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

Attention: Public Affairs – Priorities Comment

**Re: Public Comment on USSC Notice of Proposed Priorities for Amendment  
Cycle Ending May 1, 2014**

Dear Judge Saris:

On behalf of the Federal Public and Community Defenders, and pursuant to 28 U.S.C. § 994(o), we offer the following comments on the Commission's Proposed Priorities for the 2014 amendment cycle.

**I. Proposed Priority #1: Continuation of Work on Mandatory Minimum Penalties**

We urge the Commission to proactively support recently proposed bipartisan legislation creating a new "safety-valve."<sup>1</sup> The proposed safety-valve would apply to all federal offenses carrying mandatory minimum penalties and would allow judges to impose sentences below those penalties whenever the mandatory minimum sentences does not fulfill the purposes of sentencing set forth at 18 U.S.C. § 3553(a).

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<sup>1</sup> The Justice Safety Valve Act of 2013, S.619 was introduced in the U.S. Senate on March 20, 2013 by Senators Patrick Leahy (D-Vt) and Rand Paul (R-Ky). An identical version of the bill was introduced in the U.S. House of Representatives on April 24, 2013 by Representatives Bobby Scott (D-Va) and Thomas Massie (R-Ky). H.R. 1695.

This proposal would help alleviate some of the many troublesome issues created by mandatory minimum penalties.<sup>2</sup> Among other problems, mandatory minimums result in overly harsh sentences and undercut the objective of reducing disparity by transferring power from judges to prosecutors – an issue noted by former Attorney General Edwin Meese and other notable scholars and practitioners.<sup>3</sup> A fair reading of available evidence is that “mandatory minimums are the greatest source of unwarranted disparity in federal sentencing today. This disparity arises through disparate charging and plea bargaining practices, through mandatory penalties mismatched to the seriousness of the crime, and through the unwarranted uniformity that arises when one or two facts about a case control the punishment imposed despite other relevant differences among defendants.”<sup>4</sup>

Mandatory minimum penalties also add to the ever-growing prison population with no evidence that they are a cost-effective means of reducing crime.<sup>5</sup> The number of inmates housed by the Federal Bureau of Prisons has increased from 71,608 on December 31, 1991,<sup>6</sup> to 219,087 on June 29, 2013.<sup>7</sup> While the Commission in its recent Mandatory Minimum report did not use its prison impact model, which recalculates the sentence based on anticipated changes in sentencing rules and compares the recalculated sentence to the existing sentence, or provide a quantitative assessment of the impact of mandatory minimums on the prison population,<sup>8</sup> available data show that a significant number of inmates in BOP custody were convicted of offenses carrying mandatory minimum penalties.<sup>9</sup> Many of those inmates are non-violent drug offenders. Almost one-half (47.1%) of the federal prison population is incarcerated for drug offenses.<sup>10</sup> In FY 2012, 60.7% of drug offenders received a mandatory minimum sentence.<sup>11</sup> Of

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<sup>2</sup> See generally USSC, Report to the Congress: *Mandatory Minimum Penalties in the Federal Criminal Justice System* 90-102 (2011) (*Mandatory Minimum Report*).

<sup>3</sup> *Id.* at 96- 97.

<sup>4</sup> Paul J. Hofer, *Review of the U.S. Sentencing Commission’s Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 24 Fed. Sent’g Rep. 193 (2012) (reviewing the Commission’s report and assessing impact of mandatory minimum penalties on racial disparity).

<sup>5</sup> Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* 7-9 (2013) (*Federal Prison Population Buildup*), <http://www.fas.org/sgp/crs/misc/R42937.pdf>.

<sup>6</sup> *Mandatory Minimum Report*, at 76.

<sup>7</sup> Federal Bureau of Prisons, *Quick Facts About the Bureau of Prisons* (June 29, 2013) (*Quick Facts*) <http://www.bop.gov/news/quick.jsp>.

<sup>8</sup> Hofer, *supra* note 2.

<sup>9</sup> *Mandatory Minimum Report*, at 81.

<sup>10</sup> *Quick Facts*, *supra* note 7.

those, only 40% received a safety-valve adjustment. Because the overall number of offenders involved with a weapon was quite small, the reasonable inference is that factors other than violence precluded safety-valve relief.<sup>12</sup>

The costs associated with such incarceration trends are enormous. From FY 2000 to 2012, the average per capita cost of incarceration increased 29% to \$29,027.<sup>13</sup> BOP's annual appropriation now exceeds \$6.6 billion.<sup>14</sup>

The Director of the Bureau of Prisons informed the Commission in March 2013 that “[t]he most direct and immediate way to reduce prison expenditures is to reduce the total number of inmates incarcerated or the number of years to which they are sentenced.”<sup>15</sup> The Commission is in a position to help reduce the prison population and cost of incarceration by supporting the repeal of mandatory minimum sentences and/or the expansion of safety-valve relief. As discussed below, changes to the guidelines would also help alleviate prison growth, which comes at sizable cost with no proven benefit in crime reduction.

We also encourage the Commission to work with Congress to eliminate the grave disparity caused by prosecutorial decisions to charge multiple counts of 18 U.S.C. § 924(c). The Commission's data show that defendants charged with multiple § 924(c) counts are geographically concentrated in just a handful of districts.<sup>16</sup> The Commission found no evidence that these offenses occurred more frequently in those districts, concluding that the geographical concentration was created by inconsistent charging practices. In FY 2010, the average sentence for those convicted of multiple § 924(c) counts, and who did not receive a substantial assistance departure, was 351 months compared to 151 months for those convicted of only one count.<sup>17</sup>

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<sup>11</sup> USSC, *2012 Sourcebook of Federal Sentencing Statistics* tbl. 44 (2012) (*2012 Sourcebook*).

<sup>12</sup> *Id.* at tbl. 39 (85% of drug offenders had no weapon involvement).

<sup>13</sup> *Federal Prison Population Buildup*, *supra* note 5, at 15. Different sources report slightly different average per capita costs in 2012. Regardless of the source, however, the cost remains high. The Administrative Office of the Courts recently reported that the average annual per capita cost of incarceration in the BOP in FY 2012 was \$28,948. See Memorandum from Matthew G. Rowland, Assistant Director, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, to Chief Pretrial Services Officers and Chief Probation Officers, Cost of Incarceration and Supervision (May 17, 2013) (*Rowland Memorandum*).

<sup>14</sup> *Federal Prison Population Buildup*, *supra* note 5, at 11.

<sup>15</sup> Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 125 (Mar. 2013) (Charles Samuels).

<sup>16</sup> *Mandatory Minimum Report*, at 277-78.

<sup>17</sup> *Id.* at 279, 292.

The Commission concluded that the stacking of § 924(c) counts “results in excessively severe and unjust sentences in some cases.”<sup>18</sup> Many key stakeholders, including judges, defense attorneys, and some prosecutors agree that the stacking of 924(c) counts produces excessively severe sentences and should be fixed.<sup>19</sup> Given this consensus, we encourage the Commission to work with Congress to remedy the problem.

## II. Proposed Priority #2: Drug Offenses

### A. Drug Quantity Table

We commend the Commission for prioritizing the review, and possible amendment of the drug guidelines including possible consideration of amending the Drug Quantity Table in §2D1.1. As Judge Gleeson wrote earlier this year, the “drug trafficking offense guideline was *born* broken.”<sup>20</sup> The guideline “ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. If they were, they would be much less severe, and judges would respect them more. Instead, they are driven by drug type and quantity, which are poor proxies for culpability.”<sup>21</sup> The most significant problem with the current guideline is the excessive emphasis on drug quantity.<sup>22</sup> By focusing on quantity, the guidelines do not reliably categorize offenders according to their culpability, as reflected in their functional roles, and thus do not properly reflect the seriousness of the offense.<sup>23</sup> A guideline

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<sup>18</sup> *Id.* at 359.

<sup>19</sup> *Id.* at 360.

<sup>20</sup> *United States v. Diaz*, 2013 WL 322243, \*9 (E.D.N.Y. Jan. 28, 2013).

<sup>21</sup> *Diaz*, 2013 WL 322243, at \*1.

<sup>22</sup> See Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U.S. Sentencing Commission* 2 (1995) (“[T]he Judicial Conference: . . . encourages the Commission to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved.”); Peter H. Reuter & Jonathan P. Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. of Pub. Health 1059, 1062 (1995) (reporting recommendations of a RAND corporation working group, which concluded: “The U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug.”).

<sup>23</sup> The Commission’s research has shown many low-level offenders receive sentences that Congress intended only for managers or kingpins. See USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 28-30 (2007) (showing large numbers of low-level crack and powder cocaine offenders exposed to harsh penalties intended for more serious offenders); *id.* at 28-29 (showing drug quantity not correlated with offender function); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 42-49 (2002) (showing drug mixture quantity fails to closely track important facets of offense seriousness).

with an increased emphasis on role would better serve the purposes of sentencing.<sup>24</sup> We urge the Commission to amend the guidelines to address this core problem.

If such revision is not possible this year, we ask the Commission to take the interim measure of revising the Drug Quantity Table to reduce the offense levels for all drug offenses. In recent months, two different district court judges recommended that reducing the guidelines by one third is a place to start. *United States v. Diaz*, 2013 WL 322243, \*18 (E.D.N.Y. Jan. 28, 2013) (“Until the Commission does the job right . . . it should lower the ranges in drug trafficking cases by a third.”); *United States v. Hayes*, 2013 WL 2468038 (N.D. Iowa June 7, 2013) (“I will follow Judge Gleeson’s recommendation of reducing the penalty by one third for methamphetamine offenses in response to the fundamental problems with the methamphetamine Guidelines range.”). Defenders have repeatedly requested that the Commission lower the drug guidelines by two levels.<sup>25</sup> Such reductions would ensure that the statutorily-set mandatory minimum penalties are *within* rather than *below* the guideline ranges for first offenders. This is critical because it would reduce the frequency with which the guideline-recommended sentence for an offender who performs a low-level function is as long as what was intended only for wholesalers and kingpins.<sup>26</sup>

These changes to the drug guidelines are important because “real people are at the receiving end of these sentences. Incarceration is often necessary, but the unnecessarily punitive extra months and years the drug trafficking offense guideline advises us to dish out matter: children grow up; loved ones drift away; employment opportunities fade; parents die.”<sup>27</sup> In addition, the current guidelines have come at great cost to American taxpayers. “[N]o other decision of the Commission has had such a profound impact on the federal prison population.”<sup>28</sup> To be specific, of the 219,087 people in federal prison as of June 23, 2013, over 90,000, almost

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<sup>24</sup> Defenders and others have long urged this change. See, e.g., Statement of James Skuthan Before the U.S. Sentencing Comm’n, Washington, D.C., at 6-8 (Mar. 17, 2011); Letter from Marjorie A. Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 3-4 (Mar. 21, 2011); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable William K. Sessions, Chair, U.S. Sentencing Comm’n, at 2 & n.1 (Oct. 8, 2010).

<sup>25</sup> See, e.g., Skuthan Statement, *supra* note 24, at 2-17; Letter from Marjorie A. Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 9-10 (June 6, 2011).

<sup>26</sup> See Skuthan Statement, *supra* note 24, at 9-11.

<sup>27</sup> *Diaz*, 2013 WL 322243, at \*18.

<sup>28</sup> USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 49 (2004).

half (47.1%) are serving sentences for drug offenses.<sup>29</sup> Drug offenders thus have “been and continue[ ] to be the driver of the federal prison population.”<sup>30</sup> As noted above, the Director of the BOP testified before the Commission earlier this year that “[t]he most direct and immediate way to reduce prison expenditures is to reduce the total number of inmates incarcerated or the number of years to which they are sentenced.”<sup>31</sup> Reforming the drug guidelines, particularly if combined with work on reducing the impact of mandatory minimums would undoubtedly have a huge impact on the size, and cost, of the federal prison population.

This would have the added benefit of addressing the overcrowding issues in the BOP that “endanger[ ] the safety of prisoners and prison staff.”<sup>32</sup> The BOP is currently operating at 36% over rated capacity.<sup>33</sup> “Crowding is 53% at high security facilities, and 44% at medium security facilities.”<sup>34</sup> This means not only that correctional officers will face significant management problems, but also that offenders will encounter “longer waiting lists to get into GED, vocational training, Prison Industries, and other opportunities that we know can reduce recidivism.”<sup>35</sup>

Saving money by reducing the length of the guideline recommended sentence would not jeopardize public safety. Marginal increases in punishment do not increase any deterrent effects of imprisonment.<sup>36</sup> It is the certainty of being apprehended and convicted (often referred to as

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<sup>29</sup> *Quick Facts*, *supra* note 7.

<sup>30</sup> Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 55 (Mar. 17, 2011) (Harley G. Lappin); *see also Fifteen Year Review* at 48 (“Increases in sentence lengths for drug trafficking offenders are the major cause of federal prison population growth over the past fifteen years.”); Urban Institute, *Examining Growth in the Federal Prison Population 1998-2010* (2012) (increase in the time to be served by drug offenders alone accounted for one-third of total growth in the federal prison population), <http://www.urban.org/UploadedPDF/412720-Examining-Growth-in-the-Federal-Prison-Population.pdf>.

<sup>31</sup> Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 125 (Mar. 13, 2013) (Charles E. Samuels).

<sup>32</sup> *Diaz*, 2013 WL 322243, at \*11.

<sup>33</sup> Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 124 (Mar. 13, 2013) (Charles E. Samuels).

<sup>34</sup> *Id.* at 124-125.

<sup>35</sup> Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 52 (Mar. 17, 2011) (Harley G. Lappin).

<sup>36</sup> *See* Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Justice: A Review of Research* 28-29 (Michael Tonry, ed., 2006).

the certainty of punishment), not the severity of sentence that matters.<sup>37</sup> In addition, a Commission study found that drug offenders have lower than average rates of recidivism.<sup>38</sup> In 2012, more than half (53%) of all drug offenders were in Criminal History Category I.<sup>39</sup> And recently, in its recidivism study of offenders released as a result of the 2007 crack amendments, the Commission has evidence that sentences can be reduced without an increase in recidivism.<sup>40</sup>

In addition to reducing the guidelines for all drug offenses by at least two levels to undo the unjustified inflation above mandatory minimum levels, and supporting the Justice Safety Valve Act, the Commission should review and revise the most problematic drug equivalency ratios, those for (1) Methamphetamine, Amphetamine, and List I Chemicals; and (2) MDMA.<sup>41</sup> In 2011, MDMA had the lowest within-guideline rate of all drugs at 29.5%, and methamphetamine had the lowest within-guideline rate of the five major drugs at 38.2%.<sup>42</sup> In 2012, 42.6% of defendants convicted of trafficking in any drug,<sup>43</sup> but only 27.2% of defendants convicted of trafficking in MDMA,<sup>44</sup> and only 34.1% of defendants convicted of trafficking in methamphetamine,<sup>45</sup> were sentenced within the guideline range. These guidelines are deeply

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<sup>37</sup> See, e.g., Raymond Pasternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. Crim. L. & Criminology 765, 812 (2010).

<sup>38</sup> USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (2004) (“Offenders sentenced in fiscal year 1992 under fraud, §2F1.1 (16.9%), larceny, §2B1.1 (19.1%), and drug trafficking, §2D1.1 (21.2%) are overall the least likely to recidivate”; “no apparent relationship between the sentencing guideline final offense level and recidivism risk.”).

<sup>39</sup> *2012 Sourcebook*, at tbl. 37.

<sup>40</sup> Kim S. Hunt & Andrew Peterson, *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* (May 31, 2011).

<sup>41</sup> Under the current flawed structure of the drug guidelines, the debate over drug sentences is too often cast as the search for the correct quantity ratio between one drug and another. The debate over ratios has turned what should be a substantive debate over how best to achieve the purposes of sentencing into a quasi-mathematical and pseudo-scientific exercise. There are no “correct” ratios in light of 18 U.S.C. § 3553(a)(2). However, until the Commission amends the guidelines to shift the focus away from drug quantity, we are forced to continue the debate on appropriate, and inappropriate, ratios.

<sup>42</sup> USSC, *2011 Interactive Sourcebook*.

<sup>43</sup> *2012 Sourcebook*, at tbl. 28.

<sup>44</sup> 40.4% received a government-sponsored below-range sentence, 31.9% received a non-government sponsored below-range sentence, and one defendant was sentenced above the range. USSC, FY 2012 Monitoring Dataset.

<sup>45</sup> 43.6% received a government-sponsored below-range sentence, 21.5% received a non-government sponsored below-range sentence, and .7% were sentenced above the range. *Id.*

flawed, as a growing number of judges have specifically recognized in written opinions and on the record.<sup>46</sup>

## **B. Methamphetamine, Amphetamine, and Related List I Chemicals**

Our letter to the Commission in May 2013 discussed several reasons the Commission should review and revise the drug equivalency ratios for Methamphetamine, Amphetamine, and List I Chemicals. For the benefit of the new Commissioners, and ease of reference, that letter is attached, and we refer the Commissioners to pages 6–14.

## **C. MDMA**

The Commission also should reexamine the drug equivalencies for MDMA.

The Commission adopted a 500:1 marijuana-to-MDMA ratio (2.5 times that of powder cocaine) in 2001 based on research that the Commission recognized at the time was the “focus of some controversy,”<sup>47</sup> and was in fact disputed by the overwhelming majority of experts,<sup>48</sup> and a “selective and incomplete” analysis using one set of factors to conclude that MDMA was less harmful than heroin, and a different set of factors to conclude that MDMA was more harmful than powder cocaine. *United States v. McCarthy*, 2011 WL 1991146, \*3-4 (S.D.N.Y. May 19, 2011); *United States v. Qayyem*, 2012 WL 92287, \*3-4 (S.D.N.Y. Jan. 11, 2012). While the

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<sup>46</sup> See, e.g., *United States v. Hayes*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 2468038 at \*5-8, 18-38 (N.D. Iowa June 7, 2013) (disagreeing with the methamphetamine guidelines and citing similar cases); *United States v. McCarthy*, 2011 WL 1991146 (S.D.N.Y. May 19, 2011) (disagreeing with the 500:1 MDMA-to-marijuana ratio); *United States v. Qayyem*, 2012 WL 92287 (S.D.N.Y. Jan. 11, 2011) (same); *United States v. Thompson*, 2012 WL 1884661 (S.D. Ill. May 23, 2012) (“considerable uncertainty exists as to the science and policies underlying the marijuana-to-MDMA ratio”); *United States v. Kamper*, 860 F. Supp. 2d 596, 602 n.7, 603 n.9 (E.D. Tenn. 2012) (“More recent studies ... have largely discredited the earlier studies, particularly as related to [the Commission’s assertion that MDMA is] neurotoxic[,]” and the claim that MDMA is a hallucinogen “is without factual support and largely irrelevant”); Transcript of Sentencing 2-4, 6-8, 14-16, *United States v. Phan*, No. CR10-27 (W.D. Wash. Mar. 3, 2011) (recognizing that the MDMA ratio is flawed).

<sup>47</sup> USSC, *Report to Congress: MDMA Drug Offenses – Explanation of Recent Guideline Amendments* 8 (2001) (*MDMA Report*).

<sup>48</sup> See USSC, *Public Comment – Emergency Amendments 2001* (Jan. 2001), [http://www.src-project.org/wp-content/uploads/2009/08/ussc\\_publiccomment\\_200101\\_200102.pdf](http://www.src-project.org/wp-content/uploads/2009/08/ussc_publiccomment_200101_200102.pdf); USSC, *Public Comment – 2001 Amendment Cycle* (Mar. 2001), <http://www.src-project.org/resources/ussc-materials/public-comment/public-comment-2001-amendment-cycle-march/>.



Commission acted in response to a general congressional directive, Congress did not require any particular ratio.<sup>49</sup>

Whatever the merits of the evidence upon which the Commission relied or the analysis it performed at the time, the 500:1 marijuana-to-MDMA ratio is not based on *current* empirical data and research. Current evidence shows that the facts the Commission used to conclude that MDMA is more harmful than cocaine, *i.e.*, MDMA is neurotoxic, is aggressively marketed to youth and used at a particularly young age, and is not only a stimulant but a hallucinogen, *MDMA Report* at 5, were either not accurate or are no longer accurate.

As Judge Collier concluded, “[m]ore recent studies ... have largely discredited the earlier studies, particularly as related to [the assertion that MDMA is] neurotoxic[,]” *Kamper*, 860 F. Supp. 2d at 602 n.7. Indeed, the studies upon which the Commission relied to conclude that MDMA is neurotoxic, *see MDMA Report* at 8-10, were deeply flawed and apparently wrong. The Commission primarily relied on (1) “numerous studies” by Dr. Ricaurte, whose research was the “focus of some controversy” at the time, *id.* at 8, and (2) an issue of *NIDA Notes*, *id.* at 9, which summarized studies conducted by Dr. Ricaurte as the principal investigator.<sup>50</sup> It later came to light that much of Dr. Ricaurte’s research was performed with mislabeled vials of methamphetamine, causing the journal *Science* to retract one of his studies finding that a single dose of MDMA could cause brain injury, and forcing him to withdraw four other studies.<sup>51</sup> Contrary to Ricaurte’s finding of loss of serotonin transporters “throughout the brain” (summarized in *NIDA Notes*), later studies found that even heavy use of MDMA causes little loss of serotonin transporters,<sup>52</sup> and that the brain returns to normal when users stop using.<sup>53</sup> Two studies upon which the Commission relied, one by Ricaurte, *see MDMA Report* at 9 n.16, gave animals many multiples of a normal human dose per body weight on the theory that this was the proper way to determine how a human would react to a normal human dose. This theory has

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<sup>49</sup> Congress directed the Commission to “review and amend” the guidelines to “provide for increased penalties” based on the Commission’s “review” of what Congress understood to be MDMA’s harms. Pub. L. No. 106-310, §3663(b)(1) (2000).

<sup>50</sup> *See* Robert Mathias, *NIDA Notes*, Vol. 14, No. 4, Nov. 1999, available at [http://archives.drugabuse.gov/NIDA\\_Notes/NNVol14N4/index.html](http://archives.drugabuse.gov/NIDA_Notes/NNVol14N4/index.html).

<sup>51</sup> *See* Donald G. McNeil, Jr., *Research on Ecstasy Is Clouded By Errors*, N.Y. Times, Dec. 2, 2003, at F1-F2.

<sup>52</sup> *See* Stephen J. Kish *et al.*, *Decreased cerebral cortical serotonin transporter binding in ecstasy users: a positron emission tomography/[11C]DASB and structural brain imaging study*, 133 *Brain* 1779, 1791 (2010).

<sup>53</sup> *See* Sudhakar Selveraj *et al.*, *Brain serotonin transporter binding in former users of MDMA (‘ecstasy’)*, 194 *Brit. J. of Psych.* 355, 357 (2009).

been repudiated by recent studies,<sup>54</sup> and by experts testifying for both the defense and the government at the *McCarthy* hearing.<sup>55</sup>

More recent animal studies using dosage levels equivalent to normal human dosage levels or self-administration found little or no evidence of neurological harm.<sup>56</sup> Contrary to studies reporting memory impairments (one of which was Ricaurte's, *MDMA Report* at 9 & n.20), more recent studies on humans found no significant effects "on working memory, selective attention, or associative memory" of an MDMA dose consistent with the usage of the majority of recreational users.<sup>57</sup> A 2009 meta-analysis synthesizing hundreds of MDMA studies found that the effects of MDMA on memory were "small" and "within normal ranges," and that whatever deficits exist are "unlikely" to "significantly impair the average ecstasy user's everyday functioning or quality of life."<sup>58</sup>

The Commission concluded that "powder cocaine is only a stimulant, but MDMA acts as both a stimulant and a hallucinogen," *MDMA Report* at 5, based on a report indicating that MDMA "has a chemical structure similar to methamphetamine and the hallucinogen mescaline." *Id.* at 7. But a chemical structure like a hallucinogen does not mean that the drug *acts* as a hallucinogen. Experts for the defense and the government at the *McCarthy* hearing testified that MDMA does not cause hallucinations, is not properly labeled a hallucinogen, and that even if MDMA was a hallucinogen, it would say nothing regarding its harmfulness relative to other drugs.<sup>59</sup> Thus, the Commission's conclusion that MDMA is a hallucinogen "is without factual

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<sup>54</sup> See Michael H. Baumann *et al.*, *3,4-Methylenedioxymethamphetamine (MDMA) Neurotoxicity in Rats: A Reappraisal of Past and Present Findings*, 189 *Psychopharmacology* (Berl.) 407, 411 (2007); A. Richard Green *et al.*, *MDMA: On the Translation from Rodent to Human Dosing*, 204 *Psychopharmacology* 375, 375 (2009).

<sup>55</sup> Hearing Transcript at 120, *United States v. McCarthy*, No. 09 CR 1136 (S.D.N.Y. Dec. 6-17, 2010) [*McCarthy* Tr.] (Halpern, defense expert); *id.* at 352, 355-57 (Hanson, government expert); *id.* at 272, 265-66, 299-300 (Parrott, government expert).

<sup>56</sup> See William E. Fantegrossi *et al.*, *Behavioral and Neurochemical Consequences of Long-term Intravenous Self-administration of MDMA and its Enantiomers by Rhesus Monkeys*, 29 *Neuropsychopharmacology* 1270, 1278-79 (2004); Xiaoying Wang *et al.*, *Methylenedioxymethamphetamine Administration to Rats Does Not Decrease Levels of the Serotonin Transporter Protein or Alter its Distribution Between Endosomes and the Plasma Membrane*, 314 *J. Pharmacology & Experimental Therapeutics*. 1002, 1011 (2005).

<sup>57</sup> See, e.g., Gerry Jager *et al.*, *Incidental Use of Ecstasy: No Evidence for Harmful Effects on Cognitive Brain Function in a Prospective fMRI Study*, 193(3) *Psychopharmacology* (Berl.) 403, 403-04 (2007).

<sup>58</sup> G. Rogers *et al.*, *The harmful health effects of recreational ecstasy: a systematic review of observational evidence*, *Health Tech. Assessment*, Jan. 2009, at xi, xii.

<sup>59</sup> *McCarthy* Tr. at 98 (Curran, defense expert); *id.* at 128-29, 164-65 (Halpern, defense expert); *id.* at 290 (Parrott, government expert).

support and largely irrelevant.” *McCarthy*, 2011 WL 1991146, at \*3; *Kamper*, 806 F. Supp. 2d at 603 n.9.

The Commission also concluded that unlike cocaine, MDMA was aggressively marketed to youth and that use began at a particularly young age. *MDMA Report* at 5, 13-14. According to the federally-funded survey by the University of Michigan, *Monitoring the Future: A Continuing Study of American Youth* (2012), as of 2012, the percentage of 8th, 10th and 12th graders who used MDMA in the past 12 months dropped by two thirds since its high point in 2001.<sup>60</sup> Use of marijuana and cocaine also dropped but less steeply.<sup>61</sup> The prevalence of use of marijuana is about ten times that of MDMA; use of cocaine is slightly more than use of MDMA among 8th graders and slightly less among 10th and 12th graders.<sup>62</sup> While the 2008 *Monitoring the Future* report presented in *McCarthy* indicated that MDMA use among youth was “again on the rise,” *McCarthy*, 2011 WL 1991146, at \*2, that brief trend reversed itself from 2009 through 2012.<sup>63</sup>

The Department of Health and Human Services reports that among persons aged 12 to 49 in 2011, the average age at first use was 17.5 years for marijuana, and nearly the same for MDMA and cocaine, at 19.6 years and 20.1 years respectively, and that most (61.3%) recent MDMA initiates in 2011 were 18 or older at the time of first use.<sup>64</sup> The lifetime, past year, and past month prevalence of use of MDMA among youth and young adults dropped from 2002 through 2011.<sup>65</sup>

Likewise, the factors the Commission used to conclude that MDMA is less harmful than heroin, *i.e.*, relative number of cases, addictiveness, relative incidence of emergency room visits and deaths, violence, and secondary health effects such as spread of hepatitis or HIV, *see MDMA Report* at 5, also point to the conclusion that MDMA is less harmful than cocaine.

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<sup>60</sup> Univ. of Mich., *Monitoring the Future: A Continuing Study of American Youth* (2012), fig. 9, [http://www.monitoringthefuture.org/data/12data/fig12\\_9.pdf](http://www.monitoringthefuture.org/data/12data/fig12_9.pdf).

<sup>61</sup> *Id.*, fig. 1, [http://www.monitoringthefuture.org/data/12data/fig12\\_1.pdf](http://www.monitoringthefuture.org/data/12data/fig12_1.pdf), & tbl. 2, <http://www.monitoringthefuture.org/data/12data/pr12t2.pdf>.

<sup>62</sup> *Id.*, tbl. 2, <http://www.monitoringthefuture.org/data/12data/pr12t2.pdf>.

<sup>63</sup> *Id.*, fig. 9, [http://www.monitoringthefuture.org/data/12data/fig12\\_9.pdf](http://www.monitoringthefuture.org/data/12data/fig12_9.pdf).

<sup>64</sup> U.S. Dep’t of Health & Human Servs., Substance Abuse & Mental Health Servs. Admin., Results from the 2011 *Nat’l Survey on Drug Use and Health: Summary of National Findings*, at 53, 57, <http://www.samhsa.gov/data/nsduh/2k11results/nsduhresults2011.pdf>.

<sup>65</sup> *Id.* at 99-103.

- In 2012, 6134 defendants were sentenced for trafficking in cocaine, while only 246 were sentenced for trafficking in MDMA (and 2192 were sentenced for trafficking in heroin). *See* USSC, FY 2012 Monitoring Dataset.
- “[C]ocaine is . . . far more addictive than MDMA,” *McCarthy*, 2011 WL 1991146, at \*3, and is “one of the least addictive drugs,” *McCarthy* Tr. at 230, 232, 291 (Parrott, government expert); *id.* at 339 (Hanson, government expert). As noted in the Commission’s report, MDMA is not physically addictive. *MDMA Report* at 7. Heroin, of course, is physically addictive. And powder cocaine, though not physically addictive, is powerfully psychologically addictive.<sup>66</sup> USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 64 (2007) (“Cocaine is a powerful and addictive stimulant that directly affects the brain.”)
- “[C]ocaine is responsible for far more emergency room visits per year than MDMA.” *McCarthy*, 2011 WL 1991146, at \*3. In 2011, 13% of powder cocaine users, but only 0.9% of MDMA users (and 41.7% of heroin users) visited the emergency room in connection with use of the drug.<sup>67</sup> That is, controlling for the greater prevalence of use of cocaine, cocaine is 14.4 times more likely than MDMA to lead to hospitalization.

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<sup>66</sup> The Commission said that it had received “information” suggesting that MDMA is “used compulsively by some and may produce dysphoria [depression] when use is discontinued,” but the only such information was a paper reporting three case studies that failed to control for poly-drug use, family history, or preexisting conditions. *See MDMA Report* at 18 & n.61 (citing Karl L.R. Jansen, *Ecstasy (MDMA) dependence*, 53 *Drug and Alcohol Dependence* 121-24 (1999)). The subjects of the case studies were a PTSD patient who drank a bottle of Jack Daniels every day and used MDMA on weekends to keep from getting too drunk, a son of an alcoholic who had been addicted to heroin and benzodiazapines before beginning to use MDMA, and a son of a schizophrenic who used marijuana and cocaine daily and overdosed on an unusually large amount of MDMA and amphetamine combined. *See McCarthy* Tr. at 39-40 (Curran, defense expert); *id.* at 239-41 (Parrott, government expert).

<sup>67</sup> In 2011, 3,857,000 people reported past year use of powder cocaine, 2,422,000 reported past year use of MDMA, and 620,000 reported past year use of heroin. *See* U.S. Dep’t of Health & Human Servs., Substance Abuse & Mental Health Servs. Admin., 2011 *Nat’l Survey on Drug Use and Health*, tbl. 1.1A, <http://www.samhsa.gov/data/NSDUH/2011SummNatFindDetTables/NSDUH-DetTabsPDFWHTML2011/2k11DetailedTabs/Web/HTML/NSDUH-DetTabsSect1peTabs1to46-2011.htm>. In 2011, there were 505,244 emergency room visits for powder cocaine, 22,498 emergency room visits for MDMA, and 258,482 emergency room visits for heroin. *See* U.S. Dep’t of Health & Human Servs., Substance Abuse & Mental Health Services Admin., *Drug Abuse Warning Network 2011: Nat’l Estimates of Drug-Related Emergency Department Visits*, tbl. 4, <http://www.samhsa.gov/data/2k13/DAWN2k11ED/DAWN2k11ED.htm#tab4>.

- Deaths from MDMA are rare.<sup>68</sup>
- “[C]ocaine use causes several adverse health effects not implicated by MDMA use – such as ‘cardiovascular effects, including disturbances in heart rhythm and heart attacks; respiratory effects, such as chest pain and respiratory failure; [and] neurological effects, including strokes [and] seizures.’” *McCarthy*, 2011 WL 1991146, at \*3 (quoting USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* 65 (2007), and citing Tr. 128 (Halpern, defense expert) (“[C]ocaine users after many years of abuse and heavy use, run the risk of heart attack, of stroke, of death from that, and many other problems. . . .We can do a standard CAT scan of the brain that can show evidence of strokes in the brain from their repeated longstanding cocaine use.”)).
- “[I]n contrast to MDMA, cocaine trafficking is associated with substantial violence.” *McCarthy*, 2011 WL 1991146, at \*4. In 2012, offenders sentenced for MDMA trafficking received an enhancement for weapon involvement in 12.6% of cases, compared to 17.4% for powder cocaine and 15.0% for drug trafficking overall. *See* USSC, FY 2012 Monitoring Dataset. Further, unlike users of other drugs, MDMA users rarely commit crimes to support their habits. *MDMA Report* at 19.
- MDMA use is not associated with more secondary health issues, such as the spread of hepatitis or HIV, than cocaine or heroin use. Heroin is usually injected, and over 10% of powder cocaine users inject the drug, *see* USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy*, 47-48, 50, fig.6 (1995), whereas MDMA “generally is taken orally.” *MDMA Report* at 5.

In sum, there appears to be no sound basis for the current 500:1 marijuana-to-MDMA ratio, or for a 200:1 ratio equating MDMA to powder cocaine. As noted above, MDMA has the lowest within-guideline rate of all drugs. But at least one judge, even while recognizing that the 500:1 ratio is flawed, believes that he should not take those flaws into account in sentencing but should wait for the Commission to act. *See Kamper*, 860 F. Supp. 2d at 606. Other judges undoubtedly hold the mistaken belief that the ratio is sound. Until the Commission corrects the problem, unwarranted disparity will continue to result.

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<sup>68</sup> *See* Nat’l Inst. on Drug Abuse (NIDA), National Institute of Health (NIH), NIDA Notes, *Facts About MDMA (Ecstasy)*, Pub. No. 99-3478, (November 1999) at 15, G. Rogers et al., *supra* note 58, at xii (“Ecstasy . . . remains a rare cause of death when reported as the sole drug associated with death related to drug use.”).

### III. Proposed Priority #3: Booker Report

We continue to oppose the Commission's legislative proposals set forth in its recent report to Congress, USSC, *The Continuing Impact of United States v. Booker on Federal Sentencing* (Dec. 2012) (*Booker Report*). For the benefit of the new Commissioners, we refer to (and incorporate by reference) the following articles and fact sheets rebutting the various claims made by the Commission in its report and demonstrating that its proposals are contrary to Supreme Court law, without factual support, unnecessary, and counterproductive:

- **Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Judicial Discretion and Demographic Disparity*, 25 Fed. Sent'g Rep. 311 (June 2013)** (attached); **Fact Sheet: No Evidence that Judicial Discretion Increases Racial Disparity** (attached and available at <http://www.fd.org/docs/select-topics---sentencing/fact-sheet-on-sentencing-commission's-booker-report.pdf?sfvrsn=4>)

The type of multiple regression model used by the Commission to assess demographic disparity was developed to measure just one source of such disparity—discrimination by judges. It actually conceals and does not measure the most important sources of disparity: disparity arising from prosecutorial discretion and structural disparity built into the guidelines and mandatory minimums. Because changes in the rates of below-range sentences are controlled away in the model, it actually misses the primary effect of *Booker* and the beneficial effects of increased judicial discretion.

The Commission's methodology and conclusions have been called into question from many quarters. For example, new models developed by econometricians in the last few years have revealed that racial disparity in the post-*Booker* system is primarily the result of prosecutorial decisions and mandatory minimum penalties, and that increased judicial discretion has, if anything, decreased racial disparity.

Even under the Commission's own regression model, the patterns of specific findings are not consistent with a hypothesis that increased judicial discretion leads to increased demographic disparity. There was *no statistically significant difference* in sentence length between Black and White males who received a non-government sponsored below-range sentence in the post-*Gall* period; the odds of receiving a non-government sponsored below-range sentence were the *same* in the post-*Gall* period as in the PROTECT Act period; and the only consistent, statistically significant differences in sentence length between Black and White males were in cases *sentenced within the guideline range*.

- **Amy Baron-Evans & Thomas W. Hillier, II, *The Commission's Legislative Agenda to Restore Mandatory Guidelines*, 25 Fed. Sent'g Rep. 293 (June 2013)** (attached)

The three proposed statutory changes designed to curtail judicial discretion at sentencing – enactment of the Commission's "three-step" guideline, a requirement that the guidelines be given "substantial weight," and the Commission's policies forbidding or discouraging consideration of offender characteristics – are the functional equivalent of the mandatory guidelines system. The proposals are contrary to Supreme Court law, lack support in actual circuit law, and are contrary to empirical evidence.

- **Amy Baron-Evans & Jennifer Niles Coffin, *The Commission's Proposals to Restore Mandatory Guidelines Through Appellate Review* (May 2013)** (available at <http://www.fd.org/docs/select-topics---sentencing/the-commission's-proposals-to-restore-mandatory-guidelines-through-appellate-review.pdf?sfvrsn=4>)

The Commission's three proposals to "develop more robust substantive appellate review" would further diminish review of guideline sentences and reinstate strict review of non-guideline sentences, contrary to Supreme Court law, in violation of the Sixth Amendment, and without evidence of a problem. The Commission's contention that appellate review has failed to produce the "uniformity" the Supreme Court purportedly anticipated misreads the Court's decisions and lacks factual support in actual circuit law.

- **Fact Sheet: Regional Differences in Federal Sentencing** (attached and available at [http://www.fd.org/docs/select-topics---sentencing/fact-sheet-on-sentencing-commission's-booker-report-\(addressing-regional-disparity\).pdf?sfvrsn=4](http://www.fd.org/docs/select-topics---sentencing/fact-sheet-on-sentencing-commission's-booker-report-(addressing-regional-disparity).pdf?sfvrsn=4))

Regional variations in the rates of non-government sponsored below-range sentences, as reported in the Commission's *Booker* Report, reflect a variety of influences, both warranted and unwarranted. Such variations existed before the sentencing guidelines and under the mandatory sentencing guidelines. Most important, variation in *sentence length* among districts – the bottom line that includes *all* influences on sentences and not just *rates of non-government sponsored* below-guideline sentences – has *not* increased following *Booker* or *Gall*.

- **Fact Sheet: The 2012 USSC Booker Report: Inter-Judge Differences in Federal Sentencing** (attached and available at [http://www.fd.org/docs/select-topics---sentencing/fact-sheet-on-sentencing-commission's-booker-report-\(addressing-inter-judge-disparity\).pdf?sfvrsn=4](http://www.fd.org/docs/select-topics---sentencing/fact-sheet-on-sentencing-commission's-booker-report-(addressing-inter-judge-disparity).pdf?sfvrsn=4))

The Commission presents data that does not separate disparity caused by judges from disparity arising from other sources, and gaps among judges in the Commission's graphs overstate the disparity caused by judges. Differences in below-range rates among judges are generally modest. The causes of and solutions to these variations are very different today from the pre-guidelines era. "[O]ngoing revision of the Guidelines in response to sentencing practices" is the proper solution to any excessive disparity, and the "uniformity that Congress originally sought to secure . . . is no longer an open choice." *United States v. Booker*, 543 U.S. 220, 263 (2005).

We add that the Supreme Court's recent decision in *Peugh v. United States*, 133 S. Ct. 2072, 2083, 2085, 2086 (2013) – in which the Court held that the advisory guidelines continue to exert enough influence on final sentences that the *Ex Post Facto* Clause forbids application of a higher guideline range than that in effect at the time of the offense – demonstrates that the Commission's proposals are contrary to law and unnecessary.

(1) The Court made clear that the Commission's "three-step" process is not the process the Supreme Court requires. The Court set forth the three-step process judges must follow. *First*, the district court must begin by "correctly calculating the applicable Guidelines range." *Id.* at 2080.<sup>69</sup> *Second*, the district court "must then consider the arguments of the parties and the factors set forth in § 3553(a)." *Id.* *Third*, the district court "must explain the basis for its chosen sentence on the record." *Id.* No step requires district courts to consider the Commission's policy statements (most of which prohibit or discourage departures) when no departure is raised.

The Commission appears to be asking Congress to enact its three-step guideline into law because the courts are not following it. *Booker Report*, Part A, at 114. In fact, all circuits agree that district courts need not consider departure policy statements unless a party moves for a departure, and even then may consider a variance under § 3553(a) instead of a departure.<sup>70</sup> The

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<sup>69</sup> The "applicable guideline range" is the range that "corresponds to the offense level and criminal history category, which is determined before any departures." USSG § 1B1.10 cmt. (n.1A)).

<sup>70</sup> See Amy Baron-Evans & Thomas W. Hillier, II, *The Commission's Legislative Agenda to Restore Mandatory Guidelines*, 25 Fed. Sent'g Rep. 293, 298 & n.90 (June 2013) (collecting cases). In a very recent decision, Judge Raggi of the Second Circuit showed that there is no requirement under Supreme Court law (or circuit law) requiring district courts to consider departures (much less policy statements restricting departures), unless a departure is raised. See *United States v. Ingram*, \_\_\_ F.3d \_\_\_, 2013 WL 2666281 (June 14, 2013) (Raggi, J., concurring). Further, she cautioned with respect to the Commission's proposal that Congress require district courts to "evaluate departures within the Guidelines and only then consider the § 3553(a) factors," *id.* at \*10 n.5 (citing *Booker Report* at 114), that "insofar as the Commission's post-*Booker* recommendations are animated by a belief that Congress should 'statutorily require district courts to give 'substantial weight' to the guidelines,' [*Booker Report* at 114], courts should proceed cautiously before endorsing them." *Id.* at \*10 n.5 (citing *Kimbrough v. United States*, 552 U.S. 85, 113–14 (2007) (Scalia, J., concurring) (cautioning that anything that puts "thumb on the scales" in favor of Guidelines sentence raises Sixth Amendment concerns)). Even Judge Calabresi,



reason for this is fundamental. Under 18 U.S.C. § 3553(b), a departure could “only be made based on ‘the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.’” *Irizarry v. United States*, 553 U.S. 708, 714 (2008). Section 3553(b) had to be excised because the policy statements, by requiring that departures were “not available in every case, and in fact [were] unavailable in most,” made the guidelines mandatory and judicial factfinding in calculating them unconstitutional. *Booker*, 543 U.S. at 234. Thus, “there is no longer a limit comparable . . . on the variances that a district court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a).” *Irizarry*, 553 U.S. at 715.

(2) The Court reinforced that courts may not be required to give the guidelines “substantial weight,” reiterating that a district court “‘may not presume that the Guidelines range is reasonable.’” *Peugh*, 133 S. Ct. at 2080 (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)).

(3) It is still the case that a court of appeals may *not* require “greater justification for sentences imposed the further the sentence is from the otherwise applicable guideline range” (the standard the Commission has asked Congress to enact but which the Supreme Court has rejected, *see Gall*, 552 U.S. at 47), and likewise may *not* “review a sentence more closely the farther it varies from the guideline range” (notwithstanding the Commission’s interpretation of *Peugh*<sup>71</sup>). To the contrary, a court of appeals “may not apply a heightened standard of review . . . to sentences outside the Guidelines range,” *Peugh*, 133 S. Ct. at 2080, and “all sentences are reviewed under a deferential abuse-of-discretion standard.” *Id.* at 2087.

