
PUBLIC COMMENT

PROPOSED PRIORITIES 2009 AMENDMENT CYCLE



September 8, 2008



U.S. Department of Justice

Criminal Division

Office of Policy and Legislation

Washington, D.C. 20530

August 26, 2008

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

Dear Judge Hinojosa:

Under the Sentencing Reform Act of 1984, the Criminal Division is required to submit to the United States Sentencing Commission, at least annually, a report commenting on the operation of the sentencing guidelines, suggesting changes that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. § 994(o). We are pleased to submit this report pursuant to that provision as well as in response to the Commission's recently published notice of proposed policy priorities for the 2008-09 Guideline amendment year. 73 Fed. Reg. 46,341 (Aug. 8, 2008).

Impact of Recent Court Decisions

The Sentencing Reform Act of 1984 ushered in a new determinate sentencing system that has been stronger, more effective and uniform, and more honest than the sentencing system it replaced. The core values and goals of the Act and the new sentencing system have been embraced by every Administration since the Act was first signed into law. The recent Supreme Court decisions relating to federal sentencing, however, have dramatically changed the sentencing structure established by the Act and have introduced greater uncertainty into the sentencing process.

As a result, we are very pleased with the Commission's decision to continue its evaluation of the impact of *United States v. Booker*, 543 U.S. 220 (2005), and other recent Supreme Court decisions on the federal sentencing landscape. As you well know, the full impact of these decisions remains unclear. The Sentencing Commission is in the unique position of documenting and analyzing how these cases – particularly *Kimbrough v. United States*, 552 U.S. ___, 128 S.Ct. 558 (2007), and *Gall v. United States*, 552 U.S. ___, 128 S.Ct. 586 (2007) – are changing the way in which federal defendants are sentenced in the United States.

As we have iterated in the past, the Department of Justice believes in the need for new sentencing reform, in light of the Supreme Court's decision in *Booker*. The Commission's first report on the impact of *Booker* went a long way toward documenting the initial reaction of sentencing courts to this historic decision. We anticipate that the Commission's expanded study and report will lay the foundation for meaningful reform in this more uncertain climate.

To this end, we urge the Commission to focus its study on both the micro and macro impact of these cases. Unlike any other body, the Commission is exceptionally well suited to paint a national picture of current sentencing practices. Similarly, the Commission is uniquely positioned to break down the national statistics. To provide meaningful insight into the system, we believe the Commission should isolate sentencing practices based on individual crime types. Likewise, we urge the Commission to look at sentencing practices within individual districts and Circuits. We recommend the Commission isolate the impact of drug and immigration crime in the southwest border districts both to determine whether unique factors create sentencing outliers there and also to isolate the impact of *Booker* outside the border region. Finally, the Commission may also want to isolate other factors to better determine how sentencing decisions are now being made.

Alternatives to Incarceration Symposium

We commend the Commission for holding its July 2008 symposium on alternatives to incarceration. The symposium raised important questions the criminal justice community must consider as it moves forward to develop more effective sentencing policy. The symposium highlighted several re-entry programs that show significant promise. We are especially interested in the potential that global positioning systems and other monitoring technologies may offer to help successfully reintegrate offenders, significantly reduce recidivism, and improve public safety.

Clearly, further rigorous study is warranted to determine the extent to which these programs will help reduce recidivism and how such success might translate to broader sentencing practice and procedure. We look forward to the Commission's research and analysis of these alternatives to incarceration. The Commission's work will provide important evidence as well as the rigorous evaluation needed to determine how alternatives fit into federal sentencing to achieve a more just sentencing system.

Resolving Circuit Court Conflicts

We are pleased the Commission has made resolution of circuit conflicts a priority for this Guideline amendment year, pursuant to its responsibility outlined in *Braxton v. United States*, 500 U.S. 344, 347-49 (1991). There are two circuit conflicts we bring to the Commission's attention as examples of issues that should be addressed.

Influencing a minor to engage in prohibited sexual conduct

The first relates to §§2A3.2(b)(2)(B) and 2G1.3(b)(2)(B) of the Sentencing Guidelines, which provide for a sentencing enhancement where a defendant influenced a minor to engage in

prohibited sexual conduct. The Circuits have disagreed whether the enhancement applies when an undercover law enforcement officer poses as a minor. In *United States v. Root*, 296 F.3d 1222 (2002), the Eleventh Circuit recognized that the Sentencing Commission had expressly defined the term “victim” to include “an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years,” *Id.* at 1232 (quoting USSG §2A3.2, comment. (n. 1)), and that it had done so “to ensure that offenders who are apprehended in an undercover operation are appropriately punished.” *Id.* (quoting USSG Appendix C (2002 Supp.) 48 (Amend. 592, Reasons for Amendment)).

The Seventh and Sixth Circuits have disagreed with the reasoning of the Eleventh Circuit in *Root*. In *United States v. Mitchell*, 353 F.3d 552 (2003), a divided panel of the Seventh Circuit concluded that because §2A3.2(b)(2)(B) uses the phrase “unduly influenced” in the past tense, the enhancement cannot “apply where the participant had either failed in his attempt to influence the victim or where the two otherwise had not engaged in prohibited sexual conduct.” *Id.* at 556 (quoting USSG §2A3.2(b)(2)(B)). That court also decided that because the Guideline provision focused upon the effect of a defendant’s conduct on the victim, rather than the defendant’s own actions and intent, it could not apply where the victim was unaffected. *Id.* at 557-559.

In *United States v. Chriswell*, 401 F.3d 459 (2005), the Sixth Circuit criticized both *Root* and *Mitchell*. It disagreed with the *Mitchell* court’s emphasis on verb tense, which suggested that the Guideline would never apply in any case of attempt, but also disagreed with *Root* that the undue influence enhancement could sensibly be applied to the circumstance of an undercover agent posing as a minor. *Id.* at 468. Construing §2A3.2(b)(2)(B) as requiring a victim-focused inquiry, the Sixth Circuit held that the undue influence enhancement does not apply when a government agent poses as a minor. *Id.* at 469-470. Because this question turns exclusively on the proper construction of a sentencing guideline, it warrants review by the Sentencing Commission, rather than the Supreme Court.

Victims who have not sustained actual monetary loss

The courts of appeals have also disagreed on the applicability of the “multiple victim enhancement” provision of §2B1.1(b)(2) of the Guidelines, and we believe the Commission should address this issue as well. There is currently a split in the Circuits as to whether the sentencing enhancement applies when the victims have not sustained actual monetary loss resulting from the offense.

The Fifth, Sixth, and Eighth Circuits have held that individuals who have been reimbursed in a fraud conspiracy are not “victims” within the meaning of §2B1.1, because the court could not point to any evidence establishing their pecuniary loss. See *United States v. Conner*, No. 06-50218, 2008 WL 2876564 (5th Cir. July 28, 2008); *United States v. Icaza*, 492 F.3d 967 (8th Cir. 2007); *United States v. Yagar*, 404 F.3d 967 (6th Cir. 2005).

The Second and Eleventh Circuit disagree, ruling that individuals who are reimbursed by banks or credit card companies in the aftermath of a fraud scheme may qualify as “victims” for purposes of §2B1.1 if there is evidence that they incurred a measurable monetary harm. See

United States v. Abiodun, No. 06-5335-CR, 2008 WL 2924341 (2d Cir. July 30, 2008); *United States v. Lee*, 427 F.3d 881, 884 (11th Cir. 2005). The Eleventh Circuit pointed out that the Guidelines take into account an eventual recovery or return of lost money, property, or services to the victim by allowing the defendant to take credit against the total loss for the value of any recovery. The Court reasoned that the Guidelines, therefore, inherently acknowledge that there was an initial loss to such victims, even when that loss is subsequently remedied. *Lee*, 427 F.3d at 895.

Again, resolving the divergent approaches taken by the courts of appeals falls squarely into the Sentencing Commission's bailiwick. Further, this second circuit split raises one of the many victim/harm issues that we touch on below.

Immigration Offenses and "Crime of Violence"

We are pleased the Commission has recognized the importance of conducting a multi-year study of the definition of "crime of violence" as used in both statutes and the guidelines. As you know, the Department has maintained a long-standing interest in how this term is defined, particularly in §2L1.2, in light of the ever increasing immigration case load. As we have noted in the past, the current guidelines system imposes unnecessary litigation costs because of conflicting definitions and varying case law. We are hopeful that the Commission's study will result in a resolution of this problem that will ultimately reduce the resources needed to litigate these cases – an important goal given the tremendous impact of the illegal immigration docket on the courts.

Victim/Harm Issues

The Department welcomes the creation of the new Victims Advisory Group (VAG) and looks forward to its recommendations to the Commission. As we have stressed before, we strongly believe sentencing courts should weigh the non-pecuniary and non-physical harms now suffered by victims, and this group is well suited to explore how the Guidelines can best redress those harms.

In particular, we are hopeful the VAG can provide insight into the victim impact of new crimes resulting from rapidly changing technology in an increasingly global world. For example, in this day and age, defendants are able to defraud hundreds of victims using sophisticated phishing and other computer techniques. As noted above, defendants in some Circuits are not held fully accountable for the harm caused to these individuals if the victims are ultimately reimbursed by their banks or credit cards. The reasoning of these courts fails to recognize the many ways that individuals can be victimized that do not lend themselves to ready calculation – including permanent impairment of an individual's credit record, loss of privacy, or psychological trauma.

Along the same lines, we urge the Sentencing Commission to address the concern raised by others that Guideline §2B1.1 does not now accurately reflect the potential economic harm a company might suffer should its trade secrets be sold to a competitor. Using the intended gain to

the defendant is an insufficient measure of the significant harm a company might suffer should this proprietary information be compromised.

Finally, as the Small Business Administration has pointed out to the Commission, the current Guidelines do not reflect the potential harm to competitors who lose government contracts as a result of fraud in inducement cases. Although the extent of this harm remains unclear, the Sentencing Commission is best suited to study the impact of this particular crime and whether the guidelines could better account for the harm to these small businesses.

Technical and Miscellaneous Suggestions

In addition to the technical guidelines application issues the Commission has identified in its notice of proposed priorities, the Department would like the Commission to consider two additional technical suggestions.

Proposed cross-references for threats under 18 U.S.C. §§ 2280, 2332a

As we recommended last year, we urge the Commission to add additional cross-references to two threat offenses in §2A6.1 (threatening or harassing communications; hoaxes).

Although 18 U.S.C. § 2280 (violence against maritime navigation) has a threat provision (18 U.S.C. § 2280(a)(2)), the statute's many cross-references in the Sentencing Guidelines do not include a cross-reference to the threat guideline at §2A6.1. Also, threats under 18 U.S.C. § 2332a (use of weapons of mass destruction) involving conventional weapons are not currently cross-referenced to a sentencing guideline. (Threats under 18 U.S.C. § 2332a involving biological, chemical, or nuclear weapons are referred to the weapons of mass destruction guideline, §2M6.1). Explicit cross-references of both threat provisions to the threat guideline at §2A6.1 would clarify sentencing under these statutes.

Extra-territorial environmental pollution

Additionally, we ask the Commission to clarify several application notes to the environmental crimes guidelines.

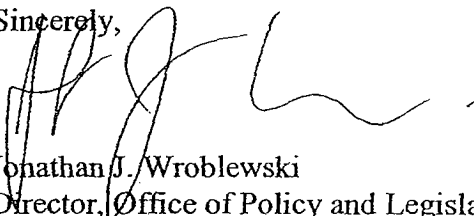
Under §§2Q1.2 and 2Q1.3 of the Guidelines, sentencing enhancements are appropriate if an environmental offense results in a discharge of a pollutant, a hazardous or toxic substance, or a pesticide to the environment. The Guidelines currently do not define the terms "environment" or "substantive environmental offense." The result is that at least one court has held that a sentencing enhancement was not warranted when the discharge of environmental pollutants or wastes occurred outside U.S. territorial waters, even though the defendant was convicted for concealing that pollution when confronted by the U.S. Coast Guard. This decision conflicts with U.S. obligations under the MARPOL treaty and the Act to Prevent Pollution from Ships, 33 U.S.C. § 1901 *et seq.*, which are aimed specifically at stemming oil pollution from international shipping.

We recommend two clarifications to these Guidelines. First, we suggest adding to Application Notes 5 and 4 of §§2Q1.2 and 2Q1.3, respectively, the following: "For purposes of subsection (b)(1), a discharge, release, or emission into the environment includes an event that occurred outside the territorial jurisdiction of the United States." Second, we suggest adding to the end of Application Note 1 for both §§2Q1.2 and 2Q1.3 this final sentence: "Solely for purposes of determining an offense level under subsection (b)(5) when a recordkeeping offense reflects an effort to conceal a discharge, release, or emission into the environment outside the territorial jurisdiction of the United States, the term 'substantive environmental offense' and the term 'offense', as it is used in subsection (b)(1), shall include any conduct constituting a violation under an international treaty to which the United States is a party."

Conclusion

As always, we are grateful for the opportunity to provide our views on federal sentencing policy and the upcoming amendment year to you and the Commission. We look forward to continuing our work together to improve federal sentencing policy and practice to help reduce crime and serve the American people.

Sincerely,



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cc: U.S. Sentencing Commissioners
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July 16, 2008

Honorable Ricardo H. Hinojosa
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Re: Proposed Priorities for 2008-2009

Dear Judge Hinojosa:

On behalf of the Federal Public and Community Defenders and pursuant to 28 U.S.C. § 994(o), we write to recommend priorities for the Commission to address in the next amendment cycle. During the previous amendment cycle, the Commission acted with courage and tenacity by reducing sentences for crack offenders. The Commission made clear its commitment to fair and just sentencing and to addressing unwarranted disparities. We also appreciate the Commission's outreach to us, and its efforts to include us in policy formulation. We believe this dialogue has been positive.

With the recent Alternatives to Sentencing Symposium, the Commission has again demonstrated its commitment to positive sentencing reform. We applaud these efforts, and hope that the Commission will take the opportunity in this upcoming amendment cycle to address several additional issues of longstanding concern.

I. Career Offender

We hope that reform of the career offender guideline will be a top priority this amendment cycle. According to the Commission's own reports and data, the guideline overstates the risk of recidivism, does not contribute to deterrence, and creates unwarranted disparity, including racial disparity.¹ For many years, the courts have been urging the Commission to narrow the definitions of the career offender predicates and, in the absence of

¹ U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 133-34 (2004) ("Fifteen Year Review").

Commission action, have been “voting with their feet” by imposing below-guideline sentences.² In its recent cases, the Supreme Court has re-emphasized the evolutionary ideal of the Sentencing Reform Act, whereby the guidelines should be revised in light of input from the courts, and other comments, data and research.³ Congress expressly chose a directive to the Commission with respect to the career offender guideline, rather than a mandate to the courts, because it believed that this evolutionary process would result in “consistent and rational” implementation of substantial sentences for “repeat violent offenders and repeat drug traffickers.”⁴ S. Rep. No. 98-225 at 175 (1983).

A. Crime of Violence

The definition of “crime of violence” in the commentary to § 4B1.2 should be narrowed to bring it in line with congressional intent and current Supreme Court law. Congress had in mind “repeat violent offenders.” S. Rep. No. 98-225 at 175 (1983). The concern, as stated in the legislative history of the precursor to § 994(h), was “a relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets,” *i.e.*, those “who stab, shoot, mug, and rob.” 128 Cong. Rec. 26512, 26518 (Sept. 30, 1982).

The current definition of “crime of violence” reaches many more than those violent offenders envisioned by Congress. In 2004, the Commission reported that the recidivism rate of those whose career offender status was based on one or more prior “crimes of violence” was about 52%.⁵ However, this did not mean that the recidivating events were violent, or even that they were drug trafficking offenses. Only 12.5% of the recidivating events for Category VI

² One year after *Booker*, the rate of below-guideline sentences in career offender cases had risen to 21.5%, and average sentence length markedly decreased. U.S. Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 137-40 (March 2006). A decade before *Booker*, a study of departures found “extensive use of [downward] departures from sentences generated by the career offender guideline,” and that these were “quite substantial,” “typically” to the sentence that would have applied absent the career offender provision. The reasons for departure identified in the article were that the predicates were “minor or too remote in time to warrant consideration.” See Michael S. Gelacak, Ilene H. Nagel and Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 356-57 (1996).

³ See *Rita v. United States*, 127 S. Ct. 2456, 2464, 2465, 2468-69 (2007); *Kimbrough v. United States*, 128 S. Ct. 558, 573-74 (2007); see also *United States v. Jones*, __F.3d__, 2008 WL 2500252, at *8 n.8 (2d Cir. June 24, 2008).

⁴ As the Court said in *Kimbrough*, “Congress has specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist offenders ‘at or near’ the statutory maximum.” 128 S. Ct. at 571. In *United States v. LaBonte*, 520 U.S. 751 (1997), the Court struck down Amendment 506, in which the Commission defined the term “at or near the maximum” more narrowly than the Court’s view of what Congress intended. However, the Commission has defined the career offender predicates more broadly than those specified in § 994(h). The Supreme Court has never ruled on whether this violates the plain language of § 994(h), but it is clear that nothing stands in the way of the Commission narrowing the predicates.

⁵ See Fifteen Year Review at 134.

offenders overall were a “serious violent offense,” defined as homicide, kidnapping, robbery, sexual assault, aggravated assault, domestic violence, and weapons offenses, and only 4.1% were drug offenses.⁶

The Commission initially used the definition of “crime of violence” in 18 U.S.C. § 16, then adopted the definition of “violent felony” from the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B). USSG, App. C, Amend. 268 (Nov. 1, 1989). Through commentary, however, the Commission significantly broadened that definition by removing the connection between unspecified offenses that present a serious potential risk of physical injury and the list of enumerated offenses in the guideline (and in § 924(e)(2)(B)(ii)), so that “crime of violence” includes any conduct that by its nature presented a serious potential risk of physical injury to another. *Id.*; USSG § 4B1.2, comment. n.1. As a result, § 4B1.2 requires no more than an abstract possibility of risk of injury.

The separation of unspecified offenses that present a risk of injury from the enumerated offenses was apparently unintended. When the Third Circuit brought this to the Commission’s attention,⁷ the Commission recognized that the effect was to cover “crimes not traditionally considered crimes of violence,” and published an amendment that would have required an unlisted offense to be similar to a listed offense. *See* 58 Fed. Reg. 67522, 67533 (Dec. 21, 1993). The Commission did not act and has not acted since, despite repeated requests by courts that the Commission reexamine the definition.⁸

Section 4B1.2’s definition of “crime of violence” is broader than either the definition of “crime of violence” in 18 U.S.C. § 16 or the definition of “violent felony” in 18 U.S.C. § 924(e)(2)(B). Both § 16 and § 924(e), as interpreted by the Supreme Court, require intentional, aggressive, violent conduct on the part of the defendant. *See Leocal v. Ashcroft*, 543 US 1, 11 (2004) (“crime of violence” includes only “violent, active crimes”); *Begay v. United States*, 128 S. Ct. 1581, 1586-87 (2008) (“violent felony” includes only “purposeful, violent and aggressive conduct”). Section 4B1.2, however, includes offenses that do not involve purposeful, aggressive, violent conduct, including DUI,⁹ reckless or negligent manslaughter,¹⁰ reckless endangerment,¹¹

⁶ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 32, Exh. 13 (May 2004).

⁷ *United States v. Parson*, 955 F.2d 858, 874-75 (3d Cir. 1992).

⁸ *See United States v. Rutherford*, 54 F.3d 370, 377 (7th Cir. 1995); *United States v. McQuilken*, 97 F.3d 723, 728-29 (3d Cir. 1996); *United States v. Stubler*, 2008 WL 821071, at *2 (3d Cir. Mar. 28, 2008).

⁹ *United States v. McGill*, 450 F.3d 1276, 1280 (11th Cir. 2006); *United States v. Moore*, 420 F.3d 1218, 1220-22, 1224 (10th Cir. 2005).

¹⁰ USSG § 4B1.2, comment. (n.1); *United States v. Chauncey*, 420 F.3d 864, 877 (8th Cir. 2005).

¹¹ *United States v. Parson*, 955 F.2d 858, 860-61 (3d Cir. 1992); *United States v. Stubler*, 2008 WL 821071, at *2-3 (3d Cir. Mar. 28, 2008).

reckless assault,¹² simple assault,¹³ tampering with a motor vehicle,¹⁴ burglary of a non-dwelling,¹⁵ fleeing or eluding a police officer,¹⁶ operating a motor vehicle without the owner's consent,¹⁷ possession of a short-barreled shotgun,¹⁸ oral threatening,¹⁹ car theft,²⁰ and failing to return to a halfway house.²¹

Congress did not intend for such offenses to be used to punish defendants as violent "career offenders," and their inclusion creates inconsistency with other law and unwarranted disparity due to differing interpretations by different courts.²²

The Supreme Court recently clarified the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B), upon which § 4B1.2's "crime of violence" is based. Offenses that do not have as an element the use, attempted use, or threatened use of force against the person of another, and are not one of the enumerated offenses, do not qualify as a violent felony unless the statute defining the offense both describes conduct that presents a serious potential risk of physical injury to another *and* requires "purposeful, violent, and aggressive conduct." *Begay v. United States*, 128 S. Ct. 1581, 1585, 1586 (2008). The current commentary to § 4B1.2 does not comport with these requirements.

The commentary in Application Note 1 to § 4B1.2 also causes confusion because it

¹² *United States v. Rendon-Duarte*, 490 F.3d 1142, 1147-48 & n.2 (9th Cir. 2007).

¹³ *United States v. Mangos*, 134 F.3d 460, 464 (1st Cir. 1998).

¹⁴ *United States v. Bockes*, 447 F.3d 1090 (8th Cir. 2006); *United States v. Young*, 229 Fed.Appx. 423, 424 (8th Cir. 2007).

¹⁵ *United States v. Hascall*, 76 F.3d 902, 904-06 (8th Cir. 1996); *United States v. Fiore*, 983 F.2d 1, 4-5 (1st Cir. 1992). The First Circuit has granted rehearing *en banc* to reconsider its holding in *Fiore*. See *United States v. Giggey*, No. 07-2317 (1st Cir. June 10, 2008).

¹⁶ *United States v. Rosas*, 410 F.3d 332, 334 (7th Cir. 2005); *United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006).

¹⁷ *United States v. Lindquist*, 421 F.3d 751 (8th Cir. 2005).

¹⁸ *United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005).

¹⁹ *United States v. Leavitt*, 925 F.2d 516 (1st Cir. 1991).

²⁰ *United States v. Sun Bear*, 307 F.3d 747, 752-53 (8th Cir. 2002).

²¹ *United States v. Bryant*, 310 F.3d 550, 553 (7th Cir. 2002).

²² The Sixth Circuit takes the position that the guideline must be interpreted consistently with § 924(e). See *United States v. Bartee*, ___ F.3d ___, 2008 WL 2340224 (6th Cir. June 10, 2008). Other circuits, however, note that the definition of "crime of violence" in the guideline is broader than that in § 924(e), or in § 16, and go on to hold that offenses not covered by the statute are covered by the guideline.

focuses on *conduct* charged against the defendant, as opposed to the elements of the offense of conviction. As the Fifth Circuit has stated interpreting the provision, under Application Note 1 “a crime is a crime of violence . . . if, from the face of the indictment, the crime charged *or the conduct charged* presents a serious potential risk of injury to a person.” *United States v. Charles*, 301 F.3d 309, 314 (5th Cir. 2002) (en banc) (emphasis added). This is contrary to the categorical approach called for by the Supreme Court: “Under this approach, we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction. That is, we consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender.” *James v. United States*, 127 S. Ct. 1586, 1593-94 (2007) (emphasis in original) (internal citations and quotation marks omitted).

A material distinction between the “crime” charged and the “conduct” charged is also contrary to what the Commission apparently intended. In 1991, the Commission added commentary in Application Note 2 to § 4B1.2 in the wake of *Taylor v. United States*,²³ stating that “[u]nder this section, the conduct of which the defendant was convicted is the focus of inquiry,” USSG, App. C., Amend. 433 (Nov. 1, 1991), in order to clarify that “the application of § 4B1.2 is determined by the offense of conviction.” USSG, App. C., Amend. 433 (Nov. 1, 1991). The Commission later amended the language of Application Note 2 so that it now states even more clearly that “the offense of conviction (*i.e.*, the conduct of which the defendant was convicted), is the focus of inquiry.” USSG § 4B1.2 comment. (n.2).

In order to bring consistency to the definition, to narrow it to what Congress had in mind, and to further the Commission’s ongoing goal of simplification, we propose that the Commission replace the second, third, and fifth paragraphs of the commentary in Application Note 1 of § 4B1.2 with the following:

“Crime of violence” includes burglary of a dwelling, arson, extortion, and offenses involving the use of explosives. Other offenses are included as “crimes of violence” if (A) the offense has as an element the use, attempted use, or threatened use of physical force against the person of another; or (B) the elements of the offense of which the defendant was convicted (i) require purposeful, violent and aggressive conduct on the part of the defendant and (ii) present a serious potential risk of physical injury to another.

The Commission should cite to the relevant Supreme Court authority, in order to avoid inconsistent interpretations.

This amendment would remove references to enumerated offenses that are not enumerated in the guideline and that would not meet the definition in the guideline as authoritatively interpreted by the Supreme Court in the context of § 924(e). We also urge the Commission to use “the elements of the offense of which the defendant was convicted” instead of “conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted”

²³ 495 U.S. 575 (1990).

because this more accurately describes the categorical approach, is more clearly consistent with Application Note 2, and is what the Commission apparently intended.

B. Drug Trafficking Offenses

Congress directed the Commission to ensure a guideline sentence at or near the maximum for a defendant convicted of a “felony” that “is an offense described in” 21 U.S.C. §§ 841, 952(a), 955, 959, or 46 U.S.C. § 70503, after previously being convicted of two or more such felonies, crimes of violence or both.²⁴ The career offender guideline exceeds the congressional directive. It includes inchoate offenses, state offenses, and a number of federal offenses the elements of which do not require dispensing, distributing or possessing with intent to distribute a controlled substance.²⁵ See USSG § 4B1.2(b) & comment. (n.1). The lowest statutory maximum for the serious drug trafficking offenses specified by Congress in § 994(h) was 15 years in 1984 and is now 20 years, but the guideline includes any offense, whether classified as a felony or misdemeanor by the convicting jurisdiction, that is punishable by as little as a year and a day.

Because of the expansive definition of “controlled substance offense,” the career offender guideline fails to distinguish between small-time drug offenders and the serious drug traffickers Congress had in mind. The result is a high number of below-guideline sentences,²⁶ and many opinions criticizing the guideline for being too severe and creating unwarranted disparity and unwarranted uniformity.²⁷

²⁴ 28 U.S.C. § 994(h).

²⁵ In the latter category are: “[u]nlawfully possessing a listed chemical with intent to manufacture a controlled substance,” 21 U.S.C. § 841(c)(1), “[u]nlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance,” 21 U.S.C. § 843(a)(6), “[m]aintaining any place for the purpose of facilitating a controlled substance offense . . . if the offense of conviction established that the underlying offense (the offense facilitated) was a ‘controlled substance offense,’” 21 U.S.C. § 856, “[u]sing a communications facility in committing, causing or facilitating a drug offense . . . if the offense of conviction established that the underlying offense (the offense committed, caused or facilitated) was a ‘controlled substance offense,’” 21 U.S.C. § 843(b), and a “violation of 18 U.S.C. § 924(c) or § 929(a) . . . if the offense of conviction established that the underlying offense was a . . . ‘controlled substance offense.’”

²⁶ See USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 137-39 (March 2006).

²⁷ See, e.g., *United States v. Pruitt*, 502 F.3d 1154, 1166-70 (10th Cir. 2007) (McConnell, J. concurring), cert. granted, judgment vacated, 128 S. Ct. 1869 (Apr 14, 2008); *United States v. Williams*, 435 F.3d 1350 (11th Cir. 2007) (per curiam); *United States v. Moreland*, slip op., 2008 WL 904652, at **10-13 (S.D. W. Va. Apr. 3, 2008); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008); *United States v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006); *United States v. Serrano*, slip op., 2005 WL 1214314 (S.D.N.Y. May 19, 2005).

According to the Commission, the career offender guideline greatly overstates the risk of recidivism for those who are classified as career offenders based on prior drug offenses, does not serve a deterrent purpose, creates unwarranted disparity, and has a disproportionate impact on African Americans.²⁸ Nor does it further proportionality: As one sentencing judge has noted, “it is not at all uncommon to find, as in the instant case, that the supplier of drugs has a minimal criminal record, and thus, avoids career offender status, precisely because of his distance from street activities, while the street dealer winds up with a substantial” sentence.²⁹ And the career offender guideline treats “offenders who are not equally culpable the same[, which] is a false equality, not at all consistent with the admonition ‘to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.’”³⁰

To “focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate,” and to “avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct,” USSG § 4B1.1, comment. (backg’d.), we recommend that the Commission distinguish between true career drug offenders on the one hand, and repeat street dealers and minor, sporadic offenders on the other,³¹ by amending the definition of “controlled substance offense” as follows:

a felony that is described in 21 U.S.C. §§ 841, 952(a), 955, 959 or 46 U.S.C. § 70503 or that is a similar offense under state law, and that is punishable by imprisonment for at least ten years.

This definition is consistent with 28 U.S.C. § 994(h), and is also consistent with the definition in 18 U.S.C. § 924(e)(2).

C. Convicted of a “Felony”

Congress intended the career offender guideline to include only defendants with qualifying prior “felony” convictions.³² The guideline, however, includes all convictions for an offense punishable by more than one year, “regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed.”³³ Defendants are thus

²⁸ Fifteen Year Review at 133-34; see also *United States v. Pruitt*, 502 F.3d 1154, 1168 (10th Cir. 2007) (McConnell, J., concurring) (“[t]his might appear to be an admission by the Commission that this guideline, at least as applied to low-level drug sellers like Ms. Pruitt, violates the overarching command of § 3553(a) that ‘[t]he court . . . impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in’ § 3553(a)(2)”).

²⁹ *United States v. Ennis*, 468 F. Supp. 2d 228, 230-31 (D. Mass. 2006).

³⁰ *Id.* at 235-36.

³¹ See, e.g., *United States v. Moreland*, slip op., 2008 WL 904652, at **10-13 (S.D. W. Va. Apr. 3, 2008) (defendant was convicted of distribution of one marijuana cigarette in 1992 and distribution of 6.92 grams of crack in 1996).

³² 28 U.S.C. § 994(h).

³³ USSG § 4B1.2, comment. (n.1).

classified as “career offenders” when they were actually convicted of a misdemeanor, and received an insignificant jail sentence or no incarceration at all.³⁴

Some states punish misdemeanors by up to two, three, or even ten years.³⁵ Convictions under these statutes, by definition, are for conduct considered by the convicting jurisdiction to be less serious than a felony. See *United States v. Colon*, slip op., 2007 WL 4246470, at *6 (D. Vt. Nov. 29, 2007) (Sessions, J.) (“Both of the predicate offenses were classified as misdemeanors under Massachusetts law, which provides, at minimum, some indication as to the seriousness of the underlying conduct.”). Because these offenses are considered less serious, these dispositions are generally not accorded the same level of searching treatment as that accorded to felony charges.³⁶ The career offender guideline, however, treats such dispositions exactly the same as felonies, resulting in unwarranted uniformity. As a result, defendants with prior misdemeanor convictions in some states have a countable career offender predicate, even while defendants convicted of the identical conduct in another state will not, resulting in unwarranted geographic disparity. See *United States v. Ennis*, 468 F. Supp. 2d 228, 234 & n.11 (D. Mass. 2006) (definition of career offender predicates covers misdemeanors that are punishable in Massachusetts by more than one year, resulting in more Massachusetts offenders convicted of assault being classified as career offenders than in the overwhelming majority of states).

Nor does the career offender guideline look to the relative culpability of defendants by considering the sentence actually served by the defendant, or even the sentence imposed by the convicting jurisdiction. Although the former is preferable for purposes of assessing culpability, either would at least give a rough estimate of the seriousness with which the convicting jurisdiction viewed the conduct, and thus would better differentiate between petty offenders and more dangerous criminals. Instead, the guideline looks only to the statutory maximum to assess whether a prior conviction should count as a “career offender” predicate, and requires an extremely low one at that. Thus a defendant who serves 6 months of unsupervised probation and

³⁴ *United States v. Thompson*, 88 Fed. Appx. 480 (3d Cir. 2004) (misdemeanor conviction for simple assault for which defendant received sentence of probation qualified as career offender predicate); *United States v. Raynor*, 939 F.2d 131 (4th Cir. 1991) (misdemeanor conviction for assault on a law officer punished by unsupervised probation and a \$25 fine qualified as career offender predicate).

³⁵ See, e.g., Letter to Hon. Ricardo H. Hinojosa from Jon M. Sands re: Follow-Up to March 20 Hearing (March 29, 2007) at 5-6; see also Br. of Amici Curiae National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums Foundation in Support of Petitioner, *Logan v. United States*, 2007 WL 1577172, at *14 n.7 (May 24, 2007) (listing state misdemeanors punishable by more than two years imprisonment).

³⁶ See Br. of Amici Curiae National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums Foundation in Support of Petitioner, *Logan v. United States*, 2007 WL 1577172, passim (May 24, 2007) (discussing difference in collateral consequences between felony and misdemeanor convictions in the states).

a defendant who serves 20 years in prison are treated exactly the same under the career offender guideline.³⁷

In *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001), the Court of Appeals for the Second Circuit recognized that serving the goal of deterrence is a major purpose of the career offender guideline and “requires an appropriate relationship between the sentence for the current offense and the sentences, particularly the times served, for the prior offenses... In some circumstances, a large disparity in that relationship might indicate that the career offender sentence provides a deterrent effect so in excess of what is required in light of the prior sentences and especially the time served on those sentences as to constitute a mitigating circumstance present ‘to a degree’ not adequately considered by the Commission.” *Id.* at 220; see also *United States v. Colon*, slip op., 2007 WL 4246470, at *6 (D. Vt. Nov. 29, 2007) (Sessions, J.) (“The relationship between the current sentence and prior sentences is an important factor in the over-representation inquiry.”).

We continue to urge the Commission to revise the career offender guideline to count prior sentences based upon the sentence actually served. Given the number of jurisdictions that continue to sentence defendants on the understanding that the defendant will actually serve less than 50% of the time, a “sentence served” rule is a far more accurate indicator of the convicting jurisdiction’s view of the seriousness of the offense.³⁸ It also solves the false equality generated by treating non-parole jurisdictions the same as parole jurisdictions.³⁹ The Commission should set a threshold sentence of more than one year served in jail or prison to count as a “career offender” predicate, and should study and consider raising the threshold to sixty months. A 1999 Department of Justice report reflects that people sentenced to state prison in 1992 for violent offenses served an average of between 92 and 129 months.⁴⁰

The Commission should revise the commentary as follows:

“Prior felony conviction” means a prior adult federal or state conviction for an offense classified as a felony by the convicting jurisdiction.

³⁷ See *United States v. Washington*, 2001 WL 1301744, at *5 (6th Cir. Aug. 8, 2001) (“the district court did not abuse its discretion by electing not to sentence Defendant as a ‘career offender’ subject to a sentence of 360 months to life imprisonment, where Defendant’s prior convictions resulted only in probation”).

³⁸ For example, a DOJ study found that, between 1992 and 1994, inmates incarcerated for violent offenses in parole jurisdictions (which include most states) served an average of 48 % of the sentence they had received. See U.S. Dept. of Justice, Bureau of Justice, *Prison Sentences and Time Served for Violence* (April 1995), available at <http://www.ojp.usdoj.gov/bjs/abstract/vospats.htm>. For non-violent offenses, the percentage rate is likely lower still.

³⁹ U.S. Sentencing Commission, *Simplification Draft Paper, Chapter Four, Part V* (failing to distinguish between sentences imposed in parole and non-parole systems is problematic because defendants may serve two very different terms of imprisonment).

⁴⁰ *Id.*

Additionally, the Commission should revise the guideline to count only those offenses for which time served was over one year, or in the alternative, to count only those offenses assigned three criminal history points under § 4A1.1(a) for purposes of § 4B1.2. The information about the sentence imposed is already part of the criminal history calculation. Further, the latter alternative would promote the Commission's goal of simplification.

Finally, the Commission should also analyze the data to determine the optimal sentence threshold to determine recidivism risk and distinguish between serious and non-serious offenders.

C. Departure

The Commission should remove the one criminal history category limit from departures under USSG § 4A1.3(b)(3)(A), p.s. While this limit was adopted in response to the PROTECT Act, it was not required by the PROTECT Act. This limited departure is inadequate to correct the over-representation when the Commission's own research shows that the criminal history category for offenders qualifying under the career offender guideline is often several categories higher than their recidivism rate would justify,⁴¹ and is discordant with feedback from the courts.

II. Relevant Conduct

We have long expressed our concern with the broad reach of the guidelines' relevant conduct rules. We urge the Commission to (1) state in the commentary to § 1B1.3 that uncharged and acquitted offenses are not included in the definition of "relevant conduct"; (2) significantly lessen the impact of charged counts that are dismissed as part of a plea agreement by limiting their impact on the guideline range to the lesser of four levels or 25% of the number of levels in the applicable table attributable to the offense of conviction as determined under § 1B1.3(a)(1); and (3) eliminate cross-references to guidelines for more serious crimes than the offense of conviction by deleting "cross references in Chapter Two" from the introductory paragraph of § 1B1.3. These changes would result in guideline ranges that more fairly reflect congressional intent, recognize the differing roles of the jury in the charging and trial process, reduce unwarranted disparity, promote respect for the law, and avoid as-applied Sixth Amendment challenges.⁴²

In addition, the definition currently in § 1B1.3(a)(1)(B) needs to be clarified, as courts continue to read it as including conduct of others that is merely "reasonably foreseeable" but was not within the scope of the defendant's agreement. *See, e.g., United States v. Gall*, 446 F.3d 884, 887 (8th Cir. 2006) (stating that the defendant received a "benefit" by virtue of not being sentenced on the basis of drug sales by others after he withdrew from conspiracy), *rev'd*, *Gall v. United States*, 128 S. Ct. 586 (2007).

⁴¹ Fifteen Year Review at 134.

⁴² Conforming changes to § 6A1.3 may also be necessary.

The guidelines' requirement that judges use uncharged, dismissed, and acquitted crimes in calculating the guideline range at the same rate as crimes of conviction has been subject to extensive criticism and repeated calls for reform by judges, commentators, and practitioners. In explaining the important function of Congress' directive to the Commission to "review and revise" the guidelines in response to such comments and criticism, 28 U.S.C. § 994(o), the Senate Judiciary Committee Report emphasized that the Commission is obligated to "continually update[e] the guidelines to reflect current views of just punishment" and to "constantly keep track of the implementation of the guidelines to determine whether disparity is effectively being dealt with." S. Rep. No. 98-225 at 178 (1983). Although the Commission has considered amending the relevant conduct guideline to change the way uncharged offenses impact sentences and to abolish the use of acquitted conduct,⁴³ the Commission has never acted on these initiatives.

In keeping with the current Commission's recognition that even longstanding policies must be revisited when testing and practice reveal that they do not further the purposes of sentencing, the Commission should now actively implement the evolutionary process Congress intended by abolishing the use of acquitted and uncharged crimes and limiting the impact of dismissed charges. See *Rita*, 127 S. Ct. at 2464, 2465, 2468-69; *Kimbrough*, 128 S. Ct. at 573-74; *United States v. Jones*, __F.3d__, 2008 WL 2500252, at *8 n.8 (2d Cir. June 24, 2008).

A. The Sentencing Reform Act

The use of acquitted, dismissed, and uncharged separate offenses in sentencing was not authorized by the Sentencing Reform Act. Congress directed the Commission to take into account "the circumstances under which the *offense was committed*" and the "nature and degree of the harm caused by the *offense*," and to "avoid[] unwarranted sentencing disparities among defendants . . . who have been *found guilty* of similar criminal conduct," 28 U.S.C. §§ 994(c)(2), (3), 991(b)(1)(B) (emphasis supplied). It directed that the courts "shall impose a sentence sufficient, but not greater than necessary" "to reflect the seriousness of *the offense*" and "to provide just punishment for the *offense*," and in doing so to consider the "nature and circumstances of the *offense*," and "the need to avoid unwarranted sentence disparities among defendants . . . who have been *found guilty* of similar conduct," 18 U.S.C. § 3553(a)(1), (2)(A), (6) (emphasis supplied).

The term "offense" was left undefined in the SRA, and thus is "give[n] its ordinary meaning." *United States v. Santos*, 128 S. Ct. 2020, 2024 (2008). A "straightforward reading" of the word "offense" means the "offense of conviction." *Hughey v. United States*, 495 U.S. 411, 416 (1990). This is particularly clear when Congress simultaneously directed the Commission and the courts to avoid disparity among defendants "found guilty" of similar conduct. Congress did not say that disparity is to be avoided among those who have *committed* similar crimes in similar ways. There can be no doubt that "offense" means "offense of conviction."

⁴³ See 61 Fed. Reg. 34,465 (July 2, 1996) (announcing priorities for the 1996-97 amendment cycle); 62 Fed. Reg. 152,161 (1997) (publishing for comment a proposal to abolish the use of acquitted conduct); 58 Fed. Reg. 67,522, 67,541 (1993) (same); 57 Fed. Reg. 62,832 (1992) (same).

