

**FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007**

**JON M. SANDS
Federal Public Defender**

**(602) 382-2700
1-800-758-7053
(FAX) 382-2800**

| March 13, 2007

Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: **§ 1B1.3 Reduction in Term of Imprisonment Upon Motion of Director
of Bureau of Prisons (Policy Statement)**

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders regarding additional Commission action on the new guideline provision, U.S.S.G. § 1B1.13, creating a policy statement governing reduction of prison terms based on extraordinary and compelling reasons pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), and to respond to the further request for comment issued in January, 2007.¹

We previously submitted written testimony regarding the proposed policy statement on March 13, 2006. On July 14, 2006, we submitted additional comment pursuant to the Commission's request. In the latter submission, we joined several other groups in supporting a proposed policy statement, submitted by the ABA, which addressed the statutory mandate of 28 U.S.C. § 994(t), stating that the Commission:

shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.

¹ We thank Steven Jacobson, AFD, District of Oregon, for his assistance in preparing these comments.

We continue to support the ABA proposal as the best response to this statutory mandate. We offer some background as context and then respond to the Government's recent positions and to the questions in the Commission's request for comment.

I. Background

Prior to the advent of the Sentencing Reform Act and the Sentencing Guidelines, the federal criminal justice system used indeterminate sentences and a parole model in which various factors, including progress toward rehabilitation, would result in release on parole before the term of a sentence expired. The sentencing court could impose a mandatory minimum period to be served of up to one third of the sentence before parole eligibility. 18 U.S.C. § 4205(b)(1) (repealed effective Nov. 1, 1987). In that system, Congress allowed the Bureau of Prisons to move the district court, at any time post-sentence, for a reduction of a minimum time before parole eligibility. 18 U.S.C. § 4205(g) (repealed effective Nov. 1, 1987). This motion was not confined to extraordinary and compelling circumstances and could be made based on prison overcrowding.

The Sentencing Reform Act of 1984 (SRA) established a determinate sentencing system with sentencing guidelines to aid the court in establishing an appropriate sentence. The parole system, and the rehabilitative model it embodied, were rejected in favor of a system intended to provide more certainty, finality and uniformity.¹ However, Congress also recognized that post-sentencing developments could provide appropriate grounds to reduce a sentence. Using § 4205(g) as a model for the mechanism, the SRA provided a way to adjust a sentence if necessary to accommodate post-sentence developments. This section of the SRA is codified in 18 U.S.C. § 3582(c)(1)(A)(i):

The court may not modify a term of imprisonment once it has been imposed except that-

(1) in any case-

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that-

(i) extraordinary and compelling reasons warrant such a reduction;

Congress also mandated that the Sentencing Commission, also created by the SRA, promulgate policy statements regarding how that section should operate and what should be considered extraordinary and compelling:

¹ See, generally, *United States v. Mistretta*, 488 U.S. 361, 363-370 (1989).

The Commission, in promulgating general policy statements regarding the sentencing modification provisions of 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

28 U.S.C. § 994(t).

The legislative history of these provisions demonstrates the Congress intended this release motion as a way to account for changed circumstances. The Senate Judiciary Committee's Report, the authoritative source of the legislative history, said, in pertinent part:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term or imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment. . . .the bill . . . provides for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.²

Thus, the plain language of the statute and the legislative history describe a reduction in sentence based on changed circumstances, to be decided upon by the court after motion by the Bureau of Prisons, using standards set forth by the Sentencing Commission and the factors set forth in 18 U.S.C. § 3553(a). Nothing in this legislation delegated to the Bureau of Prisons the authority to define compelling and extraordinary circumstances more narrowly than the statute or the Sentencing Commission.

II. Government Response to U.S.S.G. § 1B1.13

In the face of Commission inaction on the mandate of 28 U.S.C. § 994(t), commentators have noted that the Bureau of Prisons rarely made motions for reduction.³

² S.Rep.No.225, 98th Cong., 1st Sess. 37-150 at p. 55, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373.

³ See, Mary Price, The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent. R. 188, 2001 WL 1750559 (Vera Inst. Just.) (2001); John Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences, 13 Fed. Sent. R. 154, 2001 WL 1750551 (Vera Inst. Just.) (2001).