As in *Gall*, the Court in *Peugh* distinguished its instructions to the district courts from its instructions to the courts of appeals. *Id.* at 2080, 2083. The *district court* “must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance,” *id.* at 2080 (quoting *Gall*, 552 U.S. at 50), but this is not an appellate rule. A court of appeals *may* take into account “the extent of any variance,” *id.* (quoting *Gall*, 552 U.S. at 51), 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,” and *may not* substitute its judgment for that of the district judge. *Gall*, 552 U.S. at 51 (emphasis added). “[I]t is not for the Court of

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who believes that a horizontal departure under §4A1.3 would be helpful in lowering the guideline “anchor” before deciding what sentence to impose under § 3553(a), recognized that district courts need not consider such a departure unless raised by the defendant. *See id.* at \*6 (Calabresi, J., concurring) (“[W]e can hardly fault the district court for failing to discuss its power to depart from category VI when no one requested that it do so.”).

<sup>71</sup> *Peugh* Opinion Summary, USSC Staff Email: *Peugh v. United States: Sentencing Case Law* (June 11, 2013) (circulated to congressional staff).

Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable.” *Id.* at 59.<sup>72</sup>

(4) The Court reinforced that there can be no mandatory presumption of reasonableness. It twice stated that the court of appeals “‘may, but is not required to, presume that a within-Guidelines sentence is reasonable.’” *Peugh*, 133 S. Ct. at 2080, 2083. This underscores that a non-binding rebuttable presumption of reasonableness with no independent legal effect that a court of appeals “‘may” apply is permissible, *Rita v. United States*, 551 U.S. 338, 347, 350-51 (2007), but a mandatory presumption of reasonableness is not.

(5) The Court made clear that it has never held that closer review applies to a “policy disagreement” with the guidelines. *Peugh*, 133 S. Ct. at 2080 & n.2. And it repeated that the court of appeals “‘may not apply a heightened standard of review” to sentences outside the guideline range. *Id.* at 2080. It reiterated that “‘district courts may not presume that a within-Guidelines sentence is reasonable; they may ‘in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission’s views,’ and all sentences are reviewed under a deferential abuse-of-discretion standard.” *Id.* at 2087 (quoting *Pepper v. United States*, 131 S. Ct. 1229, 1247 (2011)).

(6) The Commission should heed the Court’s clear statement that “[n]othing we say today ‘undo[es]’ the holdings of *Booker*, *Rita*, *Gall*, *Kimbrough*, or our other recent sentencing cases.” *Id.* at 2088. The “Sixth Amendment and the *Ex Post Facto* Clause [do not] share a common boundary.” *Id.* The Sixth Amendment analysis focuses on “‘when a given finding of fact is required to make a defendant legally eligible for a more severe penalty,” while the *Ex Post Facto* Clause asks “‘whether a change in law creates a ‘significant risk’ of a higher sentence.” *Id.* The *Booker* remedy “‘achiev[ed]” a “balance” between “‘avoiding a Sixth Amendment violation” and “‘promot[ing] sentencing uniformity.” *Id.* The Commission’s proposals would upset that balance and render the guidelines unconstitutional.<sup>73</sup>

(7) Moreover, *Peugh* demonstrates that the Commission’s proposals would serve no purpose. As support for its conclusion that the advisory guidelines exert enough influence over the final sentence to invoke the protection of the *Ex Post Facto* Clause, the Court relied on the

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<sup>72</sup> Every court of appeals recognizes that an appellate rule like the Commission’s proposal would be contrary to Supreme Court law, and makes clear that while the district court must adequately explain a departure or variance including its extent, the appellate court’s duty is to review that decision deferentially and does not include requiring greater justifications the further the sentence is from the guideline range. See Amy Baron-Evans & Jennifer Niles Coffin, *The Commission’s Proposals to Restore Mandatory Guidelines Through Appellate Review* 6 & n.12 (May 2013).

<sup>73</sup> After *Alleyne v. United States*, 133 S. Ct. 2151 (2013), *Booker*’s Sixth Amendment holding applies to facts that increase the minimum as well as the maximum of a mandatory guideline range.

fact that less than 20% of sentences since 2007 have been outside the guideline range absent a government motion, and that sentences generally “move with” the guideline range. *Id.* at 2084.

The Commission should accept this reality and focus its energy on the root cause of the need for below-Guideline sentences by reducing unnecessary severity in the guidelines. *See* Honorable Lynn Adelman, *What the Sentencing Commission Ought To Be Doing: Reducing Mass Incarceration*, 18 Mich. J. Race & L. 295, 299 (2013) (“[T]he Commission serves no useful purpose by continuing to seek ways of preventing or dissuading judges from imposing below guideline sentences. . . . The most effective way to reduce the number of below guideline sentences would be to make the guidelines less severe.”). A focus on responding to judicial feedback and making the guidelines less severe would have the added benefit of reducing the prison population as called for in the Department’s recent letter to the Commission.<sup>74</sup>

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

Defenders commend the Commission for engaging in a multi-year study of USSG §2B1.1 and related guidelines. The problems with the current guidelines for economic offenses run deep and, accordingly, we urge the Commission to start over, and resist the temptation to continue to tinker with the current guidelines.<sup>75</sup> Judges from districts that see a significant number of economic offenses<sup>76</sup> have expressed strong concerns over the current guidelines for

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<sup>74</sup> Letter from Jonathan Wroblewski, Dir., Office of Policy and Legislation, U.S. Dep’t of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n 7 (July 2013) (*Wroblewski Letter*).

<sup>75</sup> Defenders have previously urged the Commission to “resist unnecessary tinkering with a guideline that is ‘rapidly becoming a mess,’ and instead conduct a multi-year comprehensive review of what is arguably ‘the most complex of all the sentencing guidelines.’” Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 2 (Aug. 26, 2011) (quoting Allan Ellis, John R. Steer, & Mark H. Allenbaugh, *At a ‘Loss’ for Justice: Federal Sentencing for Economic Offenses*, 25 Crim. Just. 34, 34-35 (2011)). *See also* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 7 (July. 23, 2012) (repeating the same request). Unfortunately, in the past two amendment cycles, the Commission continued to tinker with amendments that unnecessarily increase the complexity of the guidelines. In 2012, the Commission made five additions to the commentary to §2B1.1, added to §2B1.4 a new specific offense characteristic (SOC) with a corresponding application note directing courts to consider a non-exhaustive list of eight factors in deciding whether to apply the SOC, and another addition to the commentary. In 2013, the Commission added new SOCs to both §2B1.1 (for certain offenses related to pre-retail medical products and trade secret offenses) and §2B5.3 (for counterfeit drugs and counterfeit military goods), as well as an additional invited upward departure under §2B1.1.

<sup>76</sup> *Booker Report, Part C: Fraud Offenses*, at 4.

these offenses.<sup>77</sup> Our letter to the Commission in May 2013 provided a summary of some of the things that are wrong with the current structure so as to demonstrate the need for wholesale changes to the fraud guideline. For the benefit of the new Commissioners, and ease of reference, that letter is attached, and we refer the Commissioners to pages 15–21.

**V. Proposed Priority # 5: Continued Study of Definitions of “Crimes of Violence,” “Aggravated Felony,” “Violent Felony” and “Drug Trafficking Offense”**

As we have discussed in past comments, these definitions lack empirical basis, produce arbitrary distinctions, and result in grossly unjust sentences that contribute to the problem of over incarceration. Last year, we discussed the need for the Commission to reexamine the definitions of “crime of violence” and “violent felony” in light of current empirical research, which undermines the original assumptions underlying the definitions.<sup>78</sup> We also discussed myriad problems with the residual clause and offered reasons why a “crime of violence” or “violent felony” should be limited to those particularly serious felonies that have as an element the use, attempted use, or threatened use of physical force against the person of another.<sup>79</sup>

We believe it is time for the Commission to move forward with narrowing the career offender guideline to cover only those offenses that Congress set forth in 28 U.S.C. § 994(h). The Commission continues to receive feedback from judges and prosecutors that the career offender guideline is badly broken. The Commission acknowledged in its *Booker* report that the rate of within guideline sentences for career offenders has “generally decreased over time.”<sup>80</sup> That trend has continued. In FY 2012, less than one-third (30.2%) of career offenders received sentences within the range.<sup>81</sup> The non-government sponsored below range sentence for career offenders has hovered around 27% over the past three years.<sup>82</sup> Over the same time period, the

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<sup>77</sup> Nate Raymond, *Rakoff Says Sentencing Guidelines Should Be Scrapped*, Thomson Reuters News & Insight, Mar. 11, 2013, [http://newsandinsight.thomsonreuters.com/Legal/News/2013/03\\_-\\_March/Rakoff\\_says\\_sentencing\\_guidelines\\_should\\_be\\_scrapped/](http://newsandinsight.thomsonreuters.com/Legal/News/2013/03_-_March/Rakoff_says_sentencing_guidelines_should_be_scrapped/). See also *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006) (concluding that the fraud guidelines have “so run amok that they are patently absurd on their face”); *United States v. Parris*, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (guidelines in security fraud cases “are patently absurd on their face”).

<sup>78</sup> Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 11-17 (July 23, 2012).

<sup>79</sup> *Id.* at 17-18.

<sup>80</sup> *Booker Report, Part C: Career Offenders*, at 13 -14.

<sup>81</sup> USSC, FY 2012 Monitoring Data set.

<sup>82</sup> The Commission’s data show non-government sponsored below range rates of 27.7% in 2010; 26.7% in FY 2011; and 27.6% in FY 2012. USSC, FY 2010-2012 Monitoring Datasets.

government sponsored below range rate steadily increased from 37.8% to 41.1%.<sup>83</sup> The extent of reduction below the guideline minimum has been significant, with a 20-39% reduction for non-government sponsored below range sentences<sup>84</sup> and a 30-49% reduction for non-5K government sponsored below range sentences.<sup>85</sup>

The Commission should respond to this feedback, particularly in the absence of empirical evidence or a sound policy basis supporting the broad definitions of “crimes of violence” and “controlled substance offense” used in the career offender guideline. The Commission has acknowledged that the current guideline definitions of crime of violence and controlled substance offense were based upon nothing more than the definitions set forth in the Armed Career Criminal Act, 18 U.S.C. § 924(e), which are different than when the guideline was originally promulgated, and broader than what is required under 28 U.S.C. § 994(h).<sup>86</sup> The Commission made a sizable change in the guideline when it expanded the definition of “controlled substance offense,” to conform to the definition of “serious drug offense” in the Armed Career Criminal Act. Under 28 U.S.C. § 994(h), Congress only intended for persons with certain prior *federal* drug convictions to be subject to enhanced penalties as career offenders. The Commission’s 1989 expansion of the definition of “controlled substance” offense, however, brought within reach of the career offender guideline thousands of defendants convicted of *state* drug offenses.

In FY 2012, almost three-fourths, (73.5%) of career offenders were convicted of drug trafficking.<sup>87</sup> While information on the exact predicate offenses used to classify these individuals as career offenders is not available to us, we think it safe to infer that a sizable percentage of them had prior convictions for *state* drug offenses rather than *federal* drug trafficking offenses.

The use of state drug offenses to increase sentences has been a longstanding problem leading to excessive severity, unwarranted disparity, and racial disparity. Nine years ago, the Commission found that the career offender guideline – particularly as applied to defendants who qualify based on prior drug convictions – dramatically overstates their risk of recidivism.<sup>88</sup> Offenders qualifying for the career offender guideline based on one or more prior offenses had a

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<sup>83</sup> *Id.*

<sup>84</sup> *Booker Report, Part C: Career Offenders*, at 24

<sup>85</sup> *Id.* at 27.

<sup>86</sup> *Id.* at 4.

<sup>87</sup> *2012 Sourcebook*, at tbl. 22.

<sup>88</sup> *Fifteen Year Review*, at 134.

52% recidivism rate.<sup>89</sup> The rate for those qualifying on the basis of prior drug offenses was only 27%.<sup>90</sup> The Commission also found that the guideline has an adverse impact on Black offenders.<sup>91</sup> Notwithstanding those findings, the Commission has done nothing to narrow the career offender guideline.

The case of Lori Ann Newhouse – a low-level pill smurfer with two prior state drug convictions for conduct occurring on the same day – provides an example of how the career offender guideline sweeps too broadly, why judges decline to follow it, and why the Commission should act now to amend the guideline. *United States v. Newhouse*, 2013 WL 346432 (N.D. Iowa Jan. 30, 2013). In *Newhouse*, the defendant pled guilty to manufacturing or attempting to manufacture methamphetamine. Because she had two prior state drug predicate offenses from ten years before, her guideline range was enhanced from 70-97 months to 262-327 months under the career offender guideline. After a review of the history of the career offender guideline and how the Commission has expanded the list of qualifying drug convictions, the court declined to follow the guideline, noting how “none of the reasons for amendment reference any empirical studies, sentencing data, or other indicia of national experience that would support subjecting additional, and less serious, offenders to the severe Career Offender guideline than Congress specified.” *Id.* at 12. The court went onto conclude that the career offender guideline “frequently fails to promote the goals of sentencing outlined in 18 U.S.C. § 3553(a)” because of “its repeated expansion of predicate drug offenses untethered from the requirements of § 994(h).” *Id.* at 14.

The Commission should now correct the injustices caused by the career offender guideline. Under the guideline, too many people go to prison for too long for no good reason. Over the past decade, 18,775 persons have been sentenced as career offenders.<sup>92</sup> With an average guideline minimum sentence of 225 months,<sup>93</sup> that is enough inmates to fill 16 prisons like FCI Memphis for close to 20 years.<sup>94</sup> An overwhelming number of persons subject to these

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 133.

<sup>92</sup> See *Booker Report, Part C: Career Offenders*, at 75; *2012 Sourcebook*, at tbl. 22.

<sup>93</sup> *Booker Report, Part C: Career Offenders*, at 75.

<sup>94</sup> See *Bureau of Prisons, Weekly Population Report* (June 27, 2013) (reporting population of 1179 inmates at FCI Memphis – a medium security facility), [http://www.bop.gov/locations/weekly\\_report.jsp](http://www.bop.gov/locations/weekly_report.jsp).

lengthy sentences are drug offenders, not violent offenders.<sup>95</sup> Nearly two-thirds of these persons are Black.<sup>96</sup>

The costs of this incarceration policy are enormous. Career offenders in the past ten years faced a combined minimum sentence of 225,300 years imprisonment at a cost of \$6.5 billion in today's dollars.<sup>97</sup> That is enough money to pay for substance abuse treatment for 4.1 million people.<sup>98</sup>

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

As we noted last year, we are pleased that the Commission intends to undertake a comprehensive, multi-year study of recidivism, including an examination of circumstances that correlate with increased or reduced recidivism. In our letter to the Commission last July, we identified many of the issues related to recidivism we would urge the Commission to consider during this study.<sup>99</sup> For the benefit of the new Commissioners we reproduce that discussion here, with some updates and minor amendments.

As federal prison populations, like those in states across the country, have swollen beyond capacity, and the economy has forced a reexamination of what is actually gained in public safety for every dollar spent on imprisonment, recidivism is an area that warrants careful attention.<sup>100</sup> A recent study of individuals on federal community supervision found that 30% of “offenders received for supervision . . . recidivated within three years of commencing

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<sup>95</sup> *2012 Sourcebook*, at tbl. 22 (drug trafficking was the primary offense for 73.5% of defendants sentenced as career offenders); *Booker Report, Part C: Career Offenders*, at 7.

<sup>96</sup> *Booker Report, Part C: Career Offenders*, at 10.

<sup>97</sup> *See supra* note 13 regarding cost of incarceration in 2012.

<sup>98</sup> Office of National Drug Control Policy, *Fact Sheet: Cost Benefits of Investing Early in Substance Abuse Treatment* (2012) (“[o]n average, substance abuse treatment costs \$1,583 per patient”), [http://www.whitehouse.gov/sites/default/files/ondcp/Fact\\_Sheets/investing\\_in\\_treatment\\_5-23-12.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/investing_in_treatment_5-23-12.pdf).

<sup>99</sup> Letter from Marjorie A. Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 20-30 (July 23, 2012).

<sup>100</sup> *See, e.g.*, Pew Center on the States, *State of Recidivism: The Revolving Door of America’s Prisons* 1 (Apr. 2011) (“Now, however, as the nation’s slumping economy continues to force states to do more with less, policy makers are asking tougher questions about corrections outcomes. One key element of that analysis is measuring recidivism.”), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/State\\_Recidivism\\_Revolving\\_Door\\_America\\_Prisons%20.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf).

supervision – 16% were re-arrested and almost 14% were revoked.”<sup>101</sup> In recent years, the research about recidivism – and what works to reduce it – has grown exponentially. We encourage the Commission to review that research and further contribute to it through this multi-year study.

#### **D. The Prison Population Has Exploded**

The Federal Bureau of Prisons has been over-capacity for years and will continue to be so in the foreseeable future.<sup>102</sup> As long ago as 1985, “the Bureau of Prisons reported that its facilities were substantially overcrowded, which is a danger to inmates, staff, and the surrounding communities.”<sup>103</sup> In 1998, federal prisons were 26% overcrowded.<sup>104</sup> For the past decade, the federal inmate population has exceeded the rated capacity by at least 30%.<sup>105</sup> The projections on prison crowding are dire. Even with the building of new prisons and the expansion of existing facilities, the Department states that the “over-crowding rate for FY 2018 is projected to be 44 percent.”<sup>106</sup>

The overcrowding is relentless because each year the inmate population grows. The number of persons under the jurisdiction of BOP increased more than 800% from 1980 to today.<sup>107</sup> Since 2000 alone, it has increased by 50%.<sup>108</sup>

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<sup>101</sup> William Rhodes et. al., *Recidivism of Offenders on Federal Community Supervision* 9 (2013), <https://www.ncjrs.gov/pdffiles1/bjs/grants/241018.pdf>. “Thirty-eight percent of offenders . . . recidivated within five years of commencing supervision – 25 percent were re-arrested and almost 13 percent were revoked.” *Id.* at 8.

<sup>102</sup> Dep’t of Justice, *FY 2012 Performance and Accountability Report* II-23 (updated Feb. 2013) (system-wide crowding has been anywhere from 34% to 41% over the past decade, and was at 38% in FY 2012). In 2007, the Department set a target of reducing crowding to 28% by 2012. Dep’t of Justice, *FY 2007 Performance and Accountability Report* II-26. It has fallen far short of that goal. The Department has now set a goal to reduce crowding to 30% by 2016, but admits it “will have difficulty in meeting this long term goal.” *FY 2012 Performance and Accountability Report* II-22. See also General Accounting Office, *Federal Prison Expansion: Overcrowding Reduced but Inmate Population Growth May Raise Issue Again* (1993) (discussing challenges of rising prison population).

<sup>103</sup> Dep’t of Justice, *FY1998 Annual Accountability Report*, Ch. 5, [http://www.justice.gov/archive/ag/annualreports/ar98/ag\\_ar98\\_chap5.pdf](http://www.justice.gov/archive/ag/annualreports/ar98/ag_ar98_chap5.pdf).

<sup>104</sup> *Id.*

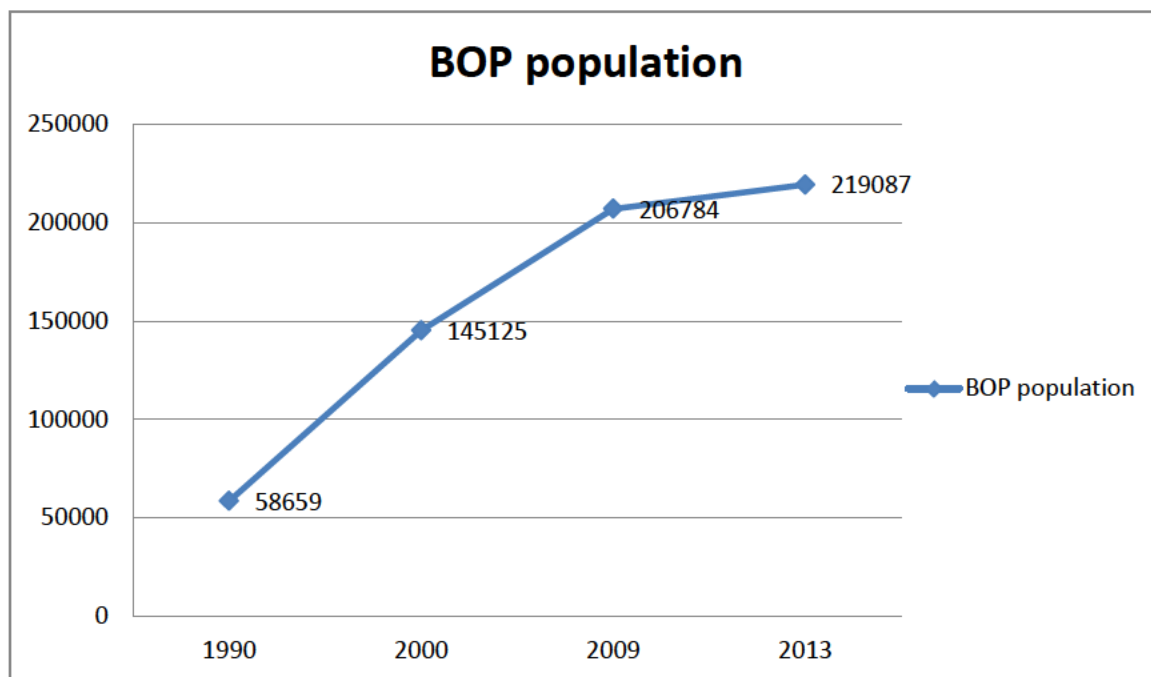
<sup>105</sup> *FY 2012 Performance and Accountability Report* II-23.

<sup>106</sup> *Id.* at I-22.

<sup>107</sup> The Sentencing Project, *The Expanding Federal Prison Population* (2012) (BOP population in 1980 was 24,252),



As the chart<sup>109</sup> below shows and as BOP Director Samuels stated, “the current trajectory is not a good one.”<sup>110</sup>



The rate of growth per 100,000 resident population is perhaps even a more striking indicator of the federal criminal justice system’s over-dependence on mass incarceration. In 1980, 9 in 100,000 residents were under federal correctional jurisdiction. By 2010, the rate rose to 61 per 100,000 residents.<sup>111</sup>

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[http://www.sentencingproject.org/doc/publications/inc\\_FederalPrisonFactsheet\\_March2012.pdf](http://www.sentencingproject.org/doc/publications/inc_FederalPrisonFactsheet_March2012.pdf)); *Quick Facts*, *supra* note 7.

<sup>108</sup> Sourcebook of Criminal Justice Statistics Online, *Table 6.0023.2011: Prisoners under the jurisdiction of the federal Bureau of Prisons* (BOP population in 2000 was 145,125), <http://www.albany.edu/sourcebook/pdf/t600222011.pdf>.

<sup>109</sup> *Id.*; *Quick Facts*, *supra* note 7.

<sup>110</sup> Statement of Charles E. Samuels, Director of the Federal Bureau of Prisons, Before the U.S. Sentencing Comm’n, Washington, D.C., at 4 (Feb. 16, 2012).

<sup>111</sup> Sourcebook of Criminal Justices Statistics Online, <http://www.albany.edu/sourcebook/pdf/t6292010.pdf>.

With this growth comes enormous cost. From fiscal year 2000 to fiscal year 2012, the budget for the Federal Bureau of Prisons rose from \$3.7 billion to \$6.6 billion – greater than the \$5.6 billion budget for the entire state of Mississippi.<sup>112</sup>

As we have previously noted, *Booker* has helped slow the growth of the prison population.<sup>113</sup> But judges stick close to the guidelines as to both sentence length and kind of sentence. Thus, the Commission plays an important role in reversing the trends of the last three decades. As the Commission has acknowledged, “[t]he changes in sentencing policy occurring since the mid-1980s – both the increasing proportion of offenders receiving prison time and the average length of time served – have been a dominant factor contributing to the growth in the federal prison population.”<sup>114</sup> The Commission’s data show that imprisonment rates have steadily increased since 1984 while alternative sentences have declined. The graph below<sup>115</sup> shows the percentage of three groups of offenders: (1) those who received a sentence involving some term of imprisonment, (2) those who received alternative confinement at home or in a community facility, and (3) those who received “simple” or “straight” probation without confinement conditions.

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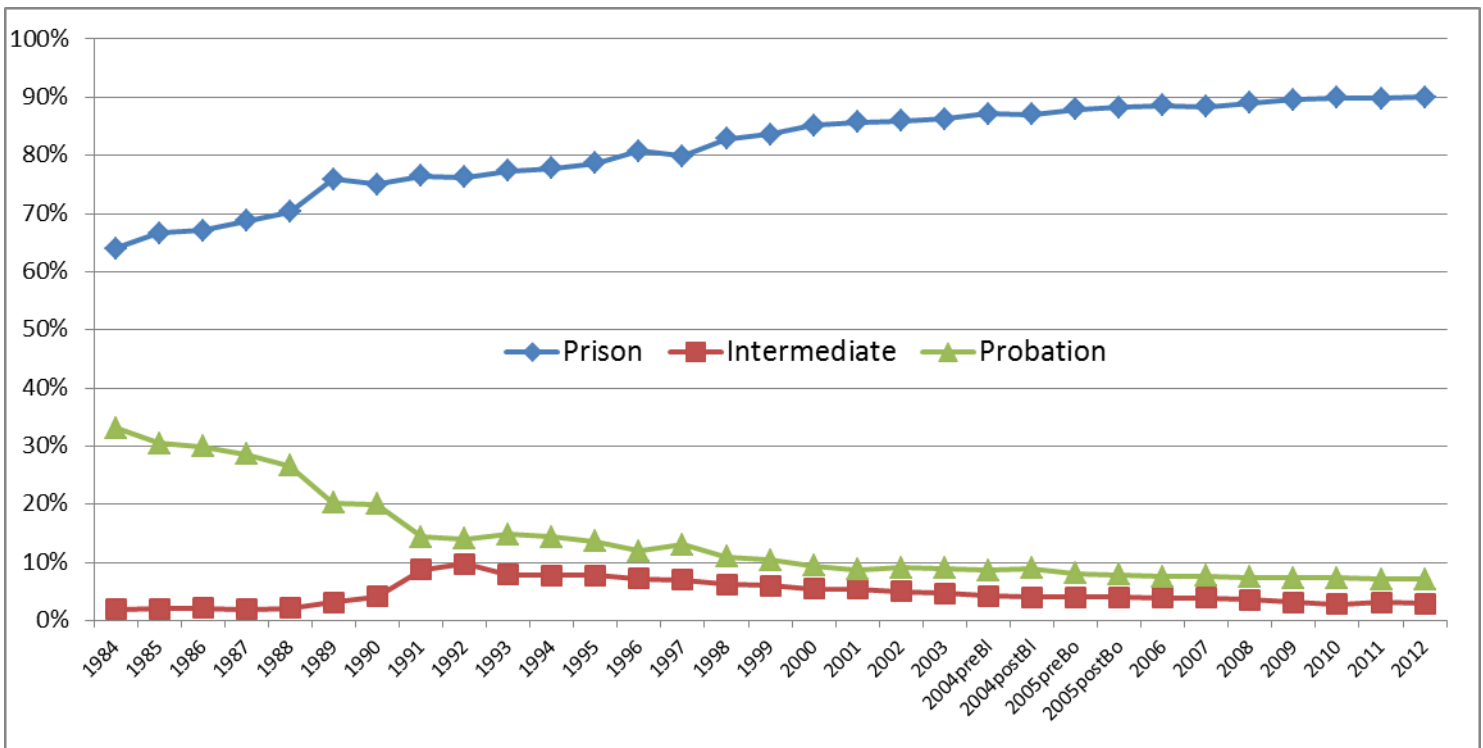
<sup>112</sup> Associated Press, *Mississippi budget negotiators set details of \$5.6B plan*, Gulflive.com, April 27, 2012, [http://blog.gulflive.com/mississippi-press-news/2012/04/mississippi\\_budget\\_negotiators.html](http://blog.gulflive.com/mississippi-press-news/2012/04/mississippi_budget_negotiators.html). Mississippi has a population of close to 3 million. U.S. Census Bureau, *State and County Quick Facts, Mississippi* (2011), <http://quickfacts.census.gov/qfd/states/28000.html>.

<sup>113</sup> Statement of Raymond Moore, Federal Public Defender for the District of Colorado, Before the U.S. Sentencing Comm’n, Washington, D.C., at 13-14 (Feb. 16, 2012).

<sup>114</sup> *Fifteen Year Review*, at 97.

<sup>115</sup> Sources: 1984-1990 Federal Probation Sentencing and Supervision Information System (FPSSIS) Datafiles, Administrative Office of U.S. Courts; 1991-2011 Annual Reports and Sourcebooks of Federal Sentencing Statistics. Most recent installments of these data can be found in USSC, 2012 Sourcebook, tbl. 12.

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



Prison sentences have also become more severe. The Commission has reported that “[t]he data clearly demonstrate that, on average, federal offenders receive substantially more severe sentences under the guidelines than they did in the preguidelines era. . . . By 1992, the average time in prison had more than doubled.”<sup>116</sup> And, despite “a slight and gradual decline in average prison time”<sup>117</sup> in recent years, federal offenders today still spend significantly more time in prison than did offenders sentenced before passage of the Sentencing Reform Act.<sup>118</sup>

<sup>116</sup> *Fifteen Year Review*, at 67.

<sup>117</sup> *Id.*

<sup>118</sup> 1984-1990 FPSSIS Datafiles, Administrative Office of U.S. Courts; 1991-2012 Annual Reports and Sourcebooks of Federal Sentencing Statistics. Most recent installments of these data can be found in *2012 Sourcebook*, at tbl. 14.

The heavy use of imprisonment is incompatible with several provisions in the Sentencing Reform Act. The Commission has never implemented the directive that “[t]he sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.” 28 U.S.C. § 994(g). Nor has the Commission fulfilled its purpose of establishing “sentencing policies and practices” that assure defendants are provided with “needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” See 28 U.S.C. § 991 (b)(1)(A) (one of the Commission’s purposes is to “assure the meeting of the purposes of sentencing set forth in section 3553(a)(2) of title 18”); 18 U.S.C. § 3553(a)(2)(C), (D).<sup>119</sup> The guidelines do not adequately ensure that defendants’ rehabilitative needs are met. A study of the “circumstances that correlate with increased or reduced recidivism,” along with guideline amendments that guide courts in how to consider information about recidivism in fashioning sentences, would help the Commission fulfill these two statutory mandates.

To reduce recidivism, the Commission must look to programs beyond prison. Section 994(k) of Title 28 directs that the “Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” A similar instruction at 18 U.S.C. § 3582(a) prohibits courts from considering rehabilitation as a justification for a prison term. See *Tapia v. United States*, 131 S. Ct. 2382, 2389-90 (2011).<sup>120</sup> As discussed below, the prohibition against using imprisonment for rehabilitation rests on a firm empirical foundation.

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<sup>119</sup> The Commission has steadfastly refused to recommend that courts consider offender characteristics such as employment, education, vocational skills, and family ties, or the lack thereof, in deciding to impose a non-prison sentence even though the research unequivocally shows that those factors are highly relevant to a defendant’s rehabilitative needs and risk of recidivism.

<sup>120</sup> Even if a court could sentence a defendant to term of imprisonment for the purpose of rehabilitation, the BOP’s ability to furnish appropriate programs is severely strained. As Director Samuels testified before the Commission in February 2012: “the levels of crowding and an increasing number of inmates with limited resources makes far more difficult the delivery of effective recidivism-reducing programming.” Statement of Charles E. Samuels, Director of the Federal Bureau of Prisons, Before the U.S. Sentencing Comm’n, Washington, D.C., at 3-5 (Feb. 16, 2012). The Federal Prison Industries, for example, “one of the BOP’s most important reentry programs” and “one that reduces inmate recidivism” employed “only about 8 percent of work-eligible inmates, well below its goal of 25 percent.” Dep’t of Justice, *FY 2012 Performance and Accountability Report* IV-9. “[M]ore factories have been closed than opened since 2007.” *Id.* at IV-24. Similarly, BOP needs to expand the capacity of its residential drug assessment program (RDAP). Dep’t of Justice, *Federal Prison System: FY 2013 Budget Request at a Glance*, <http://www.justice.gov/jmd/2013summary/pdf/fy13-bop-bud-summary.pdf>.

## B. Research on Recidivism

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

Most importantly, the empirical research shows that imprisonment is not an effective method for reducing recidivism.<sup>121</sup> As Judge Roger Warren, President Emeritus of the National Center for State Courts, stated in 2007: “The research evidence is unequivocal that incarceration does not reduce offender recidivism.”<sup>122</sup> Instead, “[i]ncarceration actually results in slightly increased rates of offender recidivism.”<sup>123</sup> In other words, “across the offender population, imprisonment does not have special powers in persuading the wayward to go straight. To the

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<sup>121</sup> See, e.g., Tina L. Freiburger & Brian M. Iannacchione, *An Examination of the Effect of Imprisonment on Recidivism*, 24 Crim. Just. Stud. 369, 377 (Dec. 2011) (“The results indicate that incarceration did not affect either offenders’ likelihood of recidivating or the severity of recidivism. The only factors found relevant to sentencing decisions that also affected the likelihood of recidivism were age and marriage. The finding that age reduced the likelihood of committing subsequent offenses is consistent with the body of research that finds that offenders ‘age out’ of crime. The finding that marriage has a significant effect on recidivism also is consistent with other research which has found that marriage is associated with lower crime rates.”); Howard E. Barbaree et al., *Canadian Psychological Association Submission to the Senate Standing Senate Committee on Legal and Constitutional Affairs* 6 (Jan. 2012) (“Psychology researchers have identified effective methods, or ‘what works’, to reduce crime – the overwhelming consensus of the literature is that treatment works, incarceration does not.”), [http://www.cpa.ca/docs/file/Government%20Relations/SenateCommitteeSubmission\\_January302012.pdf](http://www.cpa.ca/docs/file/Government%20Relations/SenateCommitteeSubmission_January302012.pdf).

<sup>122</sup> Roger Warren, National Center for State Courts, *Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries* 11 (2007), <http://nicic.gov/library/files/023358.pdf>.

<sup>123</sup> *Id.* See also Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 Ann. Rev. L. Soc. Sci. 297, 302 (2007) (“[R]esearch does not show that the aversive experience of receiving correctional sanctions greatly inhibits subsequent criminal behavior. Moreover, a significant portion of the evidence points in the opposite direction – such sanctions may increase the likelihood of recidivism. The theory of specific deterrence inherent in the politically popular and intuitively appealing view that harsher treatment of offenders dissuades them from further criminal behavior is thus not consistent with the preponderance of available evidence.”). A recent Missouri study shows “that recidivism rates actually are lower when offenders are sentenced to probation, regardless of whether the offenders have prior felony convictions or prior prison incarcerations.” Missouri Sentencing Advisory Commission, *Probation Works for Nonviolent Offenders*, 1 Smart Sentencing 1 (June 2009), <http://www.courts.mo.gov/file.jsp?id=45429>. On a three-year follow up from the start of probation or release from prison, first or second-time offenders on probation were incarcerated at a significantly lower rate (36%) than those who had been sent to prison (55%). *Id.*

extent that prisons are used because of the belief that they reduce reoffending more than other penalty options, then this policy is unjustified.”<sup>124</sup>

As for why this is so, scholars have identified numerous “criminogenic” effects of incarceration, including how prison serves as a school for criminals; severs ties to family and community; diminishes employment options upon release; and reduces rather than increases the inmate’s willingness or ability to conform to social norms.<sup>125</sup>

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

- *Community based treatment is more effective in reducing recidivism than that provided in prison.* “In general, community-based programs have a greater impact on recidivism rates than those based in prisons.”<sup>126</sup> According to a study by the Washington State Institute of Public Policy, “the latter reduced recidivism rates by an average of 5 to 10 percent, whereas intensive supervision with community-based services reduced recidivism rates by 18 percent.”<sup>127</sup> The research also shows that “[d]rug treatment in the community is more effective than drug treatment in prison. Community-based treatment yields an 8.3 percent reduction in recidivism rates,

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<sup>124</sup> Francis T. Cullen, Cheryl Lero Johnson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S, 50S-51S (2011) (“[H]aving pulled together the best available evidence, we have been persuaded that *prisons do not reduce recidivism more than noncustodial sanctions.*”).

<sup>125</sup> See generally Martin H. Pritikin, *Is Prison Increasing Crime*, 2008 Wis. L. Rev. 1049, 1054-72 (cataloging eighteen criminogenic effects of incarceration); Lynne M. Vieraitis, Tomaslav V. Kovandzic, & Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol’y 589, 614-16 (2007); see also USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 19 (1996) (recognizing imprisonment has criminogenic effects including: contact with more serious offenders, disruption of legal employment, and weakening of family ties).

<sup>126</sup> Marshall Clement et al., *The National Summit of Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending* 26 (Jan. 2011) (hereinafter *Reinvestment Summit*), <http://www.justicereinvestment.org/summit/report>.

<sup>127</sup> *Id.* See also Kimberly Wiebrecht, *Evidence-Based Practices and Criminal Defense: Opportunities, Challenges, and Practical Considerations* 8 (2008) (“The research. . . states that treatment interventions are more effective when provided to defendants while they are in the community rather than in an institutional setting.”), <http://nicic.gov/library/files/023356.pdf>.

whereas prison-based treatment (either therapeutic communities or outpatient) also reduces recidivism, but by a lesser 6.4 percent.”<sup>128</sup>

- *Specialized courts reduce recidivism.* One recent statewide study of drug courts in Minnesota, where drug court participants entered the programs both post-adjudication and pre-plea, found that “[d]rug court is a statistically significant factor in reducing new charges and convictions for participants in all time intervals analyzed (through 2½ years) after a participant’s start date. At the end of 2½ years the Drug Court Cohort shows a 37% reduction in new charges and 47% reduction in new convictions as compared to the Comparison Group.”<sup>129</sup> Another study by the Urban Institute, examining drug courts in multiple sites, again with participants entering both post-adjudication and pre-plea, found that “drug court participants were significantly less likely to report committing any crime at both the six- and 18-month follow-up interviews. Also, of those who reported criminal activity at the 18-month follow-up, drug court participants reported about half as many criminal acts (43.0 vs. 88.2), on average, in the year prior.”<sup>130</sup> Looking at the effect of the point of entry in the programs, the study found that when participants entered pre-plea courts, the average number of crimes prevented per month was 4.6, compared with 3.6 when participants entered post-plea courts.<sup>131</sup> The study also examined whether the type of offense affected recidivism rates and concluded that “offenders with violent histories showed a greater reduction in crime than others at follow-up.”<sup>132</sup>
- *Targeting a greater number of “criminogenic needs” has a greater effect on recidivism.* Research has shown that recidivism can be reduced where policies are designed to target the greatest number of “criminogenic needs” in a manner that

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<sup>128</sup> *Reinvestment Summit*, at 26. The Bureau of Prison’s RDAP is the only prison-based program that is shown to reduce recidivism by as much as 16%. Eligibility for RDAP is extremely limited. Alan Ellis & Todd Bussert, *Looking at the BOP’s Amended RDAP Rules*, 26 *Crim. Justice* 37 (2011).

<sup>129</sup> Minnesota State Court Administrator’s Office, *Minnesota Statewide Adult Drug Court Evaluation* 44 (June 2012), [http://www.mncourts.gov/Documents/0/Public/Drug\\_Court/2012%20Statewide%20Evaluation/MN\\_Statewide\\_Drug\\_Court\\_Evaluation\\_Report\\_-\\_Final\\_Public.pdf](http://www.mncourts.gov/Documents/0/Public/Drug_Court/2012%20Statewide%20Evaluation/MN_Statewide_Drug_Court_Evaluation_Report_-_Final_Public.pdf).

<sup>130</sup> Shelli Rossman et al., *The Multi-Site Adult Drug Court Evaluation: Executive Summary* 5 (Nov. 2011), <http://www.urban.org/uploadedpdf/412353-multi-site-adult-drug-court.pdf>.

<sup>131</sup> Shelli Rossman et al., *The Multi-Site Adult Drug Court Evaluation: Volume Four* 183 (Nov. 2011), <http://www.urban.org/UploadedPDF/412357-MADCE-The-Impact-of-Drug-Courts.pdf>. Courts that combined both pre-plea and post-adjudication participants had the least success, preventing on average .8 crimes per month. *Id.*

<sup>132</sup> *Id.* at 7.

considers individual characteristics when matching offenders to services. Services that target only one to three needs have been shown to increase recidivism, whereas those that target four to six needs significantly reduce recidivism. Additionally, services that match treatment to the individual's culture, gender, motivational stage, and learning style are more likely to reduce recidivism than "cookie-cutter" or "one-size-fits-all" programs.<sup>133</sup>

Significant research has emerged on how supervision affects recidivism. Specifically, the research shows that intensive supervision should be limited to high risk offenders because it actually increases recidivism rates for low risk offenders. Indeed "[t]he . . . least understood threat to public safety is when low risk offenders are subject to unnecessary levels of supervision or 'dosages' of treatment. Not only are valuable and increasingly scarce resources being diverted from those who truly need them, several studies have shown that exposing low risk offenders to treatment actually increases their recidivism rates."<sup>134</sup>

### **C. Implementation by the States**

For several years, many of the states have been looking at this evidence and taking steps to respond to it with the goal of decreasing both costs and recidivism.<sup>135</sup> While perhaps initially

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<sup>133</sup> See generally National Institute of Corrections, U.S. Dep't of Justice, *Implementing Evidence-Based Policy and Practice in Community Corrections* 14 (2d ed. 2009); Edward Latessa, *What Works and What Doesn't in Reducing Recidivism: Apply the Principles of Effective Intervention to Offender Reentry*, [http://www.familyimpactseminars.org/s\\_wifis26ppt\\_el.pdf](http://www.familyimpactseminars.org/s_wifis26ppt_el.pdf).

<sup>134</sup> James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 Fed. Sent'g Rep. 194 (2004). See also Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recidivism?*, 3 U. St. Thomas L. J. 521, 522-23 (2006) ("[R]esearch has clearly demonstrated that when we place low-risk offenders in our more intense programs, we often increase their failure rates."); Christopher T. Lowenkamp, Jennifer Pealer, Paula Smith, & Edward J. Latessa, *Adhering to the Risk and Need Principles: Does it Matter for Supervision-Based Programs?*, 70 Fed. Probation 3 (2006) ("The risk principle states that programming should be matched to the risk level of the offenders, and higher-risk offenders should receive more intensive programming for longer periods of time to reduce their risk of re-offending. Moreover, and equally important, applying intensive treatment to low-risk offenders may actually serve to increase their risk of recidivism.") (internal citations omitted), [http://www.uc.edu/ccjr/Articles/cca\\_article\\_federal\\_prob.pdf](http://www.uc.edu/ccjr/Articles/cca_article_federal_prob.pdf).