B. Prosecutorial Power, Unwarranted Disparity, and Disrespect for the Law

The Commission's untested theory for its "real offense" approach was that it would prevent prosecutors from controlling sentencing outcomes through charge bargaining. *See* USSG, Ch. 1, Pt. A, ¶ 4(a). Such concerns are not even theoretically implicated with respect to acquitted crimes because an acquitted offense is charged in an indictment and tried to a jury. And the opposite has in fact occurred -- the use of uncharged, dismissed, and acquitted crimes in calculating the guideline range has shifted sentencing power to prosecutors and this creates hidden and unwarranted disparity,⁴⁴ as the Commission acknowledged in 2004.⁴⁵

The use of uncharged and acquitted separate crimes is a significant source of disparity. One of the hidden and unwarranted disparities that the Commission recognized in 2004 is that the "untrustworthy" information upon which uncharged conduct is often based, such as cooperating witness testimony, creates disparity and inconsistency.⁴⁶ The Commission also acknowledged that the guideline is applied inconsistently because of "ambiguity in the language of the rule, discomfort with the role of law enforcement in establishing relevant conduct, and discomfort with the severity of sentences that often result."⁴⁷

In a sample test administered by Commission researchers for the Federal Judicial Center in 1997, probation officers applying the relevant conduct rules sentenced three defendants in widely divergent ways, ranging from 57 to 136 months for one defendant, 37 to 136 months for the second defendant, and 24 to 136 months for the third defendant.⁴⁸

⁴⁴ *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 adversely impact blacks 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").

⁴⁵ Fifteen Year Review at 50, 86, 92.

⁴⁶ *Id.* at 50.

⁴⁷ *Id.* at 87.

⁴⁸ *See* 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. Rep. 16 (July/August 1997).

In a recent case, 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. See *United States v. Quinn*, 472 F. Supp. 2d 104 (D. Mass. 2007). Because this occurred in the same case, it highlighted a form of disparity that is rampant but is otherwise hidden. As the court commented:

The possibility of inconsistent resolutions of essentially the same question with respect to two separate but similar defendants is a structural problem within the Guidelines' manner of addressing "relevant conduct."

Moreover, because the "relevant conduct" inquiry is adjunct rather than central to the question of criminal culpability, it is possible that it will be pursued by different investigators with different levels of vigor and thoroughness. In other words, the Guidelines are susceptible to the possibility that the effect of "relevant conduct" on the sentencing range can depend on something as impossible to know as how aggressively someone, whether prosecutor or probation officer or perhaps even judge, has probed to learn information about a defendant's past illegal activities. . . .

The essential scandal of the anomaly as it works in this case is that it directly subverts one of the fundamental objectives of the Guidelines: to reduce disparity in sentences given to similarly situated defendants.

Id. at 111 (footnote omitted).

Punishing a defendant for uncharged or acquitted crimes undermines respect for law, contrary to 18 U.S.C. § 3553(a)(2)(A). 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 possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene."⁴⁹ This erodes the moral authority of the criminal justice system, is directly contrary to what ordinary citizens take for granted, and promotes contempt for law, as many courts and judges have noted.⁵⁰ Justice Breyer too has pointed out that the guidelines' treatment

⁴⁹ See *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

⁵⁰ See *United States v. Settles*, __ F.3d __, 2008 WL 2549841, at *2 (D.C. Cir. June 27, 2008) ("we understand why defendants find it unfair [and] [m]any judges and commentators have similarly argued that using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system"); *United States v. Lombard*, 103 F.3d 1, 5 (1st Cir. 1996) ("many judges think that the guidelines are manifestly unwise, as a matter of policy, in requiring the use of acquitted conduct;" though a "lawyer can explain the distinction logically," as a "matter of public perception and acceptance, the result can often invite disrespect for the sentencing process."); *United States v. Baylor*, 97 F.3d 542, 551 (D.C. Cir. 1996) (Wald, J., concurring specially) ("[T]his justification could not pass the test of fairness or even common sense from the vantage point of an ordinary citizen. The 'law,' however, has retreated from that standard into its own black hole of abstractions."); *United States v. Frias*, 39 F.3d 391, 392-94 (2d Cir. 1994) (Oakes, J., concurring) ("[T]his is jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'"); *United States v. Hunter*, 19 F.3d

of acquitted conduct is an unsound policy, "given the role that juries and acquittals play in our system." *Watts*, 519 U.S. at 159 (Breyer, J., concurring); *see also id.* at 170 (use of acquitted conduct "raise[s] concerns about undercutting the verdict of acquittal") (Kennedy, J., dissenting). Unlike charges that were at least presented to a grand jury but ultimately dismissed as part of a plea bargain, uncharged crimes were never presented to a grand jury, often because the allegations were too weak even to support indictment. And acquitted crimes were expressly rejected by a petit jury.

In a letter to a district court judge published in the *Washington Times* on June 29, 2008, Juror #6 complained bitterly that the defendants were later sentenced based on charges of which the jury had acquitted them: "It seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves. We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice, and it is a very noble cause as you know, sir. . . . What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight. It appears to me that the defendants are being sentenced not on the charges for which they have been found guilty but in the charges for which the [prosecutor's] office would have liked them to have been found guilty. Had they shown us hard evidence, that might have been the outcome, but that was not the case."⁵¹

The Court of Appeals for the District of Columbia recently sympathized with a defendant who said at his sentencing, "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, they found me not guilty." *United States v. Settles*, __F.3d__, 2008 WL 2549841, at *2 (D.C. Cir. June 27, 2008). Congress was concerned about respect for law from both the public's and the defendant's perspective. In

895, 897-98 (4th Cir. 1994) (Hall, J., concurring) ("As regards uncharged 'relevant' conduct, this pricing [at exactly the same level of severity as convicted conduct] is at best a poor policy choice; as regards charges on which the jury has acquitted the defendant, it is just wrong."); *United States v. Concepcion*, 983 F.2d 369, 395-96 (2d Cir. 1992) (Newman, J., dissenting from denial of petition for rehearing en banc) (a "just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal."); *United States v. Boney*, 977 F.2d 624, 647 (D.C. Cir. 1992) (Randolph, J., dissenting in part and concurring in part) ("[T]his conceptual nicety might be lost on a person who . . . breathes a sigh of relief when the not guilty verdict is announced without realizing that his term of imprisonment may nevertheless be 'increased' if, at sentencing, the court finds him responsible for the same misconduct."); *United States v. Galloway*, 976 F.2d 414, 437 (8th Cir. 1992) (en banc) ("If the former Soviet Union or a third world country had permitted [sentencing based on uncharged offenses], human rights observers would condemn those countries."); *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 were acquitted."), *rev'd*, 2008 WL 895660 (4th Cir. Apr. 1, 2008); *United States v. Coleman*, 370 F.Supp.2d 661, 668 (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.").

⁵¹ Jim McElhatton, *A \$600 drug deal, 40 years in prison*, *Washington Times*, June 29, 2008, <http://video1.washingtontimes.com/video/docs/letter.pdf>.

discussing that concern, as elsewhere, the Senate Report tied an offender's respect for law to the offense of which he was convicted: "From the defendant's standpoint the sentence should not be unreasonably harsh under all the circumstances of the case and should not differ substantially from the sentence given to another similarly situated defendant convicted of a similar offense under similar circumstances." S. Rep. 98-225, at 75-76 (1983).

Finally, the Commission intended that the commentary to the relevant conduct guideline requiring the use of acquitted crimes (and uncharged crimes where there is no jointly undertaken activity) in calculating the guideline range is to be triggered "*solely* with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts." USSG § 1B1.3(a)(2) (emphasis supplied); *id.*, comment. (n.3) ("Application of this provision [§ 1B1.3(a)(2)] does not require the defendant, in fact, to have been convicted of multiple counts."); *id.*, comment. (backg'd.) ("Relying on the entire range of conduct, regardless of the number of counts . . . on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses," *i.e.*, offenses described in subsection (a)(2)); *see also Watts*, 519 U.S. at 158-59 (Breyer, J., concurring) (recognizing this limitation). As a result, it is contrary to the guideline and its commentary to use acquitted crimes at all, or uncharged crimes absent a finding of jointly undertaken activity, to calculate the guideline range for offenses that are excluded from USSG § 3D1.2(d), such as bank robbery. Although some courts are careful to make the distinction,⁵² it often goes unnoticed by the court and parties alike. *See, e.g., United States v. White*, 503 F.3d 487 (6th Cir. 2007) (district court calculated guideline for bank robbery based on acquitted offenses, adding 167 months to what would have been a 97-month sentence), *vacated and rehearing en banc granted by United States v. White*, 2007 U.S. App. LEXIS 28902 (6th Cir. Nov. 30, 2007). This random spread of the commentary pertinent only to subsection (a)(2) to all other relevant conduct determinations results in yet another source of unwarranted disparity.

C. Past Practice and National Experience

The provisions requiring judges to find (by a preponderance of the probably accurate information) and use uncharged, dismissed and acquitted crimes in calculating the guideline range, at the same rate as if charged in an indictment and conviction obtained, were not based on past practice or national experience. *See Gall*, 128 S. Ct. at 594 & n.2; *Kimbrough*, 128 S. Ct. at 567.

⁵² *See, e.g., United States v. Jones*, 313 F.3d 1019, 1023 (7th Cir. 2002) (explaining that where grouping of an offense is specifically excluded from the operation of § 3D1.2(d), § 1B1.3(a)(2)'s relevant-conduct definition is inapplicable); *United States v. Tory*, No. 95- 50335, 1996 WL 477054, at *3 (9th Cir. Aug. 21, 1996) (holding that, because bank robberies are excluded from § 3D1.2(d), uncharged gun conduct related to a dismissed bank robbery count could not be used as relevant conduct under § 1B1.3 to increase offense level for bank robbery conviction); *United States v. Ashburn*, 38 F.3d 803, 806 (5th Cir. 1994) (because "bank robbery is a non-groupable offense . . . dismissed bank robbery counts could not be considered in the offense level calculation under § 1B1.3(a)(2)"); *United States v. Schneider*, No. 93-30430, 1994 WL 681032, at *3 (9th Cir. Dec. 6, 1994) (noting that because bank robbery is not a groupable offense under § 3D1.2(d), conduct committed by co-conspirator is not included in defendant's relevant conduct under § 1B1.3(a)(2)).

Though judges and the Parole Commission took into account many details of offenders' actual conduct in the pre-guidelines era, see USSG, Ch. 1, Pt. A, ¶ 4(a), the Parole Commission did not take acquitted conduct into account as a general matter,⁵³ due to the "perceived unfairness" of this approach.⁵⁴ Further, during the pre-guideline era, judges were not required to impose additional punishment based on uncharged or acquitted conduct, much less at the same rate as convicted conduct. They were free to, and did, reject information about uncharged and acquitted conduct and to give it little or no effect, because it was unfair, unreliable, illegally-obtained, or for any other reason.⁵⁵ Moreover, 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.⁵⁶ In part as a result of these provisions, sentences under the guidelines far exceed past practice.⁵⁷

⁵³ See 28 C.F.R. § 2.19(c) (1980) ("[T]he Commission shall not consider in any determination, charges upon which a prisoner was found not guilty after trial unless reliable information is presented that was not introduced into evidence at such trial (e.g., a subsequent admission or other clear indication of guilt).") (emphasis supplied). Thus, the Parole Commission's limited use of acquitted conduct was based on a more reliable standard than the preponderance of the "probabl[y] accurate" hearsay standard recommended by the Commission. USSG § 6A1.3(a), p.s. & comment. (backg'd.).

⁵⁴ See 56 Fed. Reg. 16,269 (adoption of the prohibition "in 1979 reflected a concept of procedural fairness in keeping with the Commission's then-current practice").

⁵⁵ See, e.g., Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 151 F.R.D. 153, 154 (1993) (district court judge for twelve years before the guidelines asserting that judges typically discounted unreliable evidence); *United States v. Galloway*, 976 F.2d 414, 444 (8th Cir. 1992) (en banc) (Beam, Lay, Bright, McMillan, JJ., dissenting) (describing pre-guidelines sentencing in which judges refused to consider "allegations of other crimes of the defendant supported by raw investigative material, reports of second-hand conversations with informants eager to please police, and miscellaneous matters extraneous to the conviction or trial" as unreliable and unfair); *United States v. Johnson*, 658 F.2d 1176, 1179 (7th Cir. 1981) (unfairness of sentencing on the basis of offenses for which the defendant was not charged or convicted is "self-evident"); *United States v. Balano*, 813 F. Supp. 1423, 1425 (W.D. Mo. 1993) (before the guidelines, judge "always tried scrupulously to avoid giving any material weight to acquitted conduct"); *United States v. Clark*, 792 F. Supp. 637, 649 (E.D. Ark. 1992) (before the guidelines, "if a factor important to sentencing was, after discussion, still denied, it simply was omitted from consideration.").

⁵⁶ See Phyllis J. Newton, Staff Director, U.S. Sentencing Commission, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent. Rep. 68, 1995 WL 843512, at *3 (Sept./Oct. 1995) ("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.").

⁵⁷ See Fifteen Year Review at 47 ("[E]ither on its own initiative or in response to congressional actions, the Commission established guideline ranges that were significantly more severe than past practice" for "the most frequently sentenced offenses in the federal courts," most notably drug trafficking and "white collar" offenses); *id.* at 49 ("The drug trafficking guideline that ultimately was promulgated, in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statute."); *id.* at 54 (as of 2001, over 25% of the average prison sentence in drug

D. Serious Sixth Amendment Questions

A within-guideline sentence necessarily tied to facts underlying acquitted, dismissed, and uncharged offenses remains vulnerable to Sixth Amendment challenge. While an appellate court may presume a within-guidelines sentence to be reasonable, *Rita v. United States*, 127 S. Ct. 2456, 2462-63 (2007), there are cases in which a sentence could not be upheld as reasonable absent a judicial finding of fact not found by the jury, and if so, it violates the Sixth Amendment. See *Rita*, 127 S. Ct. at 2479-80 (Scalia, J., concurring); *id.* at 2473 (Stevens, J., concurring). “The door . . . 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*, 128 S. Ct. at 603 (Scalia, J. concurring).⁵⁸

As set forth above, the Sentencing Reform Act did not authorize the Commission to adopt an interpretation that would require judges to calculate the guideline range based on facts underlying uncharged, dismissed, and acquitted crimes. In the “absence of an affirmative intention of Congress clearly expressed,”⁵⁹ the Commission should amend the relevant conduct rules to avoid the serious Sixth Amendment questions implicated each time a judge significantly increases a sentence based on such facts. See *Martinez v. Clark*, 543 U.S. 371, 381 (2005) (it is reasonable to presume that “Congress did not intend the alternative which raises serious constitutional doubts); see also *Rita v. United States*, 127 S. Ct. 2456, 2466-67 (2007) (discussing the potential application of *Martinez v. Clark* to as-applied challenges); *id.* at 2473 (Stevens, J., concurring) (same); *id.* at 2478-79 & n.4 (Scalia, J., concurring) (same).

III. Alternatives to Incarceration

We commend the Commission’s renewed interest in examining ways to allow more flexibility and options other than imprisonment. The recent Symposium on Alternatives to Incarceration demonstrated that both public safety and public resources can be protected more effectively by use of such alternatives for the majority of offenders. As one Commissioner pointed out at the symposium, Congress expected that in the face of scarce prison resources, sentencing decisions under § 3553(a) would reflect that incarceration is appropriate for only the

cases was attributable to guideline increases above the mandatory minimum); *id.* at 139 (by 2004, average time served for firearms trafficking and illegal firearms possession had doubled independent of mandatory minimums under § 924(c)), and much of this is due to the use of cross references to uncharged and acquitted more serious offenses).

⁵⁸ See *United States v. Conatser*, 514 F.3d 508, 530-31 (6th Cir. 2008) (Moore, J., concurring) (recognizing the viability of as-applied Sixth Amendment challenge in the wake of *Rita* and in light of the appellate presumption of reasonableness, but would have upheld the life sentence imposed by the district court even without the factual findings underlying the cross reference to second degree murder guideline).

⁵⁹ See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504, 507 (1979); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 537 (2002).

most violent and serious offenders, and that "in cases of nonviolent and nonserious offenders, the interests of society as a whole as well as individual victims of crime can continue to be served through imposition of alternative sentences, such as restitution and community service." Pub. L. No. 98-473, § 239, 98 Stat. 1987, 2039 (1984) (declaring the sense of the Senate). Congress also expected that the Commission would ensure as a general matter "that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j). We agree that our current rate of imprisonment is difficult to reconcile with these provisions.

We hope the Commission will adopt as a priority for this amendment cycle a plan to examine ways to reduce the rate and length of imprisonment for appropriate offenders, and that the Alternatives to Incarceration Symposium will contribute to a rich dialogue and that it will lead to much needed results. Although we expect to comment further on this important topic, we take this opportunity to urge in particular that the Commission expand Zones A and B on the Sentencing Table to allow for greater availability of probationary sentences under § 5C1.1.

A sentence of probation is statutorily available in the majority of cases prosecuted in federal court, yet only a small percentage of offenders are eligible for probation under the guidelines. In 2007, only 7.8% of federal offenders fell into Zone A, and only 6.8% fell into Zone B.⁶⁰ The Commission should act now to expand the zones in the Sentencing Table to allow judges more flexibility to fashion appropriate nonprison sanctions and to implement Congress's overarching directive to impose a sentence that is sufficient but not greater than necessary to achieve the purposes of sentencing under 18 U.S.C. § 3553(a)(2). See *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007).⁶¹

Not only are prison terms lengthy, but they do little or nothing to prepare defendants for successful reentry into the community. Consequently, they are regularly returned to prison for violations of supervised release. To address the problem, federal courts around the country are establishing programs that offer community-based alternatives to prison and encourage defendants' successful reentry into society. The Commission should, as a starting point, consider amending the policy statements related to revocation of supervised release to encourage a defendant's participation in reentry programs.

IV. Drug Offenses

Again, we appreciate the Commission's courage in taking a step toward ameliorating the disparate effects of the drug guidelines in crack cocaine cases. We hope that at an opportune time, the Commission will revisit the issue and find a way to eliminate the disparity in its entirety. In the meantime, the Commission could promote consistency and rationality in the

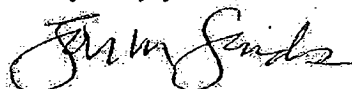
⁶⁰ USSC, 2007 *Sourcebook of Federal Sentencing Statistics*, at 34, tbl. 16 (2007).

⁶¹ See also Nora Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 339, 340 (2005) ("The expansion of nonprison punishments and guidelines regarding their imposition would allow judges to individualize sanctions while protecting public safety.").

guidelines by reducing the base offense levels for every type of drug for which § 2D1.1 assigns a base offense level corresponding to a sentencing range whose low end at Criminal History Category I *exceeds* the statutory mandatory minimum. As with crack offenses, there is no apparent reason why the calculation of the sentencing ranges for the least culpable defendants should begin at a point higher than the statutory minimum.

Again, we thank the Commission for its efforts and for including us in the process of advancing federal sentencing policy. We look forward to working with the Commission in the coming amendment cycle.

Very truly yours,



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September 8, 2008

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Re: Final Priorities for Cycle Ending May 1, 2009

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders pursuant to 28 U.S.C. § 994(o) in response to the Commission's notice of proposed priorities for the amendment cycle ending May 1, 2009. Attached is a Memorandum addressing the issues identified by the Commission and additional issues we have identified, and an Appendix containing proposed revisions to the departure provisions of the Manual.

The Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220 (2005), *Rita v. United States*, 127 S. Ct. 2456 (2007), *Kimbrough v. United States*, 128 S. Ct. 558 (2007), and *Gall v. United States*, 128 S. Ct. 586 (2007), expand the bases for non-guideline sentences to include all offender and offense characteristics and to include policy problems in the applicable guidelines; require judges to impose a sentence that is sufficient but not greater than necessary to satisfy the purposes of sentencing; require judges to give reasons for their sentences; and encourage the Commission to base its guidelines on "empirical data and national experience." As such, these decisions have breathed new life into the Commission's ability and duty to evaluate and revise the guidelines in response to feedback from the courts, experts and practitioners, as contemplated by the Sentencing Reform Act (SRA).¹ Reasoned non-guideline sentences

¹ In explaining the Commission's duty to "review and revise," 28 U.S.C. § 994(o), the Senate Report stated as follows:

Subsection [(o)] requires the Commission continually to update its guidelines and to consult with a variety of interested institutions and groups. . . . It requires continually updating the guidelines to reflect current views as to just punishment, and to take account of the most recent information on satisfying the purposes of

can, at last, serve their core function in the constructive evolution of responsible guidelines. See *Rita*, 127 S. Ct. at 2464, 2465, 2468-69; *Kimbrough*, 128 S. Ct. at 573-74; see also *United States v. Jones*, 531 F.3d 163, 174 n.8 (2d Cir. 2008).

The new advisory system is a healthy one. Sentencing is more transparent, sentences are more fair and effective, and the Commission receives the robust feedback it needs to revise the guidelines. The advisory system also tends to expose even more clearly the flaws of mandatory minimum penalties. To the extent it has introduced greater uncertainty, as the Department of Justice notes with some disappointment in its letter of August 26, 2008, it is true that the parties are no longer precluded from demonstrating, or the courts from finding, that the guideline sentence is greater than necessary, or insufficient, to satisfy legitimate sentencing purposes. While this has undoubtedly lessened prosecutorial power over sentencing, the Defenders, as well as most neutral observers, believe that the new system is an obvious improvement.² And while the Commission may be concerned that the rate of within-guideline sentences has decreased somewhat and may be uncomfortable with the increased criticism of some of the guidelines (many of which the Commission itself has found to be excessive and to create unwarranted disparities), it seems apparent that the way to reduce the rate of below-guideline sentences and to ensure the Commission's ongoing role in guiding federal sentencing policy is to revise the guidelines in response to feedback from the courts, data and research, that is, to provide advice that makes sense and that the courts want to follow.³

deterrence, incapacitation, and rehabilitation. . . . [T]his subsection [will] provid[e] effective oversight as to how well the guidelines are working. The oversight would not involve any role for the Commission in second-guessing individual judicial sentencing actions either at the trial or appellate level. Rather, it would involve an examination of the overall operation of the guidelines system to determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes.

S. Rep. No. 98-225 at 178 (1983).

² See, e.g., *The Constitution Project Sentencing Initiative Recommendations for Federal Criminal Sentencing in a Post-Booker World* (June 1, 2006).

³ In its recent addition to USSG § 1A1.1, entitled "Continuing Evolution and Role of the Guidelines," the Commission credits the statutory mechanisms requiring it to publish proposed amendments and solicit input from experts and the public with bolstering its "ability to take into account fully the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) in its promulgation of the guidelines," characterizes the guidelines as "the product a deliberative and dynamic process that seeks to embody within federal sentencing policy [those] purposes of the sentencing," and indicates that it will "periodically review[] and revise[] the guidelines in consideration of comments it receives from members of the federal criminal justice system, including the courts, probation officers, the Department of Justice, the Bureau of Prisons, defense attorneys and the federal public defenders, and in consideration of data it receives from sentencing courts and other sources." USSG § 1A1.1 (citing *Rita*, 127 S. Ct. at 2464; *Booker*, 543 U.S. at 264; *Gall*, 128 S. Ct. at 594).

We urge the Commission to embrace the advisory system as an opportunity to substantially revise the guidelines to effectuate the purposes of sentencing and to carry out the SRA's broader goals.⁴ The Commission has been stymied in achieving those goals to some extent by mandatory minimum sentencing laws and other directives from Congress, but also to some extent by its own actions. The Commission has often promulgated amendments more severe than required by legislation. The Department has routinely and successfully argued for increased guideline ranges, or mandatory minimums that in turn lead to increased guideline ranges, on the basis that prosecutors need higher sentences to "merit" prosecution, or to use as leverage to induce guilty pleas and cooperation.⁵ But those are not legitimate purposes of sentencing and are nowhere to be found in the SRA. Further, the essential feedback mechanism through which the guidelines were to be reviewed and revised was stifled by restrictions on grounds for departure (many of which predict reduced recidivism, demonstrate reduced culpability, or indicate a need for treatment in a non-prison setting), the requirement of the now-excised § 3553(b) that courts could look only to the guidelines, policy statements and official commentary of the Commission to determine whether a factor had been adequately considered, and the absence of explanation in those limited sources.

The Commission should refocus its efforts to act in its characteristic institutional role. Insofar as the Commission seeks to fulfill its statutory obligation to fully take into account the purposes of sentencing set forth in § 3553(a)(2) in promulgating the guidelines and to see the guidelines maintain a role in the sentencing courts' determination of appropriate sentences, there would seem to be no other course but to provide the courts with advice they can respect and use. The Commission should do what the Court suggested in *Rita*:

The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence.

⁴ The Sentencing Reform Act instructed the Commission to ensure that the guidelines met the purposes of sentencing set forth in § 3553(a)(2), to measure the effectiveness of the guidelines in meeting those purposes, to avoid unwarranted disparities and unwarranted similarities, to reflect advancement in knowledge of human behavior, to minimize prison overcrowding, and to regularly review and revise the guidelines in consideration of comments and data coming to its attention and by consulting with authorities on and representatives of the criminal justice system. 28 U.S.C. §§ 991(b), 994(f), 994(g), 994(o), 995(a)(12)-(16).

⁵ For example, in support of the "trafficking" enhancement based on two firearms, the Department argued that firearms "traffickers" traffic in a small number of guns, *i.e.*, two, and often have no criminal history, so penalties must be substantially increased in order to "merit" the expenditure of resources to prosecute them. See DOJ Written Testimony at 3-4 (March 15, 2006), http://www.ussc.gov/hearings/03_15_06/Richard-Hertling.PDF.

The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

Rita, 127 S. Ct. at 2464. This healthy interactive process was intended by the SRA but, as the Commission has pointed out, has been subverted: "To date the guidelines have been used, often pursuant to specific congressional directives, to increase the certainty and severity of punishment for most types of crime. They could, however, be used to advance different goals, that are also mentioned in the SRA."⁶

The Commission has invited comment on several broad areas in response to the Supreme Court's decisions, including an evaluation of their impact, development of guideline amendments, development of recommendations for legislation, and a study of mandatory minimums. We believe that the full positive impact of *Booker* has not yet been felt, and will not be felt, until the Commission amends those guidelines that are not based on empirical data and national experience. "While an advisory system is better than a mandatory one when the guidelines routinely recommend an unfair and excessive sentence, it is not as good as an advisory system with guidelines based on research, consultation with front-line participants, and reasoned deliberation."⁷

To that end, we recommend in Part I (pp. 7-26), that the Commission begin by amending some of the guidelines that are most clearly not "the product of careful study," *Gall*, 128 S. Ct. at 594, that "[do] not take account of 'empirical data and national experience,'" and that "do not exemplify the Commission's exercise of its characteristic institutional role." *Kimbrough*, 128 S. Ct. at 575. The Commission should reform the relevant conduct guideline; narrow the career offender guideline to the extent possible within statutory limits and recommend to Congress that § 994(h) be repealed; and reassess and adjust the guidelines that are based on mandatory minimums, including the crack guidelines. This amendment cycle or in the very near future, the Commission should amend the guidelines to give the courts more flexibility to sensibly use alternatives to incarceration under the guidelines. These measures would greatly reduce the rate of non-guideline sentences.

In Part II (pp. 26-37) and Appendix A, we propose revisions to those parts of the Guidelines Manual that are urgently in need of correction to accurately reflect Supreme Court law, including the recently amended USSG § 1A1.1, all provisions relating to "departures," USSG § 1B1.10(b)(2)(B), p.s., and USSG § 6A1.3, p.s.

⁶ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at 77 (Nov. 2004).

⁷ Paul J. Hofer, *The Reset Solution*, forthcoming in the *Federal Sentencing Reporter*, 20:5.

In Part III (pp. 37-40), we strongly support the Commission's proposal to prepare an updated study of mandatory minimum laws and offer suggestions regarding further evidence the Commission should include in that study.

In Part IV (pp. 41-42), we strongly support the Commission's continuing work with Congress to eliminate the unwarranted disparity in mandatory minimums for crack and powder cocaine, and provide reasons that the Commission should recommend to Congress a 1:1 ratio.

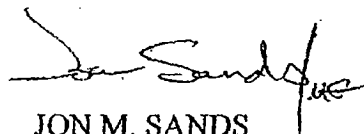
In Part V (pp. 42-46), we recommend ongoing and long-term priorities, including reduction in overall severity levels, reduction in the prison population, an increased focus on rehabilitation; increased flexibility and simplicity; suggestions regarding data, hearings and training to improve the dialogue between the Commission, Congress, the courts, the parties and other participants; and recommendations to Congress that would re-affirm the Commission's role as an independent expert body.

In Part VI (pp. 46-49), we address responses to legislation, including the Court Security Act. Because no changes are required by the Court Security Act and the data do not support increased guideline ranges, we recommend no changes based on that Act, except to remove the ten-level enhancement under amended USSG § 2H3.1(b)(2)(B), which was not published for comment.

In Part VII (pp. 50-56), we identify four circuit conflicts and recommend how they should be addressed, and also demonstrate that there is no circuit conflict regarding whether persons who are reimbursed for pecuniary losses are "victims" under USSG § 2B1.1(b)(2), contrary to the suggestion of the Department of Justice.

We appreciate the opportunity to provide our input on these important issues. As always, we are happy to provide additional information on any of the issues raised in this letter or on any other issue involving fair and appropriate sentencing policy. We look forward to continuing to work with the Commission in the coming year.

Very truly yours,



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MEMORANDUM REGARDING PROPOSED PRIORITIES

I. Guidelines Urgently in Need of Amendment

A. Uncharged, Dismissed and Acquitted Offenses

Several times during the Guidelines' history and again two years ago, the Commission announced that it would reconsider relevant conduct, and this should be a top priority now. As set forth in detail in our letter of July 16, 2008, the treatment of uncharged, dismissed and acquitted offenses as required by USSG § 1B1.3 was not required or authorized by Congress, *see* July 16, 2008 Letter from Jon Sands to the Commission at 11, was not based on past practice or national experience, *id.* at 15-16, and, as subsequent research and experience has shown, transfers sentencing power from judges to prosecutors (contrary to the untested theory upon which it was based), creates unwarranted disparity, and brings disrepute to the federal criminal justice system. *Id.* at 12-15. Further, judicial fact finding of uncharged and acquitted crimes is uniquely vulnerable to as-applied Sixth Amendment challenges. *Id.* at 17.

We understand that former Commissioner John Steer, one of the original architects of relevant conduct and co-author of *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990), left the Commission with a proposal to eliminate acquitted conduct from § 1B1.3. In addition to the fact that its use "varies from judge to judge according to the jurist's thinking regarding use of acquitted conduct," he cites "the whole gamut of policy objections to its mandatory inclusion," and the fact that the guidelines are "alone among sentencing reform efforts in using acquitted conduct to construct the guideline range." *See An Interview With Former USSC Vice Chair John R. Steer*, *The Champion* (forthcoming, September 2008). This simple change can easily be made this amendment cycle. Respect for law and common sense, as demonstrated by the increasingly negative reaction in the press and judicial decisions, *see* July 16, 2008 Letter from Jon Sands to the Commission at 13-15, requires it.

Former Commissioner Steer also believes that "the aspect of the guideline that [is] most difficult to defend" is that uncharged conduct is "given the same guideline weight as . . . the count(s) of conviction." *Id.* He believes that the weight given uncharged conduct should be decreased in order to "address another major unfairness perception about the guideline and . . . provide an incentive to prosecutors to convict on more counts if they want the underlying conduct to count more." *Id.*

We agree that the guidelines' treatment of uncharged crimes is unsupportable, but we believe that these problems are best addressed by giving less weight to dismissed conduct (one form of uncharged conduct), and eliminating the use of conduct that was never charged. The government should not be able to obtain any additional prison time based on an offense for which it did not or could not obtain a grand jury indictment.

Moreover, no guideline system accords *any* weight to uncharged crimes.⁸ And reducing the weight would not eliminate the hidden and unwarranted disparities stemming from prosecutorial control over which defendants are or are not "charged" at sentencing with uncharged conduct, the untrustworthy nature of the information upon which it is often based, the differing approaches to "calculating" uncharged conduct by different probation officers and judges, and the real and perceived unfairness of its use. See July 16, 2008 Letter from Jon Sands to the Commission at 12-16.

We again urge the Commission to (1) state in the commentary to § 1B1.3 that uncharged and acquitted offenses are not included in the definition of "relevant conduct"; (2) significantly lessen the impact of charged counts that are dismissed as part of a plea agreement by limiting their impact on the guideline range to the lesser of four levels or 25% of the number of levels in the applicable table attributable to the offense of conviction as determined under § 1B1.3(a)(1); (3) eliminate cross-references to guidelines for more serious crimes than the offense of conviction by deleting "cross references in Chapter Two" from the introductory paragraph of § 1B1.3; and (4) address the continuing problem under § 1B1.3(a)(1)(B) of including conduct of others that was merely "reasonably foreseeable" but not within the scope of the defendant's agreement by making absolutely clear that § 1B1.3(a)(1)(B) does not include any conduct that was not within the scope of the defendant's agreement.

B. Career Offender

The only priority proposed by the Commission that even touches on the career offender guideline is a proposed "multi-year study of the definition of 'crime of violence' used in both statutes and guidelines." While serious sentencing research is always welcome, the grave and widely recognized problems associated with the career offender guideline demand more direct and immediate attention. First, the Commission should narrow the criteria of the guideline so that it is no broader than § 994(h) strictly requires. As we have previously demonstrated and discuss again below, the career offender guideline is far broader than § 994(h) requires, and this exacerbates the problems inherent in the statutory requirements. Second, as one of its proposals for legislation, the Commission should recommend that Congress repeal 28 U.S.C. §994(h), as it is in conflict with the purposes of sentencing in those cases where it strictly applies.

1. Narrow the Criteria.

There are several steps the Commission should take to improve and rationalize the career offender guideline while § 994(h) remains the law. If the Commission is concerned about the rising rate of below-guideline sentences, these steps would reduce that rate.

⁸ See Phyllis J. Newton, Staff Director, U.S. Sentencing Commission, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent. Rep. 68, 1995 WL 843512, at *3 (Sept./Oct. 1995).

a. Crime of Violence

There is an urgent need to narrow the current definition of “crime of violence” contained in USSG § 4B1.2 to bring it in line with the definition of “crime of violence” in 18 U.S.C. § 16 and the definition of “violent felony” in 18 U.S.C. § 924(e)(2)(B). Such harmonization cannot wait until the conclusion of the Commission’s proposed multi-year crime of violence study.

Both § 16 and § 924(e), as interpreted by the Supreme Court, require intentional, aggressive, violent conduct on the part of the defendant. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (“crime of violence” includes only “violent, active crimes”); *Begay v. United States*, 128 S. Ct. 1581, 1586-87 (2008) (“violent felony” includes only “purposeful, violent and aggressive conduct”). Section 4B1.2, however, includes offenses that do not involve purposeful, aggressive, violent conduct, including DUI,⁹ reckless or negligent manslaughter,¹⁰ reckless endangerment,¹¹ reckless assault,¹² simple assault,¹³ tampering with a motor vehicle,¹⁴ burglary of a non-dwelling,¹⁵ fleeing or eluding a police officer,¹⁶ operating a motor vehicle without the owner’s consent,¹⁷ possession of a short-barreled shotgun,¹⁸ oral threatening,¹⁹ car theft,²⁰ and failing to return to a halfway house.²¹

⁹*United States v. McGill*, 450 F.3d 1276, 1280 (11th Cir. 2006); *United States v. Moore*, 420 F.3d 1218, 1220-22, 1224 (10th Cir. 2005).

¹⁰USSG § 4B1.2, comment. (n.1); *United States v. Chauncey*, 420 F.3d 864, 877 (8th Cir. 2005).

¹¹*United States v. Parson*, 955 F.2d 858, 860-61 (3d Cir. 1992); *United States v. Stubler*, 2008 WL 821071, at *2-3 (3d Cir. Mar. 28, 2008).

¹²*United States v. Rendon-Duarte*, 490 F.3d 1142, 1147-48 & n.2 (9th Cir. 2007).

¹³*United States v. Mangos*, 134 F.3d 460, 464 (1st Cir. 1998).

¹⁴*United States v. Bockes*, 447 F.3d 1090 (8th Cir. 2006); *United States v. Young*, 229 Fed.Appx. 423, 424 (8th Cir. 2007).

¹⁵*United States v. Hascall*, 76 F.3d 902, 904-06 (8th Cir. 1996); *United States v. Fiore*, 983 F.2d 1, 4-5 (1st Cir. 1992). The First Circuit has granted rehearing *en banc* to reconsider its holding in *Fiore*. *See United States v. Giggey*, No. 07-2317 (1st Cir. June 10, 2008).

¹⁶*United States v. Rosas*, 410 F.3d 332, 334 (7th Cir. 2005); *United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006).

¹⁷*United States v. Lindquist*, 421 F.3d 751 (8th Cir. 2005).

¹⁸*United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005).

¹⁹*United States v. Leavitt*, 925 F.2d 516 (1st Cir. 1991).

²⁰*United States v. Sun Bear*, 307 F.3d 747, 752-53 (8th Cir. 2002).

Congress did not intend for such offenses to be used to punish defendants as violent "career offenders," and their inclusion creates inconsistency with other law and unwarranted disparity due to differing interpretations by different courts. The Sixth Circuit has now held that the guideline must be interpreted consistently with § 924(e),²² and the Supreme Court has signaled the same by granting certiorari in a number of career offender cases, vacating the judgment below, and remanding for further consideration in light of *Begay*.²³ Several circuits, however, have long recognized that the definition of "crime of violence" as written in the commentary to the guideline is broader than the definition of "violent felony" in § 924(e), or the definition of "crime of violence" in § 16, and held that offenses not covered by these statutes are nonetheless covered by the guideline.²⁴

In addition, as noted in our letter of July 16, 2008, at pp. 4-5, the Commission should use "the elements of the offense of which the defendant was convicted" instead of "conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted" because this more accurately describes the categorical approach, is more clearly consistent with Application Note 2, and is what the Commission apparently intended.

In order to bring consistency to the definition, to narrow it to what Congress had in mind, and to further the goal of simplification, we propose that the Commission replace the second, third, and fifth paragraphs of the commentary in Application Note 1 of § 4B1.2 with the following:

"Crime of violence" includes burglary of a dwelling, arson, extortion, and offenses involving the use of explosives. Other offenses are included as "crimes of violence" if (A) the offense has as an element the use, attempted use, or threatened use of physical force against the person of another; or (B) the elements of the offense of which the defendant was convicted (i) require purposeful, violent and aggressive conduct on the part of the defendant and (ii) present a serious potential risk of physical injury to another.

²¹ *United States v. Bryant*, 310 F.3d 550, 553 (7th Cir. 2002).

²² *See United States v. Bartee*, 529 F.3d 357 (6th Cir. 2008).

²³ *See, e.g., Archer v. United States*, 128 S. Ct. 2051 (2008), *on remand to United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008).

²⁴ *See, e.g., United States v. McGill*, 450 F.3d 1276, 1280 (11th Cir. 2006); *United States v. Moore*, 420 F.3d 1218, 1220-22, 1224 (10th Cir. 2005); *United States v. Parson*, 955 F.2d 858, 860-61 (3d Cir. 1992).

The Commission should cite to the relevant Supreme Court authority, in order to avoid inconsistent interpretations.

Finally, it would make sense for the Commission to settle on a single definition of "crime of violence" to be used in all Guideline contexts. It causes only confusion and uncertainty to have, for instance, one definition of crime of violence for immigration offenses, *see* USSG § 2L1.2, and another for career offender. It is also exceedingly inefficient for the courts to have to undertake one analysis for the ACCA, another analysis for the career offender guideline, and yet another analysis for the immigration guideline. The fairness and efficiency of the sentencing process would be greatly improved if the Commission standardized with the definition of crime of violence set out above.

b. Drug Trafficking Offense

It is also urgent that the Commission narrow the definition of "controlled substance offense," given that the majority of career offenders are classified as such on this basis, and the Commission's own findings that in these cases, the career offender guideline greatly overstates the risk of recidivism, serves no deterrent purpose, creates unwarranted disparity, and has a disproportionate impact on African Americans.²⁵

The career offender guideline exceeds the congressional directive in § 994(h) by including inchoate offenses, state offenses, and a number of federal offenses the elements of which do not require dispensing, distributing or possessing with intent to distribute a controlled substance.²⁶ *See* USSG § 4B1.2(b) & comment. (n.1). The lowest statutory maximum for the serious drug trafficking offenses specified by Congress in § 994(h) was 15 years in 1984 and is now 20 years, but today's guideline includes any offense that is

²⁵ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at 133-34 (Nov. 2004) [*"Fifteen Year Review"*]; *see also* *United States v. Pruitt*, 502 F.3d 1154, 1168 (10th Cir. 2007) (McConnell, J., concurring) ("[t]his might appear to be an admission by the Commission that this guideline, at least as applied to low-level drug sellers like Ms. Pruitt, violates the overarching command of § 3553(a) that '[t]he court . . . impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in' § 3553(a)(2)").

²⁶ In the latter category are: "[u]nlawfully possessing a listed chemical with intent to manufacture a controlled substance," 21 U.S.C. § 841(c)(1), "[u]nlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance," 21 U.S.C. § 843(a)(6), "[m]aintaining any place for the purpose of facilitating a controlled substance offense . . . if the offense of conviction established that the underlying offense (the offense facilitated) was a 'controlled substance offense,'" 21 U.S.C. § 856, "[u]sing a communications facility in committing, causing or facilitating a drug offense . . . if the offense of conviction established that the underlying offense (the offense committed, caused or facilitated) was a 'controlled substance offense,'" 21 U.S.C. § 843(b), and a "violation of 18 U.S.C. § 924(c) or § 929(a) . . . if the offense of conviction established that the underlying offense was a . . . 'controlled substance offense.'"

punishable by as little as a year and a day, and regardless of whether it was a felony or a misdemeanor in the convicting jurisdiction. In part because of the Commission's expansion on the statutory definition, the career offender guideline fails to distinguish between small-time drug offenders and the serious drug traffickers Congress had in mind, resulting in a high number of below-guideline sentences,²⁷ and many opinions criticizing the guideline for being too severe and creating unwarranted disparity and unwarranted uniformity.²⁸

The Commission should distinguish between true career drug offenders on the one hand, and repeat street dealers and minor, sporadic offenders on the other,²⁹ by amending the definition of "controlled substance offense" as follows:

a felony that is described in 21 U.S.C. §§ 841, 952(a), 955, 959 or 46 U.S.C. § 70503, or that is a similar offense under state law, and that is punishable by imprisonment for at least ten years.

