winter 2011)). Unfortunately, last year, the Commission did tinker with the guidelines, making five additions to the commentary to §2B1.1, and adding 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, all serving only to unnecessarily increase the complexity of the fraud guidelines.

and with upward adjustments that appear elsewhere in the guidelines. The first fraud guideline, §2F1.1, included two specific offense characteristics in addition to loss. In contrast, the current fraud guideline, §2B1.1, includes seventeen cumulative specific offense characteristics in addition to loss, many with multiple alternatives. See USSG §2B1.1 (2011). With this proliferation of specific offense characteristics, “what the Guidelines have done over time is to tease out many of the factors for which loss served as a rough proxy and to give them independent weight in the offense-level calculus.”<sup>23</sup> “The result is that many 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. . . .”<sup>24</sup> Section 2B1.1 has thus become an unfortunate example of “factor creep,” where “more and more adjustments are added” to account for some discrete harm thereby making it “increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.”<sup>25</sup>

Courts have taken note of this phenomenon and have voiced strong criticism of the current fraud guideline. One court concluded the fraud guidelines have “so run amok that they are patently absurd on their face.”<sup>26</sup> This court was specifically concerned with the addition of 20 points for adjustments and enhancements the government sought above and beyond the 28 points the government sought for loss, noting it was the “kind of ‘piling-on’ of points for which the guidelines have frequently been criticized.”<sup>27</sup> Another court, two years later, noted the

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<sup>23</sup> Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent’g Rep. 167, 170 (Feb. 2008); see also, Ellis, et al., *supra* note 23, 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”); James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 Fed. Sent’g Rep. 138, 141 (Dec. 2010) (noting the “multiple upward adjustments that, either singly or in combination, produce a piling-on effect beyond their underlying rationale and often smack of double counting”).

<sup>24</sup> Bowman, *supra* note 24, at 170.

<sup>25</sup> USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 137 (2004) (hereinafter *Fifteen Year Review*) (citing Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 742 (2001) (complexity of the guidelines has created a “façade of precision” which “undermines the goals of sentencing.”)).

<sup>26</sup> *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006).

<sup>27</sup> *Id.* at 510.

same.<sup>28</sup> Even before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), courts held that a departure was warranted to avoid the problem of multiple overlapping enhancements in the fraud guideline.<sup>29</sup>

Significantly, “the overkill of the current economic crime guidelines is not limited to the most culpable offenders in the most exceptional cases.”<sup>30</sup> As Professor Bowman has explained, “[t]he over-quantification of closely correlated 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.”<sup>31</sup> Defenders see the harsh effects of cumulative enhancements for similar conduct in our representation of the indigent. For example, 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.<sup>32</sup>

Another area of concern for the Defenders is that many of the amendments to the guideline are not supported by empirical evidence. 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.”<sup>33</sup> 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.”<sup>34</sup>

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<sup>28</sup> *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).

<sup>29</sup> See, e.g., *United States v. Lauersen*, 362 F.3d 160, 164 (2d Cir. 2004) (subsequently vacated in light of *Booker*) (upholding departure to mitigate effect of “substantially overlapping enhancements” that result in “a large increase in the sentencing range minimum at the higher end of the sentencing table”).

<sup>30</sup> Frank O. Bowman, III, *Economic Crimes: Model Sentencing Guidelines §2B1*, 18 Fed. Sent’g Rep. 330, 334 (2006).

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., *United States v. Podio*, 432 Fed. Appx. 308 (5th Cir. 2011); *United States v. Abulyan*, 380 Fed. Appx. 409, 412 (5th Cir. 2010).

<sup>33</sup> USSG §2B1.1 cmt. (n. 4(E)).

<sup>34</sup> USSG App. C, Amend. 726, Reason for Amendment (Nov. 1, 2011) (emphasis added).

Research released after the Commission's 2009 amendment reveals that the assumptions underlying the Commission's conclusions were wrong. The majority of victims of identity theft do not spend significant time resolving credit problems. According to the Department of Justice National Victimization Survey, "[f]or each type of identity theft, the greatest percentage of victims resolved the problem in a day or less."<sup>35</sup> Only about 20% spent more than a month trying to clear up problems.<sup>36</sup>

Wholesale revision of guidelines for economic offenses is particularly appropriate because of the shaky ground on which they were created. The original structure was based 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."<sup>37</sup> The evidence, however, is that there is no difference in the deterrent effects of probation and imprisonment for white collar offenders.<sup>38</sup> It is in the certainty of getting caught and punished, not the severity of punishment, that a deterrent effect lies.<sup>39</sup> A 2010 review of deterrence research concluded that there is "no real evidence of a deterrent effect for severity."<sup>40</sup> Not only does a lengthy prison sentence fail to deter, as we will discuss in more detail below, the evidence also shows it is an ineffective and even counterproductive way to reduce recidivism.

#### **IV. Proposed Priority #5: Crimes of Violence**

The Commission requests comment on whether it should place among its priorities a continued study of the statutory and guideline definitions of "crime of violence." While we

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<sup>35</sup> Lynn Langton & Michael Planty, Dep't of Justice, *Victims of Identify Theft*, 2008 5 (2010).

<sup>36</sup> *Id.*

<sup>37</sup> USSG, ch. 1, intro., pt. 4(d) (1987); see also *Fifteen Year Review*, at 56 (2004) (Commission sought to ensure that white collar offenders faced "short but definite period[s] of confinement").

<sup>38</sup> 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).

<sup>39</sup> 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>.

<sup>40</sup> 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.

believe that the Commission should continue to pursue this important subject, we are concerned that the Commission appears to have dropped last year's priority of also studying the definitions of "aggravated felony," "violent felony," and "drug trafficking offense." As we discussed last year, all of these definitions are exceedingly complex, lead to significant litigation, often fail to track the statutes they were meant to implement, lack empirical basis, produce arbitrary distinctions, and too often result in grossly unjust sentences that contribute to over-incarceration.<sup>41</sup> We encourage the Commission to examine all of these definitions rather than single out for study the term "crime of violence."

If, however, the Commission chooses to start with "crime of violence," it should focus on three main goals: (1) narrowing the category of violent crimes to focus on truly violent offenders who should be subject to enhanced sentencing; (2) crafting a uniform standard that is easily applied under the categorical analysis; and (3) providing sufficient flexibility in sentencing to account for the inevitable fact that any general definition will be both over- and under-inclusive. We look forward to working with the Commission over the coming months as it continues to look at the complex issues surrounding the definition of violent crimes. Here, we offer a few comments to encourage the Commission to step back and take a broader view of the issues.

**A. Recidivist Sentencing Enhancements Should Be Based on Current Empirical Research Rather than Outdated Assumptions about Crime.**

The definitions of "crime of violence" in 18 U.S.C. § 16, "violent felony" in 18 U.S.C. § 924(e), and the related definitions in the guidelines should be reexamined in light of current empirical research. Empirical research casts doubt on the assumptions underlying the legislation that brought us the definitions of "crime of violence" in section 16 and "violent felony" in section 924(e). In light of this research, advances in data collection, and feedback the Commission has received about the categorization of violent crimes, we believe the assumptions underlying recidivist sentencing provisions for "violent" offenders (*e.g.*, Armed Career Criminal Act, Career Offender, illegal reentry) need to be revisited and that the various definitions of violent crimes used throughout the guidelines and criminal code need to be narrowly tailored to capture truly violent offenders.

Here we offer a few observations about the need for the definition to be narrowed.

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<sup>41</sup> Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti Saris, Chair, U.S. Sentencing Comm'n, at 16-19, 24 (August 26, 2011).

# **1. The Current Definitions of “Crime of Violence” and “Violent Felony” Were Built Upon Limited Data from Decades Ago.**

A brief historical review of the definition of “violent felony” at 18 U.S.C. § 924(e), “crime of violence” at 18 U.S.C. § 16, the inclusion of “crimes of violence” as an “aggravated felony” in 1990,<sup>42</sup> and how various guidelines define violent predicate offenses, helps to demonstrate why the Commission should critically analyze whether judgments made decades ago withstand empirical analysis and whether past sentencing policies are fundamentally sound.

The analysis starts with the Armed Career Criminal Act of 1984 (ACCA) and the Comprehensive Crime Control Act of 1984 (CCCA), both part of Public L. 98-473.<sup>43</sup> The ACCA and CCCA are critical starting points because later legislation, as well as the guidelines, were built upon the framework established in 1984.

The ACCA of 1984 established enhanced penalties for persons in possession of a firearm who had previously been convicted of three felonies for robberies or burglaries. According to the accompanying House Report, Congress initially focused on robberies and burglaries because they occurred with great frequency, affected many people, and caused great loss.<sup>44</sup> The Report concluded that “a high percentage of robberies and burglaries are committed by a limited number of repeated offenders” who also commit those offenses “interchangeably.”<sup>45</sup> As to burglary, the Senate Report stated: “[w]hile burglary is sometimes viewed as a non-violent crime, its character can change rapidly, depending on the fortuitous presence of the occupants of the home when the burglar enters, or their arrival while he is still on the premises.”<sup>46</sup> While the Report cites studies discussing the frequency of burglary and certain characteristics of the offenders, the history contains no data on how often burglaries involved violence or a threat of violence.

The CCCA of 1984 took a broader view of violent crimes than the ACCA, defining crime of violence for purposes of Title 18<sup>47</sup> as “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; and (b) any

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<sup>42</sup> Crimes of violence were included as aggravated felonies for purposes of immigration law in 1990. See Immigration Act of 1990, § 501, 104 Stat. 5048.

<sup>43</sup> Armed Career Criminal Act of 1984, Pub. L. 98-473, § 1801, 98 Stat. 1837 (1984); Comprehensive Crime Control Act of 1984, Pub. L. 98-473, § 1001, 98 Stat. 1837 (1984).

<sup>44</sup> H. Rep. No. 98-1073, at 3 (1984), reprinted in 1984 U.S.C.C.A.N. 3661, 3663.