<sup>135</sup> See, e.g., *Reinvestment Summit* at 55-67; National Governor's Association Center for Best Practices, *State Efforts in Sentencing and Corrections Reform* (Oct. 2011), <http://www.nga.org/cms/home/nga-center-for-best-practices/center-publications/page-hsps-publications/col2-content/main-content-list/state-efforts-in-sentencing-and.html>. See generally Pew Center on the States, *Recidivism* (website listing the Center's latest publications on recidivism), <http://www.pewstates.org/issues/recidivism-328303>; Council of State Governments Justice Center, *Work in the States* (website providing information on the states with whom the Center is working to implement justice reinvestment strategies), [http://justicereinvestment.org/states\\_](http://justicereinvestment.org/states_).



motivated to examine incarceration policies and recidivism due to fiscal concerns, many states are learning that reducing their reliance on incarceration can have a positive effect not only on the pocketbook, but on public safety.<sup>136</sup> As the Honorable Sue Bell Cobb, Chief Justice of the Alabama Supreme Court recently stated: “We now know there has been an overreliance on incarceration of nonviolent offenders. Unfortunately, research has demonstrated that it has not necessarily made us safer.”<sup>137</sup> And there is public support for the changes the states have made. The Pew Center on the States reports that “[v]oters overwhelmingly prioritize preventing recidivism over requiring non-violent offenders to serve longer prison terms.”<sup>138</sup>

Although some of these states have explored using newer forms of actuarial risk assessments as part of the sentencing process, we caution against such a change in the federal system. It simply is not possible to have a single risk assessment that yields reliable and valid results for the entire federal population. A recent study of individuals on federal community supervision found a “statistically significant variation in arrest and revocation rates across the 90 federal districts, after taking risk and protective factors into account.”<sup>139</sup> Even the strongest advocates for the use of actuarial risk assessments at sentencing have counseled that “[g]iven the purpose for and potential judicial consequences of using assessment information at sentencing, research must provide evidentiary support that the tool can effectively categorize all types of

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<sup>136</sup> See, e.g., *Reinvestment Summit*, at 4 (“Not only are states finding that a crime-fighting strategy that focuses so heavily on incarceration is fiscally not sustainable, evidence from the states demonstrates that policymakers should not assume that simply incapacitating more people will have a corresponding increase in public safety.”). “For example, from 2000 to 2007, Florida has increased its incarceration rate 16 percent, whereas New York State’s incarceration rate went in the opposite direction, decreasing 16 percent. Despite this contrast, New York’s drop in crime rate over the same period was double Florida’s decrease in crime. In short, although New York invested considerably less money in prisons than did Florida, New York delivered greater public safety to its residents.” *Id.*

<sup>137</sup> Honorable Sue Bell Cobb, *The Power of Fixing People Rather than Filling Prisons*, in *Book of the States* (2011), <http://knowledgecenter.csg.org/drupal/content/power-fixing-people-rather-filling-prisons>.

<sup>138</sup> Pew Center on the States, *Time Served: The High Cost, Low Return of Longer Prison Terms* 5 (June 2012), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Prison\\_Time\\_Served.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Prison_Time_Served.pdf).

<sup>139</sup> Rhodes, *supra* note 101, at 16. For example, districts with large populations had lower arrest and revocation rates; districts with a larger proportion of Native Americans had higher revocation rates. *Id.* at 17. Household income also had an effect on revocation rates such that persons with higher average family income experienced fewer revocations than those with lower income. *Id.* Further, “[o]ffenders who return to neighborhoods that are seen as impoverished and transient have higher failure rates.” *Id.* at 18. The availability of reentry programs in the district may also be a materially important variable in recidivism rates. One program proven to reduce recidivism in a small number of districts is the federal Workforce Development Program. At least one study has shown that persons who participated in the program had lower recidivism rates than a matched sample of individuals from other districts who did not participate in the program. See Christy Visser, *Workforce Development Program: Experiences of 80 Probationers in the U.S. Probation Office*, District of Delaware (2009).

offenders *in the local population* on which the instrument will be used into groups with different probabilities of recidivating.”<sup>140</sup> Due to different local laws and policies in different parts of the country, and different target populations, validity must be established on a local level.<sup>141</sup> In other words, “what works in downtown Los Angeles may not work in Napa Valley.”<sup>142</sup> Researchers have noted that predictive validity can suffer when a single tool is used even for an entire state (let alone the entire country): “it is highly unlikely for any single tool, applied unilaterally, to demonstrate universally high predictive validity.”<sup>143</sup>

## **VII. Proposed Priority #7: Conditions of Probation, Supervised Release, and Chapter Seven**

The Commission has proposed undertaking a multi-year review of sentencing practices pertaining to violations of conditions of probation and supervised release and possibly considering amendments to Chapter 7 of the Guidelines Manual. We agree that the Chapter 7 policy statements are out-of-step with the research on “what works” in community corrections and should be revisited. We are especially concerned that the budget crisis in the judiciary may well result in more revocations rather than less because of the lack of funds to pay for community treatment. The Commission can take a significant role in sending a message through its policy statements that revocation often is not the answer to a violation of probation and supervised release. In addition to examining revocation practices, the Commission should consider amending the guidelines governing imposition of supervised release and probation.<sup>144</sup>

*Revocations.* The number of persons who have been revoked for violations of probation and supervised release is sizable. In the past three years alone, 46,925 post-conviction

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<sup>140</sup> National Center for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing* 40 (2011), <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Sentencing%20Probation/RNA%20Guide%20Final.ashx>

<sup>141</sup> *Id.* at 30-31.

<sup>142</sup> *Id.* at 32.

<sup>143</sup> *Id.*

<sup>144</sup> See generally Vera Institute of Justice, *The Fiscal Crisis in Corrections: Rethinking Policies and Practices* 7 (2009) (discussing how some states have adopted graduated responses to violations and reduced supervision requirements); William D. Burrell, *Community Corrections Management: Issues and Strategies* 15-4, 16-6 (2012) (responses to violations should be tailored to the facts and circumstances of each incident with the goal in many cases “to stabilize offenders in order to keep them in the community, safely and productively”).

supervision cases ended with revocation.<sup>145</sup> Nearly two-thirds were revoked for technical violations or minor offenses: 58% (27,072) were closed for technical violations; 6.5% (3,041) were revoked for minor violations, such as drunken driving, disorderly conduct, petty theft, and traffic violations. Thirty-six percent (16,812) were revoked for involvement in or conviction for a new “major” offense. According to the Commission’s study on supervised release, the average sentence for technical violations was nine months.<sup>146</sup> Prison sentences for other kinds of violations were even longer. Many of these violators were sentenced to terms longer than necessary and tied up limited prison bed space that could and should have been used for more dangerous offenders.

The Chapter 7 policy statements could be better calibrated to provide for graduated sanctions rather than revocation for many kinds of violations. The terms of imprisonment in Chapter 7 are unnecessary to protect the public and thwart the rehabilitative purpose of supervision. Research shows that “felony recidivism is not lowered by using confinement for offenders who violate the technical conditions of their community supervision.”<sup>147</sup> A mild sanction, imposed reliably and immediately, will have a much greater effect on keeping an offender in compliance than the threat of a longer term of imprisonment that is “delayed and uncertain.”<sup>148</sup>

Many states have adopted the use of a graduated sanctions response to supervision violations. Graduated sanctions are swift, structured, and incremental responses to violations. Sanctions may include drug testing, substance abuse or mental health treatment, day or evening reporting centers, halfway houses, intermittent confinement, home confinement, public service, electronic monitoring, and more intensive supervision.<sup>149</sup> The Chapter 7 policy statements are

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<sup>145</sup> This data was compiled from tables E-7A in the following documents: *U.S. District Courts – Post Conviction Supervision Cases Closed With and Without Revocation, by Type, During the 12-Month Period Ending September 30, 2010*; *U.S. District Courts – Post Conviction Supervision Cases Closed With and Without Revocation, by Type, During the 12-Month Period Ending September 30, 2011*; *U.S. District Courts – Post Conviction Supervision Cases Closed With and Without Revocation, by Type, During the 12-Month Period Ending September 30, 2012*. The tables are available at <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/statistical-tables-us-district-courts-federal-prob.aspx> and the statistical archive.

<sup>146</sup> USSC, *Federal Offenders Sentenced to Supervised Release 67* (2010) (*Supervised Release Report*).

<sup>147</sup> Washington State Institute for Public Policy, *Confinement for Technical Violations of Community Supervision: Is There an Effect on Felony Recidivism?* 6 (2012).

<sup>148</sup> Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U.L. Rev. 958, 1027 (2013).

<sup>149</sup> See generally Pew Center on the States, *Policy Framework to Strengthen Community Corrections* 2, 8 (2008).

inconsistent with the principles of graduated sanctions.<sup>150</sup> For example, the policy statement contains an automatic “two strikes” provision calling for revocation in cases where the defendant has committed a technical violation after already having been continued on supervision after a finding of a violation. USSG §7B1.3, comment. (n.1). Under a graduated sanctions approach, each additional violation would be subject to increasing sanctions, but not automatic revocation.

The Office of Probation and Pretrial Services sets forth guidance for its probation officers on the use of graduated sanctions,<sup>151</sup> but the guide to managing noncompliant behavior incorporates the Ch. 7 policy statements.<sup>152</sup> As a result, a probation officer is presumptively required to report a Grade C (technical) violation unless the “officer makes an affirmative determination that the alleged violation meets the criteria for non-reporting.” USSG §7B1.2(b), comment. (n.2). Practices vary among districts as to whether a violation is non-reportable. Updated policy statements would facilitate the use of graduated sanctions across all districts.

Another problem with the policy statements is that they do not sufficiently differentiate between grades of offenses. For example, §7B1.1(a)(1) treats a controlled substance offense the same as a crime of violence or firearms offense.<sup>153</sup> No sound reason exists for this approach. The risk to public safety associated with drug offenses is smaller than that associated with a crime of violence or a firearms offense. Nor should a technical violation be treated the same as a conviction for a misdemeanor. *See* USSG §7B1.1(a)(3).

The policy statements should also be revised to encourage concurrent sentences where appropriate. Section 7B1.3(f) provides that “[a]ny term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.” *See also* USSG §7B1.3, comment. (n.4). This policy statement is inconsistent with 18 U.S.C. § 3584(a), which allows a court to impose a revocation sentence

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<sup>150</sup> One of many problems is with §5F1.8 and §5D1.3, which permit a court to use intermittent confinement for a violation of probation or supervised release, but only during the first year of supervision. Because this limit is based upon 18 U.S.C. § 3583(e)(2), a statutory amendment may be necessary to provide courts with greater flexibility in using intermittent confinement.

<sup>151</sup> U.S. Courts, *Guide to Judiciary Policy* - Vol. 8E, Ch. 6 (2012).

<sup>152</sup> *Id.* at 19.

<sup>153</sup> The Chapter 7 definitions of “crimes of violence” and “controlled substance” offense suffer from the same over-inclusive flaws we have discussed in the context of §4B1.2. *See* USSG §7B1.1, comment. (nn.2 & 3) (incorporating definitions in §4B1.2).

concurrent with another term of imprisonment. It also results in lengthy, costly, and unnecessary periods of incarceration.<sup>154</sup>

*Supervised Release Terms and Conditions.* The guidelines contain many rules governing the length of supervised release and standard conditions of release. In many cases, these terms and condition are excessive and costly. One commentator recently provided this summary of the state of affairs:

[F]ederal judges are imposing supervised release at extremely high rates. Supervised release is required by statute in less than half of all cases subject to the federal sentencing guidelines. But even when there is no statutory requirement, the guidelines provide that the court “shall order a term of supervised release to follow imprisonment” when a prison sentence of more than a year is imposed. Even after the Supreme Court's decision in *United States v. Booker*, which made the guidelines advisory, nearly everyone sentenced to federal prison is also sentenced to a term of supervised release.

Not surprisingly, given the reach of modern-day supervised release, the resources devoted to the system are substantial. The costs of supervised release now aggregate to nearly \$400 million a year. At a cost of \$77.49 per day, moreover, the average prison sentence on a revocation costs the government about \$26,000. If one third of the 103,423 people currently on supervised release are likely to be reimprisoned, we can expect an additional cost – with respect to that extant cohort of releasees alone – of \$858 million (33,000 people x \$26,000).

Doherty, *supra* note 148, at 1016 (citations omitted).

We encourage the Commission to examine whether the fifteen conditions of supervised release set forth in §5D1.3(c) are necessary to impose in every single case and whether terms of supervision can be shortened. Inasmuch as most violations occur early within the term of supervised release,<sup>155</sup> the efficacy of standard terms of three, five, or more years is questionable. One option, suggested in the Commission's report on supervised release, is to consider whether the criminal history score “may be useful in the initial determination of whether to impose

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<sup>154</sup> See e.g., *United States v. Perez-Ramos*, 2013 WL 2364185 (10th Cir. 2013) (defendant sentenced to consecutive terms for illegal reentry and revocation based upon same conduct); *United States v. Prieto*, 2013 WL 1729559 (11th Cir. 2013) (although the parties and probation recommended a concurrent sentence, court imposed 30 month revocation sentence consecutive to 262 month sentence for offense that was basis of revocation).

<sup>155</sup> *Supervised Release Report*, *supra* note 146, at 62.

supervised release (as well as the length of a term) at the original sentencing.”<sup>156</sup> We look forward to working with the Commission to explore other options as well.

### **VIII. Proposed Priority #8: Reduction in Sentence for Extraordinary and Compelling Circumstances (Compassionate Release)**

We welcome the Commission expanding the circumstances for compassionate release in USSG §1B1.13. We fear, however, that BOP will continue to read 18 U.S.C. § 3582(a)(1)(A) as giving it broad and unfettered discretion to refuse to file a motion, and thus to deny an inmate access to a judge to decide whether the inmate’s sentence should be reduced. Hence, we encourage the Commission to work with Congress to clarify BOP’s role in the process. Two possible solutions would be to recommend to Congress that it amend § 3582(a)(1)(A) to: (1) require that BOP file the motion when an inmate has made a prima facie showing that “extraordinary and compelling” circumstances, as defined by the Commission under 28 U.S.C. 994(t), exist in his or her case; and (2) provide inmates the right to seek a reduction in sentence from the court after exhausting administrative remedies. Either option enables courts, rather than BOP, to make the final decision over whether a sentence reduction is warranted. At the same time, we also believe amendments to the guidelines could be helpful to provide better guidance to BOP regarding relevant criteria for determining whether an inmate has made out a prima facie case for a sentence reduction.

Congress set forth in 18 U.S.C. § 3582(a)(1)(A) and 28 U.S.C. § 994(t) the responsibilities of the Sentencing Commission, the Bureau of Prisons, and the courts in deciding whether a person’s sentence should be reduced for extraordinary and compelling reasons. Congress directed that the Director of the Bureau of Prisons is responsible for filing a motion for the court to consider a sentence reduction, and that the court then must decide whether extraordinary and compelling reasons warrant a reduction. The Commission is charged with the critical task of identifying in policy statements “what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” 28 U.S.C. § 994(t). The statutorily prohibited consideration is “rehabilitation of the defendant alone.” *Id.*

In 2007, the Commission sought to define those circumstances in application notes to §1B1.13.<sup>157</sup> Defenders and others hoped that the 2007 amendments would prompt BOP to file more motions so that courts could decide whether to reduce the sentence. Such hope was short-

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<sup>156</sup> *Id.* at 66.

<sup>157</sup> USSG, App. C, Amend. 698 (Nov. 1, 2007).

lived.<sup>158</sup> The Department of Justice and the Director of BOP have for years steadfastly thwarted Congressional intent and usurped the power of both the Commission to define the circumstances under which an inmate might be eligible for a sentence reduction and the judiciary in deciding whether the inmate's sentence should be reduced. Two recent reports show that BOP's procedures for "compassionate release" are woefully inadequate and few worthy candidates for release ever have the opportunity get to court where a judge would make the final decision.<sup>159</sup>

"The Office of the Inspector General (OIG) found that an effectively managed compassionate release program would result in cost savings for the BOP, as well as assist the BOP in managing its continually growing inmate population and the significant capacity challenges it is facing. However, the [OIG] found that the existing BOP compassionate release program has been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided."<sup>160</sup> OIG concluded that "the BOP's regulations and Program Statement do not establish appropriate medical and non-medical criteria for compassionate release consideration and do not adequately define 'extraordinary and compelling' circumstances that might warrant release."<sup>161</sup> OIG recommended that the BOP expand the use of compassionate release and update its policies to "accurately reflect the BOP's criteria for determining eligible medical and non-medical requests."<sup>162</sup>

To date, BOP has not updated its Program Statement to include medical and non-medical reasons for compassionate release.<sup>163</sup> And it continues to refuse to file motions on behalf of worthy candidates for compassionate release. The Commission could help inform BOP's policy by doing two things: (1) providing greater guidance on the circumstances that should trigger the

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<sup>158</sup> Margaret Colgate Love, *Sentencing Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 21 Fed. Sent'g Rep. 211 (2009).

<sup>159</sup> U.S. Dep't of Justice, Office of Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program* (2013) (OIG); Human Rights Watch and Families Against Mandatory Minimums, *The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons* (2012).

<sup>160</sup> OIG, *supra* note 159, at 1.

<sup>161</sup> *Id.* at 53.

<sup>162</sup> *Id.* at 53, 55.

<sup>163</sup> BOP released a new program statement regarding procedures, but that statement does not set forth any criteria to guide prison officials in making the decision on whether to recommend the filing of a motion for sentence reduction. See U.S. Dep't of Justice, Federal Bureau of Prisons, *Program Statement 5050.48: Compassionate Release; Procedures for Implementation of 18 U.C.S. §3582(c)(1)(A) & 4205(g)* (2013), [http://www.bop.gov/policy/progstat/5050\\_048.pdf](http://www.bop.gov/policy/progstat/5050_048.pdf). We have not seen the medical criteria referenced in the Department's recent letter to the Commission.

filing of a motion, and (2) explaining in commentary that § 3582(a)(1)(A) contemplates that BOP will file a motion upon a prima facie showing that the circumstances have been met.

If BOP continues to take a narrow view of compassionate release and usurp the roles of both the Commission and the courts, amendments to the statute may be necessary to clarify that BOP does not have the unfettered discretion it has granted itself in deciding whether a judge should even be given an opportunity to decide whether to reduce an inmate's sentence. As the Supreme Court observed in a related context "[s]entencing should not be left to employees of the same Department of Justice that conducts the prosecution."<sup>164</sup>

## **IX. Proposed Priority #9: Firearms**

The Commission has indicated that among its priorities this year is the review, and possible amendment, of guidelines applicable to firearms offenses. Under this broad umbrella, we are not certain where the Commission plans to focus its attention. We believe that the Commission should proceed cautiously in this area, particularly since the Commission added a sizable trafficking enhancement in 2006 and increased sentences for straw purchasers in 2011.<sup>165</sup>

In the months following the gun violence at Sandy Hook Elementary School in Newton, Connecticut there was intense political debate in Congress on federal gun control legislation, primarily on the issue of expanded background checks, but also on increased penalties for straw purchasers.<sup>166</sup> As an independent expert body, the Commission should not get caught up in the politics of this issue and, instead, is in a unique position to inform the debate with data and information. Reliance on information and data reveals that many straw purchasers are girlfriends, neighbors, extended family, high school dropouts, college students, and mothers who are doing a favor for a boyfriend, relative, or acquaintance for nothing or a few hundred dollars. The Commission has recently – and repeatedly – increased the guideline ranges for

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<sup>164</sup> *Setser v. United States*, 132 S. Ct. 1463, 1472 (2012).

<sup>165</sup> Given the Department's concerns about prison crowding, we are troubled by its suggestion that the Commission add more enhancements to the firearms guideline. *Wroblewski Letter*, *supra* note 74, at 15-16. Nor do we see the need to remove the reduction for persons who possess firearms for lawful sporting purposes. The adjustment applies in 1% or less of cases and is one of few mitigating specific offense characteristics. See USSC, *Guideline Application Frequencies for Fiscal Year 2011* (2011); USSC, *Guideline Application Frequencies for Fiscal Year 2010* (2010).

<sup>166</sup> See, e.g., Jonathan Weisman, *Senate Blocks Drive for Gun Control*, N.Y. Times (Apr. 17, 2013), <http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html>; Ted Barrett & Tom Cohen, *Senate Rejects Expanded Gun Background Checks*, CNN (Apr. 18, 2013), <http://www.cnn.com/2013/04/17/politics/senate-guns-vote>; George Zornick, *Here Comes the Gun Bill: What's In It?*, The Nation (Apr. 9, 2013), <http://www.thenation.com/blog/173745/here-comes-gun-bill-whats-it#>; John Light, *NRA Demands Softer Penalties for Straw Purchasers*, Moyers & company (Apr. 4, 2013), <http://billmoyers.com/2013/04/04/nra-demands-softer-penalties-for-straw-purchasers>.



these offenses by increasing the base offense level and adding specific offense characteristics. Commission data shows the guideline ranges for these offenses are not too low. If the public goal is deterrence, rather than retribution and increasing the risk of recidivism, the solution to the straw purchaser problem lies outside the Commission. Straw purchasers are not deterred by the threat of long sentences because they do not know what the sentences are. Imprisoning straw purchasers for lengthy periods of time not only is costly, but also *increases* the risk of recidivism, and thus does a disservice to the tax payer's wallet as well as public safety. Rigorous law enforcement and certain apprehension and conviction are far more important for public safety than is the further lengthening of prison sentences.

#### **D. Who Are the Straw Purchasers**

Many straw purchasers are not dangerous criminals in need of lengthy incapacitation. Three statutes are currently used to prosecute straw purchasers: 18 U.S.C. § 922(d),<sup>167</sup> which requires that the defendant knew or had “reasonable cause to believe” that the recipient was a prohibited person; 18 U.S.C. § 922(a)(6),<sup>168</sup> which requires only a knowing false statement; and 18 U.S.C. §924(a)(1)(A),<sup>169</sup> which also requires only a knowing false statement. Defendants convicted under these three provisions are overwhelmingly first time, non-violent offenders. In 2012, almost three quarters (73.6%) of these defendants were in criminal history category I.<sup>170</sup> In addition, women comprised almost one quarter (23.7%) of the straw purchaser offenses, more than six times the rate of women in all firearm offenses (3.8%), and almost double the rate of women across all offenses nationally (13.2%).<sup>171</sup>

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<sup>167</sup> 18 U.S.C. § 922(d) provides it is unlawful “for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person” is among other things, a fugitive, an unlawful user of any controlled substance, illegally in the United States, or has been dishonorably discharged from the Armed Forces.

<sup>168</sup> 18 U.S.C. § 922(a)(6) provides it is unlawful “for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition.”

<sup>169</sup> 18 U.S.C. § 924(a)(1)(A) provides that whoever “knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter” can be imprisoned.

<sup>170</sup> USSC, FY 2012 Monitoring Dataset.

<sup>171</sup> USSC, FY 2012 Monitoring Dataset; *2012 Sourcebook*, at tbl. 5.

These offenders have often been involved in the purchase of firearms for a spouse, partner or other family member, motivated by an intimate relationship or fear.<sup>172</sup> As Defenders informed the Commission during a closed meeting in McAllen, Texas in February of this year, while these straw purchasers frequently receive no remuneration, sometimes they receive a few hundred dollars.

Straw purchasers cooperate with law enforcement at a higher rate than most other defendants. In 2012, 18.6% of defendants convicted of straw purchasing under the three statutes mentioned above received a §5K1.1 departure for substantial assistance, compared to 11.7% for all offenses combined.<sup>173</sup>

### **E. The Guidelines Are Too High For Many Straw Purchasers**

The current guidelines are already too high for many straw purchasers. In 2012, a majority (54.4%) of individuals convicted of these offenses was sentenced below the guidelines.<sup>174</sup> This rate is significantly higher than the national rate of below guideline sentences across all offenses in 2012 (45.6%).<sup>175</sup>

The rate of below guideline sentences should come as no surprise because the history of the firearms guidelines is one of upward ratcheting without evidence supporting the need to do so. The march to higher guidelines for these offenses has made certain that the guidelines call for long sentences for the most culpable offenders, but it has also dragged alongside the least culpable straw purchasers. Since the guidelines were promulgated in 1987, the guideline offense level for defendants who did *not* know or have reason to believe the recipient was a prohibited person have doubled from 6 to 12.<sup>176</sup> For straw purchasers who “knew or had reason to believe” that a recipient of a firearm was a prohibited person, the offense level has increased from 8 to a minimum of 14.<sup>177</sup> With the amendments in 2011, the offense level of 14 now applies whether the conviction was under § 922(d), which requires as an element that the defendant had

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<sup>172</sup> See, e.g., *Dixon v. United States*, 548 U.S. 1, 4 (2006) (defendant purchased firearms for her boyfriend after he “threatened to kill her or hurt her daughters if she did not buy the guns for him”); *United States v. Flory*, 2007 WL 1849452, \*1 (7th Cir. 2007) (defendant purchased 3 firearms for her boyfriend); *United States v. Pierre*, 71 Fed. App’x 187, 190 (4th Cir. 2003) (wife purchased 2 firearms for her husband).

<sup>173</sup> USSC, FY 2012 Monitoring Dataset; *2012 Sourcebook*, at tbl. N.

<sup>174</sup> USSC, FY 2012 Monitoring Dataset.

<sup>175</sup> *2012 Sourcebook*, at tbl. N.

<sup>176</sup> Compare USSG §2K2.3 (1987) with USSG §2K2.1 (2012).

<sup>177</sup> *Id.* For more information on the history of the guidelines applicable to straw purchasers, see Statement of Kyle Welch Before the U.S. Sentencing Comm’n, Washington, D.C., at 17 (Mar. 17, 2011).

knowledge or belief that the recipient was a prohibited person, or under §§ 922(a)(6) and 924(a)(1)(A), neither of which includes that element.

Numerous other factors in the current guideline increase the sentencing ranges for straw purchasers even further. In 2006, the Commission added a 4-level enhancement for “trafficking,” aimed specifically at straw purchasers, in response to DOJ’s argument that otherwise, “cases may simply not be prosecuted because the relatively low existing penalties may not merit the expenditure of scarce prosecutorial resources.”<sup>178</sup> The enhancement applies “regardless of whether anything of value was exchanged,” if the defendant transferred or otherwise disposed of “two or more firearms” and “knew or had reason to believe” that the recipient’s “possession or receipt of the firearm would be unlawful” or that the recipient “intended to use or dispose of the firearm unlawfully.”<sup>179</sup> This 4-level trafficking enhancement applies cumulatively with the 2- to 10-level enhancement for number of firearms, §2K2.1(b)(1), and with the 4-level enhancement if a firearm was used or possessed “in connection with” another felony offense or was possessed or transferred with “knowledge, intent, or reason to believe” that it would be used “in connection with” another felony offense, §2K2.1(b)(6)(B).<sup>180</sup> It also applies cumulatively with the 4-level enhancement that applies when a firearm is possessed or transferred “with knowledge, intent, or reason to believe that it would be transported out of the United States.” USSG §2K2.1(b)(6)(A).

In 2011, DOJ requested, and the Commission provided additional enhancements for straw purchasers. This is when the Commission increased by 2 levels the offense level for straw purchasers convicted under § 922(a)(6) or § 924(a)(1)(A) if they committed the offense with “knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person,” such that now, the base offense level for the false statement offenses is the same as for a defendant convicted of § 922(d). USSG §2K2.1(a)(6).

The Commission also added a 4-level enhancement and a floor of 18 for straw purchasers who “possessed any firearm or ammunition while leaving or attempting to leave the United States or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States.” USSG §2K2.1(b)(6)(A).

This same year, the Commission increased the base offense level to 20 for straw purchasers convicted under § 922(a)(6) or § 924(a)(1)(A) where the offense involved a “semiautomatic firearm that is capable of accepting a large capacity magazine” or a firearm

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<sup>178</sup> Statement of Richard Hertling, Dep’t of Justice, Before the U.S. Sentencing Comm’n, Washington, D.C., at 3-4 (Mar. 15, 2006).

<sup>179</sup> See USSG §2K2.1 comment. (n.13(A)).

<sup>180</sup> See USSG §2K2.1 comment. (n.13(D)).

described in 26 U.S.C. § 5845 (sawed-off shotgun, machine gun, bomb, silencer), and the defendant “committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person.” USSG §2K2.1(a)(4)(B). This is the same base offense level as for convictions under §922(d) involving the same types of firearms, and is the same base offense level as any offense involving these firearms if the defendant was himself a prohibited person. USSG §2K2.1(a)(4)(B).

As Defenders informed the Commission during the meeting in McAllen Texas, in the border districts, application of the enhancements in §2K2.1(b)(5) and (b)(6) is almost automatic, quickly adding 8 levels to a base offense level. The “reason to believe” standard in §2K2.1(b)(6) is too broad and sweeps in low-level people who know nothing or almost nothing about where the firearms are heading, and basically ensures that the enhancement applies in every case in the border districts. These enhancements, designed to address more serious offenses, are being applied to less serious offenders, and there is no adequate relief mechanism for the less serious offenders. The departure for overrepresentation of criminal history which is commonly used in such situations is generally not available for these offenses since almost three-quarters of the straw purchasers fall in criminal history category I. The new departure provision, added in 2011, is too narrow to provide relief in many less serious cases, as it only applies if (1) no specific offense characteristic applies, and (2) “the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense,” and (3) “the defendant received no monetary compensation for the offense.” USSG §2K2.1 comment. (n.15). That means the downward departure does not apply in any number of circumstances, including the following:

- Any firearm involved was stolen or had an obliterated serial number even though the defendant had no knowledge of that circumstance
- 3 or more guns were involved
- 1 gun was involved and the defendant had “reason to believe” it would be used in connection with another felony or “reason to believe” it would be transported out of the United States
- The defendant was motivated by anything but threats, fear, or familial or intimate relationship
- The defendant received any monetary compensation, even a couple hundred dollars.

**F. Longer Sentences for Straw Purchasers Do Not Deter, Are Expensive, Increase Recidivism and Fail to Enhance Public Safety.**

During the Commission's meeting in McAllen earlier this year, a member of the Commission asked whether the increased sentences for straw purchasers were serving to get the word out that people should not engage in this activity. The theory underlying this question – that more severe sentences serve as a general deterrent to crime – is premised on the view that offenders know what the punishment is for various crimes, and that they are rational actors who weight the costs and benefits of engaging in crime before doing so. Research, however, refutes that theory.<sup>181</sup> There is “no real evidence of a deterrent effect for severity.”<sup>182</sup> Lengthy sentences do not provide meaningful deterrence because most offenders do not know or consider the potential punishment for their actions.<sup>183</sup> To the extent that offenders perceive and weigh the costs and benefits, “in virtually every deterrence study to date,” the perceived certainty of being apprehended and convicted was more important than the perceived severity of the sentence.<sup>184</sup>

In addition, the theory of specific deterrence – that a harsher penalty will dissuade a particular individual from further criminal behavior – is inconsistent “with the preponderance of available evidence.”<sup>185</sup> As discussed above regarding the recidivism priority, “imprisonment does not have special powers in persuading the wayward to go straight. To the extent that prisons are used because of the belief that they reduce reoffending more than other penalty

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<sup>181</sup> Anecdote does as well. It is Defenders' experience that our straw purchaser clients do not know the penalties, and are not making a rational cost-benefit analysis, but instead are committing the offense because they are doing a favor for a friend or family member or are poor and desperate for a few hundred dollars.

<sup>182</sup> Pasternoster, *supra* note 37, at 817.

<sup>183</sup> See Kleck et. al, *The Missing Link in General Deterrence Research*, 43 *Criminology* 623 (2005); Anthony N. Doob & Cheryl Marie Webster, 30 *Crime & Just.* 143, 182-83 (2003); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst When Doing its Best*, 91 *Geo. L. J.* 949, 953 (2003); A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 *J. Legal Stud.* 1, 4-7 (1999).

<sup>184</sup> Pasternoster, *supra*, note 37, at 812; Doob & Webster, *supra* note 183, at 189 (“no consistent and plausible evidence that harsher sentences deter crime”); Valerie Wright, *The Sentencing Project, Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, at 9 (Nov. 2010), <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf> (“Existing evidence does not support any significant public safety benefit of the practice of increasing the severity of sentences by imposing longer prison terms. In fact, research findings imply that increasingly lengthy prison terms are counterproductive. . . . Instead, an evidence-based approach would entail increasing the certainty of punishment by improving the likelihood that criminal behavior would be detected.”).

<sup>185</sup> Lipsey & Cullen, *supra* note 123, at 302.

options, then this policy is unjustified.”<sup>186</sup> Imprisonment actually “results in slightly increased rates of offender recidivism.”<sup>187</sup> This is because imprisonment has numerous “criminogenic” effects, including serving as a school for criminals; severing ties to family and community; diminishing employment options upon release; and reducing, rather than increasing, an inmate’s willingness or ability to conform to social norms.<sup>188</sup> Long prison sentences are particularly detrimental for low-risk offenders, such as many straw purchasers. Low-risk offenders “who spent less time in prison were 4% less likely to recidivate than low risk offenders who served longer sentences.”<sup>189</sup> Those in prison for a short time were “more likely to maintain their ties to family, employers, and their community, all of which promote successful reentry.”<sup>190</sup> Those serving longer sentences are “more likely to become institutionalized, lose pro-social contacts in the community, and become removed from legitimate opportunities, all of which promote recidivism.”<sup>191</sup> In addition, prison sentences are expensive. In FY 2012, the annual cost of imprisonment for a federal inmate at a Bureau of Prisons facility was \$28,948, more than eight times the annual cost of supervision for an individual on federal probation (\$3,347.41).<sup>192</sup>

With regard to gun crimes in particular, studies show that increased penalties for gun violations “have produced little in the way of deterrence for arrestees, who continue to obtain and use firearms with ease.”<sup>193</sup> “[P]unitive interventions such as enhanced prison terms and prosecutorial strategies were shown to be much less effective” in reducing gun violence than other strategies.<sup>194</sup> “[M]ultidimensional, community-based approaches . . . noticeably outperformed other more limited interventions. This should come as no surprise because these programs capitalize on the strengths of multiple law enforcement strategies, such as directed

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<sup>186</sup> Cullen, Johnson & Nagin, *supra* note 124, at 50S-51S.

<sup>187</sup> Warren, *supra* note 122.

<sup>188</sup> See generally Pritikin, *supra* note 125, at 1054-72; Vieraitis et al., *supra* note 125, at 614-16; see also USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 19 (1996).

<sup>189</sup> Valerie Wright, The Sentencing Project, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, at 7 (Nov. 2010), <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Rowland Memorandum, *supra* note 13.

<sup>193</sup> Scott Decker, Susan Pennell, & Ami Caldwell, National Institute of Justice, *Illegal Firearms, Access and Use by Arrestees* 4 (1997).

<sup>194</sup> Matthew D. Makarios & Travis C. Pratt, *The Effectiveness of Policies and Programs That Attempt to Reduce Firearm Violence: A Meta-Analysis*, 58 *Crime & Delinq.* 222, 237 (2012).

patrol, federal prosecution, and specialized probation. Furthermore, the majority of these programs also included a community-level component that targeted well-established community risk factors, such as community organization and mobilization.”<sup>195</sup> Data show that stepped up enforcement, tighter controls on gun show sales, background checks at gun shows, purchase permits, and required reporting of lost or stolen firearms would have a greater impact on trafficking than sentence severity.<sup>196</sup>

#### **X. Proposed Priority #10: Violence Against Women Reauthorization Act of 2013**

The Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54 (VAWA) adds a new federal assault offense at 18 U.S.C. § 113(a)(8) for assaulting particular victims by strangulation and suffocation. We urge the Commission to reference this new offense to both §2A2.2 and §2A2.3, which together, in their current form adequately address the full and wide range of conduct and culpability at issue.

Specifically, the VAWA amends 18 U.S.C. § 113 to add as an eighth form of assault: “Assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, by a fine under this title, imprisonment of not more than 10 years, or both.”<sup>197</sup> The definitions of “strangling” and “suffocating” sweep broadly to include conduct that ranges from the intentional to the merely reckless. The guidelines should reflect the wide scope of offense seriousness, and address not only the most serious form of the offense, but also the least.<sup>198</sup> Sentences at or near the statutory maximum penalty should be reserved for the worst possible variation of the crime committed by the most dangerous offender, and sentences at the bottom of the statutory range should be provided for the least serious offense committed by the least dangerous offender, and a range of conduct and appropriate sentences accommodated in between. To achieve this we recommend referring the offense to both §2A2.2 (Aggravated Assault) and §2A2.3 (Minor Assault). When the conviction is for merely reckless conduct, §2A2.3 adequately addresses the seriousness of the offense. It provides for a base offense level of 7 in any case involving “physical contact” and recommends increasing the offense level by 2 levels when there is “bodily injury.” Bodily injury is defined by the guidelines as “any significant injury.” USSG §1B1.1 comment. (n.1(B)). The definition includes, as an example,

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<sup>195</sup> *Id.*

<sup>196</sup> See generally Mayors Against Illegal Guns, *The Movement of Illegal Guns in America: The Link between Gun Laws and Interstate Gun Trafficking* (2008) (discussing how local control of firearms regulations and state inspections of gun dealers have a significant impact on illegal gun trafficking).

<sup>197</sup> Pub. L. 113-4, § 906, 127 Stat. 54, 124-25 (2013).

<sup>198</sup> The Commission is charged, among other things, with creating guideline ranges that are proportional to the seriousness of the offense and the dangerousness of the offender within the statutory ranges. See 28 U.S.C. § 994(c)-(d).

“an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.” *Id.* This is a broad definition that requires only that the injury be “significant,” and does not require that the injury be visible.<sup>199</sup>

For the more serious offenses, §2A2.2 is already designed to address aggravated assault. Section 2A2.2 starts with a base offense level of 14, and provides for a 3-level enhancement whenever there is “bodily injury.” USSG §2A2.2(b)(3)(A). As mentioned above, bodily injury is broadly defined in §1B1.1, and does not require visible injury. The guideline provides for additional increases, from 4-7 levels, above the base offense level as the degree of injury increases (up to and including permanent or life-threatening bodily injury). USSG §2A2.2(b)(3)(B)-(E). Additional enhancements are called for when the offense involves a firearm, from a 3-level increase where the use of a firearm was threatened, to a 5-level increase where the firearm was discharged. USSG §2A2.2(b)(2). There is also a 2-level enhancement where the offense involved more than minimal planning and another 2-level enhancement where it involved violation of a court protection order. USSG §§2A2.2(b)(1) and (b)(5).

Because §§2A2.2 and 2A2.3 adequately address the range of conduct at issue in this new offense, we urge the Commission to refer it to these two guidelines without further amendment.

## **XI. Proposed Priority #12: Child Pornography Offenses**

### **A. The Commission’s Recent Report and the Policy Development Process**

The Federal Public and Community Defenders believe that the guidelines for child pornography offenses are severely flawed. A previous Commission report documented the frequent intervention by the political branches in the formulation of these guidelines.<sup>200</sup> We agree with the recommendations of the Commission and the Department of Justice that Congress should now enact legislation to permit revision of the child pornography guidelines, irrespective of previous Congressional directives. These directives have largely determined the severity and structure of the current guideline, and have prevented the Commission from functioning in the characteristic institutional role envisioned by the Sentencing Reform Act.

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<sup>199</sup> See, e.g., *United States v. Hargrove*, 201 F.3d 966 (7th Cir. 2000) (affirming application of bodily injury enhancement for a pulled neck muscle); *United States v. Washington*, 500 Fed. App’x 279, 283 (5th Cir. Dec. 10, 2012) (concluding that the absence of visible “bruising, swelling, or bleeding is not dispositive,” and affirming finding that bank employee who was punched in the face sustained “bodily injury”).

<sup>200</sup> USSC, *The History of the Child Pornography Guidelines* (2009). For discussion of how Congressional micromanagement has undermined policy development throughout the guidelines era, see *Fifteen Year Review*; Paul J. Hofer, *The Reset Solution* 20 Fed. Sent’g Rep. 349 (2008).



Judges have recognized that the guidelines were not expertly crafted to recommend sentences that are sufficient, but not greater than necessary, to fulfill the purposes of sentencing. This fundamental problem helps explain why nearly two-thirds of sentences imposed under §2G2.2 in recent years were below the guideline range. This judicial feedback – a primary mechanism for guideline evolution emphasized, along with empirical data and national experience, by the Supreme Court – is clear evidence that the guideline recommends excessively severe sentences in the mine-run cases to which it applies.<sup>201</sup> Guideline §2G2.2 is so severely flawed that one circuit court has come close to holding that sentences *within* the guideline range are presumptively *unreasonable*. *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010). This guideline is arguably the worst in the system.

We also agree with the Commission and the Department of Justice that a significant problem with §2G2.2 is that it currently “places a disproportionate emphasis on outdated measures of culpability regarding offenders’ collecting behavior. . . .”<sup>202</sup> The review in the Commission’s recent report of changes in technology and law enforcement techniques help explain why the guideline’s enhancements sweep far too broadly and accumulate too quickly in typical cases. While this and many other aspects of the report are helpful and welcome, the Commission greatly understates its own findings when it concludes that “the current sentencing scheme results in overly severe guideline ranges for some offenders based on outdated and disproportionate enhancements related to their collecting behavior.”<sup>203</sup> The current scheme results in overly severe guideline ranges in nearly all cases.

We also agree with the Commission that penalties for receipt and possession should be aligned. We reject the view of some Commissioners, however, that mandatory minimum statutory penalties are ever needed or appropriate, and especially the suggestion that they should be *expanded* to include simple possession. We find no evidence in either the child pornography report or the previous report on mandatory minimums that justify the need for such penalties. Instead, the evidence shows that mandatory minimums routinely result in unwarranted disparity and unnecessarily severe sentences, and that they limit judges’ ability to impose individualized sentences based on the circumstances of each offense and offender.

The question facing the Commission is whether sound empirical evidence shows that the mainstream of judicial opinion regarding the child pornography guideline is wrong. In our experience, judges would welcome – indeed, desperately want – expert advice that could help

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<sup>201</sup> USSC, *Report to Congress: Federal Child Pornography Offenses*, tbl. 6-5 (2012) (*Child Pornography Report*).

<sup>202</sup> *Id.* at xviii. *See also id.* at xxi, 321, 331.

<sup>203</sup> *Id.* at 321.

them protect the public from dangerous offenders and impose appropriate sentences that reflect the relative harms and culpability of different offenses and offenders. If the guidelines' adjustments and severity levels were clearly explained, judges would give the guidelines' recommendations appropriate weight. Where, however, the evidence suggests that the current guidelines reflect intervention by the political branches, fueled by misunderstandings and fanned by politics, judges are to be applauded for rejecting the guideline recommendations when they conflict with the statutory principles and purposes of sentencing. The job of the Commission should then be to support and explain the importance of judicial discretion in these circumstances, to correct misunderstandings about child pornography offenders, to explain to Congress and the public the problems and costs of the current guideline, and to recommend changes that can earn the respect of judges.

Unfortunately, the recent report on child pornography gives us little confidence that the Commission's continuing work in this area will accurately reflect empirical evidence and judicial feedback, or clearly explain the rationale underlying the guideline and any proposed amendments. We believe the Commission needs to address some troubling questions that have been raised about this guideline by judges and scholars, as well as questions raised by the child pornography report itself about the Commission's views of its proper institutional role.

This comment is not the place for a comprehensive review of the methods and findings of the report, or of the implications of the Commission's novel, and sometimes disturbing, concepts and analytical framework; we are studying the report carefully and will provide additional feedback as the amendment cycle proceeds. As a first priority, however, we believe the Commission needs to clarify some questions raised by the report, to increase confidence that the Commission's work in this area will reflect its role as an impartial expert agency in the judicial branch of government:

- When the historical record demonstrates that much of the public, and many members of Congress, misunderstand crucial aspects of child pornography offenses and offenders, can the Commission be counted upon to serve as an independent expert body by highlighting the empirical data relevant to the purposes of sentencing and educating the public and policy makers about the true nature of these crimes?
- Does the Commission believe it is proper to increase the penalties for any category of offenders in the absence of persuasive evidence that current penalties are too short to achieve the purposes of sentencing? Will the Commission provide reasons for any proposed increase, linked to clear evidence that the benefits of any recommended increase will outweigh the costs?

- Does the Commission believe it is ever appropriate to base the severity of punishment for a category of offender on a belief that some, or a minority, or even a majority of offenders in the category might have committed crimes that were not specifically charged or proven?

Our concerns about these issues will be briefly discussed in the following sections.

### **B. The Report Reinforces Rather than Corrects Many Misunderstandings**

Neither Congress nor the public need to be convinced that child pornography offenses are serious. The challenge for rational policymaking in this emotional arena is to calm fears and impartially examine the data so that distinctions and gradations necessary to ensure proportionate punishment and safeguard the public are drawn. In contrast to the images of predatory child rapists that sex crimes against children bring to mind, judges and other actors on the front lines in the courtroom know that a wide spectrum of offenses and offenders are prosecuted under the laws for production, distribution, trafficking, receipt, and possession of child pornography.

Scholars have noted that public reaction to sex crimes involving children bears the hallmarks of a “moral panic,” with exaggerated fears based on lurid stereotypes and widespread misunderstanding of the typical nature of these offenders.<sup>204</sup> Some have called current attitudes toward child pornography offenders a “modern day witch hunt,”<sup>205</sup> where individuals are demonized and ostracized rather than provided appropriate treatment.<sup>206</sup> Legislative history contains many examples of law makers overstating the risk of recidivism among child pornography offenders, the likelihood that they have engaged in contact sexual offending, and understating the effectiveness of close supervision and treatment.