This definition is consistent with 28 U.S.C. § 994(h), and is also consistent with the definition in 18 U.S.C. § 924(e), from which the definition of "crime of violence" was derived.

c. Prior Felony Conviction

Section 994(h) directed the Commission to specify a prison sentence at or near the maximum term authorized for defendants with qualifying prior "felony" convictions.³⁰ When § 994(h) was enacted in 1984, the term "felony" was defined for all purposes under the Controlled Substances Act as "any Federal or State offense classified by applicable Federal or State law as a felony." See 21 U.S.C. § 802(13). Section 802(13) still defines the unadorned term "felony," and it applies specifically to several career offender

²⁷ See USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 137-39 (March 2006).

²⁸ See, e.g., *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); *United States v. Pruitt*, 502 F.3d 1154, 1166-70 (10th Cir. 2007) (McConnell, J. concurring), *cert. granted, judgment vacated*, 128 S. Ct. 1869 (Apr 14, 2008); *United States v. Williams*, 435 F.3d 1350 (11th Cir. 2007) (per curiam); *United States v. Moreland*, slip op., 2008 WL 904652, at **10-13 (S.D. W. Va. Apr. 3, 2008); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008); *United States v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006); *United States v. Serrano*, slip op., 2005 WL 1214314 (S.D.N.Y. May 19, 2005).

²⁹ See, e.g., *United States v. Moreland*, slip op., 2008 WL 904652, at **10-13 (S.D. W. Va. Apr. 3, 2008) (defendant was convicted of distribution of one marijuana cigarette in 1992 and distribution of 6.92 grams of crack in 1996).

³⁰ 28 U.S.C. § 994(h).

predicates. See 21 U.S.C. § 951(b); *Burgess v. United States*, 128 S. Ct. 1572, 1579 (2008) (listing offenses to which the definition set forth in § 802(13) applies, including § 843(b) (use of a communication facility to commit a felony), § 843(d)(1)-(2) (sentencing enhancements for § 843(a)(6), (b) if one or more prior convictions for a felony), and § 848(c)(1) (“continuing criminal enterprise”)).

The commentary, however, includes all convictions for an offense punishable by more than one year, “regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed.”³¹ Defendants are thus unnecessarily classified as “career offenders” when they were actually convicted of a misdemeanor and received an insignificant jail sentence or no jail sentence at all.³²

As the Commission is aware, some states punish misdemeanors by up to two, three, or even ten years.³³ Convictions under these statutes, by definition, are for conduct considered by the convicting jurisdiction to be less serious than a felony. See *United States v. Colon*, slip op., 2007 WL 4246470, at *6 (D. Vt. Nov. 29, 2007) (Sessions, J.) (“Both of the predicate offenses were classified as misdemeanors under Massachusetts law, which provides, at minimum, some indication as to the seriousness of the underlying conduct.”). And because these offenses are considered less serious and are thought to have minor collateral consequences, they are not treated with the same level of care and scrutiny as that accorded felony charges.³⁴

The career offender guideline, however, treats such dispositions exactly the same as felonies, resulting in unwarranted uniformity. Defendants with prior misdemeanor convictions in some states have a countable career offender predicate, while defendants convicted of the identical conduct in most other states do not, resulting in unwarranted geographic disparity. See Table of Statutory Maxima for Assault and Battery (of 48 states reviewed, the statutory maximum for assault and battery was greater than one year

³¹ USSG § 4B1.2, comment. (n.1).

³² *United States v. Thompson*, 88 Fed. Appx. 480 (3d Cir. 2004) (misdemeanor conviction for simple assault for which defendant received sentence of probation qualified as career offender predicate); *United States v. Raynor*, 939 F.2d 131 (4th Cir. 1991) (misdemeanor conviction for assault on a law officer punished by unsupervised probation and a \$25 fine qualified as career offender predicate).

³³ See, e.g., Letter from Jon M. Sands to Hon. Ricardo H. Hinojosa re: Follow-Up to March 20 Hearing 5-6 (Mar. 29, 2007); see also Br. of Amici Curiae National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums Foundation in Support of Petitioner, *Logan v. United States*, 2007 WL 1577172, at *14 n.7 (May 24, 2007) (listing state misdemeanors punishable by more than two years imprisonment).

³⁴ See Br. of Amici Curiae National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums Foundation in Support of Petitioner, *Logan v. United States*, 2007 WL 1577172, *passim* (May 24, 2007) (discussing difference in collateral consequences between felony and misdemeanor convictions in the states).

in only Maryland, Massachusetts and Pennsylvania).³⁵ We therefore recommend that the Commission revise the commentary as follows:

“Prior felony conviction” means a prior adult federal or state conviction for an offense classified as a felony by the convicting jurisdiction.

In addition, we continue to urge the Commission to add a requirement that the sentence served, or at least the sentence imposed, exceeded a threshold that reasonably distinguishes between serious and minor offenses. Under the career offender guideline, a defendant who served, or was sentenced to, 6 months of unsupervised probation, and a defendant who served, or was sentenced to, 20 years in prison are treated exactly the same.³⁶

The most accurate measure of the seriousness of the offense is the sentence actually served. A large number of jurisdictions continue to sentence defendants on the understanding that the defendant will serve less than 50% of the time imposed,³⁷ and the average time served for all states as of 2004 is 66% of the sentence imposed.³⁸ A “sentence served” rule would also solve the false equality generated by treating non-parole jurisdictions the same as parole jurisdictions.³⁹ Further, as the Second Circuit recognized in *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001), deterrence is a major purpose of the career offender guideline and this “requires an appropriate relationship between the sentence for the current offense and the sentences, particularly the times served, for the prior offenses... In some circumstances, a large disparity in that relationship might indicate that the career offender sentence provides a deterrent effect so in excess of what is required in light of the prior sentences and especially the time served on those sentences as to constitute a mitigating circumstance present ‘to a degree’ not adequately considered by the Commission.” *Id.* at 220; *see also Colon, supra*, at *6

³⁵ Available

at

http://www.fd.org/pdf_lib/Appendix%20F%20Tables%20of%20Statutory%20Maxima.pdf.

³⁶ *See United States v. Washington*, 2001 WL 1301744, at *5 (6th Cir. Aug. 8, 2001) (“the district court did not abuse its discretion by electing not to sentence Defendant as a ‘career offender’ subject to a sentence of 360 months to life imprisonment, where Defendant’s prior convictions resulted only in probation”).

³⁷ A DOJ study found that, between 1992 and 1994, inmates incarcerated for violent offenses in parole jurisdictions (which include most states) served an average of 48 % of the sentence they had received. *See U.S. Dept. of Justice, Bureau of Justice, Prison Sentences and Time Served for Violence* (April 1995), available at <http://www.ojp.usdoj.gov/bjs/abstract/psatsfv.htm>. For non-violent offenses, the percentage rate is likely lower still.

³⁸ <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/sheets/scs04t105.csv>.

³⁹ U.S. Sentencing Commission, *Simplification Draft Paper, Chapter Four, Part V* (failing to distinguish between sentences imposed in parole and non-parole systems is problematic because defendants may serve two very different terms of imprisonment).

("The relationship between the current sentence and prior sentences is an important factor in the over-representation inquiry.").

The Commission should revise the guideline to count only those offenses for which time served was at least 36 months. A 2004 Department of Justice Report estimates that people sentenced to state prison for violent offenses of all types, from minor (39 months) to serious (147 months), will serve an average of 61 months.⁴⁰

In the alternative, the Commission should count only sentences imposed of at least 60 months. A 2004 Department of Justice study reports that the average sentence imposed for all violent offenders sentenced to state prison was 92 months.⁴¹ At the very least, the Commission should count only those offenses assigned three criminal history points under § 4A1.1(a) for purposes of § 4B1.2. Because the information about the sentence imposed is already part of the criminal history calculation, there can be no objection based on the difficulty of obtaining the information, and it would serve the goal of simplification.

d. Departure

If the Commission wishes for departures to remain relevant, it should remove the limit to one criminal history category for departures under USSG § 4A1.3(b)(3)(A), p.s. While this limit was adopted in response to the PROTECT Act, it was not required by the PROTECT Act. This limited departure is inadequate to correct the over-representation when the Commission's own research shows that the criminal history category for offenders qualifying under the career offender guideline is often several categories higher than their recidivism rate would justify,⁴² and is out of step with feedback from the courts.

2. Recommend Repeal of Section 994(h).

The Commission's own research and sentencing data, as well as feedback from judges, all demonstrate that even applications of the career offender guideline that are clearly required by § 994(h) are unnecessary and interfere with the purposes of sentencing and the broader goals of the SRA, including fairness and avoidance of unwarranted disparity.⁴³ While the Commission can and should ameliorate the damage by scaling back the guideline definitions to the statutory terms, the statute itself hobbles

⁴⁰ See <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/sheets/scs04t105.csv>.

⁴¹ See <http://www.ojp.usdoj.gov/bjs/sent.htm#publications>.

⁴² *Fifteen Year Review* at 134.

⁴³ See 28 U.S.C. § 991(b)(1)(A), (B); 18 U.S.C. § 3553(a).

the Commission's ability to adjust and improve the career offender guideline in response to new information and understanding as contemplated by the SRA.⁴⁴

The most problematic aspect of § 944(h) and the one which presents the greatest obstacle to ensuring that the career offender guideline advances rather than subverts the objectives of the SRA is the provision which states that "[t]he Commission shall assure the guidelines specify a sentence at or near the maximum term authorized." The Commission's own research shows unequivocally that this mandate results in systematic and unjustified over-punishment for large numbers of defendants.

For instance, it is well documented that automatically elevating defendants classified as career offenders to criminal history category VI overstates their true risk of recidivism. The overall rate of recidivism for category VI offenders two years after release is 55%, but the recidivism rate for such offenders who are career offenders based on prior drug offenses is only 27%, and thus "more closely resembles the rates for offenders in lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules."⁴⁵ This "makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses."⁴⁶ In the words of the Commission's own report: "[I]t appears that assigning offenders to criminal history category VI" under the career offender guideline "is for reasons other than their recidivism risk."⁴⁷

In fact, the Commission has never indicated what reasons might justify disparate treatment of prior drug trafficking or crimes of violence (compared to other prior offenses) and no justifiable reason is apparent. There is no reason to believe, for example, that repeated drug trafficking or crimes of violence categorically indicate greater culpability than do repeated fraud, tax, or environmental offenses, or any other offenses that are not presently included as predicate offenses. In this sense, sentencing within the ranges recommended by the career offender guideline actually *creates*

⁴⁴ See 28 U.S.C. § 994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section."); 28 U.S.C. § 991(b)(1)(C) (Commission to establish sentencing policies and practices that "reflect, to the extent practicable advancement in knowledge of human behavior"); 28 U.S.C. § 991(b)(2) (Commission to "develop means of measuring the degree to which the sentencing . . . practices are effective in meeting the purposes of sentencing"); 28 U.S.C. § 995(a)(12)-(16) (Commission to systematically collect, study and disseminate empirical evidence of sentences imposed under the guidelines, the relationship of such sentences to the purposes of sentencing, and their effectiveness in meeting those purposes).

⁴⁵ *Fifteen Year Review* at 134.

⁴⁶ *Id.* (emphasis in original).

⁴⁷ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 9 (May 2004).

unwarranted sentencing disparity. Thus, it is no wonder that the departure rate in career offender cases is substantially higher than is typical for other guidelines.

Moreover, the Commission has determined that the draconian punishments regularly visited on low- to mid-level drug defendants by the career offender guideline cannot be justified by any other purpose of sentencing. These penalties have minimal deterrent effect. "[C]riminologists and law enforcement officials testifying before the Commission have noted that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating low-level drug sellers prevents little, if any, drug selling; the crime is simply committed by someone else."⁴⁸

The Commission has not yet released a report on career offenders based on "crimes of violence" as the instant offense or one or more predicate offenses. The Commission did report in 2004 that the recidivism rate of those whose career offender status was based on one or more prior "crimes of violence" was about 52%.⁴⁹ Yet, this did not mean that the recidivating events were violent, or even that they were drug trafficking offenses. Only 12.5% of the recidivating events for Category VI offenders overall were a "serious violent offense," defined as homicide, kidnapping, robbery, sexual assault, aggravated assault, domestic violence, and weapons offenses, and only 4.1% were drug offenses.⁵⁰ Thus, it appears likely that the vast majority of career offenders based on "crimes of violence" are not the threat to public safety that Congress envisioned when it enacted § 994(h).

Finally, the career offender guideline has created racial disparities that did not exist in the pre-Guidelines era. The Commission reports that sentences in the Guidelines era "have a greater adverse impact on black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation," and one of the reasons is the "increasingly severe treatment of . . . repeat offenders" under the career offender guideline.⁵¹ In FY 2000, black offenders were 26% of offenders sentenced under the guidelines generally, but 58% of offenders sentenced under the career offender guideline.⁵² Most of these were subject to the guideline based on drug trafficking crimes, for which black offenders have a higher risk of conviction than similarly situated white offenders.⁵³

⁴⁸ See *Fifteen Year Review* at 134.

⁴⁹ *Id.*

⁵⁰ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 32, Ex. 13 (May 2004).

⁵¹ *Id.* at 135.

⁵² *Id.* at 133.

⁵³ *Id.* at 133-34.

Courts have long recognized these problems and have, for many years, urged the Commission to address them.⁵⁴ Moreover, post-*Booker*, courts have increasingly used their expanded discretion to impose below-guideline sentences in career offender cases.⁵⁵ According to the Commission, “departures were considered an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines.”⁵⁶ However, § 994(h) prevents this feedback loop from operating effectively in the career offender context because it unduly constrains the Commission’s ability to improve the guideline in ways that incorporate this judicial wisdom and experience. See *United States v. LaBonte*, 520 U.S. 751 (1997). In order for the Guideline development process to work as intended, § 994(h) must be discarded.

Significantly, the repeal of § 994(h) would in no way thwart Congress’s goal of ensuring that “a relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets,” i.e., those “who stab, shoot, mug, and rob,”⁵⁷ receive stern punishment. First, there are several statutory sentencing enhancements, such as those found at 21 U.S.C. § 851 and 18 U.S.C. § 3559(c), which mandate stiff prison terms for repeat offenders. Indeed, the Commission has found that the career offender increase and such statutory enhancements constitute “unwarranted double counting.”⁵⁸ Second, and even more importantly, the courts now possess the authority and discretion to identify those truly dangerous offenders who have made a “career” out of serious crime and, through § 3553(a), to impose a punishment as severe as their misdeeds deserve. This approach, relying on the experience and expertise of judges on the ground, is much more likely to capture the true “career offender” than a “one-size-fits-all” guideline based on a statutory mandate. Whatever purposes § 994(h) may once

⁵⁴ See, e.g. *United States v. Pruitt*, 502 F.3d 1154, 1167-70 (10th Cir. 2007) (O’Connell, J., concurring) (collecting cases), *cert. granted, judgment vacated*, 2008 WL 1699453 (U.S. Apr 14, 2008); see also Michael S. Gelacak, Ilene H. Nagel and Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 356-57 (December 1996) (finding “extensive use of [downward] departures from sentences generated by the career offender guideline,” that these were “quite substantial,” “typically” to the sentence that would have applied absent the career offender provision).

⁵⁵ One year after *Booker*, the rate of below-guideline sentences in career offender cases had risen to 21.5%, and average sentence length markedly decreased. Ninety-four percent of below-guideline sentences were in cases with an instant offense of drug trafficking, robbery or firearms, and 75% were drug trafficking cases. See USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 137-40 (March 2006).

⁵⁶ USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 5 (Oct. 2003).

⁵⁷ 128 Cong. Rec. 26,512, 26,518 (Sept. 30, 1982).

⁵⁸ USSC, App. C, Amend. 506 (Nov. 1, 1994).

have been intended to serve, it now demonstrably thwarts, rather than advances, the goals of sentencing.

C. Re-Assess and Adjust the Guidelines that Are Based on Mandatory Minimums.

We strongly support the Commission's proposal to issue a new report on mandatory minimum sentences, and urge the Commission to recommend to Congress that it abolish mandatory minimums. *See* Part III. In the meantime, the Commission should re-evaluate all of the guidelines that are based on mandatory minimum statutes, and amend them to ensure that they comply with the purposes of sentencing in the most fair, efficient and effective manner possible. USSG § 5G1.1(b) can operate in cases where the mandatory minimum exceeds the amended guideline range.

Kimbrough highlighted the fact that mandatory minimums have interfered with the Commission's development of rational and fair sentencing guidelines, as the Commission itself had already acknowledged.⁵⁹ Last year, the Criminal Law Committee of the Judicial Conference urged the Commission to assess and adjust the existing guidelines based on principles of parity, proportionality and parsimony, independent of any potentially applicable mandatory minimums.⁶⁰ The Judicial Conference has opposed mandatory minimums since 1953 -- because they "unnecessarily limit judicial discretion," "interfere with the operation of the Sentencing Reform Act," and "may, in fact, create unwarranted sentencing disparity."⁶¹ Further, guidelines that are based on nothing more than mandatory minimums provide no helpful advice in cases in which a mandatory minimum does not apply.⁶² The Criminal Law Committee therefore believes that the Commission is "obligated to make an independent assessment of what the appropriate sentence should be."⁶³

If the Commission is not prepared to re-assess and adjust the guidelines that are based on mandatory minimums now, it can at least reduce all of the drug guidelines by two levels. In promulgating the two-level reduction to the crack guidelines, the Commission acknowledged that it had contributed to the problem by unnecessarily setting the guideline range two levels above that required to include the mandatory minimum penalties at the two statutory quantity levels. *See* USSG, App. C, Amend. 706,

⁵⁹ "In some cases, the results of research and collaboration have been overridden or ignored in policymaking during the guidelines era through enactment of mandatory minimums or specific directives to the Commission." *Fifteen Year Review* at xvii.

⁶⁰ *See* Comments of the Criminal Law Committee of the Judicial Conference 4, 5 (March 16, 2007), http://www.ussc.gov/hearings/03_20_07/walton-testimony.pdf.

⁶¹ *Id.* at 3.

⁶² *Id.* at 4.

⁶³ *Id.* at 3.

Reason for Amendment (Nov. 1, 2007). This is true of all of the drug guidelines, and should be addressed.

We also support the Commission in continuing to urge Congress to eliminate the unwarranted disparity in sentencing between crack and powder cocaine offenders. See Part IV. However, we urge the Commission to reconsider its position that it cannot amend crack guideline penalties beyond the two-level reduction unless and until Congress creates a new ratio at the two mandatory minimum levels, particularly if Congress does not act quickly. First, Congress did not require the Commission to key guideline ranges to mandatory minimum penalties at the two statutory levels, or to extrapolate guideline ranges below, between and above those levels. See *Kimbrough v. United States*, 128 S. Ct. 558, 571-73 (2007). Second, as the Judicial Conference has pointed out, the Commission has an obligation under the Sentencing Reform Act to make its own assessment of the appropriate sentence, independent of mandatory minimum statutes, and to adjust the guidelines accordingly.⁶⁴ Third, the guidelines already take account of any mandatory minimum that is higher than the recommended guideline range through USSG § 5G1.1(b).

D. Alternatives to Incarceration

We welcome the Commission's proposal to consider alternatives to incarceration, and offer some ideas for implementing such alternatives in the guidelines. We also look forward to the public dissemination of the record of the "Symposium on Crime and Punishment in the United States: Alternatives to Incarceration" hosted by the Commission on July 14-15, 2008.

Through the Sentencing Reform Act, Congress directed the Commission to design a federal sentencing policy that "ensure[d] that prison resources are, first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society" while permitting "increased use of restitution, community service, and other alternative sentences" in all other cases.⁶⁵ Contrary to Congress's intent, the Guidelines make prison a potential sanction in every case, and the only sanction in the vast majority of cases. The result has been massive overcrowding in the federal prison system and exorbitant costs to taxpayers with no demonstrable increase in public safety.⁶⁶

⁶⁴ See *id.* at 3-5.

⁶⁵ See Pub. L. 98-473, § 239, 98 Stat. 1987, 2039 (1984) (emphasis added); see also 28 U.S.C. § 994(g) (the Guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons"); *id.* § 994(j) (Commission "shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" and the "general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury") (emphasis added).

⁶⁶ See, e.g., Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 339 (Oct. 2005).

This Commission is now poised to do what no other Commission has done – rectify the problems of over-incarceration caused by Guideline policies. The information presented at the Commission’s comprehensive Symposium on Alternatives to Incarceration confirmed Congress’s original finding, now twenty-four years old, that alternatives to prison for nonviolent and nonserious offenses serve “the interests of society as a whole, as well as individual victims of crime.”⁶⁷ It also confirmed the Commission’s own finding – reflected in numerous Commission-generated reports throughout the past two decades – that the Guideline system routinely calls for unnecessary incarceration.⁶⁸

Through this accumulation of research, culminating with its recent Symposium, the Commission has amassed a wealth of sound empirical support that it can now draw upon to refine the Guidelines’ approach to the question of whether and when a prison sentence – and only a prison sentence – will adequately serve the purposes of punishment. Federal courts around the country are already establishing programs that offer community-based alternatives to prison and encourage defendants’ successful reentry into society without guidance from the Commission. The Commission should encourage these efforts and foster further experimentation with programs that will serve both defendants and the public by simultaneously reducing recidivism and the heavy costs of unnecessary incarceration. We encourage the Commission to embrace Congress’s direction, take concrete steps in this cycle, and revise those guideline sections which are most at odds with current research and data concerning human behavior as it relates to the criminal justice process.⁶⁹

1. Expand the Availability of Alternative Sentences in the Guidelines Sentencing Table.

We can no longer afford to pretend that a penalty structure that ties the availability of alternatives to pre-determined Zones in the Sentencing Table serves the purposes of punishment. This fact was echoed time and again at the Symposium by representatives from all sectors of the criminal justice community. In the state systems, the ability to fashion a sentence based on empirical data regarding offense type, individualized offender characteristics, and need-based conditions has been crucial to reducing prison populations and costs while increasing public safety through reduced

⁶⁷ See Pub. L. 98-473, § 239, 98 Stat. 1987, 2039 (1984).

⁶⁸ See *Fifteen Year Review* at 47-49; USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 12-16 & Exs. 9-11 (May 2004); USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* (1996); USSC, Alternatives to Imprisonment Project, *The Federal Offender: A Program of Intermediate Punishments* (Dec. 28, 1990).

⁶⁹ See 28 U.S.C. §§ 991(b)(1)(C), 994(f).

crime rates, arrests and revocations. In the problem solving courts in the federal system, the same flexible, individualized approach has worked on the back end to ensure that those offenders with a high recidivism risk successfully reenter society and do not return to prison.

Through the experience of states like Washington, Pennsylvania, Virginia, Texas, New York, and Maryland, and federal districts like Massachusetts, Oregon, Utah, the Western District of Michigan, the Western District of Philadelphia, and the Eastern District of Missouri (to name just a few of the jurisdictions represented at the Symposium), we know that there are many non-prison options that better serve the purposes of just punishment, incapacitation, deterrence and rehabilitation. As but one example, the Washington State Institute for Public Policy has issued a "Consumer Reports"-type analysis of the benefits in crime reduction and cost savings of over 70 different types of alternative sanctions.⁷⁰ Each of the jurisdictions represented at the Symposium has demonstrated through experience that the best way to ensure success in every case is to establish a sentencing system that is sufficiently flexible to address the specific needs of each offender.

Given this universal experience, it is a mistake to attempt to limit and control (except in broad strokes) whether and when courts can impose alternative sentences. The guidelines closely link the availability of alternatives to the offense level, and to a lesser extent, the criminal history category, even though these measures do not reflect the considerations that judges have traditionally employed to decide if prison is necessary and beneficial for a particular defendant. The guidelines zones do not address an offender's amenability to treatment, the availability of treatment options in the community that are not found in prison, or the impact of incarceration on the defendant's employment, family, or health. In short, the guidelines fail to provide useful guidance to judges regarding which defendants can be safely, effectively, and sufficiently punished with a non-prison punishment, and which defendants for whom prison is "necessary."

In addition to placing limitations on who can receive alternative sentences, the Guidelines arbitrarily limit the types of alternatives judges can consider. By statute, probation is generally available to any defendant convicted of a Class C felony or less, meaning any crime punishable by less than 25 years; under the Guidelines, it is available only for those with a sentencing range of 1 year or less.⁷¹ And although courts are

⁷⁰ See Washington State Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (Oct. 2006).

⁷¹ Compare 18 U.S.C. § 3561 with USSG Ch. 5, Pt. A & § 5C1.1(c)(3). Under the Guidelines, only those few defendants who face a maximum of six months in prison and thus fall within Zone A can receive a straight probation sentence, meaning a sentence without any type of confinement, despite the fact that confinement for certain types of low-level offenders has been empirically shown to increase recidivism risk. Compare USSG § 5C1.1(b)-(d) with USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 13 & Ex. 12 (May 2004). The court cannot sentence Zone B defendants to probation unless the sentence requires community confinement or home detention, and a supervised release sentence requires at least one month incarceration. See USSG § 5C1.1(c)(3). Zone C defendants must

statutorily authorized to impose on probationers such beneficial conditions as treatment, community service, fines and restitution, only probation with a condition of intermittent confinement, community confinement or house arrest is acceptable under the Guidelines for defendants subject to a sentencing range of between 6 and 12 months (Zone B defendants), while those subject to a range of more than 12 months are excluded from receiving a probation sentence altogether.⁷²

The Commission should revise the Guidelines' cramped approach to non-prison alternatives in favor of a more flexible approach that permits courts to tailor probationary conditions to fit the needs of any particular offender. It can do this without further complicating the Manual by simply removing the Zones altogether and revising USSG § 5C1.1 to permit probation and supervised release for nonviolent and nonserious offenders with whatever conditions the court finds appropriate in light of § 3553(a). Standard release conditions that are currently ignored by § 5C1.1, such as restitution, community service, electronic monitoring, intensive supervision, day reporting, substance abuse or mental health treatment, and the like, can be added to either the guideline or its commentary to provide guidance to the court on the types of sanctions available.⁷³ Further guidance could be provided by including examples of offenses and types of offenders who statistically tend to benefit from particular types of sanctions (e.g., residential substance abuse treatment for substance abusers, mental health treatment for the mentally ill, etc.). To the extent the data suggests non-prison sentences are inappropriate for certain offenders, such as truly violent offenders who need to be incapacitated, the commentary can so advise the courts.

Removing the artificial lines drawn by the Zones in favor of rational guidance based on empirical evidence serves the interests of simplicity and efficiency, in addition to allowing for more effective, humane and rational sentences. The guideline ranges themselves would not need to be adjusted, nor would the criminal history categories. A guideline range of 30-37 months for a drug offender, for example, would remain but could be satisfied, when appropriate, by a sentence of 24 months in a residential treatment program, 6 months in community or home confinement, and 6 additional months of supervised probation. Additional conditions, such as community service, restitution, or electronic monitoring could be added where necessary to serve the purposes of punishment and ensure the safety of the community. At the very least, the Commission should collapse the Zones to make all defendants in Zones A-C eligible for

serve at least half of their sentences in prison before supervised release can begin, and probation is not permitted at all. *Id.* at § 5C1.1(d).

⁷² Compare 18 U.S.C. § 3563(b) with USSG § 5C1.1(c)(3), (d).

⁷³ We urge caution with respect to GPS monitoring as a non-prison alternative. A panelist at the Symposium indicated that web-based GPS monitoring data has been made accessible to local law enforcement personnel for prosecutorial purposes. Another panelist pointed to research showing that GPS monitoring may be "dysfunctional" for low risk offenders. The impact on privacy and efficacy must be analyzed with care.

the full panoply of non-prison sentences currently available by statute, and should conduct studies to determine which Zone D defendants should also be eligible for such sanctions, for example, those defendants who were not convicted of a crime of violence that resulted in serious bodily injury. *Accord* 28 U.S.C. § 994(j).

We are eager to work with the Alternatives Working Group to develop specific language that would permit courts the necessary flexibility to craft non-prison sentences in appropriate cases and, in so doing, to better ensure public safety both during and after the supervisory period.

2. Amend Chapter Five To Add a "First Offender Safety Valve" Provision.

In addition to removing the artificial Zones in the Sentencing Table, the Defenders join the Practitioners Advisory Group in recommending that the Commission amend Chapter Five to add a "first offender safety valve, which" would operate similarly to § 5C1.2.⁷⁴ This would achieve § 994(j)'s mandate to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" in a simpler, more effective way than tinkering with the criminal history categories or otherwise further complicating the Sentencing Table.

3. Amend Chapter Five To Encourage Specific Alternative Sanctions and Programs That Have Been Proven To Decrease Recidivism Risk.

Part F of Chapter Five currently provides only four alternative sentencing options for courts to consider: community confinement, home detention, community service, and shock incarceration. Of those options, shock incarceration is no longer available through BOP, and the Manual places restrictions on the other three. We recommend that the Commission amend Part F by deleting the first two sentences of Application Note 2 to § 5F1.1, which recommend that the court limit community confinement to no more than 6 months unless necessary to accomplish a specific rehabilitative program, deleting Application Note 1 to § 5F1.3, and expanding the availability of alternative sentencing options as discussed in subpart 1, *supra*. In addition, the Commission should recognize that fines and restitution can be punishing sanctions and allow them to offset any prison time that is necessary to ensure proportionate punishment, as is currently possible with other alternatives under §5C1.1(e).

4. Amend Chapter Seven to Recognize and Encourage a Defendant's Participation in Reentry Programs.

The Commission should also amend Chapter 7 to make clear that:

⁷⁴ See July 23, 2008 Letter from Practitioners Advisory Group to U.S. Sentencing Commission at 4-6.

- Before revoking or terminating any term of supervised release, the court should consider whether the purposes of sentencing would be served by requiring the defendant to participate in a court-approved post-sentence reentry program.
- In determining whether to impose a term of imprisonment for a violation of supervised release conditions, the court should consider the availability of alternatives to incarceration.

5. Recommend That the Bureau of Prisons Revise Its Policies to Address the Problem of Over-Incarceration.

Finally, we urge the Commission to recommend that the Bureau of Prisons revise its policies that conflict with federal sentencing policy as reflected in statutes or the Guidelines and, if BOP refuses, to promulgate appropriate policy statements recommending compensatory reductions at sentencing. The Commission is empowered to take these actions pursuant to its authority under 28 U.S.C. § 991(b)(2) to develop means of measuring the degree to which sentencing, penal and correctional practices are effective in meeting the purposes of sentencing set forth in § 3553(a)(2), as well as its obligations under 28 U.S.C. § 994(g) & (q) to make recommendations to BOP that may become necessary as a result of the Guidelines, to minimize prison overcrowding, and to analyze and recommend the maximum utilization of resources to deal effectively with the Federal prison population. Those BOP policies that should be revised include:

- Its practice of awarding good time credits at a rate of 12.8% of the sentence imposed instead of the 15% rate the Commission used when constructing the Sentencing Table;
- Its refusal to provide a mechanism for meaningfully implementing USSG § 1B1.13's policy on sentence reductions for "extraordinary and compelling circumstances;"
- Its unilateral discontinuation of the federal boot camp despite its express inclusion as a sentencing option under USSG § 5F1.7;
- Its failure to implement the Residential Drug and Alcohol Program consistent with 18 U.S.C. § 3621, USSG § 4A1.1 and Commission studies on recidivism;
- Its sentence computation policies, which conflict with 18 U.S.C. §§ 3584 & 3585 and USSG § 5G1.3; and

- Its refusal to revise its community corrections policies as contemplated by 18 U.S.C. §§ 3621 & 3624, as amended by the Second Chance Act.⁷⁵

Once again, we commend the Commission for its interest in alternatives to imprisonment and look forward to working with the Commission as it seeks to better integrate these alternatives into the federal guidelines sentencing system.

II. Correcting the Manual to Accurately Reflect Current Law

Consistent with the Commission's intention to continue its work on federal sentencing policy in light of *Booker* and subsequent Supreme Court decisions, the Commission should act quickly to revise the Manual to accurately reflect those decisions.

A. USSG § 1A1.1, "Continuing Evolution and Role of the Guidelines"

The Commission should amend the soon-to-be-effective commentary in USSG § 1A1.1, entitled "Continuing Evolution and Role of the Guidelines," so that it honestly reflects both the vitality of the guidelines and the courts' role in their constructive evolution. The commentary, which was not the subject of public notice and comment,⁷⁶ identifies two related themes in the decisions: first, that the guidelines are the product of a deliberative process that seeks to embody the purposes of sentencing and as such

⁷⁵ Each of these issues is discussed extensively in Stephen R. Sady & Lynn Deffebach, *The Sentencing Commission, the Bureau of Prisons and the Need for Full Implementation of Existing Ameliorative Statutes to Address Unwarranted and Unauthorized Over-Incarceration* (June 2008), which was included in the Commission's materials from the Alternatives to Incarceration Symposium. For efficiency, this letter incorporates that article by reference.

⁷⁶ Although Rule 4.3 of the Rules of Practice and Procedure currently permits the Commission "to promulgate commentary and policy statements, and amendments thereto, without regard to provisions of 28 U.S.C. § 994(x)," we again urge the Commission to provide notice and comment with respect to commentary, policy statements and amendments thereto. While there may have been a rationale for treating commentary and policy statements differently from guidelines in the past, there is no reason to do so post-*Booker*, as the guidelines, commentary and policy statements are all advisory and should be viewed and treated consistently by the Commission.

In the commentary to § 1A1.1, the Commission credits the notice and comment requirement with bolstering its ability to take into account fully the purposes of sentencing when promulgating guidelines. Surely, providing notice and soliciting comment with respect to commentary which seeks to explain so critical an issue as the role of the guidelines in federal sentencing as a result of landmark Supreme Court decisions would similarly bolster the Commission's ability to provide a more balanced and helpful assessment of the impact of the decisions. As the Commission has said previously, "because the Commission values public input, the Commission traditionally attempts to solicit public comment, even when not required to do so." See USSC, *Report to the Congress: MDMA Drug Offenses, Explanation of Recent Guideline Amendment*, at 4 (May 2001).

continue to play an important role in the sentencing court's determination of an appropriate sentence; and second, that the guidelines are evolutionary in nature.

The commentary fails to provide an accurate and balanced account of the Supreme Court's decisions. First, it inaccurately suggests that the Supreme Court's cases set forth a three-step sentencing procedure in which the court considers the guideline range first, policy statements regarding departure second, "and then the factors under 18 U.S.C. § 3553(a)," as if the governing statute were some sort of afterthought. There is no such three-step procedure to be found in the Court's decisions, and the Court made perfectly clear that the "Guidelines are only one of the factors to consider when imposing sentence," *Gall v. United States*, 128 S. Ct. 586, 602 (2007), that the Guidelines, "formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence," *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007), and that "[t]he statute, as modified by *Booker*, contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to achieve the goals of sentencing." *Id.* at 570.

In *Gall*, the Court set out a very different three-step procedure: First, "begin all sentencing proceedings by correctly calculating the applicable Guidelines range." Second, "after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." Third, the judge should explain. *Gall*, 128 S. Ct. at 596-97. Moreover, in *Gall*, the Court made no mention of the Commission's policy statements regarding departure, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by those policy statements.

At page 2465 of *Rita*, which the commentary cites for the Commission's three-step procedure, the Court did not describe that three-step procedure but instead listed departures as one of several possible arguments for a non-guideline sentence:

The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines. 18 U.S.C. § 3553(a); Fed. Rule Crim. Proc. 32. He may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the "heartland" to which the Commission intends individual Guidelines to apply, USSG § 5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless.

Rita v. United States, 127 S. Ct. 2456, 2465 (2007).

In sum, policy statements regarding departure are not a second step of the sentencing procedure. They are merely one argument the court may consider, if made. They are not considered in every case, and they are not necessarily considered even when

their subject matter applies to the offense or offender, as demonstrated in *Gall*. They certainly do not take precedence over § 3553(a)(1), (a)(2) or (a)(3). We urge the Commission to replace this inaccurate slant on the Supreme Court's decisions with what the Court actually said.

Second, the commentary entirely ignores the most important feature of the Court's recent sentencing jurisprudence, *i.e.*, those aspects of the Court's decisions which invite a critical assessment of the guidelines and which are intended to assist in the evolution of the guidelines. It fails to note that judges may impose a sentence outside the recommended guideline range even in a "mine run" case when the judge determines that a non-guideline sentence better complies with § 3553(a). This may occur, for example, when the court determines that the guideline represents an "unsound judgment" based "solely on policy considerations, including disagreements with the Guidelines." *Rita*, 127 S. Ct. at 2468; *Kimbrough*, 128 S. Ct. at 570. It should be noted that the possibility of imposing a sentence outside the recommended range in these circumstances is what preserves the constitutionality of the now-advisory guidelines and is thus a crucial feature of the new system.⁷⁷ It certainly seems desirable to acknowledge, rather than omit, this constitutional reality within the *Guideline Manual*.

As the rationale for permitting a presumption of reasonableness on appeal, for the guidelines being the starting point and initial benchmark, and for requiring careful consideration of the extent of a variance, the Court said that the guidelines were *generally* based on empirical evidence of past practice and that they *can* evolve in response to court decisions and input from stakeholders.⁷⁸ However, this account of guideline development reflects the ideal envisioned in the SRA, and not necessarily the reality with respect to a given guideline. "Notably, not all of the Guidelines are tied to this empirical evidence. For example, the Sentencing Commission departed from the empirical approach when setting the Guideline range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes." *Gall*, 128 S. Ct. at 594 n.2. While "[i]n the main, the Commission

⁷⁷ See *Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007) (system that does not permit judges to sentence above a recommended range based on "general objectives of sentencing" alone without a "factfinding anchor" violates the Sixth Amendment.).

⁷⁸ As the rationale for permitting, but not requiring, a presumption of reasonableness on appeal, the court said that it was "fair to assume" that the guidelines reflect a "rough approximation" of sentences that "might achieve 3553(a) objectives" because original Commission used an "empirical approach" based on "past practice" and the guidelines "can" evolve in response to non-guideline sentences and input from practitioners and experts. *Rita*, 127 S. Ct. at 2464-65. As the rationale for requiring "that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate," the Court said that the guidelines are the product of "careful study" based on "extensive evidence" derived from "thousands" of pre-guideline sentences. *Gall*, 127 S. Ct. at 594. And, as the rationale for the guidelines being the starting point and benchmark, the Court said that the Commission has the "capacity" to base the guidelines on "empirical evidence and national experience." *Kimbrough*, 128 S. Ct. at 574.

developed Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports," it "did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses." *Kimbrough* at 567. When a guideline is not the product of "empirical data and national experience," it is not an abuse of discretion to conclude that it fails to achieve the § 3553(a)'s purposes, even in "a mine-run case." *Id.* at 575.

The commentary not only ignores this important aspect of the Supreme Court's decisions and its impact on sentencing and the evolution of the guidelines, but unjustifiably suggests that the decisions affirm the guidelines' central role in sentencing. For example, the commentary cites *Rita* for the proposition that the guidelines remain an important part of sentencing because they "seek to embody the § 3553(a) considerations." However, it fails to explain that, in *Rita* itself, as well as in *Gall* and *Kimbrough* as noted above, the Court expressly recognized that the guidelines do not always embody the § 3553(a) considerations. *Rita*, 127 S. Ct. at 2465, 2468 (district court may conclude that the guideline sentence fails to reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way).

While it is understandable that the Commission may be uncomfortable acknowledging that judges may now critically review its judgments and find them unsound, this review is a crucial element in the ongoing revision of the guidelines, as anticipated by the Court. The appellate presumption of reasonableness of a within-guideline sentence permitted by *Rita* explicitly does not allow courts of appeals to afford "greater factfinding leeway to [the Commission] than to [the] district judge." *Id.* at 2463. Challenges to guideline recommendations can generate testimony, findings and other information that the Commission can use in its ongoing review and revision of the guidelines. These challenges should at least be acknowledged, and preferably encouraged, to ensure adequate feedback and healthy evolution of the guidelines system.

To this end, the commentary should include the Supreme Court's holdings that "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines," *Kimbrough*, 128 S. Ct. at 570, that courts must consider arguments by either party "that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way," *Rita*, 127 S. Ct. at 2468, and that when the guidelines at issue in the case "do not exemplify the Commission's exercise of its characteristic institutional role," it is not an abuse of discretion for the judge to conclude that they "yield[] a sentence 'greater than necessary' to achieve §3553(a)'s purposes, even in a mine-run case." *Kimbrough*, 128 S. Ct. at 575.

Third, the commentary provides an incomplete description of appellate review by including only the guidelines and extent of variance as issues for review, while omitting all other potential procedural errors (treating the guidelines as mandatory, failing to consider the purposes and factors set forth in § 3553(a), selecting a sentence based on clearly erroneous facts, and failing to explain the sentence whether inside or outside the guideline range) and omitting the deference that is due the district court's decision as to

the extent of any variance and the fact that no special deference is due based on the uniqueness of the case. The Court described appellate review as follows:

Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. . . . It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. . . . The uniqueness of the individual case . . . does not change the deferential abuse-of-discretion standard of review that applies to all sentencing decisions.

Gall, 128 S. Ct. at 597-98 (emphasis supplied). We urge the Commission to include the italicized language.

Fourth, the commentary inaccurately suggests that Congress can impose mandatory sentencing practices on the courts by issuing specific directives to the Commission: "Congress retains the authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines." To support this proposition, the commentary takes out of context a passage from *Kimbrough*: "As the Supreme Court noted in *Kimbrough v. United States*, 128 S. Ct. 558, 571 (2007), 'Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders 'at or near' the statutory maximum. See 28 U.S.C. § 994(h)." The full quotation from *Kimbrough* is as follows: "Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders 'at or near' the statutory maximum. 28 U.S.C. § 994(h)." *Kimbrough*, 128 S. Ct. at 571. The Court's comment addressed the government's argument that the Anti-Drug Abuse Act "implicitly" required the Commission to write guidelines corresponding to the statutory mandatory minimums and extrapolating below, between and above those two levels, and explained that there was no congressional directive to the Commission to do so.