<sup>45</sup> *Id.*

<sup>46</sup> S. Rep. No. 98-190, at 4 (1983). See also *Taylor v. United States*, 495 U.S. 575, 581 (1990).

<sup>47</sup> For an overview of the numerous places in Title 18 where Congress used the phrase “crime of violence,” see *Leocal v. Ashcroft*, 543 U.S. 1, 6-7 & n.4 (2004).

other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 18 U.S.C. § 16.<sup>48</sup> The legislative history of the CCCA states that the definition was taken from S. 1630, 97<sup>th</sup> Cong. (1981) (Criminal Code Reform Act of 1981).<sup>49</sup> Neither it nor the report accompanying the Criminal Code Reform Act of 1981<sup>50</sup> explain, or provide empirical evidence, as to why Congress defined “crime of violence” by reference to property crimes or crimes that merely involve a substantial risk that physical force against a person or property will be used in the course of committing them.

Just two years after passage of the ACCA and CCCA, Congress expanded the predicate offenses under 18 U.S.C. § 924(e). The House sponsors of the 1986 legislation sought to eliminate burglary as a predicate, but proposed including offenses other than robbery, by expanding the definition of a violent crime to “any State or federal felony that has as an element the use, attempted use, or threatened use of physical force against the person of another.” H.R. 4768. (1986). That amendment was rejected in favor of even more expansive language supported by the Senate, which defined “violent felony” as “any crime punishable by imprisonment for a term exceeding one year that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207 (1986). Like the ACCA and CCCA, the legislative history

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<sup>48</sup> Comprehensive Crime Control Act of 1984, Pub. L. 98-473, § 1001(a), 98 Stat. 1837 (1985). The same definition, along with a list of other enumerated offenses, appears in the bail provisions of the CCCA at 18 U.S.C. § 3156. Before 1984, the term “crime of violence” appeared in the Federal Firearms Act of 1938 to define the class of persons prohibited from possessing a firearm in interstate commerce. 15 U.S.C. §§ 901 and 902(f) (Supp. 1938). The 1938 Act defined “crime of violence” as “murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.” *Id.* The 1938 Act followed on the heels of the violent tactics of Prohibition Era criminals, the attempted assassination of President-elect Franklin D. Roosevelt in 1933, and unsubstantiated claims by the Attorney General that “America was being terrorized by half a million armed thugs, a force larger than the contemporary United States Army.” David T. Hardy, *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 589 (1986).

<sup>49</sup> S. Rep. No. 98-225, at 308 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3486.

<sup>50</sup> See S. Rep. No. 97-307, at 888 n. 42 (1981); S. 1630, 97th Congress (1981). The definition of “crime of violence” set forth in the CCCA also appeared in the Criminal Code Reform Act passed by the Senate in 1977, S. 1437, 95th Cong. § 111 (1977), but that stalled in the House. The original source of the definition is unclear. It did not appear in the Proposed New Federal Criminal Code (1971). National Commission on Reform of Federal Criminal Laws, Final Report (1971).

of the 1986 amendment sets forth no evidence about the nature of violence associated with the broad swath of crimes considered “violent.”

In 1990, Congress imported into immigration law the “crime of violence” definition set forth in 18 U.S.C. § 16 when it amended the definition of “aggravated felony” to include “any crime of violence (as defined in section 16 of Title 18, United States Code, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years.” Immigration Act of 1990, Pub. L. 101–649, § 501, 104 Stat. 4978 (1990).

The definitions of violent crime set forth in the CCCA, the Career Criminal Amendment Act of 1986, and the Immigration Act of 1990, greatly influenced the guidelines. Many guidelines turn on the definition of “crime of violence.” For example, the original guidelines used the definition from 18 U.S.C. § 16 to define “crime of violence” for purposes of §4B1, but then expanded it to include: murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson or robbery. Burglary of dwellings was covered as well, but not burglary of other structures. USSG §4B1.2, cmt. (n. 1) (Nov. 1, 1987). Two years later, the Commission deleted §16 as the definition of “crime of violence” and adopted the definition of “violent felony” in 18 U.S.C. § 924(e)(2)(B), excepting all burglaries but burglary of a dwelling. USSG §4B1.2(1) (Nov. 1, 1989). The Commission also has enumerated in commentary specific offenses that are considered crimes of violence. USSG §4B1.2, cmt. (n. 1). The “crime of violence” definition at §4B1.2 applies to a number of guidelines, including those for career offender, §4B1.2; armed career criminal, §4B1.4; explosives, §2K1.3; firearms, §2K2.1; money laundering, §2S1.1; criminal history, §4A1.1; upward departures for certain semiautomatic firearms, §5K2.17; and classification of probation and supervised release violations, §7B1.1. Under each guideline, predicate convictions for a “crime of violence” have the effect of increasing the otherwise applicable advisory guideline range.

The illegal reentry guideline at USSG §2L1.2(b) also contains sentencing enhancements for “crimes of violence.” Section 2L1.2 captures “crimes of violence” in two ways. First, the guideline provides for an 8-level enhancement if the defendant was previously convicted of an “aggravated felony.” “Aggravated felony” includes any offense that would be a “crime of violence” under 18 U.S.C. § 16 (with the exception of a “purely political offense”). Second, the guideline contains a 16-level enhancement if the defendant was previously deported, or unlawfully remained in the United States, after a conviction for a “crime of violence.” The commentary lists a series of offenses that qualify as a “crime of violence” and also includes any other offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” USSG §2L1.2, cmt. (n. 1) (B)(iii).

This short history shows the enormous effect that the ACCA of 1984, the CCCA of 1984, the Armed Career Criminal Amendments of 1986, and the Immigration Act of 1990 have had on

recidivist sentencing provisions. By defining “violence” by reference to the risk of physical force against the property of another and the serious potential risk of physical injury to another, sections 16 and 924(e) of Title 18 represent an unprecedented expansion in the concept of violence.<sup>51</sup> Rather than focus on actual violence, or even threats of violence, the analysis turns on the risk of violence. The net result has been an explosion in the crimes that qualify as “violent,”<sup>52</sup> which in turn fuels the growth in the prison population.<sup>53</sup>

## **2. Current Empirical Evidence Undermines the Original Assumptions Underlying the Definitions of Violent Crimes.**

The above discussion of the legislative history of the definition of “crime of violence” and “violent felony” reveals that Congress lacked sufficient data on the nature of the violence or the risk of violence associated with certain crimes when it chose to expand the definition of violence from actual violence, to the threat of violence, to the potential risk of violence. Instead, Congress, like the Supreme Court, resorted to “casual empiricism,” *i.e.*, personal experience, intuition, and belief.<sup>54</sup>

The decision to characterize burglary as a violent crime, even though it historically has been considered a property crime, provides an example of how commonly held beliefs about crime can be wrong. Burglary was originally classified as a “crime of violence” and “violent felony” because of the view that it could “change rapidly” from a non-violent crime to a violent one “depending on the fortuitous presence of the occupants of the home.”<sup>55</sup> Hence, the violent aspect of burglary consists not in the act of burglary, but in the potential for a startling,

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<sup>51</sup> See Alice Ristorph, *Criminal Law in the Shadow of Violence*, 62 ALLR 571 (2011).

<sup>52</sup> The focus on “risk” rather than actual force or threats of force in the violent crimes analysis has resulted in numerous state crimes being used to enhance federal sentences that would not be considered “violent” under any common sense use of the term. See, e.g., *United States v. Herrick*, 545 F.3d 53 (1st Cir. 2008) (homicide by negligent operation of motor vehicle); *United States v. Alderman*, 601 F.3d 949 (9th Cir. 2010) (Washington first degree theft aka “pick-pocketing”); *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994) (pickpocketing under District of Columbia statute); *Sykes v. United States*, 131 S. Ct. 2267 (2011) (fleeing a police officer by vehicle); *United States v. Alfaro-Gramajo*, 283 Fed. Appx. 677 (11th Cir. 2008) (burglary of a vehicle); *United States v. Lopez-DeLeon*, 513 F.3d 472 (5th Cir. 2008) (statutory rape).

<sup>53</sup> A single crime of violence predicate for a defendant convicted of possession of a firearm after having been convicted of a felony increases the offense level from 14 to 20 under §2K2.1. At a criminal history II, that is a 105 to 155% increase in prison time. For a defendant subject to the career offender guideline, the results are even more draconian.

<sup>54</sup> Jonathan Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 B.U.L. Rev. 171, 176 (2012).

<sup>55</sup> S. Rep. No. 98-190, at 4 (1983).

unexpected confrontation between the burglar and another person. See *Sykes v. United States*, 131 S. Ct. 2267, 2273 (2011); *James v. United States*, 550 U.S. 192, 203 (2007) (noting that the “main risk of burglary arises ... from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate”). Congress also believed that burglary was a crime most frequently committed by a “very small percentage” of career criminals, *Taylor v. United States*, 495 U.S. 575, 581 (1990), who committed robberies and burglaries “interchangeably”<sup>56</sup> and were “responsible for the bulk of the violent crime.”<sup>57</sup>

More recent evidence, not available to Congress in 1984, shows that burglary does not typically put third parties at risk of any bodily harm. First, most burglars “tak[e] great care to avoid” “occupied homes”<sup>58</sup> and usually do not encounter people at home. In 72.4% of household burglaries between 2003 and 2007, no one was home.<sup>59</sup> Second, violence is rare. In only 7.2% of burglaries was a person a victim of violence.<sup>60</sup> Serious violence is even rarer. Of the small percentage of household burglaries that were violent, only 8.5% involved serious injury.<sup>61</sup> Between 2003 and 2007, household burglaries ending in homicide made up only 0.0004% of all burglaries.<sup>62</sup> Third, unlike offenders who commit robbery, persons who commit burglary do not typically arm themselves. Only 1 in 25 offenders serving a state sentence for burglary possessed a firearm during the offense.<sup>63</sup> In contrast, 1 in 3 state inmates convicted of

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<sup>56</sup> H. Rep. No. 98-1073, at 3 (1984), reprinted in 1984 U.S.C.C.A.N. 3661, 3663.