The challenge for the Commission is to bring a judicial temperament to the difficult problem of tailoring appropriate punishment to the wide range of offense and offender characteristics sentenced under these guidelines. In our view the Commission has an extra responsibility in this area, as in others, because it has exclusive access to the data most relevant for answering the empirical questions. We believe the recent report does not meet this challenge. We find little questioning of the assumptions underlying the public’s severe and punitive

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<sup>204</sup> Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 Stan. L. & Pol’y Rev. 547 (2011).

<sup>205</sup> The Guardian, *Calm the Witch-Hunt* (January 17, 2003), <http://www.guardian.co.uk/news/2003/jan/18/leadersandreply.mainsection>.

<sup>206</sup> Richard Kreuger, M.D., *The New American Witch Hunt*, L.A. Times (March 11, 2007), <http://www.latimes.com/news/opinion/commentary/la-op-krueger11mar11,0,2088276.story>.

response to these offenders. While the report shows great sensitivity to the victims of these crimes, we find little compassion or understanding for our clients – the human beings subject to the Commission’s rule making.

The report contains sweeping statements and “findings” that repeat conventional wisdom, without subjecting these claims to critical scrutiny. For example, rather than highlight the wide range of conduct and characteristics that are sentenced under these guidelines, the first major finding begins by declaring that “*All child pornography offenses are extremely serious . . .*” (emphasis supplied). In our experience, persons not familiar with this area of the law are surprised at how little it takes – a click of a mouse – to commit the crimes of production or trafficking in child pornography. The report uncritically repeats language that reinforces the worst stereotypes about matters that remain unclear and controversial. For example, claims about the use of child pornography to “groom” potential victims for contact offenses were taken largely from advocacy work by the Department of Justice or other interest groups. Rather than a one-sided focus on the most dangerous and aggravated aspects of these offenses, the Commission might well have included data and examples of offenders – often sad and dysfunctional, and themselves victims of various types of disadvantage, disability, and abuse – that have led judges to mitigate sentences so frequently.<sup>207</sup>

Most important, the Commission downplayed the finding that we consider the most urgently needed contribution of the report. In the penultimate chapter the Commission addresses the issue most important to sentencing judges – the likelihood that a child pornography offender will engage in sexual contact with a child or other victim in the future. The report notes that incorrect assumptions about this matter were a driving force behind the PROTECT Act legislation that limited the discretion of both judges and the Commission itself.<sup>208</sup> Yet the report blandly observes that “the Commission’s study of known recidivism by child pornography offenders suggests that the rate of known recidivism (in particular sexual recidivism) may not be as high as commonly believed.”<sup>209</sup>

What the Commission found was that 3.6% of non-production child pornography offenders were re-arrested or re-convicted of a contact sexual offense. If re-arrest or re-

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<sup>207</sup> See Statement of Deirdre von Dornum Before the U.S. Sentencing Comm’n, Washington, D.C., at 11 (Feb. 15, 2012) (discussing examples of individuals with dementia, Asperger’s syndrome, developmental disabilities, and trauma history); see also Mary Cohen, PhD, *Asperger Center for Education and Training*, (2011) (discussing increasing number of individuals with Asperger’s syndrome who are arrested for child pornography offenses and other crimes against children), [http://aspergercenter.com/articles/MaryRiggsCohen\\_ASD\\_and\\_InternetCrime.pdf](http://aspergercenter.com/articles/MaryRiggsCohen_ASD_and_InternetCrime.pdf).

<sup>208</sup> *Child Pornography Report*, *supra* note 201, at 293, n.2.

<sup>209</sup> *Id.* at 293.

conviction for any sexual offense is included in the definition of recidivism, including new child pornography offenses, the rate was 7.4%. This finding is so dramatically different from conventional wisdom (yet consistent with other studies of similar populations), and so contrary to the presumptions that underlay congressional policy making in this area, that it well deserved to be the headline finding of this report. Instead, the Commission obscures and downplays its importance with confusing definitions and presentations. (For example, it is unclear why the key findings in Table 11-1 present the percentages of offenders engaging in various types of recidivist conduct *among those offenders who recidivated* instead of among *all* offenders in the study, given that the latter most directly translates into numbers most relevant to judges and policymakers – the overall risk of recidivism of federal non-production child pornography offenders.)

The Department of Justice, which unlike the Federal Public and Community Defenders has a seat at the Commission table, has urged the Commission to ignore this finding during its policy making.<sup>210</sup> Since the need to “protect the public from further crimes of the defendant” is a statutory purpose of sentencing that cannot be ignored by the Commission or judges, and since this finding is clearly relevant to that purpose, we must conclude that the Department believes relying on subjective impressions is preferable to the best available empirical data. We disagree. While it is true that some child sex offenses, like other offenses, go undetected (just as some innocent defendants are arrested), the rate of unreported or detected sexual offending with children is most likely similar to other sexual offenses, which means that even with an appropriate multiplier, the recidivism rate of child pornography offenders is far below what is commonly believed.<sup>211</sup> The Department focuses on undetected child *pornography* offenses, which it claims are committed in the “privacy of an offender’s home” and are “particularly difficult to detect.”<sup>212</sup> This is nonsense, as those of us familiar with modern law enforcement techniques in cyber-space are well aware.

The Commission’s research on recidivism rates is of the type and quality of other research in the area. It is the most recent among the limited number of studies of federal child

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<sup>210</sup> Letter from Anne Gannon, National Coordinator for Child Exploitation Prevention and Interdiction, to the U. S. Sentencing Comm’n 5 (March 5, 2013), <http://sentencing.typepad.com/files/doj-letter-to-ussc-on-cp-report.pdf>.

<sup>211</sup> See, e.g., Bureau of Justice Statistics, *Female Victims of Sexual Violence 1994-2010* 7 (2013) (survey finding 64-71% of sexual offenses against females were not reported to police), <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>; Bureau of Justice Statistics, *Violent Victimization Committed by Strangers 1993-2010* 8 (2013) (from 1993 to 2010, rate of unreported violent crimes varied from 42-58%), <http://www.bjs.gov/content/pub/pdf/vvcs9310.pdf>; Bureau of Justice Statistics, *Hate Crime Victimization 2003-2011* 5 (2013) (53-65% of hate crimes went unreported from 2003-2011).

<sup>212</sup> *Id.*

pornography offenders, and it has the longest average follow-up period. The results are highly relevant to sentencing decisions and sentencing policy making. Our concern is that the Commission's treatment of this central finding reflects its overall approach to policy making in this area: uncritical acceptance of claims and language that reinforce negative stereotypes and conventional wisdom, but reluctance to highlight results that challenge the views of advocates and partisans in the political branches.

### **C. No Evidence Supports the Commission's Conclusion That the Current Guidelines Are Too Lenient for Any Category of Offenders.**

The report pairs its conclusion that the current guideline results in "overly severe guideline ranges for some offenders" with a claim that is also "results in unduly lenient ranges for other offenders who engaged in aggravated collecting behaviors not currently addressed in the guidelines, who were involved in child pornography communities, or who engaged in sexually dangerous behavior not qualifying for an enhancement in the current penalty scheme."<sup>213</sup> These parallel conclusions give us the impression of a politically crafted "balance" rather than the empirically-based and reasoned distinctions of an independent expert agency. This impression was reinforced by the utter lack of persuasive evidence in the report that current penalties are too short for any identifiable category of defendant.

We will address in greater detail the various offense characteristics the Commission and Department of Justice have suggested might currently be under-punished as the specifics of those proposals crystalize during the amendment cycle. For now, we note with alarm that the report asserts, without explanation, that "the culpability of child pornography offenders may vary depending on the extent of their immersion in an online community of offenders and their utilization of sophisticated technology to access and distribute child pornography."<sup>214</sup> In recent years, increased "culpability" has become the Commission's ever-ready, go-to rationalization for greater punishment when the empirical evidence fails to demonstrate that it serves any purpose.<sup>215</sup> Ever-finer gradations in culpability are a prime driver of the "factor creep" that has led to undue complexity and severity in the guidelines.<sup>216</sup>

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<sup>213</sup> *Child Pornography Report*, *supra* note 201, at 321.

<sup>214</sup> *Id.* at 94.

<sup>215</sup> Hofer, *supra* note 4, at n.9 and surrounding text.

<sup>216</sup> R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 *Psychology, Law & Pub Policy* 739, 752 (2001) ("In every guideline amendment cycle, law and order policymakers, whether they be in Congress, at the Department of Justice, or on the Sentencing Commission, petition the Commission to add more aggravating factors as specific

Even though the Commission has recommended adding aggravating adjustments for these new factors, it elsewhere notes that “there is no evidence that . . . dangerousness in necessarily correlated with technical savvy.”<sup>217</sup> Moreover, “[e]xisting social science research is inconclusive regarding whether a child pornography offender’s community involvement is associated with an increased risk of committing other sex offenses.”<sup>218</sup> The Commission has not made a persuasive case that valid and reliable categories of offense conduct involving these collecting behaviors or communities can be defined, or that increased punishments for such categories are necessary to advance a purpose of sentencing. “[S]exually dangerous behavior not qualifying for an enhancement in the current penalty scheme”<sup>219</sup> is even more problematic, as discussed in the next section.

Two numbers in the report could conceivably provide empirical starting points for identifying a small group of offenders in need of lengthier incarceration. In 2010, 12 receipt, trafficking or distribution offenders and 22 possession offenders received sentences above the guideline range.<sup>220</sup> The report does not describe what aggravating features of these cases led judges to impose the above-range sentence, however, and it seems unlikely that judges identified any cognizable case characteristics suitable for incorporation into the guideline adjustments. (In our experience, above-range sentences, especially for crimes like possession, often reflect a judge’s adjustment to a guideline range that does not reflect a defendant’s actual criminal conduct, due to the charges or plea agreements reached in a case).

The other number that could provide an empirical starting point for identifying aggravating factors is that 3.6% of non-production offenders who were re-arrested or re-convicted for new contact sexual offenses.<sup>221</sup> The risk of imposing too short a sentence on an offender who commits a new crime when released is a concern of judges. Perhaps the most surprising thing about the Commission’s report is its apparent lack of interest in identifying, or success at validating, offense and offender characteristics – beyond those already taken into account by factors like the criminal history score and pattern of activity – that might assist judges in identifying this small number of offenders who recidivate with dangerous new conduct. Instead, for reasons whose policy making relevance is obscure at best, attention is lavished upon

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offense characteristics or generally applicable adjustments to account more fully for the harms done by criminals.”).

<sup>217</sup> *Child Pornography Report*, *supra* note 201, at 94 (citations omitted).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 321.

<sup>220</sup> *Id.* at 133.

<sup>221</sup> *Id.* at 300.

identifying *prior* “criminal sexually dangerous behavior.” But the report defines this concept in a way that proved completely worthless for identifying future risk of recidivism.<sup>222</sup>

If the Commission wants its rule-making to reflect the best agency practices it would demonstrate that the benefits of any proposed lengthening of incarceration for a category of offenders will outweigh the costs. If, for example, reliable predictors of dangerous recidivism that cannot be controlled through treatment or supervision could be found, it is conceivable that the costs of incarceration of lengthier prison terms for the highest-risk offenders might be justified by the prevention of harmful crimes. But given the current technology of prediction, their high false positive rates, and the already-lengthy sentences imposed on most child pornography offenders, identifying such a category will require much more work than contained in the Commission’s recent report. The report’s appeal to murky reasons for higher “culpability” of some offenders, in order to justify even more severe punishment for some of our clients, gives us little confidence that the Commission’s policy development in this area will reflect its proper and best institutional role.

#### **D. The Report Embraces Shocking Rationales and Muddled Concepts**

Legal scholars have raised many disturbing questions about the rationale underlying the current child pornography guidelines.<sup>223</sup> Perhaps the most alarming was discussed at length by Professor Carissa Hessick, who noted that some government officials attempt to justify severe child pornography penalties as “proxy punishment” because the offenders are actually guilty of more serious crimes.<sup>224</sup> “The proxy punishment argument is quite difficult to defend. It is not a well-accepted justification for punishment, probably because punishing someone for conduct that has not been proven raises serious due process concerns. At the very least, the premise underlying the proxy punishment argument that all possessors of child pornography have also committed a past contact offense – requires strong empirical support, and that support does not exist.”<sup>225</sup>

One might expect the Commission’s report on this subject to assure stake holders that the Commission does not endorse punishing offenders for merely presumed criminal conduct that has not been specifically alleged and proven against them. The federal guidelines are already well known for having broken new ground with the expansive concept of relevant conduct,

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<sup>222</sup> *Id.* at fig. 11-4, 302.

<sup>223</sup> See e.g. Hamilton, *supra* note 204 ;Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 Cardozo L .Rev. 1679, 1683, 1698-99 (2012).

<sup>224</sup> Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 Wash. U. L. Rev. 835, 882 (2011).

<sup>225</sup> *Id.*



whereby offenders are punished, the same as if convicted, for uncharged criminal acts or even conduct of which they were acquitted. While we have strongly objected to this erosion of due process, we note that relevant conduct must at least be alleged and proven at a sentencing hearing by a preponderance of reliable evidence. The proxy rationale deems it appropriate to punish a defendant for conduct one thinks he likely engaged in without any specific proof at all.

Rather than disavow this odious proxy rationale, the Commission's report recognizes *and endorses it*. In a shocking explanation of the "relevance of" "reliable data about the overall prevalence rate of CSDB [criminally sexually dangerous behavior] among *all* §2G2.2 offenders," the report asserts that "*such data is one of several considerations relevant to the determination of whether penalty levels are generally proportionate for non-production offenders.*"<sup>226</sup> It then acknowledges "critics" of the proxy rationale:

Some critics have contended that the current penalty ranges in non-production cases are inappropriately based in significant part on the notion that an offender's possession of child pornography is a "proxy" for detected and undetected prior sexual abuse of children. . . . These critics contend that, because some non-production offenders have not engaged in CSBD in the past and will not engage in CSBD in the future, it is unfair to punish them based on what other non-production offenders have done in the past or may do in the future.<sup>227</sup>

The report attempts to mollify these "critics" worried about punishing offenders for conduct they did not commit by explaining that "the Commission believes that a non-production offender's sexual dangerousness – demonstrated on a case-by-case basis – is one of three primary aggravating factors relevant to sentencing in non-production cases." But it offers an additional, and alarming, explanation for why it deems such data relevant: "*In addition, reliable data about the prevalence of sexual dangerousness among all non-production offenders is one factor that policy makers should consider in deciding whether overall penalty levels are generally proportionate for the entire class.*"<sup>228</sup>

The report's suggestion that it is acceptable to punish people more harshly because they "are more likely to have engaged in other, as yet undetected acts of [criminal sexual conduct] in the past" is deeply troublesome and cannot be justified with any purpose of sentencing.<sup>229</sup> The "heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011,

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<sup>226</sup> *Child Pornography Report*, *supra* note 201, at 171 (emphasis added).

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

<sup>228</sup> *Id.* (emphasis added).

<sup>229</sup> *Child Pornography Report*, *supra* note 201, at 170.

2028 (2010) (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)); *see also Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012). Retribution cannot support punishment that is based on a theoretical or statistical possibility that the person engaged in some undetected act. It must be predicated on proof of actual misconduct. Similarly, incapacitation should be based upon actual proof about some aspect of the defendant's character and behavior that makes him a greater risk to public safety, which a history of "CSDB" as defined by the Commission demonstrably does not.

We believe the Commission owes the federal criminal justice community an explanation of whether the report's reference to the relevance of the rate of "sexual dangerousness among all non-production offenders" is a misstatement or if it reflects the belief of a majority of Commissioners that proxy punishment is justified.

Beyond the alarming ethical, legal, and constitutional implications of proxy punishment, the Commission expended considerable effort to collect data for no apparent purpose other than providing support for the proxy rationale. The theoretical importance of "CSDB" to sentencing policy making is thoroughly muddled throughout the report, mingling together in unhelpful ways elements of risk prediction and, once again, "culpability." The concept of "CSDB" seems poorly formed for clear thinking about culpability, given that it is defined in a way that mixes together past bad behavior that was never punished with past behavior for which a defendant has already been punished, as well as conduct already taken into account by the guidelines with conduct not now taken into account.

The concept is also poorly formed for clear thinking about risk prediction. Many characteristics that researchers have begun exploring as risk predictors for child pornography offenders, and which need to be empirically validated with regard to federal child pornography offenders, are not included within the concept. The criminal conduct that is included was not combined and analyzed in a way to optimize prediction, for example, by discounting conduct that occurred long ago rather than more recently. This confusion about the theoretical purpose of the concepts of "CSDB" and the extensive data collection effort undertaken for the report no doubt accounts for why there was no statistically significant difference in the rate of recidivism between offenders classified as with or without a history of "CSDB."<sup>230</sup>

It is very disturbing to see the report contain false statements that its own data, presented later in the report, disprove. In its discussion of the relevance of "CSDB" in Chapter 7, the report states that "non-production offenders with histories of CSDB pose a greater risk of sexual recidivism than non-production offenders without any history of CSDB."<sup>231</sup> The statement is

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<sup>230</sup> *Id.* at 303, fig. 11-4.

<sup>231</sup> *Id.* at 170.

supported by reference to studies that do *not* use the concept of “CSDB” as defined by the Commission. The citations are to studies that demonstrate the well-known fact that prior criminal offending predicts future offending. To reference these studies as relevant to the Commission’s analysis of “CSDB” misleads the reader and exaggerates the significance of the Commission’s unique use of the construct of “CSDB.”

The concept of “CSDB,” and the related, novel, concept of “precidivism,” is in our view poorly formed for clear thinking about anything, and we urge the Commission to drop them in its further policy development. The report uses the term “CSDB” to describe a wide range of behavior, including non-contact sex offenses, indecent exposure, voyeurism, prior possession of child pornography, and offenses involving adult victims.<sup>232</sup> Congress has used the term “sexually dangerous” in the civil commitment statute to describe a person who “has engaged or attempted to engage in sexually violent conduct or child molestation.” 18 U.S.C. § 4247. For the report to use a more expansive definition confuses the issue and characterizes a wide range of conduct as violent that is not normally considered so.

The guidelines already take into account criminal history in a way that *does* predict recidivism.<sup>233</sup> Moreover, under the current guidelines and statutes, conduct considered “CSDB” may be accounted for in multiple ways, including: (1) a 5-level increase in the offense level for a “pattern of activity involving the sexual abuse or exploitation of a minor,” §2G2.2(b)(5); (2) an enhanced sentence under § 2252A(b) or § 2252(b)(1); (3) criminal history points in those cases where the conduct resulted in a countable prior conviction, (4) an upward departure in the criminal history category even if the conduct did not result in a conviction or otherwise count under the criminal history scoring rules USSG §4A1.3; and (5) a sentence at the middle or top of the guideline range.

The report concludes that the guidelines’ criminal history score does not account for prior criminal sexual conduct in the majority of cases where it existed because most defendants are in Criminal History Category I.<sup>234</sup> There are good reasons why some of the conduct the report characterizes as “CSDB” is not presently taken into account. Some of the offenses covered by the definition are not even felonies or considered severe enough to require registration on a sex offender registry.<sup>235</sup> Moreover, some prior convictions may not result in a higher criminal

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<sup>232</sup> *Id.* at 174, 177.

<sup>233</sup> *Id.* at fig. 11-3.

<sup>234</sup> *Id.* at 205.

<sup>235</sup> See Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tacking, *National Guidelines for Sex Offender Registration and Notification – Final Guidelines* (July 2008), [http://www.ojp.usdoj.gov/smart/pdfs/final\\_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf). Under the guidelines, offenses such as

history category because of sound aspects of the rationale underlying the criminal history score. For example, if the conduct occurred decades ago, the offender is now older and at lower risk of recidivism than younger defendants with more recent convictions. A judge is always free to impose a higher sentence within the applicable guideline range, or depart upwardly, even in cases where the prior conduct is not counted in the criminal history score or did not result in a conviction. *See* USSG §4A1.3. A defendant in Criminal History Category I with multiple convictions may also have received a pattern of activity enhancement or statutory enhancement, but the report provides no information as to how many of the 376 offenders in Criminal History Category I were among the 230 individuals who received such enhancements.

In summary, the novel theoretical concepts developed for the report have not proven useful for advancing any purpose of punishment, and instead raise disturbing questions about the Commission's approach to policy making in this area. Accordingly, we believe the Commission should abandon its efforts to increase penalties based on these concepts, or on the other dimensions of increased "culpability" the report cites, and focus instead on fixing the fundamental flaws in these guidelines, which produce sentences far too high in the mine run cases arising under them.

## **XII. Proposed Priority #13: Miscellaneous Guideline Application Issues**

In our May 2013 letter to the Commission we discussed several issues we hope the Commission will focus on in the near future. Specifically, in addition to the issues above, we also encourage the Commission to:

- encourage Congress to amend the good time credit statute so that it at least conforms to the assumptions underlying the Sentencing Table, i.e., defendants would serve 85% of the sentence imposed (addressed in May 2013 letter at pp. 4–5);
- encourage Congress to provide for a Federal Defender ex officio on the Sentencing Commission so that the Commission's decision-making is more fully informed (addressed in May 2013 letter at pp. 5-6);
- modify the relevant conduct rules in USSG §1B1.3 to prohibit the use of acquitted conduct and suppressed evidence and to prohibit or limit the use of uncharged, dismissed or non-criminal conduct (addressed in May 2013 letter at pp. 24-31);
- amend USSG §6A1.3 so it discourages reliance upon undisclosed evidence and unreliable hearsay (addressed in May 2013 letter at pp. 31-33).

### **XIII. Conclusion**

As the Commission pursues its priorities for the 2013-2014 amendment cycle, we remain hopeful that it will take steps to formulate guidelines based upon judicial feedback and sound empirical research, and that reflect advances in knowledge of human behavior as it relates to the criminal justice process. 28 U.S.C. § 991(b)(1)(C). The Commission has the institutional capacity and authority to fashion a workable advisory guideline system that results in fair and just sentences. We look forward to working with the Commission and its staff during the upcoming amendment cycle.

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

Amy Baron-Evans  
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#### Enclosures

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Hon. Ricardo H. Hinojosa, Vice Chair  
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May 17, 2013

Honorable Patti B. Saris  
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United States Sentencing Commission  
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**Re: Proposed Priorities for 2013-2014**

Dear Judge Saris:

As the Commission begins to set its priorities for the upcoming amendment cycle, the Federal Public and Community Defenders, pursuant to 28 U.S.C. § 944(o), offer the following suggestions for the Commission's consideration this year.<sup>1</sup> Many of our suggested priorities are directed at recurring problems with guidelines that lack empirical evidence, create disproportionately severe sentences, or result in inconsistent application. We encourage the Commission to:

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

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

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

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

## **I. Immigration Reform**

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

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

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

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

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

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

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



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

## II. Good Time Credits

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

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

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

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

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

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

<sup>10</sup> *GAO BOP Report*, at 25.

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

### **III. Defender Ex Officio**

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

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

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

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

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

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

#### **IV. The Drug Quantity Table, Methamphetamine and MDMA**

##### **A. Drug Quantity Table**

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

##### **B. Methamphetamine, Amphetamine, and Related List I Chemicals**

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

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

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

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

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

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

A review of the data shows that the drug quantity table results in sentences that are often too high in cases involving methamphetamine. In FY2012, 21.5% of methamphetamine cases received a non-government sponsored below range sentence.<sup>17</sup> That is above the 17.8% rate for all non-government sponsored below range sentences<sup>18</sup> and a 69.3% increase in the rate of below range sentences from FY2008 to FY2012.<sup>19</sup> As the chart below shows, the percentage of non-government sponsored below range sentences has steadily increased from 12.7% in FY2008 to 21.5% in FY2012.<sup>20</sup>

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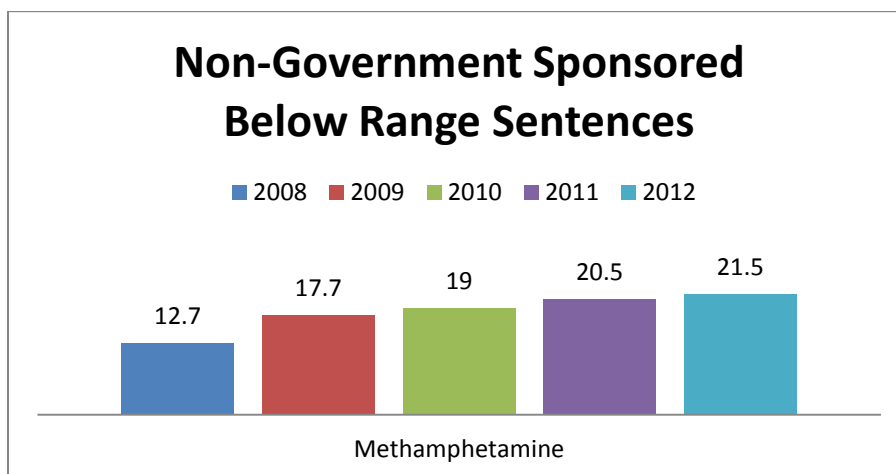
<sup>16</sup> The ratio of powder to LSD is 500:1.

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

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

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

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



Rates of government sponsored below-guideline sentences have also increased over time.<sup>21</sup> At the same time, the average guideline minimum has changed little, indicating that the general nature of methamphetamine offenses has remained the same. Whereas the average guideline minimum sentence since 2008 has been around 121 months (low end of 121-151 month range), the average non-government sponsored below range sentence has been 91 months<sup>22</sup> (middle of 87-108 month range), i.e., three offense levels lower than the average guideline minimum range. In short, as the Commission itself has acknowledged, the available data show that the influence of the guidelines in methamphetamine cases has diminished over time.<sup>23</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Cocaine
  - average user dose of 1g or less a day<sup>38</sup>; minimum quantity at OL 26 is 500 g = minimum of 500 daily doses
- Heroin
  - average user dose of 300-500mg a day<sup>39</sup>; minimum quantity at OL 26 is 100g = 200 to 333 daily doses

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

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

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

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

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



- Methamphetamine (actual)
  - average user dose of 100-1000mg a day<sup>40</sup>; minimum quantity at OL 26 is 5g = 5 to 50 daily doses

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

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

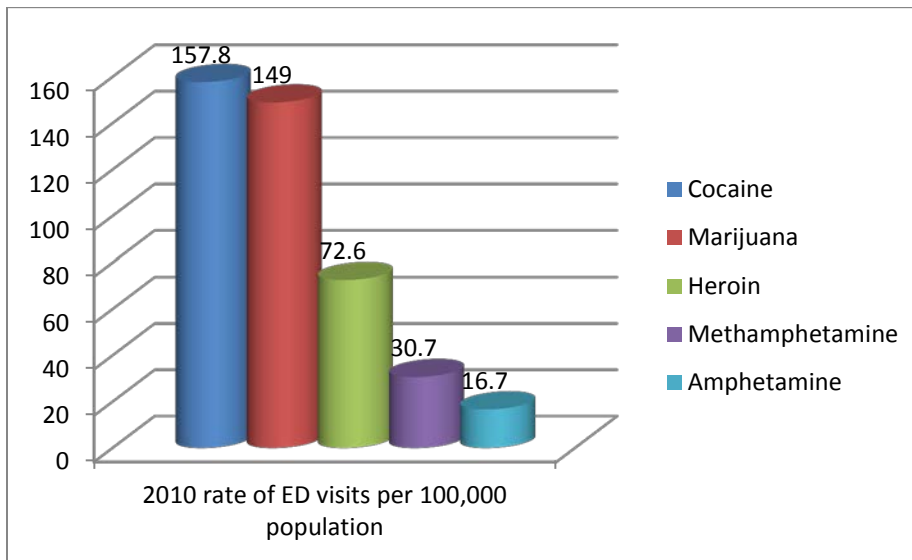
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<sup>40</sup> National Traffic Highway Safety Administration, *Drugs and Human Performance Fact Sheets: Methamphetamine (And Amphetamine)*, <http://www.nhtsa.gov/People/injury/research/job185drugs/methamphetamine.htm>.

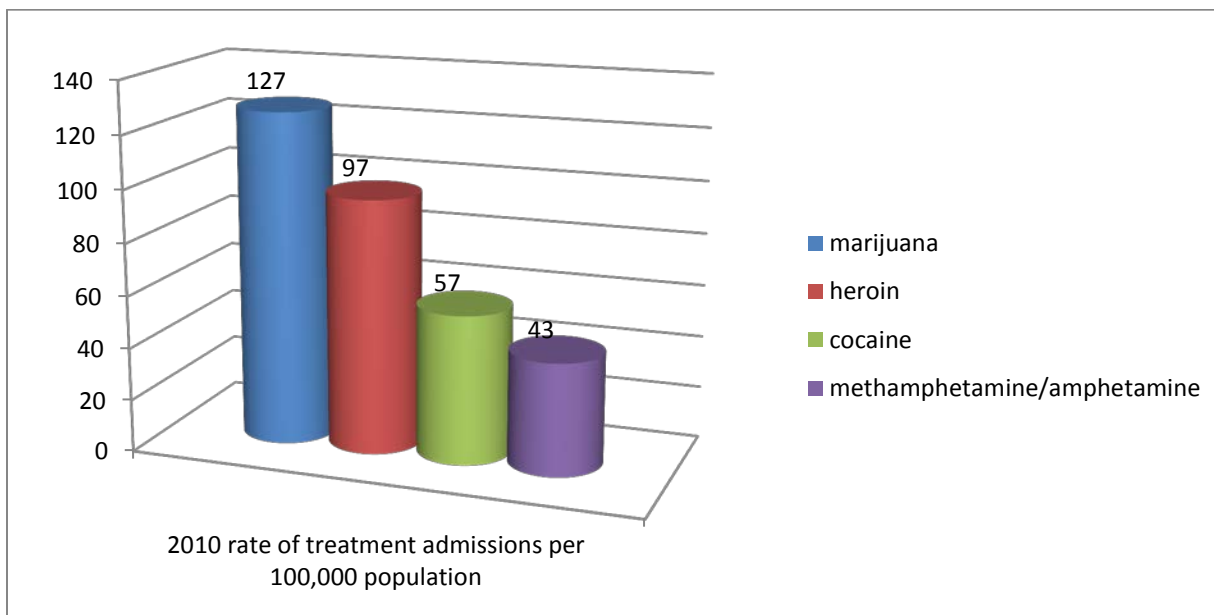
<sup>41</sup> According the Commission's most recent analysis, the majority of methamphetamine trafficking offenders are concentrated in seven states, with none in the East. *Booker Report, Part C: Drug Trafficking Offenses, Methamphetamine*, at 1. Substance Abuse and Mental Health Services Administration,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

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

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



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



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

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

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

### C. MDMA

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

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

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

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

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

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

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

<sup>48</sup> *Spears v. United States*, 555 U.S. 261 (2009).

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

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

## V. Fraud

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

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

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

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

<sup>52</sup> Nate Raymond, *Rakoff Says Sentencing Guidelines Should Be Scrapped*, Thomson Reuters News & Insight, Mar. 11, 2013, [http://newsandinsight.thomsonreuters.com/Legal/News/2013/03\\_-\\_March/Rakoff\\_says\\_sentencing\\_guidelines\\_should\\_be\\_scrapped/](http://newsandinsight.thomsonreuters.com/Legal/News/2013/03_-_March/Rakoff_says_sentencing_guidelines_should_be_scrapped/).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>63</sup> Nate Raymond, *Rakoff Says Sentencing Guidelines Should Be Scrapped*, Thomson Reuters News & Insight, Mar. 11, 2013, (quoting Judge Rakoff) [http://newsandinsight.thomsonreuters.com/Legal/News/2013/03\\_-\\_March/Rakoff\\_says\\_sentencing\\_guidelines\\_should\\_be\\_scrapped/](http://newsandinsight.thomsonreuters.com/Legal/News/2013/03_-_March/Rakoff_says_sentencing_guidelines_should_be_scrapped/).

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

<sup>77</sup> *Fifteen Year Review*, at 137 (citing Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 742 (2001) (complexity of the guidelines has created a “facade of precision” that “undermines the goals of sentencing.”)).

Because of the overlap of specific offense characteristics with one another, and with the loss table, and the broad reach of many of the specific offense characteristics, the current guideline does not adequately distinguish the more culpable offenders from the less. “[T]he overkill of the current economic crime guideline is not limited to the most culpable offenders in the most exceptional cases.”<sup>78</sup> For example, “[t]he over-quantification of closely related factors is so extreme that a corporate officer, stockbroker, or commodities trader engaged in a stock fraud causing a loss as low as \$2.5 million could be subject to a guidelines sentence of life imprisonment.”<sup>79</sup> And, to provide an example that we see more regularly in our work representing the indigent: a defendant who uses a magnetic credit card swiper to commit fraud can be subject to the two-level increase for sophisticated means under §2B1.1(b)(9)(C) and the two-level increase for possession or use of device-making equipment under §2B1.1(b)(10), based on the same conduct.<sup>80</sup> This problem of overlapping and piling-on is exacerbated by the broad range of conduct that is covered by many of the specific offense characteristics. For example, the “sophisticated means” enhancement has been applied to a broad range of conduct, only some of which is highly sophisticated.<sup>81</sup> In one recent case, addressing the “sophisticated means” enhancement in §2T1.1(b)(2), which is similar to the one in §2B1.1(b)(10)(C), the Ninth Circuit affirmed the application of the enhancement based on evidence that the defendants opened a bank account with a deceptive name, even though they used the real name and social security number of one of the defendants when they opened the account.<sup>82</sup>

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

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

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

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

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

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

## VI. Career Offender, USSG §4B1.1

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

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

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

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

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

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

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

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

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

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

<sup>90</sup> *Booker Report, Part A*, at 59.

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

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

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

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

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

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

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

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

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

<sup>96</sup> Office of National Drug Control Policy, *Fact Sheet: Cost Benefits of Investing Early in Substance Abuse Treatment* (2012) (“[o]n average, substance abuse treatment costs \$1,583 per patient”), [http://www.whitehouse.gov/sites/default/files/ondcp/Fact\\_Sheets/investing\\_in\\_treatment\\_5-23-12.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/investing_in_treatment_5-23-12.pdf).

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

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

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

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

### **VIII. Relevant Conduct, USSG §1B1.3**

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

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

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

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

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

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

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

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

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

<sup>102</sup> See, e.g., *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) (“the unfairness perpetuated by the use of ‘acquitted conduct’ at sentencing in federal district courts is uniquely malevolent”); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, B., J., dissenting) (“Reliance on acquitted conduct in sentencing diminishes the jury’s role and dramatically undermines the protections enshrined in the Sixth Amendment.”); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) (“I strongly believe ... that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.”); *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005) (Gertner, J.) (“To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense—as a matter of law or logic.”).

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

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

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

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

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

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

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

<sup>107</sup> See *Fifteen Year Review*, at 50, 87 (relevant conduct rule is inconsistently applied because of ambiguity in the language of the rule, law enforcement’s role in establishing it, and untrustworthy evidence); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline §1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent’g Rep. 16 (1997) (sample test administered by researchers for the Federal Judicial Center to probation officers resulted in widely divergent guideline ranges for three similar defendants); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 857 (1992) (“interaction of quantity-driven Guidelines with the relevant conduct standard can produce enormous [sentence increases] for virtually any drug defendant” resulting in manipulation of guidelines; “judicial acquiescence in such manipulation must be understood against the backdrop of this special feature in drug cases”). See also *United States v. Quinn*, 472 F. Supp. 2d 104, 106-7 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant).

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

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

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<sup>109</sup> See, e.g., Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 140, 159 (1998); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 442, 449-50 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 Stan. L. Rev. 523, 550 (1993) (“Implementation of a conviction-offense system [rather than a ‘real offense’ system] places a burden on prosecutors to file and prove, or bargain for, conviction charges that reflect the seriousness of an offenders’ criminal behavior. If, with respect to certain nonconviction crimes, this is an obligation they cannot discharge, then we should have grave doubts that the imposition of punishment is justified.”). The use of acquitted conduct “also allows prosecutors to avoid the restrictions of the Double Jeopardy Clause by essentially giving them a second try at inflicting punishment for the same offense.” Barkow, *supra* note 104, at 1629.

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

<sup>111</sup> See Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. Rev. 2103, 2111 (2003); see also Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 Stan. L. Rev. 309, 318-19 (2005).

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

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



In addition, the relevant conduct rules deprive defendants of their Sixth Amendment right to a jury trial and undermine the legitimacy of the presumption of innocence by permitting the use of acquitted conduct. Although appellate courts have generally upheld the use of acquitted and uncharged conduct after *United States v. Booker*, 543 U.S. 220 (2005), many judges<sup>114</sup> and commentators<sup>115</sup> believe it is inconsistent with the Sixth Amendment.<sup>116</sup> Sentencing guidelines “that require judges to increase sentences on the basis of conduct for which the defendant has

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

<sup>114</sup> *See, e.g., Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) (“I strongly believe ... that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.”); *Mercado*, 474 F.3d at 658 (Fletcher, B., J., dissenting) (“Reliance on acquitted conduct in sentencing diminishes the jury’s role and dramatically undermines the protections enshrined in the Sixth Amendment.”); *Canania*, 532 F.3d at 776 (Bright, J., concurring) (writing separately to “express [his] strongly held view that the consideration of ‘acquitted conduct’ to enhance a defendant’s sentence is unconstitutional,” and explaining that “[p]ermitting a judge to impose a sentence that reflects conduct the jury expressly disavowed through a finding of ‘not guilty’ amounts to more than mere second guessing of the jury—it entirely trivializes its principal fact-finding function”).

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

<sup>116</sup> The Supreme Court has not squarely addressed the issue. The Court’s decision in *United States v. Watts*, 519 U.S. 148 (1997), held only that the use of acquitted conduct did not violate the Double Jeopardy Clause. In *United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc), six dissenting judges concluded that *Watts* did not govern the Sixth Amendment issue and “[b]ecause the sentence cannot be upheld as reasonable without accepting as true certain judge-found facts, the sentence represents an as applied violation of White’s Sixth Amendment rights.” *White*, 551 F.3d at 387, 392 (Merritt, J., dissenting). In addition, “the Court has not foreclosed as-applied constitutional challenges to sentences. The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.” *Gall v. United States*, 552 U.S. 38, 60, 128 S. Ct. 586, 602-03 (2007) (Scalia, J., concurring).

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

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

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

<sup>118</sup> *Blakely v. Washington*, 542 U.S. 296, 306 (2004). One district judge compared the rules governing cross-references based upon relevant conduct rules to the strange occurrences in Lewis Carroll’s *Wonderland*: “As the Queen of Hearts said, ‘Sentence first-verdict afterwards.’ *See* L. Carroll, *Alice’s Adventures in Wonderland* 146 (Random House, 1946). Federal offenders deserve better justice than that meted out in the court of the King and Queen of Hearts.” *United States v. Carroll*, 798 F. Supp. 291, 294 (D. Md. 1992) (Smalkin, J.), *vacated*, 3 F.3d 98 (4th Cir. 1993).

<sup>119</sup> *See also* Statement of Alan Dubois and Nicole Kaplan before the U.S. Sentencing Comm’n, Atlanta, GA, at 24 (Feb. 10, 2009) (describing case in Eastern District of North Carolina where defendant would have had excellent argument for self-defense had he been tried for murder before a jury).

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

The additional 30-36 months took up limited bed space<sup>121</sup> and cost tax payers as much as \$86,680.<sup>122</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To remedy the disparity created by different procedural rules, the Commission should amend the commentary to §6A1.3 to make clear that a "presentence report is not evidence and is not a legally sufficient basis for making findings on contested issues of material fact."<sup>134</sup> When

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<sup>132</sup> *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990) (defendant's "mere objection" to information in a presentence report is insufficient to challenge its accuracy and reliability) (cited in *United States v. Powell*, 650 F.3d 388, 394 (4th Cir. 2011); *United States v. Mustread*, 42 F.3d 1097, 1101 (7th Cir. 1994) ("[g]enerally, where a court relies on a PSR in sentencing, it is the defendant's task to show the trial judge that the facts contained in the PSR are inaccurate."); *United States v. Fuentes*, 411 Fed. App'x 737, 738 (5th Cir. 2011) (defendant bears burden of showing information in presentence report is materially unreliable) (quoting *United States v. Ford*, 558 F.3d 371, 377 (5th Cir. 2009)); *United States v. Carbajal*, 290 F.3d 277, 287 (5th Cir. 2002) (information in the presentence report is "presumed reliable and may be adopted by the district court without further inquiry if the defendant fails to demonstrate by competent rebuttal evidence that the information is materially untrue, inaccurate or unreliable").

<sup>133</sup> See *United States v. Ramos-Colin*, 426 Fed. App'x 874 (11th Cir. 2011). See also *United States v. Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005) (en banc) ("by placing the burden on [the defendant] to disprove the factual statements made in the PSR, the district court improperly shifted the burden of proof to [the defendant] and relieved the government of its burden of proof to establish the offense level"); *United States v. Wise*, 976 F.2d 393, 404 (8th Cir. 1992) (en banc) (PSR "is not evidence and is not a legally sufficient basis for making findings on contested issues of material fact"; discussing how court that presumes hearsay in PSR reliable has "turned the general approach to hearsay on its head"); *United States v. Hammer*, 3 F.3d 266, 268 (8th Cir. 1993) (same).

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

a defendant challenges a factual statement in a presentence report that is used to determine the applicable guideline range, the government must introduce evidence to establish that fact by the appropriate standard of proof consistent with due process.

The Commission should also strike from the commentary the last sentence, which states: “The Commission believes that the use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.” This statement is not consistent with the rule in the Ninth Circuit that the standard of proof should be higher in some circumstances.<sup>135</sup>

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

Both the Federal Public and Community Defenders and the Commission’s Practitioner’s Advisory Group have requested in the past that the Commission consider amending USSG §1B1.8 so that it provides more uniform protection against the use of adverse information that a defendant discloses during proffer sessions with the government – whether the statements are part of a cooperation agreement or a safety-valve proffer.<sup>136</sup> We have repeatedly pointed out several problems with §1B1.8: (1) the disparity in sentencing created from the unwillingness of some prosecutors to use §1B1.8 to protect against the use of certain information at sentencing; (2) the failure of §1B1.8 to protect against the use of statements the defendant made at arrest or during negotiations, but before the parties reach a formal cooperation or plea agreement;<sup>137</sup> and

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

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

<sup>137</sup> See Statement of Nicholas T. Drees, Hearing Before the U.S. Sentencing Comm’n (Oct. 2009) (describing disparate use of §1B1.8 in N.D. Iowa); Statement of Nicole Kaplan, Hearing Before the U.S. Sentencing Comm’n (Feb. 2009) (describing how defendants who provide statements after arrest and who later enter into cooperation agreements receive no protection against use of pre-agreement statements); Statement of Henry Bemporad, Hearing Before the U.S. Sentencing Comm’n (Jan. 2010) (proposing amendment to §1B1.8 that “expressly recognize[s] that the parties may agree to exclude information that the defendant provides before entering into formal cooperation”); Transcript of Public Hearing Before the U.S. Sentencing Comm’n 47-50 (Jan. 2010) (Henry Bemporad) (describing how a defendant may make a good faith effort to cooperate upon arrest, but the cooperation does not proceed because the client fears for the safety of his family or himself, or the government decides not to pursue the matter).

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

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

The Commission could remedy the disparity and unfair use of a defendant's statements by amending §1B1.8 in the following manner:

- provide for a downward departure where the government refuses to exercise its discretion to negotiate a use immunity agreement under §1B1.8<sup>139</sup>
- include within the scope of §1B1.8 any statements the defendant made in the course of good faith negotiations for a cooperation or plea agreement, but that do not result in such an agreement<sup>140</sup>
- include within the scope of §1B1.8 any statements the defendant makes prior to entering into a cooperation agreement<sup>141</sup>

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<sup>138</sup> See *United States v. Jarman*, 144 F.3d 912, 915 (6th Cir. 1998) (defendant's disclosure of information about his own drug use, which raised his offense level under §2K2.1, was "completely extraneous to 'information concerning the unlawful activities of other persons'").