When Congress directs the Commission to promulgate or amend a guideline, even in express terms, the resulting guideline is *not* a mandate to the courts but one factor for the courts to consider under § 3553(a). The courts have so found in a variety of contexts,⁷⁹ and even the Department recognizes as much.⁸⁰ If it were otherwise, the separation of powers problem that most troubled the Court in *Mistretta* would arise:

We are somewhat more troubled by petitioner's argument that the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch. . . . The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.

Mistretta v. United States, 488 U.S. 361, 407 (1989).

Moreover, the suggestion that Congress can mandate sentences by acting through the Commission is at odds with the Commission's role as an independent expert body, as well as the Commission's opposition to mandatory minimum statutes. The Commission should remove this inaccurate and problematic suggestion.

B. Provisions Relating to "Departures"

Many of the departure provisions in the Manual are not consistent with current law, nor do we believe they are a good idea. Sentencing is needlessly complicated if the

⁷⁹ *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (career offender); *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008) (fast track); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008) (career offender); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008) (career offender); *United States v. Marshall*, slip op., 2008 WL 55989 at **8-9 (7th Cir. Jan. 4, 2008) (career offender); *United States v. Moreland*, slip op., 2008 WL 904652 (S.D. W. Va. Apr. 3, 2008) (career offender); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008) (career offender); *United States v. Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008) (child pornography); *United States v. Shipley*, __ F. Supp. 2d __, 2008 WL 2470001 (S.D. Iowa June 19, 2008) (child pornography); *United States v. Hanson*, __ F. Supp. 2d __, 2008 WL 2486336 (E. D. Wis. June 20, 2008) (child pornography); *United States v. Rausch*, __ F. Supp. 2d __, 2008 WL 3411819 (D. Colo. Aug. 13, 2008) (child pornography).

⁸⁰ Brief of the United States at 29, *Kimbrough v. United States* ("As long as Congress expresses its will wholly through the Guidelines system, the policies in the Guidelines will best be understood as advisory under Booker and subject to the general principles of sentencing in section 3553(a)."); Letter Stating the Government's Position on the Career Offender Guideline, docketed March 17, 2008, *United States v. Funk*, No. 05-3708, 3709 (6th Cir.) ("position of the United States" is that "*Kimbrough's* reference to [§ 994(h)] reflected the conclusion that Congress intended the Guidelines to reflect the policy stated in Section 994(h), not that the guideline implementing that policy binds federal courts.") (emphasis in original), available at http://www.fedlib.org/pdf/lib/Funk_aua_Letter.pdf.

court feels compelled to examine restrictive policy statements regarding departures first before moving on to § 3553(a), which then overrides the restrictions. In addition, the restrictions potentially stifle feedback from the courts. We believe that the best solution is to delete all of the prohibitions, restrictions and limitations on departure, and possibly move them to a Historical Note.

However, we recognize that the Commission may not be willing or able to do this at the present time, and so we propose specific changes to correct what is now incorrect in the Manual. As we have previously proposed, the Commission should remove from USSG § 5K2.0 all references to 18 USC § 3553(b),⁸¹ given that it has been excised by the Supreme Court in *Booker*.⁸² In addition, the Commission should revise other portions of the Manual in order to make clear that the Commission's departure standards are relevant only to a decision to "depart," and do not control the sentencing court's discretion to sentence outside the guideline range.⁸³ These specific proposed amendments are set forth in Appendix A to this Memorandum.

The Supreme Court has recognized that a "departure" is one kind of outside-guideline sentence that judges can impose, *see Rita*, 127 S. Ct. at 2468, and also that "departure" is a "term of art" applicable to a "narrow category of cases" authorized by the now-excised § 3553(b). *Irizarry v. United States*, 128 S. Ct. 2198, 2202 (2008). The data show that "departures" are still being imposed, but that their rate is shrinking. For example, in FY 2004, 5.2% of sentences were non-government-sponsored below-guideline sentences, all of which at the time were downward "departures." *See* USSC, 2004 Sourcebook, Table 26A. In the first two quarters of FY 2008, there were only 3.3% non-government-sponsored downward "departures," and 9.4% non-government-sponsored below-guideline sentences not categorized as "departures." *See* USSC, Quarterly Data Report, Table 1 (March 31, 2008). This data confirms anecdotal evidence we have received from Defenders in many districts — that after *Booker*, *Gall* and *Kimbrough*, many courts are dispensing with the "departure" analysis even when a

⁸¹ *See* Letter from Jon M. Sands to Hon. Ricardo H. Hinojosa Regarding Proposed Priorities 2007-2008, at 4 (July 9, 2007).

⁸² The Supreme Court explicitly excised subsection (b)(1), but the lower courts have held that subsection (b)(2) was implicitly excised as well. *See United States v. Hecht*, 470 F.3d 177, 181 (4th Cir. 2006); *United States v. Shepherd*, 453 F.3d 702, 704 (6th Cir. 2006); *United States v. Jones*, 444 F.3d 430, 441 n. 54 (5th Cir. 2006); *United States v. Grigg*, 442 F.3d 560, 562-64 (7th Cir. 2006); *United States v. Selioutsky*, 409 F.3d 114, 116-18 (2d Cir. 2005); *United States v. Yazzie*, 407 F.3d 1139, 1145-46 (10th Cir. 2005) (en banc).

⁸³ *See, e.g., United States v. Davis*, ___ F.3d ___, 2008 WL 3288384, at *6 (6th Cir. 2008) (while true that age is "not ordinarily relevant" under § 5H1.1, the court must consider the "history and characteristics of the defendant" under § 3553(a)(1)); *United States v. Limon*, 273 Fed. Appx. 698 (10th Cir. Apr. 3, 2008) ("Consequently, § 5H1.3 clearly applies to departures and not to a variance under 18 U.S.C. § 3553(a), which is at issue here."); *United States v. Myers*, 503 F.3d 676, 685-86 (8th Cir. 2007) (upholding variance based on mental condition though departure not warranted under § 5K2.13).

“departure” may be warranted. Indeed, some circuits have held that the departure concept is “obsolete” or that it has little force.⁸⁴ Nonetheless, departures are still being imposed in some cases.

Although departures still have a role in sentencing, prohibitions, restrictions and limitations on the factors judges may consider in sentencing that were devised in the pre-*Booker* era are not consistent with current Supreme Court law.⁸⁵ Several provisions remain that indicate that such prohibitions, restrictions and limitations apply beyond the narrow category of “departures.” Under current law, however, the judge must consider the characteristics of the defendant and the circumstances of the offense in reaching an appropriate sentence, despite the fact that the Commission may have prohibited, discouraged or limited consideration of such factors for “departure” or any other purpose.⁸⁶ This principle was demonstrated in practice in *Gall v. United States*, 128 S. Ct. 586 (2007). There, the Court upheld a non-guideline sentence in which the judge imposed a sentence of probation based on circumstances of the offense and characteristics of the defendant which the guidelines’ policy statements prohibit, *i.e.*, voluntary withdrawal from a conspiracy,⁸⁷ or deem “not ordinarily relevant,” *i.e.*, age and immaturity, and self rehabilitation through education, employment, and discontinuing the use of drugs.⁸⁸ *Gall*, 128 S. Ct. at 598-602. In approving the factors upon which the judge relied, the Court made no mention of these policy statements whatsoever.

Thus, while departures are *allowed*, as the Court said in *Rita*, it is not permissible to *deny* a request for an outside-guideline sentence because a policy statement prohibits or discourages departure (or a sentence otherwise outside the guideline range) on that

⁸⁴ See *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005); *United States v. Arnaout*, 431 F.3d 994 (7th Cir. 2005); *United States v. Mohamed*, 477 F.3d 94 (9th Cir. 2006); *United States v. Toliver*, 183 Fed. Appx. 745 (10th Cir. 2006).

⁸⁵ The following provisions prohibit downward departure under all or some circumstances: USSG §§ 4A1.3(b)(2)(A), 4A1.3(b)(2)(B), 5H1.4, 5H1.7 & 5K2.0 (d)(3), 5H1.10, 5H1.12, 5K2.0(b), 5K2.0(c), 5K2.10, 5K2.12, 5K2.19, 5K2.0(d)(2), 5K2.0(d)(4), 5K2.0(d)(5), 5K2.13, 5K2.16, 5K2.20. The following provisions deem certain factors “not ordinarily relevant” for downward departure: USSG §§ 5H1.1, 5H1.2, 5H1.3, 5H1.4, 5H1.5, 5H1.6, 5H1.11, 5K2.10, 5K2.12. USSG § 4A1.3(b)(3) limits the extent of downward departure.

⁸⁶ See *Rita*, 127 S. Ct. at 2473 (Although various factors are “not ordinarily considered under the Guidelines,” § 3553(a)(1) “authorizes the sentencing judge to consider” these factors and “an appellate court must consider” them as well) (Stevens, J., concurring).

⁸⁷ While voluntary withdrawal from a conspiracy is a factor that may be considered in determining whether to grant a two-level reduction for acceptance of responsibility, see USSG § 3E1.1, comment. (n.1(b)), acceptance of responsibility is a prohibited ground for departure. See USSG § 5K2.0(d)(2).

⁸⁸ See USSG §§ 5H1.1, 5H1.2, 5H1.4, 5H1.5.

basis. This is a necessary corollary of the Court's decision, on constitutional grounds, to make the guidelines advisory. *United States v. Booker*, 543 U.S. 220, 233-34 (2005).

The Commission can and should act quickly to revise the Manual to reflect the fact that § 3553(b) has been excised and to make clear that departure standards only apply to the question whether to grant a departure, and not to any other consideration in the sentencing decision. Again, our specific proposals are set forth in Appendix A.

C. USSG § 1B1.10(b)(2)(B), p.s.

The second sentence of subsection (b)(2)(B) of revised § 1B1.10, p.s., bolded below, should be deleted. Subsection (b)(2)(B) reads as follows:

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. **However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.** (emphasis supplied)

This sentence has created confusion, and nothing the Commission has said in explanation has dispelled it. On its face, subsection (b)(2)(B) says that a defendant who received a "departure" at his first sentencing may receive a comparable reduction from the amended guideline range, but a defendant who received a below-guideline sentence as authorized by the Supreme Court and the controlling sentencing statute "generally" should not. One court has read it to mean that if a variance was imposed at the original sentencing, a further reduction is simply "not appropriate." See *United States v. Estevez*, slip op., 2008 WL 3200832 (D.R.I. Aug. 7, 2008).

Understandably, this provision has been perplexing to judges and practitioners. Further, it invites unwarranted disparity, as the sentence would depend on whether the judge labeled the sentence a departure or a sentence pursuant to *Booker* and § 3553(a).

The explanations the Commission has given, when asked, are difficult to understand. One explanation was that the sentence refers to when a judge does not consider the guideline range "at all," but judges must consider the guideline range and to do otherwise is reversible error. *Gall*, 128 S. Ct. at 596; *Kimbrough*, 128 S. Ct. at 564, 570; *Rita*, 127 S. Ct. at 2465, 2468; *Booker*, 543 U.S. at 245-46. Another, slightly different, explanation was that it refers to a situation where the judge did not "peg" the variance to the guideline range. While judges must consider the extent of a variance and give a reason that supports it, they may not be required to use mathematical formulas or percentages. *Gall*, 128 S. Ct. at 595, 597. Both explanations suggest that judges "generally" do not follow the law when imposing outside guideline sentences other than

departures. The second explanation also suggests that judges should do what *Gall* says they may not be required to do.

The Commission could not have intended these meanings, but we remain at a loss as to what it did mean. The second sentence of § 1B1.10(b)(2)(B), p.s. should be deleted.

D. USSG § 6A1.3, p.s.

This policy statement is in need of revision to ensure fair notice of the facts relevant to sentencing, and accurate resolution of those facts, consistent with current Supreme Court decisions, rules of criminal procedure, and statutes.

First, the first paragraph of the commentary to § 6A1.3, p.s., should be updated to include relevant principles from *Rita*, *Irizarry*, and circuit caselaw correctly applying those decisions. See *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) (“the sentencing court subjects the defendant’s sentence to the thorough adversarial testing contemplated by federal sentencing procedure”); *Irizarry v. United States*, 553 U.S. ___, 128 S. Ct. 2198, 2203-04 (2008) (the court should “withhold [its] judgment until after the parties have had a full opportunity to present their evidence and their arguments,” and “make sure that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made.”). See also, e.g., *United States v. Pena-Hermosillo*, 522 F.3d 1108, 1116 (10th Cir. 2008) (parties must be given an “adequate” opportunity to present relevant information to the court,” and holding that it was an abuse of discretion to decide a disputed question of fact against a party without giving that party an opportunity to present evidence on the issue, citing *Rita*); *United States v. Langford*, 516 F.3d 205, 213 (3d Cir. 2008) (courts must subject each sentence to thorough adversarial testing and must give reasons for the sentence, citing *Rita*); *United States v. Warr*, 530 F.3d 1152, 1162-63 & n.8 (9th Cir. 2008) (district court erred in “failing to provide Warr with any notice whatsoever before relying on [a recidivism] study” and “should have notified Warr of it before the sentencing hearing,” because the study “amounted to relevant and factual information” and was “[o]ne of the reasons the district court sentenced Warr to a term well beyond the guidelines range,” citing *Irizarry*).

Second, the “sufficient indicia of probable accuracy” standard should be removed from the policy statement itself, and from the second paragraph of the commentary, because it comes from the pre-guidelines era when factual accuracy was of very little moment. The “probable accuracy” standard first appeared in the guidelines in 1987, where it was quoted directly from a 1981, pre-guidelines, district court case. See 52 Fed. Reg. 18,046, 18,054 (May 13, 1987) (quoting *United States v. Marshall*, 519 F.Supp.751 (D. Wis. 1981), *aff’d*, 719 F.2d 887 (7th Cir. 1983)). While the commentary cites *United States v. Watts*, 519 U.S. 148, 157 (1997), for the proposition that “[a]ny information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy,” this proposition does not in fact appear in *Watts*.

In the pre-guidelines era, the judge was not required to find or give any weight to any facts in imposing sentence, and could impose sentence "giving no reason at all." *Williams v. New York*, 337 U.S. 241, 248-49, 252 (1949). In *Williams* itself, the defendant did not attempt to challenge the accuracy of the allegations or ask the judge to disregard them. *Id.* at 244. In that context, the Supreme Court held that a judge could rely on "out-of-court" sources without offending due process. *Id.* at 248, 252. We now have a system in which the guidelines, while advisory, must still be calculated and considered. The relevant facts in support of any sentence must undergo thorough adversarial testing and judges must give reasons for their sentences, whether inside or outside the guideline range. Whether or not this is required by due process, it is sound practice according to the Supreme Court, Rule 32 and § 3553(c). See *Rita*, 127 S. Ct. at 2465, 2468-69; *Irizarry*, 128 S. Ct. at 2203-04. The "sufficient indicia of probable accuracy" standard is inconsistent with current law.

Third, cases that are outdated and/or do not stand for the propositions for which they are cited should be removed from the second paragraph of the commentary. This paragraph relies heavily on *Watts*, *Witte v. United States*, 515 U.S. 389 (1995), and *Nichols v. United States*, 511 U.S. 738 (1994), for the general proposition that courts may rely on information without regard to admissibility and without procedural protections. That was not the holding of any of these cases. To the extent they mentioned lax procedural principles that were "traditionally" allowed, they cited the pre-guidelines *Williams* case. The commentary mis-cites these cases in support of applying a pre-guidelines procedural regime in a post-guidelines era. They should be deleted.

Watts and *Witte* should be removed because they simply do not stand for any proposition affecting procedural fairness or accuracy in the resolution of disputed facts, the topic addressed by this policy statement. The majority in *Booker* emphasized that both cases were decided under the Double Jeopardy Clause, and that "*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 & n.4.

Watts, 519 U.S. at 154 is also cited for the proposition that the "lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct." This is inaccurate because the Court did not hold that acquitted conduct could be used at sentencing *because* of the preponderance standard, nor did it issue any holding regarding the preponderance standard. The Court noted that the *Guidelines* state that the preponderance standard is appropriate, that the Court itself had held that the preponderance standard generally satisfies due process *in other contexts*, that there was a divergence of opinion on this among the circuits in cases under the federal sentencing guidelines, and that it was not addressing the issue. *Id.* at 156-57. As Justice Breyer accurately described it, the guidelines' treatment of acquitted conduct merely "rests upon the logical possibility that a sentencing judge and a jury, applying different evidentiary standards, could reach different factual conclusions." *Watts*, 519 U.S. at 159 (Breyer, J., concurring). To say that it is possible to reach different results depending on the standard

of proof is quite different from saying that the "lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct."

Fourth, we again urge the Commission to delete the last paragraph of the commentary, as the standard of proof required by the Due Process Clause is a matter for the courts, not the Commission.

III. Study of Statutory Mandatory Minimum Statutes, Recommendation to Congress to Abolish Mandatory Minimums

Seventeen years ago, the Commission led the way in showing that mandatory minimums result in unduly severe sentences, transfer sentencing power directly from judges to prosecutors, and result in unwarranted disparity and unwarranted uniformity.⁸⁹ Since then, only more evidence demonstrating that mandatory minimum statutes require sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense and racially discriminatory, has accumulated.⁹⁰ Further, several judges and appeals courts recently have found mandatory minimums to be cruel and irrational even if not unusual by Eighth Amendment standards, and have highlighted the problems of prosecutorial power over sentencing that mandatory minimum statutes confer.

In its *Fifteen Year Review*, the Commission detailed many of these problems with support from many sources, including a study by the Department of Justice, showing "that mandatory minimum statutes [are] resulting in lengthy imprisonment for many low-level, non-violent, first-time drug offenders."⁹¹ By virtue of mandatory minimums, sentences for similarly situated offenders vary dramatically depending on the disparate charging and plea bargaining decisions of individual prosecutors,⁹² and such decisions

⁸⁹ See USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress* (1991).

⁹⁰ *Fifteen Year Review* at 135; Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 3, 12 (June 26, 2007); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); Leadership Conference on Civil Rights, *Justice on Trial* (2000); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199 (1993); *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment).

⁹¹ See *Fifteen Year Review* at 51 (citing U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994)).

⁹² *Fifteen Year Review* at 84-85, 89-91, 102-04, 106, 141-42; see also Statement of John R. Steer, Member and Vice Chair of the United States Sentencing Comm'n Before the ABA Justice Kennedy Comm'n 17 (Nov. 13, 2003); Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes and Prospects for Improvement*, 37 Am. Crim. L. Rev. 41 (2000).

“disproportionately disadvantage minorities.”⁹³ “Today’s sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.”⁹⁴

The related problems of undue severity, unfettered prosecutorial power, and unwarranted disparity have been highlighted in several recent cases. In *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), Judge Cassell was required to sentence a twenty-four-year-old first offender, a music executive with two young children, to a mandatory consecutive term of 55 years based on his three convictions in the same trial for possessing (not displaying) a firearm in connection with small marijuana deals.⁹⁵ The judge found this sentence to be “unjust, cruel, and even irrational,” but felt he had no choice but to impose it. He called upon the President to commute the sentence, and upon Congress to make the “second or subsequent” enhancement applicable only to true recidivists who *previously* had been convicted of a serious offense. One hundred and sixty-three former U.S. Attorneys, federal judges, and DOJ officials, including four former Attorneys General, filed an *amicus* brief in the appeal before the Tenth Circuit, arguing that the sentence violated the Eighth Amendment, to no avail.

In the course of rational basis review under the Equal Protection Clause, Judge Cassell found that § 924(c) is not justified by its plea-inducing properties, but quite the opposite. When Angelos “had the temerity to decline” a plea bargain to drug trafficking and one § 924(c) count (with a fifteen-year sentence), the government charged him with four additional § 924(c) counts, thus demonstrating that the statute’s “harsh punishment” is not visited on “‘flagrantly guilty repeat offenders (who avoid the mandatory by their guilty pleas), but rather on first offenders in borderline situations (who may have plausible defenses and are more likely to insist upon trial).” *Id.* at 1254 (quoting Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199, 203 (1999)). Further, the government obtained 25 years of the 60-year mandatory minimum sentence by not arresting Mr. Angelos after the first controlled buy, but by arranging additional controlled buys which produced an additional § 924(c) count. Because the government had “in some sense procured” the additional criminal acts, the deterrence rationale did not justify the stacking feature. *Id.* at 1253.

The Fifth Circuit was faced with a similar situation in *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008). There, a 53-year-old woman with no prior convictions received a 45-year sentence for a crime involving no violence, which the court found to be “disproportionate punishment” and “unduly harsh.” *Id.* at 396-97. Forty years of the sentence were attributable to mandatory minimums – ten years for drug conspiracy and

⁹³ *Fifteen Year Review* at 91.

⁹⁴ *Id.* at 135.

⁹⁵ In 1993, the Supreme Court interpreted “second or subsequent” in § 924(c) to refer to convictions on separate counts in the same proceeding. *Deal v. United States*, 508 U.S. 129 (1993).

possession with intent to distribute drugs, and thirty years for two counts of possessing guns in furtherance of drug dealing, though there was “no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house.” *Id.* at 396. The judge “had little discretion in imposing this sentence . . . [b]ecause of the way the indictment was stacked by the prosecutor.” *Id.* at 395. The prosecutor had several less draconian options, but instead exercised his discretion, “rather poorly we think,” to charge Ms. Looney with counts providing for a life sentence.

The court of appeals, which had no power to do anything but affirm, observed “that the possibility of abuse is present whenever prosecutors have virtually unlimited charging discretion and Congress has authorized mandatory, consecutive sentences”:

[T]he power to use § 924(c) offenses, with their mandatory minimum consecutive sentences, is a potent weapon in the hands of the prosecutors, not only to impose extended sentences; it is also a powerful weapon that can be abused to force guilty pleas under the threat of an astonishingly long sentence. For example, a defendant who sincerely and fervently believes in his innocence, and who has witnesses and other evidence that support his claim of innocence, could easily be pressured into pleading guilty under a plea agreement that eliminates the threat—rather than face the possibility of life imprisonment based on a prosecutor’s design of an indictment that charges and stacks mandatory minimum consecutive sentences.

Id. at 398.⁹⁶

An even more tragic result of the absolute prosecutorial power conferred by mandatory minimum statutes occurred in *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006). There, a severely mentally ill 52-year-old woman was sentenced to 159 years in prison, 150 years of which were due to seven stacked § 924(c) counts. Ms. Hungerford had no prior convictions and had led a spotless and law-abiding life. Her husband of 26 years and father of her four children had recently left her due to her deteriorating mental condition. With no money and no employment prospects, she began living with another man. To obtain money for living expenses, he robbed several stores with a gun. No one was hurt and the total loss was less than \$10,000. Ms. Hungerford shared in the proceeds but never touched a gun and took no active part in the robberies. Due to Ms. Hungerford’s mental illness, she held a fixed belief that she was innocent.⁹⁷

⁹⁶ See also *United States v. Ramos*, ___ F.3d ___, 2008 WL 2875791, at *2 (5th Cir. July 28, 2008) (noting that the judge had no discretion but to impose ten-year mandatory minimum sentences on Border Patrol agents who shot at fleeing drug smuggler because they were the result of the government’s charging decision).

⁹⁷ She repeatedly declared her innocence at sentencing: “I have not done anything illegal. I did not go about with any gun. I don’t like them. . . . I didn’t take any money. . . . I honestly didn’t

For this reason, she declined the prosecutor's offer of a plea bargain in exchange for her testimony against the man who actually robbed the stores and held the gun. The prosecutor told the judge that the 159-year sentence was fair because she declined to cooperate and so had no one to blame but herself. The robber received a reduced sentence in exchange for his testimony against Ms. Hungerford. The judge, of course, was not permitted to consider any of the substantial mitigating circumstances in Ms. Hungerford's sentencing because of the prosecutor's unreviewable decisions. At sentencing, he instructed Ms. Hungerford to report to the probation office within 72 hours of her release at the age of 208, and then to undergo 104 urinalysis tests, participate in mental health counseling, and pay the cost of her treatment. *Id.* at 1118-23 (Reinhardt, J., concurring in the judgment). Judge Reinhardt described the sentence as "irrational, inhumane, and absurd," as well as "immensely cruel, if not barbaric," but all he could do was concur in the judgment and call upon Congress to abolish the mandatory minimum sentencing regime. *Id.*

Nor are mandatory minimums a cost-effective way to reduce crime. As Judge Cassell pointed out in *Angelos*, if Mr. Angelos "only" served 55 years of his 61-year sentence, the cost would be at least \$1,265,000, not including increased costs for medical care in his old age. While this would prevent any future crimes by Mr. Angelos and might (or might not) deter some others, the money would be better spent on programs that would produce greater reductions in crime. 345 F. Supp. 2d at 1255. In its 1991 report, the Commission found that uneven application of mandatory minimums by prosecutors reduces certainty, and thus thwarts their possible deterrent value.⁹⁸ Since then, the Commission has also determined that, with respect to street level drug dealers, who bear a large brunt of mandatory minimum sentencing laws, lengthy imprisonment serves no deterrent purpose, as they are immediately replaced and the crime is committed by someone else.⁹⁹

The Commission should therefore recommend to Congress that it abolish mandatory minimum penalties. Effective and efficient resource allocation is of greater concern to the public and to Congress than ever before. There is now a solid consensus in opposition to mandatory minimums among an ideologically diverse range of judges, governmental bodies and organizations dedicated to policy reform, including the Judicial Conference of the United States, the U.S. Conference of Mayors, Justice Kennedy and the ABA's Justice Kennedy Commission, and the Constitution Project's Sentencing Initiative.¹⁰⁰

do it So please don't do whatever you're going to do to me for what you think I did, because I didn't do it." 465 F.3d at 1121.

⁹⁸ USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress* iii (1991).

⁹⁹ *Fifteen Year Review* at 134; USSC, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995).

¹⁰⁰ See U.S. Conference of Mayors, *Resolution Opposing Mandatory Minimum Sentences* 47-48 (June 2006); Statement of Paul G. Cassell Before the Subcommittee on Crime, Terrorism and

IV. Crack Cocaine Legislation

We strongly support the Commission in continuing to work with Congress to eliminate the unwarranted disparity between sentences for crack and cocaine powder offenders. We agree with the Commission that the mandatory minimum for simple possession of crack cocaine should be repealed, and that sentences for powder cocaine should not be raised. We understand that the Commission takes no position on the exact ratio other than that it should not exceed 20:1. We urge the Commission to recommend that penalties for the same quantity of crack and powder cocaine be equalized, as in most of the bills introduced earlier this year, for all of the reasons identified in the Commission's reports. Differences among offenses and offenders should be taken into account by the sentencing judge in the individual case. Aggravating circumstances should not be built into every sentence for crack cocaine, but should affect the sentence only if they exist in the individual case, as with other drug types.

An additional reason to recommend a 1:1 ratio is that any disparity between crack and powder cocaine based on drug type invites manipulation of type and quantity. The Commission has found that drug quantity manipulation and untrustworthy information provided by informants are continuing problems in federal drug cases.¹⁰¹ These problems are particularly pronounced in cocaine cases because the simple process of cooking powder into crack results in a drastic sentence increase, and a very small increase in the quantity of crack results in a very large increase in the sentence.¹⁰²

Homeland Security of the House Judiciary Committee, Hearing on Mandatory Minimum Sentencing Laws (June 26, 2007), <http://judiciary.house.gov/hearings/June2007/Cassell070626.pdf>; Statement of Hon. Paul J. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 59-65 (March 16, 2006); Constitution Project Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005); American Bar Association, *Report of the ABA Justice Kennedy Commission* (June 23, 2004); Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting at 4 (Aug. 9, 2003); Leadership Conference on Civil Rights, *Justice on Trial* (2000); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994).

¹⁰¹ *Fifteen Year Review* at 50, 82.

¹⁰² See, e.g., *United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F. Supp. 2d 1335 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with Williams' prior drug sales), the base criminal offense level would have been only 14."); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

Finally, the Commission should recommend a 1:1 ratio because it would eliminate mathematical problems which create disparate ratios between crack and powder cocaine. The current variances in the relationship between crack and powder cocaine, which occur both within guideline ranges and between offense levels, create unwarranted disparity among persons convicted of crack cocaine offenses.

V. Recommended Ongoing and Long-Term Priorities

A. Reduce Sentence Severity, Reduce the Prison Population, Increase Focus on Rehabilitation

Any evaluation of the guideline system should, first and foremost, seek ways to lower sentences for offenders who are not dangerous to the public, to reduce the federal prison population to no more than 100% of its capacity in a specific and short period of time, and to provide rehabilitation to violent and non-violent offenders in the most effective manner. The recurring theme at the Alternatives Symposium was that lengthy incarceration may actually lead to increased recidivism and is not the most cost-effective means of protecting public safety.

The federal prison population is four and half times what it was when the guidelines became law,¹⁰³ has increased at least three times the rate of state prisons since 1995,¹⁰⁴ and costs the taxpayers over \$5 billion per year.¹⁰⁵ As of year end 2006, the Bureau of Prisons was 37% overcapacity.¹⁰⁶ Some of this over-incarceration is due to mandatory minimums, but much of it is due to the guidelines alone. By 2002, the guidelines, independent of mandatory minimums, accounted for 25% of the more than doubling of drug trafficking sentences, the tripling of immigration offense sentences, and the doubling of sentences for firearms trafficking and illegal firearms possession.¹⁰⁷ Further, "[m]any offenses not subject to minimum penalty statutes have shown severity increases similar to offenses that are subject to statutory minimums."¹⁰⁸

¹⁰³ The federal prison population was 44,408 in 1986, 48,300 in 1987, see Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics – 1988*, tbl. 6.34, Department of Justice, Bureau of Justice Statistics, Washington, DC: USGPO, 1989, and is almost 201,417 today. See <http://www.bop.gov/news/quick.jsp#1>.

¹⁰⁴ Sentencing Project, *The Federal Prison Population: A Statistical Analysis*, http://www.sentencingproject.org/Admin/Documents/publications/inc_federalprisonpop.pdf.

¹⁰⁵ *Costs of Incarceration and Supervised Release* (\$24,922 per inmate in FY 2007), available at <http://www.uscourts.gov/newsroom/2008/costs.cfm>.

¹⁰⁶ U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2006* at 5, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf>.

¹⁰⁷ *Fifteen Year Review* at 53-54, 64, 67, 139.

¹⁰⁸ *Id.* at 138.

While federal prison sentences are long and costly, they do little to prepare prisoners for successful reentry and contribute to increased recidivism.¹⁰⁹ Inmates are released after lengthy sentences untreated, unable to find employment, and without family ties, thus leading to the commission of further crimes.¹¹⁰ Studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption by many tons and save billions of taxpayer dollars.¹¹¹ As Justice Kennedy said, "our resources are misspent, our punishments too severe, our sentences too long. In the federal system the sentencing guidelines are responsible in part for the increased terms," and they "should be revised downward."¹¹²

B. Provide More Flexibility and Simplicity in the Guidelines

The Commission can take steps to give judges more flexibility in using the guidelines, and to simplify the guidelines. First, the Commission should greatly reduce the number of aggravating factors that currently go into calculating the guideline range. Many of these factors are trivial, many essentially duplicate others, many overstate the seriousness of the offense, and altogether, they make calculation of the guideline range far too complex. Judges are well-situated to determine whether an offense is particularly serious or not particularly serious based on the totality of the circumstances, without being required to add up points for every possible aspect of the offense. Second, the Commission should remove restrictions on downward departures. Third, the Commission could recommend to Congress that it repeal the 25% rule, in order to give judges more flexibility even when sentencing within the guideline range.

C. Provide More Useful Data

¹⁰⁹ Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (July/August 1994) (recidivism study published by Bureau of Prisons researcher in 1994 concluding that for the 62.3% of federal drug trafficking prisoners who were in Criminal History Category I, guideline sentences were costly to taxpayers, had little, if any, incapacitation or deterrent value, and were likely to negatively impact recidivism).

¹¹⁰ The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

¹¹¹ *Id.* at 8; Caulkins, Rydell, Schwabe & Chiesa, *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* at xvii-xviii (RAND 1997); Rydell & Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (RAND 1994); Aos, Phipps, Barnoski & Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime* (Washington State Institute for Public Policy 2001), <http://www.nicic.org/Library/020074>.

¹¹² Speech at the American Bar Association Annual Meeting, Associate Justice Anthony M. Kennedy, August 9, 2003, http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

The Commission is authorized to systematically collect, study and disseminate empirical evidence of sentences imposed, the relationship of such sentences to the purposes of sentencing, and their effectiveness in meeting those purposes.¹¹³ See 28 U.S.C. § 995(a)(12)-(16).

Particularly after *Booker* and before *Rita*, *Gall* and *Kimbrough*, sentences that were different from the guideline range were often characterized as creating "unwarranted disparity." However, one of the goals of the SRA was to provide for "sufficient flexibility to permit individualized sentencing." 28 U.S.C. § 991(b)(1)(B). *Gall* reaffirmed that goal and specifically endorsed the "need to avoid unwarranted similarities among other co-conspirators who were not similarly situated." 128 S. Ct. at 600 (emphasis in original). And both *Rita* and *Kimbrough* opened the door to outside-guideline sentences based on policy problems with the guidelines, with the hoped-for result of improving the guidelines, including reducing unwarranted disparities that the guidelines themselves create.

After these clarifications by the Court, the Commission could better assist judges in imposing sentences that are sufficient but not greater than necessary to achieve sentencing purposes and that avoid unwarranted disparities and unwarranted similarities, and could facilitate a more productive dialogue between the Commission and all stakeholders, by reporting more specific data. Currently, the Commission publishes reasons that are in many cases too general to be meaningful, the number and rate of such reasons in all cases but not by guideline or offense type, see USSC Sourcebook, tbls. 24-25B, and the number of outside-guideline sentences by guideline but without reasons. *Id.* tbl. 28. We suggest that the Commission report the reasons for outside-guideline sentences in a more specific and meaningful way. Reasons such as "criminal history issues," "general guideline adequacy issues," "circumstances not considered by guidelines," really say nothing about what the specific problems were. The Commission should also publish the number, rate and reasons for outside-guideline sentences for each offense guideline, and for each offense type where the guideline covers different offense types. In addition, the Commission should publish the number of defendants sentenced under the career offender guideline, what their qualifying instant and prior convictions were, the mean and median sentence length, and the rate of and reasons for outside-guideline sentences.

We also think that regional variation in sentencing has been misunderstood and misused in the past, and if this issue is again raised, the Commission should be very

¹¹³ Congress considered this to be "essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in . . . 18 U.S.C. § 3553(a)(2), and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." S. Rep. No. 98-225 at 182 (1983).

careful about accurately identifying the reasons for it. As demonstrated in the Commission's *Fifteen Year Review* and in its *Final Report on the Impact of United States v. Booker on Federal Sentencing* in March 2006, most regional variation is due to government practices. Congress's failure to understand this led to passage of the PROTECT Act. In this regard, we note that in 2007, the government moved for early disposition departures in twenty districts, both on and off the border, in districts with and without heavy immigration caseloads, but not in other districts that are on the border and do have heavy immigration caseloads.¹¹⁴ Further, regional variation is not necessarily inappropriate, as community norms vary for entirely legitimate reasons. Indeed, Congress contemplated that judges would take into account the community view of the gravity of the offense and the public concern generated by the offense. See 28 USC 994(c)(4), (5).

D. Training, Hearings

The Commission proposes "to receive feedback and provide expanded training on the federal sentencing guidelines, including possibly holding regional public hearings," pursuant to 21 U.S.C. § 995(a)(17), (18) and (21), and "in light of the Supreme Court's recent jurisprudence."

We believe that the Commission can receive the most useful feedback and provide the most useful training by including judges, probation officers, defense counsel and prosecutors together in its seminars and workshops. While it is sometimes done this way, usually these seminars are held separately by profession. The statutes that authorize the Commission to conduct seminars and workshops seem to contemplate an inclusive model, in which a transparent discussion can take place, not only about guideline application issues, which are surely important, but about broader sentencing issues and techniques, the need for which is heightened by the Supreme Court's recent jurisprudence.¹¹⁵ The process should be opened up so that we can all learn from each other and a productive dialogue can occur.

A good way to expand training would be to include Defenders, and prosecutors if they are interested, in teaching at Commission seminars and workshops. Their daily, hands-on expertise would be beneficial to all concerned. The Defender Services Training Branch invites Commission staff to teach at its Winning Strategies seminars. Defenders have co-taught with Commission staff at the invitation of judges or Defenders in particular districts. This has worked out well, as we assume the staff would agree.

¹¹⁴ See USSC, 2007 Sourcebook of Federal Sentencing Statistics, Appendix B, <http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm>.

¹¹⁵ Section 995(a)(17) authorizes the Commission to conduct "seminars and workshops providing studies for persons engaged in the sentencing field." Section 995(a)(18) authorizes the Commission to conduct "periodic trainings of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process."

If the Commission holds regional hearings, as authorized by § 995(a)(21), it should elicit testimony regarding both mandatory minimums and guidelines that are in need of reform. It should ensure that all stakeholders are fully and fairly represented. For example, the Commission may get more useful information from line prosecutors than from Main Justice. Likewise, the Commission should hear from a broader range of judges, especially judges who have taken the trouble to examine the fairness and efficacy of the guidelines in individual cases. Further, we believe regional hearings should be used as a forum to raise questions to which the staff can turn for further study. The Commission should not amend by anecdote, but based on research, data and national experience.

E. Re-Affirm the Commission's Role as an Independent Expert Body

In order for true improvement to occur, the Commission must be willing to act as an independent expert body, and Congress must be willing to allow it to do so. To that end, the Commission might propose to Congress that it direct the Commission to re-evaluate the guidelines, without regard to mandatory minimums and other statutory directives, to ensure that they comply with the purposes of sentencing in the most fair, efficient and effective manner, and reduce the prison population to no more than 100% capacity within a few years. The Commission might also recommend that Congress enact a law specifically reaffirming that the Commission is an independent expert body and that it should act solely on the basis of research, judicial feedback, and consultation with all stakeholders in the criminal justice system. The Commission can and should demonstrate to Congress that guidelines based on mandatory minimums and other statutory directives are unsound.

VI. Implementation of Crime Legislation

The Commission proposes as a priority the "implementation of crime legislation enacted during the 110th or 111th Congress warranting a Commission response, including (A) the Court Security Improvement Act of 2007, Pub. L. 110-177; and (B) any other legislation authorizing statutory penalties or creating new offenses that requires incorporation into the guidelines."

The Commission should not take any action to implement crime legislation unless it is based on its own expert evaluation of the need for changes in the guideline structure and then narrowly designed to further the purposes of sentencing in the most fair, effective and efficient manner.

The stated purpose of Title II of the Court Security Improvement Act of 2007 is to enact "criminal law enhancements to protect judges, family members, and witnesses." See Pub. L. No. 110-177, 121 Stat. 2534. The Act created two new offenses, codified at 18 U.S.C. § 1521 (relating to false claims and slander of title in retaliation against a Federal judge or federal law enforcement officer) and 18 U.S.C. § 119 (relating to publication of restricted information about certain persons performing official duties with the intent to threaten or intimidate). In addition, the Act added "or other dangerous

weapon” to 18 U.S.C. § 930(e)(1) (possessing a firearm in a court facility), and increased statutory penalties for tampering with a witness, victim or informant, 18 U.S.C. § 1512, retaliating against a witness, victim or informant, 18 U.S.C. § 1513, manslaughter, 18 U.S.C. § 1112(b), and assault of a federal judge, federal officer, or immediate family member, 18 U.S.C. § 115(b)(1).

With respect to threats punishable under 18 U.S.C. § 115, Congress directed the Commission to study the guidelines as they apply to threats occurring over the Internet and determine “whether and by how much that circumstance should aggravate the punishment” and provided several factors the Commission should consider in conducting the study, including the number of threats made and the intended number of recipients. See Pub. L. No. 110-177, § 209. Except for this specific directive to study threats occurring over the Internet as they relate to § 115, Congress did not direct the Commission to take any action in response to the Act.

During the last amendment cycle, the Commission requested and received public comment regarding the two new offenses and the directive to study threat offenses occurring over the Internet. In May, it promulgated amendments responding to the two new offenses. See 73 Fed. Reg. 26,924, 26,931 (May 9, 2008) (Amendment 2). The Commission amended § 2A6.1 (Threatening or Harassing Communications; Hoaxes) to incorporate the new offense under 18 U.S.C. § 1521, and amended § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) to incorporate the new offense under 18 U.S.C. § 119. *Id.*

Although the Commission did not refer specifically to Congress’s directive regarding threats under 18 U.S.C. § 115 or to any study conducted, the amendments also included an enhancement under § 2A6.1, which also applies to § 115(b)(4) threat offenses, to account for large numbers of, or prolonged periods of, harassing communications, as well as for multiple victims. *Id.* (Reason for Amendment). In addition, it amended § 2H3.1 in a manner that includes an additional two levels if the offense under new § 119 “involved the use of a computer or an interactive computer service to make restricted personal information about a person publicly available.” *Id.*

The Commission should not take any further action to increase guideline ranges in response to the Act. The Criminal Law Committee of the Judicial Conference has urged the Commission, when deciding whether to amend the guidelines in response to a new or increased mandatory minimum, to make an assessment based on its own study and expertise and independent of any potentially applicable mandatory minimum. See Comments of the Criminal Law Committee of the Judicial Conference, at 4 (Mar. 16, 2007).¹¹⁶ Likewise, the Commission should not amend the guidelines to increase punishment simply because Congress increased the statutory maximum penalty for an offense. Instead, it should be guided by the stated purpose of the legislation, the purposes of sentencing, and the need to avoid unwarranted disparity and unwarranted uniformity as it considers whether to take action and if so, what action is appropriate.

¹¹⁶ Available at http://www.ussc.gov/hearings/03_20_07/walton-testimony.pdf.