However, BOP rules clearly contemplated both medical and non-medical reasons and did not purport to narrow the statutory terms. The program statement in place from 1980 to 1994 (covering both pre- and post-SRA sentences) instructed staff to file motions “in particularly meritorious or unusual circumstances which could not have reasonably been foreseen by the court at the time of sentencing,” including “if there is an *extraordinary change in an inmate’s personal or family situation* or if an inmate becomes severely ill.” 28 C.F.R. § 572.40 (1980) (emphasis added); see 45 Fed. Reg. 23365-66 (Apr. 4, 1980). The BOP amended the program statement in 1994, updating it with references to the legislative language of § 3583, “extraordinary and compelling circumstances,” but maintaining the same broad standards and including medical and non-medical cases. 28 C.F.R. § 571.61, *et seq.*, 59 Fe. Reg. 1238 (Jan. 7, 1994); see USDOJ-BOP, Program Statement 5050.44, *Compassionate Release: Procedures for Implementation of 18 U.S.C. 3582(c)(1)(A) & 4205(g)* (Jan. 7, 1994) (emphasizing “the standards to evaluate the early release remain the same,” though prison overcrowding eliminated as an appropriate basis).

Once the Sentencing Commission entered the arena by adopting the policy statement in U.S.S.G. § 1B1.13 in 2006, the executive branch reacted in two ways. First, the Department of Justice submitted a letter on July 14, 2006, which warned that the Commission should not adopt a policy for granting motions broader than the Department’s standards for filing such motions:

The policy statements adopted by the Sentencing Commission for granting motions under 18 U.S.C. § 3582(c)(1)(A)(i) cannot appropriately be any broader than the Department’s standards for filing such motions. . . . It would be senseless to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them. . . . At best, such an excess of permissiveness in the policy statement would be a *dead letter* because the Department will not file motions under 18 U.S.C. § 3582(c)(1)(A)(i) outside the circumstances allowed by its own policies.

DOJ Lt. p. 4 (emphasis added). The letter advocated that reductions should only be entertained in a narrow range of medical situations:

the inmate for whom the reduction in sentence is sought has a terminal illness with a life expectancy of one year or less, or a profoundly debilitating (physical or cognitive) medical condition that is irreversible and irremediable and that has eliminated or severely limited the inmate’s ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others;

DOJ Lt. p. 1. Of course, as is apparent from the previous discussion, nothing in the statutory language or history, nor in the BOP rules, narrowed “extraordinary and compelling reasons” to such a small subset of medical-only cases.

The BOP then, more recently, published new proposed rules outlining exactly such a narrowing of cases in which sentence reductions would be sought. 71 Fed. Reg. 245, pp.76619-76623 (Dec. 21, 2006). Claiming that the new regulations would "more accurately reflect our authority under these statutes and our current policy," the rules rename the section "Reduction in Sentence for Medical Reasons," and confine action to cases involving terminal illness with less than a year to live or the near-vegetative state described in the DOJ letter above.

The DOJ position and BOP's proposed rule-making action are misguided for several reasons. First, Congress, while making the reduction dependant on motion of the BOP, clearly delegated authority to set standards and policy for these sentence reductions to the Sentencing Commission. The process for doing so is set forth in the SRA and includes instructing all the participating players in the criminal justice system to provide their input and expertise to the Commission during the rule making process. The executive agencies are specifically mentioned as one of the key organizations that

shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted and otherwise assessing the Commission's work.

28 U.S.C. § 994(o). This appears to be the only congressionally approved mechanism for transmitting the Bureau of Prisons' concerns and proposals to the Sentencing Commission. It also provides the mechanism for the other essential players in the federal sentencing system – the United States Probation Office, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and the Federal Public Defenders – to provide their input on the question. The amendment would then be subject to approval by the Commission and acquiescence by Congress under 28 U.S.C. § 994(p).

Nothing in the statutory scheme delegates to the Bureau of Prisons authority to limit or construe "extraordinary and compelling" beyond its plain meaning. The task of formulating the standards and providing examples was expressly delegated by Congress to the Sentencing Commission in the same statute that provided the Bureau of Prisons with a mechanism for making its suggestions to the Sentencing Commission regarding guideline amendments.