<sup>139</sup> See *United States v. Buckendahl*, 251 F.3d 753 (8th Cir. 2001) (divided opinion over whether disparities in sentencing resulting from prosecutor's use of §1B1.8 warrants departure); *United States v. Blackford*, 469 F.3d 1218, 1220 (8th Cir. 2006) (sentencing court's disagreement with USSG §1B1.8's requirement that the government agree not to use self-incriminating information against defendant is not proper grounds for variance). Cf. USSG, App. C, Amend. 365 (amending guideline "to reduce the disparity resulting from the exercise of prosecutorial discretion"); USSC, App. C, Amend. 506 (amending guideline to avoid "unwarranted disparity associated with variations in the exercise of prosecutorial discretion").

<sup>140</sup> Notwithstanding the commentary's reference to Rule 11(f) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence, USSG §1B1.8, comment. (n.3), those rules do not restrict the use of a defendant's statements at a sentencing proceeding. Rule 11(f) merely references Rule 410 of the Federal Rules of Evidence. The Rules of Evidence, however, do not apply at a sentencing proceeding. Fed. R. Evid. 1101(d)(3). See also *United States v. Upton*, 91 F.3d 677, 688 (5th Cir. 1996) (rules do not prohibit statements made during plea negotiations to be used during sentencing).

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

## **XI. Conclusion**

As the Commission decides upon its priorities for the 2013-2104 amendment cycle, we remain hopeful that it will propose priorities that are rooted in empirical research, responsive to judicial feedback, ameliorate the undue severity of the guidelines, and reduce unwarranted disparity in guideline application.

We look forward to working with the Commission during the upcoming amendment cycle.

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

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

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<sup>141</sup> *United States v. Maxie*, 89 Fed. App'x 180, 184 (10th Cir. 2004) (“cooperation agreement created after incriminating information has been furnished” cannot “retroactively shield that information”); *United States v. Hopkins*, 295 F.3d 549 (6th Cir. 2002) (no protection for statements defendant made at time of arrest); *United States v. Holden*, 426 Fed. App'x 163, 164-65 (4th Cir. 2011) (§1B1.8 permitted government to use defendant’s statements about his involvement in four handgun sales that were provided before defendant signed cooperation plea agreement).



# The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Demographic Disparity?

## I. Introduction

In Part E of its *Booker* Report,<sup>1</sup> the U. S. Sentencing Commission presents the latest of its repeated analyses of “Demographic Differences in Sentencing.” A “key finding” of the report is that “[d]emographic factors (such as race, gender, and citizenship) have been associated with sentence length at higher rates in the *Gall* period than in previous periods.”<sup>2</sup> The report goes on to state that “Black male offenders received longer sentences than similarly situated White male offenders, and that the gap between sentence lengths for Black and White male offenders increased from the PROTECT Act period through the *Gall* period.”<sup>3</sup> Previous analyses have been used to argue that *Booker* resulted in greater unwarranted demographic disparity, and it didn’t take long for the press to headline from this new report a “Racial Gap in Men’s Sentencing,” and to echo the Commission’s claim that the “gap has widened since the Supreme Court restored judicial discretion in sentencing in 2005.”<sup>4</sup>

This idea that increased judicial discretion leads to increased disparity toward certain demographic groups might be called the Commission’s “hidden hypothesis.” The Commission never comes out and says it, and it repeatedly cautions that its results should not be taken as evidence of *discrimination* by judges. Yet the analyses the Commission undertook, the findings it highlighted, and the findings and methods of other researchers it ignored or criticized seem chosen to lend support to this hidden hypothesis. And, of course, the Commission’s proposals for statutory changes, which all seek to curb judicial discretion, reinforce the strong impression that the Commission believes increased discretion increases demographic disparities. Why curb judicial discretion if it hasn’t created problems, rather than provided solutions?<sup>5</sup>

This new report is even more adamant in defending the hidden hypothesis than the Commission’s previous work, which is surprising for several reasons. For one, the Commission wisely conducted many more specific analyses for this report. But rather than support the hypothesis, these raise new questions about whether judicial discretion plays any role in creating demographic disparity. Moreover, the Commission relies on a single methodology—a type of multivariate regression analysis, with a controversial set of control variables—which has come under increasing criticism by researchers outside the

Commission. The more we learn about disparity in the post *Booker* system, the clearer it becomes that policy makers need research from a variety of perspectives, using a variety of methods.

This review begins with defining the types of disparity, and putting it in a broader context, by examining data that reflect *all* the sources of demographic differences in sentencing, both fair and illegitimate. We then take the Commission’s results on their own terms and show how, even using its preferred multivariate regression model, the specific findings in the report are *not* consistent with a hypothesis that increased judicial discretion leads to increased demographic disparity. For example, after the Supreme Court’s decision in *Gall*, Black male defendants who were sentenced below the Guideline range did *not* receive longer sentences than similar White males, even though this is the time period and type of case in which judicial discretion was at its peak. Nor do the Commission’s results show that the likelihood of receiving a non government sponsored (NGS) below range sentence has decreased for Black males compared to Whites as judicial discretion has increased. In short, the specific findings do not support the hidden hypothesis, nor clarify the general finding that was highlighted in the report’s summary and press accounts. In fact, the incoherence of the overall pattern of findings raises questions about whether the Commission’s statistical model is valid and robust.

We next examine the Commission’s preferred statistical method, and show that it was designed to measure just one source of disparity—discrimination by judges—and does *not* measure unwarranted disparity from many other sources, including earlier stages of the criminal justice process, or structural disparity arising from unsound sentencing rules. Moreover, the control variables the Commission included in its statistical model actually *conceal* the results of one of *Booker*’s most important effects—increased rates of NGS below range sentences. If judges helped reduce unfair disparity in the years following *Booker* by more frequently sentencing below the ranges recommended by unfair Guidelines, such as that for crack cocaine, the Commission’s analyses would not detect or measure it. We examine alternative models developed outside the Commission that measure some of these other sources of unwarranted disparity, and discuss the trade offs among approaches.



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It's been almost thirty years since researchers were accused of supplying "Life Support for Ailing Hypotheses" by summarizing their findings in ways that created a false or exaggerated impression of widespread racial discrimination in sentencing.<sup>6</sup> Federal sentencing law was changed around that time, of course, to dramatically restrict judicial discretion, in part because of these impressions. Yet research studies and press reports have continued to claim racial and ethnic disparity in federal sentencing under the Guidelines, both prior to *Booker* and after.<sup>7</sup> With this report, the Commission lends its support to this ailing hypothesis, so a close look at the data, and how the Commission presents its findings, is certainly in order.

## II. Sources of Unwarranted Disparity

The Commission offers no definition in this report of what it considers to be unwarranted demographic disparity. For most people, different treatment of individuals or groups compared to others who are similar in relevant ways, such as the seriousness of their crimes, or their risk of recidivism, fits the commonsense definition. If race or other demographic factors *cause* or *contribute* to different treatment, criminologists would call it discrimination.<sup>8</sup> Under this definition, it makes no difference whether the different treatment is at the hands of prosecutors or judges; charging and plea bargaining practices can lead to unwarranted sentencing disparity as surely as judicial decision making, as the Commission itself has previously noted.<sup>9</sup>

Moreover, as the Commission has also sometimes acknowledged, unsound sentencing statutes and Guidelines that treat offenders more severely than is justified by the seriousness of their crimes, or some other purpose of sentencing, also create unwarranted disparity.<sup>10</sup> The statutes and Guidelines for crack cocaine, especially prior to their relatively recent amendment, are an example of this "structural disparity." Sentence increases based on prior drug convictions, such as those under the so called career offender Guideline, also require longer prison terms than the terms required for offenders with similar risks of recidivism, and longer than necessary to protect the public.<sup>11</sup> These unsound rules disproportionately affect African American males, and result in an unwarranted adverse impact.<sup>12</sup> In employment law, unwarranted adverse impacts are considered a form of discrimination. With the incarceration rate of non Hispanic Black males seven times that of non Hispanic White males, surely the rules governing criminal sentencing should be analyzed as carefully as those governing employee selection.<sup>13</sup>

All of these sources of unwarranted disparity exist in the federal sentencing system today, and a complete analysis of the effects of *Booker* on demographic disparity should take account of them. No one statistical method isolates and measures every potential source, and no single metric exists for the total amount of demographic disparity in the system at a given time. This makes the job for empirical researchers investigating demographic disparity very difficult, and the job for policymakers trying to make sense of

the empirical literature even more so. Careful attention must be paid to what is, and is not, included in a particular measure of disparity.

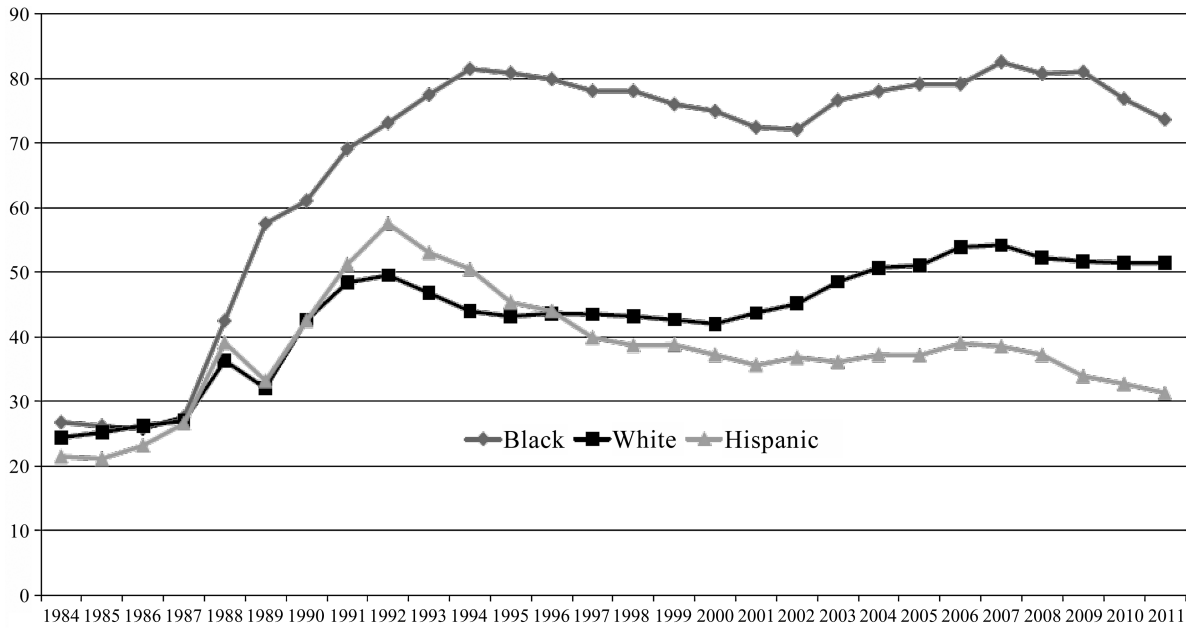
## III. A Broader View: Advantages of "Simplistic" Analyses

The most straightforward way to examine the effects of *all* the factors influencing demographic differences in sentencing is to compare average sentences over time. Differences in average sentences among groups obviously reflect many factors that are perfectly legitimate, such as differences in the seriousness of crimes committed by group members. Group differences also reflect factors that may or may not be fair and legitimate, such as prosecutors' charging and plea bargaining decisions, the laws and policies governing sentencing, and the behavior of judges. Changes in the gaps among groups across time can reflect changes in any of these factors, so aggregate comparisons cannot be taken as a measure of the amount of unwarranted disparity in the system. Such data can still be enlightening, however, provided conclusions are drawn with care.

A previous Commission report, the *Fifteen Year Review*, explored demographic differences in sentencing using a variety of methods, including changes over time in average time served by offenders sentenced to imprisonment.<sup>14</sup> (Full disclosure: I was the primary author of the *Review*.) Different methods illuminated different aspects of racial disparity. Multivariate regression analyses were used to examine whether discrimination by judges might contribute to gaps among groups. The Commission's prison impact model was used to examine the effects of changes in particular laws and policies, such as reducing the 100:1 powder to crack cocaine quantity ratio. The prison impact model performs "what if" analysis; it recalculates what sentences would be in a given year if defendants had been subject to different laws and policies. (It does not incorporate changes in prosecutorial practices, or the mix of offenses and offenders, but other impact models can do that.) The "what if" analysis conducted for the *Review* predicted that reducing the 100:1 quantity ratio between powder and crack cocaine to 20:1 would substantially reduce the gap in prison time served between Black defendants and other groups.<sup>15</sup>

Figure 1 updates these data on average time served through fiscal year 2011.<sup>16</sup> The *Review* explained that the gaps among groups reflect a wide variety of factors. The decline in average time served by Hispanic defendants largely reflects the increased portion of the federal caseload involving immigration offenses, many of which receive relatively short sentences compared to drug trafficking and other crimes. More disturbing are changes in the gap due to enactment of unsound statutes or Guidelines having severe adverse impacts, or unfair charging practices involving those statutes. For example, if the mandatory minimum sentence enhancements under 18 U.S.C. § 924(c) for possession or use of a firearm are charged against Black offenders who possess or use firearms more often than against similar White offenders (the data show that they

**Figure 1**  
Average time served by Black, White, and Hispanic offenders, FY 1984–2011



Source: U.S. Sentencing Commission, 1984–1990 AO FPSSIS Datafiles; 1991–2010 USSC Monitoring Datafiles  
Time served is estimated from the sentence imposed. In the Monitoring Datafile TIMESERV assumes good time credits will be applied. Offenders receiving no term of imprisonment are excluded [SENTIMP=1,2].

are<sup>17</sup>), this would strike most people as unfair. If sentence increases for prior drug convictions apply more often to Black offenders than to White ones (they do<sup>18</sup>), this adverse impact contributes to the gap. Ideally, an analysis of demographic disparity in federal sentencing would isolate and measure on a common metric all of the various sources, along with potential discrimination by judges. But no one has figured out how to do that yet.

Figure 1 leaves little doubt that something very dramatic occurred to increase the sentences imposed on African American defendants at the time the Guidelines, and many statutory mandatory minimum penalties, became effective in the late 1980s and early 1990s. Increased penalties for drug and firearm offenses, and enhanced sentences for prior convictions, radically increased average sentences for Black defendants compared to other groups. This finding passes the simplistic “interocular traumatic impact test” it strikes you right between the eyes and it has also been confirmed by more sophisticated multivariate analyses.<sup>19</sup>

#### A. Lessons from the broader view

Based on this range of methods, the *Review* concluded that “[d]iscrimination on the part of judges contributes little, if any, to the gap[.]”<sup>20</sup> The *Review* went on to note:

To be useful to policymakers, evidence of continuing sentencing disparities must be both accurate and informative concerning *how* and *where* in the criminal justice process disparities arise . . . The review of

evidence in this chapter suggests that the importance of discrimination by judges has been exaggerated by the existing research, while other stages of the criminal justice process have been relatively neglected . . . Today’s sentencing policies, crystallized into the 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. Attention might fruitfully be turned to asking whether these new policies are necessary to achieve any legitimate purpose of sentencing.<sup>21</sup>

*Booker* and subsequent decisions, of course, invite judges to consider whether the sentences recommended by the Guidelines are necessary to achieve the purposes of sentencing in the individual cases that appear before them. Many judges have concluded that often they are not. It is natural to wonder whether this increased discretion might have helped reduce the gaps among groups, especially since, as Figure 1 clearly shows, the gap between Black and White defendants has finally begun to narrow in the post *Booker* era.

#### B. Rejecting the broader view

In its new report, the Commission did not perform “what if” analyses and strongly rejects the possibility that anything can be learned from “simplistic” comparisons of average sentence differences among groups. (This rejection

apparently applies only to demographic disparity; the report relies on simple aggregate comparisons throughout the sections on regional and inter judge disparity.) Aggregate data can be “misleading,” according to the report. While they “may yield results that accurately describe sentencing outcomes . . . differences that may seem to correlate with demographic factors may actually be attributable to non demographic factors.”<sup>22</sup> If the Commission is saying that one shouldn’t conclude that gaps in average sentences among groups are attributable to demographics alone, it is, of course, correct. But neither the *Fifteen Year Review*, nor a recent *Fact Sheet* produced by the Federal Public Defenders that includes these data,<sup>23</sup> have done that.

The Commission’s rejection of “simplistic” data in the new report is part of two related arguments it seems determined to make. The first is that increased judicial discretion post *Booker* cannot be credited with helping to reduce the unwarranted sentencing gap between Black and White offenders that opened in the Guidelines era. The second is that the only “gap” that matters is a different one: the differences among groups that remain after adjusting for the control variables the Commission included in the multivariate regression analyses it performed. Each of these claims is highly problematic and will be explored in turn.

#### IV. What Explains the Narrowing Gap?

Why the gap in average sentences for Black and White offenders has finally begun to narrow in the post *Booker* era seems like an important question for policymakers, which begs for thorough analysis. The report, however, criticizes “commentators” who have attempted to answer this question by using “publicly available data to draw certain conclusions about trends in federal sentencing and the contributions of various factors to those trends.” The idea that “the gap between sentences for Black and White offenders has narrowed as a result of judges’ increased discretion in an advisory guideline regime”<sup>24</sup> is singled out and flatly rejected. The Commission argues instead in a remarkable and convoluted series of statements, discussed in the next section that its multivariate analyses show that demographic disparity has actually *increased*, and that judicial discretion is the likely culprit.

There are, in fact, good reasons to believe that increased judicial discretion, especially to sentence below the advisory Guideline range, has helped narrow the gap between Black and White offenders in the post *Booker* era. The report shows that the rate of NGS below range sentences has increased in the *Gall* period to levels not seen for ten years; NGS below range sentences are about four times more common than in the highly restrictive PROTECT Act period.<sup>25</sup> Moreover, while Black defendants have received a lower rate of below range sentences than Whites in recent years (especially government sponsored below range), the NGS below range rates have been higher than average for several unsound Guidelines that have a pronounced adverse impact on Black defendants, such as those for crack cocaine and career offenders.<sup>26</sup>

In testimony at a Commission hearing on the post *Booker* system, a witness for the Federal Public Defenders reported results from a simple “what if” analysis: What if *Booker* had not increased judicial discretion to sentence below the Guideline range in crack and career offender cases? This analysis used the differences in the NGS below range rates in crack and career offender cases before and after *Booker*, along with data on the average extent of departure, to estimate of how many prison bed years were saved by the higher rates of below range sentences.<sup>27</sup> In 2010 alone, judges spared more than 860 Black defendants sentenced under the crack or career offender Guidelines over 3300 years of unnecessary incarceration. More than 230 defendants of other races were likewise spared over 900 years of unnecessary imprisonment under these two Guidelines.<sup>28</sup> There is no doubt that the increased rate of NGS below range sentencing in these cases reduced the gap between Black and White offenders *compared to what it would have been* had the rate remained at PROTECT Act levels. It seems very likely that some of the observed narrowing in the aggregate gap in recent years reflects this increased discretion.

It is mathematically possible, however, that these reductions in crack and career offender sentences have been offset by judges using increased discretion to disadvantage Black defendants in other ways (though the Commission’s more specific analyses, discussed in the next section, make it difficult to see how this is so). It is also mathematically possible that increased departures for White defendants have outpaced the benefits for Blacks. And it is almost certain that much of the narrowing of the aggregate gap in recent years reflects the reduction of the 100:1 powder to crack cocaine quantity ratio, as predicted in the *Fifteen Year Review*.<sup>29</sup> It is also worth noting that the increased judicial discretion resulting from the Supreme Court’s constitutional decision in *Booker* seemed to add impetus for the political branches to finally address that long standing injustice. Increased judicial discretion has proven good for sentencing fairness in the larger context.<sup>30</sup> The important point for present purposes is that no analysis conducted by the Commission, or anyone else, has measured how increased judicial discretion has affected the aggregate gap, much less unwarranted disparity arising from all other possible sources.<sup>31</sup> In fact, the Commission’s multivariate analysis *does not even measure* any effects of increased rates of NGS below range sentences on demographic disparity (as discussed more fully in a later section).

Perhaps a statistician more sophisticated than I am can develop a grand model that isolates and measures the effects of changes in NGS below range rates, Guideline amendments, and all the other factors that contribute to demographic disparity. But in the meantime, it seems prudent to examine *Booker*’s effects using a variety of methods. The point of the Public Defender testimony criticized in the report seems more sound today than ever: The Commission’s research to date has created the impression that increased judicial discretion leads only to increased

disparity. The Commission has failed to explore how increased discretion can help reduce the gap and make sentencing more fair.

## V. The Commission's Detailed Findings Refute the Hidden Hypothesis

Immediately after dismissing evidence that judicial discretion has helped narrow the demographic gap, the Commission returns to its preferred multivariate regression analyses and makes a remarkable series of claims:

The Commission's multivariate analysis determined that, when legally relevant factors are controlled for, the gap in sentence length between Black male and White male offenders *increased* during the *Gall* period compared to the *Booker* period. Furthermore, with respect to the role of judicial discretion in determining sentence length, the Commission's study concluded that when judges have the discretion to impose a non government sponsored below range sentence, Black offenders were less likely to receive such a reduction than White offenders during the three periods studied.<sup>32</sup>

It is difficult to see what the juxtaposition of these two sentences—describing two very different analyses, with very different problems—was intended to achieve other than lead readers to conclude that increased judicial discretion works to the disadvantage of Black offenders, especially discretion to sentence below the Guideline range. The passage diverts attention away from the narrowing gap in actual sentences imposed and toward an allegedly widening gap, which is revealed only by the Commission's multiple regression analyses. The passage ignores specific findings that don't fit the pattern of the overall findings, and focuses on one problematic analysis that purportedly sheds light "with respect to the role of judges." In short, this passage makes the strongest case the Commission can muster for its hidden hypothesis, so it is worth examining these claims in some detail.

### A. Specific analyses of within-range and below-range cases

The Commission conducted many more analyses of subgroups of cases for this report "to identify more precisely where demographic differences may be occurring."<sup>33</sup> But rather than clarify matters, the specific findings cause trouble for the hidden hypothesis. Demographic effects were calculated, after controlling for a number of legally relevant factors, in three time periods: PROTECT Act, post *Booker*, and post *Gall*. Cases were divided into groups sentenced within the Guideline range, below the range for various reasons sponsored by the government, and NGS below range sentences.

If judges use increased discretion to the disadvantage of Black male defendants, one might expect to see it most clearly in cases where judicial discretion is at its peak—defendants receiving NGS below range sentences,

especially in the post *Gall* period. But Black males received longer sentences than White males in NGS below range cases *only in the Booker period*.<sup>34</sup> No statistically significant differences were found during either the PROTECT Act or post *Gall* periods. So this specific analysis of cases most affected by judicial discretion did *not* fit the pattern of the overall finding from all cases combined, which was highlighted in the report's summary: increasing disadvantage for Black males as judicial discretion increased from the PROTECT Act period forward.

Bizarrely, the only type of case that fit the pattern of increasing differences in sentence lengths between Black and White males were cases *sentenced within the Guideline range*.<sup>35</sup> If this finding is valid, and not an artifact of the model,<sup>36</sup> the Commission's proposals to make sentencing below the Guideline range more difficult would have no effect, because disparity arises within the range. And even here, the specific result seems puzzling, because the greatest difference (12.2%), obtained during the post *Gall* period, was much smaller than the difference obtained in the overall analysis (19.5%), when these within range cases were mixed with other subgroups *showing no statistically significant difference* during the post *Gall* period at all.

Other findings from the specific analyses defy easy interpretation. Hispanic males received longer sentences than White males in NGS below range cases, but only in the *Gall* period. Among defendants receiving below range sentences for substantial assistance, Black males were disadvantaged compared to White males, but only during the *Koon* period, and "other" races were disadvantaged only during the *Booker* period.<sup>37</sup> The pattern is perplexing, and little can be concluded from these analyses because the Commission lacks data on the most important legally relevant factors in these cases. For example, for cases receiving a substantial assistance reduction, there are no data on the type, degree, or quality of assistance provided by different defendants, or on how much of a reduction was requested by the government.

### B. Likelihood of receiving an NGS below-range sentence

The second sentence in the passage above makes an even more remarkable, and muddled, claim. The Commission starts by saying that its study "concluded that when judges have the discretion to impose a non government sponsored below range sentence, Black offenders were less likely to receive such a reduction than White offenders. . . ." But rather than a pattern of increasing difference, the sentence ends with "during the three time periods studied".<sup>38</sup> In fact, differences between Black and White males in the likelihood of receiving NGS below range sentences did *not* increase as judicial discretion increased; it was essentially the same after *Gall* as it was during the PROTECT Act, and was *lowest* in the post *Booker* period.<sup>39</sup>

Moreover, the Commission implies "with respect to the role of judicial discretion in determining sentence length" that the growing gap in sentence lengths

highlighted in its summary may have something to do with the likelihood of receiving a NGS below range sentence. These results were also cited in the report's summary as a possible explanation for the Commission's favorite finding: "Black male offenders were more than 20 percent less likely to receive a non government sponsored below range sentence than White male offenders," and "[t]hese differences may contribute to the differences in sentence length between Black and White male offenders." It is hard to see how these results help explain the finding highlighted in the summary, however, given that no growing gap was discovered among defendants actually receiving NGS below range sentences, and no growing gap was found in the likelihood of receiving them.

Apart from this questionable characterization of the findings, the analyses the Commission relies upon here logistic regressions of the likelihood, or odds, of receiving an NGS below range sentence are quite different from, and more problematic than, the analyses of differences in sentence lengths. The Commission describes the circumstances that "prompted" it to undertake these analysis on page 21 of the report. The overall analyses had "revealed some statistically significant demographic differences in sentence length," including the 19.5 percent gap in the post *Gall* period highlighted in the report's summary. But, as described above, the specific analyses "did not reveal the same differences." The Commission apparently turned to these logistic regression analyses to try to make sense of the inconsistent findings regarding sentence length.

Although not unknown, analyses of the likelihood of receiving a NGS below range sentence have generally been considered of limited use for assessing demographic disparities.<sup>40</sup> This is because the Commission *has no data* on most of the legally relevant differences among defendants that might *warrant* an NGS below range sentence, and thus justify any group differences that are found. Such data, used as control variables, have been considered crucial for studying discrimination, because without it differences among groups resulting from legally relevant differences might mistakenly be attributed to group membership itself.

Sound familiar? This is the argument the Commission itself made earlier for why "simplistic analyses" are not appropriate and multivariate regressions are needed. But the multivariate analyses it described there included measures of important legally relevant differences. It is also the argument the Commission made for why it was *prevented* from analyzing demographic disparity in the likelihood of receiving a *government sponsored* below range sentence. The Commission "has no data from which it could determine which defendants who did not receive a substantial assistance departure were eligible for [one] in the first place."<sup>41</sup> The analogous problem with NGS below range sentences the Commission also has no data to determine whether defendants who did *not* receive such a sentence were eligible for one<sup>42</sup> is not mentioned. The Commission simply forged ahead with the analyses, using the same control variables it used for its analyses of sentence length,

even though these are largely legally *irrelevant* to the decision to sentence below the Guideline range.<sup>43</sup>

Undertaking this analysis at all is questionable, given the circumstances that "prompted" it. It bears the hallmarks of a "fishing expedition" a search for results you'd like to catch to support the hypothesis you'd like to prove. But the way the Commission *describes* the results that were caught is even more questionable, and borders on disingenuous. As noted above, the results do not fit the pattern of the sentence length analyses; the gaps in likelihoods between Black and White males were essentially the same in the post *Gall* and PROTECT Act periods, and lowest in the post *Booker* period. While Black male offenders did have lower likelihoods in all three time periods, whether this is unwarranted, or reflects differences among groups in circumstances that might justify below range sentences, we cannot know given the lack of relevant control data.

Moreover, as discussed in a later section, the Commission's overall analyses of sentence lengths *control for* differences among groups in the rate of receiving below range sentences. If these differences are controlled for, how can they explain differences in sentence lengths among different demographic groups? To claim, as the Commission does, that its logistic analyses of the likelihood of receiving NGS below range sentences may shed light "with respect to the role of judicial discretion" in creating the sentence length gaps is just plain misleading.

## VI. The Narrow Focus of the Commission's Multivariate Regression Analyses

The Commission argues that the demographic "gap" that matters is the one revealed by its multivariate regression analyses of sentence lengths.<sup>44</sup> But this "gap" does not measure the effects of the most important sources of demographic disparity in federal sentencing today. In addition, the type of multivariate regression model favored by the Commission has a long history of controversy and inconsistent findings when used to assess disparity in judicial decision making. The Commission understates how much its results depend on questionable assumptions and contested methodological choices.

Ironically, the statistical model the Commission used was developed to address the very question the Commission denies it can answer: whether judicial discrimination or bias affects sentencing.<sup>45</sup> The basic logic of the approach is to ask whether sentences are influenced by race, ethnicity, or gender over and above the predicted effect of control variables, which measure legitimate, legally relevant factors present in the cases.<sup>46</sup> While the Commission repeatedly warns that its results "must be taken with caution" and "should not be taken to suggest race or gender discrimination on the part of judges,"<sup>47</sup> these caveats are hard to square with its use of a methodology that was developed to uncover it. Moreover, robbed of its normal purpose and interpretation, it is far from clear what the Commission's multivariate research is intended to show, or what guidance it can provide policymakers who want to reduce the

unwarranted demographic disparity that still plagues federal sentencing.

### A. Regression is controversial

The Commission's previous research inspired commentary and criticism, including re analyses of the same datasets by researchers at Pennsylvania State University.<sup>48</sup> Different methods yielded different results about when and where demographic differences arose, the magnitude of the effects when found, and the implications for policy. A special section of the *Journal of Criminology and Public Policy* was organized to discuss the differences, but no clear consensus on the best model emerged. The state of affairs was summarized by one contributor: "At best, the evidence is inconsistent regarding whether disparity worsened post *Booker* and post *Gall*, but there clearly is no evidence of an urgent need for legislation to counteract the supposedly deleterious effects of increased judicial discretion."<sup>49</sup>

The Commission's new report does not engage most of this debate. The research from Penn State is addressed, however, with additional re analysis and discussion of differences.<sup>50</sup> After defending its methodological choices, the Commission summarizes its view this way: "[t]he only difference in findings was the magnitude: the Penn State study's findings . . . were less pronounced than those found in the Commission's study." Readers are encouraged to conclude that, despite all the controversy, research has converged on a finding that demographic disparity has increased in the post *Booker* era, with the only debate about how large it is. Jeffrey Ulmer and Michael Light, two authors of the Penn State research, write in this issue about differences between the Commission and Penn State models, and about misstatements concerning their research in the Commission's new report.

Multivariate regression studies in the Guidelines era have often yielded conflicting results. Authors too rarely try to reconcile their findings, so the exchange between Penn State and the Commission is a welcome improvement. Replication and re analysis has helped illuminate the ways that methodological choices about which populations to study, which factors to include as control variables, and how to define control and outcome variables all affect the size, and even the direction, of any demographic effects found. Throughout the Guidelines era, the sensitivity of results to differences in model specification has fueled skepticism about whether multivariate regression analyses can be useful for policy making.<sup>51</sup> The danger is especially great given that results are of keen interest—witness the headlines, and the ready publication in academic journals—even if the results are misunderstood, or the analyses that produced them are incomplete or inept.

The controversies over proper methodology seem unlikely to be settled any time soon, especially as econometric methods enter the field. Indeed, as discussed below, recent work has raised fundamental questions about how to study the effects of *Booker* on demographic disparities in sentencing.<sup>52</sup> One hopes this new wave of research can

avoid the methodological quandaries and inconsistent findings that have plagued the previous literature, and instead send a clear signal for policymakers. So far, the criminology and econometrics research literatures have barely engaged each other, and there are some signs the latter may repeat the experience of the former.<sup>53</sup>

### B. Statistical control can both exaggerate and conceal various sources of disparity

As the Commission notes,<sup>54</sup> any time a regression model omits a legally relevant variable that is distributed disproportionately among groups, the effect of that factor on sentences will appear as a demographic effect instead. To avoid mistaken conclusions that judges discriminate, researchers have generally taken a conservative approach. They use the most complete data they can find on all the legally relevant factors that might affect sentences. The Commission follows this same logic, although as explained by Ulmer and Light in this issue, Penn State included in its models some variables that the Commission excludes, and this helps explain why the Commission found larger race effects than they did.

Criminal history provides a good example of how the absence of control variables can make legitimately different treatment appear as demographic disparity. The Penn State research drew attention to the fact that much of the race effect in the Commission's overall results arose from judges' decision whether to incarcerate or grant probation, with Black male offenders disproportionately receiving imprisonment. (The Commission replicates this finding in its current study at page 11.) However, there are inadequate data to rule out the possibility that this disproportionate imprisonment of Black males might be result from factors that judges' might legitimately consider when deciding whether imprisonment is necessary. For example, there are no statistical controls for the presence of violence in defendants' histories, or for defendants' employment records. Thus, some of the "demographic" effect reported by the Commission can be explained by these omitted control variables. (Which is why the Commission was wise to warn that its results do not prove that judges discriminate.)

On the other hand, some control variables can cause a regression model to underestimate demographic disparity and conceal its source. Recently most work in criminology has used the "presumptive sentence"—defined as either the minimum of the applicable Guideline range or any statutory minimum that trumps that range—as a unitary measure of the legally relevant factors bearing on the sentencing decision.<sup>55</sup> These models find demographic disparity only when judges impose sentences that differ, on average for different groups, more than the sentences recommended, or required, by the applicable Guidelines and statutes. To the extent the Guidelines and statutes themselves create unwarranted disparity, this source is "controlled away" and not measured at all. The 18.5 percent gap in sentence lengths the Commission reports between

Black and White males in the post *Gall* period is much less than the 62 percent gap in actual sentences imposed.<sup>56</sup> Much of this gap is created by unsound rules having adverse impacts, and goes unmeasured by the Commission's model. Use of the presumptive sentence greatly increased accuracy in predicting and explaining sentencing variation,<sup>57</sup> but this doesn't guarantee that the model isolates and measures the most important sources of disparity, or provides a useful guide to policy making.

Econometric researchers have criticized the use of the presumptive sentence as a control.<sup>58</sup> As explained by Sonja Starr in this issue, disparity that results from charging or plea bargaining decisions, or from unsound laws, are included in the presumptive sentence and controlled away. Moreover, as discussed in the next section, because the Commission also includes a control variable indicating whether a below range sentence was imposed in a case, the Commission does not measure any disparity created, or reduced, by changes in the rate of below range sentences. The result is an incomplete picture of the amount, and sources, of demographic disparity in the system, and a distorted picture of the changes resulting from *Booker*.

### C. Regression is complicated

The Commission's report offers a very simplistic description of how multivariate regression works. It states that regression "controls for the effect of each factor in the analysis by comparing offenders who are similar to one another in relevant ways."<sup>59</sup> This makes it sound like regression identifies demographic differences by comparing only offenders who are similar in every respect except for the demographic differences. In fact, regression analysis compares all offenders at the same time and controls for the factors *statistically*. (The following explanation is also an oversimplification, but sufficient for present purposes.)

Regression determines the best weights to give each control factor in a given model (the weights that minimize errors of predicting the sentence) and then assumes that each factor affects each offender the same way.<sup>60</sup> (It is possible to build models with interaction terms, but this creates new issues, and the Commission did not do that.) To measure a demographic effect, the model predicts what each offender's sentence will be based on the control factors, and then calculates average differences among the groups after removing that is, "controlling for" these predictions. Researchers have usually reported the "independent" effect of demographics that is, the effect remaining after taking all legally relevant factors into account. In the real world, race, gender, and ethnicity are intercorrelated with offense type, criminal history, and other control factors. This makes determining the proper weight for any one factor, to some extent, a matter of methodological choice.<sup>61</sup>

Multivariate regression results are thus the product of intricate calculations that require several assumptions. There are risks that results represent statistical artifacts of the control factors included, or omitted, and how they

interact with each other and with the outcome measure. For example, earlier in the Guidelines era some researchers used the cell of the Guidelines' Sentencing Table in which a defendant fell as a control for the most important legally relevant factor influencing judges' decisions.<sup>62</sup> This improved over previous models in some respects, but did not account for the fact that mandatory minimum sentences frequently trump the Guideline range. Because Black defendants are disproportionately subject to trumping mandatory minimums, some of the "race" effect measured in these studies was actually the product of the statutory trumps.<sup>63</sup>

## VII. Research to Assess the Effects of *Booker* on Demographic Differences

Most sentencing disparity research has asked whether demographic factors influence sentences in a particular period of time. The Commission's report, and much of the new econometric research, concerns a different question: Has *Booker* affected the influence of demographic factors at sentencing? This is a much more difficult question, but the Commission largely ignores the serious problems involved.<sup>64</sup>

The report repeatedly compares the size of "statistically significant" demographic gaps at different time periods, which the Commission defined by crucial legal events that affected judicial discretion—the decision in *Koon*, the PROTECT Act, and the decisions in *Booker* and *Gall*. The reader is left to infer whether changes in the gaps were caused by the legal events. The report does not warn against leaping to this conclusion, nor make any serious attempt to evaluate rival explanations for the changes. Ulmer and Light in this issue discuss how changes in the size of the effect for citizenship status reflect long term trends and not the legal events highlighted by the Commission.

A number of methodologies exist to help isolate the effect of a particular event from historical trends or other events, some of which have previously been used by the Commission.<sup>65</sup> Starr and Rehavi use a regression discontinuity design to isolate the immediate impact of *Booker* and separate its causal effects from background trends.<sup>66</sup> Fischman and Schanzenbach contrast periods when an abuse of discretion standard applied to review of sentences outside the Guideline range with the period when a *de novo* standard applied, while controlling for a lengthy list of other time related changes using interaction terms. They also examine shorter windows around each legal event.<sup>67</sup> Both these approaches take the problem of causal attribution seriously, and vastly improve on the Commission's report.

### A. The Commission's strange choice to control for below-range sentences

The Commission's model includes two control variables to indicate whether some type of below range sentence was imposed in a case, one for substantial assistance departures and one for all others.<sup>68</sup> This means that before demographic effects are calculated, the predicted sentence is



adjusted for each case receiving a reduction by the average reduction for that type. The result is that the effects of changes in the *rate* of below range sentences over time are controlled away by these variables.<sup>69</sup> If judges (and prosecutors) create demographic disparity by imposing (and requesting) sentence below the range more frequently for some groups than for others, including these control variables conceals the effect. On the other hand, if judges help reduce demographic disparity by sentencing below the range more often for some groups, the beneficial effects of increased judicial discretion would also be missed.

Econometric researchers studying demographic disparity in the post *Booker* system have strongly criticized inclusion of a control for below range sentences, as well as the use of the presumptive sentence and other legally relevant controls, on the ground that increasing the rate of below range sentences *was the major effect of the decision*. In the language of econometrics, a judge's decision to impose a NGS below range sentence, and potentially other discretionary decisions, are *endogenous* to the *Booker* decision, that is, they have been causally influenced by the decision. As such, they are not proper control variables for a model intended to measure the effects of *Booker* on demographic disparity.

Researchers face a dilemma if they are interested both in the effects of *Booker* and in demographic disparity at sentencing. If a control variable, like the presence of an NGS below range sentence, represents real factual differences among the cases, *excluding* it risks attributing to demographics effects that are more properly attributed to legally relevant differences among groups. But if a control variable reflects discretionary decisions and *not* factual differences, *including* it means a major effect of *Booker* on demographic disparity will not be measured. It is impossible to take a conservative approach to attributing discrimination to judges, while simultaneously assessing the effects of the legal change. There is no way around this dilemma, but Commission's resolution of it is rather strange. It included control factors for discretionary decisions, in a report about the *effects of Booker*, while repeatedly cautioning that its research should not be taken as evidence that judges discriminate. If it was interested in the former, and didn't believe it could measure the latter, it should have used a different set of controls.

This difference in control variables included in their models appears to help explain why, as discussed in the next section, the latest econometric analyses have *not* uniformly found increased demographic disparity after *Booker*. Indeed, some of the new analyses have found *reductions* in disparity after *Booker*. This could result, for example, if judges used their increased discretion to sentence below the Guideline range to help reduce some of the adverse impact of unsound Guidelines, or to undo some of the disparate effects of prosecutorial practices. These new models have also identified, and measured, some influences on demographic disparity that the Commission's

model misses, especially the effects of mandatory minimum penalty statutes.

## B. Findings from the new wave

Because the recent econometric work measures different sources of disparity, it provides valuable new perspectives for policymakers trying to understand the effects of *Booker*. Fischman and Schanzenbach model several different sentencing outcomes. In addition to sentence length and the decision to depart, they studied influences on the final offense level and whether an offender was sentenced to the statutory mandatory minimum level. While not controlling for presumptive sentences or whether sentences were below the range, they usually controlled for base offense level and also reported some results not controlling for any measure of severity. This means that the effects of the crack to powder quantity ratio are *not* included in most of their measures of disparity, but changes to the rate of NGS below range sentences *are* captured. Their model contrasted the *Koon* and post *Booker* period, when a deferential standard of review of below range sentences was in place, with the PROTECT Act period of de novo review. This contrast directly measures the effect of greater and lesser sentencing judge discretion on demographic disparity.

In contrast to the Commission, Fischman and Schanzenbach's results showed that "racial disparities are smaller during periods of deferential review" with the gap in both sentence length and departure rates smaller, on average, than under de novo review.<sup>70</sup> The gap did not increase in the period immediately following *Booker*. Gaps in sentence length and below range rates did increase in the period following the Supreme Court's decisions in *Rita*, *Kimbrrough*, and *Gall*, but additional analyses shed interesting light on the reason for this increase. Sentences below the Guideline range increased for all groups in this period, but the increase was less for Black defendants. This appeared to result from an increase in the percentage of Black offenders *sentenced at the statutory mandatory minimum*.<sup>71</sup> Prison sentences declined for White offenders, but for Black offenders, prison sentences declined only in cases unlikely to involve a binding mandatory minimum. In cases not likely to involve such a minimum, sentences fell by the same proportion for White and Black defendants.<sup>72</sup>

The implication for the Commission's hidden hypothesis could hardly be more clear. "[W]hen judges are freer to depart, they do so proportionally more often for blacks than whites, resulting in lower prison sentences. However, judges appear to be constrained more frequently by mandatory minimums when sentencing black defendants."<sup>73</sup> They conclude: "[J]udicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing." Thus, "[p]olicymakers interested in redressing racial disparity today should pay much closer attention to the effects of mandatory minimums and their effect on prosecutorial and judicial discretion."<sup>74</sup>

A similar contrast can be seen in the results from the recent analysis by Starr and Rehavi, who greatly expanded

the data used to study disparity to include earlier stages in the criminal justice process. They, too, reject use of the presumptive sentence as the primary control variable and instead use data on the nature of the crime committed, as noted in arrest records. They found racial disparity in the severity of charges faced by defendants arrested for similar conduct, and in the likelihood of facing a charge that included a mandatory minimum penalty.<sup>75</sup> In an analysis of sentences imposed, they found a 10 percent Black White disparity in non drug cases, which rose to 14 percent when drug cases were added. But at least half, and possibly all, of the gap disappeared when differences between groups in mandatory minimum charges were taken into account.<sup>76</sup> In the non drug sample, charges for possession or use of a firearm under 18 U.S.C. § 924(c) appear to be the biggest reason for the racial gap.<sup>77</sup>

In a second analysis of the effects of *Booker*, all non immigration cases were studied. To isolate the effects of the decision from the contributions of prosecutors, judges, and applicable laws, they studied the periods immediately surrounding the date of the decision. They found a temporary increase in the rate of charges carrying mandatory minimum penalties against Black defendants, but “no evidence that *Booker* increased racial disparity in the exercise of judicial discretion; if anything it may have reduced it.”<sup>78</sup> They conclude that focusing on judicial decision making alone risks missing the most important sources of demographic disparity today. Elsewhere in this issue, Professor Starr explains their findings and methods further, and offers her own critique of the Commission’s research.