Commission data indicates that guideline ranges for the offenses for which the statutory maxima were raised by the Act are more than adequate to reflect the seriousness of the offenses. Currently, almost twice as many sentences for manslaughter offenses are below the guideline range as they are above.¹¹⁷ For assault, the rate of sentences below the guidelines is almost three times the rate of sentences above the guidelines.¹¹⁸ Because the rate of sentences outside the guideline ranges is important feedback regarding the proper operation of a guideline,¹¹⁹ these numbers show that, if anything, the guideline ranges are too high for these offenses.

In addition, generally increasing offense levels for manslaughter or assault would disproportionately impact Native Americans in a manner disconnected from the stated purpose of the Act. In fiscal year 2007, Native Americans represented 87.5% of persons convicted of manslaughter in federal court, and 38.9% of persons convicted of assault,¹²⁰ yet Congress was not concerned with increasing punishment for Native Americans when it passed the Court Security Improvement Act of 2007. Although the statute sweeps more broadly than offenses involving court security, the Commission – as the independent body charged with developing sound sentencing policy – should interpret Congress's actions narrowly.

With respect to the penalty increases in 18 U.S.C. § 1512 (tampering with a witness, victim, or informant) or § 1513 (retaliating against a witness, victim or informant), the Commission should likewise refrain from increasing guideline ranges. Again, Congress did not direct the Commission to take any action with respect to these changes. Although the Commission does not publish specific data regarding sentences for these offenses, available data for the relevant guidelines – which apply broadly to numerous federal offenses – indicate rates of upward departure far lower than rates that

¹¹⁷ See USSC, *2007 Sourcebook of Federal Sentencing Statistics*, tbl. 27 (2007) (for the primary offense category of manslaughter, showing 15.5% rate of sentences above the guideline range and a 26.9% rate of sentences below the guidelines).

¹¹⁸ *Id.* tbl. 27 & App. A (for the primary offense category of assault, which includes offenses involving threatening communication and obstructing or impeding officers, showing a rate of sentences above the guideline range in 4.6% of cases, and a 13.4% rate of sentences below the guidelines).

¹¹⁹ See USSC, *Report to Congress: Downward Departures From the Federal Sentencing Guidelines*, at 5 (Oct. 2003) (“Downward Departures”) (“[A] high or increasing rate of departures for a particular offense, for example, might indicate that the guideline for that offense does not take into account adequately a particular recurring circumstance and should be amended accordingly.”); see also USSG ch. 1, intro, pt. 4(b); see also 28 U.S.C. § 994(o) (“The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.”).

¹²⁰ USSC, *2007 Sourcebook of Federal Sentencing Statistics*, tbl. 4 & App. A (2007).

have previously prompted the Commission to revise a given guideline.¹²¹ In any event, the Commission should not increase guideline ranges for these offenses unless empirical evidence shows it to be necessary to protect judges, their family members, or witnesses.

Finally, because § 2K2.5 already includes a two-level enhancement for possessing a firearm or any other dangerous weapon in a court facility, *see* USSG § 2K2.5 (b)(1)(A), there is no need to amend the guidelines to account for the Act's change to 18 U.S.C. § 930(e).

If the Commission does anything, it should *remove* the ten-level enhancement under amended § 2H3.1(b)(2)(B) if the new offense of publishing restricted information under 18 U.S.C. § 119 involved a computer or interactive computer service. First, Congress's directive regarding the Internet was aimed at threats under 18 U.S.C. § 115, not at the offense of publishing restricted information under new 18 U.S.C. § 119. Second, the Commission did not state in its request for public comment that it was considering such an enhancement,¹²² and so lacked the benefit of public comment. Third, the scope of the enhancement exceeds its stated purpose.

The Commission explained that this enhancement "accounts for the more substantial risk of harm posed by widely disseminating such protected information via the Internet." *See* 73 Fed. Reg. 26,924, 26,932 (May 9, 2008). However, given that the Internet functions as the most readily available and widely used means of communicating all kinds of information, it is far more likely that the use of a computer or interactive computer service will prove to be the ordinary means of violating of § 119, with the result that virtually every offender will receive the enhancement. This would be true when the information was not "widely disseminated" but emailed to one person, and when no additional harm resulted from the use of a computer or interactive computer service. If a given case presents extraordinary harm due to the wide dissemination of restricted information, the court is free to account for it. *See* 18 U.S.C. § 3553(a)(1); (a)(2)(A).

¹²¹ *Id.* tbl. 28 (for fiscal year 2007, showing above-guidelines sentences at a rate of only 1.7% for first degree murder (§ 2A1.1); 9.1% for second degree murder (§ 2A1.2); 15.4% for voluntary manslaughter (§ 2A1.3); 5.7% for assault with intent to murder and attempted murder (§ 2A2.1); 5.4% for aggravated assault (§ 2A2.2), and 2.0% for obstruction of justice (§ 2J1.2)). The Commission previously amended guidelines in response to higher rates of departure, including the guidelines for homicide. *See* USSG App. C, Amend. 663 (Nov. 1, 2004) (explaining that it amended many of the homicide guidelines based in part on high rates of upward departure for second degree murder (34.3%) and voluntary manslaughter (28.6%)); *see also Downward Departures* at 16-17 (explaining that the 2001 amendment to § 2L1.2 (Illegal Reentry) was prompted by the 35.6% rate of downward departure).

¹²² *See* 73 Fed. Reg. 4,931, 4,939 (Jan. 28, 2008).

VII. Resolution of Circuit Conflicts

- A. USSG § 4A1.2(c)(1) – Whether § 4A1.2(b)(2) (providing that “[i]f part of a sentence of imprisonment was suspended, ‘sentence of imprisonment’ refers only to the portion that was not suspended”) applies when determining whether a sentence for certain misdemeanor and petty offenses was “a term of imprisonment of at least thirty days” under § 4A1.2(c)(1).

The circuits are split over whether § 4A1.2(b)(2) – which provides that “[i]f part of a sentence of imprisonment was suspended, ‘sentence of imprisonment’ refers only to the portion that was not suspended” – applies when determining whether a sentence for certain misdemeanor and petty offenses was “a term of imprisonment of at least thirty days” under § 4A1.2(c)(1) – which renders the sentence countable under § 4A1.1(c). In a recent en banc decision, the Ninth Circuit held that § 4A1.2(b)(2)’s definition of “sentence of imprisonment” applies in that instance. *United States v. Gonzalez*, 506 F.3d 940, 943-45 (9th Cir. 2007) (en banc). Thus, “a totally suspended sentence for a qualifying misdemeanor, regardless of its length, cannot be *counted* as a prior sentence.” *Id.* at 945. Likewise, “a partially suspended sentence for a misdemeanor listed in §4A1.2(c)(1) counts only if the non-suspended portion of the sentence is at least thirty days.” *Id.*

The Eleventh Circuit, on the other hand, has held that a suspended sentence is counted under § 4A1.2(c)(1), pointing only to § 4A1.2(a)(3), which provides that a “sentence [that] was totally suspended or stayed shall be counted as a prior sentence under § 4A1.1(c).” *United States v. Hernandez*, 160 F.3d 661, 670-71 & n.7 (11th Cir. 1998). The court did not mention the definition of “sentence of imprisonment” in § 4A1.2(b)(2), or explain why that definition would not apply to determinations of sentence length under § 4A1.2(c)(1). *See id.*

The Eleventh Circuit’s position produces anomalous results. Under that court’s interpretation of the guideline, a 29-day imprisonment sentence for reckless driving would not be counted for criminal history purposes, but a 30-day sentence which was totally suspended would count. The Ninth Circuit’s interpretation, which gives full effect to all relevant provisions in § 4A1.2, avoids such anomalies. It is also more consistent with the guideline’s commentary, which shows that § 4A1.2(a)(3)’s general statement concerning suspended sentences must be read together with (b)(2)’s specific instruction on how to calculate the length of imprisonment when a sentence is partially or totally suspended: “To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence (or, if the defendant escaped, would have served time). *See §4A1.2(a)(3) and (b)(2).*” USSG § 4A1.2, comment. (n.2) (emphasis added); *see also* Thomas W. Hutchison et al., *Federal Sentencing Law and Policy* § 4A1.1, author’s cmt. 5(f)(B)(5), at 1289-90 (2008 ed.) (“Taking the guidelines and commentary as a whole, it would appear equally plausible, and consistent with the principle of lenity, to exclude the suspended portion of a term of imprisonment in

determining the application of § 4A1.2(c)(1).”) The Commission should amend § 4A1.2 to make clear that the Ninth Circuit’s approach is the correct one.

B. USSG § 2A3.2(b)(2)(B)(ii) – Whether the enhancement for unduly influencing a minor to engage in statutory rape applies to law enforcement stings.

USSG § 2A3.2(b)(2)(B)(ii) – the statutory rape guideline – provides for a four-level increase if “a participant . . . unduly influenced the minor to engage in prohibited sexual conduct[.]” Application Note 3(B) explains that, “[i]n determining whether subsection (b)(2)(B)(ii) applies, the court should closely consider the facts of the case to determine whether a participant’s influence over the minor compromised the voluntariness of the minor’s behavior.”

The Eleventh Circuit has held that the enhancement applies to sting operations in which an undercover officer poses as a minor. *See United States v. Root*, 296 F.3d 1222, 1233-34 (11th Cir. 2002). The court relied on Application Note 1’s definition of the term “minor,” which includes fictitious people as well as undercover law enforcement officers. *Id.* at 1233. It then reasoned that if no actual victim is necessary, then the focus of the enhancement must be on the defendant’s conduct. *Id.* at 1234. *Root* ultimately concluded that for the enhancement to apply, “the offender need only have exerted undue influence aimed at convincing the victim ‘to engage’ in future improper sexual activities.” *Id.*

The Sixth and Seventh Circuits, focusing on the text of the guideline and commentary, disagree with the Eleventh Circuit. In *United States v. Mitchell*, the Seventh Circuit held that because the enhancement, and the discussion of “undue influence” in Application Note 3(B), both rely on the past tense, “the offender must have succeeded in influencing or compromising.” 353 F.3d 552, 556-57 (7th Cir. 2003). Thus, “the enhancement cannot apply where the offender and victim have not engaged in illicit sexual conduct.” *Id.* at 557. The court expressly declined to follow *Root*, faulting it for ignoring the plain language of the guideline, which “was specifically written to require an examination of the effect on the victim,” not of the offender’s conduct. *Id.* at 561-62.

In *United States v. Chriswell*, 401 F.3d 459 (6th Cir. 2005), the Sixth Circuit likewise held that the enhancement does not apply in the case of a sting operation. Like the Seventh Circuit in *Mitchell*, the Sixth Circuit in *Chriswell* faulted *Root* for ignoring the discussion of “undue influence” in Application Note 3(B), and held that the “plain language of § 2A3.2(b)(2)(B) indicates that the two level enhancement should not be available in cases involving undercover agents rather than actual minors.” *Id.* at 468-69. The Sixth Circuit agreed with the Seventh Circuit that “the court must engage in a victim-focused inquiry when applying this subsection in any case.” *Id.* at 469. Thus, it would not make sense to apply the enhancement in cases arising out of sting operations because “[t]he dictionary definition of ‘undue influence’ suggests, by its reference to affecting the mind or action of another, that there must be an actual person who is affected in some way[.]” and “[a]n undercover officer who is not at all persuaded in thought or in deed . . .

cannot be 'unduly influenced.'" *Id.* The Sixth Circuit also found compelling *Mitchell's* observation that applying Application Note 3(B)'s rebuttable presumption of undue influence – which is triggered when "a participant is at least 10 years older than the minor" – to cases involving undercover officers would, as a practical matter, "render[] the presumption irrebuttable." *Id.* at 469-70. As the *Mitchell* court explained, the application note says that the court is to determine whether the victim was unduly influenced based on careful consideration of the facts of the case, but if the facts are the imaginary ones produced by the government, including the victim's age, the presumption of undue influence would be irrebuttable. 353 F.3d at 560-61.

The Commission last amended the guideline in 2004, raising the enhancement from two levels to four levels. USSG, App. C, Amend. 664 (Nov. 1, 2004). The Commission should now amend the guideline to make clear that the enhancement does not apply in cases involving an undercover officer posing as a minor.

C. USSG § 2D1.1 – Whether the district court must err on the side of caution and take into account the margin of error when estimating the drug quantity used to determine the base offense level when no drugs were seized.

The Guidelines direct a court to calculate a defendant's offense level on the basis of quantities of drugs not specified in the counts of conviction, if those other drugs were part of the same course of conduct.¹²³ "Where there is no drug seizure . . . the court shall approximate the quantity of the controlled substance."¹²⁴ Courts of appeals have approved various methods of approximation, including the use of a "multiplier" to extrapolate the total quantity of a controlled substance involved in an entire course of conduct by multiplying the amount a witness or report says was involved in a single instance of conduct by the number of reported instances. *See, e.g., United States v. Betancourt*, 422 F.3d 240, 246-47 (5th Cir. 2005); *United States v. Culps*, 300 F.3d 1069, 1077 (9th Cir. 2002); *United States v. Paulino*, 996 F.2d 1541, 1548-49 (3d Cir. 1993).

However, the courts of appeals are divided over the exact process that a district court must follow when estimating drug quantity. Recognizing the inherent imprecision of multiplier estimates, the Ninth Circuit has held that "a sentencing judge must err on the side of caution . . . whenever a court is estimating drug quantities[.]" *United States v. Scheele*, 231 F.3d 492, 498 (9th Cir. 2000). It noted that caution is particularly important when estimating drug quantities, as "slight differences in the amount ultimately assessed can result in the imposition of significantly longer sentences." *Id.* For that reason, "the district court must consider the margin of error before finally fixing the amount attributable to the defendant." *Id.* "Under that requirement, a final approximated quantity must be compared to the 'break points' under the Sentencing Guidelines." *Culps*, 300 F.3d at 1076 n.3. "If taking the margin of error into account and erring on the

¹²³ USSG §§ 1B1.3(a)(2), 2D1.1, comment. (n.12).

¹²⁴ USSG § 2D1.1, comment. (n.12).

side of caution would reduce the defendant's base offense level to the next lowest level, the court must do so." *Scheele*, 231 F.3d at 499.

The Fifth Circuit applies a less rigorous standard than the Ninth Circuit. Although it has approved what it has characterized as "conservative" estimates, it does not expressly require a sentencing court to err on the side of caution or to take into account the margin of error inherent in the process, as the Ninth Circuit does. *See, e.g., Betancourt*, 422 F.3d at 247. Instead, it simply requires that any estimate be supported by a preponderance of sufficiently reliable evidence. *Id.*

As the Commission has noted, "[d]rug quantity is often highly contested, and disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators," *see Fifteen Year Review* at 50, and there is "discomfort with the role of law enforcement in establishing relevant conduct." *Id.* at 87. These problems are, of course, especially pronounced when no actual drugs were seized. This, in combination with the fact that small changes to the variables in a multiplier estimate can produce large changes in the resulting advisory guideline range, especially at higher quantities, should lead the Commission to expressly adopt the Ninth Circuit's approach to such inherently imprecise estimates.

D. USSG § 2D1.1(b)(1) – Whether the government bears the burden of proving that it was not clearly improbable that a dangerous weapon was possessed in connection with a drug offense.

USSG § 2D1.1(b)(1) directs the court to apply a two-level enhancement if a dangerous weapon was possessed in connection with the offense, "unless it was clearly improbable that the weapon was connected with the offense."¹²⁵

The circuits are split over which party bears the burden of proving clear improbability. As the Eighth Circuit recently explained, most circuits "have taken the language of clear improbability to reduce what the government must prove to such an extent that the defendant has the burden of disproving the connection once the government has shown that the weapon was present." *United States v. Peroceski*, 520 F.3d 886, 889 (8th Cir. 2008) (citing cases), *petition for cert. filed*, (U.S. July 18, 2008) (No. 08-5387). The Eighth Circuit disagreed, holding that the application note "reduce[s] the quantum of proof" otherwise necessary for Guidelines enhancements, but that the government still retains the burden of proof: "The Government must simply show that it is not clearly improbable that the weapon was connected to the drug offense." *Id.*

The Eighth Circuit's position is consistent with the general rule that the party seeking to apply an adjustment bears the burden of establishing the necessary factual predicate. The Commission should amend § 2D1.1(b)(1) as follows: "If a dangerous weapon (including a firearm) was possessed in connection with the offense, increase by 2

¹²⁵USSG § 2D1.1, comment. (n.3).

levels.” The third sentence of Application Note 3 should be amended as follows: “The adjustment should be applied if the government proves that the weapon was present and that it is not clearly improbable that the weapon was connected with the offense.”

E. USSG § 2B1.1(b)(2) – There is no circuit conflict regarding whether persons who are reimbursed for pecuniary losses in fraud and theft cases are “victims.”

The Department contends that the circuits are split over whether persons who have been reimbursed in fraud cases are “victims” for purposes of the enhancement in guideline § 2B1.1(b)(2). While statements in some opinions may suggest such a split, the cases are entirely consistent with one another. The different outcomes are due to the evidence, or lack thereof, offered to support the enhancements in those cases.

As the Department notes, the Fifth and Sixth Circuits have held that persons who were reimbursed for temporary pecuniary losses were not “victims” for purposes of USSG § 2B1.1(b)(2). See *United States v. Conner*, No. 06-50218, 2008 WL 2876564, at *8-9 (5th Cir. July 28, 2008); *United States v. Yagar*, 404 F.3d 967, 970-72 (6th Cir. 2005). But those cases did not hold, as the Department implies, that a person who is reimbursed can never be a victim. Instead, both holdings rested on the lack of any evidence that the persons incurred losses which were not reimbursed. In *Yagar*, the Sixth Circuit expressly stated that “account holders [were] not ‘victims’ under the Guidelines because they were *fully reimbursed* for their temporary financial losses. While there may be a situation in which a person could be considered a ‘victim’ under the Guidelines even though he or she is ultimately reimbursed, in situations such as this, where the monetary loss is short-lived and immediately covered by a third-party, we do not think that there has been ‘actual loss’ or ‘pecuniary harm.’” *Id.* at 971. Likewise, in *Conner*, the Fifth Circuit noted that “[i]t is possible that with a proper evidentiary foundation these types of unreimbursed business losses,” such as credit account holders “pa[ying] bills with fraudulent account charges before being reimbursed, . . . logically involv[ing] a loss of business time,” “could be considered ‘actual losses’ for the purposes of counting ‘victims.’ But the district court’s speculation as to the existence of these facts,” after “admitt[ing] that it did not have ‘any evidence’ for that finding,” “was an insufficient basis to enhance Conner’s sentence.”¹²⁶ 2008 WL 2876564, at *8.

¹²⁶ A third case cited by the Department as being in accord with the Fifth and Sixth Circuits on this point does not address the question of whether a person who is reimbursed for any or all pecuniary losses is a “victim.” In *United States v. Icaza*, the defendants had shoplifted merchandise from hundreds of Walgreens stores. 492 F.3d 967, 968-69 (8th Cir. 2007). The Eighth Circuit held that there was only one victim in the case – Walgreens Corporation, not the individual Walgreens stores – because of testimony that “ultimately the corporation takes the loss” and receives any restitution that the defendants would be ordered to pay. *Id.* at 969-70. The testimony did not characterize the arrangement as a reimbursement, but rather that the “stores would be – they would – everything is done by budget. They have inventoried – they have taken their loss, but ultimately the corporation takes the loss.” *Id.* at 969.

Although some statements in opinions from the Second and Eleventh Circuits suggest a different interpretation of the term “victim,” they are consistent with the approach of the Fifth and Sixth Circuits. In *United States v. Lee*, the Eleventh Circuit suggested that *Yagar* should have read guideline § 2B1.1’s actual loss provision – and a “victim” is one who suffered an “actual loss” – in conjunction with the guideline’s provision concerning “credits against loss.” 427 F.3d 881, 895 (11th Cir. 2005). In *Lee*’s view, one whose losses are reimbursed may still suffer an actual loss because “inherent in the credit against loss provision is an acknowledgment that there was in fact an initial loss, even though it was subsequently remedied by recovery of collateral or return of goods.” But that quibble with *Yagar* is *dictum*, because, as *Lee* acknowledged, “the facts before us are significantly different than those before” the Sixth Circuit in *Yagar*. *Id.* In *Lee*, the victim’s losses were not fully offset by the return of the collateral obtained by fraud, because they had to incur litigation costs to reclaim the collateral. *Id.* Thus, “unlike the individual account holders in *Yagar*, our victims suffered considerably more than a small out-of-pocket loss and were not immediately reimbursed by any third party.” *Id.* *Lee* is therefore fully consistent with *Yagar* and *Conner*, which both suggested that that such unreimbursed losses may suffice to establish “victim” status under § 2B1.1(b)(2), provided that there is evidence to support such a finding.

More recently, in *United States v. Abiodun*, 536 F.3d 162 (2d Cir. 2008), the Second Circuit “conclude[d] that individuals who have been fully reimbursed for their financial losses may be deemed victims for purposes of the sentencing enhancement set forth” in § 2B1.1(b)(2). *Id.* But it also recognized that “[i]n doing so, . . . [it] need not reject the Sixth Circuit’s reasoning in *Yagar*[,],” and that *Yagar*’s reasoning is similar to *Lee*’s. *Id.* The Second Circuit “agree[d] with the Sixth Circuit and Eleventh Circuit that individuals who are ultimately reimbursed by their banks or credit card companies can be considered ‘victims’ of a theft or fraud offense for purposes of USSG § 2B1.1(b)(2) if, as a practical matter, they suffered (1) an adverse effect (2) as a result of the defendant’s conduct that (3) can be measured in monetary terms.” *Id.* And there was such evidence in *Abiodun*: “the District Court found that the individuals whose credit card information defendants stole had to spend an appreciable amount of time securing reimbursement from their banks or credit card companies and that this ‘loss of time’ could be measured in monetary terms.” *Id.* That was the very type of evidence that was lacking in *Yagar* and *Conner*, and which those cases suggested would have been sufficient to trigger the enhancement if it had been presented to the district court. See *Conner*, 2008 WL 2876564, at *8 (no evidence that businesses lost time “pa[ying] bills with fraudulent account charges before ultimately being reimbursed”); *Yagar*, 404 F.3d at 971-72 (no evidence that bank failed to reimburse account holders who had to order new checks as a result of defendant’s scheme).

As the circuits agree in their interpretation of § 2B1.1(b)(2)’s victim enhancement, there is no split for the Commission to resolve. And for the same reason, it is not the case, as the Department contends in urging issues for the Victims Advisory Group to explore, that “defendants in some Circuits are not held fully accountable for the harm caused [in fraud cases] if the victims are ultimately reimbursed by their banks or credit cards.” As long as the government offers evidence that the victims in a particular

fraud case incurred some unreimbursed pecuniary loss, all of the circuits, as discussed above, would uphold application of the enhancement.

APPENDIX A

§1B1.1. Application Instructions

Commentary

Application Notes:

E) "Departure" means (i) for purposes of the provisions of the Guidelines Manual other than §4A1.3 (Departures Based on Inadequacy of Criminal History Category) those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "Depart" means grant a departure.

"Downward departure" means departure that effects a sentence less than the sentence recommended a sentence that could be imposed under by the applicable guideline range or a sentence that is otherwise less than the guideline sentence. "Depart downward" means grant a downward departure.

"Upward departure" means departure that effects a sentence greater than the sentence recommended a sentence that could be imposed under by the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. "Depart upward" means grant an upward departure.

§1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

(a) In determining the an appropriate sentence to impose within the applicable guideline range, or whether a departure from outside the that guidelines is warranted range, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

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(b) Race, Sex, National Origin, Creed, Religion, and Socio- Economic Status. The court may not determine the kind or length of the defendant's sentence because of the defendant's race, sex, national origin, creed, religion or socioeconomic status.

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Commentary

Application Notes:

Background:

1. Subsection (a) This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing sentence within or outside that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to impose a sentence outside the guideline range. depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for a sentence above the guideline range. an upward departure. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. See, e.g., Chapter Five, Part H (Specific Offender Characteristics). Some policy statements do, however, express a Commission policy that certain factors are not relevant or not ordinarily relevant for purposes of departure. See, e.g., Chapter Five, Part H (Specific Offender Characteristics).
2. Subsection (b) restates former policy statement 5H1.10. It makes clear that the court may not determine the kind or length of the defendant's sentence because of the defendant's race, sex, national origin, creed, religion, or socioeconomic status. Congress directed the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders." See 28 U.S.C. § 994(d). The purpose of this directive was to make clear that it would be inappropriate "to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training." See S. Rep. No. 98-225 at 171 (1983). "Indeed, in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, [the Senate Judiciary] Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training." Id. at 171 n.531.

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CHAPTER 5 – DETERMINING THE SENTENCE

PART H - SPECIFIC OFFENDER CHARACTERISTICS

Introductory Commentary

The following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be outside to depart from the applicable guideline range and, in certain cases, to the determination of a sentence within the applicable guideline range. Under 28 U.S.C. § 994(d), the Commission is directed to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined to be relevant by the Commission. The Commission has determined that certain circumstances are not ordinarily relevant to the determination of whether the sentencing court should depart a sentence should be outside from the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a departure sentence should be outside the applicable guideline range is warranted, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. See §5K2.0 (Grounds for Departure).

In addition, 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, and family ties and responsibilities in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment. "The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties." § Rep. No. 98-225 at 175 (1983).

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§5H1.6

Family Ties and Responsibilities

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a downward departure is warranted sentence should be below the applicable guideline range.

§5K2.0 Grounds for Departure (Policy Statement)

(a) UPWARD DEPARTURES IN GENERAL AND DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.—

(1) IN GENERAL.—The sentencing court may depart from the applicable guideline range if—

- (A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(1), that there exists an aggravating or mitigating circumstance; or
- (B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i), that there exists an aggravating circumstance,

of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

(2) DEPARTURES BASED ON CIRCUMSTANCES OF A KIND NOT ADEQUATELY TAKEN INTO CONSIDERATION.—

- (A) IDENTIFIED CIRCUMSTANCES.--This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (e.g ., as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. § 3553(b) and the provisions of this subpart may be warranted.
- (B) UNIDENTIFIED CIRCUMSTANCES.--A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.

(3) DEPARTURES BASED ON CIRCUMSTANCES PRESENT TO A DEGREE NOT ADEQUATELY TAKEN INTO CONSIDERATION.—A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into

consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

(4) **DEPARTURES BASED ON NOT ORDINARILY RELEVANT OFFENDER CHARACTERISTICS AND OTHER CIRCUMSTANCES.**

-An offender characteristic or other circumstance identified in Chapter Five, Part H (Offender Characteristics) or elsewhere in the guidelines as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.

(b) **DOWNWARD DEPARTURES IN CHILD CRIMES AND SEXUAL**

OFFENSES.—Under 18 U.S.C. § 3553(b)(2)(A)(ii), the sentencing court may impose a sentence below the range established by the applicable guidelines depart downward only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—

- (1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;
- (2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and
- (3) should result in a sentence different from that described.

The grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure ~~within the meaning of section 3553(b)(2)~~ unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.

(c) **LIMITATION ON DEPARTURES BASED ON MULTIPLE**

CIRCUMSTANCES.—The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—

- (1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and
- (2) each such offender characteristic or other circumstance is—
 - (A) present to a substantial degree; and
 - (B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.

(d) **PROHIBITED DEPARTURES.**—Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:

- (1) Any circumstance specifically prohibited as a ground for departure in § 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third and last sentences of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts).
- (2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under §3E1.1 (Acceptance of Responsibility).
- (3) The defendant's aggravating or mitigating role in the offense, which may be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively.
- (4) The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreement)).
- (5) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (i.e., a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).
- (6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.

- (e) **REQUIREMENT OF SPECIFIC WRITTEN REASONS FOR DEPARTURE.**—If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the written judgment and commitment order.

Commentary

Application Notes :

1. Definitions .—For purposes of this policy statement:

“Circumstance” includes, as appropriate, an offender characteristic or any other offense factor.

“Depart”, “departure”, “downward departure”, and “upward departure” have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. Scope of this Policy Statement .—

(A) Departures Covered by this Policy Statement .—This policy statement covers departures from the applicable guideline range based on offense characteristics or offender characteristics of a kind, or to a degree, not adequately taken into consideration in determining that range. See 18 U.S.C. § 3553(b).

Subsection (a) of this policy statement applies to upward departures in all cases covered by the guidelines and to downward departures in all such cases except for downward departures in child crimes and sexual offenses.

Subsection (b) of this policy statement applies only to downward departures in child crimes and sexual offenses.

(B) Departures Covered by Other Guidelines .—This policy statement does not cover the following departures, which are addressed elsewhere in the guidelines: (i) departures based on the defendant's criminal history (see Chapter Four (Criminal History and Criminal Livelihood), particularly §4A1.3 (Departures Based on Inadequacy of Criminal History Category)); (ii) departures based on the defendant's substantial assistance to the authorities (see §5K1.1 (Substantial Assistance to Authorities)); and (iii) departures based on early disposition programs (see §5K3.1 (Early Disposition Programs)).

3. Kinds and Expected Frequency of Departures under Subsection (a) .—As set forth in subsection (a), there generally are two kinds of departures from the guidelines based on offense characteristics and/or offender characteristics: (A) departures

based on circumstances of a kind not adequately taken into consideration in the guidelines; and (B) departures based on circumstances that are present to a degree not adequately taken into consideration in the guidelines.

(A) Departures Based on Circumstances of a Kind Not Adequately Taken into Account in Guidelines.—Subsection (a)(2) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case other than a child crime or sexual offenses under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case of a child crime or sexual offense under 18 U.S.C. § 3553(b)(2)(A)(i), of a kind not adequately taken into consideration in the guidelines.

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(i) Identified Circumstances.—This subpart (Chapter Five, Part K, Subpart 2) identifies several circumstances that the Commission may have not adequately taken into consideration in setting the offense level for certain cases. Offense guidelines in Chapter Two (Offense Conduct) and adjustments in Chapter Three (Adjustments) sometimes identify circumstances the Commission may have not adequately taken into consideration in setting the offense level for offenses covered by those guidelines. If the offense guideline in Chapter Two or an adjustment in Chapter Three does not adequately take that circumstance into consideration in setting the offense level for the offense, and only to the extent not adequately taken into consideration, a departure based on that circumstance may be warranted.

(ii) Unidentified Circumstances.—A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.

(B) Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration in Guidelines.—

(i) In General.—Subsection (a)(3) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case other than a child crime or sexual offense under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case of a child crime or sexual offense under 18 U.S.C. § 3553(b)(2)(A)(i), to a degree not adequately taken into consideration in the guidelines. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to determine the most appropriate weight to be accorded the mitigating and

aggravating circumstances specified in the guidelines, it is expected that departures based on the weight accorded to any such circumstance will occur rarely and only in exceptional cases.

- (ii) Examples .--As set forth in subsection (a)(3), if the applicable offense guideline and adjustments take into consideration a circumstance identified in this subpart, departure is warranted only if the circumstance is present to a degree substantially in excess of that which ordinarily is involved in the offense. Accordingly, a departure pursuant to §5K2.7 for the disruption of a governmental function would have to be substantial to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the guideline covering the mailing of injurious articles is applicable, however, and the offense caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure may be warranted if several persons were injured.

(C) Departures Based on Circumstances Identified as Not Ordinarily Relevant .-- Because certain circumstances are specified in the guidelines as not ordinarily relevant for purposes of departure to sentencing (see, e.g., Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

In addition, as required by subsection (e), each circumstance forming the basis for a departure described in this subdivision shall be stated with specificity in the written judgment and commitment order.

4. Downward Departures in Child Crimes and Sexual Offenses .--

(A) Definition .--For purposes of this policy statement, the term "child crimes and sexual offenses" means offenses under any of the following: 18 U.S.C. § 1201 (involving a minor victim), 18 U.S.C. § 1591, or chapter 71, 109A, 110, or 117 of title 18, United States Code.

(B) Standard for Departure .--

- (i) Requirement of Affirmative and Specific Identification of Departure Ground.—The standard for a downward departure in child crimes and sexual offenses differs from the standard for other departures under this policy statement in that it includes a requirement, set forth in ~~18 U.S.C. § 3553(b)(2)(A)(ii)(I)~~ and subsection (b)(1) of this guideline, that any mitigating circumstance that forms the basis for such a downward departure be affirmatively and specifically identified as a ground for downward departure in this part (i.e., Chapter Five, Part K).
 - (ii) Application of Subsection (b)(2).—The commentary in Application Note 3 of this policy statement, except for the commentary in Application Note 3(A)(ii) relating to unidentified circumstances, shall apply to the court's determination of whether a case meets the requirement, set forth in ~~subsection 18 U.S.C. § 3553(b)(2)(A)(ii)(I)~~ and subsection (b)(2) of this policy statement, that the mitigating circumstance forming the basis for a downward departure in child crimes and sexual offenses be of kind, or to a degree, not adequately taken into consideration by the Commission.
5. Departures Based on Plea Agreements.—Subsection (d)(4) prohibits a downward departure based only on the defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense. Even though a departure may not be based merely on the fact that the defendant agreed to plead guilty or enter a plea agreement, a departure may be based on justifiable, non-prohibited reasons for departure as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreements). In cases in which the court departs based on such reasons as set forth in the plea agreement, the court must state the reasons for departure with specificity in the written judgment and commitment order, as required by subsection (e).

Background : This policy statement sets forth the standards for departing from the applicable guideline range based on offense and offender characteristics of a kind, or to a degree, not adequately considered by the Commission. Circumstances the Commission has determined are not ordinarily relevant to determining whether a departure is warranted or are prohibited as bases for departure are addressed in Chapter Five, Part H (Offender Characteristics) and in this policy statement. Other departures, such as those based on the defendant's criminal history, the defendant's substantial assistance to authorities, and early disposition programs, are addressed elsewhere in the guidelines.

As acknowledged by Congress in the Sentencing Reform Act and by the Commission when the first set of guidelines was promulgated, "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." (See Historical Note to §1A1.1 (Authority)). Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in

which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain "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). By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, along with appellate cases reviewing these departures, the Commission can further refine the guidelines to specify more precisely when departures should and should not be permitted.

As reaffirmed in the *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003* (the "PROTECT Act", Public Law 108-21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.

In order for appellate courts to fulfill their statutory duties under 18 U.S.C. § 3742 and for the Commission to fulfill its ongoing responsibility to refine the guidelines in light of information it receives on departures, it is essential that sentencing courts state with specificity the reasons for departure, as required by the PROTECT Act.

This policy statement, including its commentary, was substantially revised, effective October 27, 2003, in response to directives contained in the PROTECT Act, particularly the directive in section 401(m) of that Act to—

"(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and

(2) promulgate, pursuant to section 994 of title 28, United States Code—

- (A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced;
- (B) a policy statement authorizing a departure pursuant to an early disposition program; and
- (C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by the Act, including a revision of "...section 5K2.0".

The substantial revision of this policy statement in response to the PROTECT Act was intended to refine the standards applicable to departures while giving due regard for concepts, such as the "heartland", that have evolved in departure jurisprudence over time.

Section 401(b)(1) of the PROTECT Act directly amended this policy statement to add subsection (b), effective April 30, 2003.

§5K2.1. Death (Policy Statement)

If death resulted, the court may ~~increase the sentence above the authorized guideline range~~ depart upward.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

§5K2.2. Physical Injury (Policy Statement)

If significant physical injury resulted, the court may ~~depart upward~~ increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in §5K2.1.

§5K2.3. Extreme Psychological Injury (Policy Statement)

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may ~~depart upward~~ increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

Normally, psychological injury would be sufficiently severe to warrant application of this ~~adjustment policy statement~~ only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or

psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

§5K2.4. Abduction or Unlawful Restraint (Policy Statement)

If a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime, the court may depart upward~~increase the sentence above the authorized guideline~~ range.

§5K2.5. Property Damage or Loss (Policy Statement)

If the offense caused property damage or loss not taken into account within the guidelines, the court may depart upward~~increase the sentence above the authorized guideline~~ range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.

§5K2.6. Weapons and Dangerous Instrumentalities (Policy Statement)

If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may depart upward~~increase the sentence above the authorized guideline~~ range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.

§5K2.7. Disruption of Governmental Function (Policy Statement)

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may depart upward~~increase the sentence above the authorized guideline~~ range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

§5K2.8. Extreme Conduct (Policy Statement)

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may depart upward~~increase the sentence above the guideline~~ range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

§5K2.9. Criminal Purpose (Policy Statement)

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may ~~depart upward~~increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.

§5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may ~~depart downward~~reduce the sentence below from the guideline range to reflect the nature and circumstances of the offense. In deciding whether a ~~sentence reduction~~departure is warranted, and the extent of such reduction, the court should consider the following:

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a ~~reduced penalty~~downward departure in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

§5K2.11. Lesser Harms (Policy Statement)

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a ~~reduced sentence~~downward departure may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a downward departure~~reduction in sentence~~ is not warranted. For example, providing defense secrets to a hostile power should not receive a downward departure ~~no lesser punishment~~ simply because the defendant believed that the government's policies were misdirected.

In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a downward departure~~reduced sentence~~ might be warranted.



Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

July 23, 2008

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

RE: PROPOSED 2009 PRIORITIES

Dear Judge Hinojosa:

We write on behalf of the Practitioners' Advisory Group (PAG) to suggest priorities for the United States Sentencing Commission to address in the next amendment cycle. We hope that this letter will be of assistance to the Commission as it develops its issues agenda.

I. UPDATING AND SIMPLIFYING THE MANUAL

The federal sentencing system, like the Guidelines Manual, is evolving and dynamic. Yet, the Manual contains numerous references that are incorrect based on changes in law and policy. In an effort to update and simplify the Manual, the Commission should consider the following.

Chapter 6 cites the correct rule but the wrong standard for determining whether a court should accept a binding plea agreement under Rule 11(c)(1)(C). *See* U.S.S.G. § 6B1.2. Subsections (b) and (c) of § 6B1.2 instruct that the sentencing court should only accept a sentencing recommendation or agreement if the recommended or specific sentence is within the guideline range or departs for justifiable reasons. *Post-Booker*, the sentencing court must now consider the full range of factors set forth in 18 U.S.C. § 3553(a) in deciding whether or not a recommended or specific sentence is appropriate, not just the Guidelines and the recognized Guideline departures. In this same vein, last year's amendment to the Introductory Section to Chapter One does not acknowledge the full import of *Rita v. United States*, 127 S.Ct. 2456 (2007), in which the Supreme Court held that the Guidelines have no presumptive force at sentencing. *Compare Id.* 2465 with Ch. 1, Intro. Commentary 2 (citing to *Rita* for appellate standard as well as requirement that district courts must calculate Guidelines correctly before weighing § 3553(a) factors).

Although more technical in nature, Section 1A1.1(4)(c) also needs correction since the general application principles cite to a prior version of Fed. R. Crim. P. 11. Specifically, that guideline notes that sentencing courts will analyze plea agreements pursuant to Rule 11(e); however, Rule 11 was amended in 2002 so that the applicable provision is now Rule 11(c).

Section 5F1.7 references a court's ability to recommend participation in the "Shock Incarceration Program," which the Bureau of Prisons (BoP) terminated in 2005. While the PAG continues to support

reinstatement of the BoP's Intensive Confinement Center program, as well as any policy statement that the Commission might issue regarding the propriety of the same, at present this provision may confuse practitioners.

Finally, the PAG requests the opportunity to meet and collaborate with staff about broader changes to the Manual that will both promote simplification and better account for courts' discretion post-*Booker*. As but one example, in view of the individualized sentencing determinations to be made pursuant to § 3553(a) as well as the scope of information appropriately before a sentencing court under 18 U.S.C. § 3661, reconsideration and reassessment of 'departure' restrictions and prohibitions appears warranted. Perhaps a working group that includes representatives of the Department of Justice, the PAG, the Public and Community Defenders, the POAG and the VAG would be an appropriate first step in this process.

II. EXPANDING THE SCOPE OF NON-PRISON OPTIONS

We congratulate and thank the Commission for the exceptional Alternatives to Imprisonment Symposium just held in Washington, D.C. The feedback received from the PAG members and others who attended has been uniformly strong in its praise for the program. Particular recognition is given to Deputy General Counsel Kathleen Cooper Grilli, who we understand headed the symposium working group, though we know that she was not alone in the long hours and significant effort that went into organizing two days of highly informative and thought-provoking panels. We commend the entire Commission for bringing the issues presented to the fore of the ongoing federal criminal justice debate.

Having gained tremendous insight into the myriad of community-based sanction, treatment and supervision options that "work" in terms of safely managing offenders in the community and reducing recidivism (as well as those that do not), the obvious question is how best to move forward so as to afford district court judges the greater flexibility they seek to impose individualized sentences within a guidelines framework. USSC, *Summary Report: U.S. Sentencing Commission's Survey of Article III Judges*, p. 2 (Dec. 2002); see USSC, *The Federal Offender: A Program of Intermediate Punishments*, Part I § 1, p. 4 (Dec. 28, 1990) ("a significant national need exists... [to] increase[e] our efforts to develop innovative methods to accomplish the punishment of some offenders in the community"). The PAG proposes an initial multi-prong approach.

For one, the Commission should amend the Manual to expand sentencing courts' options with respect to non-prison sanctions, particularly for low-to-moderate risk offenders facing a recommended range of 30 months' or less. One of the most direct ways to achieve this end is through enlargement of Zone A and of Zone B within the Sentencing Table, and the elimination of Zone C. This would adopt what the Commission's Alternatives to Imprisonment Project proposed nearly two decades ago. *Id.* at Part II § VI, Attch. 2. In the interim, guidelines penalties have only increased for numerous offense categories, lengthening sentences and further restricting courts ability to impose non-confinement sentences.