<sup>57</sup> 128 Cong. Rec. 26,518 (Sept. 30, 1982) (statement of Sen. Edward Kennedy).

<sup>58</sup> Deborah Weisel, U.S. Dep’t of Justice, Office of Community Oriented Policing Services, *Burglary of Single Family Homes* 8 (2002), <http://www.cops.usdoj.gov/pdf/e07021611.pdf>.

<sup>59</sup> Shannan Catalano, U.S. Dep’t of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey: Victimization During Household Burglary* 1 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/vdhib.pdf>

<sup>60</sup> *Id.* at 9.

<sup>61</sup> *Id.* at 10. In the small percentage of violent household burglaries, almost a third of the perpetrators were known to the victim. *Id.* at 8.

<sup>62</sup> *Id.*

<sup>63</sup> Caroline Harlowe, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Firearms Use by Offenders: Survey of Inmates in State and Federal Correctional Facilities* 3, tbl. 4 (2001).

robbery possessed a firearm.<sup>64</sup> Even perpetrators of violent household burglaries did not typically arm themselves with firearms. Only 12.4% possessed a firearm.<sup>65</sup>

In short, the available empirical evidence demonstrates that burglary is not an act that “shows[s] an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.” *Begay v. United States*, 553 U.S. 137, 146 (2008). In the absence of such evidence, burglary should not be categorized as a “crime of violence.” Instead, it should be classified as a property crime that presents minimal risk of physical injury to another.

If the Commission were to declassify burglary as a “crime of violence” in the guidelines, and recommend to Congress that it no longer be characterized as a “violent” offense for recidivist sentencing provisions, it would not be alone. Before 1994, Maryland included burglary, as well as daytime housebreaking as a crime of violence for purposes of mandatory sentencing provisions. Md. Code Ann. 1957 Art. 27, § 643B(a) (1993). In 1994, the Maryland General Assembly changed the law to exclude burglary and housebreaking from the definition of “crime of violence.” As the Committee explained: “This is a substantive change that is intended to enhance the fairness and uniformity of sentencing practices in the State. The Committee believes that the mandatory minimum sentences established in this section should be applicable only to crimes against persons or crimes that directly involve a threat to human life.” 1994 Md. Laws Ch. 712 (Oct. 1, 1994).

#### **B. The Residual Clause Provides an Unworkable Formulation.**

Section 4B1.2 of the guidelines, as well as 18 U.S.C. §§ 16 and 924(e), include what is known as a “residual clause.”<sup>66</sup> The residual clause is a “drafting failure” that leads to endless litigation, consumes substantial judicial resources, and needs to be abandoned. *Sykes*, 131 S. Ct. at 2284, 2287 (Scalia, J., dissenting). *See also Derby v. United States*, 131 S. Ct. 2858, 2859 (2011) (Scalia, J. dissenting from denial of certiorari) (arguing that residual clause should be declared unconstitutionally vague and that Court should “ring down the curtain on the ACCA farce playing in federal courts throughout the Nation”). Justice Scalia has been the most outspoken critic of the residual clause, but he is not alone in his criticism. *See, e.g., United*

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<sup>64</sup> *Id.*

<sup>65</sup> Catalano, *supra* note 60, at 8.

<sup>66</sup> *See* USSG §4B1.2(a)(2) (“burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another”); 18 U.S.C. § 924(e) (“burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another”); 18 U.S.C. § 16 (b) (“any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense”).

*States v. Chitwood*, 676 F.3d 971, 977 n. 3 (11th Cir. 2012) (noting logic of Justice Scalia’s view and how “appealing the result of that logic might be to courts with caseloads enhanced by residual clause enhancement issues”), *petition for cert. filed*, (July 3, 2012) (No. 12-5074); *United States v. Kearney*, 675 F.3d 571, 577 n. 6 (6th Cir. 2012) (noting “chorus of criticisms swelling around” the residual clause); *United States v. Vann*, 660 F.3d 771, 801 (4th Cir. 2011) (en banc) (Wilkinson, J., concurring in the judgment) (highlighting the difficulties the Fourth Circuit has experienced in applying ACCA’s residual clause); *id.* at 787 (Agee, J., concurring); *United States v. Doss*, 825 F. Supp. 2d 726, 730 (W.D.Va. 2011) (“proper interpretation of the language of the residual clause is ‘ever-evolving’”); *United States v. Morales*, 2012 WL 113512, \*6 (E.D. Pa. Jan 13, 2012) (“I agree with Justice Scalia’s observations in *Sykes* that the various tests employed in the four Supreme Court cases on this issue have ‘not made the statute’s application clear and predictable.’”); *United States v. Lowery*, 599 F. Supp. 2d 1299, 1303 (M.D. Ala. 2009) (determining “degree of risk posed has proven conceptually difficult for judges”).

One of the many problems with the residual clause is that it depends on probabilistic determinations of the level of risk involved in a particular offense even though in the vast majority of cases the government presents no evidence about the rates of physical injury or force associated with the offense. *Sykes*, 131 S. Ct. at 2275. Probabilistic risk assessment should be based on a scientific method used to predict the likelihood of a given outcome related to certain activity. That, however, is not the case with application of the residual clause. Instead of relying on empirical evidence of risk, most courts use nothing more than general intuition and experience. *Sykes*, 131 S. Ct. at 2291 (Kagan, J., dissenting) (referring to “majority’s intuition that dangerous flights outstrip mere failures to stop—that the aggravated form of the activity is also the ordinary form” and noting how it “seems consistent with common sense and experience”); *United States v. Harrison*, 558 F.3d 1280, 1295 (11th Cir. 2009) (noting how with “lesser crimes, courts, without empirical evidence, are left to rely on their own intuition about whether certain kinds of behavior pose serious potential risks of physical injury”), *abrogated on other grounds*, *Sykes*, 131 S. Ct. 2267.

“This business of adjudicating ‘levels of risk’ by ‘intuition’ is problematic.” *Vann*, 660 F.3d at 797 (Davis, J., concurring). While intuition may have a place in the law, it should not be used to decide whether to take away years of a defendant’s liberty. See *United States v. Oliveira*, 798 F. Supp. 2d 319, 325 (D. Mass. 2011) (Gertner, J.) (“It is surely troubling that substantial punishment enhancement should turn on as ambiguous a category as the “residual” clause of the ACCA.”).

The best solution to the problems caused by the residual clause is to abandon it altogether and focus the analysis on whether the offense has as an element the use, attempted use, or threatened use of physical force against the person of another.

**C. The Enumerated Offenses Should Be Removed From the “Crime of Violence” Definition.**

The commentary to USSG §§4B1.2 and 2L1.2 enumerate certain offenses that are considered “crimes of violence.” In determining whether a particular offense fits within the definition, a court must determine the generic, contemporary meaning of a host of undefined, enumerated offenses.<sup>67</sup> The result has been protracted litigation and appeal, with the propriety of a massive enhancement often turning on esoteric questions of state law that have little to do with the defendant or his instant offense.<sup>68</sup> Some such litigation is inevitable as long as the guideline uses the complex aggravated-felony definition for enhancement purposes under §2L1.2. But there is no reason to add to this complexity in setting rules for determining the appropriate sentence under §2L1.2, §4B1.2, or other guideline provisions that depend upon the definition of “crime of violence.” Instead of setting out a list of enumerated offenses, the “crime of violence” definition should be limited to a subset of particularly serious felony crimes of violence: crimes that have as an element the use, attempted use, or threatened use of physical force against the person of another. This definition is already used in the commentary to §2L1.2,<sup>69</sup> and it is consistent with (though narrower than) the statutory definition used for the 8 U.S.C. § 1326(b)(2) enhancement. It also tracks the career-offender definition in §4B1.2(a)(1), and the statutory definition of violent felony in the Armed Career Criminal Act.<sup>70</sup> By using this single definition, confusing references to other offenses or definitions could be eliminated.

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<sup>67</sup> See, e.g., *United States v. Marquez-Lobos*, \_\_ F.3d \_\_, 2012 WL 2307529\*4 (9th Cir. June 19, 2012) (determining contemporary meaning of kidnapping); *United States v. Najera-Mendoza*, \_\_ F.3d \_\_, 2012 WL 2054937\*3 (5th Cir. June 8, 2012) (extensive analysis of state law required to determine if Oklahoma offense fit generic meaning of kidnapping); *United States v. Ramirez-Garcia*, 646 F.3d 778, 782-84 (11th Cir.) (relitigating contemporary generic meaning of “sexual abuse of a minor” found in §2L1.2), *cert. denied*, 132 S.Ct. 595 (2011); *United States v. Hernandez-Rojas*, 426 Fed. Appx. 67, 70 (3d Cir.) (examining whether Pennsylvania involuntary manslaughter conviction falls within contemporary meaning of manslaughter as enumerated in §2L1.2), *cert. denied*, 132 S.Ct. 337 (2011). See also *United States v. Garcia-Caraveo*, 586 F.3d 1230, 1233 (10th Cir. 2009); *United States v. Aguila-Montes*, 553 F.3d 1229, 1233 (9th Cir. 2009); *United States v. Fierro-Reyna*, 466 F.3d 324, 326-27 (5th Cir. 2006).

<sup>68</sup> See, e.g., *Fierro-Reyna*, 466 F.3d at 326-30; *United States v. Cervantes-Blanco*, 504 F.3d 576, 578-87 (5th Cir. 2007).

<sup>69</sup> See USSG. §2L1.2, cmt. (n.1(B)(iii)) (using this definition, but also adding a list of twelve other specific offenses).

<sup>70</sup> See 18 U.S.C. § 924(e)(2)(B)(i).