In addition, the narrowing proposed by the government has no basis in the statute or legislative history. As already described above, Congress clearly contemplated changed circumstances more broadly than end of life or near-vegetative state standards proposed by the government. The statutory scheme delegated the job of coming up with standards and examples to the Commission, then delegated to the sentencing court, the decision making power to rule on the motion after consideration of the statutory factors in 18 U.S.C. § 3553(a).

Unilateral narrowing of eligibility by the government not only misconstrues the statute, but usurps authority delegated to the judicial branch, creating a Separation of Powers problem. Declaring anything the Commission does to define "extraordinary and compelling reasons" as a *dead letter* if it is broader than the government's chosen standard serves to highlight the reversal of the proper roles and the constitutional violation that reversal embodies.

To avoid this problem and properly implement the statute, the power to move for sentence reductions should be broadly construed. The structure of the statute provides a gate-keeping function to the Bureau of Prisons. Whenever a factor arises that is arguably within the definition of "extraordinary and compelling reasons," the Bureau of Prisons should notify the court by motion so the sentencing judge can make the ultimate determination of whether a sentence reduction is appropriate, implementing the § 3553(a) factors that sentencing judges are very experienced in applying in every federal sentencing. This system does not work, either statutorily or constitutionally, unless the Bureau of Prisons implements its authority to notify the court in a very broad manner.

Under the statute, if the Bureau of Prisons is prejudging whether the sentence reduction should be granted, it substitutes its judgment for that of the court. Unless the notifications are very broad, allowing for some denials by sentencing judges, some cases in which "extraordinary and compelling" circumstances exist will not be before the sentencing judge. A restrictive view of when the § 3582(c) authority should be exercised compromises the statutory scheme. Even worse, Separation of Powers is violated when an executive body, faced with "extraordinary and compelling" circumstances, fails to provide the sentencing judge with the opportunity to make the ultimate judgment whether the sentence reduction is appropriate under the statute and § 3553(a). In whatever form the Bureau of Prisons addresses the implementation of § 3582(c), the power to file motions should be broadly and liberally construed in order to faithfully carry out the statutory scheme and to avoid unconstitutional limitations on judicial authority.

III. Further Comment and Response to Questions

Our positions on most of the questions posed in the current "Issue for Comment" are obvious from our previous submissions and the positions set forth above. We support the ABA proposal defining a broad range of circumstances which can provide extraordinary and compelling reasons and warrant a reduction in sentence. Examples should include a broad range of medical and non-medical circumstances and should not be limited to end-of-life releases.

There are medical conditions that, while not producing imminent death, make continued incarceration serve none of the purposes of sentencing under 18 U.S.C. § 3553(a). For example, a prisoner who suffers a non-life threatening stroke that forecloses the type of conduct that led to incarceration in the first place; a debilitating disease that makes an otherwise harmless prisoner easier to care for in the community than in the prison; crippling injuries such as an amputation or paralysis that both limit dangerousness

and render the prisoner vulnerable to other prisoners. Further, the requirement that the person be almost dead is far too limiting based on the constellation of potential circumstances surrounding a terminal illness.

There are also non-medical changes of circumstances which Congress contemplated and could clearly warrant relief under the statute. Such circumstances could include acts of heroism by prisoners; positive conduct in the prison or assistance to authorities that, although not permitting a Rule 35 motion, expose the prisoner to mistreatment and ostracism within the prison; family circumstances, such as death of a spouse leaving the prisoner as the only care giver for children, or a child dying and needing the prisoner present for care giving at the end of life. Further, rehabilitation in combination with other factors may render circumstances extraordinary and compelling from the negative inference in 28 U.S.C. § 994(t) (stating that rehabilitation "alone" is not sufficient).

We submit that the Commission should take a "combination" approach referred to in the question for comment, allowing the court to consider more than one reason, each of which is, alone, less than extraordinary and compelling, but that, taken in combination, are. This approach not only makes inherent sense, but is suggested by the statutory provision stating that rehabilitation alone is not sufficient.

Also, as implied in the last question for comment, the policy statement should allow a BOP motion based on an extraordinary and compelling reason not specifically identified by the Commission. This is an area which, by its nature, does not allow listing of all possible reasons. Any list of examples is necessarily non-exclusive and should so state.