Another important way in which the Commission can assist sentencing courts, who have often expressed an interest in seeing more offenders eligible for non-prison dispositions, is to promulgate policy statements or issue a report explaining which community-based options have proven to be most successful (e.g., substance abuse treatment, cognitive behavioral therapy, targeted community service, etc.). *Id.* at Part II § I-C, p. 29-30 (40 percent of responding district judges felt policy regarding eligibility for alternative was inappropriate, and of those most felt first-offenders and nonviolent offenders should be

eligible); FJC, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey*, p. 15 (1997) (approximately two-thirds of district court judges and chief probation officers asserted that more offenders should be eligible for alternatives to incarceration); *Survey of Article III Judges* at 5. Such elucidation is consistent with the Commission's responsibility to insure that the Guidelines reflect the inappropriateness of prison sentences to rehabilitate defendants, to provide defendants with needed educational or vocational training, or to provide medical care or other correctional treatment. 28 U.S.C. § 994(k); see 18 U.S.C. § 3582(a) ("imprisonment is not an appropriate means of promoting correction and rehabilitation).

A third step in advancing alternatives would be to create a series of roundtable discussions involving relevant stakeholders (*i.e.*, judges, prosecutors, defense counsel, probation and the Bureau of Prisons). The symposium made clear that successful comprehensive community-based models are time- and resource-intensive and affect a large number of individuals and agencies. We encourage the Commission to extend the dialogue started at the symposium so that revisions to the Manual are but a part of larger systemic reform that the Commission is uniquely positioned to help facilitate. For instance, the Bureau of Prisons could explore whether and how Comprehensive Sanctions Centers (CSCs) and Residential Reentry Centers (RRCs (formerly Community Corrections Centers) or halfway houses) — community confinement options that are also places of imprisonment under 18 U.S.C. § 3621(b), see *Reno v. Koray*, 515 U.S. 50 (1990) and *Goldings v. Winn*, 383 F.3d 17, 25-27 (1st Cir. 2004) — could be used to incarcerate nonviolent drug offenders facing mandatory minimums within the community. See USSC and USDOJ-BoP, *Report to Congress on the Maximum Utilization of Prisons Resources*, p. 10 (June 30, 1994) (describing a "full service" concept intended to offer "a range of supervision, accountability, and program options to reach a much broader spectrum of offenders"). Growing the use of federal community confinement facilities would provide an option commensurate with the State of Pennsylvania's regular use of county facilities to house offenders sentenced to five years or less imprisonment, as presented by Mark Bergstrom, the Executive Director of the Pennsylvania Commission on Sentencing.

In conjunction with these efforts, the Commission might survey courts and probation offices to delve more fully into issues previously identified and those that are evolving. For instance, the Commission could investigate why courts sentence offenders eligible for straight probation to periods of confinement; inquire about the high end of recommended Guidelines sentencing ranges with which court feel comfortable imposing community-based sanctions; and gauge judicial opinions regarding whether there are certain offense categories or offense characteristics that should not be eligible for non-prison sentences. Likewise, the Commission should work with the Bureau of Prisons and the Administrative Office of the Courts to study the financial impact of the guidelines and mandatory minimum sentences akin to the analysis undertaken by the State of Washington, as presented by Steve Aos, the Associate Director of the Washington State Institute for Public Policy. In so doing, the Commission would create invaluable information for policy makers in terms of devising a "portfolio" of sanctions to be administrated by federal agencies.

III. BASE OFFENSE FOR IMPURE MIXTURES OF PRECURSOR CHEMICALS

Guideline Section 2D1.11 provides, *inter alia*, the base offense level for ephedrine, pseudoephedrine or phenylpropanolamine (PPA), precursor chemicals used to manufacture methamphetamine and amphetamine. As currently drafted, ambiguity in the Manual permits unwarranted

disparity between the tablet form of these precursors and other impure forms. Accordingly, Sections 2D1.1 and 2D1.11 should be amended to require that the actual weight of ephedrine, pseudoephedrine or PPA is used to establish a defendant's base offense level.

As written, Note C to § 2D1.11 provides: "In a case involving ephedrine, pseudoephedrine, or phenylpropanolamine *tablets*, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level." *Id.* (emphasis added); see U.S.S.G. § 2D1.1-App. Note 10 (same). This directive tracks the rationale of Amendment 519, through which the Commission sought to avoid unwarranted disparity between pure forms of ephedrine and tablets because the latter "contain a substantially lower percentage of ephedrine (about 25 percent)." U.S.S.G.App. C, amen. 519-Reason for Amendment; see U.S.S.G. § 2D1.1-Note (B) (distinguishing "mixture" from "actual"); see also Pub. L. 103-200. However, changes to the Manual made pursuant to Amendment 611 — promulgated in 2001 in response to the Methamphetamine Anti-Proliferation Act of 2000 (Pub. L. 106-310) — leave open the question of how courts should weigh precursor chemicals (*i.e.*, ephedrine, pseudoephedrine or PPA) when found in impure mixtures other than tablets. See U.S.S.G.App. C, amen. 611-Reason for Amendment (use "total quantity" of chemicals involved); see also *United States v. Martin*, 438 F.3d 621, 624-26 (6th Cir. 2006) (history of amendment).

In a case of first impression nationally, the U.S. Court of Appeals for the First Circuit addressed the lack of clear guidance that the Manual provides. *United States v. Goodhue*, 486 F.3d 52 (1st Cir. 2007). The Goodhue court concluded that under § 2D1.11, "the relevant drug weight for sentencing purposes is the weight of the precursor chemicals themselves." *Id.* at 60 (affirming government's burden to isolate and weigh precursor chemicals). Based on the First Circuit's analysis and in an effort to avoid further unintended disparity as well as needless litigation, the PAG urges the Commission to adopt the following amendment to Note C to § 2D1.11, and correspondingly to Application Note 10 to § 2D1.1:

In a case involving an impure mixture(s) of ephedrine, pseudoephedrine, or phenylpropanolamine tablets (e.g., tablet, sludge, powder, etc.), use the actual weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets mixture(s), not the weight of the entire tablets mixture(s), in calculating the base offense level.

IV. 5C1.3—FIRST-TIME, NONVIOLENT OFFENDERS ELIGIBILITY FOR NON-PRISON SENTENCES

Consistent with the mandate under 28 U.S.C. § 994(j) to establish non-prison sentences for first time, nonviolent offenders who do not stand convicted of serious offenses as well as the Commission's finding that "[p]ossible sentencing reductions for 'first offenders' are supported by the recidivism data and would recognize their lower re-offending rates", the PAG recommends that the Commission make a downward adjustment modeled after the criteria set forth in Section 5C1.2 — a product of the statutory relief for low-level, nonviolent drug offenders found in 18 U.S.C. § 3553(f) — available for all federal offenders. See USSC, *Measuring Recidivism: The Criminal History Component of the Federal Sentencing Guidelines*, 15 (May 2004). Specifically, the PAG urges that Chapter Five be amended to include the following provisions:

§ 5C1.3 . Limitation on Applicability of the Guideline Range in Certain Cases

- (a) In any case in which a statutory minimum sentence does not apply, the court should consider a sentence without regard to the guideline range that would otherwise be applicable if the court finds that the defendant meets the criteria set forth below:
- (1) the defendant does not have more than 1 criminal history point, as determined by the sentencing guidelines before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category);
 - (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
 - (3) the offense did not result in death or serious bodily injury to any person;
 - (4) the defendant was not an organizer or leader of others in the offense, as determined under the sentencing guidelines; and
 - (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.
- (b) If the defendant fits the criteria set forth in (a)(1)-(5), the court shall, where appropriate under 18 U.S.C. § 3553(a), sentence the defendant to a term of probation.

Application Notes:

1. This guideline is intended to reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence on an otherwise serious offense. *See* 28 U.S.C. § 994(j). Where consistent with the sentencing factors set forth in § 3553(a), the court should sentence a first offender as defined in this guideline to a term of probation under whatever conditions the court deems appropriate. Where a sentence to a term of probation without confinement would be inconsistent with § 3553(a), the court should consider alternative forms of confinement. A straight sentence of imprisonment should be imposed

only if the court finds that no alternative sentence would be sufficient to comply with the purposes of sentencing.

At a minimum, and mirroring the relief afforded similarly situated drug offenders, there should be a several-level reduction for any defendant who meets the criteria. This would be similar to the current specific offense characteristic at § 2D1.1(b)(9), and it could be added to Chapter Three, which includes other adjustments that potentially apply regardless of the defendant's Chapter Two offense guideline.

The proposed provision encourages, but does not require, courts to sentence eligible offenders below an otherwise recommended guideline range in all appropriate cases. It supports imposition of other than straight-prison sentences whenever doing so satisfies § 3553(a) by directing consideration of community-based confinement in cases where some form of incapacitation is deemed necessary. As in § 5C1.2, defendants who use violence or credible threats of violence; possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; and cause death or serious bodily injury to any person; or act as an organizer or leader of others in the offense are ineligible for relief. The proposal also replicates § 5C1.2's requirement that a defendant provide truthful information to the government no later than the time of sentencing, therein affording relief to less culpable defendants amenable to assisting federal authorities but lacking useful information with which to trade — a principle underpinning the relief that Congress provided drug offenders facing statutory mandatory minimums, which the Commission expanded through Section 5C1.2. See *United States v. Cruz*, 156 F.3d 366, 375 (2d Cir.1998); *United States v. Arrington*, 73 F.3d 144, 147-48 (7th Cir. 1996). In sum, the proposal incorporates all of the factors that the Commission has already determined demonstrate reduced culpability and warrant relief. See USSC, *Recidivism and the First Offender*, 9-10 (May 2004) (criteria generally associated with less culpable criminal conduct are no use of violence or weapons, no bodily injury of a victim, a minor role or minimal participation, and acceptance of responsibility).

Through adoption of this proposal, the Commission would advance § 994(j)'s mandate and provide a means for first offenders to obtain relief from recommended guideline ranges — including any limitation on a straight probation sentence or forms of confinement that would otherwise apply under the Sentencing Table's zones — without complicating or disrupting the structure of the Table itself.

V. RELEVANT CONDUCT RULE

The PAG again urges the Commission to review and revise the relevant conduct rule, namely to abandon the use of acquitted and uncharged conduct. In so doing, we acknowledge the Defenders July 16 priorities letter, which accentuates the deficiencies and concerns associated with the continued permissibility of courts' reliance on uncharged and acquitted conduct when establishing a defendant's Guidelines offense level beyond conviction-related adjustments. Absent amendment the relevant conduct rule shall continue to be subject to manipulation and produce unjustified recommended sentences for minor participants in larger, serious conspiracies that mirror those meted out to more involved players. Were the Commission to remove the use of acquitted and uncharged conduct from the calculation of the guideline range, courts could still give weight to such facts, if found and if appropriate, but would no longer be compelled to give them the same weight in every case as if charged in an indictment and affirmed via conviction. See 18 U.S.C. §§ 3353(a) and 3661.

VI. EXPANDING APPLICATION OF THE "CRACK FIX"

In amending the crack cocaine guidelines last year, the Commission noted that the amendment kept faith with statutory mandatory minimum penalties because the crack guidelines had been set above the mandatory minimums for the relevant triggering quantity. In other words, the Commission reduced recommended sentences for crack cocaine offenses within the Guidelines while maintaining what it considers a necessary relationship between the statutory and guideline penalties for those drugs that merit mandatory penalties.

Importantly, the Guidelines still treat all other controlled substance offenses that have mandatory minimum triggers in the same way, meaning that, except for crack cocaine, the bottom of the applicable guideline range for all such offenses is higher than the statutory mandatory minimum. There is no reason in law or policy for this anomaly and many reasons to correct it, including, but not limited to, the widespread view that Guideline-recommended sentences for controlled substance offenses, particularly for those involving first-time, nonviolent and minimal or minor offenders, are altogether too long. We thus urge the Commission to replicate the "crack fix" throughout the Sentencing Table for controlled substance offenses. In an effort to rationalize and equitably reduce drug sentences, we further urge the Commission to undertake a comprehensive review of the drug sentencing Guidelines, which create a patchwork of original and directive-based ranges.

VII. MANDATORY MINIMUM REPORT

The PAG urges the Commission to revisit and update its comprehensive study, *Mandatory Minimum Penalties in the Criminal Justice System*. Mandatory minimums continue to be popular sentencing choices and a number of additional federal mandatory minimums were enacted in the years following the report. As mandatory minimums continue to be proposed and challenged and as sentencing under current mandatory minimums continue, a deeper understanding of the role, usefulness and effect of mandatory minimums remains crucial. The Sentencing Commission is in the best position to revisit the questions and conclusions considered in the 1991 report, gather and analyze new empirical evidence, and reconsider its policy recommendations of 17 years ago. As we have noted in our last two priorities letters, the questions the initial report attempted to answer remain relevant today. They include the impact of mandatory sentencing on disparity, and whether mandatory minimums are compatible with a sentencing guideline system. Answering those questions is critical given the resurgence of interest in mandatory minimums as a potential antidote to the advisory guideline system.

VIII. CONSUMER PRODUCT SAFETY OFFENSES

It is the PAG's understanding that later this month Congress is likely to pass the Consumer Product Safety Commission Reform Act, bipartisan legislation already approved overwhelmingly in the Senate that modifies several provisions of Chapter 47 of Title 15 of the United States Code. See H.R. 4040; S. 2663. Among other things, the Act would create Class D felonies for "knowing and willful" violations of 15 U.S.C. § 2068, therein prohibiting, *inter alia*, importation for resale of "any consumer product which is not in conformity with an applicable consumer product safety standard." No Guideline provision covers violations of 15 U.S.C. § 2068 directly, or the penalty provisions contained within 15 U.S.C. § 2070.

Before promulgating any amendments, the Commission should study import safety offenses, not only to provide guidance to courts and practitioners on appropriate sentences but also to encourage U.S. importers' adoption of robust corporate compliance and ethics programs that include an import safety procedure component. In this regard, we note that regulatory offenses like those contained in the Act are construed generally as public welfare offenses containing no *mens rea* element, that is, they are effectively strict liability offenses. *See, e.g., Staples v. United States*, 511 U.S. 600, 607 (1994); *Id.* at 607, n.3; 21 U.S.C. §§ 331(a) and 333(a)(1). The varying degrees of culpability inherent in the statutory provisions therefore warrant a cautious approach so as to ensure a reasonable degree of uniformity, certainty and proportionality in sentencing.

Over 825,000 U.S. companies imported more than \$2 trillion of product last year. *See* <http://www.hhs.gov/news/facts/productsafety.html>. It was out of recognition that most defective consumer products are imports that the President commissioned the cabinet-level Interagency Working Group on Import Safety to study the issue of import safety and report on strategies for improving the same. *See* <http://www.importsafety.gov>. In this regard, one approach that the Commission may wish to take up is mechanisms by which large corporate entities can promote compliance and ethics programs among U.S. importers. Specifically, Chapter 8 provides that "[a]s appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs." *Id.* App. Note 2(A)(C)(ii). This provision is a potentially powerful tool in furthering compliance because it leverages the commercial power of large retailers and distributors with both domestic and foreign suppliers (*e.g.*, China), such as education programs at major trade shows in the U.S. and abroad.

* * *

We thank the Commission for its consideration of the foregoing and are available should any additional information be required.

Sincerely,

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PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

July 24, 2008

The Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
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Dear Judge Hinojosa:

The Probation Officers Advisory Group ("POAG") met in Washington, D.C. on July 16, 2008, following the Alternatives to Incarceration Symposium held at the Hyatt Regency on July 14th and July 15th. The purpose of our meeting was to discuss and formulate recommendations to the United States Sentencing Commission. As such, we submit the following comments to assist you in deciding the issues of consideration for the next amendment cycle.

General Comments

The members of POAG would like to thank the Commission for inviting us to attend the Alternatives to Incarceration Symposium. We found this program to be enlightening and educational, and were pleased with the variety of speakers and topics. We were excited about the prospect of future modifications to the existing statutory and guideline policies which may provide more flexibility in sentencing, and, ultimately more services to defendants in need of employment, mental health, substance abuse, and other treatment. We look forward to working with the Commission to develop ways to work within the existing guidelines and/or ways to modify the guidelines to help effectively achieve a more enriched federal criminal justice system.

Immigration

Although POAG recognizes and appreciates that the Commission gave this guideline a great deal of consideration during the last amendment cycle, the members of POAG remain concerned about the application of this guideline and hope that the guideline can continue to be simplified, in part, by clarifying definitions, such as the crime-of-violence definition. It is believed that any clarification in this area will continue to prove beneficial and eliminate inconsistencies in application. POAG also recognizes that in some districts, defendants enter the United States on multiple occasions prior to the instant offense and that the immigration guideline may not adequately address this issue.

Definition for Crimes of Violence (in General)

The guidelines continue to contain a number of differing definitions for crimes of violence, some of which, recognizably, are based on statutory directives. POAG believes that the guideline-application process would be greatly simplified if a more universal definition could be adopted. Having only one definition for a crime of violence would minimize misapplication and/or inconsistency in application, as well as time spent responding to counsel's objections in this area. POAG believes that any step toward unifying the statutory and guideline definitions of a crime of violence would prove beneficial, and create more uniformity in guideline application.

Criminal History - New Definition at § 4A1.2(a)(2), Single Sentence

The group discussed this issue at length. Several group members were concerned that this "new" guideline was being inconsistently applied, as not all districts are interpreting the guideline directives in the same manner. In some cases, the result of this inconsistent/incorrect application was the "loss" of a career offender predicate. Others expressed concern that the fact that arrest dates were not always available created difficulty in determining whether or not cases should be considered a "single sentence," as that term is defined in § 4A1.2(a)(2).

Similarly, there was discussion about some apparent confusion regarding the assignment of criminal-history points under § 4A1.1(c) in relation to the application of career offender and with respect to the assignment of criminal history points pursuant § 4A1.1(d) (being under a criminal justice sentence) and/or § 4A1.1(e) (being released from a sentence within two years of the instant offense). There appears to be some inconsistency in application and scoring based on the chronology of prior criminal convictions. One district noted that in some instances, officers were only assigning points to the "first" four cases, rather than assigning points to all relevant cases, and then only ultimately "counting" a total of four points under § 4A1.1(c). This caused some career-offender predicates to "drop out," and/or at times, no points were being assigned under § 4A1.1(d) and (e).

Because of the above, POAG considered recommending to the Commission that it clarify the language under § 4A1.2(a)(2) and/or § 4A1.1(c). Nevertheless, after much discussion, the group ultimately decided that the issues may be better addressed as training issues, rather than as amendments to the guidelines. The group expects that it may reevaluate these issues at future meetings, as these inconsistencies appeared to be present in a number of districts. The group also discussed the best manner to detail the above-noted "single-sentence" cases in the report so as to avoid confusion/counsel objections regarding the assignment of criminal-history points. Again, the group decided that this issue was better dealt with as a training issue.

Criminal History - Career Offender Predicates and Singles Sentences

POAG is concerned that under the new definition at § 4A1.2(a)(2), i.e., single sentences, some cases which had previously been considered career-offender predicates are no longer career-offender predicates, as they are no longer scorable under § 4A1.1(a), (b), or (c). POAG encourages the Commission to monitor the frequency of this issue to determine what, if any, change to the career-offender guideline should be made.

Guideline Simplification

This issue appears to be a factor in all of the above-detailed concerns raised. POAG recognizes that "Guideline Simplification" has been an ongoing area of consideration for the Commission, and that the Commission is aware of, and actively works to, simplify the guidelines whenever possible.

As noted in several of POAG's earlier position papers, cross references to other guidelines continue to be an area of confusion which often results in misapplication of the guidelines and/or greater objections by counsel. While the application of a "simple" or "single" cross reference may not be particularly problematic, issues/objections often arise when one must "jump" to multiple guidelines in order to determine the "final" guideline. The guidelines most often impacted by the confusion in application appear to be as follows: § 2A3.1(c) and 2A3.4, and other guidelines involving sexual contact; § 2J1.2, the obstruction-of-justice guideline; § 2X3.1, the accessory-after-the-fact guideline; and § 2K2.1(c), the cross reference under the firearms guideline, compared with § 2K2.1(b)(6), the specific offense characteristic under § 2K2.1 which appears to "overlap" the cross reference. POAG speculates that some of these issues can be (and are being) resolved or reduced through training, but notes that any effort to minimize the addition of "new" cross references in the guidelines would be beneficial and would help to ensure greater consistency in guideline application.

Circuit Conflicts

POAG encourages the Commission to continue to resolve circuit conflicts whenever possible.

Closing

POAG appreciates the opportunity to express its concerns and the willingness of the Commission work with POAG to address issues we believe are important. Should you have any further questions or require any clarification regarding the issues detailed above, please do not hesitate to contact us.

Sincerely,

Probation Officer's Advisory Group
July 2008

THE NATIONAL CENTER FOR
Victims of Crime

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Mary Lou Leary

September 11, 2008

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

RE: Proposed 2009 Priorities

Dear Judge Hinojosa:

The newly-created Victims Advisory Group (VAG) writes to recommend priorities for the United States Sentencing Commission (the Commission) to consider in the next amendment cycle. We greatly appreciate the Commission's establishment of VAG and the opportunity to serve in this important capacity. Thank you for reaching out to us. We hope to provide advice that will help the Commission better understand the needs of victims and the impact that the Commission's work has on victims.

Because VAG was established very recently, our current comments are brief. Our overarching recommendation, however, is that the Commission closely examine the relationship of victims to each of its priorities in the coming amendment cycle. With respect to specific priorities, we submit the following comments for your consideration.

Alternatives to Incarceration

VAG supports the consideration of alternatives to incarceration but recommends that, in addition to offender-related issues, deliberate attention be given to the potential impact on and benefits to victims. Some alternatives have the potential to address victim needs and interests while providing appropriate sanctions and interventions for offenders. For example, alternatives that require restitution to the victim(s) both provide some recompense to the victim for his or her suffering and benefit the offender by holding him or her accountable.

Several members of VAG attended the Commission's recent symposium on alternatives to incarceration and were pleased to note the attention given to offender accountability.

Restitution

VAG strongly urges that the Commission prioritize restitution as a part of sentencing both in recommendations regarding legislation and in amendments to the federal sentencing guidelines. A variety of statutes and guidelines already address restitution, but there is much confusion regarding the circumstances under which restitution is mandatory and under which it is left to the discretion of the court. Further, victims should be informed not only about the possibility of restitution, but how to request that the court consider it whenever it is a potential sanction at sentencing. Additionally, the sanction of restitution should be a meaningful part of the sentence; i.e., there should be effective collection of the sanction to the extent possible. Enforcement of the sanction will also avoid re-victimizing the victim through failure to collect court-ordered restitution.

Training

Expanded training on application and interpretation of the sentencing guidelines is sorely needed. It should include training for probation officers, judges, and others on the experiences and needs of victims (including an understanding of crime-related trauma) as well as victim rights. Ideally, it would help individuals involved in sentencing understand victims better, be more comfortable with them and their role in the criminal justice process, and comprehend the ways that their work, and sentencing, might address victim needs and rights. The training should also address issues of particular interest to underserved victim populations; e.g., providing meaningful notice to victims who are not English-speaking, particularly in Indian country where the language may be unwritten. The full implementation of newly enacted §6A1.5 regarding victims' rights in relationship to the sentencing process should be a priority.

>

Analysis of the Guidelines

VAG strongly urges that the sentencing guidelines be analyzed from the perspective of their impact on victims, including how §6A1.5 directs other guidelines and statutes be applied: What are the implications of the guidelines for victims? How do they serve the needs of victims? What is missing? What inconsistencies might there be? What possibilities for positive victim engagement might exist? Such an analysis would help the Commission more fully understand the impact of its work on victims of crime and could highlight opportunities to address inconsistencies and omissions in the protection of victims' rights

Harm Caused to Victims

The guidelines should be reviewed to ensure that they truly reflect the harm suffered by victims, regardless of physical injury or monetary loss.

In the 20 years since the guidelines were originally enacted, the types of cases being prosecuted in federal court have changed dramatically. Much of the change can be attributed to the explosive growth in technology that has produced such crimes as identity theft, cyber stalking, and a variety of fraudulent schemes. These crimes harm victims in ways that cannot be measured in financial loss or physical harm but, nevertheless, can be devastating to victims who may feel

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fear or suffer from poor credit or loss of privacy. VAG recommends that the Commission undertake a study of current guidelines to ensure that they reflect the actual harm to victims produced by a criminal act.

Definition of Victim

VAG recommends that the Commission reconsider the definition of victim in §2B1.1 which limits victims to those “who sustained any part of the actual loss” or “any individual who sustained bodily injury as a result of the offense.” This definition excludes many individuals who suffer in ways that are not readily measured in dollars lost or physical harm suffered and fails to recognize that many victims suffer other forms of severe harm.

It excludes, for example, the cyber-stalking victim who suffers fear, loss of privacy, and impairment of his or her ability to move about freely, among other harms. It excludes the victim of identity theft who suffers significant impairment of his or her credit record and may also suffer psychological trauma and loss of privacy. Current guidelines produce the anomalous result that an identity thief who victimizes hundreds of victims will not receive a sentence that reflects the harm to those victims unless it can be measured in dollars and cents. The definition of victim under 2B1.1 should be amended to address this issue.

Resolution of Conflicts among Judicial Circuits

VAG encourages the Commission to continue to resolve conflicting interpretations of the guidelines by the federal courts, particularly with respect to issues affecting victims. For example, conflicts among the circuits regarding the applicability of enhancement provisions that depend on the “number of victims” have produced widely disparate results for victims, as demonstrated by the following:

A defendant who preys upon the credit of a large number of people who were ultimately reimbursed by their credit companies does not qualify for the “number of victims” enhancement provided by the U.S. Sentencing Guidelines, the U.S. Court of Appeals for the Fifth Circuit decided July 28. Two days later, the Second Circuit rejected defendants’ argument that an individual who is reimbursed for his or her economic loss does not qualify as a “victim” for purposes of the guidelines enhancement. (*United States v. Conner*, 5th Cir., No. 06-50218, 7/28/08, and *United States v. Abiodun*, 2d Cir., No. 06-5335-cr, 7/30/08)

The guideline governing thefts and frauds provides, at U.S.S.G. § 2B1.1 (b) (2), a number of boosts to offense level depending on the number of “victims.” The commentary to the guideline defines “victim” as including “any person who sustained any part of the actual loss. ...” It defines “actual loss” as “the reasonably foreseeable pecuniary harm that resulted from the offense.” The commentary further explains that “Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.”

Other circuits that have interpreted the guideline are divided as to how to count heads when defrauded individuals are ultimately reimbursed for their losses. In *United States v. Icaza*, 492 F.3d 967, 81 CrL 552 (8th Cir. 2007), the Eighth Circuit addressed a similar situation and held that individual stores that are part of a corporate chain that bears all losses associated with thefts from the stores do not count as individual "victims" for purposes of Section 2B1.1(b)(2).

The Sixth Circuit reached the same conclusion in a case involving thefts from numerous individual accounts at a few banks. *United States v. Yagar*, 404 F.3d 967 (6th Cir. 2005). The *Yagar* court, however, expressly left open the possibility that an individual who is ultimately reimbursed can qualify as a "victim" if he or she is not reimbursed as promptly as the victims in the case before it.

The Eleventh Circuit took a different approach in *United States v. Lee*, 427 F.3d 881 (11th Cir. 2005). In that case, the defendants used personal checks drawn upon closed bank accounts to pay off mortgages and purchase expensive automobiles. The Eleventh Circuit decided that those businesses that were able to recoup their losses through repossession or foreclosure should still be counted as victims because they incurred a pecuniary loss at some point.

Closing

The VAG appreciates the opportunity to express its concerns to the Commission and looks forward to working with the Commission on sentencing guidelines issues that are critical to victims of crime. Please call upon us for further information, clarification, or advice.

Sincerely,

Mary Lou Leary
Chair, Victims Advisory Group
Douglas Beloof
Russell Butler
Montie Deer
Pat Sekaquaptewa
Howard Zehr
Victims Advisory Group

cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions III, Vice Chair
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Kelli H. Ferry
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Alan Dorhoffer, Senior Staff Attorney



September 8, 2008

VIA EMAIL pubaffairs@ussc.gov

United State Sentencing Commission

One Columbus Circle, NE, Suite 2-500, South Lobby

Washington, DC 20002-8002

Attention: Public Affairs – Proposed Priorities Public Comment

Dear Commissioners:

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TREASURER

On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists and fifty-three affiliates nationwide, we submit these comments pursuant to the U.S. Sentencing Commission's request for public comment, as noted in the Federal Register on August 8, regarding the possible priority policy issues for the amendment cycle ending on May 1, 2009. We applaud the Commission's proposal that continuation of its work on cocaine sentencing policy be one of the Commission's priority issues for this amendment cycle.

The Commission has identified a list of eight potential priorities. Because eliminating the disparity in sentencing between crack and powder cocaine is of critical importance to the ACLU, we would like to focus our comments on proposal Number 4:

Continuation of its work with Congress and other interested parties on cocaine sentencing policy to implement the recommendations set forth in the Commission's 2002 and 2007 reports to Congress, both entitled Cocaine and Federal Sentencing Policy, and to develop appropriate guideline amendments in response to any related legislation[.]

The Commission should be commended for the work it has done over more than a decade to address the 100:1 crack/powder cocaine sentencing disparity – consistently reporting to Congress that the disparity remains unjustified. We support the Commission's proposal to continue to focus on ways in which the disparity can be rectified.

Due in large part to the Commission's important work on the subject, last year saw more progress in addressing the unequal nature of cocaine sentencing disparity than any year since Congress enacted the law in 1986. The amendments to the federal sentencing guidelines that the Commission promulgated in May 2007 and took effect in November 2007, helped to bring the guideline ranges for crack cocaine federal sentences in line with the mandatory minimums prescribed by statute. Additionally, the Commission's decision in December 2007 to apply

the guideline changes retroactively will make nearly 20,000 crack offenders eligible for sentencing reductions over the next three decades. Last year also saw the Supreme Court's decision in *Kimbrough v. United States*, permitting judges to exercise discretion in sentencing below the federal guidelines for crack cocaine offenses. Taken together, the last year was one marked by steady progress towards eliminating the unfair and overly harsh cocaine sentencing structure.

In its 2002 and 2007 cocaine sentencing reports, the Commission took bold steps to bring much needed reform. The Commission's proposal to prioritize this issue will continue that momentum. The Commission's ongoing work will highlight the need for congressional action in order to eliminate the 100:1 federal statutory sentencing disparity and harsh mandatory minimums for low-level crack cocaine offenses.

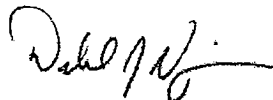
As this body has noted, revising the crack cocaine thresholds would do more than any other single policy change to dramatically improve the fairness of the federal sentencing system.¹ Correcting this disparity could help to increase the sense of trust in our criminal justice system by removing a harsh penalty imposed disproportionately and unfairly on the African American community. Passing legislation to address the disparity in the upcoming Congress will be a priority for ACLU, and we welcome the Commission's proposal to develop appropriate guideline amendments in response to any related legislation.

Thank you for your consideration of this important issue. The ACLU commends the Commission's recommendation that cocaine sentencing policy remain a priority during the next amendment cycle.

Sincerely,



Caroline Fredrickson
Director



Deborah J. Vagins
Legislative Counsel

¹ See, e.g., U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING 132 (2004).

September 8, 2008

The 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: 2009 Priorities

Dear Judge Hinojosa:

Families Against Mandatory Minimums (FAMM) writes in response to the Commission's request for comment on its proposed priorities for the amendment cycle ending May 1, 2009.

Study of Statutory Mandatory Minimum Penalties

FAMM commends the Commission for considering revisiting the 1991 Report, "Mandatory Minimum Penalties in the Criminal Justice System," as a priority for 2009. An updated and revised report would meet growing congressional interest in addressing both mandatory minimums for certain crimes, like crack cocaine, and also serve as a resource as Congress evaluates wider issues of incarceration, including mandatory minimums.

In the seventeen years since the report, the number of mandatory minimums has increased and the prison population has grown dramatically. Years of practice under the mandatory minimums have produced a wealth of data that the Commission can draw on for evaluation, analysis, and answers to the most pressing questions about mandatory minimums in the federal criminal justice system. At the same time, the environment in which mandatory minimums exist has changed and opposition to these flawed sentencing rules has grown. The Commission has been at the forefront of those critical about mandatory minimums but is by no means alone in its opposition.

There is a very timely reason for you to revisit the report now. In January 2009, a new administration and new Congress will begin work. The Commission is heard by members of Congress. The 2007 cocaine sentencing report and the sentencing reductions implemented by the Commission for crack cocaine undoubtedly spurred members of Congress to take a fresh look at the issue. Members introduced no fewer than seven bills addressing the crack cocaine sentencing structure in the 110th Congress. You accepted invitations to testify at hearings considering crack cocaine reform legislation in the Senate and the House.

There are signs that members of Congress are looking beyond crack cocaine to the wider issues of incarceration, including mandatory minimums. For example, Sen. Jim Webb (D-Va) chaired Joint Economic Committee hearings in October 2007 and June 2008 on over-incarceration. Both hearings highlighted, among other issues, the failure of disproportionate sentences and mandatory minimums to reduce the crime rate.

It is an appropriate time to build on the information you presented in your June 26, 2007 testimony to the Subcommittee on Crime, Terrorism, and Homeland Security, revisit the conclusions of the first and only report to date on mandatory minimums, and test how and to what extent your concerns about mandatory minimums expressed in that report remain relevant. We encourage you to do so also so that you can identify trends in and concerns about mandatory minimums that have emerged since that report was published.

An updated report would allow Congress to truly rely on the Commission, presenting a valuable contribution containing updated information about the state of mandatory minimum sentencing and its impact on federal sentencing.

Consideration of Alternatives to Incarceration

FAMM applauds the Commission for its leadership in engaging Congress, practitioners, and experts from the criminal justice and academic communities in a discussion on alternatives to incarceration. The Symposium on Alternatives to Incarceration hosted by the Commission on July 14-15, 2008 in Washington D.C. was a tremendous contribution to the discussion about how to reduce imprisonment and focus resources on preventing crime and imprisonment.

With federal prisoners currently numbering more than 200,000 individuals and the federal Bureau of Prisons operating at 37 percent above capacity at the end of 2006,¹ there are practical reasons to re-examine and reform the model that currently provides for prison sentences for the vast majority of people sentenced in the federal system. Despite the admonition in the Sentencing Reform Act that the guidelines provide alternatives to incarceration for non-violent, first-time offenders,² the use of prison rose by twenty percent to 86 percent of all offenders and among drug offenders fully 95 percent serve a sentence of incarceration.³

Support for alternatives to sentences for some offenders is longstanding. For example, the judiciary has long advocated alternatives and judges responding to a survey circulated by the Commission in 2002 underscored that support. According to the Commission: "The majority of district judges urged greater availability of probation with confinement conditions, particularly for drug trafficking offenders (64 percent), and the majority of Circuit judges requested that such

¹ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, *Prisoners in 2006* at 5 (December 2007).

² 28 U.S.C. § 994(j) (2008).

³ United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 43, 52 (Nov. 2004) (*Fifteen Years of Guideline Sentencing*).

sentencing options be made either more available or not reduced from their current availability.”⁴ While work to develop effective policy alternatives at the federal level is still in the exploration stages, we encourage the Commission to enact one long-recommended measure to increase the potential for non-prison sentences where appropriate: We ask that the Commission amend Zones A and B of the Sentencing Table, making more low-level offenders eligible for shorter or non-prison sentences. Expansion of the zones both reflects the nuanced flexibility of the Federal Sentencing Guidelines to reflect the nature of the offense and the details that qualify or exacerbate an offender’s conduct and is consistent with the Commission’s duty to provide alternatives to incarceration for non-violent, first-time offenders.

Continuation of Work on Crack Cocaine Sentencing Policy and an Invitation to Amend the Drug Table

FAMM unconditionally supported the Commission’s just decision to amend and then make retroactive the guideline for crack offenses to reduce the sentencing range by two levels and commends the Commission for its continued efforts to address disparity in the crack cocaine sentencing policy as set forth in the Commission’s 2002 and 2007 reports to Congress.

In addition to continued work to redress the lengthy and unjust sentences being served by crack cocaine offenders, we urge the Commission to apply the same two-level adjustment to all drug offenses anchored by the mandatory minimums. In the 2004 report, *Fifteen Years of Guidelines Sentencing*, the Commission acknowledged that “finding the correct quantity ratios among different drugs and the correct thresholds for each penalty level has proven problematic.”⁵ While in that Report, the Commission urges Congress to revise the mandatory minimum penalty statutes, the Commission itself has the mandate to apply the same sound policy to drug offense guidelines.

The Commission’s own history explains why this adjustment is sound policy. The passage of the Anti-Drug Abuse Act of 1986, introducing mandatory minimum sentencing, interrupted the Commission’s development of drug offense guidelines.⁶ The Commission necessarily responded to the “dilemma” posed by Congress’s new legislation.⁷ Striving to keep the guidelines and their more nuanced considerations effective, the Commission correlated the guideline range to the new mandatory minimums, but in all cases indexing the applicable range above the applicable mandatory minimum, thus providing for longer guideline sentences than called for even by the applicable mandatory minimums.⁸ This twin attack on drug offenses caused the unprecedented and disproportionate incarceration of first-time and low-level drug

⁴ *Fifteen Years of Guideline Sentencing*, at 44-45 (Nov. 2004).

⁵ *Id.* at vii (November 2004).

⁶ *Id.* at 47.

⁷ *Id.* at 48 and 53.

⁸ *Id.* at 49.

offenders,⁹ characterized by the Kennedy Commission as “far beyond historical norms.”¹⁰ Because of this grim reality, the Commission has urged Congress to revise mandatory minimums and the guidelines, without avail.¹¹

The problem of disproportionate drug sentencing plagues many drug offenses.¹² The “dramatic increase in time served by federal drug offenders” includes all drug offenders and the Commission admits that “relative harmfulness” of different drugs was not necessarily reflected by the guideline sentences.¹³ The Commission was able to correct two decades of disproportionate sentencing with the crack amendment—it is time to apply the same good judgment to amend the drug offense guidelines that have suffered under the same twenty-year-old rush to policy-setting. Such a move would represent an important first step in what should be a complete overhaul of the drug sentencing guidelines which are a patchwork in need of repair.

There is no sound reason to maintain the guidelines at levels above those required by the drug mandatory minimums. Reducing them would have an immediate and salutary effect on the length of sentences for drug trafficking which have, in the Commission’s words “in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.”¹⁴

Safety Valve and Relevant Conduct

In addition to the priorities identified by the Commission and the suggestions outlined above, we encourage the Commission to expand the safety valve provided for in 18 USC § 3553 (f) and reform the relevant conduct standard to prohibit the consideration during sentencing of conduct of which the offender was acquitted.

First, we urge the Commission to expand the safety valve adjustment to *all* offenders who satisfy the five criteria, not just drug defendants, through an amendment to the guidelines. The proposed safety valve expansion would replicate the two-level reduction and go further, encouraging courts to consider lower sentences in cases where true first offenders might benefit from a second chance that includes punishment but does not include incarceration.

⁹ *Id.* at 49, 55 (Figure 2.7), and iv (where the Commission acknowledges that, under the guidelines, sentences have been made “more severe” and lengths of imprisonment have “climbed dramatically”).

¹⁰ Report by the American Bar Assoc.’s Justice Kennedy Comm. 38 (Aug. 2004). The report also shows, by a comparison to states’ guideline systems, that the federal guidelines are unique in accomplishing an *increase* in the severity of sentencing. Thus, the over-incarceration under the federal guidelines is a problem with the administration of the guidelines, not the guidelines as a system. As the states’ guidelines and the 2007 crack adjustment illustrate, this is also a problem that can be fixed. *Id.* at 35.

¹¹ *Fifteen Years of Guideline Sentencing* at vii.

¹² *Id.*

¹³ *Id.*

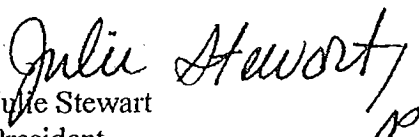
¹⁴ *Id.* at 49.

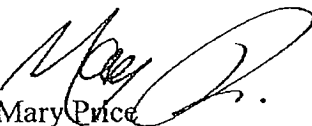
In testimony before the Subcommittee on Crime, Terrorism and Homeland Security on June 26, 2007, the Commission urged Congress to expand the safety valve to benefit more than the drug defendants currently eligible for its relief. This reflected a concern previously expressed by the Commission that first-time, low-level, non-violent defendants suffer unnecessarily harsh sentences. We agree that the safety valve has proven a valuable way to better individualize sentences for first time, non-violent drug defendants by directing courts to use the more nuanced guidelines. We applauded your call for its expansion and we added that message to ours in our own work in Congress. Now, more than a year has passed and it is time to consider prioritizing this expansion as an amendment to the guidelines.

Second, we ask that you consider abolishing consideration of acquitted conduct and reform or eliminate the use of uncharged and dismissed conduct during sentencing, now permitted under the relevant conduct rule. If dismissed conduct is retained, we encourage the Commission to require that it be tested by the beyond a reasonable doubt standard (and if found, weighted differently for sentencing purposes than that conduct that forms the offense of conviction) , and notice of intent to use all relevant conduct is given prior to entry of a guilty plea.

Thank you for considering our comments. We stand ready to assist the Commission in any way we can in these very important matters.

Sincerely,


Julie Stewart
President


Mary Price
Vice President and General Counsel

Cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions, III, Vice Chair
Commissioner Dabney Friedrich
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Kelli H. Ferry
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel



Families Against Mandatory Minimums

F O U N D A T I O N

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

July 25, 2008

Re: 2009 Priorities

Dear Judge Hinojosa:

We write to you on behalf of Families Against Mandatory Minimums (FAMM) to make five recommendations to the Commission for your consideration during the 2009 amendment cycle. We urge you to (1) update your 1991 report to Congress on mandatory minimum sentencing; (2) expand the safety valve provided for in 18 USC § 3553 (f); (3) reform the relevant conduct standard to prohibit the consideration during sentencing of conduct of which the offender was acquitted; (4) expand the Sentencing Table Zones to make more lower-level offenders eligible for shorter sentences; and, (5) apply the 2007 guideline adjustment for crack cocaine to all substance-based offenses.