**D. Recommendations on Statutory Changes and Development of Guideline Amendments that May be Appropriate in Response to Any Related Legislation**

The Commission seeks comment on whether it should make “recommendations to Congress on any statutory changes” that may be appropriate in light of its study of the statutory and guideline definitions of “crime of violence” and develop “guideline amendments that may be appropriate in response to any related legislation.” We think it premature for the Commission to consider making recommendations to Congress about changes to the definition of “crime of violence” or “violent felony.” A comprehensive analysis of the various definitions governing recidivist-sentencing enhancements for violent crimes, followed by consolidation and clarification of the guideline definitions, should be a priority. Once the Commission implements new guideline definitions, it will be better situated to determine what, if any, specific recommendations to make to Congress.

**V. Proposed Priority #6: Recidivism Study**

We are pleased that the Commission intends to undertake a comprehensive, multi-year study of recidivism, including an examination of circumstances that correlate with increased or reduced recidivism. As federal prison populations, like those in states across the country, have swollen beyond capacity, and the economy has forced a reexamination of what is actually gained in public safety for every dollar spent on imprisonment, recidivism is an area that warrants careful attention.<sup>71</sup> In recent years, the research about recidivism has grown exponentially. We encourage the Commission to review that research and further contribute to it through this multi-year study.

**A. The Prison Population Has Exploded**

The Federal Bureau of Prisons has been over-capacity for years and will continue to be so in the foreseeable future.<sup>72</sup> As long ago as 1985, “the Bureau of Prisons reported that its

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<sup>71</sup> See, e.g., Pew Center on the States, *State of Recidivism: The Revolving Door of America’s Prisons* 1 (Apr. 2011) (“Now, however, as the nation’s slumping economy continues to force states to do more with less, policy makers are asking tougher questions about corrections outcomes. One key element of that analysis is measuring recidivism.”), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/State\\_Recidivism\\_Revolving\\_Door\\_America\\_Prisons%20.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf).

<sup>72</sup> Dep’t of Justice, *FY 2011 Performance and Accountability Report* II-39 (2011) (system-wide crowding has been anywhere from 33% to 41% over the past decade). In 2007, the Department set a target of reducing crowding to 28% by 2012. Dep’t of Justice, *FY 2007 Performance and Accountability Report* II-26. It has fallen far short of that goal. See also General Accounting Office, *Federal Prison Expansion: Overcrowding Reduced but Inmate Population Growth May Raise Issue Again* (1993) (discussing challenges of rising prison population).

facilities were substantially overcrowded, which is a danger to inmates, staff, and the surrounding communities.”<sup>73</sup> In 1998, federal prisons were 26% overcrowded.<sup>74</sup> For the past decade, the federal inmate population has exceeded the rated capacity by at least 30%.<sup>75</sup> The projections on prison crowding are dire. Even with the building of new prisons and the expansion of existing facilities, the Department states that the “over-crowding rate for fiscal year 2012 is projected to be 43 percent.”<sup>76</sup>

The overcrowding is relentless because each year the inmate population grows. The number of persons under the jurisdiction of BOP increased 799% from 1980 to 2012.<sup>77</sup> Since 2000 alone, it has increased by 50%.<sup>78</sup>

As the chart below shows and as BOP Director Samuels stated, “the current trajectory is not a good one.”<sup>79</sup>

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<sup>73</sup> Dep’t of Justice, *FY1998 Annual Accountability Report*, Ch. 5, [http://www.justice.gov/archive/ag/annualreports/ar98/ag\\_ar98\\_chap5.pdf](http://www.justice.gov/archive/ag/annualreports/ar98/ag_ar98_chap5.pdf).

<sup>74</sup> *Id.*

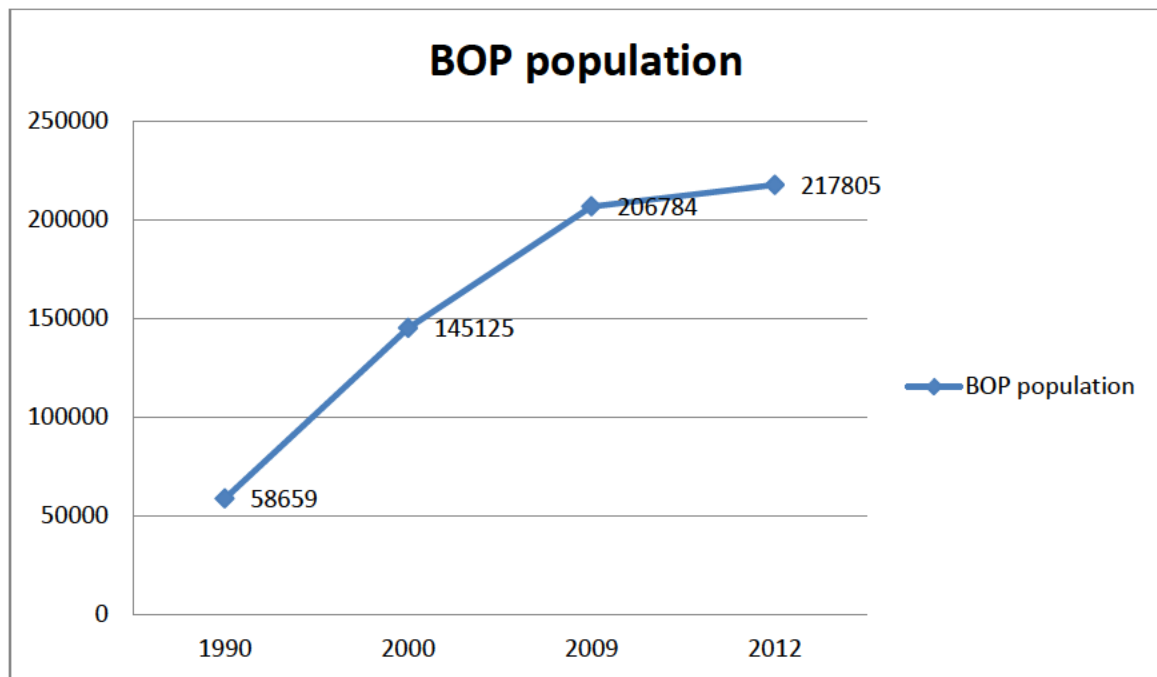
<sup>75</sup> Dep’t of Justice, *FY 2011 Performance and Accountability Report* I-24 (2011).

<sup>76</sup> *Id.*

<sup>77</sup> The Sentencing Project, *The Expanding Federal Prison Population* (2012) (BOP population in 1980 was 24,252), [http://www.sentencingproject.org/doc/publications/inc\\_FederalPrisonFactsheet\\_March2012.pdf](http://www.sentencingproject.org/doc/publications/inc_FederalPrisonFactsheet_March2012.pdf)); U.S. Dep’t of Justice, Federal Bureau of Prisons, *Weekly Population Report* (July 19, 2012) (population of 218,128), [http://www.bop.gov/locations/weekly\\_report.jsp](http://www.bop.gov/locations/weekly_report.jsp).

<sup>78</sup> Sourcebook of Criminal Justice Statistics Online, (BOP population in 2000 was 145,125), <http://www.albany.edu/sourcebook/pdf/t600222011.pdf>.

<sup>79</sup> Statement of Charles E. Samuels, Director of the Federal Bureau of Prisons, Before the U.S. Sentencing Comm’n, Washington, D.C., at 4 (Feb. 16, 2012).



The rate of growth per 100,000 resident population is perhaps even a more striking indicator of the federal criminal justice system's over-dependence on mass incarceration. In 1980, 9 in 100,000 residents were under federal correctional jurisdiction. By 2010, the rate rose to 61 per 100,000 residents.<sup>80</sup>

With this growth comes enormous cost. From fiscal year 2000 to fiscal year 2012, the budget for the Federal Bureau of Prisons rose from 3.7 billion dollars to 6.6 billion dollars – greater than the \$5.6 billion budget for the entire state of Mississippi.<sup>81</sup>

As we have previously noted, *Booker* has helped slow the growth of the prison population.<sup>82</sup> But judges stick close to the guidelines as to both sentence length and kind of sentence. Thus, the Commission plays an important role in taking more steps to reverse the

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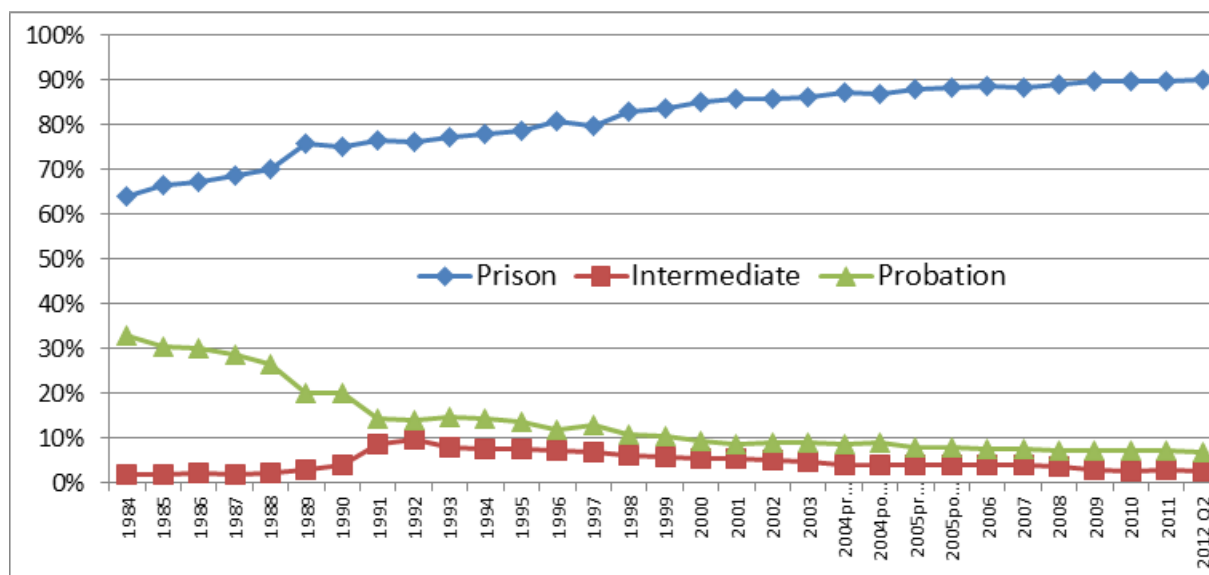
<sup>80</sup> Sourcebook of Criminal Justices Statistics Online, <http://www.albany.edu/sourcebook/pdf/t6292010.pdf>.