### VIII. Conclusion

Research on demographic disparity in federal sentencing seems poised for creative development. The purpose of the research, and the statistical models employed, are in a confusing but productive state of flux. There are reasons to hope that fresh thinking will yield fresh insights. At the least, the new wave of research should prevent policy makers from relying exclusively on narrow analyses and single measures, especially like the Commission’s multiple regressions models, which miss the most important sources of demographic disparity and distort the effects of the decision in *Booker*. Unfortunately, rather than engage and contribute to these constructive developments, the Commission’s latest report seems determined to entrench outdated methods and confuse matters further.

The discrepancies in the Commission’s own findings cast serious doubt on its hidden hypothesis that increased judicial discretion leads to increased demographic disparity. The odd patterns of results also suggest that something may be wrong with the Commission’s regression model. Researchers hesitate to reach firm conclusions, or make policy recommendations, based on results from a single model, especially if the results are not robust. When results defy any coherent explanation, more than mere caution is required—a conclusion should not be reached, or implied, at all. This is especially important if the policy proposals

supported by a mistaken conclusion, like the Commission’s proposals for statutory changes, would actually reverse the recent progress toward fairer federal sentencing.

### Notes

- \* Thanks to Sonja Starr, Max Schanzenbach, Joshua Fischman, Michael Light, and Amy Baron Evans for reviewing earlier versions of this article.
- <sup>1</sup> U.S. Sentencing Comm’n, Report on the Continuing Impact of *United States V. Booker* on Federal Sentencing (2012) [herein after *Booker* Report].
- <sup>2</sup> *Id.* at pt. A, p. 8. It is not entirely clear to which “rates” the Commission is referring.
- <sup>3</sup> *Id.* at pt. E, p. 1.
- <sup>4</sup> Joe Palazzolo, *Racial Gap in Men’s Sentencing*, Wall St. J., Feb. 15, 2013, at A3, available at <http://online.wsj.com/article/SB10001424127887324432004578304463789858002.html?mod=WSJ-US-News-5>; see also Lahny Rose Silva, *Black Men Receive Longer Prison Sentences*, Network Indiana, Feb. 18, 2013, <http://indianapublicmedia.org/news/report-suggests-black-men-receive-longer-sentences-45089/>.
- <sup>5</sup> For a review of evidence that *Booker* has improved federal sentencing, see Amy Baron Evans & Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1667–81 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1987041](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1987041).
- <sup>6</sup> Gary Kleck, *Life Support for Ailing Hypotheses: Modes of Summarizing the Evidence for Racial Discrimination in Sentencing*, 9 Law & Hum. Behav. 271 (1985).
- <sup>7</sup> See U.S. Sentencing Comm’n, Fifteen Years of Guideline Sentencing (2004), 117–127 [hereinafter Fifteen Year Review], for a review of research in the pre *Booker* period and discussion of limitations of the prevalent methodologies.
- <sup>8</sup> Research On Sentencing: the Search For Reform (Alfred Blumstein ed., 1983).
- <sup>9</sup> Fifteen Year Review, *supra* note 7, at 81–92. The Commission’s commitment to a definition of unwarranted disparity that includes the effects of charging and plea bargaining has wavered in recent years. The Commission even argued post *Booker* that disparity resulting from prosecutor’s charging discretion “cannot be considered *unwarranted* disparity within the meaning of § 3553(a)(6).” See Brief for the U.S. Sentencing Comm’n as *Amicus Curiae* in Support of Respondent, *Rita v. United States*, 551 U.S. 338 (2007) (No. 06 5754), at 30 n.29 (emphasis in original). But the Guidelines Manual continues to contain policy statements, however ineffective, intended to ensure that plea negotiation practices “do not perpetuate unwarranted sentencing disparity.” Introductory Commentary, ch. 6, pt. B. And there is no doubt that Congress intended sentencing reform to control disparity from both judges and prosecutors. See Stephen J. Schulhofer & Ilene Nagel, *Negotiated Pleas under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231 (1989).
- <sup>10</sup> U.S. Sentencing Comm’n, *Cocaine and Federal Sentencing Policy* (1995), xii, 196.
- <sup>11</sup> U.S. Sentencing Comm’n, *Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines* (2004); Fifteen Year Review, *supra* note 7, at 133–134.
- <sup>12</sup> For discussion of this and other definitional issues regarding demographic disparity, see Fifteen Year Review, *supra* note 7, at 113–114, 135, and references therein; Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* (1995); Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85 (2005).
- <sup>13</sup> Paul Guerino, Paige M. Harrison, & William J. Sabol, *Prisoners in 2010*, Bureau of Justice Statistics (2011), available at <http://bjs.gov/content/pub/pdf/p10.pdf>.

<sup>14</sup> Fifteen Year Review, *supra* note 7, at 116.

<sup>15</sup> *Id.* at 133.

<sup>16</sup> The Commission's new report includes bar graphs, Figures E 1 and E 2, showing the average guideline minimums and confinement sentences imposed for various demographic groups during the four time periods covered by the report. These graphs reveal the same patterns shown in this paper's chart of trends in average time served. Black males received sentences 30 to 40 months longer than white males throughout these time periods, with the smallest gap in the most recent period.

<sup>17</sup> Paul J. Hofer, *Review of the U.S. Sentencing Commission's Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 24 Fed. Sent'g Rep. 193 (2012), at 198.

<sup>18</sup> *Id.*, at 204

<sup>19</sup> John Scalia Jr., *The Impact of Changes in Federal Law and Policy on the Sentencing of, and Time Served in Prison by, Drug Defendants Convicted in U.S. Courts*, 14 Fed. Sent'g Rep. 152, 157 (2002).

<sup>20</sup> Fifteen Year Review, *supra* note 7, at 117. See also Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District Level Judicial Demographics*, 34 J. Legal Stud. 57 (2005).

<sup>21</sup> Fifteen Year Review, *supra* note 7, at 135.

<sup>22</sup> Booker Report, *supra* note 1, at 3.

<sup>23</sup> This Fact Sheet, which criticizes the Commission's earlier research on demographic disparities after Booker, can be found at [http://www.fd.org/docs/select\\_topics\\_sentencing/booker\\_fix\\_factsheet\\_3.pdf?sfvrsn=6](http://www.fd.org/docs/select_topics_sentencing/booker_fix_factsheet_3.pdf?sfvrsn=6).

<sup>24</sup> Booker Report, *supra* note 1, at 3.

<sup>25</sup> *Id.* at pt. C, p. 20.

<sup>26</sup> *Id.* at pt. A, pp. 71, 74.

<sup>27</sup> U.S. Sent'g Comm'n Public Hearing on Federal Sentencing Options After Booker (Feb. 16, 2012) (statement of Raymond Moore, Federal Public Defender, Districts of Colorado and Wyoming, written statement at 18). The footnote in the report referencing this testimony states: "It is not clear what methodology the commentators used to reach these conclusion [sic], and the Commission did not attempt to replicate it." They have my phone number.

<sup>28</sup> See Baron Evans & Stith, *supra* note 5, at 1688. These estimates are based on the increase in the rate of NGS below range sentences for crack and career offenders in fiscal year 2010 as compared to the rate in 2003 and the average extent of these reductions. Fiscal year 2003 was used as the baseline because it preceded the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which affected the types of cases that were continued and sentenced in anticipation of Booker.

<sup>29</sup> The new report relies on comparisons of presumptive sentences (those required or recommended by applicable statutes and guidelines) with the sentences actually imposed in order to conclude that the amendment to the crack guidelines did much to reduce the gap. Booker Report, *supra* note 1, at 4.

<sup>30</sup> Bobby Scott, Essay, *United States v. Booker: System Failure or System Fix?*, 160 U. Pa. L. Rev. Pennumbra 195 (2011), [http://www.pennumbra.com/essays/12\\_2011/Scott.pdf](http://www.pennumbra.com/essays/12_2011/Scott.pdf).

<sup>31</sup> It might be that the specific analyses of changes in sentence length over time for various race gender pairs, reported at pages 28-29, were intended to disentangle some of these factors, but multiple re-readings left me baffled about what the findings show or how to relate them to other sources of disparity.

<sup>32</sup> Booker Report, *supra* note 1, at 4 (emphasis in original).

<sup>33</sup> *Id.* at 14.

<sup>34</sup> *Id.* at 19, fig.E 13.

<sup>35</sup> *Id.* at 14, fig.E 7.

<sup>36</sup> How regression models can produce statistical artifacts is discussed in a later section. While I have not investigated how the

Commission's model might have generated these results, the places I would start looking are the control variables and their hard to anticipate interactions, especially the simultaneous controls for the presumptive sentence and the presence of a mandatory minimum, discussed further in endnote 62.

<sup>37</sup> Booker Report, *supra* note 1, at 16, fig.E 9.

<sup>38</sup> *Id.* at 4; a similar claim is made on p. 22.

<sup>39</sup> Booker Report, *supra* note 1, Figure E 15 at 22.

<sup>40</sup> See Fifteen Year Review, *supra* note 7, at 130.

<sup>41</sup> Booker Report, *supra* note 1, at 21.

<sup>42</sup> The Commission collects reasons for departures and variances from the Statement of Reasons form completed by the courts, but the reasons are provided only in cases actually receiving a departure or variance. No data are collected on whether similar circumstances were present in cases not receiving a below range sentence.

<sup>43</sup> Only one of the control variables (age) measures a ground for departure approved by the Commission's policy statements. (See Guidelines Manual, ch. 5, pt. H.) Several are considered "not ordinarily relevant" (educational attainment) or prohibited as grounds for departure (citizenship/national origin). It is possible to create control variables to represent potentially legitimate grounds—for example, whether crack cocaine was the principle drug involved in the offense—but none were created.

The Commission excluded from the analyses cases where below range sentences were impossible because of mandatory minimum statutory penalties. These cases are disproportionately Black males. If they had been included, the likelihood of receiving an NGS below range sentence would have been lower for Black males, but for reasons having to do with charging, not judicial, discretion. Their exclusion means the sample selected for the analyses was necessarily biased, and surely excluded many defendants whom judges would have liked to sentence below the range.

<sup>44</sup> Booker Report, *supra* note 1, at 4.

<sup>45</sup> Cassia Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 Crim. Just. 427, 440-42 (2000).

<sup>46</sup> "Influenced," of course, is a loaded term that implies causation. The Commission explains in a footnote that "correlation and causation are different concepts" and cautions that its results do not mean that demographic factors caused the gap it reports (Booker Report, *supra* note 1, at 8). Avoiding causal thinking in this area is almost impossible, however, and it is doubtful readers will avoid it. Even the report can't resist claiming that the multivariate regression analysis it favors "is necessary to explore whether [demographic] factors contribute to these outcomes" (*id.* at 5, emphasis supplied).

<sup>47</sup> *Id.* at 1.

<sup>48</sup> Jeffery T. Ulmer, Michael T. Light, & John H. Kramer, *Racial Disparity in the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 Criminology & Pub. Pol'y 1077 (2011); Sentencing Resource Counsel Project, Fact Sheet: Racial Fairness in the Advisory Guidelines System, *supra* note 23.

<sup>49</sup> Rodney Engen, *Racial Disparity in the Wake of Booker/Fanfan: Making Sense of "Messy" Results and Other Challenges for Sentencing Research*, 10 Criminology & Pub. Pol'y 1139 (2011).

<sup>50</sup> Booker Report, *supra* note 1, at 10-14.

<sup>51</sup> See Douglas C. McDonald & Kenneth E. Carlson, Department of Justice, *Sentencing in the Federal Courts: Does Race Matter?* (1993). These researches reviewed variability in the existing studies, and also showed how modeling the effects of particular policies, such as the 100:1 powder to crack quantity ratio, was likely to point to more important sources of racial disparity.

<sup>52</sup> Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial*

- Discretion and Mandatory Minimums*, 9 J. Empirical Legal Stud. 729 (2012); Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*, Univ. of Mich. Sch. of Law Program in Law & Econ. Working Paper No. 12 002, 2012, available at <http://SSRN.com/Abstract=1985377>; Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. (forth coming fall 2013).
- <sup>53</sup> Different econometric researchers have used different methods, and reached somewhat different conclusions. See Todd Sorenson, et al., *Race and Gender Differences under Federal Sentencing Guidelines*, 102 Am. Econ. Rev.: Papers & Proc. 256 (2012); Andrew W. Nutting, *The Booker Decision and Discrimination in Federal Criminal Sentences*, 51 Econ. Inquiry 637 (2012); Crystal S. Yang, *Free at Last?: Judicial Discretion and Racial Disparities in Federal Sentencing*, John M. Olin Center of Law, Economics, and Business, Harvard Law School, Discussion Paper No. 47, 2012, available at [http://www.law.harvard.edu/programs/olin\\_center/fellows\\_papers/47](http://www.law.harvard.edu/programs/olin_center/fellows_papers/47) Yang.php.
- <sup>54</sup> Booker Report, *supra* note 1, at 6.
- <sup>55</sup> Use of a “presumptive sentence” for studying disparity in a guidelines system was pioneered just over a decade ago, but it also proved controversial at first. See Rodney L. Engen & Randy R. Gainey, *Modeling the Effects of Legally Relevant and Extralegal Factors Under Sentencing Guidelines: The Rules Have Changed*, 38 Criminology 1207 (2000); Jeffrey T. Ulmer, *The Rules Have Changed So Proceed with Caution: A Comment on Engen and Gainey’s Method for Modeling Sentencing Outcomes Under the Guidelines*, 38 Criminology 1231 (2000).
- <sup>56</sup> Booker Report, *supra* note 1, at 5. The average confinement sentence in the post *Gall* period was 86 months for Black males and 53 months for White males. These averages include probation as 0 months.
- <sup>57</sup> Fifteen Year Review, *supra* note 7, at 81.
- <sup>58</sup> See Starr & Rehani, *Mandatory Sentencing*, *supra* note 54 for a critique of the presumptive sentence as a control variable in research interested in the effect of *Booker* and of earlier stages in the criminal justice process.
- <sup>59</sup> Booker Report, *supra* note 1, at 6.
- <sup>60</sup> There has been some controversy over whether the weight of the presumptive sentence should also be allowed to vary. The law, after all, specifies a particular outcome. The Commission has used different approaches at different times. See Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 Law & Soc’y Rev. 733 (2001).
- <sup>61</sup> Intercorrelations among control variables can also vary across time, which affects the weight given to any particular factor, such as demographics. When the comparisons of interest, as here, are changes in the size of the demographic effects over time, it is especially important to use a unified model that assigns the same weight to control factors at each time period. Starr and Ulmer & Light describe in this issue how they used unified models. The Commission calculated a different regression equation at each time period and compared the size of the demographic effects. This means that some unknown amount of the changes across time might be due to variations in these intercorrelations, or some other source of error. The Commission does not report any test of the statistical significance of the changes.
- <sup>62</sup> David B Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the US Federal Courts*, 44 J. L. & Econ. 635 (2001). In its latest research, the Commission used a presumptive sentence control, and an additional dummy variable indicating whether an effective mandatory minimum (i.e., one not waived by the safety valve or a substantial assistance motion) was present in a case. It is not obvious to me how this affects calculations. Judging from the Commission’s brief description of this variable (p. 32), it treats cases where the mandatory minimum is also reflected in the presumptive sentence, where judges are entirely prevented from departing below, the same as cases where the mandatory minimum is below the range and judges have room to depart downward, albeit in limited and varying ways. The variable received a positive weight in most, but not all, analyses.
- <sup>63</sup> The Commission’s recent report on mandatory penalties, remarkably, did not report the rates and disproportionalities of trumping mandatory minimums, but these can be calculated from the publicly available data. See *U.S. Sent’g Comm’n Public Hearing* (May 27, 2010) (statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia), available at [http://www.uscc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20100527/Agenda.htm](http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100527/Agenda.htm).
- <sup>64</sup> Starr & Rehani, *id.*, discuss how some problems that complicate accurate estimates of the influence of demographic factors, such as the omitted variable problem noted above, can be less of a concern if one is primarily interested in *change* in the factor. So long as one’s “yardstick” is broken in the same way in each period of time, changes in the measure can still reflect changes in the real world. Attributing those changes to a particular event, however, remains a daunting problem, and a unified model is needed to ensure changes are not merely the effects of varying intercorrelations. See *supra* note 64.
- <sup>65</sup> U.S. Sentencing Comm’n, the Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining (1991) ch. 5 (reporting time series analysis of factors influencing incarceration rates and lengths).
- <sup>66</sup> Starr & Rehani, *Mandatory Sentencing*, *supra* note 54 at 25–30. Rehani and Starr include an excellent discussion of problems inferring causation written for a nontechnical audience.
- <sup>67</sup> Fischman & Schanzenbach, *supra* note 54.
- <sup>68</sup> The Commission lumps together, for good reason, departures and so called “variances.” But it also indicates by the same variable all other government sponsored below range sentences, including “early disposition” departures. Substantial assistance departures are treated separately. See p. 32 of the report. It is puzzling why the Commission did not use separate controls for fast track, other government sponsored, and NGS below range sentences, because the data show the average decrease for these is very different.
- <sup>69</sup> See Starr and Rehani, *Mandatory Sentencing*, *supra* note 54, for additional discussion of this point.
- <sup>70</sup> Fischman & Schanzenbach, *supra* note 54, at 757.
- <sup>71</sup> *Id.* at 752.
- <sup>72</sup> *Id.* at 757, 761.
- <sup>73</sup> *Id.* at 746.
- <sup>74</sup> *Id.* at 761.
- <sup>75</sup> Starr & Rehani, *Mandatory Sentencing*, *supra* note 54, at 18.
- <sup>76</sup> *Id.*
- <sup>77</sup> Parts of Starr and Rehani’s analyses were limited to property and fraud offenders, regulatory offenses, violent crimes, and weapons cases, due to problems in some years with the data on drug quantity and other considerations. Starr & Rehani, *Racial Disparity in Federal Criminal Charging*, *supra* note 54, at 17. The Commission dismisses the study, in footnote 25 of Part E, largely because drug and immigration offenses, and noncitizen offenders, were not included, but also because “the researchers excluded variables that the Commission included, such as whether the offender obtained relief from a statutory mandatory minimum penalty.” The Commission does not address the profound methodological criticisms of its own approach raised by Starr & Rehani.
- <sup>78</sup> Starr & Rehani, *Mandatory Sentencing*, *supra* note 54, at 39.

# ***Fact Sheet:***

## ***No Evidence that Judicial Discretion Increases Racial Disparity***

**The Supreme Court's decision in *United States v Booker*, 543 U.S. 220 (2005), solved a Sixth Amendment constitutional violation with the federal sentencing guidelines.**

- The Court made the sentencing guidelines “effectively advisory” by striking portions of the Sentencing Reform Act of 1984 that had made the guidelines mandatory in practice.
- Subsequent decisions, such as *Rita*, *Gall*, *Kimbrough*, and *Pepper*<sup>1</sup> reaffirmed the importance of judicial discretion in implementing the statutory directives of 18 U.S.C. § 3553(a).
- In a 2012 report, the U.S. Sentencing Commission found that the guidelines “have remained the essential starting point in all federal sentences and have continued to exert significant influence on federal sentencing trends over time.”<sup>2</sup> (USSC Report, Part A, at 3)
- Nonetheless, the Commission has proposed several statutory changes that would restore a mandatory sentencing system. (USSC Report, Part A, at 111-114)<sup>3</sup>
- One of the “Key Findings” of the USSC Report states: “Demographic factors (such as race, gender, and citizenship) have been associated with sentence length at higher rates in the *Gall* period than in previous periods” (USSC Report, Part A, at 8). The Commission particularly claims that Black males have been treated more harshly after *Booker* and other cases. (Part E, p. 1)

**In fact, the best and most complete empirical analyses show that *Booker* and advisory sentencing guidelines have *not* increased racial or ethnic disparity.**

- A study soon to be published in the *Yale Law Journal* finds “no evidence that *Booker* increased racial disparity in the exercise of judicial discretion; if anything it may have reduced it.”<sup>4</sup> The article describes problems with the methods used by the U. S. Sentencing Commission to assess demographic disparity, and analyzes additional data with sophisticated econometric models to improve on past research. Most of the racial disparity uncovered “can be explained by prosecutors’ decisions to bring mandatory minimum charges.”<sup>5</sup>
- Other econometric research found that “racial disparities are smaller during periods of deferential review” than under *de novo* review.<sup>6</sup> Sentences below the guideline range increased for all groups after *Booker*; the somewhat lesser increases for Black defendants was due to more being *sentenced at the statutory mandatory minimum*, which reflects prosecutorial, not judicial, discretion.
- The message from the new econometric research is that “judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing. Policymakers interested in redressing racial disparity today should pay much closer attention to the effects of mandatory minimums and their effect on prosecutorial and judicial discretion.”<sup>7</sup>

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<sup>1</sup> *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimrough v. United States*, 552 U.S. 85 (2007); *Pepper v. United States*, 131 S. Ct. 1229 (2011).

<sup>2</sup> U.S. Sentencing Commission, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (2012) [hereinafter USSC Report].

<sup>3</sup> Amy Baron-Evans & Thomas W. Hillier, II, *The Commission's Legislative Agenda to Restore Mandatory Guidelines*, (forthcoming) 25 Federal Sentencing Reporter (April, 2013). Available at SSRN: <http://ssrn.com/abstract=2252105>

<sup>4</sup> Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, (forthcoming) *Yale Law Journal*, Fall 2013, at 39.

<sup>5</sup> *Id.*, at 1.

<sup>6</sup> Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. Empirical Legal Stud. (2012), at 757.

<sup>7</sup> *Id.*, at 761.

- Criminologists have also re-analyzed the data used by the U.S. Sentencing Commission and found that relatively minor variations in the statistical model it used have profound effects on results. These authors conclude: “current research—theirs or ours—is a long way from demonstrating that the *Gall* period has caused greater black-white federal sentencing disparity.”<sup>8</sup> In a major review of this research another expert noted that there is “no evidence of an urgent need for legislation to counteract the supposedly deleterious effects of increased judicial discretion.”<sup>9</sup>

**The Commission highlights a general finding, but results of specific analyses are *not* consistent with any claim that increased judicial discretion leads to increased demographic disparity.**

- In the summary of its report the Commission notes an increase in the sentencing gap between Black and White males in the overall caseload. But results from its more detailed analyses show no link to judicial discretion. *No statistically significant differences* were found between these groups when judicial discretion was at its peak—defendants sentenced below the guideline range without government sponsorship. No significant differences were found in these cases during either the PROTECT Act or the post-*Gall* periods. (USSC Report, Part E, p. 19, Figure E-13)
- The Commission attempted to explain its results by citing differences in the odds of receiving a below-range sentence without government sponsorship. But the gap between Black and White males in these odds were the *same* in the *Gall* period as in the PROTECT Act period, and were actually lowest in the *Booker* period. (USSC Report, Part E. at 22, Figure E15)
- The only consistent, statistically significant differences in sentence lengths between Black and White male offenders were among cases *sentenced within the guideline range* (USSC Report, Part E, p. 14, Figure E-7)—i.e. cases *not affected* by the Commission’s proposals for statutory changes.

**The Commission’s statistical model does not properly measure the effects of *Booker* or the most important sources of demographic disparity in federal sentencing today.**

- The Commission includes control variables in its model that mask the two biggest sources of demographic disparity: 1) prosecutors’ decisions and 2) unsound laws with adverse impacts. And the model does not measure the key benefit of *Booker* in decreasing disparity from these sources—increased rates of below-range sentences imposed by judges without government sponsorship.<sup>10</sup>
- After *Booker*, judges have helped alleviate unduly harsh sentences imposed on all defendants, and especially African-Americans, who are disproportionately sentenced under unsound guidelines, such as those for crack cocaine and so-called “career offenders.” In 2010 alone, judges saved more than 860 Black defendants sentenced under either the crack or career offender guidelines over 3300 years of unnecessary incarceration. More than 230 defendants of other races were likewise spared excessive, and expensive, incarceration under these two unsound guidelines.<sup>11</sup>
- The gap in average prison time served between Blacks and other groups, which widened after the guidelines and mandatory minimum penalty statutes were enacted in the mid-1980s, has finally begun to narrow thanks to *Booker* and the systemic changes it helped bring about.<sup>12</sup>

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<sup>8</sup> Jeffrey Ulmer & Michael Light, *The USSC’s 2012 Booker Report’s Characterization of the Penn State Studies: Setting the Record Straight*, (forthcoming) 25 Federal Sentencing Reporter (April 2013).

<sup>9</sup> Rodney Engen, *Racial disparity in the wake of Booker/Fanfan: Making sense of “messy” results and other challenges for sentencing research*, 10 J. of Crim. & Pub. Pol’y 1139 (2011).

<sup>10</sup> Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Judicial Discretion and Demographic Disparity* (forthcoming), 25 Federal Sentencing Reporter (April, 2013). Available at SSRN: <http://ssrn.com/abstract=2252159>

<sup>11</sup> These estimates are based on the increase in the rate of NGS below-range sentences for crack and career offenders in fiscal year 2010 as compared to the rate in 2003 (prior to the *Blakely* decision) and the average extent of these reductions.

<sup>12</sup> *Supra*, note 10.

# The Commission's Legislative Agenda to Restore Mandatory Guidelines

At a point in time when bipartisan congressional leaders and the Attorney General are joining in a call to address the unsustainable costs and longstanding injustice associated with over incarceration under mandatory sentencing rules, the U.S. Sentencing Commission has released a report<sup>1</sup> on the impact of *United State v. Booker*,<sup>2</sup> calling for a return to the very pre *Booker* policies that caused our current crisis. In its rearview report, the Commission sets forth six recommendations to Congress that would constitute a return to a guideline system that is functionally no different than, and every bit as unconstitutional as, the mandatory system struck down in *Booker*. The proposals would eviscerate judges' authority to consider the history and characteristics of the defendant and mitigating circumstances of the offense, and would suppress disagreement with the guidelines and policy statements, all contrary to Supreme Court law. If enacted into law, the proposals would result in years of litigation over their constitutionality and wreak havoc with a fully functional sentencing system to which judges, courts of appeals, probation officers, and lawyers have become accustomed over the past eight years.

Outside the Commission, the view is forward. "Everywhere you look, federal policy makers are complaining about the rising costs of incarceration."<sup>3</sup> Senators Leahy and Paul recently denounced the nearly \$7 billion cost of housing a federal prison population that has increased nearly ninefold since 1980 because of mandatory minimums and the guidelines that incorporate them, recognized the "terribly unjust results in individual cases" that ensue "without making [the taxpayers] any safer," and called for judges to "mak[e] decisions on the individual facts before them."<sup>4</sup> The Attorney General likewise condemned the "significant economic burden . . . along with human and moral costs that are impossible to calculate" of laws "that mandate sentences, irrespective of the unique facts of an individual case, [that] too often bear no relation to the conduct at issue, breed disrespect for the system, and are ultimately counterproductive," and voiced support for "giv[ing] judges more flexibility in determining certain sentences."<sup>5</sup>

The legislative and executive branches have plenty of company. The importance of sentencing flexibility was emphatically recognized during the Commission's seven cross country regional hearings in 2009 and 2010, in which the Commission sought to gauge support for the

advisory Guidelines system and test the waters for a *Booker* fix: Judges, probation officers, and practitioners praised and overwhelmingly endorsed the advisory Guidelines system. At the Commission's hearing in February 2012 on "Federal Sentencing Options after *Booker*," where its current proposals were previewed, nearly every witness, including witnesses for the Judicial Conference, and even some Commissioners, noted that the proposals posed significant constitutional problems and would engender disruptive and costly litigation. No one was able to identify a benefit that would outweigh those problems.<sup>6</sup> Witnesses who commented on the Commission's proposals to prevent individualized sentencing said that such legislation would be unfair (particularly to racial minorities), bad public policy (in ignoring differences among defendants that are relevant to the need for incapacitation), and/or unconstitutional (on Sixth Amendment, separation of powers, and/or equal protection grounds).<sup>7</sup> Judge Barbadoro recounted the efforts of the Judicial Conference since 1990 to convince the Commission to encourage departures and to enable greater consideration of offender characteristics,<sup>8</sup> and the judges made clear that the most significant improvement instituted by *Booker* is their authority to consider defendants' individualized circumstances.<sup>9</sup>

We should not return to the "bad old days." Indeed, one wonders why the Commission is seeking to undo *Booker*, given what it says is the "continued importance and influence of the guidelines" as reflected in the rate of within guideline sentences, the extent of reductions, and substantial sentence lengths.<sup>10</sup> According to the Commission, the answer is that "sentencing decisions increasingly depend upon consideration of the section 3553(a) factors other than the Guidelines (section 3553(a)(4)) and policy statements (section 3553(a)(5))."<sup>11</sup> That was the point, but even so, the rate of judge initiated below guideline sentences has not changed one whit over the past three years.<sup>12</sup> If, as it appears, the Commission wants even greater adherence to its guidelines, it should do what the vast majority of judges, probation officers, defense lawyers, and even a few prosecutors advised at its many hearings: Conduct careful study, amend the guidelines accordingly, and justify its work.

This article addresses only the three proposals aimed at curtailing the discretion of district court judges at sentencing. These proposals are the functional equivalent of



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a mandatory Guidelines system, are based on a misreading of the relevant case law, and lack support in empirical evidence. If enacted, the Supreme Court would have to either strike them down or overrule every one of its decisions beginning with *Booker*. In the meantime, they would engender disruptive litigation, and waste the increasingly limited time and resources of the lower courts. Given the need to address in some detail the Commission's account of Supreme Court law, the law in the lower courts, and statutory law set forth in support of these three proposals, space does not permit treatment of the three proposals aimed at appellate review. Those are addressed in an article posted at [http://www.fd.org/odstb/home/2013/04/23/sentencing\\_resource\\_counsel\\_rebut\\_sentencing\\_commission's\\_booker\\_report](http://www.fd.org/odstb/home/2013/04/23/sentencing_resource_counsel_rebut_sentencing_commission's_booker_report).

To place the Commission's recommendations in perspective, we begin with a brief account of past and recent history.

## I. Past and Recent History

### A. The mandatory Guidelines system: 1984 2005

As enacted in the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. § 3553(b) required courts to sentence within the guideline range unless they found a circumstance of a kind or degree not adequately taken into consideration by the Commission in formulating the guidelines. In language added at the Commission's request in 1987, after the guidelines had already gone into effect, § 3553(b) also required the judge to determine whether to depart by considering *only* the Commission's guidelines, policy statements, and official commentary. The guidelines themselves were constructed of a vast array of heavily weighted aggravating factors. The Commission used policy statements and commentary to institute its own departure standard, more restrictive than that set forth in § 3553(b), permitting departures only in "atypical" cases that "significantly differ[]" from the "heartland" of "typical cases embodying the conduct that each guideline describes," and to prohibit or strongly discourage below guideline sentences on many specific grounds.<sup>13</sup>

The Commission provided no explanation for these restrictions or any indication that it had conducted research on whether the factors it prohibited and discouraged were relevant to the purposes of sentencing. Contrary to its present claim that as part of its past practice study it determined the "specific characteristics of . . . offenders" that judges had considered "salient at sentencing" before the guidelines,<sup>14</sup> the Commission actually did not estimate the impact of mitigating offender characteristics on past sentences,<sup>15</sup> though judges had routinely considered those factors.<sup>16</sup> Its assertion that it relied on the Parole Commission's guidelines and statistics,<sup>17</sup> is also puzzling, given that the Parole Commission had long before found that age, employment history, education, family circumstances, and lack of history of drug use are statistically significant predictors of reduced risk of recidivism,<sup>18</sup> and otherwise treated them as mitigating factors to be considered in the discretion of the parole officer in the

individual case.<sup>19</sup> The Parole Commission also considered drug dependence as a factor mitigating the severity of small scale drug cases.<sup>20</sup>

As then Commissioner Breyer explained, the Commission omitted from the guidelines most of the mitigating factors Congress said it "should, but was not required to, consider" and in the process "deviated from average past practice," as one of several "'trade offs' among Commissioners with different viewpoints."<sup>21</sup> Later, Justice Breyer said that the exclusion of these factors was "intended to be provisional" and "subject to revision in light of Guideline implementation experience."<sup>22</sup>

That revision did not materialize. Instead, when courts attempted to depart downward based on a defendant's extenuating life circumstances or accomplishments on grounds the Commission had not already disapproved, the Commission added those grounds to its disfavored list, and in the process frequently overruled the courts of appeals.<sup>23</sup> At the same time, the courts of appeals prohibited judges from departing based on the excessive severity and unwarranted disparity caused by the crack guidelines because these problems were "typical" of all crack cases and thus within the guidelines' "heartland."<sup>24</sup> The Commission did not overrule those decisions, and instead issued commentary stating that departures were not "intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Commission."<sup>25</sup>

The Commission placed additional restrictions on judicial downward departures in 2003 in response to the PROTECT Act's directive to reduce their incidence.<sup>26</sup> The Commission's report states that this directive arose from Congress's "concern that the increasing rate of downward departures from the sentencing Guidelines at the time was undermining the goals of the SRA" as a result of the Supreme Court's 1996 decision in *Koon v. United States*.<sup>27-28</sup> But that concern was the result of the Commission's method of reporting departure data, which gave the mistaken impression that *Koon* had caused an increase in judicial departures.<sup>29</sup> As the Commission reported after the PROTECT Act was passed, the increase in the rate of downward departures began well before *Koon* and was attributable to an increase in government sponsored downward departures, primarily in immigration and drug cases on the border.<sup>30</sup>

### B. The advisory Guidelines system: 2005 2013

In *United States v. Booker*,<sup>31</sup> the Supreme Court excised 18 U.S.C. § 3553(b) because it allowed departures only in "specific, limited" circumstances dictated by the Commission's policy statements, under which "departures [were] not available in every case, and in fact [were] unavailable in most," thus rendering the guidelines mandatory and judicial fact finding in calculating them unconstitutional.<sup>32</sup> The Court directed judges to treat the guidelines as "advisory only" by following § 3553(a). Section 3553(a) renders the guidelines advisory by requiring courts to *first* consider the history and characteristics of the defendant and



circumstances of the offense, *then* the purposes of sentencing, *then* the kinds of sentences available by statute, and *only then* the guidelines and any “pertinent” policy statement. After considering the factors and purposes in that order, the court *shall* impose a sentence that is sufficient, but not greater than necessary, to satisfy the *need* for just punishment, deterrence, incapacitation to protect the public from further crimes of the defendant, and rehabilitation in the most effective manner. The sentencing framework set forth in § 3553(a) had previously been rendered inoperative by § 3553(b) and its incorporation of the Commission’s policy statements and commentary.

Today, the Commission’s policy statements and accompanying commentary continue to cite and quote from excised § 3553(b), require “extraordinary” circumstances for departures, and deem a large number of mitigating factors to be never or not ordinarily relevant.<sup>33</sup> The Supreme Court has repeatedly made clear that these provisions do not control the court’s decision under § 3553(a), and may not be used to deny or reverse a variance.

Under the advisory Guideline system, a sentencing judge may hear arguments for a sentence outside the guideline range in “either of two forms”: departure “*within the Guidelines framework*” or that “application of the sentencing factors set forth in [§ 3553(a)] warrant a lower sentence.”<sup>34</sup> “‘Departure’ is a term of art under the guidelines and refers only to non guidelines sentences imposed under the framework set out in the guidelines.”<sup>35</sup> A departure can “only be made based on ‘the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission,’” but “there is no longer a limit comparable . . . on the variances that a district court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a).”<sup>36</sup> In other words, policy statements are “pertinent,” in the words of § 3553(a)(5), only to departures. Courts *may* consider a departure if raised by a party or on their motion, but they *may not* apply policy statements when ruling on variances.

Variances may be based on arguments that “the Guidelines sentence itself fails properly to reflect § 3553(a) considerations,” “reflect[s] an unsound judgment, or, for example, that [the Guidelines] do not generally treat certain defendant characteristics in the proper way.”<sup>37</sup> In *Gall v. United States*,<sup>38</sup> the Court upheld a variance based on offender characteristics and circumstances of the offense that were highly relevant to the purposes of sentencing, but were prohibited or deemed not ordinarily relevant by the Commission’s policy statements, rejected one justice’s view that policy statements should be given “some significant weight,” and rejected an appellate rule that, like the Commission’s departure standard, required “extraordinary” circumstances to justify a sentence outside the guideline range because it came “too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.”<sup>39</sup> In *Pepper v. United States*,<sup>40</sup> the Court upheld a variance based on a constellation of offender characteristics that were highly relevant to the

purposes of sentencing and the parsimony clause, but prohibited by a Commission policy statement.<sup>41</sup> Amicus appointed to defend the judgment below, which had reversed the variance based on a circuit rule, argued that the judgment could be upheld based on the policy statement. The Court rejected that argument, holding that policy statements may not be elevated above factors that are relevant under § 3553(a), and that district courts must instead give those factors “appropriate weight.”<sup>42</sup>

Finally, the Court held that judges are free to reject Commission policies reflected in the guidelines that are not based on empirical data and national experience and that fail adequately to reflect § 3553(a) considerations,<sup>43</sup> a principle that applies to policy statements as well.<sup>44</sup>

### C. Post-Booker amendments to policy statements and commentary

To its credit, the Commission deleted the policy statement prohibiting courts from considering post sentencing rehabilitation,<sup>45</sup> in response to the Supreme Court’s holding that it “rest[ed] on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted.”<sup>46</sup>

Otherwise, the Commission has continued its restrictive approach to outside guideline sentences and has attempted to impose those restrictions on the courts’ consideration of variances under § 3553(a). Three amendments, effective November 1, 2010, show the Commission’s attempts to limit consideration of offender characteristics and restrict variances.

First, following submission of voluminous public comment and empirical evidence demonstrating that mitigating offender characteristics are highly relevant to the purposes of sentencing,<sup>47</sup> the Commission changed age, mental and emotional condition, physical condition, physique, and military service from “not ordinarily relevant” to “may be relevant,” but only if “present to an unusual degree and distinguish[es] the case from the typical cases covered by the guidelines”<sup>48</sup> the same standard for characteristics deemed “not ordinarily relevant.”<sup>49</sup> It also changed drug or alcohol dependence or abuse from “not relevant” to “ordinarily is not a reason for a downward departure.”<sup>50</sup>

Second, without publishing the language for comment, the Commission amended the introductory commentary to Chapter 5, Part H to state that although after *Booker* the court must consider the history and characteristics of the defendant under § 3553(a), “the court should not give them excessive weight” and the “most appropriate use of offender characteristics is to consider them not as a reason for a sentence outside the guideline range” but for determining a sentence within the range.<sup>51</sup>

Third, the Commission promulgated its three step guideline, which states that the court “shall” consider policy statements in every case including when no departure is raised, and “shall then” consider the “applicable” factors in § 3553(a) “taken as a whole.”<sup>52</sup>

The Commission’s restrictive approach is unfortunate. The history and characteristics of the offender and the

mitigating circumstances of the offense, largely missing from the guideline calculation, are critically important to the imposition of sentences that achieve just punishment, protect the public, and rehabilitate offenders in the most effective manner, without unnecessary financial or human cost.

## II. The Commission's Proposals

The Commission recommends three statutory changes that would curtail judicial discretion at sentencing. First, the Commission recommends that Congress enact into law the “three step” guideline the Commission promulgated in 2010, which states that the court “shall” consider in every case all of the policy statements and commentary prohibiting or discouraging sentences outside the guideline range, and only then consider the “applicable” § 3553(a) factors “taken as a whole.”<sup>53</sup>

Second, the Commission recommends that the courts be required to give the guidelines “substantial weight.”<sup>54</sup> It acknowledges that the Supreme Court in *Gall* and *Pepper* “declined to distinguish the guidelines and policy statements as deserving any greater weight than any of the other section 3553(a) factors,”<sup>55</sup> but argues that codification of its three step guideline would “have the dual benefit of working in concert with the substantial weight amendment.”<sup>56</sup> Whether the Commission also intends for its policy statements to be given “substantial weight” is not expressly stated, but that alarming conclusion emerges upon a close reading of the report. It asserts that a guideline sentence cannot be properly determined without “required” consideration of policy statements,<sup>57</sup> and clearly disagrees with the Supreme Court’s holdings that policy statements may not be given greater weight than the other factors and purposes set forth in § 3553(a).<sup>58</sup>

Third, the Commission asks Congress to “reconcile” 28 U.S.C. § 994(d) and (e), which it interprets as “requir[ing] the Commission to restrict the manner in which certain offender characteristics can be considered in the guidelines,” with 18 U.S.C. § 3553(a), which the Supreme Court interprets as requiring courts “to consider broadly offender characteristics.”<sup>59</sup> The report strongly suggests that Congress should resolve the purported conflict in favor of the Commission’s interpretation of title 28 as reflected in its policy statements.<sup>60</sup> Such a resolution would consist of a statute directed to the courts proscribing and limiting consideration of individual offender characteristics that courts now routinely consider at sentencing. The Commission has previously stated how 28 U.S.C. § 994(e) and 18 U.S.C. § 3553(a)(1) could be reconciled: “§ 3553(a)(1) could be amended to state that the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant are not ordinarily relevant to the determination of whether to impose a sentence outside the applicable guideline range.”<sup>61</sup> The Commission has not said how it would ask Congress to account for its proscriptions and limitations on many other offender

characteristics, which it states were “required” by 28 U.S.C. § 994(d).<sup>62</sup>

Under these recommendations “working in concert,” the sentencing judge would be required to (1) consider the guideline range, giving it “substantial weight”; (2) then consider in each case the policy statements prohibiting, restricting, and discouraging sentences outside the guideline range, giving them priority over the other factors and objectives set forth in § 3553(a), and apparently “substantial weight”; (3) follow a binding statute directed to the courts that would require adherence to Commission policies regarding offender characteristics; (4) then consider the “applicable” § 3553(a) factors, if any but the guidelines and policy statements are “applicable” after steps 2 and 3, giving them less weight than the guidelines or policy statements.

This is the sentencing framework the Supreme Court struck down. The report offers no theory of how this would be constitutional, and its account of Supreme Court law, the law in the lower courts, and statutory law is materially inaccurate.

## III. The Proposals Would Violate the Constitution

Under the framework the Supreme Court struck down in *Booker*, the guidelines were mandatory because departures were allowed only in “specific, limited” circumstances dictated by the Commission’s policy statements; judicial fact finding in support of guideline increases therefore violated the Sixth Amendment.<sup>63</sup> The Supreme Court saved the Guidelines system from unconstitutionality by requiring district court judges to impose sentences in compliance with § 3553(a), giving no greater weight or priority to the guidelines than any other factor, and necessarily confining the influence of policy statements to “departures.”

The Supreme Court’s holdings are not merely a matter of statutory interpretation that Congress is free to undo. Section 3553(a) as written renders the guidelines advisory. If Congress were to amend it to require courts to consider policy statements disfavoring non guideline sentences in every case, and to give the guidelines and those policy statements a higher priority and greater weight than the relevant factors, purposes of sentencing, and parsimony clause presently set forth in § 3553(a), it would no longer function as a remedy for the unconstitutionality of judicial fact finding in support of guideline increases under the Sixth Amendment.

The Commission’s apparent request for a statutory directive to judges to follow the Commission’s restrictions on considering virtually all offender characteristics other than criminal history raises additional constitutional concerns by interfering with the fundamental judicial sentencing function.<sup>64</sup>

## IV. The Commission’s “Three-Step” Proposal Is Contrary to Supreme Court Law and That of Every Court of Appeals

The report indicates that the Commission’s three step guideline is taken from the Supreme Court’s decision in

*Gall*, and that some courts of appeals have adopted it. Neither is true.