Update the Mandatory Minimums report

We urge you to update the 1991 Report, "Mandatory Minimum Penalties in the Criminal Justice System." In the seventeen years since the report, the number of mandatory minimums has increased and the prison population has grown dramatically. Seventeen years of practice under the mandatory minimums have produced a wealth of data that the Commission can draw on for evaluation, analysis, and answers to the most pressing questions about mandatory minimums in the federal criminal justice system. At the same time, the environment in which mandatory minimums exist has changed and opposition to these flawed sentencing rules has grown. The Commission has been at the forefront of those critical about mandatory minimums but is by no means alone in its opposition.

There is a very timely reason for you to revisit the report. In January 2009, a new administration and new Congress will return to Washington. The Commission is heard by members of Congress. The 2007 cocaine sentencing report and the sentencing reductions implemented by the Commission for crack cocaine undoubtedly spurred members of Congress to take a fresh look at the issue. Members introduced no fewer than seven bills addressing the crack cocaine sentencing structure in the 110th Congress. You were invited to testify at hearings considering crack cocaine reform legislation in the Senate and the House.

There are signs that members of Congress are looking beyond crack cocaine to the wider issues of incarceration, including mandatory minimums. For example, Sen. Jim Webb (D-Va) chaired Joint Economic Committee hearings in October 2007 and June 2008 on over-

incarceration. Both hearings highlighted, among other issues, the failure of disproportionate sentences and mandatory minimums to reduce the crime rate.

It is an appropriate time to build on the information you presented in your June 26, 2007 testimony to the Subcommittee on Crime, Terrorism, and Homeland Security, revisit the conclusions of the first and only report to date on mandatory minimums, and test how and to what extent your concerns about mandatory minimums expressed in that report remain relevant.

An updated report would allow Congress to truly rely on the Commission, presenting a valuable contribution containing vastly updated information about the state of mandatory minimum sentencing and its impact on federal sentencing.

Apply the Safety Valve to All Offenders

We urge the Commission to expand the safety valve adjustment to *all* offenders who satisfy the five criteria, not just drug defendants. In testimony before the Subcommittee on Crime, Terrorism and Homeland Security on June 26, 2007, the Commission urged Congress to expand the safety valve to benefit more than the drug defendants currently eligible for its relief. This reflected a concern previously expressed by the Commission that first-time, low-level, non-violent defendants suffer unnecessarily harsh sentences. We agree that the safety valve has proven a valuable way to better individualize sentences for first time, non-violent drug defendants by directing courts to use the more nuanced guidelines. We applauded your call for its expansion and we added that message to ours in our own work in Congress. Now, more than a year has passed and it is time to consider prioritizing this expansion as an amendment to the guidelines.

The statutory safety valve obliges courts to impose a more flexible guideline sentence in place of a mandatory minimum upon a judicial finding that the conditions enunciated in 18 U.S.C. § 3553(f) are satisfied. The Commission amended U.S.S.G. § 2D1.1 (b) (6) in 1995 to include a two-level reduction for defendants who meet the criteria of § 3553(f), and in 2002 clarified that the reduction should be applied without respect to whether the defendant was subject to a mandatory minimum. Since 2002, the guideline safety valve has benefited over 13,300 defendants, not subject to mandatory minimums, who received the benefit of a two-level guideline reduction. Fully 13.9 percent of all drug defendants, 3,321 defendants, in 2007 had their sentences lowered. This reduction has made a genuine difference, lessening sentences for the least culpable, least serious offenders.

The proposed safety valve would replicate the two-level reduction and go further, encouraging courts to consider lower sentences in cases where true first offenders might benefit from a second chance that includes punishment but not include incarceration. Such a guideline is modeled in the 2008 letter from the Practitioners' Advisory Group at pages 5-6. We heartily endorse this proposal and encourage you to place it on the agenda for the 2009 amendment cycle.

Reform Relevant Conduct Considerations

Explaining to a family member that the relevant conduct rule has increased a loved one's sentence for uncharged, dismissed, or acquitted conduct is one of the most difficult things we do

at FAMM. People are incredulous that our system of justice permits this. It should not. The Commission should abolish consideration of acquitted conduct and reform the use of uncharged and dismissed conduct during sentencing, now permitted under the relevant conduct rule.¹ Under this practice, sentences are unfairly lengthened based on conduct that was thoughtfully considered and rejected at trial, never charged, or dismissed and thus not the subject of guilt phase advocacy. Such conduct is revived for consideration at sentencing under the less exacting and less reliable preponderance of the evidence standard. The consideration of acquitted conduct places a disproportionate amount of power in the hands of prosecutors.² In the drug guidelines, relevant conduct is responsible for increasing, sometimes very dramatically, the single most important sentencing factor, drug quantity, to the minimization of other, more accurate measures of culpability. The Commission has been critical of the role drug quantity plays in determining sentence length and identified concerns that quantity is a poor, incomplete measure of culpability.³

We strongly encourage the Commission to reform the rule such that use of acquitted and uncharted conduct is abolished, and dismissed conduct, if retained, is tested by the beyond a reasonable doubt standard (and if found, weighted differently for sentencing purposes than that conduct that forms the offense of conviction), and notice of intent to use all relevant conduct is given prior to entry of a guilty plea.

Expand the Zones to enhance alternatives to incarceration

We applaud the Commission for its initiative in holding the Alternatives to Incarceration symposium. It was a tremendous contribution to the discussion about how to reduce imprisonment and focus resources on preventing crime and recidivism. While the work to construct effective alternatives at the federal level is in the early stages, we encourage the Commission to implement one long-recommended and straightforward measure to increase the potential for non-prison sentences. Increasing the reach of Zones A and B of the Sentencing Table will make more low-level offenders eligible for shorter or non-prison sentences. Unlike the binary workings of mandatory minimum sentencing, the guidelines offer a more nuanced approach to every offender, responsive to the nature of the offense and the details that qualify or exacerbate that offender's conduct. A simple expansion of the zones is in keeping with this nuanced approach and with the Commission's duty to provide alternatives to incarceration for non-violent, first-time offenders.⁴ An expansion of the Zones would simply allow judge's access to options that they can use to impose more just and proportionate sentence for the many offenders whose conduct and personal characteristics militate for less incarceration.

Apply the Crack Guideline Adjustment to All Substance-Based Offenses

On May 1, 2007, the Commission amended the guideline for crack offenses to reduce the sentencing range by two levels. This courageous move followed a thorough investigation of the

¹ United States Sentencing Commission, *Guidelines Manual*, § 1B1.3 (Nov. 2007).

² Rep. Artur Davis and Judge Hinojosa, Statements before House Judiciary Comm., Subcomm. on Crime Terrorism and Homeland Security, June 26, 2007.

³ United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 50-51 (November 2004).

⁴ 28 U.S.C. § 994(j) (2008).

disparity between crack and powder cocaine sentencing. We encourage the Commission to apply the same adjustment to all drug offenses.

The Commission's own history explains why this adjustment is sound policy. The passage of the Anti-Drug Abuse Act of 1986, introducing mandatory minimum sentencing, interrupted the Commission's development of drug offense guidelines.⁵ The Commission necessarily responded to the "dilemma" posed by Congress's new legislation.⁶ Striving to keep the guidelines and their more nuanced considerations effective, the Commission correlated the guideline range to the new mandatory minimums, but in all cases indexing the applicable range above the applicable mandatory minimum, thus providing for longer guideline sentences than called for even by the applicable mandatory minimums.⁷ This twin attack on drug offenses caused the unprecedented and disproportionate incarceration of first-time and low-level drug offenders,⁸ characterized by the Kennedy Commission as "far beyond historical norms."⁹ Because of this grim reality, the Commission has urged Congress to revise mandatory minimums and the guidelines, without avail.¹⁰

Admirably, the Commission acted on its own to redress the lengthy and unjust sentences being served by crack offenders, calling the problem "urgent and compelling."¹¹ The Commission correlated the guideline to encompass the mandatory minimum at its high end, instead of its low end—an enormously beneficial change that affects 70 percent of crack cocaine cases sentenced in federal courts and reduces sentences by an average of 15 months.

However, the Commission has also acknowledged that the crack-powder disparity is not the only example of disproportionate drug sentencing—the problem plagues many drug offenses.¹² The "dramatic increase in time served by federal drug offenders" includes all drug offenders and the Commission admits that "relative harmfulness" of different drugs was not necessarily reflected by the guideline sentences.¹³ The Commission was able to correct two decades of disproportionate sentencing with the crack amendment—it is time to apply the same good judgment to amend the drug offense guidelines that have suffered under the same twenty-year-old rush to policy-setting.

There is no sound reason to maintain the guidelines at levels above those required by the drug mandatory minimums and reducing them would have an immediate and salutary effect on the length of sentences for drug trafficking which have, in the Commission's words "in

⁵ *Fifteen Years of Guideline Sentencing* at 47.

⁶ *Id.* at 48 and 53.

⁷ *Id.* at 49.

⁸ *Id.* at 49, 55 (Figure 2.7), and iv (where the Commission acknowledges that, under the guidelines, sentences have been made "more severe" and lengths of imprisonment have "climbed dramatically").

⁹ Report by the American Bar Assoc.'s Justice Kennedy Comm. 38 (Aug. 2004). The report also shows, by a comparison to states' guideline systems, that the federal guidelines are unique in accomplishing an *increase* in the severity of sentencing. Thus, the over-incarceration under the federal guidelines is a problem with the administration of the guidelines, not the guidelines as a system. As the states' guidelines and the 2007 crack adjustment illustrate, this is also a problem that can be fixed. *Id.* at 35.

¹⁰ *Fifteen Years of Guideline Sentencing* at vii.

¹¹ United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* at 9 (May 2007).

¹² *Fifteen Years of Guideline Sentencing* at vii.

¹³ *Id.*

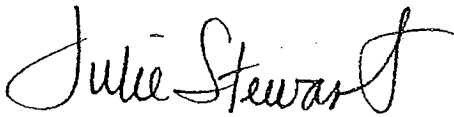
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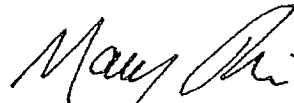
combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes."¹⁴

We appreciate your consideration of these recommendations.

Sincerely,



Julie Stewart
President



Mary Price
Vice President and General Counsel

cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions, III, Vice Chair
Commissioner Dabney Friedrich
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Kelli H. Ferry
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel

¹⁴ *Fifteen Years of Guideline Sentencing* at 49.



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*"A National Effort to Reduce Crime
Through Federal Criminal Justice Reform"*

THE FEDERAL ISSUE CHAPTER OF WWW.INTERNATIONALCURE.ORG

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PRIORITY FOR AMENDMENT CYCLE ENDING MAY 1, 2009

Pursuant to an issue the Commission has identified as a tentative priority for the coming cycle of recommendations from the Commission to Congress in its Notice published in the Federal Register, August 8, 2008 (Volume 73, Number 154), under (1)(C) Development of recommendations for legislation regarding federal sentencing policy and (2) Consideration of alternatives to incarceration, FedCURE respectfully submits the following public comment as a recommendation:

I. Insertion in the Guidelines under Part B of Chapter 1 General Application Principles a new subsection denoted as 1B1.14 called Reduction in the Term of Imprisonment as a Result of Motion of the Chairman of the U. S. Parole Commission (Policy Statement), which would state:

Upon Motion of the Chairman of the U. S. Parole Commission, the Commission may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that do not exceed the unserved portion of the original term of imprisonment) and set a release date for those inmates with sentences of more than seven (7) years if, after considering the factors set forth in 18 U.S.C. § 3553(a) (1), to the extent that they are applicable, the Commission determines that—

- (1) the defendant meets a Commission guideline range for the sentenced offense,
- (2) the defendant is not a danger to the safety of any other person or to the community, and
- (3) the reduction is consistent with this policy statement.

Background:

There are presently nearly 202,000 incarcerated federal inmates. The number has increased exponentially since 1987 with no end in sight for this significant growth — fueled by draconian sentences put in place by the U. S. Sentencing Commission's reliance on guidelines and Congress' mandatory minimums. More than half (55%) of federal prisoners are serving time for drug related crimes. Nearly three-fourths (72%) of the federal prison population is non-violent offenders. More than one-fourth (34.4%) are first-time non-violent offenders. The average stay is thirteen years.

Even though 97% of federal inmates eventually are released, discharge may not occur for

many years because better than nine out of ten inmates convicted of federal crimes will be released only after serving approximately 87.5% of their sentences under the new Sentencing Guidelines. "New law" inmates have no incentive to rehabilitate and are all painted with the same brush. Since the bulk of the population is "new law" the evidence based result is prison overcapacity, facility instability and increased danger to both inmates and staff. The new system essentially doubled the sentences that judges were forced to impose with no chance for early release and these sentences have uniformly been initiated and determined by the charging decisions of prosecutors.

In contrast, "old law" inmates have an opportunity (pursuant to USPC's discretion) for early release from prison and early termination of parole. Historically, USPC has promoted public safety and justice by fairly exercising its authority to release and supervise offenders under its jurisdiction through a conscious application of its own guidelines in each case. It has done this by a willingness to give due regard to individual circumstances while applying the least restrictive sanction that is consistent with public safety and the appropriate punishment for the offense.

Lengthy sentences have an inordinate impact on inmates' families, particularly on the children who must be raised by one parent or grandparent. Moreover, with the loss of a wage earner, inmates' families are forced onto the welfare rolls with the resulting negative impact on state budgets. Depending upon whose numbers one wishes to use, the cost to the country to incarcerate our huge federal population runs approximately \$30,000 to \$40,000 per inmate per year. The total operational cost exceeds \$6 billion yearly and if one includes amortization of land and buildings total yearly cost is more than \$8 billion. Our prison population is aging dramatically. The cost to house older inmates is over twice that of younger inmates because of the increased medical costs.

Inmates can be rehabilitated and should have a second chance to lead positive lives. The fact that there are over 18,000 federal inmates with sentences longer than twenty years most of who are non-violent and many of whom are first-time offenders indicates that review of these sentences by the USPC would be attractive and advantageous to reducing the burgeoning prison population and its attendant costs. The USPC, an existing federal agency with inmate release expertise, is standing by to take over supervision of this plan.

II. Insertion in the Guidelines under Part B of Chapter 1 General Application Principles a new subsection denoted as 1B1.15 called Reduction in the Term of Imprisonment as a Result of Motion of the Director of the Bureau of Prisons (Policy Statement), which would state:

Upon Motion of the Director of the Bureau of Prisons, the Bureau of Prisons may reduce a term of imprisonment by awarding institutional good time to those inmates who demonstrate good behavior and/or superior programming achievement during their term of imprisonment as follows:

Computation generally –

A. Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that s/he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:

Five days for each month, if the sentence is not less than six months and not more than one year.

Six days for each month, if the sentence is more than one year and less than three years.

Seven days for each month, if the sentence is not less than three years and less than five years.

Eight days for each month, if the sentence is not less than five years and less than ten years.

Ten days for each month, if the sentence is ten years or more.

When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed.

B. (1) A prisoner may, in the discretion of the Director of the Bureau of Prisons, be allowed a deduction from his sentence of not to exceed three days for each month of any year or any part thereof, where the prisoner is employed at a job.

(2) In the discretion of the Director of the Bureau of Prisons such allowance may also be made to a prisoner performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations.

(3) A prisoner may, in the discretion of the Director of the Bureau of Prisons, be allowed a deduction from his sentence of up to three additional days for each month or part thereof for superior program achievement. Superior program achievement includes, but is not limited to, satisfactory progress toward degrees from accredited educational institutions or completion certificates from vocational technical or rehabilitative programs and teaching such courses of study.

All current and future sentences shall be recalculated by the Director of the Bureau of Prisons based upon the criteria set forth in Section II (A) and Section II (B)(1)(2) and (3) notwithstanding any other statute to the contrary.

Except as hereinafter provided a prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct. A certificate of such deduction shall be entered on the commitment by the warden or keeper. If such release date falls upon a Saturday, a Sunday, or on a Monday which is a legal holiday at the place of confinement, the prisoner may be released at the discretion of the warden or keeper on the preceding Friday. If such release date falls on a holiday, which falls other than on Saturday, Sunday, or Monday, the prisoner may be released at the discretion of the warden or keeper on the day preceding the holiday.

Background:

Prison good time allowances should be designed to promote institutional good conduct by rewarding exemplary behavior and encouraging educational pursuits. Instead, section 3624(b) of Title 18 states: "a prisoner who is serving a term of imprisonment of more than one year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations."

In other words, each "new law" inmate (other than lifers) is limited to this amount of time that can be deducted from his sentence for good behavior. This statutory requirement has been interpreted by the Bureau of Prisons to amount to a maximum of 47 days each year that can be subtracted from the sentence, only after each year of the sentence is completed.

On the other hand, "old law" inmates are entitled to up to as much as three times the amount of good time as "new law" inmates because the repealed sections of Title 18 U.S.C., (4161-4166), are much more generous. The result of this change has been a dramatic upsurge in prison violence and grave institutional misconduct by all prisoners leading to a dangerous environment for both staff and inmates.

If the Sentencing Guidelines focus on "truth in sentencing" had not, in effect, doubled the time to serve, the good time plan in effect today might prove somewhat important. Instead, the reverse is true and the present plan is meaningless, especially for those with enormous sentences. Upon enactment of the recommended provision, 18 U.S.C. 3624(b) should be repealed.

FedCURE believes there is evidence that the majority of federal inmates can be rehabilitated with significant educational courses, substance abuse programs, and a good time plan that serves as an incentive to improve one's life by proving there is light at the end of the tunnel. The good time plan enumerated herein does all of the above by making statutory good time allowances available to all those in a particular sentencing range and giving additional incentives for educational pursuits and superior program achievement.

Respectfully submitted, this 7th day of September 2008,

Kenneth Linn, J.D.

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August 29, 2008

VIA UPS AND EMAIL (pubaffairs@ussc.gov)

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Attention: Public Affairs-Priorities Comment

Dear Commissioners,

The Center on the Administration of Criminal Law at New York University School of Law ("the Center") submits this letter in response to the Commission's request for comments on its Notice of Proposed Priorities and Request for Public Comment for the amendment cycle ending May 1, 2009.¹

Introduction

Summary of Proposal. The Center proposes that among the top priorities for the next amendment cycle, the Commission include two key issues that are currently absent from the Commission's agenda.

First, given the rising costs of incarceration and the increasingly limited available federal prison space, the Commission should forecast the fiscal costs of any provision affecting sentencing in pending criminal legislation prior to congressional enactment and should similarly forecast the costs of any proposed Commission amendment to the Guidelines before those amendments go into effect. This proposal will allow Congress to

¹ 73 Fed. Reg. 46341 (Aug. 8, 2008).

have valuable information about the costs of proposed legislation during its deliberations so that it can assess whether the legislation will make the most efficient use of federal resources in combating crime.

Second, given the racial and ethnic imbalance among the large federal prison population and the concerns this has raised in communities across the country, the Commission should also implement a program where it forecasts the racial and ethnic impact of any provision affecting sentencing in pending criminal legislation prior to congressional enactment and should likewise forecast the racial and ethnic impact of any proposed Commission amendment to the Guidelines. As with cost forecasting, this information would be enormously valuable to legislators as they consider what policies are the most appropriate for fighting crime and maintaining citizen confidence in the equal treatment of the law. Both of these recommendations are based on the successful experience in the States with similar forecasts. The federal government – with the Commission’s assistance – should examine these state practices with an eye toward adopting a version of them at the federal level.

About the Center. The Center is an apolitical advocacy organization and think-tank dedicated to the improvement and promotion of good government and prosecution practices in criminal matters. The Center pursues this mission in three main arenas: academia, litigation, and public policy debates. The public policy component applies the Center’s criminal justice expertise to improve the dialogue on criminal justice matters with elected and appointed public officials. The Center’s Faculty Director, Professor Rachel E. Barkow, is a nationally-recognized expert on criminal law and sentencing. In 2004, she testified before the United States Senate Judiciary Committee regarding the future of the federal sentencing guidelines in the wake of the Supreme Court’s decision in *Blakely v. Washington*. The Center’s Executive Director, Anthony S. Barkow, was a federal prosecutor for 12 years, the last six of which were spent as an Assistant United States Attorney in the United States Attorney’s Office for the Southern District of New York, where he prosecuted some of the most significant terrorism and white collar criminal cases in the United States. In 2005, he was awarded the Attorney General’s Award for Exceptional Service, which is the highest award bestowed in the United States Department of Justice.

The Center submits these comments on the basis of its extensive research into successful state practices and sentencing commission models.

I. The Commission Should Include Among Its Priorities the Pre-Enactment Forecasting of the Costs of Federal Criminal Legislation and of Commission Proposals

The Commission should include among its priorities the implementation of a program in which it forecasts the fiscal impact of its proposed amendments and of federal criminal legislation prior to congressional enactment so that Congress can determine if the legislation’s benefits are worth its costs. Virtually every state with a sentencing commission has adopted a cost projection program, and these fiscal impact forecasts have

been enormously successful in helping states make the most of their crime fighting resources.² Indeed, these cost projections have been so successful that the American Bar Association has included cost forecasts as an integral part of its proposed Model Sentencing Act. That Act requires an impact analysis on the theory that "it is in every state's interest to coordinate resource and policy decisions."³

The United States Sentencing Commission has the resources and capacity to perform these cost projections, and that information would be valuable to Members of Congress and the Commissioners in helping them determine how best to use federal resources. In addition, using this data to assist policymakers will improve the Commission's standing as a valuable public agency. State commissions that use these forecasts "have found that, over time, as their resource projections have been shown to be accurate and objectively-determined, their legislatures have placed ever-greater stock in their forecasts, affording the commissions a deepening reputation for credibility, and allowing their research to play a more powerful role in legislative deliberations."⁴

Since Minnesota established the first sentencing commission in the country in 1978 and passed guidelines in 1980 that included cost projections as a key part of its mandate, virtually every sentencing commission has followed this model because of its demonstrated success. In the face of legislative concern with keeping the Minnesota prison population below capacity, the Minnesota Sentencing Commission has developed sophisticated computer models to estimate prison populations under different sentencing options. The Minnesota legislature, in turn, has relied on the Minnesota Commission's "prison population impact statements" on proposed legislation. The Minnesota Commission's pre-enactment input has allowed Minnesota to avoid the prison overcrowding that has plagued other states and had increased the Minnesota Commission's influence over state sentencing policy.⁵ In Minnesota, "this 'early-warning system'" has empowered – indeed, forced – elected officials to consider the costs of sentencing proposals prior to enacting them.⁶ During the period it has received this cost-benefit data, the Minnesota legislature has proceeded more rationally and cost-effectively in enacting criminal sentencing legislation, allocating its resources according to its needs but within its cost constraints. The state has increased sentences for violent crimes, such as first-degree criminal sexual contact, but has kept sentences lower for nonviolent offenses.⁷ If Congress were advised of the costs of proposed criminal legislation and of Guideline amendments, it, too, could consider *ex ante* the costs of the laws prior to enactment, and thereby achieve a more rational and effective criminal justice system that maximizes the nation's crime reduction benefits from its criminal justice expenditures.

² See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 809 (2005) (noting that "[a]lmost every state to adopt a guideline system since the middle of the 1980s has opted to require some version of an impact statement" and that these cost estimates have "proven to be effective").

³ Kevin R. Reitz & Curtis R. Reitz, *Building a Sentencing Reform Agenda: The ABA's New Sentencing Standards*, 78 JUDICATURE 189, 194 (1995).

⁴ Barkow, *supra* note 2, at 810 (quoting Kevin R. Reitz, *A Proposal for Revision on the Sentencing Articles of the Model Penal Code* 31, available at <http://www.ali.org/MPC02Revision.htm>).

⁵ See Barkow, *supra* note 2, at 771-77.

⁶ See Richard Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. 1, 38 (1993).

⁷ See Barkow, *supra* note 2, at 775.

Indeed, precisely because of Minnesota's success with this model, virtually every state with a commission has followed suit. Like its Minnesota counterpart, the Washington Sentencing Commission provides the state legislature with prison resources cost estimates with its recommendations. These estimates project whether implementation of its recommendations would exceed its current correctional capacity and, if so, includes a list of alternative sentence ranges that are consistent with correctional capacity. Undoubtedly in reliance, at least in part, upon this data, the Washington legislature has implemented drug sentencing reforms and alternative treatment programs and expanded use of cost-effective community corrections programs at a projected savings to the state of \$45 million per year.⁸ Similar to the experience in Minnesota, providing such data has increased the Washington Sentencing Commission's influence in the politics of crime in the state.⁹

The North Carolina Sentencing Commission similarly uses expert forecasting models to highlight the costs of legislative choices. In making recommendations to the legislature, the Commission considers "available resources and constitutional capacity" of prison facilities, and provides statements of an "estimate of the effect of [its recommended] sentencing structures . . . both in terms of fiscal impact and on inmate population."¹⁰ If its recommendations would result in prison populations exceeding current capacity, alternative recommendations are made. The North Carolina Commission's estimates have been extremely accurate, and the state legislature has relied upon them.¹¹ In response to political and cost pressures in the state, the North Carolina Commission now uses its computer models to provide the state legislature with "two plans [for each proposal] for the legislature to choose from, one with more severe sentences, and another with slightly less severe sentences that would forestall the need to build new prisons for a few more years."¹² Armed with this data, the North Carolina legislature has acted more rationally, adopting lower sentences when that is the appropriate course and longer sentences when that makes the most sense.¹³ Moreover, the data have allowed the legislature to engage in more accurate long-term planning. For example, in connection with the enactment of a three-strikes law, a gun enhancement law, and higher penalties for rape, the Commission's fiscal impact statements permitted the legislature to calibrate the precise number of new prison beds needed to accommodate the anticipated increase in incarceration that would result from the legislation.¹⁴ And, as in Minnesota and Washington, provision of cost forecasting data has increased the influence of the North Carolina state sentencing commission on the enactment of criminal policy there.¹⁵

⁸ See *id.* at 779-81.

⁹ See *id.* at 780-81.

¹⁰ N.C. Gen. Stat. § 164-42(d).

¹¹ Barkow, *Administering Crime*, *supra*, at 784-85.

¹² *Id.* (citing Daniel F. Wilhelm & Nicholas R. Turner, Vera Inst. Of Justice, *Is The Budget Crisis Changing the Way We Look At Sentencing and Incarceration?* 7 (2002), available at http://www.vera.org/publication_pdf/167_163.pdf).

¹³ See *id.* at 786.

¹⁴ See *id.* at 786-87.

¹⁵ See *id.* at 782-87.

Other states have similarly embraced the value of cost information, using this data to implement rational sentencing policies and to further their incarceration policies.¹⁶ In fact, it is precisely because commissions can help states use their limited resources most effectively that so many states have established commissions in the first place. A recent empirical study of all the states with commissions and guidelines found that legislative concerns with costs are a main driver for the establishment of sentencing commissions and the promulgation of sentencing guidelines.¹⁷

It is important to note that cost information, standing alone, does not support either reduced or increased sentences. Sometimes states raise sentences in light of cost data, knowing that they have the resources to afford the financial outlay. Other times, states lower sentences for some crimes (particularly nonviolent crimes) in order to reserve scarce prison resources for violent crimes and achieve the same overall reduction in crime, but at a lesser cost. What the data allows is more informed, efficient use of resources to achieve whatever policy goals are set by Congress or the Commission.

The experience in the states has shown that using cost information to help set policy can help achieve lower crime rates or maintain already low rates while saving money. The states have managed to maximize their limited resources without increasing their crime rate. Indeed, during the last twenty years – the period in which most states have made the use of these estimates – crimes rates have largely declined or stabilized. Beginning in 1992, and by 1999, homicide rates had declined to rates not seen since the 1960s.¹⁸ Nationwide, the overall crime rate reached a historic low in 2000.¹⁹ During this entire period of lower crime rates, states used cost projections to make the most of their limited resources by lowering the growth in their incarceration rates and reducing the growth rate of corrections as a percentage of their overall expenditures.²⁰

The federal government, like the states, can therefore achieve cost savings and keep crime rates low. Such forecasting by the Commission would achieve benefits at the federal level like those attained in these states. Using cost forecasting, the federal government could realize fiscal rationality and implement better, more cost-effective federal criminal justice policies. Whatever the benefits to crime control of the incarceration boom, the possibility is worth exploring that the existing sentencing structure could perform at a lower cost equally well or more effectively, by producing even lower crime rates, by

¹⁶ See, e.g., Kim Hunt, *Sentencing Commissions as Centers for Policy Analysis and Research: Illustrations from the Budget Process*, 20 LAW AND POL'Y 465, 470 (1998) (describing the use of fiscal impact statements in Virginia); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1288-1289 (2005) (describing the impact of these cost estimates in Alabama).

¹⁷ See Rachel Barkow & Kathleen O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 2011, 2017 (2006).

¹⁸ See Alfred Blumstein & Joel Wallman, *The Recent Rise and Fall of American Violence*, published in THE CRIME DROP IN AMERICA, at 3-4 (2000).

¹⁹ See Emma Schwartz, *Crime Rates Shown to Be Falling: Latest figures show a reversal of an upward tick, but the picture remains complicated*, U.S. NEWS AND WORLD REPORT, June 11, 2008, available at <http://www.usnews.com/articles/news/national/2008/06/11/crime-rates-shown-to-be-falling.html>.

²⁰ See Barkow & O'Neill, *supra* note 17, at 2008-09.

yielding the same rates in a more cost-effective manner, or by reducing the social costs of incarceration policies without increasing the crime rates.

Commission-provided information on costs in advance of the adoption of any amendment or law would be particularly valuable because resource management is often otherwise lost in the legislative debate. The focus is instead on short-term costs and the desire for retribution or the need for deterrence or incapacitation. Of course those are important considerations. But the long-term fiscal impact is also critical. Sentencing laws can require large capital expenditures to maintain and staff prison facilities that are often overlooked. Although the costs of longer terms of imprisonment may make sense for many offenses and offenders, in some situations the money spent on longer prison terms would be better spent on incarceration for more serious offenders, alternatives to incarceration for some nonviolent offenders, or resources for policing or education. Because the political process does not, on its own, always provide reasoned consideration of these options,²¹ Commission-provided cost data can fill the void and ensure that federal dollars are spent wisely.

Cost forecasting is all the more important in the current era of limited federal budgets and escalating costs. Federal budget deficits are ballooning to record levels, in part due to the current recession as well as the need to fund military operations in Iraq and Afghanistan.²² Even though incarceration costs represent only approximately 1% of federal government expenditures,²³ corrections expenditures are rising rapidly. Between 1982 and 2003, the federal government increased expenditures on corrections by 925%, compared to increases of only 241% on police protection during the same period.²⁴ At year-end 2005, the last year for which the Bureau of Justice Statistics has issued a report on the status of the Nation's prisons, federal prisons were operating at 34% above their capacity.²⁵ Greater attention to costs could therefore assist the Commission and Congress in using these overtaxed resources wisely and to use the money saved for more police protection, other crime-fighting programs, or other congressional priorities.

Such forecasting is consistent with the Commission's statutory purpose, duties, and authority. "The purposes of the United States Sentencing Commission are to . . . develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing"²⁶ Indeed, the Sentencing Reform Act explicitly charges the Commission in promulgating guidelines to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" and to "make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the

²¹ See *id.* at 1291-99.

²² See Martin Crutsinger, *Budget Deficit Soars to \$102.8 Billion in July* (Associated Press 8/12/2008), available at <http://ap.google.com/article/ALeqM5gEiJcU7rR0o8aFOk3fXoM29cpGbQD92GTPEO0>.

²³ See Bureau of Justice Statistics, *Justice Expenditure and Employment in the United States 2003*, at 2, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jecus03.pdf>.

²⁴ See *id.* 2, 9.

²⁵ See Bureau of Justice Statistics, *Prisoners in 2005*, available at <http://www.ojp.usdoj.gov/bjs/abstract/p05.htm>.

²⁶ 28 U.S.C. § 991(b)(2).

guidelines promulgated pursuant to the provisions of this chapter. The 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”²⁷ The Commission unquestionably has the authority to conduct such cost forecasting: “[t]he Commission . . . shall have the power to . . . make recommendations to Congress concerning modification or enactment of statutes related to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy.”²⁸

Not only is cost forecasting consistent with the Commission’s specific mandate, it is consistent with the government’s practice in other areas. The federal government has embraced cost benefit analysis as a centerpiece of the movement to reinvent government to be more effective and streamlined. The Office of Management and Budget reviews the proposed regulations of executive agencies before they take effect to ensure that they are justified under a cost-benefit analysis. Although the Commission’s proposed amendments are exempt from this requirement, they fall within its spirit. Sentencing policies, like all other government policies, should seek to make government as efficient and effective as possible. It is the very definition of good government to ensure that any proposed policy maximizes welfare at the lowest cost.²⁹ This should therefore be a top priority for the Sentencing Commission as it enters its next amendment cycle.

II. The Commission Should Include Among Its Priorities the Pre-Enactment Forecasting of the Racial and Ethnic Impact of Federal Criminal Legislation and of Commission Proposals

The costs of a system of mass incarceration are not just measured in dollars. There are social costs as well, and one of the greatest stems from the racial and ethnic disparities in our federal prison population. Blacks and Hispanics are disproportionately incarcerated, relative to both their numbers in the general population and the incidence with which they commit crimes. As of July 26, 2008, of the 201,417 people incarcerated in federal prisons, 79,476 individuals (39.5% of the total) were black and 64,079 (31.8%) were Hispanic.³⁰ In 2007, 72.2% of federal drug offenders were black or Hispanic.³¹ Blacks comprise only

²⁷ *Id.* § 994(g).

²⁸ *Id.* §995(a)(20); *see also id.* §§ 995(a)(12)-(16).

²⁹ *See* RICHARD L. REVEZ AND MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 12-13 (2008) (discussing benefits of cost-benefit analysis in government decisionmaking, even regarding government regulation motivated by goals other than efficiency, because it achieves more rational government programs, increases accountability and transparency in government, and structures and channels exercises of discretion by government decisionmakers); STEPHEN HOLMES & CASS SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 228-29 (1999) (noting that public deliberation should be focused on, among other things, how much to spend on a given right and “the optimal package of rights, given that the resources that go to protect one right will no longer be available to protect another right.”).

³⁰ *See* Federal Bureau of Prisons, Inmate Population, available at <http://www.bop.gov/news/quick.jsp#1>.

³¹ *See* UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, available at <http://www.ussc.gov/ANNRPT/2007/Table34.pdf>.

12.4% of the American population, and Hispanics make up 14.8%.³² Eleven and one-half percent of black men under the age of 40 are imprisoned, and more than 20% of black men born since the late 1960s have spent at least a year, and typically two, in jail for a felony conviction.³³ In some cities, more than 40-50% of black men are under the supervision of the criminal justice system.³⁴ "If brought together in one incorporated region, the black males who are now in prison would instantly become the twelfth-largest urban area in the country."³⁵ If current trends continue, almost one-third of black men can expect to be incarcerated during their lifetimes, while only 4% of white men face the same expectation.³⁶ And black children are nearly 9 times more likely to have a parent in prison than are white children.³⁷

Critically, despite their disproportionate representation among incarcerated individuals, black men do not commit crimes (other than serious violent crimes) more than whites. Thus, although high rates of homicide among black men explain the parallel high rates of imprisonment for murder, for less serious offenses, race differences in incarceration are not well explained by higher crime rates among blacks.³⁸ This is particularly true for drug offenses, where, as noted, people of color make up almost three-fourths of the federal prison population. Their rates of offending are nowhere near those numbers. Instead, "black men are much more likely than whites to be arrested for a drug offense, and go to prison if arrested, even though they are no more likely to use drugs than whites."³⁹

State prisons have comparable demographics, and they have begun to take action to investigate why the numbers are so disproportionate. For example, Iowa recently enacted

³² See 2006 American Community Survey, United States Census Bureau, available at http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-ds_name=ACS_2006_EST_G00_&-CONTEXT=dt&-mt_name=ACS_2006_EST_G2000_B02001&-tree_id=306&-redoLog=false&-currentselections=ACS_2006_EST_G2000_B02001&-currentselections=ACS_2006_EST_G2000_B02003&-currentselections=ACS_2006_EST_G2000_C02003&-geo_id=01000US&-geo_id=02000US1&-geo_id=02000US2&-geo_id=02000US3&-geo_id=02000US4&-search_results=01000US&-format=&-lang=en.

³³ See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 19, 26 (2006).

³⁴ See Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 744 (1993).

³⁵ DERRICK BELL, SILENT COVENANTS 183 (2004).

³⁶ See *Impact of Incarceration on the African-American Family*, ed. Harris & Miller, at 89, available at http://books.google.com/books?id=zr0BWzjLrKGC&pg=PA167&lpg=PA167&dq=Impact+of+Incarceration+on+the+African-American+Family&source=web&ots=jO02Cj_ZFt&sig=XUsUZCfrQMnG5WF9I2xaEP8c63c&hl=en&sa=X&oi=book_result&resnum=1&ct=result; see also Bureau of Justice Statistics, *Lifetime Likelihood of Going to State or Federal Prison* (March 1997), available at http://209.85.165.104/search?q=cache:CssOMn0m_NIU:www.ojp.usdoj.gov/bjs/pub/ascii/lfgsf.txt+1/3+black+men+incarcerated+during+lifetimes&hl=en&ct=clnk&cd=1&gl=us&client=firefox-a.

³⁷ See *id.* 88. This problem promises only to become more acute because "[e]thnic and racial minorities will comprise a majority of the nation's population in a little more than a generation, according to new Census Bureau projections." Sam Roberts, *In a Generation, Minorities May Be the New U.S. Majority*, N.Y. TIMES, Aug. 13, 2008, at A1.

³⁸ See WESTERN, *supra* note 33, at 50.

³⁹ See *id.* at 50.

legislation requiring a "Minority Impact Statement" for any proposed criminal law. The law, which was overwhelmingly endorsed by both parties (the vote in favor was unanimous in the Iowa House and 47-2 in the Iowa Senate), requires examination of the impact upon minorities, including racial and ethnic minorities, of all new criminal laws, including sentencing laws, prior to passage.⁴⁰ The Minority Impact Statement Bill provides a means for Iowa legislators to anticipate any unwarranted disparities and enables them to consider alternative policies to accomplish the goals of the proposed legislation without causing undue negative effects on public safety and without creating the same disparities.

The Commission should follow Iowa's example and set as a priority the establishment of a reporting scheme whereby the Commission would report to Congress on the racial/ethnic impact of proposed criminal legislation and Guideline amendments.⁴¹ In addition to empowering Congress – like the Iowa legislature – to anticipate and reduce unwarranted disparate effects posed by pending legislation and to consider alternatives prior to enacting criminal legislation, such forecasting would reflect federal legislative priorities and be consistent with the Commission's currently-listed tentative priorities.

Forecasting the racial and ethnic impact of proposed federal criminal legislation and Commission sentencing rules could help Congress and the Commission develop more fair and rational federal criminal legislation. Unwarranted disparate effects of criminal laws are unjust and discriminatory. To the extent such unwarranted, unfair effects are not tied to actual differences in the incidence of crime commission, such effects should be avoided and alternatives considered. The Commission would provide invaluable data to Congress in the effort to root out such unfair racial and ethnic discrimination and to enact alternative legislation without unwarranted disparate impact.

There is already congressional interest in such information. This summer, Senator Joseph Biden introduced the Justice Integrity Act.⁴² The legislation would establish a pilot program in the Justice Department to identify and eliminate unjustified racial and ethnic disparities in the administration of criminal justice. The program calls for an advisory group to gather and examine data regarding the criminal process in 10 federal districts and seek to determine the causes of any racial or ethnic disparity, produce a report on key findings, and recommend a plan to reduce any unwarranted racial and ethnic disparity. The bill is now co-sponsored by Senators Cardin, Feingold, Kerry, Murkowski, and Specter.⁴³ Commission examination of racial and ethnic impact of proposed criminal legislation would be consistent with the goals of the Justice Integrity Act and the Commission is well positioned to provide this information given its extensive staff and expertise.

⁴⁰ See Iowa House File No. 2393, available at <https://www.edinfo.state.ia.us/web/legisupdate.asp>.

⁴¹ Such examination is consistent with the Commission's statutory purpose. "The purposes of the United States Sentencing Commission are to . . . establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, *avoiding unwarranted sentencing disparities* among defendants with similar records who have been found guilty of similar criminal conduct . . ." 28 U.S.C. § 991(b)(1)(B) (emphasis added).

⁴² See S. 3245, available at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.3245>.

⁴³ See <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN03245:@@P>. A companion bill has been introduced in the House of Representatives. See H.R. 6518, available at <http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.6518>.

Examining the racial and ethnic impact of proposed criminal legislation would also complement the Commission's currently-listed tentative priorities. Two of those tentative priorities – “a study of statutory mandatory minimum penalties” and “[c]ontinuation of . . . work . . . on cocaine sentencing policy” – are intertwined with the severity of racial and ethnic disparities. Black and Hispanic offenders make up the overwhelming majority of individuals convicted under mandatory minimum law. Black offenders make up 32.9% of those convicted with a mandatory minimum sentence, and Hispanic offenders make up 38.2%. Overall, black offenders comprise a greater percentage of offenders convicted under a statute carrying a mandatory minimum penalty than their already high percentage of the overall offender population.⁴⁴ And, as the Commission itself has recognized, the disparity of penalties between crack cocaine and powder cocaine offenses is vast: more than 80% of crack cocaine defendants in 2006 were black, and black defendants serve as much time in prison for drug offenses (58.7 months) as white defendants do for violent offenses (61.7%). Recognizing the severity of this disparity, the Commission has repeatedly advocated eliminating it, and in fact, recently took steps to reduce the disparity.