<sup>81</sup> Associated Press, *Mississippi budget negotiators set details of \$5.6B plan*, GulfLive.com, April 27, 2012, [http://blog.gulflive.com/mississippi-press-news/2012/04/mississippi\\_budget\\_negotiators.html](http://blog.gulflive.com/mississippi-press-news/2012/04/mississippi_budget_negotiators.html). Mississippi has a population of close to 3 million. U.S. Census Bureau, *State and County Quick Facts, Mississippi* (2011), <http://quickfacts.census.gov/qfd/states/28000.html>.

<sup>82</sup> Statement of Raymond Moore, Federal Public Defender for the District of Colorado, Before the U.S. Sentencing Comm'n, Washington, D.C., at 13-14 (Feb. 16, 2012).

trends of the last three decades. As the Commission has acknowledged, “[t]he changes in sentencing policy occurring since the mid-1980s – both the increasing proportion of offenders receiving prison time and the average length of time served – have been a dominant factor contributing to the growth in the federal prison population.”<sup>83</sup> The Commission’s data show that imprisonment rates have steadily increased since 1984 while alternative sentences have declined. The graph below<sup>84</sup> shows the percentage of three groups of offenders: (1) those who received a sentence involving some term of imprisonment, (2) those who received alternative confinement at home or in a community facility, and (3) those who received “simple” or “straight” probation without confinement conditions.

**PERCENTAGE OF DEFENDANTS RECEIVING VARIOUS  
TYPES OF SENTENCES  
All Felonies 1984 - 2012 2nd Quarter**



Prison sentences have also become more severe. The Commission has reported that “[t]he data clearly demonstrate that, on average, federal offenders receive substantially more severe sentences under the guidelines than they did in the preguidelines era. . . . By 1992, the average time in prison had more than doubled.”<sup>85</sup> And, despite “a slight and gradual decline in

<sup>83</sup> *Fifteen Year Review*, at 97.

<sup>84</sup> Sources: 1984-1990 FPSSIS Datafiles, Administrative Office of U.S. Courts; 1991-2011 Annual Reports and Sourcebooks of Federal Sentencing Statistics. Most recent installments of these data can be found in USSC, 2011 Sourcebook, tbl. 18.

<sup>85</sup> *Fifteen Year Review*, at 67.

average prison time”<sup>86</sup> in recent years, federal offenders today still spend significantly more time in prison than did offenders sentenced before passage of the Sentencing Reform Act.<sup>87</sup>

The heavy use of imprisonment is incompatible with several provisions in the Sentencing Reform Act. The Commission has never implemented the directive that “[t]he sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.” 28 U.S.C. § 994(g). Nor has the Commission fulfilled its purpose of establishing “sentencing policies and practices” that assure defendants are provided with “needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” See 28 U.S.C. § 991 (b)(1)(A) (one of the Commission’s purposes is to “assure the meeting of the purposes of sentencing set forth in section 3553(a)(2) of title 18”); 18 U.S.C. § 3553(a)(2)(C), (D).<sup>88</sup> The guidelines do not adequately ensure that defendants’ rehabilitative needs are met. A study of the “circumstances that correlate with increased or reduced recidivism,” along with guideline amendments that guide courts in how to consider information about recidivism in fashioning sentences, would help the Commission fulfill these two statutory mandates.

To reduce recidivism, the Commission must look to programs beyond prison. Section 994(k) of Title 28 directs that the “Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” A similar instruction at 18 U.S.C. § 3582(a) prohibits courts from considering rehabilitation as a justification for a prison term. See *Tapia v. United States*, 131 S. Ct. 2382, 2389-90 (2011).<sup>89</sup> As discussed below, the prohibition against using imprisonment for rehabilitation rests on a firm empirical foundation.

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<sup>86</sup> *Id.*

<sup>87</sup> 1984-1990 FPSSIS Datafiles, Administrative Office of U.S. Courts; 1991-2011 Annual Reports and Sourcebooks of Federal Sentencing Statistics. Most recent installments of these data can be found in USSC, 2011 Sourcebook, tbl. 14.

<sup>88</sup> The Commission has steadfastly refused to recommend that courts consider offender characteristics such as employment, education, vocational skills, and family ties, or the lack thereof, in deciding to impose a non-prison sentence even though the research unequivocally shows that those factors are highly relevant to a defendant’s rehabilitative needs and risk of recidivism.

<sup>89</sup> Even if a court could sentence a defendant to term of imprisonment for the purpose of rehabilitation, the BOP’s ability to furnish appropriate programs is severely strained. As Director Samuels testified before the Commission in February 2012: “the levels of crowding and an increasing number of inmates with limited resources makes far more difficult the delivery of effective recidivism-reducing programming.” Statement of Charles E. Samuels, Director of the Federal Bureau of Prisons, Before the U.S. Sentencing

## **B. Research on Recidivism**

Fortunately, the Commission need not reinvent the wheel in fashioning a sentencing policy aimed at reducing recidivism and that is not dependent upon prison programming. Because of the volume of research, we do not attempt to provide a comprehensive summary here. Instead, we highlight what we believe are some of the more important and interesting findings.

Most importantly, the empirical research shows that imprisonment is not an effective method for reducing recidivism.<sup>90</sup> As Judge Roger Warren, President Emeritus of the National Center for State Courts, stated in 2007: “The research evidence is unequivocal that incarceration does not reduce offender recidivism.”<sup>91</sup> Instead, “[i]ncarceration actually results in slightly increased rates of offender recidivism.”<sup>92</sup> In other words, “across the offender population,

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Comm’n, Washington, D.C., at 3-5 (Feb. 16, 2012). The Federal Prison Industries, for example, has a goal of employing 25 percent of work-eligible inmates, but in FY 2011, it employed only 9 percent. Dep’t of Justice, *FY 2011 Performance and Accountability Report* IV-19. Similarly, BOP needs to expand the capacity of its residential drug assessment program (RDAP). Dep’t of Justice, *Federal Prison System: FY 2013 Budget Request at a Glance*, <http://www.justice.gov/jmd/2013summary/pdf/fy13-bop-bud-summary.pdf>.

<sup>90</sup> See, e.g., Tina L. Freiburger & Brian M. Iannacchione, *An Examination of the Effect of Imprisonment on Recidivism*, 24 Crim. Just. Stud. 369, 377 (Dec. 2011) (“The results indicate that incarceration did not affect either offenders’ likelihood of recidivating or the severity of recidivism. The only factors found relevant to sentencing decisions that also affected the likelihood of recidivism were age and marriage. The finding that age reduced the likelihood of committing subsequent offenses is consistent with the body of research that finds that offenders ‘age out’ of crime. The finding that marriage has a significant effect on recidivism also is consistent with other research which has found that marriage is associated with lower crime rates.”); Howard E. Barbaree, et al., *Canadian Psychological Association Submission to the Senate Standing Senate Committee on Legal and Constitutional Affairs* 6 (Jan. 2012) (“Psychology researchers have identified effective methods, or ‘what works’, to reduce crime – the overwhelming consensus of the literature is that treatment works, incarceration does not.”), [http://www.cpa.ca/docs/file/Government%20Relations/SenateCommitteeSubmission\\_January302012.pdf](http://www.cpa.ca/docs/file/Government%20Relations/SenateCommitteeSubmission_January302012.pdf).

<sup>91</sup> Roger Warren, National Center for State Courts, *Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries* 11 (2007), <http://nicic.gov/library/files/023358.pdf>.

<sup>92</sup> *Id.* See also Mark W. Lipsey and Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 Ann. Rev. L. Soc. Sci. 297, 302 (2007), (“[R]esearch does not show that the aversive experience of receiving correctional sanctions greatly inhibits subsequent criminal behavior. Moreover, a significant portion of the evidence points in the opposite direction – such sanctions may increase the likelihood of recidivism. The theory of specific deterrence inherent in the politically popular and intuitively appealing view that harsher treatment of offenders dissuades them from further criminal behavior is thus not consistent with the preponderance of available evidence.”). A recent Missouri study shows “that recidivism rates actually are lower when offenders are sentenced to probation, regardless of whether the offenders have prior felony convictions or prior prison incarcerations.” Missouri Sentencing Advisory Commission, *Probation Works for Nonviolent Offenders*, 1 Smart

imprisonment does not have special powers in persuading the wayward to go straight. To the extent that prisons are used because of the belief that they reduce reoffending more than other penalty options, then this policy is unjustified.”<sup>93</sup>

As for why this is so, scholars have identified numerous “criminogenic” effects of incarceration, including how prison serves as a school for criminals; severs ties to family and community; diminishes employment options upon release; and reduces rather than increases the inmate’s willingness or ability to conform to social norms.<sup>94</sup>

In addition to the research showing prison is not an effective way to reduce recidivism, in recent years there have been extensive studies and reports regarding the impact of a wide variety of other common criminal justice practices on recidivism. Much, if not all, of it provides further support for a federal sentencing scheme that relies more on alternatives to incarceration, and shorter prison sentences. A small sampling from this research includes evidence that:

- *Community based treatment is more effective in reducing recidivism than that provided in prison.* “In general, community-based programs have a greater impact on recidivism rates than those based in prisons.”<sup>95</sup> According to a study by the Washington State Institute of Public Policy, “the latter reduced recidivism rates by an average of 5 to 10 percent, whereas intensive supervision with community-based services reduced recidivism rates by 18 percent.”<sup>96</sup> The research also shows that

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Sentencing 1 (June 2009), <http://www.courts.mo.gov/file.jsp?id=45429>. On a three-year follow up from the start of probation or release from prison, first or second-time offenders on probation were incarcerated at a significantly lower rate (36%) than those who had been sent to prison (55%). *Id.*

<sup>93</sup> Francis T. Cullen, Cheryl Lero Johnson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S, 50S-51S (2011) (“[H]aving pulled together the best available evidence, we have been persuaded that *prisons do not reduce recidivism more than noncustodial sanctions.*”).