Finally, in light of the way in which the executive branch is attempting to narrow the definition of extraordinary and compelling reasons without deference to standards set by Congress or the Sentencing Commission, we believe the Commission should provide a statement of the correct roles in its policy statement. The policy statement should provide that the Bureau of Prisons' role is that of a gate-keeper, which should implement Congressional and Commission-set standards for extraordinary and compelling reasons by broadly bringing motions when such reasons appear to be present, allowing the courts to exercise their authority to decide whether a reduction is warranted, after considering the policy statements and the § 3553(a) factors. This is the appropriate balance and the way in which a Separation of Powers violation will be avoided.

Thank you for your consideration of our comments.

Very truly yours,



JON M. SANDS

Federal Public Defender

*Chair, Federal Defender Sentencing Guidelines
Committee*

AMY BARON-EVANS

ANNE BLANCHARD

SARA E. NOONAN

JENNIFER COFFIN

Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Tom Brown, Assistant General Counsel
Judy Sheon, Staff Director
Ken Cohen, Staff Counsel

FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007

JON M. SANDS
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

March 29, 2007

Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Follow-Up on March 20 Hearing

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to follow up on some of the issues that arose at the March 20th hearing relating to the Guideline Manual, Immigration, Criminal History, Mandatory Minimums, and Sentence Reduction.

I. The Guideline Manual

The Guideline Manual should correctly represent current sentencing law. As the Commission has said, *United States v. Booker*, 543 U.S. 220 (2005) is "the most significant case affecting the federal sentencing guidelines system since . . . *Mistretta*." Testimony of Judge Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, March 16, 2006. When we again urged the Commission to amend the Manual to take the *Booker* decision into account, the response was that judges and practitioners know the law and so, apparently, there is no need for the Commission to change the Manual.

The Supreme Court announced over two years ago that the mandatory guideline system established by 18 U.S.C. § 3553(b), and echoed throughout the Guideline Manual, violated the Constitution. The Manual has yet to mention the case. This is not a matter of formality – it goes to the integrity of the Manual itself. A new practitioner reading the Manual has no way of discerning that the Guidelines no longer represent the final word on the appropriate sentence, and that 18 U.S.C. § 3553(a) is now the governing sentencing law. The Manual offers no understanding of this framework or of the advisory role of the Guidelines within it, as constitutionally mandated. To the contrary, the mandatory language of the Manual would lead one to believe, wrongly, that the

Guidelines continue to represent the sum total of appropriate considerations in any sentencing.

The Manual is not only silent about *Booker*, but in numerous instances recommends a course of action that is in direct conflict with the *Booker* decision and the Constitution. As one example, § 5K2.0 continues to rely explicitly on 18 U.S.C. § 3553(b)(1), which was excised as unconstitutional over two years ago. See U.S.S.G. § 5K2.0(a)(1), (c). As another, the Manual states that numerous aspects of the defendant's history and characteristics are never or not ordinarily relevant, though such matters "shall" be considered under § 3553(a)(1).

We would be happy to work with Commission staff on how to harmonize these and other guideline provisions with the state of the law post-*Booker*, as well as how and where to insert *Booker*'s holding and citation as is done with other cases in the Manual, even those the Supreme Court has since questioned, such as *Witte v. United States*, 515 U.S. 389 (1995), and *United States v. Watts*, 519 U.S. 148 (1997). See *Booker*, 543 U.S. at 240 & n.4.

We would also welcome the opportunity to work with staff on improving the procedural advice set forth in U.S.S.G. § 6A1.3. *Watts*, for example, is cited for the proposition that a court may consider any information with "sufficient indicia of reliability to support its probable accuracy," U.S.S.G. § 6A1.3, comment., but the Court said no such thing. See 519 U.S. at 157. It said that a preponderance of the evidence standard is generally permissible, though a clear and convincing standard may be required under some circumstances, and said nothing to denigrate the quality of the evidence required at sentencing.

II. Immigration

Since our last communication with the Commission, we have studied the immigration legislation that is currently under consideration by Congress. Unlike the Department, which has urged the Commission to amend § 2L1.2 without waiting to hear from Congress, we urge the Commission to proceed with caution and with respect for congressional intent.