### A. The three-step guideline is contrary to Supreme Court law

In a section labeled “The Sentencing Process After *Booker*,” the report states:

In *Gall v. United States*, the Supreme Court described the proper procedure for post *Booker* sentencing. First, a sentencing court must properly determine the guideline range pursuant to 18 U.S.C. § 3553(a)(4). Second, the court must consider whether any of the guidelines’ departure policy statements apply pursuant to 18 U.S.C. § 3553(a)(5). Third, the court must consider the factors set forth in 18 U.S.C. § 3553(a) taken as a whole before determining the sentence to be imposed, including whether a variance is warranted. Although the guidelines now incorporate the three step process, [citing USSG § 1B1.1(a) (c)], courts take different approaches to applying it, particularly with respect to consideration of departure provisions and offender characteristics.<sup>65</sup>

The procedure directed by the Supreme Court in *Gall* and other decisions is not the “three step process” described in this passage, nor is it the one actually set forth in the Commission’s three step guideline, which the Commission urges Congress to enact into law. Under Supreme Court law, policy statements do not apply to variances, may not be elevated above the relevant § 3553(a) factors, the purposes of sentencing, or the parsimony clause, and may not be used to deny a variance.<sup>66</sup>

In 2010, the Commission nonetheless promulgated its three step guideline,<sup>67</sup> along with commentary indicating that judges should apply its policy statements restricting consideration of offender characteristics when ruling on variances.<sup>68</sup> The guideline states in step two that the court, after calculating the guideline range, “shall then consider Parts H and K of Chapter Five . . . and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.”<sup>69</sup> This means that the court “shall” always consider the policy statements and commentary in every case, even when no party has moved for a departure,<sup>70</sup> which is most cases.<sup>71</sup>

These policy statements and commentary:

- quote from and cite § 3553(b),<sup>72</sup> despite the fact that it was excised because it made the guidelines mandatory;<sup>73</sup>
- deem many factors that are relevant to the purposes of sentencing to be never or not ordinarily relevant,<sup>74</sup> despite statutory and Supreme Court law stating that these factors must be considered;<sup>75</sup>
- require an “exceptional case” or presence of a factor to an “exceptional degree” for a sentence below the guideline range,<sup>76</sup> despite the Supreme Court’s invalidation of that standard;<sup>77</sup>

- state that “[a]lthough the court must consider ‘the history and characteristics of the defendant’ among other factors, *see* 18 U.S.C. § 3553(a),” “the court should not give them excessive weight,” and “the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for . . . determining the sentence within the applicable guideline range” or “the type of sentence . . . within . . . the applicable Zone on the Sentencing Table,”<sup>78</sup> despite Supreme Court law holding that these factors must be given appropriate weight in considering a variance notwithstanding contrary policy statements;<sup>79</sup>
- state that judges are not “to substitute their policy judgments for those of Congress or the Sentencing Commission,”<sup>80</sup> despite Supreme Court law holding that judges must be free to disagree with such policies reflected in the guidelines or policy statements in order to ensure that the guidelines are truly advisory.<sup>81</sup>

The guideline states in step three that the court “shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole,”<sup>82</sup> despite Supreme Court law holding that policy statements may not be elevated above the other factors and purposes set forth in § 3553(a) and § 3661, and that those factors must instead be given “appropriate weight.”<sup>83</sup>

The Commission’s stated purpose for seeking codification of its three step guideline is that the courts do not follow the second step.<sup>84</sup> To follow the second step, however, would violate Supreme Court law, which holds that departure limiting policy statements do not control variances and may not be elevated above other § 3553(a) factors and objectives. The second step would make the guidelines mandatory because the policy statements ensure that “departures are not available in every case, and in fact are unavailable in most.”<sup>85</sup> Moreover, to follow the second step would be a waste of time: 76 percent of judges report that the policy statements do not adequately reflect reasons for a sentence outside the guideline range, and 65 percent find them to be too restrictive.<sup>86</sup>

Under the three step guideline, “working in concert with the substantial weight amendment,”<sup>87</sup> by the time the court got to considering the “applicable factors in” § 3553(a) “taken as a whole” at Step 3, it would already have been directed at Step 2 *not* to apply § 3553(a) and the Supreme Court’s decisions as written. That is, much of § 3553(a) would not be “applicable.” Just as § 3553(a) was rendered a nullity in the mandatory Guidelines era by § 3553(b) and its incorporation of Commission policy statements, Step 3 would be rendered a nullity by Step 2.

### B. No circuit endorses the Commission’s three-step process

While the Commission previously stated that all but one circuit agreed with its three step process,<sup>88</sup> it now urges Congress to codify its three step guideline because the

circuits have declined to adopt it.<sup>89</sup> In fact, all circuits agree that district courts need not consider departure policy statements unless a party moves for a departure, and even then may consider a variance under § 3553(a) instead of a departure.<sup>90</sup> The circuits are also unanimous that policy statements setting forth the Commission's departure standard and restrictions on departures on specified grounds do not control variances.<sup>91</sup>

The report, however, attempts to show that some circuits support its three step guideline, and that the others are wrong. The Commission's account of circuit law is not correct. For example, citing *United States v. Hawk Wing*,<sup>92</sup> it claims that "the Eighth Circuit has stated that 'after determining the appropriate sentencing range, the district court must decide if a traditional departure is appropriate under Part K or §4A1.3.'" <sup>93</sup> That pre *Gall* decision noted in passing that the district court had followed the procedure established in a prior Eighth Circuit decision by applying a departure first, then a variance. Under current Eighth Circuit law, however, it is not reversible error for a district court to grant a variance without first considering a departure.<sup>94</sup> The Commission also claims that the Third Circuit "requires 'that the entirety of the guidelines calculation be done correctly, including rulings on Guidelines departures.'" <sup>95</sup> But in the Third Circuit, departures "require a motion by the requesting party," <sup>96</sup> and even when a motion is made, district courts may consider a variance instead of a departure.<sup>97</sup>

The Commission asserts that a "number of circuits" have held that "if a district court does not conduct a departure analysis, the guideline sentence cannot properly be considered as part of the § 3553(a) analysis." <sup>98</sup> In fact, no circuit has held that a district court did not properly consider the guideline sentence because it did not conduct a departure analysis when no party requested a departure. All of the decisions cited by the Commission involved review of a decision to depart or to deny a request for departure.<sup>99</sup> These decisions do not establish that "courts are required to consider departure policy statements" when no party moves for a departure.<sup>100</sup>

Because no circuit requires a district court to conduct departure analysis when no departure is raised, the Commission erroneously identifies a split between circuits that require district courts to engage in departure analysis when no departure is raised and those that do not. While the Seventh and Ninth Circuits have opted not to review departures under departure law, and instead only as part of reasonableness review under § 3553(a), their approach is entirely consistent with the uniform rule that a district court need not consider departure policy statements when a departure is not raised, and that when a departure is raised the court may instead choose to vary.<sup>101</sup>

Having set up the false dichotomy, the report then suggests that the Sixth Circuit, too, is joining a trend of abandoning appellate review of departures under departure law, and by implication relieving district courts of applying departure provisions when deciding whether or not to

depart.<sup>102</sup> It cites *United States v. McBride*,<sup>103</sup> as support for this suggestion, but *McBride* does not stand for the proposition that the Sixth Circuit does not review a district court's decision whether or not to depart under departure law and requested policy statements. The district court denied a requested departure in that case. The Sixth Circuit held that just as before *Booker*, the court of appeals "cannot review a district court's decision to deny a Chapter 5 Guideline departure in calculating the Guideline sentence," but that after *Booker*, the court of appeals "must review" every sentence "for reasonableness," including any "decision not to sentence below the Guideline range."<sup>104</sup> The Sixth Circuit continues to review actual departure decisions under departure law and policy statements,<sup>105</sup> but any error in granting a departure may be harmless if the district court "independently" and "adequately explained [the sentence] by reference to the 18 U.S.C. § 3553(a) factors, . . . an explanation required by the Supreme Court in *Gall*. In such a case, the sentence would be unreasonable as a departure but reasonable as a variance from the advisory Guidelines range."<sup>106</sup>

Finally, the Commission says that the Fifth Circuit has taken inconsistent positions with regard to the purported split,<sup>107</sup> but that is not correct. In *United States v. Gutierrez Hernandez*,<sup>108</sup> the Fifth Circuit vacated the sentence because the district court "gave no valid basis for the § 5K2.0 departure and misapplied the § 4A1.3 departure."<sup>109</sup> In a footnote, it repeated a statement by the Sixth Circuit in *McBride* (in which a departure was raised) that "the appropriate Guideline range including Guideline departures must still be considered. . . . This Guideline sentence is then considered in the context of the section 3553(a) factors."<sup>110</sup> In the later case, *United States v. Gutierrez*,<sup>111</sup> the district court did not depart or even consider a departure. It varied upward. The Fifth Circuit held that the district court was not required to consider an upward departure before varying upward. It did not "disavow" the holding in *Gutierrez Hernandez*, but distinguished it based on the issues presented in *Gutierrez Hernandez*, whether the departure was valid under departure law, and in *Gutierrez*, whether the court must first consider a departure before it may vary. It said that "[t]o the extent that this citation in *Gutierrez Hernandez* [to the language from *McBride*] could arguably be construed to require a district court to apply the Guidelines' departure methodology before imposing a non Guidelines sentence, this passage in *Gutierrez Hernandez* is *dicta*. Our earlier precedent in *Mejia Huerta* controls."<sup>112</sup> It also expressly disavowed any reliance on a three step process adopted by the Eighth Circuit before *Gall*.<sup>113</sup> The Fifth Circuit upheld the variance under § 3553(a).

In short, no circuit requires a district court to apply departure standards and policy statements when no departure is raised. All circuits but the Seventh and Ninth continue to review departure decisions in the same way as before *Booker*, and separately from their review of the sentence under § 3553(a). The approach of the Seventh and Ninth Circuits, which have opted to review both departures and variances under the § 3553(a) rubric, is entirely

consistent with the rule of all circuits that a district court is not required to engage in departure analysis unless a party moves for a departure, and even then may vary instead. To the extent the Commission believes that the Seventh and Ninth Circuits should, like other circuits, separately review granted departures under departure law, its three step proposal is obviously misdirected.

#### **V. The Supreme Court Has Made Clear that the Guidelines and Policy Statements May Not Be Given Greater Weight than the Other Factors and Objectives of Section 3553(a)**

The Commission urges Congress to require district courts, in applying its three step procedure, to give the guidelines, and apparently its policy statements disfavoring sentences outside the guideline range, “substantial weight.”<sup>114</sup> The report claims that there is “uncertainty about the weight to be given the guidelines.”<sup>115</sup> It asserts a lack of “uniform direction” in appellate decisions, citing decisions that show no such thing.<sup>116</sup> It cites no decision directing district courts to give the guidelines “substantial weight” because there is none. No such decision exists because such a ruling would violate the plain language of § 3553(a) and the Supreme Court’s explicit holdings.

The “Guidelines are only one of the factors to consider when imposing sentence.”<sup>117</sup> There is no “legal presumption that the Guidelines sentence should apply.”<sup>118</sup> “The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.”<sup>119</sup> As the Commission admits,<sup>120</sup> the guidelines and policy statements may not be given greater weight or elevated above other § 3553(a) factors.<sup>121</sup> Policy statements that discourage or prohibit consideration of facts that are required to be considered under § 3553(a) and are relevant to the purposes of sentencing are entitled to no weight.<sup>122</sup> Only Justice Alito believes that the guidelines and policy statements can be given “some significant weight.”<sup>123</sup> But “the dissenting opinion’s view . . . is not the law.”<sup>124</sup> The “weight” to be given the guidelines and policy statements is neither uncertain nor lacking uniform direction.

The Commission also suggests two other possibilities that would give the guidelines and policy statements greater weight than the other § 3553(a) factors: “due regard” and “respectful consideration.”<sup>125</sup> But the guidelines are no longer self justifying. They are not “due” any more regard than other § 3553(a) factors.<sup>126</sup> The Supreme Court has noted that district courts must give “respectful consideration” to the guidelines, but this is reflected in the requirement that the guideline range must be calculated and treated as the starting point.<sup>127</sup> Neither the guidelines nor policy statements may be “elevated” above any other factor,<sup>128</sup> as the report acknowledges.<sup>129</sup> District courts must “consider and give appropriate weight” to the other § 3553(a) factors,<sup>130</sup> including factors the guidelines ignore and factors the policy statements disapprove.<sup>131</sup> It is significant procedural error to fail to consider all of the § 3553(a) purposes and factors,<sup>132</sup> including the

“overarching duty under § 3553(a) to ‘impose a sentence sufficient, but not greater than necessary’ to comply with the sentencing purposes set forth in § 3553(a)(2).”<sup>133</sup> In other words, all of the provisions of § 3553(a) must be given respectful consideration, and the guidelines may not be elevated above the others.<sup>134</sup>

The Commission, however, urges Congress to impose a “standard that conveys the importance of the guidelines at sentencing,” asserting that in “the process of developing the initial set of guidelines and refining them throughout the ensuing years, [it] has considered the factors listed in section 3553(a).”<sup>135</sup> In support, the report quotes the Supreme Court’s statement that the guidelines “seek to embody the § 3553(a) factors” and “reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives,”<sup>136</sup> but ignores the Court’s express recognition that the guidelines and policy statements frequently do not reflect § 3553(a)’s objectives.<sup>137</sup> In fact, substantial evidence shows that the Commission did not take the § 3553(a) purposes and factors into account in developing the guidelines.<sup>138</sup> The Commission’s own reports and contemporaneous accounts by Commissioners make clear that it did not do so in the child pornography guideline,<sup>139</sup> the career offender guideline,<sup>140</sup> the drug guidelines,<sup>141</sup> the fraud guidelines,<sup>142</sup> or the policy statements disfavoring departures.<sup>143</sup>

The Commission’s theory of why the guidelines should be given special weight is not only unjustified as a matter of fact. A statute based on a presumption that the guidelines already incorporate all § 3553(a) purposes and factors would “make the guidelines more mandatory than before *Booker*, . . . and thus clearly unconstitutional.”<sup>144</sup> When the Commission first advanced this theory and some courts of appeals accepted it before *Rita*, *Gall*, *Kimbrough*, *Nelson*, *Spears* and *Pepper* were decided,<sup>145</sup> one appellate judge warned that “it would be foolhardy to ignore the constitutional dangers of adopting an approach to the guidelines post *Booker* that approximates, in a new guise, the mandatory guidelines.”<sup>146</sup> Six subsequent Supreme Court decisions prove that warning to have been entirely correct.

#### **VI. Congress Should Not Adopt the Commission’s Apparent Proposal to Direct the Courts to Follow the Commission’s Questionable Interpretation of the SRA as Reflected in Its Policy Statements Restricting Consideration of Offender Characteristics**

While the heading of this proposal recommends that Congress “reconcile” the Commission’s interpretation of directives to it with the Supreme Court’s interpretation of directives to the courts, the report presents a one sided argument in favor of statutory restrictions on the courts’ consideration of offender characteristics, and at no point acknowledges that offender characteristics are relevant. For example, the report indicates that judges should not be permitted to “independently” consider offender characteristics as the Supreme Court “dictates,” and states that doing so deprives them of the “benefit” of the Commission’s

policy statements,<sup>147</sup> which it defends as having been “required” by the SRA.<sup>148</sup> It claims that “unwarranted disparities . . . appear to be increasing,” and that this is the fault of the Supreme Court’s emphasis on “the importance of individual offender characteristics,”<sup>149</sup> and what it claims are “widely divergent views” among judges regarding the relevance and weight to be accorded offender characteristics,<sup>150</sup> “much as during the years leading up to the SRA.”<sup>151</sup> It asserts that educational background and employment record “may be associated with socioeconomic status,”<sup>152</sup> and even implies that consideration of offender characteristics is the cause of what it claims to be “widening demographic differences in sentencing.”<sup>153</sup> In short, the Commission appears to be arguing that Congress should direct the courts that they must follow the Commission’s prohibitions and restrictions on offender characteristics.

Because the Commission presents no actual evidence of any divergence of opinion among the courts regarding the relevance of offender characteristics or of any unwarranted disparity arising from consideration of offender characteristics, its real complaint appears to be that courts are consistently following Supreme Court law. Nor does the Commission present any data connecting consideration of offender characteristics to socioeconomic or any other demographic disparity. Its interpretation of the SRA as “requiring” it to proscribe and limit consideration of offender characteristics is unconvincing in light of the plain language of the SRA and the Commission’s systematic eradication of departures on a wide variety of grounds, including grounds not mentioned in any directive to the Commission. Even assuming there was any tension between directives to the Commission and directives to the courts, it is apparent from the Commission’s past and recent actions that it should not be permitted to dictate the relevance and weight that courts may give offender characteristics. These factors are too important in determining sentences that best protect the public without unnecessary cost and that provide rehabilitation in the most effective manner, and in ensuring that the guidelines are truly advisory and thus constitutional.

**A. The Commission’s report establishes that courts are in agreement that offender characteristics are relevant to the purposes of sentencing, and provides no evidence that their consideration results in unwarranted disparity**

The Commission’s report asserts that the Supreme Court “has not made clear whether the proscriptions and limitations imposed by Congress to which the Commission must adhere . . . also limit the courts’ consideration of offender characteristics under section 3553(a),”<sup>154</sup> and that the lower courts are “divided” on this question, without citation to a single case.<sup>155</sup> Even assuming that Congress did direct the Commission to proscribe and limit consideration of offender characteristics, the Supreme Court and every court of appeals that has addressed the question has held that

a directive to the Commission is not a directive to the courts.<sup>156</sup>

The report insists that judges disagree about the relevance of offender characteristics. But as it partially admits at the end of a footnote,<sup>157</sup> large majorities of district court judges view the offender characteristics that the Commission deems never or not ordinarily relevant to be ordinarily relevant, 76 percent do not rely on its policy statements because they do not adequately reflect reasons for sentences outside the guideline range, and 65 percent do not rely on them because they are too restrictive.<sup>158</sup> As the report acknowledges, probation officers believe that offender characteristics are relevant in assessing the risk of recidivism.<sup>159</sup>

Significantly, the Commission provides no sentencing data to support its claim of “divergent views” among “judges” regarding offender characteristics. Instead, the report says that a “review” of “current case law demonstrate[s] that judges weigh section 3553(a)(1) factors differently and have widely divergent views about the relevance of offender characteristics at sentencing.”<sup>160</sup> It contends that these different views cause “unwarranted disparity [to] become[] inevitable,”<sup>161</sup> and that this is the most significant reason that appellate review “has not promoted uniformity in sentencing.”<sup>162</sup>

The Commission’s review of case law consists entirely of an incorrect account of Eighth Circuit law, and proof that sentencing judges and courts of appeals give weight to offender characteristics “as required by § 3553(a),” while a handful of dissenting appellate judges and one dissenting justice would give “greater weight” to the Commission’s restrictions on offender characteristics.<sup>163</sup> Since dissenting views are not the law, this review demonstrates that courts are in agreement that offender characteristics are relevant to the purposes of sentencing and must be considered under the law.

In support of its assertion that “courts sometimes reach different conclusions” about whether offender characteristics should affect sentences because of a “lack of certainty” in this area,<sup>164</sup> the report begins by citing the Supreme Court’s approval of youthful age as a mitigating consideration in sentencing and reversal of the Eighth Circuit’s disapproval of that factor in *Gall*. It says that “[o]ther courts . . . have taken the view that a defendant’s status as a young adult cannot support a substantial downward departure.”<sup>165</sup> This may seem surprising in light of the fact that “other courts” must follow Supreme Court law, but the sole support for a “view” contrary to *Gall* is *United States v. Maloney*,<sup>166</sup> an Eighth Circuit decision reversing a variance based on youth that preceded *Gall*.<sup>167</sup>

The report omits from its discussion the later demise of *Maloney*. When the Eighth Circuit relied on *Maloney* to reverse a variance based on youth in another case, *United States v. Feemster*,<sup>168</sup> the Supreme Court granted the defendant’s petition for certiorari, vacated the judgment, and remanded for further consideration in light of *Gall*. When the panel declined to reconsider its decision,<sup>169</sup> the

en banc Eighth Circuit reversed, holding that “the district court’s justifications for imposing a [variance] rest on precisely the kind of defendant specific determinations that are within the special competence of sentencing courts, as the Supreme Court has repeatedly emphasized.”<sup>170</sup>

The report refers to the en banc *Feemster* decision as merely a case “subsequent” to *Maloney*, and fails to mention its holding abrogating *Maloney*. Instead, it describes the complaints of two concurring judges about age as a mitigating factor.<sup>171</sup> But those views are not the law. The report also neglects to mention that the Eighth Circuit, after the Supreme Court vacated another case in light of *Gall*, reversed a district court because it improperly denied a request for variance based on age by using the departure standard.<sup>172</sup> Thus, neither the Eighth Circuit nor any other court of appeals<sup>173</sup> holds the “view” that age “cannot support a substantial downward variance.”<sup>174</sup>

The report next asserts that “judges have expressed disparate views . . . on how to account for a defendant’s positive employment history . . . as required by § 3553(a) . . . making sentencing outcomes less certain.”<sup>175</sup> In support, the Commission cites Justice Alito’s dissent in *Gall*, a dissent in the Third Circuit’s en banc decision in *United States v. Tomko*,<sup>176</sup> and a dissent from the Ninth Circuit’s denial of rehearing en banc in *United States v. Whitehead*.<sup>177</sup> Since dissenting opinions are not the law with which judges comply, this does not demonstrate that disparity results from divergent views. The Supreme Court has decided that offender characteristics are relevant and must be considered by sentencing judges. Appellate courts and sentencing judges follow that law. There is no uncertainty.

The report quotes dissenting opinions complaining that a good employment record is common to white collar offenders,<sup>178</sup> asserts that education and employment record “may be associated with socio economic status, a forbidden factor under section 994(e),”<sup>179</sup> and implies that “individual offender characteristics” are the cause of “widening demographic disparities.”<sup>180</sup> These statements are not supported by any data. Moreover, the idea seems to be that the poor and racial minorities do not have mitigating characteristics, or have them less frequently than others, and it would therefore be unfair for judges to consider anyone’s mitigating characteristics, including those of the poor and racial minorities. This idea relies on false stereotypes, and turns fairness on its head.

If circumstances could be considered only if they appeared equally in all demographic groups, virtually no aggravating factor in the Guidelines Manual could be considered. The Commission cannot credibly accept the proven disparate impact on the poor and racial minorities of heavily weighted aggravating factors such as criminal history score and drug type and quantity while simultaneously decrying an alleged disparate impact of offender characteristics that are clearly relevant to the purposes of sentencing and that judges have used to

mitigate excessively harsh punishment in deserving cases.

Whether consideration of any factor creates a warranted or unwarranted difference in sentencing depends on whether consideration of the factor advances the purposes of sentencing. The Supreme Court has made this abundantly clear,<sup>181</sup> and so has the Commission.<sup>182</sup> Empirical evidence establishes that offender characteristics are highly relevant to the purposes of sentencing. For example, having or obtaining education or job skills, holding a job, maintaining family ties, acting responsibly toward dependents, and receiving treatment reduce the risk of recidivism and thus the need for incapacitation to protect the public from further crimes of the defendant and the need to provide rehabilitation in the most effective manner.<sup>183</sup> Conversely, unnecessarily lengthy imprisonment increases the risk of recidivism by disrupting employment, reducing prospects of future employment, weakening family ties, and exposing less serious offenders to more serious offenders.<sup>184</sup>

In our experience, defendants of all races and backgrounds have mitigating characteristics that are relevant to the purposes of sentencing, and judges take them into account. Moreover, contrary to the suggestion in the report, sentencing judges know very well how to fairly judge the import of offender characteristics, including whether they are mitigating or aggravating. For example, in *United States v. Moreland*, the judge varied from a career offender guideline range of 360 months to life, to the mandatory minimum of ten years, where the entire amount of drugs involved in his instant and prior convictions “would rattle around in a matchbox.” Moreland had not “demonstrated the pattern of recidivism or violence that would justify disposal to prison for a period of 30 years to life.” He had “demonstrated that he has the ability and potential to become a productive member of society,” by graduating from high school, going on to community college, working at several jobs, returning to school to take computer courses, and continuing his educational achievements while incarcerated. The judge therefore found that he had an “excellent chance of turning his life around,” and declined to “destroy[] all hope and take[] away all possibility of useful life,” as the guideline recommended.<sup>185</sup>

In *United States v. Shull*, the judge varied downward from a range of 78 to 97 months to the mandatory minimum of 60 months, taking into account that Shull, who was a passenger in a car in which crack was found, was “another drug user without an education or a job who started selling drugs,” and had since obtained his GED, completed courses and obtained certifications in several trades, and was enrolled in college taking business classes.<sup>186</sup> In *United States v. Hernandez*, the judge sentenced Hernandez to 405 months’ imprisonment, but the Second Circuit reversed; the judge should have considered that Hernandez was once a young drug addict who had had a difficult childhood, but that during his twenty years of imprisonment since he was first sentenced, had succeeded at numerous vocational and educational efforts, including

earning an associate degree with honors and a diploma for financial planning, had tutored other inmates, and received positive performance reports for work in a variety of prison jobs.<sup>187</sup>

In *United States v. Munoz Nava*, the judge varied downward from a range of 46 to 57 months to one year and a day in prison, appropriately considering that Munoz Nava had a long and consistent work history, was the primary caretaker and sole financial support of his eight year old son and his ailing, elderly parents, his brief stint smuggling drugs in the soles of his boots was “highly out of character,” and he was “committed to supporting his family by returning to his pattern of working hard at a legitimate job.”<sup>188</sup> In *United States v. Davis*, the court varied downward from a range of 18 to 24 months’ imprisonment to time served, 200 hours of community service, and three years’ supervised release, considering that further imprisonment would be “disastrous” to Davis’ six young children and wife of fifteen years, who had together “worked night and day” to provide for their family and move them out of a homeless shelter, and who, though unemployed after an injury that required surgery and regular physical therapy, supplemented the family’s public assistance funds by working as a barber from home while devoting himself to the health and education of his children and working toward a college degree in radiology when he made the “foolish mistake” of selling a gun due to financial hardship.<sup>189</sup>

In other circumstances, judges decline to consider a defendant’s education or employment as mitigating, and instead consider it as aggravating, in light of all the circumstances. For example, in *United States v. Wyrick*, the Tenth Circuit affirmed an upward departure based in part on the fact that the defendant used his employment position to make telephone calls in which he threatened to kill a law enforcement officer and her family.<sup>190</sup> In *United States v. Rios*, the Third Circuit affirmed an upward variance based in part on the fact that the defendant used his position as a licensed chiropractor to write false reports of injuries as part of an insurance fraud scheme involving the staging of fraudulent car accidents.<sup>191</sup> In *United States v. Guerra*, the Fifth Circuit affirmed an upward departure in which the judge considered that the defendant “remorsefully us[ed] his position as police chief to facilitate and encourage drug trafficking.”<sup>192</sup> In *United States v. Singleton*, the district court denied the defendant’s request for a variance, which was based on the defendant’s good works, including his employment in public service, because the defendant, who “had the benefit of education and a masters degree, [and] was a role model in the community helping the unfortunate, [ ] yet, while employed with an agency entrusted to aid the poor of the community, [ ] used his position to steal the money designated for the needy.”<sup>193</sup>

In sum, the Commission has presented no evidence of a division in the law or among the courts regarding offender characteristics, or of any unwarranted disparity arising from consideration of offender characteristics.

## **B. The Commission’s proscriptions and limitations on mitigating offender characteristics and other grounds for departure throughout the years were not necessitated by the SRA**

The report asserts that the Supreme Court’s “emphasis on the history and characteristics of the defendant is not easily reconciled with” what it calls “the SRA’s proscriptions and limitations on offender characteristics.”<sup>194</sup> It asserts that 28 U.S.C. § 994(d) and (e) “require” it “to restrict the manner in which certain offender characteristics can be considered in the guidelines,” and “[a]ccordingly,” it adopted policy statements “limiting the relevance” of and deeming “not ordinarily relevant” the mitigating offender characteristics listed in § 994(d) and (e) for purposes of “determin[ing] whether a sentence should be outside the applicable guideline range.”<sup>195</sup>

The Commission’s interpretation of 28 U.S.C. § 994(d) and (e) as “requiring” it to proscribe and limit consideration of offender characteristics not only by omitting these factors from the guideline rules but by placing them off limits for purposes of sentencing outside the guideline range is not supported by the statutory text and legislative history.

The SRA directed the Commission, in establishing categories of offenders in the guidelines and policy statements governing the type (i.e., probation, fine, or imprisonment), length, and conditions of sentences, to consider the relevance of twelve offender characteristics: age, education, vocational skills, mental and emotional condition, physical condition, drug dependence, employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence on criminal activity for a livelihood.<sup>196</sup> As with the offense circumstances listed in § 994(c), Congress considered all twelve offender characteristics listed in § 994(d) to be relevant to the kind, length, and conditions of sentences to be recommended by the Commission. While § 994(d) directs the Commission to take these twelve factors into account in recommending the type, length, and conditions of sentences “only to the extent they do have relevance,” it does not authorize, much less require, the Commission to limit their relevance as grounds for a sentence of a different kind or length than recommended by the applicable guideline range.

The twelve factors listed in § 994(d) that Congress believed to be relevant include the five factors listed in § 994(e). With respect to those factors, Congress directed the Commission to “assure that the guidelines and policy statements, *in recommending a term of imprisonment or length of a term of imprisonment*, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”<sup>197</sup> The Senate Report explained: “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,”<sup>198</sup> but “each of these factors may play other roles in the sentencing decision.”<sup>199</sup> Congress gave several examples suggesting how the Commission might



recommend that these and other offender characteristics be used to mitigate sentences.<sup>200</sup>

Thus, § 994(e) means that it would be “generally inappropriate” for the Commission to recommend a prison sentence over probation or a longer prison term based on a defendant’s lack of education, employment, or stabilizing ties. This interpretation is confirmed by related and complementary provisions of the SRA. Section 994(e) is one of three provisions in the SRA reflecting Congress’s judgment that prison is not an effective means of rehabilitation and that the disadvantaged should not be incarcerated on the theory that prison might be rehabilitative.<sup>201</sup> Interpreting the other two provisions, 28 U.S.C. § 994(k) and 18 U.S.C. § 3582(a), the Supreme Court explained:

Section 994(k) bars the Commission from recommending a “term of imprisonment” a phrase that again refers both to the fact and to the length of incarceration based on a defendant’s rehabilitative needs. And § 3582(a) prohibits a court from considering those needs to impose or lengthen a period of confinement when selecting a sentence from within, or choosing to depart from, the Guidelines range.<sup>202</sup>

Congress also recognized that it was not possible to write all relevant factors into general rules, and that some variation was “not only inevitable but desirable.”<sup>203</sup> It therefore directed the Commission to “maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors *not* taken into account” in the guidelines.<sup>204</sup> Congress directed judges in § 3553(a)(1) to consider “the nature and circumstances of the offense and the history and characteristics of the defendant.” The Senate Report stated:

All of these considerations [set forth in § 3553(a)(1)] and others the judge believed to be appropriate would . . . help the judge to determine whether there were circumstances or factors that were not taken into account in the sentencing guidelines and that call for the imposition of a sentence outside the applicable guideline.<sup>205</sup>

Congress further directed: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”<sup>206</sup>

In sum, the SRA merely directs both the Commission and the courts that lack of education, vocational skills, or stabilizing ties may not be used to recommend (in the case of the Commission)<sup>207</sup> or to choose (in the case of the courts)<sup>208</sup> prison over probation or a longer prison term.

Thus, the Commission could have included offender characteristics in the guidelines or encouraged them as grounds for departure. The reason it didn’t appears to be the product of its own philosophy rather than any requirement in 28 U.S.C. § 994(d) or (e). Indeed, it did not limit its disapproval to the offender characteristics listed in those

provisions. For example, the policy statements prohibit departures based on gambling addiction, lack of guidance as a youth, disadvantaged upbringing, personal financial difficulties, economic pressures on a business, and until recently, post sentencing rehabilitation and physique, none of which is listed in § 994(d) or (e).

Moreover, the Commission did not rely on § 994(e) as the reason for policy statements deeming education, vocational skills, employment record, family ties and responsibilities, and community ties “not ordinarily relevant” when it promulgated them in 1987. Nor did then Commissioner Breyer remotely suggest that § 994(d) or (e) required the Commission to proscribe or limit consideration of offender characteristics. Rather, he explained that the Commission had omitted most of the factors “which Congress suggested that the Commission should, but was not required to, consider,” as a “‘trade off[]’ among Commissioners with different viewpoints.”<sup>209</sup> The Commission amended the introductory commentary to Chapter 5H in 1990 to state for the first time that certain policy statements were “required” by § 994(e).<sup>210</sup>

### **C. Even if the Commission’s interpretation were correct, Congress should not direct the courts to follow it**

It is evident that the Commission is asking Congress to “reconcile” the Commission’s interpretation of 28 U.S.C. § 994(d) and (e) with the Supreme Court’s interpretation of 18 U.S.C. § 3553(a) and § 3661 by enacting a directive to the courts to follow the Commission’s policy of disapproving consideration of offender characteristics. Even if that policy was required by 28 U.S.C. § 994(d) and (e), a statute requiring sentencing courts to follow it would make the guidelines mandatory in a great many cases and violate Supreme Court law. That intent is apparent in commentary issued by the Commission in 2010, contrary to multiple Supreme Court decisions, declaring that even though courts must now consider the history and characteristics of the defendant, their “most appropriate use . . . is to consider them not as a reason for a sentence outside the guideline range but for . . . determining the sentence within the applicable guideline range” and “the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table.”<sup>211</sup> The Commission has consistently refused to recognize the relevance of offender characteristics. But as all available research shows, these factors are critically important in determining sentences that best protect the public without unnecessary cost, and that provide rehabilitation in the most effective manner.

## **VII. The Commission’s Proposals Have No Evident Benefit**

### **A. The proposals are contrary to empirical research**

The Commission says that the “second step, which requires consideration of departure policy statements, is often

overlooked by parties and courts,” and this “deprives the courts from benefitting from the Commission’s expertise provided in the departure provisions.”<sup>212</sup> The policy statements, which are unexplained, are directly contrary to empirical research, including the Commission’s own research.<sup>213</sup> Of all sentences below the guideline range imposed without a government motion, over 80 percent are not based on a departure in whole or in part.<sup>214</sup> That is because the vast majority of judges correctly believe that the factors the Commission’s policy statements deem never or “not ordinarily relevant” are in fact relevant.<sup>215</sup>

### **B. The proposals would result in unwarranted uniformity and unwarranted disparity**

The Commission states that codification of its three step guideline “would promote uniformity” and “may reduce unwarranted disparity.”<sup>216</sup> In fact, it would strongly encourage, if not require, judges to treat unlike offenders alike, thus promoting unwarranted uniformity and unwarranted disparity as the Commission itself has defined it: “Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing.”<sup>217</sup>

The report also appears to complain that judges follow ing Supreme Court law sentence offenders outside the guideline range based on characteristics that “are often present in the typical case.”<sup>218</sup> But the Commission’s “atypicality” departure standard has been invalidated and replaced with § 3553(a). Moreover, if mitigating offender characteristics are present in the typical case, they should be considered no less than aggravating factors that are present in the typical case, such as drug quantity and criminal history. Mitigating offender characteristics are at least as relevant to sentencing purposes, as shown by significant research including the Commission’s own research,<sup>219</sup> and as the courts well know.<sup>220</sup>

### **C. The proposals would not result in better feedback, but instead would stifle it**

The Commission claims that when the courts “overlook” the policy statements, it “diminishes the quality of the feedback from the courts to the Commission regarding offense severity, consideration of offender characteristics, and other aspects of the guidelines.”<sup>221</sup> It is difficult to see how a failure to consider policy statements that tell judges they should not depart based on offender characteristics,<sup>222</sup> could diminish the quality of feedback from the courts to the Commission regarding offender characteristics. Only two departure provisions can be fairly described as inviting judges to inform the Commission that a particular guideline is generally too severe: the one encouraging downward departure when loss overstates the seriousness of the offense in fraud cases, and the one encouraging downward departure when criminal history category overstates the seriousness of the defendant’s criminal history or the risk

that he will reoffend.<sup>223</sup> There is no similar policy statement for any other guideline.

Variations, on the other hand, are well suited to provide feedback to the Commission, as the Supreme Court has repeatedly emphasized. Courts grant variances when “the Guidelines sentence itself fails properly to reflect § 3553(a) considerations,” “the Guidelines reflect an unsound judgment,” or “they do not generally treat certain defendant characteristics in the proper way,”<sup>224</sup> or the guideline itself fails adequately to reflect the purposes of sentencing even in a mine run case,<sup>225</sup> and the precise extent to which it fails to do so.<sup>226</sup>

The problem is that the Commission has not made a serious effort to collect this feedback. It states that it “finds that as courts increasingly rely on the broad section 3553(a) factors without providing the same level of specificity as required by departure provisions, its ability to discern and respond to specific areas of concern to the courts is hindered and transparency is lessened.”<sup>227</sup> The statement of reasons form, which the Commission designed, is the only source of feedback it collects.<sup>228</sup> Although it revised the form after *Booker*, it is designed to emphasize the guidelines and policy statements and to de-emphasize § 3553(a). It begins with a multitude of check boxes corresponding to “departures authorized by the advisory sentencing guidelines.” These checkboxes do not, as the Commission asserts, invite the courts to provide any “level of specificity” through departures; rather, they invite a check mark. The form then provides one check box for each broad paragraph of § 3553(a) and a small space for “*facts* justifying a sentence *outside the advisory system*.”

The problem is not the courts’ purported reliance on “broad section 3553(a) factors” when they vary, but a form that lists each broad paragraph of § 3553(a) with a checkbox. By failing to ask or provide adequate space for courts to identify and explain grounds for variances relating to the guidelines themselves, the form “has discouraged rather than captured specific feedback about problems with the guidelines.”<sup>229</sup> Almost seven years after *Rita* first invited courts to vary based on a conclusion that the guideline itself reflects an unsound judgment, the Commission does not know in how many cases or why judges vary on that basis from any particular guideline because it doesn’t ask.

If the Commission wants to consider feedback from the courts, it should revise the statement of reasons form to invite answers to pertinent questions.

## **VIII. Conclusion**

The Commission’s report evidences disrespect for the Supreme Court’s teachings and the ability of experienced district court judges to apply them. It advances an empirically invalid view that guideline ranges, even though they largely do not account for mitigating characteristics of the defendant or mitigating circumstances of the offense, are the best measure of just punishment, the need for incapacitation, and the need for rehabilitation in the most effective manner in nearly every case. The Commission

could be of great help at this juncture by reducing guideline penalties that are obviously too severe and disseminating useful research on the relevance of mitigating factors. Instead, the Commission's indifference to the law, the opinions of others, and the idea that judges honestly try to do their best results in recommendations that would invite a return to an unjust and wasteful sentencing regime, and years of costly litigation. These recommendations should be emphatically rejected.