<sup>94</sup> See generally Martin H. Pritikin, *Is Prison Increasing Crime*, 2008 Wis. L. Rev. 1049, 1054-72 (cataloging eighteen criminogenic effects of incarceration); Lynne M. Vieraitis, Tomaslav V. Kovandzic, & Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol’y 589, 614-16 (2007); see also USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 19 (1996) (recognizing imprisonment has criminogenic effects including: contact with more serious offenders, disruption of legal employment, and weakening of family ties).

<sup>95</sup> Marshall Clement, et al., *The National Summit of Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending* 26 (Jan. 2011) (hereinafter *Reinvestment Summit*), <http://www.justicereinvestment.org/summit/report>.

<sup>96</sup> *Id.* See also Kimberly Wiebrecht, *Evidence-Based Practices and Criminal Defense: Opportunities, Challenges, and Practical Considerations* 8 (2008) (“The research. . . states that treatment interventions

“[d]rug treatment in the community is more effective than drug treatment in prison. Community-based treatment yields an 8.3-percent reduction in recidivism rates, whereas prison-based treatment (either therapeutic communities or outpatient) also reduces recidivism, but by a lesser 6.4 percent.”<sup>97</sup>

- *Specialized courts reduce recidivism.* One recent statewide study of drug courts in Minnesota, where drug court participants entered the programs both post-adjudication and pre-plea, found that “Drug court is a statistically significant factor in reducing new charges and convictions for participants in all time intervals analyzed (through 2 ½ years) after a participant’s start date. At the end of 2 ½ years the Drug Court Cohort shows a 37% reduction in new charges and 47% reduction in new convictions as compared to the Comparison Group.”<sup>98</sup> Another recent study by the Urban Institute, examining drug courts in multiple sites, again with participants entering both post-adjudication and pre-plea, found that “drug court participants were significantly less likely to report committing any crime at both the six- and 18-month follow-up interviews. Also, of those who reported criminal activity at the 18-month follow-up, drug court participants reported about half as many criminal acts (43.0 vs. 88.2), on average, in the year prior.”<sup>99</sup> Looking at the effect of the point of entry in the programs, the study found that when participants entered pre-plea courts, the average number of crimes prevented per month was 4.6, compared with 3.6 when participants entered post-plea courts.<sup>100</sup> Significantly, the study also examined whether the type of offense affected recidivism rates and concluded that “offenders

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are more effective when provided to defendants while they are in the community rather than in an institutional setting.”), <http://nicic.gov/library/files/023356.pdf>.

<sup>97</sup> *Reinvestment Summit*, at 26. The Bureau of Prison’s RDAP is the only prison-based program that is shown to reduce recidivism by as much as 16 percent. Eligibility for RDAP is extremely limited. Alan Ellis and Todd Bussert, *Looking at the BOP’s Amended RDAP Rules*, 26 *Crim. Justice* 37 (2011).

<sup>98</sup> Minnesota State Court Administrator’s Office, *Minnesota Statewide Adult Drug Court Evaluation* 44 (June 2012), [http://www.mncourts.gov/Documents/0/Public/Drug\\_Court/2012%20Statewide%20Evaluation/MN\\_Statewide\\_Drug\\_Court\\_Evaluation\\_Report\\_-\\_Final\\_Public.pdf](http://www.mncourts.gov/Documents/0/Public/Drug_Court/2012%20Statewide%20Evaluation/MN_Statewide_Drug_Court_Evaluation_Report_-_Final_Public.pdf).

<sup>99</sup> Shelli Rossman, et al., *The Multi-Site Adult Drug Court Evaluation: Executive Summary* 5 (Nov. 2011), <http://www.urban.org/uploadedpdf/412353-multi-site-adult-drug-court.pdf>.

<sup>100</sup> Shelli Rossman, et al., *The Multi-Site Adult Drug Court Evaluation: Volume Four* 183 (Nov. 2011), <http://www.urban.org/UploadedPDF/412357-MADCE-The-Impact-of-Drug-Courts.pdf>. Courts that combined both pre-plea and post-adjudication participants had the least success, preventing on average .8 crimes per month. *Id.*

with violent histories showed a greater reduction in crime than others at follow-up.”<sup>101</sup>

- *Targeting a greater number of “criminogenic needs” has a greater effect on recidivism.* Research has shown that recidivism can be reduced where policies are designed to target the greatest number of “criminogenic needs” in a manner that considers individual characteristics when matching offenders to services. Services that target only one to three needs have been shown to increase recidivism, whereas those that target four to six needs significantly reduce recidivism. Additionally, services that match treatment to the individual’s culture, gender, motivational stage, and learning style are more likely to reduce recidivism than “cookie-cutter” or “one-size-fits-all” programs.<sup>102</sup>

There has also been significant research on how supervision affects recidivism. Specifically, the research shows that intensive supervision should be limited to high risk offenders because it actually increases recidivism rates for low risk offenders. Indeed “[t]he . . . least understood threat to public safety is when low risk offenders are subject to unnecessary levels of supervision or ‘dosages’ of treatment. Not only are valuable and increasingly scarce resources being diverted from those who truly need them, several studies have shown that exposing low risk offenders to treatment actually increases their recidivism rates.”<sup>103</sup>

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<sup>101</sup> *Id.* at 7.

<sup>102</sup> See generally National Institute of Corrections, U.S. Dep’t of Justice, *Implementing Evidence-Based Policy and Practice in Community Corrections* 14 (2d ed. 2009); Edward Latessa, *What Works and What Doesn’t in Reducing Recidivism: Apply the Principles of Effective Intervention to Offender Reentry*, [http://www.familyimpactseminars.org/s\\_wifis26ppt\\_el.pdf](http://www.familyimpactseminars.org/s_wifis26ppt_el.pdf).

<sup>103</sup> James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 Fed. Sent’g Rep. 194 (2004). See also Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recidivism?*, 3 U. St. Thomas L. J. 521, 522-23 (2006) (“[R]esearch has clearly demonstrated that when we place low-risk offenders in our more intense programs, we often increase their failure rates.”); Christopher T. Lowenkamp, Jennifer Pealer, Paula Smith, & Edward J. Latessa, *Adhering to the Risk and Need Principles: Does it Matter for Supervision-Based Programs?*, 70 Fed. Probation 3 (2006) (“The risk principle states that programming should be matched to the risk level of the offenders, and higher-risk offenders should receive more intensive programming for longer periods of time to reduce their risk of re-offending. Moreover, and equally important, applying intensive treatment to low-risk offenders may actually serve to increase their risk of recidivism.”) (internal citations omitted), [http://www.uc.edu/ccjr/Articles/cca\\_article\\_federal\\_prob.pdf](http://www.uc.edu/ccjr/Articles/cca_article_federal_prob.pdf).

### C. Implementation by the States

For several years, many of the states have been looking at this evidence and taking steps to respond to it with the goal of decreasing both costs and recidivism.<sup>104</sup> While perhaps initially motivated to examine incarceration policies and recidivism due to fiscal concerns, many states are learning that reducing their reliance on incarceration can have a positive effect not only on the pocketbook, but on public safety.<sup>105</sup> As the Honorable Sue Bell Cobb, Chief Justice of the Alabama Supreme Court recently stated: “We now know there has been an overreliance on incarceration of nonviolent offenders. Unfortunately, research has demonstrated that it has not necessarily made us safer.”<sup>106</sup> And there is public support for the changes the states have made. The Pew Center on the States reports that “[v]oters overwhelmingly prioritize preventing recidivism over requiring non-violent offenders to serve longer prison terms.”<sup>107</sup>

Although some of these states have explored using actuarial risk assessments as part of the sentencing process, we caution against such a change in the federal system. It simply is not possible to have a single risk assessment that is valid for the entire federal population. Even the strongest advocates for the use of actuarial risk assessments at sentencing have counseled that “[g]iven the purpose for and potential judicial consequences of using assessment information at sentencing, research must provide evidentiary support that the tool can effectively categorize all types of offenders *in the local population* on which the instrument will be used into groups with

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<sup>104</sup> See, e.g., *Reinvestment Summit* at 55-67; National Governor’s Association Center for Best Practices, *State Efforts in Sentencing and Corrections Reform* (Oct. 2011), <http://www.nga.org/cms/home/nga-center-for-best-practices/center-publications/page-hsps-publications/col2-content/main-content-list/state-efforts-in-sentencing-and.html>. See generally Pew Center on the States, *Recidivism* (website listing the Center’s latest publications on recidivism), <http://www.pewstates.org/issues/recidivism-328303>; Council of State Governments Justice Center, *Work in the States* (website providing information on the states with whom the Center is working to implement justice reinvestment strategies), <http://justicereinvestment.org/states>.