If the Commission amends § 2L1.2 this year, it must avoid promulgating a guideline that conflicts with legislation the 110th Congress is likely to enact. H.R. 1645, introduced in the House on March 22, 2007, and S. 2611, passed by the Senate last term, have identical penalty structures. The Commission must not promulgate a guideline that is more severe, more complex, or creates more unwarranted disparity than this penalty structure.

The Department suggests that its proposal is consistent with what Congress is considering, and maintains that it merely seeks simplicity and not increased severity. See 3/20/07 Testimony of John C. Richter at 5. This is not accurate. Option 7 is more complex, more severe, and would create more unwarranted disparity than the penalty

structure set forth in H.R. 1645 and S. 2611, and in some respects is more severe than current § 2L1.2.

H.R. 1645 and S. 2611 set forth statutory maxima of 20, 15, 10 and 2 years for illegal re-entry. Predicates for the 20-year maximum are (1) a "felony" for which the defendant was sentenced to not less than 60 months, (2) three "felonies," or (3) murder, rape, kidnapping, a "felony" described in chapter 77 (relating to peonage or slavery), or a "felony" described in chapter 113B (relating to terrorism). See H.R. 1645, § 236; S. 2611, § 207. In contrast, Option 7:

- would not require the prior offense to be a felony;
- would set a lower threshold of 48 months for the length of sentence imposed;
- would treat two prior convictions sentenced to as little as 12 months the same as one prior conviction sentenced to 48 months (in contrast with H.R. 1645 and S. 2611, which treat three "felonies" the same as one prior "felony" sentenced to at least 60 months)
- would add numerous specific *and* categorical offenses in the areas of child pornography and child sexual abuse;¹
- unlike H.R. 1645, S. 2611 or current § 2L1.2, would create a higher penalty level for "terrorism offenses" than for any other kind of offense (except "national security"), and would use a definition of "terrorism offense" that requires a complex factual inquiry far afield of the offense of conviction;²
- unlike H.R. 1645, S. 2611 or current § 2L1.2, would create a higher penalty level for "national security offenses" than for any other kind of offense (except "terrorism"), and would define "national security offense" as any offense "covered" in Chapter 2, Part M, which includes offenses that bear no resemblance to terrorism with offense levels as low as 6, 13, 14 and 18.

¹ Those are (1) an offense described in 18 USC 2251, 2251A, 2252, 2252A, or 2260, (2) any offense under state or local law consisting of "conduct" that would have been such an offense had it been committed within the special maritime or territorial jurisdiction, (3) an offense in which the victim had not attained the age of 18 and is "an offense described in 18 USC 2242," (4) an offense in which the victim had not attained the age of 18 and is a "forcible sex offense," (5) an offense in which the victim had not attained the age of 18 and is "statutory rape," (6) an offense in which the victim had not attained the age of 18 and is "sexual abuse of a minor."

² Under the case law interpreting the same definition in § 3A1.4, the inquiry is: Did the offense of conviction or any relevant conduct of the defendant or others for whose acts or omissions the defendant can be held accountable involve or have as one purpose the intent to promote a Federal crime of terrorism set forth in 18 U.S.C. § 2332b(g)(5), which in turn is defined as an enumerated offense calculated to intimidate, coerce or retaliate against government action? See *United States v. Arnaout*, 431 F.3d 994, 1002 (7th Cir. 2005); *United States v. Mandhai*, 375 F.3d 1243, 1247 (11th Cir. 2004); *United States v. Graham*, 275 F.3d 490, 516 (6th Cir. 2003).

The predicate for the 15-year maximum in H.R. 1645 and S. 2611 is a "felony" sentenced to not less than 30 months. See H.R. 1645, § 236; S. 2611, § 207. For a 12-level increase, Option 7 would not require the prior offense to be a felony, and would set a lower threshold – of 24 months – for the length of sentence imposed.