Imprisonment causes significant adverse socio-economic consequences for the imprisoned individual, their families, and society generally. Imprisonment causes dislocation from the labor market upon release, dissolves marriages and relationships with children and family, causes post-release domestic violence, and by reducing wages and employment opportunities, creates social welfare costs that must be borne by rest of society.⁴⁵ When warranted, such consequences are a necessary part of ordering society under the rule of law. But when such consequences are unwarranted and are not linked to the actual incidence of crime – and thus do not achieve deterrence of criminal conduct – such consequences should be avoided, particularly when they fall disproportionately on certain communities. Implementation of the proposed program would assist Congress to achieve a more rational and fair criminal justice policy and avoid the adverse consequences of unwarranted disparate incarceration.

Providing Congress and the Commission with cost data about proposed sentencing legislation and its impact on racial and ethnic communities will help policymakers to fight crime efficiently and effectively and to minimize the social costs of this effort.

⁴⁴ See Statement of Ricardo H. Hinojosa before House Judiciary Committee, June 26, 2007, at 3, *available* at http://www.ussc.gov/testimony/6_26_07.pdf.

⁴⁵ See WESTERN, *supra* note 33, at 108-67.

August 25, 2008

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

Dear Judge Hinojosa,

I am writing to you on behalf of The Sentencing Project to offer recommendations in regard to the Commission's priorities for the 2009 amendment cycle. We appreciate this opportunity to submit comments for the Commission's consideration.

Over the past year, the Commission has demonstrated strong leadership in enacting reforms for sentencing in crack cocaine cases. The Guideline adjustments have been among the most significant changes in sentencing policy in recent years and serve as a model for responsible policymaking. We hope that the Commission will continue to play a constructive role in this area, as well as others, as Congress considers a range of reform proposals to the statutory penalties.

With a new administration and Congress taking office in 2009, now is an important moment for consideration and review of federal sentencing policy. In that regard, we offer recommendations that we believe would enlighten the policy discussion regarding federal sentencing and contribute to an evidence-based and fair system. The proposals are as follows:

Study the Impact of Mandatory Minimum Sentencing

Although mandatory sentencing provisions have historically been a part of American criminal sentencing, the past three decades have witnessed an exponential increase in their use. Beginning with the Anti-Drug Abuse Act of 1986, mandatory minimums have become a high profile legislative tool at the federal level, most often targeting narcotics, firearms, and gang offenses. During this period, mandatory minimums have become an increasingly polarizing topic, receiving an unparalleled level of political and media attention. Supporters of mandatory sentencing laws, such as the Department of Justice, argue they increase public safety by "deter[ring] certain types of criminal behavior . . . incapacitat[ing] dangerous offenders for long periods of time," and "provid[ing] an indispensable tool for prosecutors" to compel defendants to cooperate in ongoing criminal investigations. Opponents argue that mandatory sentencing has had a questionable impact on crime, while resulting in disproportionately severe penalties, exacerbating racial disparities, and jeopardizing fair sentencing outcomes. United States

Supreme Court Justice Anthony M. Kennedy observed, “[I] can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”

These positions are emblematic of a profound divergence of opinion as to the efficacy of mandatory minimum sentencing. Unfortunately, despite sparking widespread disagreement during this period, the actual impact of federal mandatory minimum sentencing has not been subject to sustained analysis. Since the Commission issued its report, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, in 1991, there have been a number of developments that warrant an update of that work.

- In 1991, mandatory sentencing was still a relatively new phenomenon in the federal system. We now have more than two decades worth of data to consider, which can provide a much more comprehensive understanding of how mandatory minimums have affected federal sentencing.
- The introduction of the “safety valve” in 1994 changed how mandatory minimums apply to low-level offenses. The effectiveness of this policy at re-calibrating mandatory sentences to apply to more serious offenses should be analyzed.
- Members of Congress continue to introduce new mandatory sentencing legislation every year and a host of such policies have become law since 1991.

Considering the wide use of mandatory minimums, it is critical that the Commission undertake a comprehensive review of how these policies have influenced the federal justice system. A review is particularly important as Congress considers policy on crack cocaine and other sentencing issues. In urging the Commission to address this informational void, we note four specific questions deserving of attention.

What effect do mandatory minimum sentences have on reducing crime?

- There is widespread disagreement as to the efficacy of mandatory sentencing in reducing crime. Some state-level analyses raise doubts about the utility of mandatory sentencing, but Department of Justice officials argue in support of them as a critical instrument in reducing crime. The Commission can provide valuable guidance in this debate by analyzing more than two decades of federal sentencing patterns to ascertain what impact, if any, mandatory sentencing has had on crime.

How have mandatory minimums affected criminal court case processing dynamics?

- While proponents of mandatory sentences view them as a valuable tool in obtaining cooperation from defendants as well as eliciting favorable plea agreements, opponents question whether their use has unfairly concentrated discretion in the office of the prosecutor at the expense of the defendant.

How do mandatory minimums interact with the Guidelines?

- Longer mandatory minimum sentences have resulted in the inflation of Guideline ranges to maintain consistency, leading to concern about how this adjustment influences the statutory goals of the Guidelines such as proportionality in punishment and the elimination of disparity in sentencing.

To what degree have mandatory minimums had a racially disparate impact?

- The Commission's report, *Fifteen Years of Guidelines Sentencing*, noted that mandatory sentences, such as those associated with powder and crack cocaine offenses, are likely responsible for some degree of racially disparate outcomes in federal sentences. The issue of mandatory sentencing was beyond the purview of the 1991 report, but a focused analysis on this critical issue would be invaluable to policymakers.

Expand Alternatives to Incarceration in Federal Guidelines

The Sentencing Project strongly supports the Commission's consideration of alternatives to incarceration during its upcoming amendment cycle. As highlighted at the Commission's July 2008 symposium, *Crime and Punishment in the United States: Alternatives to Incarceration*, states are taking bold steps to reduce prison populations by expanding the use of alternative sentences that divert offenders from incarceration. We urge the Commission to follow suit and expand the federal sentencing guideline ranges for nonviolent offenses to include non-imprisonment sentencing options in a broader range of cases.

Over 200,000 people are incarcerated under the jurisdiction of the Federal Bureau of Prisons, making it the largest prison system in the country. The population doubled in the period 1995-2005, largely due to a jump in incarcerations for drug and public order offenses. Violent offenses were responsible for less than 10% of the increase in the prison population over this period. These high rates of incarceration for nonviolent offenses, and the significant cost associated with imprisonment, highlight the need to reduce the federal prison population by diverting individuals serving sentences for these low-level offenses from prison.

The public supports such action. In 2002, a poll conducted by Peter D. Hart Research Associates for the Open Society Institute, entitled *Changing Public Attitudes toward the Criminal Justice System*, found strong support for alternatives to incarceration. Over 70% of respondents favored a policy that would mandate drug treatment and community service rather than prison for people found guilty of selling small amounts of drugs. More broadly, three-quarters of all adults favored sentencing nonviolent offenders to supervised community service or probation instead of imprisonment, including 41% who strongly favored this proposal.

As the body responsible for setting the federal sentencing guidelines to advise judges on the appropriate sentencing range for all federal offenses, the Commission's consideration and efforts to expand alternative sentencing options would have a significant impact on the ballooning federal prison population. To accomplish this objective, the Commission may consider creating a new criminal history score that denotes the lowest level defendants, who are likely to be the most appropriate candidates for diversion from incarceration. The Commission should also consider shifting the sentencing grid to allow for alternative sentences for the lowest-level offenses.

Explore the option of producing racial impact statements for proposed guideline changes

Concerns about unwarranted racial disparity in the criminal justice system have been widespread, as evidenced most notably in the policy debate regarding sentencing for crack cocaine offenses. While there has been broad discussion about the racial dynamics of crack cocaine policy in recent years, there was little analysis about these issues when the laws were adopted in the 1980s. Responses could have been developed that would not have exacerbated unwarranted racial disparities if policymakers had examined available data and anticipated the likely effect of these changes in the law.

There are now mechanisms in place in several states that can serve as models for federal policy in this area. In 2008, three states adopted or implemented processes by which policymakers can assess the racial and ethnic impact of proposed law changes prior to adoption. These states are:

- *Minnesota* – The Minnesota Sentencing Guidelines Commission adopted an internal policy to conduct racial impact analyses of proposed sentencing changes, and to assess the degree of change in sentence length for racial and ethnic groups. The Commission notes that “[t]he agency does not intend to comment on whether or not a particular bill should be enacted. Rather, it is setting out facts that may be useful to the Legislature, whose members frequently express concerns about the disparity between the number of minorities in our population and the number in our prisons.”
- *Iowa* -- In April, Governor Culver signed legislation that will require that the legislature receive a racial and ethnic impact statement, along with a fiscal and population assessment, for proposed sentencing changes.
- *Connecticut* – In June, Governor Rell approved a law that will grant committee chairs the option of requesting a racial impact statement prior to consideration of sentencing policy changes by a full committee.

In addition to these newly-enacted policies, the concept of racial impact statements has received significant support from the legal community. In 2004, the American Bar Association's Justice Kennedy Commission recommended that legislative bodies “conduct racial and ethnic disparity impact analyses to evaluate the potential disparate effects on racial and ethnic groups of existing

statutes and proposed legislation.” In 2007, as part of its revision to the Model Penal Code, the American Law Institute (ALI) called for sentencing commissions to prepare projections to quantify “demographic patterns,” along with correctional resource projections. The ALI noted that “[t]he provision treats numerical disparities in punishment as an important societal cost that must be considered along with other factors when the existing sentencing structure is assessed, or when changes within the system are contemplated.”

In order to aid policymakers in considering the racial and ethnic impact of proposed sentencing changes, the Commission should review existing mechanisms in the states and assess the feasibility and utility of incorporating such analyses into the federal system. Such an assessment would include a review of available data by race and ethnicity, the range of circumstances under which a racial/ethnic impact statement might be beneficial, the process by which such statements could be produced, and the ability of existing software to produce such analyses. A Commission review could then make a recommendation regarding whether such analyses would be a useful tool in federal policymaking and if so, the means by which this could be accomplished.

Thank you for the opportunity to provide these recommendations for your consideration. We would be pleased to elaborate on any of these issues if helpful.

Sincerely,



Marc Maurer

cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions, III, Vice Chair
Commissioner Dabney Friedrich
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Kelli H. Ferry
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel



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September 1, 2008

SENT BY PRIORITY MAIL

United States Sentencing Commission
Attention: Public Affairs-Priorities Comment
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Request for Public Comment for the Amendment Cycle
Ending May 1, 2009

Dear Commission:

Having submitted public comment for many years, envisioning public comment to submit for the past two years seemed quite futile without continued research to support any analysis of the fallout from United States v. Booker and subsequent Supreme Court decisions upon the now voluntary federal sentencing guidelines and its Chapter 8, organizational sentencing guidelines. Using the Booker model, organizations who hesitate to accept an upward departure plea bargain from the government would be entitled to a jury trial. However, using the Post-Booker mandatory organizational sentencing guidelines model only leaves the federal sentencing guidelines begging for constitutionality that exhibits slim-to-none chances of ever happening without complete guidelines overhaul by Congress and/or delegation to the United States Sentencing Commission.

As would be expected from organizations following the black letter of the law and not the spirit of the law, many powerful public corporations, of course, headed for the private arena through the normal slash-and-burn leveraged buyout acquisition tactics that line the pockets of the loyal corporate executive who turned a blind eye to corporate compliance, leaving employees without jobs and benefits. Unfortunately, the government provides no bailout monies to those public employers who magically converted to private employers. Even public corporations used "poor me" tactics to give most employees lower-to-no pay raises and reduced benefits.

*Protecting the Workplace for All Employers
and Employees™*

Forward-looking corporate compliance professionals long for a new vision, a vision that incorporates worldwide social consciousness of employees with the need for profits of executives. This **WORLD VISION COMPLIANCE©SM** rewards those corporations that support worldwide social consciousness of their employees, not through mindless donations to less-than-stellar social causes that piggyback as illegal bribes, but corporations that effectuate "**actual social change programs**" to make the world a better place. How can this **WORLD VISION COMPLIANCE©SM** transpire into the organizational sentencing guidelines that discourage criminal conduct by organizations? By making "actual social change programs" as the eighth key criteria for establishing an "effective compliance program".

Can the typical corporate executive that drives a Lamborghini relate to what it is like to starve on a daily basis, to live without adequate medical care and to live in fear of dying due to war, poverty and the like. Probably not, but the typical corporate executive of a corporation has the power and influence to make the world a better place however that transpires to its employees through "actual social change programs". This higher plain of social awareness breeds the much-needed INTRINSIC MOTIVATION necessary for employers and employees to rise above ethical and moral calamities that precede criminal activity and, yet, foster the innovation, growth and profits necessary for corporations to flourish and prosper.

Thank you very much for the opportunity to have provided the above Public Comments.

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law

September 5, 2008

In regards to: Priority Policy issues for the amendment cycle ending May 1, 2009

United States Sentencing Commission

One Columbus Circle, NE, Suite 2-500, South Lobby, Washington, DC 20002-8002, Attention Public Affairs-Priorities Comment.

Dear United States Sentencing Commission:

I am writing to assist with feedback you are requesting from the public. I am the wife of a present federal prisoner. Who better to give this kind of feed back? I am not angry at our system but disappointed. My husband was going to serve a mandatory sentence for a non-violent crime. However due to his cooperation with our government this was reduced to a lesser sentence. This doesn't make it any better because his crimes in comparison to other crimes of violent nature are still less time. My husband had a difficult upbringing as a child and young adult. However once he matured into a man he realized that the path he was on was not leading to anything positive. He married had children and made the decision to leave the past behind, repent, and live a righteous life. It happened that at the time he made the choice it was a moment too late. The individuals whom he surrounded himself were not in the same mind set. One of the individuals (my husband acquaintance) found themselves in trouble. I am thinking this person's only option was to be an informant and persuade others to commit crimes so he could relieve himself of prison time. My husband became his opportunity for this and he kept persuading him help him in scoring some drugs. At one point my husband told him that he no longer wanted to be involved that he now had a family but he insisted so my husband told him that a person he knew might be able to help him. In the mean time we moved away from that city to begin a family life. Months later the people he put in contact with this informant and my husband were charged with conspiracy. My husband was released on bail and for the past 6 years he has complied with everything the government has requested of him. He feels great regret and remorse for his past actions and doesn't want the same life for his children. He is an excellent father and husband. His greatest concern now is for his children. His crime was not one of violence. For the past 6 years that he was out on bail he didn't cause any harm or commit any crime that would indicate that he is a threat to our society. If anything he established positive relationships in our community even with the government officials that he had to report to. I have had some contact with some of them after asking how he is doing. Our children miss their father dearly. They all sleep with me now and I have had to become the sole provider in our household. The ones who are suffering the most are our children, our future. We have 13, 10, and 7 year old boys and 4 and 3 year old girls. I have been blessed that I have been able to manage, with the support of my employer, friends and family. It hurts me to see my husband in those conditions knowing that his punishment is too long for the time that has past, his accomplishments, and his crime. Not to mention the fact that for 6 years we dealt with the uncertainty of what was going to be the out come. Every time we had to go to court the fear, the stomach aches the worry for our family. I am not excusing his past behavior but the fact that a lot of these people in our federal prisons are serving severe punishment for non violent crimes and are more productive in our society then in prison. I believe in you do the crime you do the time and I know my husband feels the same. But a fair amount of time. For example it's like a child do I beat my child over something minimal? Or do I find appropriate punishment for what they have done? All I am asking is that we find better ways to be just. I know that in my husband's case the Judge had really no control in his sentence and if he did, it would be too much of a risk to the judge from what I have research. For a judge to go against a mandatory sentence or what a Prosecutor is requesting or dictates. There is just so much I have learned about our sentencing guidelines since my family has had to deal with this. More negative than positive I hate to say. I hope and pray that my husband remains strong and that something chance soon so he may come home to do what is necessary and important. I can report to you proudly that he has made the choice to keep to himself in prison. He is involved in classes, church, and work. So far he is ok but it's not him I am concerned about it's others who are in the system that truly have committed awful crimes and have hurt people. It's sad that even they get rehabilitation help, assistance, early release, Counseling, etc. What about the people involved in drugs. They too have instabilities, emotional issues, etc. but these can also be helped with counseling and assistance. My husband is an

example that these people can be rehabilitated and be productive if given a chance. But sending them away and not helping them and then sending back out to society (because sooner or later they get it) not only with a drug problem but a mental effect of the things that go on in prison. More crime, plus by this time they possibly lost there support group or are forgotten. Life has changed from what they knew it to be like before they went to prison. They will now they have a record. How are they going to get a job? It's frustrating. Please help. If you would like to speak with me or my family I will be more than happy. My phone number (559)210-1654 please feel free to call anytime. Thank you for the opportunity to share this with you.

Respectfully,

A handwritten signature in cursive script, appearing to read "Olivia Hernandez Banuelos". The signature is fluid and stylized, with a large loop at the end.

Olivia Hernandez Banuelos

Dear USSC

We The People...

Families, Friends, and Concerned Citizens of the men and women incarcerated in the United States of America
by submit this letter in an attempt to appeal to your humanity and common sense. A similar letter was sent to Legislators and concerned parties across this nation as a call to action, the first week of July 2008..

The system as it exists is broken. We ask that you begin working together to fix it. More than **one in forty children** in the United States has a parent in prison. The loss of a parent to incarceration means a crisis for that child. Concerned people in all settings are dealing with children of prisoners and their caregivers daily. The situation is only getting worse. We do not even give inmates enough phone time to be able to be active in their children's lives. I wonder how many inmates would LOVE the opportunity to HELP their children with their homework, even if it is over the phone. We are punishing the wrong people. Study after study has shown that when a parent is absent from their children's lives, the children are affected and may fall into the same pattern, as their parent. Children of incarcerated parents often come from poverty level incomes and environments. With out the other parent being able to help, is it any wonder that they (children) often end up with drug problems, lack of social skills, and teenage pregnancies, a history of relying on government programs. The children are the ones that end up with the **THREE STRIKES**.

As the recently released Pew Report shows, there are currently more than 2.3 million Americans imprisoned nationwide. That is an astonishing **1 in 99.1** American adults. According to the US Census Bureau, the population of the US represents 4.6% of the world's total population. Yet the United States accounts for **one full quarter (25%)** of the entire Worlds prison population.

These figures do not even represent those who are on probation or parole, which brings the total to over **7.2 million citizens**. About 3.2% of the U.S. adult population, or **1 in every 31 adults**, were incarcerated or on probation or parole at yearend 2006. That is a staggering and unacceptable amount of our citizens!

America prides itself as being the *Leader of the Free World* yet our Nation has the **highest incarceration rate in the entire world**. It is deplorable! We have become the "**Land of the Free and Home of the Incarcerated**".

We are tired of our tax dollars being diverted out of Education and into prisons. This country currently has a 33% high school dropout rate. This figure will only increase unless we curb the current rate of incarceration.

We, taxpaying and voting citizens, are tired of families being torn apart by a system which does not prevent crime and serves all too often only to prevent those who have committed a crime from ever successfully re-entering society.

We are tired of the endless creation of punitive laws and measures that serve only to further oppress the citizens, and as a side effect, the families of this country. **Mandatory Minimums, the War on Drugs and the 3-Strike Laws, sexual offense laws such as Jessica's Law (which has ensnared many undeserving young men in its trap) and "Conspiracy Laws as they stand, today.** The list goes on and on.

We need to restore Federal Parole. We have many men and woman incarcerated that should be given the chance to be tax paying citizens, once again. Incarcerating somebody in their 20's, convicting them under the mandatory minimums and not releasing them till their 30's or 40's (because there is no parole) hurts everybody. We learn most of our skills that carry us thru life in our 20's and 30's. We equip ourselves for retirement, and a future. We instill what we have learned to our children. We are locking up way to many people for way to long. Communication with family is so hard when one is locked up. How is somebody expected to get a decent job when they are 40 years old because they have been locked up for 10 + years. What future is there for tem or their children?

We ask that before you continue to add new laws to the books, you first look at the ones that are already in place. **They are not working**. The answer is not to "lock 'em up and throw away the key". The answer is restorative measures that allow for rehabilitation and re-entry into society as future tax-paying citizens.

prisons overflow with Americans who are substance addicted; an estimated 60% of all inmates. The majority is also mentally ill, estimated to be an appalling 62%. These people are not being given the treatment they need to become

functioning and productive adults. Rehabilitation and Mental Health programs are the only logical answer. As of now, only **less than 10%** are receiving treatment for their substance abuse problems, and even fewer are receiving proper mental health care.

We need prisons for our most violent and predatory criminals, but that is NOT what the majority of our prisons hold. One-third of all American prisoners are presently incarcerated for non-violent drug-related offenses. Alternatives to prison, such as Drug Courts, must replace incarceration when possible. **The length of prison sentences often far exceeds the severity of the crime committed. Young bodies and minds are wasted and destroyed because of the public's perceived desire for revenge rather than rehabilitation. We submit that this perception is wrong.**

The only sure way to reduce recidivism is through programs that educate, rehabilitate and provide job skills along with the reformation of both sentencing *and* parole. The ultimate goal of imprisonment, in most cases, should be the restoration to society that of a law-abiding, tax-paying citizen. The US Dept. of Justice Bureau reports that 95% of inmates will be released; yet the recidivism rate in some States is as high as 70%. Programs must be instituted to address this.

There are thousands of American citizens that been railroaded into prison by corrupt officials (e.g. the Duke Lacrosse Rape Case.) Many untold thousands more have landed there due to incompetent or inept legal representation assigned to them through their Public Defender's office. Over 95% of convicted felony cases *DO NOT* even go to a jury trial!

Plea deals are made, often times under threats by the Police, District Attorneys and even Judges. **An estimated 30% currently incarcerated are believed innocent of the charges brought against them.** So why take a plea? A person who refuses to plead guilty will receive a penalty as high as 10 times greater than they would have if they take a plea deal. They punish those who exercise their right to a jury trial. When it comes to plea-bargaining, an innocent defendant has nothing to gain and everything to lose. **INNOCENT UNTIL PROVEN GUILTY** must once again become the cornerstone of American justice, not mere hollow words.

Sex Offense laws are completely out of control in America. 316 years after the Salem Witch Trials, we apply many of the same principles to an often wrongly labeled segment of society. Have we learned nothing in three centuries? Separate the *truly deviant* and harmful predators from society. The brush stroke that is being used now is too broad and too severely punitive for lesser offenses.

Our prison systems are at best dysfunctional, at worst inhumane. Prison medical care in America is abysmal. Disease runs rampant throughout the prison system, which has spread to guards who then bring it home to their families. These diseases come back into our neighborhoods, schools and homes when the inmates are released untreated. Healthy young men and women are contracting life threatening diseases while in the custody of the State and they do not receive proper medical attention. Too many are leaving prisons with a terminal illnesses or a permanent disability contracted in the environment they are forced to live in. **These American Citizens were sentenced to loss of FREEDOM, not loss of life.**

The financial burden to taxpayers of today's system of incarceration is enormous. At present, it is estimated at \$49 billion a year and rising. Expenditures for operating the Nation's justice system increased from almost \$36 billion in 1982 to over \$185 billion in 2003, an **increase of 418%**. The cost to date is even higher, and continues to climb.

At yearend 2006, 23 States and the Federal system operated at more than 100% of their highest capacity, with some States operating at **over 200%** capacity. Seventeen States operated at between 90% and 99% of their highest capacity. The Federal prison system was operating at 37% above its rated capacity at year end 2006. **This is no longer acceptable.**

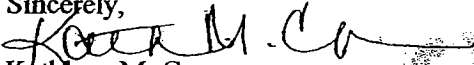
You have been given report after report, study after study, and finding after finding. They detail out what needs to be done to fix the broken and corrupted quagmire your citizens have become engulfed in.

WE IMPORE you to direct all possible effort toward the reformation of our current Judicial and Prison systems. Quit throwing our tax dollars into something that so obviously does not work, and instead use that money to rebuild the lives of your citizens that are in desperate need of repair. Make this Country once again the *Leader of the Free World*, and the *Champion of Human Rights*. A society that destroys its own members at such an alarming rate cannot endure much longer, nor may it properly call itself *civilized*. **THE TIME FOR CHANGE HAS COME!**

YOU can open the doors that have been slammed shut on prison reform, and slam shut the revolving door our prisons have become.

Each time a person stands up for an ideal, or acts to improve the lot of others. . . they send forth a ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current that can sweep down the mightiest walls of oppression and resistance." Robert F. Kennedy

Sincerely,



Kathleen M. Corson

A Concerned United States Citizen and an American Taxpayer



Tyranny Ended in America

Participant

Website:

www.21stcenturyteaparty.us

Email

tea_prisonreform_2008@yahoo.com

From: <LMDuncan@aol.com>
To: <pubaffairs@ussc.gov>
Date: 9/7/2008 2:14:26 PM
Subject: Proposed priorities comment

We appreciate the opportunity to comment. We are highly in favor of reinstating a system of parole for non-violent offenders in the federal system. We know that there are many such inmates who could be earning their living, paying taxes and, in many circumstances, restitution instead of being a drain on an overcrowded and under funded system.

We also favor the proposed legislation that would permit early release for non-violent offenders. We do not believe that mandatory minimum sentencing is a reasonable approach.

Loyd and Ramona Duncan
1211 W 106th St
Bloomington, MN 55431-4151
952-888-7664

*****Psssst...Have you heard the news? There's a new fashion blog, plus the latest fall trends and hair styles at StyleList.com.
(<http://www.stylelist.com/trends?ncid=aolsty00050000000014>)

Bethany Ibarra, MBA
669 Heritage Drive Weston, FL 33326
954-275-0997 bethany_ibarra@hotmail.com

United States Sentencing Commission
One Columbus Circle NE, Suite 2-500, South Lobby
Washington, DC 20002-8002
Attention: Public Affairs Priorities Comment

September 5, 2008

I am writing this letter in response to the sentencing guidelines that are used in this country. There are currently over 200,000 people in federal prison with 1 in 3 people incarcerated or on parole. Therefore, sentencing guidelines is a topic of wide public interest. I am one of those people where the guidelines directly impacted my family and me.

On June 25, 2008, my brother, Thomas Kent, was sentenced to 178 months for conspiracy to distribute marijuana. It was his first offense and the crime was non-violent in nature. Thomas is not the stereo typical criminal, but I have come to learn, that tens of thousands of people serving long mandatory sentences with no hope for parole are not what society thinks of when they might envision someone serving 10 or 20 years of their lives behind prison walls.

Thomas was raising his 2-year-old daughter and working at a cable company at the time of his indictment. He lived in a middle class neighborhood and came home every night and cooked dinner and proceeded with the nighttime routine that parents of young children are very familiar with. Thomas cared for our brother when he was recovering from a stem cell transplant in 2007 after his continued battle with Hodgkin's lymphoma. The federal system rewards individuals that incriminate others and Thomas was a victim of this as other people traded testimony against him in order to lower their own sentences. However, Thomas accepted his responsibility, even if it was exaggerated, and hoped the judge would use his judgment and not strictly go by the sentencing guidelines. It was simply too ridiculous to believe that someone could be sent away for almost 14 years for a first time non-violent offense for an individual that was living a productive life. Sadly, the new judge that had only served 6 months went by the guidelines.

How can a nation that prides itself on being the land of the free throw people away and not even give them a chance for redemption? The financial and moral burden this places on our great nation is insurmountable. The hundreds of thousands of children left without parents will be feeling the affects of these sentencing guidelines for their entire respective lives. It is estimated to cost \$40,000 annually to maintain an inmate and that doesn't include the costs after this individual has served his/her time and finds that most jobs are not an option anymore. Please reconsider the lengthy guidelines for non-violent crimes and

- ✓ Reduce billions in unnecessary spending,
- ✓ Send parents back to children,
- ✓ and align with what the voters want by once again allowing people to rehabilitate and contribute to society.



*Thomas with his daughter Lucy enjoying time together
at a water park*

Sincerely,
Bethany Ibarra

September 3, 2008

U.S. Sentencing Commission
One Columbus Circle NE Suite 2-500
South Lobby
Washington, DC 20002-8002
Attn: Public Affairs-Priorities Comment

I am totally against and want reform with the sex offender laws. For a few tragic cases such as Adam Walsh, Jessica, and Megan—this country's legislators have gone overboard with the new laws and sentences.

If anyone had taken the time to get statistics and reports on this type of offense, they would find that most of the incidents are with family or close friends/teaching types. And most of the incidents do not involve violence. It is more seduction. It is unfortunate that these things happen, but they have been happening for hundreds of years. I myself am a victim of this crime. And I see that if a child was molested a year ago it was about a ten-year sentence, now it is up to 20 years for the same thing. I could see 20 years if it was done with violence. But five to ten years and probation is ample for the average molestation.

With these new laws that have been imposed on one particular crime, we find teenagers going to prison and being labeled for a lifetime for an act that has also been going on for hundreds of years. Just touching a young person can be labeled rape. As far as I am concerned, rape is penetration, not touching. And there should be degrees of rape with sentences to match.

I am against the registration of sex offenders that the general public can access. One group is being picked out and told they can only live certain places, must register their whereabouts, and are on the web so that it is hard to find work and housing. Even some of the parole officers treat them more severely with rules than any other type criminal.

Why is the average sex offender treated worse than a murderer or someone with multiple drunk driving convictions?

Has anyone given a thought to what these laws mean to the family of the sex offender??? The children may have to face a childhood of being pointed at and shunned. The family can suffer having to move often because of the label and public offender search. It is very hard to find housing that meets the criteria they have to follow. Why are they more dangerous to an area than a murderer??? It is often very hard to find good jobs, so the offender has to work two jobs and his wife must also work just to scrape by. This is because they aren't able to get into good paying jobs with the label the family bears.

It is time to revise or toss out these laws that were made up because of a few violent people doing horrible things, and make laws for the average sex offender.

And there are statistics that show the average sex offender does not re-offend. It was a one time huge regrettable mistake. Why do they have to be labeled and pay for their whole lives???

Thank you for allowing me to state my feelings on this subject.

Sandra Ries
1152 Murray Ave.
Ravenna, OH 44266



The World of The Sacramento Area

WITH UTAH DEPT. OF
CORRECTIONS
Can give good
stats on this
Crime

This story is taken from Sacbee / Opinion.

Editorial: Jessica's Law is an expensive failure

Published 12:00 am PDT Tuesday, August 12, 2008

By now, it should be apparent that California voters made a serious mistake when they passed Proposition 83, the 2006 ballot initiative popularly known as Jessica's Law.

The law requires lifetime monitoring of sex offenders – not only those charged with child sexual abuse and rapists whose victims were adults, but also those convicted of consensual sex with a teenager and even misdemeanor indecent exposure. It bars offenders from living within 2,000 feet of a school or park.

By the end of 2007, it was obvious that the law was a failure. Almost no local police agencies in California were enforcing it, partly because it was unenforceable and partly because even trying to enforce it proved prohibitively expensive.

Now the Los Angeles Times has added still more evidence of the law's failure. In addition to its monitoring requirements, Proposition 83 also established a system of mandatory psychological evaluations for sex offenders. Like most other things about this law, that sounds like a good idea in theory.

In practice, as the Times reported, it has led to the state contracting with 79 psychologists and psychiatrists to do the evaluations. Last year, 14 of them billed the state more than a half-million dollars apiece for those services. One billed the state for more than \$1.5 million in 2007.

Such payments to contractors might be worthwhile if the evaluations were producing clear benefits. But they aren't.

The evaluations were supposed to be used to determine if sex offenders should be committed to a mental hospital after serving their sentences. But the Times found that the number of commitments was essentially the same for the 18-month periods before and after voters approved the law.

The mounting evidence that this law is a failure is likely to produce new efforts to amend it. Such efforts are a waste. This law is flawed beyond repair. It's time to acknowledge the failure of good intentions and repeal Jessica's Law.

Go to: Sacbee / Back to story

3714 Nassau Drive
San Diego, California 92115
September 5, 2008

United States Sentencing Commission
Attention: Public Affairs-Priorities Comment
One Columbus Circle NE Suite 2-500
South Lobby
Washington, DC 20002-8002

RE: Public Input

Dear US Sentencing Commission:

I am writing this letter in response to your request for input from the public regarding federal sentencing guidelines. This is a topic very near and dear to me as a voting taxpayer and as the relative of a non-violent federal offender.

The sentencing guidelines are much too restrictive. Although I understand and agree with the spirit of the design, the scope of the sentencing is much too severe and does not fit the crime, especially for non-violent offenders.

For example, a non-violent offender is sentenced to a longer period of incarceration than a state offender for the same or similar crime and in many cases; the time is 2.5 to 3 times the length of time given in the state courts. Violent offenders in the state courts are given shorter sentences for vicious crimes and are back out on the streets hurting people while the non-violent offender remains incarcerated.

I do not feel that a study would be productive at this time. In fact, I think at this point it would be a waste of time and taxpayer dollars since the only data that you could glean is the draconian length of sentence for any given crime. If a study were to be valuable and reliable the endpoints should indicate the difference between shorter sentences reducing recidivism and at this point there is no data to gather for that. In the interim, alternatives to incarceration should be *immediately* implemented for all non-violent offenders.

The prisons are over-crowded and that is due in part to the ridiculously long sentences rendered to non-violent offenders. These inmates are being brutally attacked by the violent offenders that they are forced to be housed with despite being classified as low security or minimal security risk. The ones who are high risk are simply mingled with the low risk inmates who are non-violent. Since the non-violent offender does not instigate assaults and when assaulted can not adequately defend themselves, it is a grossly negligent position to put a non-violent offender in. In other words, our non-violent offenders are being tortured while incarcerated which is not in accordance with a principle of the United States of America.

One alternative would be house arrest. It is very restrictive and carries with it a penalty for incarceration if not strictly adhered to. The cost is approximately \$4.00/day which is a nominal expense to pay for the taxpayers. If you were to *immediately* implement this, the offender would be in their own homes, able to be

parents to their children, able to work to pay for fines, restitution and contribute to the household.

Once a non-violent offender is sent home for house arrest or perhaps time served, then you can begin to collect data such as: cooperation with realistic guidelines, reduction in the rate of recidivism, and integration into society and the workplace. It is essential that the criteria for success be obtainable, measurable and realistic. For example, it is not feasible to expect a person with a felony conviction on their history to obtain work in 2 weeks when it takes a professional with a clean record and no history of drugs, 4 to 7 months to obtain a job. The standard for compliance needs to be more appropriate such as circulation of a resume, continuing education to become marketable in their field, integration into the family, participation in family counseling, etc.

When you release a non-violent offender after 10 or more years of incarceration with no significant job training other than mopping floors or doing laundry, it is unrealistic to expect them to find a job in 2 weeks, and in fact, it is a set up for failure as evidenced by the current rate of recidivism.

For all persons with drug addiction charges, not distribution, or intent to distribute, but for those who are drug addicted, immediately court order inpatient drug rehabilitation. To incarcerate a sick person is a violation of the 8th amendment of the constitution of the United States. Addiction is an illness treated in hospitals. When they commit crimes it is due to a disease and if the disease is not treated, there is no hope.

The recent audit report conducted by the OIG and submitted to congress shows some horrific proof that for whatever reason the BOP is *not* able to handle illness and *not willing to comply* with the policies of the BOP, therefore any ill inmate is in my opinion as a medical practitioner a violation of the 8th amendment. Every day, inmates die while incarcerated for conditions that should never result in death in this day and time such as death due to untreated appendicitis, death due to non treatment of diabetic gangrene.

Sick people should not be in jail. It is a crime in of itself to incarcerate a sick person. It is also a crime to operate as a physician without a license and to hire a physician's assistant, who must work under the license of a physician, is frankly inexcusable. It is a crime and it seems to me that the criminal physician is being paid by my tax dollars to render incompetent medical care to my loved one, and I am appalled at this miscarriage of justice and the misappropriation of my hard earned money.

The lawsuits presented to the BOP for these gross negligence cases and blatant disregard for the health, safety and well being of an inmate is costing the government millions of dollars per year. As a taxpayer, I resent wasting my money on law suits that could have been prevented.

The next issue at hand regarding the sentencing guidelines is that there is enormous pressure on judges to stay within those guidelines even though post Booker, they do not have to strictly adhere to them. This sounds promising to the non-violent offender and their loved ones, but the reality is that the judges are still ruling within the guidelines. The political pressure to be tough on crime puts their reputation and job on the line and since they too want to show that they have done a good job, the sentencing guidelines are being followed even though they do not have to.

The sentencing guidelines are a very bad practice. The decision should be for the judge and not mandated by a piece of paper. It is time to revisit this mistake and correct this error. Now that it has been in place for a number of years, we can see the horrible miscarriage of justice associated with it and we do not need a study to tell us what we already know. We need to step up to the plate and eliminate the sentencing guidelines and we need to do so immediately!

Prisons should be full of criminals, murders, robbers, arson, molesters and folks like that, not a non-violent person who never hurt anyone but himself! These offenders are banished from their families, their homes, their careers, and millions of dollars are being wasted on federal criminal defense for non-violent crimes. The focus and the harsh sentencing should be for the violent criminal only.

I will end with a question. Please ask yourself this: If something came up in your life and you had to go to court but you did not go because you were afraid..... And no one disputes that fact, how long would you like to go to jail for? What do you think is a fair federal sentence for not showing up to something and that is the only crime?

After you think about that, and determine what you think would be fair for your wife, your husband, your son, your mother, your brother, please look up the federal sentencing guidelines for failure to appear and ask yourself, does that sentence fit the crime?

Respectfully submitted,

Linda Sirota, RN, BSN, CCRN, TNCC-P

From: "grt" <grthom@cox.net>
To: <pubaffairs@ussc.gov>
Date: 9/7/2008 12:35:15 AM
Subject: sentencing laws

Gentlemen:

We need common sense in this process of making sentencing laws! Sentencing laws are extremely harsh and TOO long, especially for nonviolent offenses where alternatives to incarceration would better serve society while cutting taxpayer costs.

With over 1 million 5 hundred children affected by having a parent in prison for years, this nation is simply creating a generation of next offenders when a parent or parents are not able to bond, raise, and support their children. Two years in prison at the maximum for a nonviolent offense should be enough to rehabilitate that person and prepare them for re-entry into society. If not, what does that say about the system of "corrections."? Simply "warehousing" is costly and not productive! We need educators in our prisons (not jocks as guards).

Corporate criminals are treated differently and softly. Too often big corporations cheat consumers, damage the environment and abuse power but the penalty imposed on their executives' criminal acts is just a slap on the wrist. The fines imposed are a fraction of the company or CEO's net worth; whereas an ordinary person committing a fraud must pay full restitution.

We don't have equal justice in America. The mandatory sentencing laws meant to equalize sentencing was a huge mistake and was definitely NOT equal! Prosecutors have ALL the power and very often abuse their power to enhance their conviction rate for political gain. Judges have basically been taken out of the sentencing process.

According to the Commission on Human Rights: "It is only if there is willingness to protect the worse and weakest amongst us that all of us can be secure that our own rights will be protected." Sentencing laws MUST take into account those individuals represented by overburdened public defenders while wealthy individuals can hire the best defense money can buy.

Sincerely,
(supported by members of the social justice committee of the Unitarian
Universalist Church of Surprise, AZ
Roma Thomas
20425 133rd Dr.
Sun City West, AZ 85375
623-546-2561

Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle
NE Suite 2-500 South Lobby,
Washington, DC 20002-8002

RE: Attention: Public Affairs Priorities Comment

Dear Mr. Hinojosa;

I would like to voice my opinion concerning matters of public interest raised during the United States Sentencing Commission's SYMPOSIUM ON ALTERNATIVES TO INCARCERATION.

I would like the Commission to pay special attention to the following priorities:

- Implementation of increased good-time measures
- Alternative sentencing options for low level drug offenders, and
- Prison programs resulting in reduced sentences

In closing, I sincerely hope that the Sentencing Commission takes a forward looking position and use its statutory authority to seek alternatives to incarceration, to relieve the burden placed on the public, and to restore equitable results to our justice system.

Sincerely Yours,

Mrs. Vanessa J. Hosney
336-638-5002

cc: Ricardo H. Hinojosa, Chair
United States Sentencing Commission

Att: Mr. Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle
NE Suite 2-500 South Lobby
Washington, DC 20002-8002

RE: Comments on possible Priority Policy Issues.

Dear Mr. Hinojosa:

I respectfully urge the Commission to make it a priority in fashioning a remedy for the men and women sentenced during the period of November 1, 1987 and January 12, 2005 when the Guidelines were imposed as mandatory.

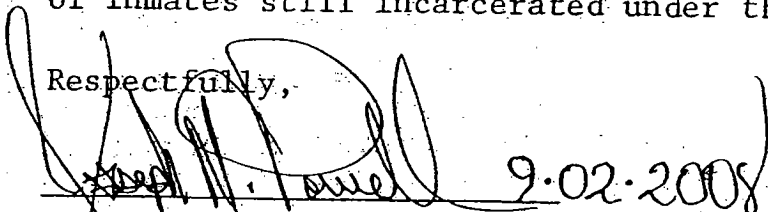
In light of United States v. Booker and subsequent Supreme Court decisions, the retroactive application is non-existent for relief under Booker because Booker does not meet the Watershed Rule addressed as the criteria in Teague v. Lane, 489 U.S. 288 (1989); as interpreted in Tyler v. Cain, 533 U.S. 656 (2001) and further analyzed in Schriro v. Summerlin, 542 U.S. 348 (2004). Consequently, thousands of men and women (predominately minorities), are left with no remedy to correct unjust and excessive sentences and must continue to serve sentences that the law clearly establishes is unconstitutional.

It is requested that remedial Legislation be presented to Congress and that a solution be studied, found, and presented in order to rectify the harm caused as a result of the mandatory application of the Guidelines between the period of November 1, 1987 and January 12, 2005. Public trust would be strengthened if the following legislation be considered as a form of correcting the harm:

1. Implementation of increased Good-Time Measures.
2. Prison Programs resulting in reduced sentences.
3. Reinstating Parole for sentences imposed within time period of November 1, 1987 and January 12, 2005.

In closing, I encourage that this Commission evaluate the impact the Federal Sentencing Guidelines pre-Booker has had on the thousands of inmates still incarcerated under the flawed sentencing regime.

Respectfully,


cc: Ricardo Hinojosa, Chair
United States Sentencing Commission