<sup>105</sup> See, e.g., *Reinvestment Summit*, at 4 (“Not only are states finding that a crime-fighting strategy that focuses so heavily on incarceration is fiscally not sustainable, evidence from the states demonstrates that policymakers should not assume that simply incapacitating more people will have a corresponding increase in public safety.”). “For example, from 2000 to 2007, Florida has increased its incarceration rate 16 percent, whereas New York State’s incarceration rate went in the opposite direction, decreasing 16 percent. Despite this contrast, New York’s drop in crime rate over the same period was double Florida’s decrease in crime. In short, although New York invested considerably less money in prisons than did Florida, New York delivered greater public safety to its residents.” *Id.*

<sup>106</sup> Honorable Sue Bell Cobb, *The Power of Fixing People Rather than Filling Prisons*, in *Book of the States* (2011), <http://knowledgecenter.csg.org/drupal/content/power-fixing-people-rather-filling-prisons>.

<sup>107</sup> Pew Center on the States, *Time Served: The High Cost, Low Return of Longer Prison Terms* 5 (June 2012), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Prison\\_Time\\_Served.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Prison_Time_Served.pdf).

different probabilities of recidivating.”<sup>108</sup> Due to different local laws and policies in different parts of the country, and different target populations, validity must be established on a local level.<sup>109</sup> In other words, “what works in downtown Los Angeles may not work in Napa Valley.”<sup>110</sup> Researchers have noted that predictive validity can suffer when a single tool is used even for an entire state (let alone the entire country): “it is highly unlikely for any single tool, applied unilaterally, to demonstrate universally high predictive validity.”<sup>111</sup>

## **VI. Proposed Priority #8: Setser**

In *Setser v. United States*, 132 S. Ct. 1463 (2012), the Court held that a federal court retains the authority to order that a federal sentence run consecutive or concurrent with an anticipated state sentence that has not yet been imposed. The Court made clear that the Bureau of Prisons has no authority in this regard. In cases where the court fails to specify whether the sentence should be run concurrent or consecutive, the default rule is that the federal sentence runs consecutive to the state sentence.

Section 5G1.3 of the guidelines currently does not address whether a judge should impose a sentence concurrent or consecutive to an anticipated but not yet imposed state sentence. We see no need for it to do so. Amending §5G1.3 would only add complexity to the guideline.

## **VII. Other Issues: (A) Career Offender, (B) Relevant Conduct, (C) Defender Ex Officio**

The Commission also requests comment on other issues that might warrant the Commission’s attention. Here, we include significant issues that we believe the Commission should take up: (A) amend key definitions in the career offender guideline; (B) amend the relevant conduct rules; and (C) recommend to Congress that it amend the Sentencing Reform Act to allow a Federal Defender to serve as an *ex officio* member of the Commission.

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<sup>108</sup> National Center for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing* 40 (2011), <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Sentencing%20Probation/RNA%20Guide%20Final.ashx>

<sup>109</sup> *Id.* at 30-31.

<sup>110</sup> *Id.* at 32.

<sup>111</sup> *Id.*

**A. Amend the Guideline Definitions of “Controlled Substance Offense” and “Prior Felony Conviction.”**

Several of the key definitions the guidelines use are broader than what Congress required. Here, we discuss two of particular importance to Defender clients: the definitions of “controlled substance offense” and “prior felony conviction” in §4B1.2.

Section 994(h) directed the Commission to “assure that the guidelines specify a sentence to a term of imprisonment at or near the” statutory maximum for a defendant convicted of a “felony” that is a “crime of violence” or one of several enumerated federal drug trafficking offenses. Rather than follow the directive, the Commission substantially expanded the class of persons subject to the career offender provisions by including state drug offenses, which are often minor offenses involving small quantities for personal use or small sales to support drug use.

As the Commission acknowledged in its *Fifteen Year Review*, the use of these prior drug trafficking convictions to define career offenders has a significant adverse impact on African-American offenders. And it does so without clearly promoting an important purpose of sentencing. The Commission’s study showed that the recidivism rate of offenders qualifying on the basis of prior drug offenses was substantially lower than the rate for those qualifying on the basis of prior violent offenses, and more closely resembled the recidivism rate of defendants in the criminal history category that would have otherwise applied. *Fifteen Year Review* 131, 133-34.

The guidelines also define “prior felony conviction” in broad terms. The commentary to §4B1.2 defines a “prior felony conviction” as a “prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specially designated as a felony and regardless of the actual sentence imposed.”<sup>112</sup> This definition is broader than that set forth in 21 U.S.C. § 802(13), which defines the term “felony” as “any Federal or State offense classified by applicable Federal or State law as a felony.” The guidelines definition classifies many defendants as career offenders even though they are actually convicted of state misdemeanors and receive insignificant jail terms or no jail at all. *See United States v. Colon*, 2007 WL 4246470, \*6 (D. Vt. Nov. 29, 2007) (Sessions, J.) (imposing 64 month sentence after downwardly departing from career offender guideline; defendant classified as career offender based on state misdemeanor convictions for which he served no time in a state correctional facility). Because these offenses are considered less serious and do not carry with them the significant collateral consequences of a felony conviction, the state courts and litigants do not treat them with the same level of scrutiny as they would a felony.

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<sup>112</sup> USSG §4A1.2(o) sets forth a similar definition of “felony.”

Yet, under §4B1.2's definition of "felony," these are treated the same as serious felonies, resulting in unwarranted uniformity among dissimilarly situated defendants.<sup>113</sup>

The guideline definition of "felony" even sweeps in state misdemeanors, like resisting arrest, even though they are otherwise considered minor offenses under the guidelines. *Compare United States v. Almenas*, 553 F.3d 27 (1st Cir. 2009) (state misdemeanor of resisting arrest counts as career offender predicate) *with* USSG §4A1.2(c)(1) (resisting arrest counts in criminal history score only if sentence was term of probation of more than one year or term of imprisonment of at least thirty days, or was similar to instant offense).

In a different context, the Commission noted that the broad definition of "felony drug offense" in 21 U.S.C. § 802(44), results in "inconsistent application" because of the various ways that states punish certain drug offenses.<sup>114</sup> It recommended that Congress "consider incorporating the particular state's classification of an offense as a "felony" or misdemeanor" to better reflect the state's judgment concerning the seriousness of the prior offense."<sup>115</sup> The Commission should follow its own advice and more "finely tailor" the reach of the career offender guideline,<sup>116</sup> consistent with the statutory definition of the term "felony" used in 28 U.S.C. § 994(h).<sup>117</sup>

Until the Commission narrows the definition of "felony" and controlled substance offense, courts will continue to express their disagreement with the over-inclusiveness of the guidelines through departures and variances.

In combination with significant and consistent narrowing of the recidivist definitions, we encourage the Commission to include a more general and flexible departure provision that gives courts latitude to determine whether a defendant's categorization under a recidivist sentencing

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<sup>113</sup> The same is true for what counts as a "conviction" for career offender purposes. In states that use diversionary dispositions that do not result in convictions as defined under state law, the guideline nonetheless counts them as career offender predicates. *See United States v. Fraser*, 388 F.3d 371, 375 (1st Cir. 2004); *United States v. Curet*, 670 F.3d 296, 305 (1st Cir. 2012). In contrast, such dispositions do not count under the Armed Career Criminal Act. *See* 18 U.S.C. § 921(a)(20) ("W]hat constitutes a conviction of such crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.").

<sup>114</sup> USSC, Report to Congress: *Mandatory Minimum Penalties in the Federal Criminal Justice System* 356 (2011).

<sup>115</sup> *Id.* at 356

<sup>116</sup> *Id.*

<sup>117</sup> Congress used the term "felony" in 28 U.S.C. § 994(h), which is defined in 21 U.S.C. § 802(13) as "any Federal or State offense classified by applicable Federal or State law as a felony."

provision understates, or overstates, the seriousness of the prior offense and the impact it rightfully ought to have on the sentencing decision. In this way, the Commission will further its purpose of avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct, while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices. 28 U.S.C § 991(b)(1)(B).

## **B. Relevant and Acquitted Conduct**

We also encourage the Commission to consider a comprehensive review of relevant conduct under USSG §1B1.3. The Commission has been aware of problems with the relevant conduct guidelines for many years. In 1996, the Commission announced as a priority for the 1996-97 amendment cycle “developing options to limit the use of acquitted conduct at sentencing,” and for future amendment cycles, “[s]ubstantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence.”<sup>118</sup> Commission staff began to “investigate ways of incorporating state practices; *e.g.*, using an offense of conviction system for base sentence determination; providing a limited enhancement for conduct beyond the offense of conviction; or limiting acquitted conduct to within the guideline range.”<sup>119</sup> Proposals to abolish the use of acquitted conduct were published for comment at various times.<sup>120</sup> But the Commission has declined to act. We urge the Commission to address this long-standing, well-known problem.

As the Commission knows, a sizable majority of judges believe that it is not appropriate to consider dismissed conduct (69% of judges), uncharged conduct not presented at trial or admitted by the defendant (68%), or acquitted conduct (84%).<sup>121</sup> These views are not surprising.

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<sup>118</sup> See 61 Fed. Reg. 34,465 (July 2, 1996).

<sup>119</sup> See 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, 1995 WL 843512 \*3 (Sept./Oct. 1995); see also USSC, Guidelines Simplification Draft Report on Relevant Conduct (Nov. 1996).

<sup>120</sup> See 62 Fed. Reg. 152,161 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832 (1992).

<sup>121</sup> See USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 5 (2010). Both district and appellate court judges have issued sharply worded opinions criticizing the use of acquitted conduct. See, *e.g.*, *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) (“the unfairness perpetuated by the use of “acquitted conduct” at sentencing in federal district courts is uniquely malevolent”); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, B., J., dissenting) (“Reliance on acquitted conduct in sentencing diminishes the jury’s role and dramatically undermines the protections enshrined in the Sixth Amendment.”); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) (“I strongly believe ... that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.”); *United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) (Kelley, J.) (“Sentencing a defendant to time in prison for a crime that the jury found

This opposition is well-placed because the “relevant conduct” rules work great mischief at sentencing: they contribute to unwarranted disparity, undue severity, and disrespect for the law.<sup>122</sup> They create hidden disparities because of their complexity and inconsistent application among prosecutors, courts and probation officers.<sup>123</sup>

The relevant conduct rules give prosecutors “indecent power”<sup>124</sup> over sentencing and enormous leverage during plea negotiations, allowing them to inflate guideline ranges with the use of uncharged, dismissed, and acquitted conduct.<sup>125</sup> Prosecutors need only provide information about uncharged or acquitted conduct to a probation officer to include in the

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he did not commit is a Kafka-esque result.”), *vacated by*, 271 Fed. Appx. 298 (4th Cir. 2008); *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005) (Gertner, J.) (“To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense-as a matter of law or logic.”). *See also State v. Cote*, 530 A.2d 775, 784 (N.H. 1987) (“disingenuous at best to uphold the presumption of innocence . . . while at the same time punishing a defendant based upon charges in which that presumption has not been overcome”).