Predicates for the 10-year maximum in H.R. 1645 and S. 2611 are (1) three or more misdemeanors, or (2) a "felony." See H.R. 1645, § 236; S. 2611, § 207. Current § 2L1.2 requires an 8-level increase for an aggravated felony not covered by previous subsections, and a 4-level increase for any other felony or three or more misdemeanor crimes of violence or drug trafficking offenses. Option 7 would require an 8-level increase for any offense sentenced to as little as 12 months (even if a misdemeanor) or any three offenses sentenced to at least 90 days, and a 4-level increase for a felony not covered by previous subsections or any one offense sentenced to at least 90 days. As explained in our letter of March 16, Option 7 would result in an 8- or 4-level increase in some instances where currently there would be no increase.

Again, we urge the Commission to provide us with the data runs for Options 7 and 8. If we receive the data in sufficient time before the April 18 meeting at which the Commission plans to vote, we will submit further comments, and probably an Option 9 that more closely mirrors congressional intent than any of the options proposed thus far.

III. Criminal History

During the hearing, the Department asserted that the criminal history score is already "a very good indicator of the risk of recidivism," and that "excluding more offenses will not improve the ability of criminal history score to identify those offenders who provide a greater risk of recidivism." See Tr. 3/20/07, Testimony of Jonathan Wroblewski at 9, 11.

These assertions are not statistically supportable. For example, according to the Commission's statistics, defendants with two criminal history points have a *lower* risk of recidivism of any kind – including being rearrested or violating the terms of supervised release or probation – than defendants with one criminal history point, yet they are lumped into Criminal History Category II irrespective of the reason for those two points. *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) at 23; U.S.S.G., Ch. 5, Pt. A, Sentencing Table. Thus, a defendant with two prior convictions for driving without insurance could receive two criminal history points, be placed into Criminal History Category II, and denied safety valve under the current rules.

There is no data of which we are aware that shows that minor offenses are a good predictor of recidivism. The Fifteen Year Report states that including minor traffic offenses in the criminal history calculation may have an "unwarranted adverse impact" on minorities "without clearly advancing a purpose of sentencing," and that there are many other such possibilities. See *Fifteen Years of Guideline Sentencing: An Assessment*

of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform at 134 ("Fifteen Year Report"). Here, the Fifteen Year Report cites a 2003 paper by Blackwell, which would shed further light on the subject, but we are told it is not available to the public. And though a study on the relationship between recidivism risk and minor offenses is mentioned in one of the recidivism reports, that study either has not been completed or has not been published. See U.S. Sentencing Commission, *Recidivism and the First Offender* at 5 n.14 (May 2004).

Assigning only half a point for countable minor offenses would not alleviate the current problems with U.S.S.G. § 4A1.2(c). In our experience, convictions for the minor offenses listed in subsection (c)(1) reflect conduct that does not indicate either a need to protect the public or a likelihood of recidivism. For this reason, counting such offenses in the criminal history score – even by a fraction of a point – results in an unwarranted inflation of the criminal history score of many defendants. The addition of even a half point for such offenses would likely have a disparate impact on minorities, in some cases making them ineligible for safety valve treatment. As we noted in our previous letter and at the hearing, motor vehicle offenses frequently reflect the limited financial circumstances of the defendant. Adding even a half point for such offenses would result in harsher treatment, under the guidelines, for economically strained defendants.

Assigning even a half a point to these offenses will also perpetuate the unwarranted disparity caused by the current version of § 4A1.2(c), which depends upon the various state statutory schemes. Our earlier letter provided some examples of states in which some of the minor offenses are always counted because they carry a maximum sentence of more than one year. Set forth below is a more comprehensive account of misdemeanor offenses that would be excluded under subsection (c)(1) but for the fact that the state authorizes punishment of imprisonment for more than one year. We also note that, in addition to those states mentioned in our previous letter, Colorado permits sentences of more than one year for some of the minor offenses.

Colorado: Each of the following offenses is a misdemeanor under state law punishable by a maximum of eighteen months of imprisonment, *see* Colo. Rev. Stat. § 18-1.3-501:

- Driving after revocation of license, Colo. Rev. Stat. § 42-2-206;
- Professional gambling, Colo. Rev. Stat. § 18-10-103;
- Fish and game violations – e.g., illegal taking of black bears, Colo. Rev. Stat. § 33-4-101.3.

Iowa: Each of the following offenses is a misdemeanor under state law punishable by a maximum of two years imprisonment:

- Gambling, Iowa Code § 725.7 (if the amount involved exceeds \$100);
- Prostitution, Iowa Code § 725.1.

Maryland: Each of the following is a misdemeanor punishable by the maximum term of imprisonment indicated:

- Gambling: playing "thimbles," "Little Joker," "Craps," etc. for money, Md. Code Ann., Crim. Law § 12-103(a) (up to 2 years);
- Insufficient funds check ("Misdemeanor Bad Check"), less than \$500, Md. Code Ann., Crim. Law §§ 8-103, 8-106(b) (up to 18 months);
- Non-support, Md. Code Ann., Fam. Law § 10-203 (up to 3 years);
- Resisting or interfering with arrest, Md. Code Ann., Crim. Law § 9-408 (up to 3 years).

Massachusetts: Each of the following offenses is a misdemeanor under state law and is punishable by up to two-and-a-half years in the house of correction:

- Reckless driving, Mass. Gen. Laws ch. 90 § 24(2)(a);
- Leaving the scene of an accident (with or without injury or property damage), Mass. Gen. Laws ch. 90 § 24(2)(a), (a1/2)(1);
- Resisting arrest, Mass. Gen. Laws ch. 268 § 32B.

Pennsylvania: The following are misdemeanors under state law and punishable by up to five years:

- Misdemeanor offenses relating to gambling and pool selling, 18 Pa. Cons. Stat. Ann. §§ 5513, 5514.

South Carolina: Each of the following is a misdemeanor punishable by the maximum term of imprisonment indicated:

- Failure to obey a police officer by failing to stop for siren or flashing light, S.C. Code § 56-750(B)(1) (up to three years);
- Fishing or trespassing in private fish or oyster breeding ponds, S.C. Code Ann. § 50-13-350 (up to three years);
- Insufficient funds check over \$1000, S.C. Code Ann. § 34-11-90(b) (up to two years);
- Hunting bears out of season or in violation of the law, S.C. Code Ann. 50-11-430 (up to two years);
- Trespass upon state park property, S.C. Code Ann. § 51-3-150 (up to two years).

In contrast to these states where the current version of U.S.S.G. § 4A1.2(c) requires that certain minor offenses are always counted, other jurisdictions have statutory schemes that insure that the offenses listed in § 4A1.2(c)(1) are never counted because the state does not authorize a term of probation or imprisonment for 30 days or more.

Thus, under the current version of the guidelines, a defendant convicted of reckless driving in Massachusetts will always have that conviction counted (because it carries a possible sentence of more than one year imprisonment), while a defendant

convicted of *the exact same conduct* across the state line in New Hampshire will *never* see that conviction counted because the maximum sentence in New Hampshire for reckless driving (unless injury or death result) is a fine and loss of license, N.H. Rev. Stat. Ann. § 265:79.

In Texas, the maximum punishment for gambling offenses and fish and game violations is a fine. *See* Tex. Penal Code §§ 12.23 & 47.02 (gambling offense punishable up to a maximum fine of \$500); Tex. Parks & Wild. Code § 66.019 (offense relating to fishing reports punishable by a maximum fine of \$500); Tex. Parks & Wild Code § 90.011 (maximum fine of \$ 500 for offenses relating to access to protected freshwater areas).

In New Hampshire, the maximum sentence for disorderly conduct (unless committed after a request to desist) is a fine of \$1,000, N.H. Rev. Stat. Ann. §651:2III-a. Driving without a license (first offense) carries a fine of \$1,000; N.H. Rev. Stat. Ann. § 263:1; and fish and game violations (where no human injury or death result) are punished by a fine and/or loss of hunting or fishing license, N.H. Rev. Stat. Ann. § 207:46.

In Pennsylvania, certain fish and game violations can only be punished by a fine. For example, a violation of 30 Pa. Cons. Stat. § 2703 (fish license violation) carries a fine of up to \$50. *See* 30 Pa. Cons. Stat. § 923(a)(3). A violation of 34 Pa. Cons. Stat. § 2711 (unlawful acts concerning licenses) carries a fine of up to \$200. *See* 34 Pa. Cons. Stat. § 925.

In Alabama, driving without a license is a misdemeanor punishable by a maximum fine of \$100. Ala. Code Ann. § 32-6-18.