<sup>122</sup> The relevant conduct rules conflict with an essential provision of the Sentencing Reform Act, which directed the Commission to take into account “the circumstances under which the *offense was committed*,” the “nature and degree of the harm caused by the *offense*.” 28 U.S.C. § 994(c)(2), (3) (emphasis added). It was also to provide “certainty and fairness” and “avoid[] unwarranted sentencing disparities among defendants . . . who have been *found guilty* of similar criminal conduct.” 28 U.S.C. § 991(b)(1)(B) (emphasis added).

<sup>123</sup> *See Fifteen Year Review* 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, 111 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned different offense levels based upon counting of relevant conduct).

<sup>124</sup> Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (2008).

<sup>125</sup> American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463 (2001); Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 140, 159 (1998); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 524-54 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 Stan. L. Rev. 523, 524 (1993); Paul J. Hofer, *Implications of the Relevant Conduct Study for the Revised Guideline*, 4 Fed. Sent’g. Rep. 334 (May/June 1992).

presentence report. In *United States v. Hurn*, 496 F.3d 784 (7th Cir. 2007), for example, “[a]fter a two day trial, a jury acquitted Mark Hurn of possession of cocaine base with intent to distribute, but found him guilty of possession of powder cocaine with intent to distribute.” *Id.* at 785. Probation, however, “advised the district court to consider Hurn’s possession of cocaine base when determining Hurn’s relevant conduct” pursuant to USSG §1B1.3, and, accordingly, calculated the guideline range to be 188-235 months. *Id.* at 786. The sentencing court imposed a sentence of 210 months imprisonment. *Id.* “Had the PSR not included Hurn’s [acquitted conduct] in its relevant conduct calculation, Hurn’s recommended Guidelines range would have been 27–33 months.” *Id.*<sup>126</sup>

The relevant conduct rules also deprives defendants of their Sixth Amendment right to a jury trial<sup>127</sup> and undermine the legitimacy of the presumption of innocence by permitting the use of acquitted conduct. In *United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc), for example, the defendant was sent to prison for 14 additional years for three crimes the jury in its verdict said he did not commit. The enhancement more than doubled the sentence to 22 years. *White*, 551 F.3d at 386 (Merritt, J., dissenting). Cross-references based upon acquitted or uncharged conduct provide a particularly egregious example of how the rules work an end-run around fundamental constitutional rights. Under USSG §2K2.1(c)(1)(B), a defendant convicted of nothing more than possessing a firearm after being convicted of a felony can be sentenced as a murderer even when he had a strong defense to a murder charge had he been charged and tried for that offense.<sup>128</sup>

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

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<sup>126</sup> Probation officers can also arrive at different guideline conclusions based on uncharged conduct. See *United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant).

<sup>127</sup> Although appellate courts have generally upheld the use of acquitted conduct after *United States v. Booker*, 543 U.S. 220 (2005), serious questions remain about whether it violates the Sixth Amendment to sentence a defendant on the basis of such conduct. The Court in *United States v. Watts*, 519 U.S. 148 (1997), held only that the use of acquitted conduct did not violate the Double Jeopardy Clause. 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).

<sup>128</sup> See Statement of Alan DuBois Before the U.S. Sent’g 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).

discretionary factor.<sup>129</sup> In addition to the disparity created by the use of acquitted conduct, Mr. Steer noted that the “federal guideline system is alone among sentencing reform efforts in using acquitted conduct to construct the guideline range.”<sup>130</sup> Mr. Steer also noted that uncharged conduct was the aspect of the relevant conduct guideline that was the most difficult to defend and recommended that the Commission “decrease the weight given to unconvicted counts that are part of the same course of conduct or scheme under 1B1.13(a)(2) and (3).”<sup>131</sup>

We agree that the Commission should prohibit the use of acquitted conduct. Its use undermines respect for the law in many quarters.<sup>132</sup> We also encourage the Commission to either eliminate the use of uncharged and dismissed conduct or significantly limit its impact on the guideline range.

### **C. Defender Ex Officio**

The Defenders continue to believe that the Commission’s mission would be better served if a federal defender was given an *ex officio* seat on the Commission. In 2004, the Judicial Conference of the United States, upon recommendation of the Committee on Criminal Law, voted to recommend legislation authorizing the Conference to appoint a federal defender to serve as an *ex officio* member of the Commission.<sup>133</sup> We encourage the Commission to add to its priorities a recommendation to Congress to adopt legislation authorizing a defender *ex officio*.

The absence of a defender *ex officio* deprives the Commission of advice and input at crucial stages in the process. Defenders offer comments and hearing testimony that the Commission has repeatedly acknowledged is valuable. Yet, we do not have a voice at critical times during the Commission’s internal discussions and debates. Compounding this disadvantage is that when comment is provided, it is without the benefit of the information that is

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<sup>129</sup> *An Interview with John R. Steer*, 32 *Champion* 40, 42 (2008).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *See, e.g., United States v. Settles*, 530 F.3d 920, 923-924 (D.C. Cir. 2008) (noting that the defendant’s sentiment (“I just feel as though, you know, that that’s not right. That I should get punished for something that the jury and my peers, the found me not guilty.”) was similar to that of “[m]any judges and commentators” who have “argued that using acquitted conduct to increase a defendant’s sentence undermines respect for the law and the jury system”); *United States v. Magallanez*, 408 F.3d 672, 683 (10th Cir. 2005) (defendant “might well be excused for thinking that there is something amiss” with using acquitted conduct to increase his sentence by 43 months); *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) (“most people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they are acquitted”), *vacated and remanded*, 271 Fed. Appx. 298 (4th Cir. 2008).

<sup>133</sup> *See Report of the Proceedings of the Judicial Conference of the United States* 11 (March 16, 2004).

often central to the Commission's ultimate decision. For example, Defenders are not privy to staff briefings nor do they see staff reports, memos, results of special coding projects, or the amendment-related data analyses. We do not see drafts of Commission reports and thus are unable, unlike the Department of Justice, to offer comments and encourage revisions. We do not see proposed amendments before they are published. And we do not see proposed final amendments before the Commission reads them aloud in public during its vote, all of which clearly follows deliberations closed to the public and to us.

The absence of a defender *ex officio* also creates at least the appearance that the Commission is unduly influenced by the Department of Justice. Moreover, the Commission is out-of step with other sentencing commissions, most of which require a member of the defense bar to serve on the commission and none of which preclude it.<sup>134</sup> As in the states, a Defender member would allow for a more productive and comprehensive discussion of the issues, which would result in a more effective process and outcomes.

A representative of the Federal Defender would bring unparalleled breadth and experience to the work of the Commission. The Federal Defender system – which includes 80 offices nationwide serving 90 of the 94 judicial districts – includes among its ranks lawyers who have devoted their entire professional careers to indigent defense work. They possess the kind of experience and judgment that can only be acquired through continuous day-to-day interaction with all players in the criminal justice system – judges, probation officers, prosecutors, law enforcement officials, correctional administrators, community treatment providers, and other stakeholders. Defender representatives already serve as voting members on the Advisory Committee on Evidence Rules and the Advisory Committee on Criminal Rules. Their role is to bring extensive experience to inform the development of federal criminal policy and practice. There is no reasonable or fair basis for excluding a Defender representative from the Commission.

We encourage the Sentencing Commission to support a Defender *Ex Officio* because it would enrich the quality of the Commission's deliberations and would efficiently avoid misunderstandings and inaccuracies. In so doing, the voting Commissioners would be assured

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<sup>134</sup> See National Center for State Courts, *State Sentencing Guidelines: Profiles and Continuum* (July 2008). Fourteen out of the twenty-one states studied require that defense counsel serve on their sentencing commissions: Alabama, Arkansas, Delaware, the District of Columbia, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Ohio, Pennsylvania, Utah, and Washington. All except Alabama, Louisiana, Pennsylvania, and Washington explicitly require a representative from the state public defender system, and no state disallows public defenders from serving. *Id.* See also Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 *Judicature* 173, 174 (1995) (noting that most state sentencing commissions include defense attorneys and other interested parties, "making these panels much more broadly representative than the federal commission").

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the broadest possible understanding of the ramifications of their decisions, which can only serve to advance the Commission's work.

### **VIII. Conclusion**

As the Commission pursues its priorities for the 2012-2013 amendment cycle, we remain hopeful that it will take steps to formulate guidelines based upon judicial feedback and sound empirical research, and that reflect advances in knowledge of human behavior as it relates to the criminal justice process. 28 U.S.C. § 991(b)(1)(C). The Commission has the institutional capacity and authority to fashion a workable advisory guideline system that results in fair and just sentences. We look forward to working with the Commission and its staff during the upcoming amendment cycle.

Very truly yours,

/s/ Miriam Conrad

Miriam Conrad

Federal Public Defender

Vice-Chair, Federal Defender Sentencing  
Guidelines Committee

/s/ Marjorie Meyers

Marjorie Meyers

Federal Public Defender

Chair, Federal Defender Sentencing  
Guidelines Committee

Enclosures

cc (w/encl.): William B. Carr, Jr., Vice Chair  
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Hon. Ricardo H. Hinojosa, Commissioner  
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