In South Carolina, a first offense of driving with a license that has been suspended for failure to pay a motor carrier property tax is punishable by a maximum fine of \$50, and a second offense carries a maximum punishment of a fine of \$250. S.C. Code Ann. § 12-37-2890.

To resolve these and other problems inherent in the current guideline structure, U.S.S.G. § 4A1.2(c) should be amended as we proposed in our March 13th letter.

IV. Mandatory Minimums

Mandatory minimums create unwarranted uniformity and interfere with proportionality by treating different offenses and offenders the same. *See* Brief Amicus Curiae of Senators Kennedy, Hatch and Feinstein, *United States v. Claiborne*, 2007 WL 197103 **13, 28-29 (Jan. 22, 2007). When the Commission reflexively builds mandatory minimums into offense guidelines, the resulting sentences are not based on the purposes of sentencing but on politics. The Commission's choice to build mandatory minimums into the drug guidelines without independent study has resulted in disproportionately severe sentences and unwarranted uniformity, contrary to the goals of the Sentencing Reform Act. *Id.* at ** 21, 29. We fully agree with the Judicial

Conference that the Commission should not repeat this mistake with other offenses, but should develop guidelines irrespective of the mandatory minimum and allow § 5G1.1(b) to operate when necessary.

Exacerbating the lack of a sound policy basis, the guidelines spawned by mandatory minimums do not just meet mandatory minimum levels, but exceed them. As we noted in our testimony, the Commission has acknowledged that "[o]ver 25 percent of the average prison time for drug offenders sentenced in 2001 can be attributed to guideline increases above the mandatory minimum penalty levels." *Fifteen Year Report* at 54. This is true for all drug offenders, not just crack offenders. *Id.* It was suggested that this may no longer be accurate because of the effect of the safety valve and the mitigating role cap since 2001. However, the analysis done for the Fifteen Year Report controlled for safety valve by excluding cases in which it was applied. *Id.* at D-9. Moreover, the safety valve does not successfully apply to all low-level offenders as Congress intended. See Jane L. Froyd, *Safety Valve Failure: Low Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. Rev. 1471, 1498-1500 (2000). We expect that the mitigating role cap has had little effect in ameliorating the excess, since the extent of the reduction was sharply cut back only two years after it was promulgated. See App. C, amend. 640 (Nov. 1, 2002), amend. 668 (Nov. 1, 2004).

The proposed sex offense amendments would continue on the same misguided course. Examining the facts of all of the reported cases involving a conviction under the four statutes with new mandatory minimums under the Adam Walsh Act (18 U.S.C. §§ 2241(c), 1591, 2422(b), and 2423(a)), we found that the guideline range under the published proposals for offenders in Criminal History Category I would exceed the mandatory minimum in every case, not in an aggravated case or an unusual case, but the standard case, because of specific offense characteristics that are inherent in the basic unadorned offense. See 3/6/07 Comments on Proposed Amendments Relating to Adam Walsh Act at 15-16, 18-24.

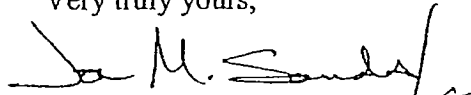
We urge the Commission to publish a current report on mandatory minimums, including data on the extent to which guideline sentences exceed mandatory minimum levels. The Commission's report is sixteen years old. Congress is seriously questioning the wisdom of both the crack/powder disparity and mandatory minimums generally. A current report would be of particular interest to Congress, the criminal justice community, and the public at this time.

V. Sentence Reduction

We join in the letter of the American Bar Association responding to the Commission's questions at the hearing on the topic of standards and examples for a motion for sentence reduction under § 3582(c)(1).

As always, we hope that our comments and testimony have been helpful.

Very truly yours,



JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines
Committee

AMY BARON-EVANS
ANNE BLANCHARD
SARA E. NOONAN
JENNIFER COFFIN
Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Martin Richey, Visiting Assistant Federal Public Defender
Alan Dorhoffer, Senior Staff Attorney
Kelley Land, Assistant General Counsel
Tom Brown, Assistant General Counsel
Judith Sheon, Staff Director
Ken Cohen, General Counsel