## Notes

- \* We thank Denise Barrett and Jennifer Niles Coffin for their helpful contributions to this article.
- 1 U.S. Sentencing Comm'n, Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing (2013).
  - 2 543 U.S. 220 (2005).
  - 3 See *United States v. Leitch*, Nos. 11 CR 00609 (JG), 11 CR 00457 (JG), 11 CR 00039 (JG), slip op., 2013 WL 753445, at \*1 (E.D.N.Y. Feb. 28, 2013).
  - 4 Press Release, Senator Patrick Leahy, Bipartisan Legislation to Give Judges More Flexibility for Federal Sentences Imposed (Mar. 20, 2013), <http://www.leahy.senate.gov/press/bipartisan-legislation-to-give-judges-more-flexibility-for-federal-sentences-introduced> (quoting statements of Senators Leahy and Paul).
  - 5 Attorney General Eric Holder, Attorney General Eric Holder Speaks at the 15th Annual National Action Network Convention, New York (Apr. 4, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130404.html>.
  - 6 See, e.g., Transcript of Public Hearing Before the U.S. Sentencing Comm'n on Federal Sentencing Options after *Booker*, Washington, D.C., at 94-95 (Feb. 16, 2012) (statement of Comm'r Friedrich) [hereinafter Transcript of Public Hearing on Sentencing Options]; *id.* at 166-67 (statement of J. Howell); *id.* at 62 (statement of J. Barbadoro); *id.* at 88-89, 95 (statement of Associate Deputy Att'y Gen. Matthew Axelrod); *id.* at 107-09, 167-69 (statement of Professor Klein); *id.* at 169-71 (statement of J. Lynch); *id.* at 171 (statement of J. Davis); *id.* at 116-20, 171-73 (statement of Federal Defender Henry Bemporad); *id.* at 363-72 (statement of David Debold, Chair, Practitioners' Advisory Group); *id.* at 380-93 (statement of James Felman, American Bar Association); Statement of Chief United States Circuit Judge Theodore McKee on Behalf of the Judicial Conference Before the U.S. Sentencing Comm'n, Public Hearing on Federal Sentencing Options after *Booker*, Washington, D.C., at 6-19 (Feb. 16, 2012). *But see* Transcript of Public Hearing on Sentencing Options, *supra*, at 174 (Matthew Miner acknowledging constitutional concerns but urging the Commission to "take some risks.").
  - 7 See Transcript of Public Hearing on Sentencing Options, *supra* note 6, at 154-56 ("I'd be surprised if a rational Congress would seriously do that.") (remarks of J. Lynch); *id.* at 108, 141, 152-53 (explaining that it would raise a separation of powers problem if Congress told judges they could not consider matters important to judging) (remarks of Professor Klein); *id.* at 156 (opining that a pure "just deserts system" would lead the Court to change its selective prosecution doctrine) (remarks of J. Davis); *id.* at 157-58 (such a system would leave "only the guidelines standing" and thus "raise Sixth Amendment issues") (remarks of Henry Bemporad). See also Henry J. Bemporad, Fed. Pub. Defender for the W. Dist. of Tex., Statement Before the U.S. Sentencing Comm'n, Public Hearing on Federal Sentencing Options after *Booker*, Washington, D.C., at 4-10 (Feb. 16, 2012); Raymond Moore, Fed. Pub. Defender for the Dists. of Colo. and Wyo., Statement Before the U.S. Sentencing Comm'n, Public Hearing on Federal Sentencing Options after *Booker*, Washington, D.C., at 20-25 (Feb. 16, 2012); Susan R. Klein, Professor, Univ. of Tex., Statement Before the U.S. Sentencing Comm'n, Public Hearing on Federal Sentencing Options after *Booker*, Washington, D.C., at 9-11 (Feb. 16, 2012); David Debold, Chair, Practitioners Advisory Grp., Statement Before the U.S. Sentencing Comm'n, Public Hearing on Federal Sentencing Options after *Booker*, Washington, D.C., at 8-9 (Feb. 16, 2012); Lisa Wayne, President, Nat'l Ass'n of Criminal Def. Lawyers, Statement Before the U.S. Sentencing Comm'n, Public Hearing on Federal Sentencing Options after *Booker*, Washington, D.C., at 6-7 (Feb. 16, 2012); Michael Tonry, Professor of Law and Public Policy, U. of Minn., Statement Before the U.S. Sentencing Comm'n, Public Hearing on Federal Sentencing Options after *Booker*, Washington, D.C., at 1 (Feb. 16, 2012).
  - 8 Paul J. Barbadoro, U.S. District Court Judge, Statement on Behalf of the Judicial Conference Committee on Criminal Law Before the U.S. Sentencing Comm'n, Public Hearing on Federal Sentencing Options after *Booker*, Washington, D.C., at 2 (Feb. 16, 2012).
  - 9 See Theodore McKee, Chief U.S. Circuit Judge, Statement on Behalf of the Judicial Conference Committee on Criminal Law Before the U.S. Sentencing Comm'n, Public Hearing on Federal Sentencing Options after *Booker*, Washington, D.C., at 11-12, 21 (Feb. 16, 2012); Paul J. Barbadoro, U.S. District Court Judge, Statement on Behalf of the Judicial Conference Committee on Criminal Law Before the U.S. Sentencing Comm'n, Public Hearing on Federal Sentencing Options after *Booker*, Washington, D.C., at 2, 6-7 (Feb. 16, 2012); Transcript of Public Hearing on Sentencing Options, *supra* note 6, at 111-13 (remarks of J. Davis).
  - 10 The Commission asserts that the "continued importance and influence of the guidelines is evident" from data showing that (1) "the overwhelming majority of offenders 80.7 percent" after *Gall* "still received a sentence either within the guideline range or for a reason sponsored by the government," (2) the average extent of judge initiated reductions is the same as it has been since at least 1996, and (3) "most federal offenders have continued to receive substantial sentences of imprisonment." U.S. Sentencing Comm'n, *supra* note 1, Part A, at 4-7, 62, 111.
  - 11 *Id.* at 111.
  - 12 See U.S. Sentencing Comm'n, 2010 Sourcebook of Federal Sentencing Statistics, tbl.N (2010); U.S. Sentencing Comm'n, 2011 Sourcebook of Federal Sentencing Statistics, tbl.N (2011); U.S. Sentencing Comm'n, 2012 Preliminary Quarterly Data Report, Fourth Quarter Release, tbl.1 (2012).
  - 13 See Amy Baron Evans & Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1641-57, 1664-67 (2012).
  - 14 U.S. Sentencing Comm'n, *supra* note 1, Part A, at 20.
  - 15 The Commission collected no data on offender characteristics other than drug use, and no data on mitigating factors about the offense other than role in the offense. All other factors whose impact was estimated were aggravating factors about the crime. See U.S. Sentencing Comm'n, Supplementary Report On the Initial Sentencing Guidelines and Policy Statements 27-39 (1987) (tables listing factors); *id.* at 18 n.59 ("not all relevant data items were requested and coded"); *id.* at 22-23 n.64 (acknowledging that a "factor's relative importance for sentencing" was estimated only for factors related to the offense).
  - 16 See *Williams v. New York*, 337 U.S. 241, 247 (1949) (the "fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant if not essential" to sentencing, because "the punishment should fit the offender and not merely the crime."); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which*

- They Rest*, 17 Hofstra L. Rev. 1, 18 19 (1988) [hereinafter Breyer, *Key Compromises*]; Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heartland: The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723, 757 (1999).
- <sup>17</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 20.
- <sup>18</sup> See Breyer, *Key Compromises*, *supra* note 16, at 19 & n.96; Peter B. Hoffman & James L. Beck, *Parole Decision Making: A Salient Factor Score*, 2 J. Crim. Just. 195, 198 99 (1974) (describing the construction and validation of the original salient factor score, which included age, employment history, education, living with family as mitigating factors). In 1977, the factor of "living arrangements" though showing "good predictive power" was replaced by an equally predictive factor because it was "difficult to score reliably." See Paroling, Reccommitting, and Supervising Federal Prisoners, 42 Fed. Reg. 12,043, 12,403 (Mar. 2, 1977) (revising the Salient Factor Score to be codified at 28 C.F.R. § 2.20 (1977)). Education was similarly replaced, because it "appeared to substantially overlap with other items." *Id.* The Parole Commission also said that perceptions of fairness militated in favor of a salient factor score that focuses on circumstances within the defendant's control, "leav[ing] to the informed judgment of the decision maker those factors which the Commission feels are better weighed in the individual context." *Id.* at 12,044. Employment was removed from the score in 1981 because it was difficult to score reliably, though it "ha[d] shown considerable predictive power." Peter B. Hoffman, *Screening for Risk: A Revised Salient Factor Score (SFS 81)*, 11 J. Crim. Just. 539, 545 n.10 (1983); see Paroling, Reccommitting, and Supervising Federal Prisoners, 45 Fed. Reg. 81,212 (Dec. 10, 1980) (proposing revision); Paroling, Reccommitting, and Supervising Federal Prisoners, 46 Fed. Reg. 35,637 (July 10, 1981) (final rule revising the Salient Factor Score to be codified at 28 C.F.R. § 2.20 (1981)).
- <sup>19</sup> See, e.g., 28 C.F.R. § 2.24(e) (1973); 28 C.F.R. § 2.19(e) (1975).
- <sup>20</sup> See 28 C.F.R. § 2.20 (1973); Hoffman, *Screening for Risk*, *supra* note 18, at 545 n.10.
- <sup>21</sup> Breyer, *Key Compromises*, *supra* note 16, at 19 20.
- <sup>22</sup> Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180, 182 (1999) [hereinafter Breyer, *Guidelines Revisited*].
- <sup>23</sup> For example, in *United States v. Lara*, the Second Circuit upheld a departure based on the defendant's "diminutive size [and] immature appearance," after he was sexually victimized and subsequently placed in solitary confinement for his protection. 905 F.2d 599, 601 02 (2d Cir. 1990). The Commission responded by issuing an amended policy statement asserting that "[p]hysical appearance, including physique, is not ordinarily relevant" in deciding whether to depart. U.S.S.G. § 5H1.4 (1991). In response to a ruling in *United States v. Floyd* that a disadvantaged childhood could justify a downward departure, 945 F.2d 1096, 1099 1100 (9th Cir. 1991), the Commission issued a policy statement asserting that a defendant's "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds" for departure. U.S.S.G. § 5H1.12 (1992). The Commission also prohibited departure based on post sentencing rehabilitation, U.S.S.G. § 5K2.19 (2000), and in doing so, overruled seven courts of appeals. See *United States v. Bradstreet*, 207 F.3d 76, 82 (1st Cir. 2000); *United States v. Rudolph*, 190 F.3d 720, 722 (6th Cir. 1999); *United States v. Roberts*, No. 98 8037, 1999 WL 13073, at \*6 7 (10th Cir. Jan. 14, 1999); *United States v. Green*, 152 F.3d 1202, 1207 (9th Cir. 1998); *United States v. Rhodes*, 145 F.3d 1375, 1379 (D.C. Cir. 1998); *United States v. Core*, 125 F.3d 74, 77 (2d Cir. 1997); *United States v. Sally*, 116 F.3d 76, 79 (3d Cir. 1997). Additionally, employment related contributions, prior good works, and military, civic, charitable, and public service were all deemed "not ordinarily relevant," U.S.S.G. § 5H1.11 (1991), also in "response to court decisions," which held those factors relevant. U.S. Sentencing Comm'n, Simplification Draft Paper: Departures and Offender Characteristics (Nov. 1996), available at <http://www.uscc.gov/Research/Working Group Reports/Simplification/DEPART.HTM>.
- <sup>24</sup> See *In re Sealed Case*, 292 F.3d 913, 914 16 (D.C. Cir. 2002); *United States v. Canales*, 91 F.3d 363, 369 70 (2d Cir. 1996); *United States v. Lewis*, 90 F.3d 302, 304 06 (8th Cir. 1996); *United States v. Fike*, 82 F.3d 1315, 1326 (5th Cir. 1996).
- <sup>25</sup> U.S.S.G. 5K2.0, cmt. (backg'd) (2003).
- <sup>26</sup> Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, Pub. L. No. 108 21, § 401(m) (2003).
- <sup>27</sup> 518 U.S. 81 (1996).
- <sup>28</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 23 24.
- <sup>29</sup> From the early 1990s until 2003, the Commission had reported a large and growing number of government sponsored departures in the same category with judge initiated departures, and had identified only substantial assistance departures as government sponsored. See, e.g., U.S. Sentencing Comm'n, 2002 Sourcebook of Federal Sentencing Statistics tbl.26 (2002). After receiving comments from the Judicial Conference expressing concern that the Commission's "approach to reporting the data has resulted in confusion, misinformation, and misuse by some who mistakenly infer that all 'other downward' departures are attributable to judges" and "may have prompted the enactment of the PROTECT Act," the U.S. Government Accountability Office reported that the Commission's "data are not recorded, coded, or reported in ways that clearly delineate other downward departures due to judicial discretion from those due to prosecutorial discretion" and that the Commission's "other" departure category, which had been "generally thought to represent judicial discretion," included a significant proportion of government sponsored departures, and suggested that changes to the way the Commission reports "other" departures would be beneficial. U.S. Gov't Accountability Office, gao 04 105, Federal Drug Offenses: Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999 2001, at 4, 11, 22 23, 24, 26, 64, app. IV at 67, app. VI at 78 79 (2003).
- <sup>30</sup> See U.S. Sentencing Comm'n, Downward Departures from the Federal Sentencing Guidelines 53 65 (2003).
- <sup>31</sup> 543 U.S. 220 (2005).
- <sup>32</sup> *Id.* at 234.
- <sup>33</sup> Prohibited grounds for a departure include gambling addiction; lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing; personal financial difficulties; economic pressures on a trade or business; diminished capacity if caused by the voluntary use of drugs or other intoxicants or if the defendant was convicted of a sex offense; fulfillment of restitution obligations as required by law; acceptance of responsibility; role in the offense; and decision to plead guilty. U.S.S.G. §§ 5H1.4, 5H1.7, 5H1.12, 5K2.12, 5K2.13, 5K2.0(d) (2012). Factors deemed "not ordinarily relevant" include education and vocational skills; employment record; drug or alcohol dependence or abuse; family ties and responsibilities; civic, charitable, or public service; employment related contributions; and prior good works. U.S.S.G. §§ 5H1.2, 5H1.4, 5H1.5, 5H1.6, 5H1.11 (2012). Age, mental and emotional condition, physical condition, physique, and military service "may be relevant," but only if the factor is "present to an unusual degree and distinguish[es] the case from the typical cases covered by the guidelines," the same standard for characteristics deemed "not ordinarily relevant." U.S.S.G. §§ 5h1.1, 5h1.3, 5h1.4, 5h1.11 (2012).
- <sup>34</sup> *Rita v. United States*, 551 U.S. 338, 344 (2007) (first emphasis added, second emphasis in original).

- 35 Irizarry v. United States, 553 U.S. 708, 714 (2008).  
 36 *Id.* at 714 15.  
 37 *Rita*, 551 U.S. at 351, 357.  
 38 552 U.S. 38 (2007).  
 39 *Id.* at 47, 53 60; *see also id.* at 68 (Alito, J., dissenting).  
 40 131 S. Ct. 1229 (2011).  
 41 *Id.* at 1242 43.  
 42 *Id.* at 1249 50.  
 43 Kimbrough v. United States, 552 U.S. 85 (2007).  
 44 Pepper v. United States, 131 S. Ct. 1229, 1247 (2011).  
 45 U.S.S.G. app. C, amend. 768 (Nov. 1, 2012).  
 46 *Pepper*, 131 S. Ct. at 1247.  
 47 *See, e.g.*, Comment of Philip Miller, Chief U.S. Probation Officer, E. Dist. of Mich. 3 4 (2010); Letter from Probation Officers Advisory Grp. to Hon. William K. Sessions, III, Chair, U.S. Sentencing Comm'n 3 (Feb. 3, 2010); Letter from Jon Conyers, Jr., Chair, H. Comm. on the Judiciary, and Robert C. "Bobby" Scott, Chair, H. Subcomm. on Crime, Terrorism, & Homeland Sec., to Hon. William K. Sessions III, Chair, U.S. Sentencing Comm'n 2 3 (Apr. 6, 2010); Margy Meyers & Marianne Mariano, Fed. Pub. & Cmty. Defenders, Statement Before the U.S. Sentencing Comm'n 19, 43 80 (Mar. 17, 2010); Letter from Practitioners Advisory Grp. to Hon. William K. Sessions, III, Chair, U.S. Sentencing Comm'n 6 10 (Mar. 22, 2010); Letter from Carissa Byrne Hessick, Assoc. Professor, Ariz. State Univ., to the U.S. Sentencing Comm'n 1 5 (Mar. 17, 2010).  
 48 Compare U.S.S.G. §§ 5h1.1, 5h1.3, 5h1.4, 5h1.11 (2012) with U.S.S.G. §§ 5H1.1, 5H1.3, 5H1.4, 5H1.11 (2001). *See also* U.S.S.G. app. C, amend. 739 (Nov. 1, 2010).  
 49 *See* U.S.S.G. § 5K2.0(a)(4) (2012) (circumstances deemed "not ordinarily relevant" may be considered "only if . . . present to an exceptional degree"); U.S.S.G. § 5K2.0 (2001) ("[A]n offender characteristic or other circumstance that is, in the Commission's view, 'not ordinarily relevant' . . . may be relevant . . . if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines." ).  
 50 Compare U.S.S.G. § 5H1.4 (2012) with U.S.S.G. § 5H1.4 (2001). *See also* U.S.S.G. app. C, amend. 739 (Nov. 1, 2010).  
 51 U.S.S.G. app. C, amend. 739 (Nov. 1, 2010); U.S.S.G. ch. 5, pt. H, intro. cmt. (2012).  
 52 U.S.S.G. § 1B1.1 (2012).  
 53 U.S. Sentencing Comm'n, *supra* note 1, Part A, at 114.  
 54 *Id.*  
 55 *Id.*  
 56 *Id.*  
 57 *Id.* at 29.  
 58 *Id.* at 42, 114. Efforts to clarify whether the Commission is proposing that the policy statements be given "substantial weight" have not been entirely successful. The only answer we have received is that it depends on how Congress would reconcile the Commission's interpretation of directives to the Commission in 28 U.S.C. § 994 with the courts' interpretation of directives to the courts in 18 U.S.C. § 3553(a) regarding offender characteristics. This is not a complete answer first, because the policy statements restrict departures on grounds not listed in any directive to the Commission and on grounds that are not offender characteristics, and second, because it does not answer what weight the Commission would seek for its policy statements if Congress disagreed with the Commission's interpretation of directives to it and/or declined to instruct courts to follow that interpretation.  
 59 U.S. Sentencing Comm'n, *supra* note 1, Part A, at 113.  
 60 *See id.* at 3 4, 9, 32 33, 107, 111, 113 14.  
 61 *See* Henry J. Bemporad, Fed. Pub. Defender for the W. Dist. of Tex., Statement Before the U.S. Sentencing Comm'n, Public Hearing on Federal Sentencing Options after *Booker*, Washington, D.C., Appendix at 34 (Question 4) (Feb. 16, 2012), [http://www.fd.org/docs/select\\_topics\\_sentencing/bemporad\\_statement\\_2\\_16\\_12.pdf](http://www.fd.org/docs/select_topics_sentencing/bemporad_statement_2_16_12.pdf).  
 62 U.S. Sentencing Comm'n, *supra* note 1, Part A, at 113.  
 63 *See Booker*, 543 U.S. at 234.  
 64 *Cf. Setser v. United States*, 132 S. Ct. 1463, 1471 72 (2012) (noting that "our tradition of judicial sentencing" is accompanied by the "desideratum that sentencing [is] not [to] be left to employees of the same Department of Justice that conducts the prosecution").  
 65 U.S. Sentencing Comm'n, *supra* note 1, Part A, at 29.  
 66 *See Irizarry v. United States*, 553 U.S. 708, 714 15 (2008); *Rita v. United States*, 551 U.S. 338, 344 (2007); *Gall v. United States*, 552 U.S. 38, 53 60 (2007); *Pepper v. United States*, 131 S. Ct. 1229, 1242 43, 1249 50 (2011).  
 67 U.S.S.G. app. C, amend. 741 (Nov. 1, 2010); U.S.S.G. § 1B1.1 (2012).  
 68 U.S.S.G. app. C, amend. 739 (Nov. 1, 2010); U.S.S.G. ch. 5, pt. H, intro. cmt.  
 69 U.S.S.G. § 1B1.1(b) (2012).  
 70 Commissioners have sometimes described the second step as simply requiring courts to consider departure policy statements if a departure is raised. Commission staff and one Commissioner have confirmed with one of the authors that the guideline means that the court must consider departure policy statements in every case, including cases in which no party moves for a departure.  
 71 *See* U.S. Sentencing Comm'n, *supra* note 1, Part A, at 29 30, 114.  
 72 U.S.S.G. § 5K2.0(a) (b) (2012); *id.* at cmt., nn.2 4.  
 73 *See Booker*, 543 U.S. at 233 34, 259.  
 74 *See* note 33, *supra*.  
 75 *See* 18 U.S.C. § 3553(a)(1) (2) (2006); 18 U.S.C. § 3661 (2006); *Booker*, 543 U.S. at 261; *Rita*, 551 U.S. at 351, 357; *Gall*, 552 U.S. at 49 50, 53 60; *Pepper*, 131 S. Ct. at 1242 43, 1249 50.  
 76 U.S.S.G. ch. 5, pt. H, intro. cmt. (2012); U.S.S.G. §§ 5H1.4, 5K2.0(a), (c), 5K2.20, 5K2.22 (2012).  
 77 *See Gall*, 552 U.S. at 47.  
 78 U.S.S.G. ch. 5, pt. H, intro. cmt. (2012).  
 79 *See Rita*, 551 U.S. at 351, 357; *Gall*, 552 U.S. at 49 50, 53 60; *Pepper*, 131 S. Ct. 1229, 1242 43, 1247, 1249 50.  
 80 U.S.S.G. § 5K2.0, cmt. (backg'd.) (2012).  
 81 *See Kimbrough*, 552 U.S. at 101 02; *Pepper*, 131 S. Ct. at 1247.  
 82 U.S.S.G. § 1B1.1(c) (2012).  
 83 *See Pepper*, 131 S. Ct. at 1249 50; *see also Gall*, 552 U.S. at 53 60.  
 84 U.S. Sentencing Comm'n, *supra* note 1, Part A, at 114 ("The importance of the second step, which requires consideration of departure policy statements, is often overlooked by parties and courts." ).  
 85 *Booker*, 543 U.S. at 234; *see also Pepper*, 131 S. Ct. at 1245.  
 86 U.S. Sentencing Comm'n, Results of Survey of United States District Judges January 2010 Through March 2010, tbls.13 & 14 (June 2010), [http://www.ussc.gov/Research/ResearchProjects/Surveys/20100608\\_Judge\\_Survey.pdf](http://www.ussc.gov/Research/ResearchProjects/Surveys/20100608_Judge_Survey.pdf) [hereinafter Results of 2010 Survey].  
 87 U.S. Sentencing Comm'n, *supra* note 1, Part A, at 114.  
 88 *See Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After Booker: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 57 58 (2011) (statement of Judge Patti B. Saris, Chair, U.S. Sentencing Comm'n), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Testimony/20111012\\_Saris\\_Testimony.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20111012_Saris_Testimony.pdf); U.S.S.G. app. C, amend. 741 (Nov. 1, 2010) (Reason for Amendment).

- <sup>89</sup> See U.S. Sentencing Comm'n, *supra* note 1, Part A, at 114 (one circuit "does not support the three step process," and the case law of "other circuits . . . does not state clearly whether the second step is necessary").
- <sup>90</sup> See *United States v. Politano*, 522 F.3d 69, 74-75 (1st Cir. 2008); *United States v. McGowan*, 315 F. App'x 338, 341-42 (2d Cir. 2009); *United States v. Colon*, 474 F.3d 95, 99 & n.8 (3d Cir. 2009); *United States v. Diosdado Star*, 630 F.3d 359, 362-66 (4th Cir. 2011); *United States v. Gutierrez*, 635 F.3d 148, 153 (5th Cir. 2011); *United States v. Mejia Huerta*, 480 F.3d 713 (5th Cir. 2007); *United States v. Tristan Madrigal*, 601 F.3d 629, 635 (6th Cir. 2010); *United States v. Jackson*, 547 F.3d 786, 793 (7th Cir. 2008); *United States v. Carter*, 425 F. App'x 527, 529-30 (8th Cir. 2011); *United States v. Vasquez Cruz*, 692 F.3d 1001 (9th Cir. 2012); *United States v. Martinez Barragan*, 545 F.3d 894, 901 (10th Cir. 2008); *United States v. Moton*, 226 F. App'x 936, 939-40 (11th Cir. 2007); *United States v. Perez Zuniga*, 501 F. App'x 856, 860 (11th Cir. 2012).
- <sup>91</sup> See *United States v. Martin*, 520 F.3d 87, 93 (1st Cir. 2008); *United States v. Hamilton*, 323 F. App'x 27, 31 (2d Cir. 2009); *United States v. Howe*, 543 F.3d 128, 137-39 (3d Cir. 2008); *United States v. Simmons*, 568 F.3d 564, 567-70 (5th Cir. 2009); *United States v. Simpson*, 346 F. App'x 10, 15 (6th Cir. 2009); *United States v. Powell*, 576 F.3d 482, 499 (7th Cir. 2009); *United States v. Harris*, 567 F.3d 846, 854-55 (7th Cir. 2009); *United States v. Chase*, 560 F.3d 828, 830-32 (8th Cir. 2009); *United States v. Tankersley*, 537 F.3d 1100, 1114-15 (9th Cir. 2008); *United States v. Tom*, 327 F. App'x 93, 94, 97-99 (10th Cir. 2009); *United States v. Matthews*, 477 F. App'x 585, 586 (11th Cir. 2012).
- <sup>92</sup> 433 F.3d 622, 631 (8th Cir. 2006).
- <sup>93</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 29 (citing *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006)).
- <sup>94</sup> See *United States v. Green*, 691 F.3d 960, 966 (8th Cir. 2012) (rejecting defendant's procedural challenge that district court committed reversible error because it failed to consider rules for departure before imposing upward variance); *United States v. Carter*, 425 F. App'x 527, 529-30 (8th Cir. 2011) ("The record [] show[s] that the district court clearly and explicitly considered the specific characteristics of Carter and his offense in light of the § 3553(a) factors and imposed the sentence based on those characteristics," and its "failure to consider a traditional departure before varying was not a reversible error.").
- <sup>95</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 29 (citing *United States v. Jackson*, 467 F.3d 834 (3d Cir. 2006)).
- <sup>96</sup> *United States v. Brown*, 578 F.3d 221, 225-26 (3d Cir. 2009).
- <sup>97</sup> See *United States v. Colon*, 474 F.3d 95, 99 & n.8 (3d Cir. 2009).
- <sup>98</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 29 & n.199.
- <sup>99</sup> See *United States v. Wallace*, 461 F.3d 15, 37-45 (1st Cir. 2006) (where district court departed upward based on six separate departure provisions, remanding for resentencing because the district court did not make adequate findings to support four of the grounds for departure); *United States v. Selioutsky*, 409 F.3d 114, 119-20 (2d Cir. 2005) (where defendant sought, and the district court granted, a downward departure based on extraordinary family circumstances, remanding for resentencing because the district court had not made adequate findings to support the departure); *United States v. Jackson*, 467 F.3d 834, 840 (3d Cir. 2006) (where defendant sought a downward departure based on extraordinary acceptance of responsibility, district court was still required to follow circuit precedent in responding to the departure request, and because it could be inferred that the court considered the request and denied it, its decision was not reviewable); *United States v. McBride*, 434 F.3d 470 (6th Cir. 2006) (where district court expressly considered and denied departure, explaining that departures remain relevant after *Booker* but reaffirming that the court of appeals may not review the denial of departure as under pre *Booker* case law); *United States v. Crawford*, 407 F.3d 1174, 1181-82 (11th Cir. 2005) (where defendant sought a downward departure, and the district court engaged in a departure analysis, reversing because three of the grounds for departure were invalid).
- <sup>100</sup> Cf. U.S. Sentencing Comm'n, *supra* note 1, Part A, at 29.
- <sup>101</sup> See *United States v. Vasquez Cruz*, 692 F.3d 1001 (9th Cir. 2012); *United States v. Jackson*, 547 F.3d 786, 793 (7th Cir. 2008).
- <sup>102</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 30.
- <sup>103</sup> 434 F.3d 470, 476 (8th Cir. 2006).
- <sup>104</sup> *Id.* at 477.
- <sup>105</sup> See, e.g., *id.* at 474 (recognizing that it will continue to review decisions not to depart where the "record reflects that the district court was not aware of or did not understand its discretion to make such a departure") (internal quotation marks omitted); *United States v. Brown*, 397 F. App'x 187, 188 (6th Cir. 2010) (where district court declined to depart downward, reviewing whether the "sentencing determination 'rested on [the district court's] mistaken belief that it lacked the legal power to grant a departure'" (quoting *United States v. Ruiz*, 536 U.S. 622, 627 (2002)); *United States v. O'Georgia*, 569 F.3d 281, 296-97 (6th Cir. 2009) (reversing sentence where district court erred in departing upward based on findings that were inadequate under the policy statements, and thus "amount[ed] to 'significant procedural error'").
- <sup>106</sup> *O'Georgia*, 569 F.3d at 296.
- <sup>107</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 30.
- <sup>108</sup> 581 F.3d 251 (5th Cir. 2009).
- <sup>109</sup> *Id.* at 255.
- <sup>110</sup> *Id.* at 256 n.16.
- <sup>111</sup> 635 F.3d 148 (5th Cir. 2011).
- <sup>112</sup> *Gutierrez*, 635 F.3d at 153.
- <sup>113</sup> *Id.* at 152.
- <sup>114</sup> *Id.* at 114.
- <sup>115</sup> *Id.*
- <sup>116</sup> It cites decisions holding that while district courts must give the guidelines "respectful consideration," they may not "ignore[] or slight[]" any of the § 3553(a) factors, and must determine "on a case by case basis" what weight to give the guidelines with reference to the "remaining section 3553(a) factors." *Id.* at 33 & n.212 (citations omitted).
- <sup>117</sup> *Gall*, 552 U.S. at 59.
- <sup>118</sup> *Rita*, 551 U.S. at 351.
- <sup>119</sup> *Nelson v. United States*, 555 U.S. 350, 352 (2009).
- <sup>120</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 41, 114.
- <sup>121</sup> *Pepper*, 131 S. Ct. at 1249-50.
- <sup>122</sup> *Id.* at 1242-43, 1249-50; *Gall*, 552 U.S. at 53-60.
- <sup>123</sup> *Gall*, 552 U.S. at 68 (Alito, J., dissenting).
- <sup>124</sup> *City of Mobile v. Bolden*, 446 U.S. 55, 75-76 (1980) (plurality opinion).
- <sup>125</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 114.
- <sup>126</sup> "Due" means "belonging or falling to by right," "belonging or incumbent as a duty," "owing by right of circumstances or condition; that ought to be given or rendered; proper to be conferred, granted, or inflicted," "merited, appropriate; proper, right," "such as ought to be, to be observed, or to be done; fitting; proper; rightful." Oxford English Dictionary (2d ed. 1989), available at <http://www.oed.com/view/Entry/58238?rskey=qrbxUW&result=2&isAdvanced=false#eid>.
- <sup>127</sup> See *Pepper*, 131 S. Ct. at 1241.
- <sup>128</sup> *Id.* at 1249.
- <sup>129</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 41.
- <sup>130</sup> *Pepper*, 131 S. Ct. at 1250.

- <sup>131</sup> *Id.* at 1242 43.
- <sup>132</sup> *Gall*, 552 U.S. at 51.
- <sup>133</sup> *Pepper*, 131 S. Ct. at 1242 43; see also *Kimbrough*, 552 U.S. at 101.
- <sup>134</sup> *Pepper*, 131 S. Ct. at 1249 50.
- <sup>135</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 114.
- <sup>136</sup> *Id.* (quoting *Rita*, 551 U.S. at 350).
- <sup>137</sup> See *Pepper*, 131 S. Ct. at 1247; *Kimbrough*, 552 U.S. at 96; *Gall*, 552 U.S. at 46 n.2; *Rita*, 551 U.S. at 351, 357.
- <sup>138</sup> See, e.g., Baron Evans & Stith, *supra* note 13, at 1657 67; Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 51 74 (1998).
- <sup>139</sup> U.S. Sentencing Comm'n, *Federal Child Pornography Offenses*, 1 15, 320 23 (2012).
- <sup>140</sup> U.S. Sentencing Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 133 34 (2004) [hereinafter *Fifteen Year Review*].
- <sup>141</sup> *Id.* at 47 55.
- <sup>142</sup> See Jeffery S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post Mistretta): Sunshine or Sunset?*, 27 *Am. Crim. L. Rev.* 289, 318 20 (1989) (Commissioner Block explaining that the Department's ex officio representative convinced four of six Commissioners to increase fraud penalties with a "fallacious" argument "that recent congressional enactments had given oblique 'signals' to the Commission" to do so and "despite the absence of any empirical proof that an increase would improve the effectiveness of sentencing," resulting in "gratuitous punishment" for reasons that were "overtly political and inexpert"); Michael K. Block, *Emerging Problems in the Sentencing Commission's Approach to Guideline Amendments*, 1 *Fed. Sent'g Rep.* 451, 453 (1989) (quoting Commissioner Breyer as warning that "this [Commission] will not last if the answer to the question 'How did you choose that level?' is that what happened was seven people sat around in a room and they decided on the basis of what they thought was somehow appropriately severe" (alteration in original)).
- <sup>143</sup> See Breyer, *Key Compromises*, *supra* note 16, at 19 20 (explaining that the Commission omitted from the guidelines most of the mitigating factors Congress directed it to consider as one of several "'trade offs' among Commissioners with different viewpoints."); Breyer, *Guidelines Revisited*, *supra* note 22, at 182 (explaining that the exclusion of these factors was "intended to be provisional" and "subject to revision in light of Guideline implementation experience," but that did not occur).
- <sup>144</sup> Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 *Duq. L. Rev.* 675, 703 (2011).
- <sup>145</sup> See U.S. Sentencing Comm'n, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 42 (2006); *Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Sec. of the Jud. Comm.*, 109th Cong. 3 4 (Feb. 10, 2005) (testimony of Judge Ricardo H. Hinojosa).
- <sup>146</sup> *United States v. Jimenez Beltre*, 440 F.3d 514, 526 28 & n.11 (1st Cir. 2006) (Lipez, J., dissenting).
- <sup>147</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 3, 114.
- <sup>148</sup> *Id.* at 112 13.
- <sup>149</sup> *Id.* at 3.
- <sup>150</sup> *Id.* at 113 14, 107.
- <sup>151</sup> *Id.* at 111.
- <sup>152</sup> *Id.* at 32 33.
- <sup>153</sup> *Id.* at 111.
- <sup>154</sup> *Id.* at 32.
- <sup>155</sup> *Id.* at 43.
- <sup>156</sup> See *United States v. LaBonte*, 520 U.S. 751, 761 n.5 (1997); *Vazquez v. United States*, 558 U.S. 1144 (2010) (remanding for reconsideration in light of the government's position that directives to the Commission are not binding on the courts, Brief for the United States at 9, *Vazquez v. United States*, 558 U.S. 1144 (2010) (No. 09 5370), 2009 WL 5423020); *United States v. Mitchell*, 624 F.3d 1023, 1028 30 (9th Cir. 2010); *United States v. Michael*, 576 F.3d 323, 328 (6th Cir. 2009); *United States v. Sanchez*, 517 F.3d 651, 653 (2d Cir. 2008); *United States v. Corner*, 598 F.3d 411, 415 16 (7th Cir. 2010) (en banc); *United States v. Jimenez Perez*, 659 F.3d 704, 710 (8th Cir. 2011); *United States v. Reyes Hernandez*, 624 F.3d 405, 417 18 (7th Cir. 2010); *United States v. Arrelucea Zamudio*, 581 F.3d 142, 151 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 229 (1st Cir. 2008).
- <sup>157</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 35 n.235.
- <sup>158</sup> Results of 2010 Survey, *supra* note 86, tbls.13 & 14.
- <sup>159</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 35.
- <sup>160</sup> *Id.* at 113 14, 111.
- <sup>161</sup> *Id.* at 114.
- <sup>162</sup> *Id.* at 105.
- <sup>163</sup> *Id.* at 33 35, 105.
- <sup>164</sup> *Id.* at 33.
- <sup>165</sup> *Id.*
- <sup>166</sup> 466 F.3d 663 (8th Cir. 2006).
- <sup>167</sup> See U.S. Sentencing Comm'n, *supra* note 1, Part A, at 34 35 (citing *United States v. Maloney*, 466 F.3d 663 (8th Cir. 2006)).
- <sup>168</sup> See *United States v. Feemster*, 483 F.3d 583, 590 (8th Cir. 2007).
- <sup>169</sup> *United States v. Feemster*, 531 F.3d 615, 619 20 (8th Cir. 2008).
- <sup>170</sup> *United States v. Feemster*, 572 F.3d 455, 464 (8th Cir. 2009) (en banc) (internal quotation marks and alteration omitted).
- <sup>171</sup> See U.S. Sentencing Comm'n, *supra* note 1, Part A, at 34.
- <sup>172</sup> See *United States v. Chase*, 560 F.3d 828, 832 (8th Cir. 2009) ("[T]he standards governing departures do not bind a district court when employing its discretion with respect to variances.").
- <sup>173</sup> See note 91, *supra*.
- <sup>174</sup> Cf. U.S. Sentencing Comm'n, *supra* note 1, Part A, at 33.
- <sup>175</sup> *Id.* at 34.
- <sup>176</sup> 562 F.3d 558 (3d Cir. 2009) (en banc).
- <sup>177</sup> 559 F.3d 918 (9th Cir. 2009) (denial of rehearing en banc); see U.S. Sentencing Comm'n, *supra* note 1, Part A, at 34 35.
- <sup>178</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 34 35.
- <sup>179</sup> *Id.* at 32 33.
- <sup>180</sup> *Id.* at 111.
- <sup>181</sup> See *Pepper*, 131 S. Ct. at 1242 43; *Gall*, 552 U.S. at 53 60. As the Court said in *Pepper*, "A defendant's race or nationality may play no adverse role in the administration of justice, including at sentencing." 131 S. Ct. at 1240 n.8 (emphasis added) (internal quotation marks and citation omitted).
- <sup>182</sup> "Unwarranted disparity is defined as different treatment of individual offenders who are similar in relevant ways, or similar treatment of individual offenders who differ in characteristics that are relevant to the purposes of sentencing. Membership in a particular demographic group is not relevant to the purposes of sentencing, and there is no reason to expect [that] the average sentence of different demographic groups are the same or different. As long as the individuals in each group are treated fairly, average group differences simply reflect differences in the characteristics of the individuals who comprise each group." *Fifteen Year Review*, *supra* note 140, at 113 14.
- <sup>183</sup> See, e.g., U.S. Sentencing Comm'n, *Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines* 12 13 & ex. 10 (2004); Miles D. Harer, *Federal Bureau of Prisons, Office of Research and Evaluation, Recidivism Among Federal Prisoners Released in 1987*, at 4 6, 54 (1994), [http://www.bop.gov/news/research\\_projects/Published\\_reports/recidivism/orepreceid87.pdf](http://www.bop.gov/news/research_projects/Published_reports/recidivism/orepreceid87.pdf); Correctional

- Service Canada, *Does Getting Married Reduce the Likelihood of Criminality*, Forum On Corrections Research, May 1995, available at [http://www.csc.scc.gc.ca/text/pblct/forum/e072/e072b\\_eng.shtml](http://www.csc.scc.gc.ca/text/pblct/forum/e072/e072b_eng.shtml); Robert J. Sampson & John H. Laub, *Crime and Deviance over Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609 (1990); Robert J. Sampson, John H. Laub & Christopher Winer, *Does Marriage Reduce Crime? A Counterfactual Approach to Within Individual Causal Effects*, 44 Criminology 465, 497-500 (2006); Shirley R. Klein et al., *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002); U.S. Dep't of Health & Human Servs., Nat'l inst. on Drug Abuse, *Principles of Drug Addiction Treatment: A Research Based Guide* 13 (2d ed. 2009); Smart Sentencing (Missouri Sentencing Advisory Comm'n), July 20, 2009, <http://www.mosac.mo.gov/file.jsp?id=45342>; Elizabeth K. Drake, Steve Aos & Marna G. Miller, Washington State Institute for Public Policy, *Evidence Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State* (2009), <http://www.wsipp.wa.gov/rptfiles/09001201.pdf>; Susan L. Ettner et al., *Benefit Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself?"*, 41 Health Services Res. 192-213 (2006); Doug Mcvay Et Al., Justice Policy Institute, *Treatment Or Incarceration: National and State Findings On the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* 5, 6, 18 (2004).
- <sup>184</sup> See Lynne M. Vieraitis et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol'y 589, 591-93 (2007); U.S. Sentencing Comm'n, *Sentencing Options Under the Guidelines* 18-19 (Nov. 1996) (staff discussion paper), available at <http://www.uscc.gov/Research/Working Group Reports/Simplification/SENTOPT.HTM>; Miles D. Harer, *Do Guideline Sentences for Low Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent'g Rep. 22 (1994); U.S. Sentencing Comm'n, *Alternative Sentencing in the Federal Criminal Justice System*, at 2-3 (2009); Laura Baber, *Results Based Framework for Post Conviction Supervision Recidivism Analysis*, Fed. Probation, Dec. 2010, at 5, available at <http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/201012/results.html>; Alfred Blumstein & Kiminori Nakamura, *'Redemption' in an Era of Widespread Criminal Background Checks*, Nij Journal, June 2009, at 10, 12-14, available at <http://www.ncjrs.gov/pdffiles1/nij/226870.pdf>.
- <sup>185</sup> *United States v. Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008).
- <sup>186</sup> *United States v. Shull*, 793 F. Supp. 2d 1048 (S.D. Ohio 2011).
- <sup>187</sup> *United States v. Hernandez*, 604 F.3d 48, 53-54 (2d Cir. 2010).
- <sup>188</sup> *United States v. Munoz Nava*, 524 F.3d 1137 (10th Cir. 2008).
- <sup>189</sup> *United States v. Davis*, No. 07 CR 727(HB), slip. op., 2008 WL 2329290, at \*1-3, \*5 (S.D.N.Y. June 6, 2008).
- <sup>190</sup> *United States v. Wyrick*, 416 F. App'x 786, 791 (10th Cir. 2011).
- <sup>191</sup> *United States v. Rios*, No. 11-2335, 2012 WL 5374126, at \*1-2 (3d Cir. Nov. 2, 2012).
- <sup>192</sup> *United States v. Guerra*, 463 F. App'x 451, 454 (5th Cir. 2012).
- <sup>193</sup> *United States v. Singleton*, 435 F. App'x 272, 273 (4th Cir. 2011).
- <sup>194</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 32.
- <sup>195</sup> *Id.* at 113 (citing Federal Sentencing Guidelines Manual, ch. 5, pts. H & K).
- <sup>196</sup> 28 U.S.C. § 994(d) (2006).
- <sup>197</sup> 28 U.S.C. § 994(e) (2006) (emphasis added).
- <sup>198</sup> S. Rep. No. 98-225, at 175 (1983).
- <sup>199</sup> *Id.* at 174.
- <sup>200</sup> *Id.* at 171-74 & nn.531-32.
- <sup>201</sup> See 28 U.S.C. § 994(k) (2006); 18 U.S.C. § 3582(a) (2006); S. Rep. No. 98-225, at 31, 38, 40, 67 n.262, 76, 77, 95, 119, 171 & n.531 (1983).
- <sup>202</sup> *Tapia v. United States*, 131 S. Ct. 2382, 2390 (2011).
- <sup>203</sup> S. Rep. No. 98-225, at 150 (1983).
- <sup>204</sup> 28 U.S.C. § 991(b)(1)(B) (2006) (emphasis added).
- <sup>205</sup> S. Rep. No. 98-225, at 75 (1983).
- <sup>206</sup> 18 U.S.C. § 3661 (2006).
- <sup>207</sup> See 28 U.S.C. § 994(e) & (k) (2006).
- <sup>208</sup> See 18 U.S.C. § 3582(a) (2006).
- <sup>209</sup> Breyer, *Key Compromises*, *supra* note 16, at 19-20 & n.98 (1988).
- <sup>210</sup> U.S.S.G. ch. 5, pt. H, intro. cmt. (1990); U.S.S.G. app. C, amend. 357 (Nov. 1, 1990).
- <sup>211</sup> U.S.S.G. app. C, amend. 739 (Nov. 1, 2010); U.S.S.G. ch. 5, pt. H, intro. cmt. (2012).
- <sup>212</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 114.
- <sup>213</sup> See notes 183-84, *supra*.
- <sup>214</sup> See U.S. Sentencing Comm'n, 2012 Preliminary Quarterly Data Report, *supra* note 12, tbl.1; U.S. Sentencing Comm'n, 2011 Sourcebook, *supra* note 12, tbl.N.
- <sup>215</sup> Results of 2010 Survey, *supra* note 86, tbls.13 & 14.
- <sup>216</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 114.
- <sup>217</sup> Fifteen Year Review, *supra* note 140, at 113-14 (emphasis in original).
- <sup>218</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 113.
- <sup>219</sup> See notes 183-84, *supra*.
- <sup>220</sup> Results of 2010 Survey, *supra* note 86, tbls.13 & 14.
- <sup>221</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 114.
- <sup>222</sup> See U.S.S.G. ch. 5, pt. H, intro. cmt. (2012).
- <sup>223</sup> See U.S.S.G. § 2B1.1, cmt. (n. 19(C)) (2012); U.S.S.G. § 4A1.3 (2012). The latter is limited to one criminal history category in career offender cases, U.S.S.G. § 4A1.3 (2012), where it is most needed.
- <sup>224</sup> *Rita*, 551 U.S. at 351, 357.
- <sup>225</sup> See *Kimbrough*, 552 U.S. at 110.
- <sup>226</sup> See *Spears v. United States*, 555 U.S. 261 (2009) (per curiam).
- <sup>227</sup> U.S. Sentencing Comm'n, *supra* note 1, Part A, at 114.
- <sup>228</sup> 28 U.S.C. § 994(w)(1) (2006) (authorizing the Commission to "approve[] and require[]" the format of sentencing information it receives, including the statement of reasons).
- <sup>229</sup> Hofer, *supra* note 144, at 700.



# *Fact Sheet: Regional Differences in Federal Sentencing*

## **The Supreme Court's decision in *United States v Booker*, 543 U.S. 220 (2005), solved a Sixth Amendment constitutional violation with the federal sentencing guidelines.**

- The guidelines are now “effectively advisory,” and subsequent decisions, such as *Rita*, *Gall*, *Kimbrough*, and *Pepper*<sup>1</sup> reaffirmed the importance of judicial discretion in assuring the constitutionality of the guidelines.
- In a 2012 report,<sup>2</sup> the U.S. Sentencing Commission found that the guidelines “have remained the essential starting point in all federal sentences and have continued to exert significant influence on federal sentencing trends over time.” (USSC Report, Part A, at 3)
- Nonetheless, the Commission has proposed several statutory changes that would restore a mandatory guidelines system. (USSC Report, Part A, at 111-114)<sup>3</sup>
- The “Key Findings” of the 2012 report include: “The influence of the guidelines . . . has varied by circuit” (USSC Report, Part A, p. 6); “sentencing outcomes increasingly depend upon the district in which the defendant is sentenced;” and “[p]rosecutorial practices have contributed to disparities in federal sentencing” (USSC Report, Part A p. 7).

## **Federal sentencing practices varied by region before the sentencing guidelines, and under the mandatory sentencing guidelines, and they continue to vary to some extent today.**

- Congress recognized in the Sentencing Reform Act and in subsequent legislation that some regional variation in sentencing practices may be reasonable and even desirable.<sup>4</sup>
- Like previous reports,<sup>5</sup> the new USSC Report confirms that most of the variation among districts is due to differences in case characteristics, prosecutorial practices, and applicable guidelines and statutes. In every circuit, changes in sentences imposed closely track changes in the applicable guidelines and statutes (USSC Report, Part C, pp. 25-30).
- Districts vary in the rates of government sponsored below-range sentences, including substantial assistance and early disposition program sentences (USSC Report, Part C, pp. 33, 38, 43). Variation in the rates (measured by the inter-quartile range<sup>6</sup>) and average reduction below the guideline range for these sentences have remained relatively stable since the PROTECT Act period (pp. 33, 35).
- The average reduction below the guideline range is higher for government-sponsored below-range sentences than for non-government sponsored below-range [NGS below-range] sentences (USSC Report, Part C, pp. 35, 55).
- Both the rate of NGS below-range sentences and variation among districts in those rates (measured by the inter-quartile range) has increased since the PROTECT Act (USSC Report, Part C, p. 53). The average percent of reduction below the guideline range has remained relatively constant, however, and variation in the percent of reduction was highest during the PROTECT Act period (p. 55).

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<sup>1</sup>*Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Pepper v. United States*, 131 S. Ct. 1229 (2011).

<sup>2</sup>U.S. Sentencing Commission, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (2012).

<sup>3</sup>Amy Baron-Evans & Thomas W. Hillier, II, *The Commission's Legislative Agenda to Restore Mandatory Guidelines*, (forthcoming) 25 Federal Sentencing Reporter (April, 2013). Available at SSRN: <http://ssrn.com/abstract=2252105>

<sup>4</sup>Commentary explaining the desirability of some local variations in federal sentencing was recently summarized in Adam J. Richardson, *Harnessing Local Variations in Federal Sentencing to Increase the System's Moral Credibility*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1422823](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1422823). For an earlier discussion of the inevitability and desirability of regional differences, see *Panel II: The Effects of Region, Circuit, Caseload and Prosecutorial Policies on Disparity*, 15 Federal Sentencing Reporter 165 (2003).

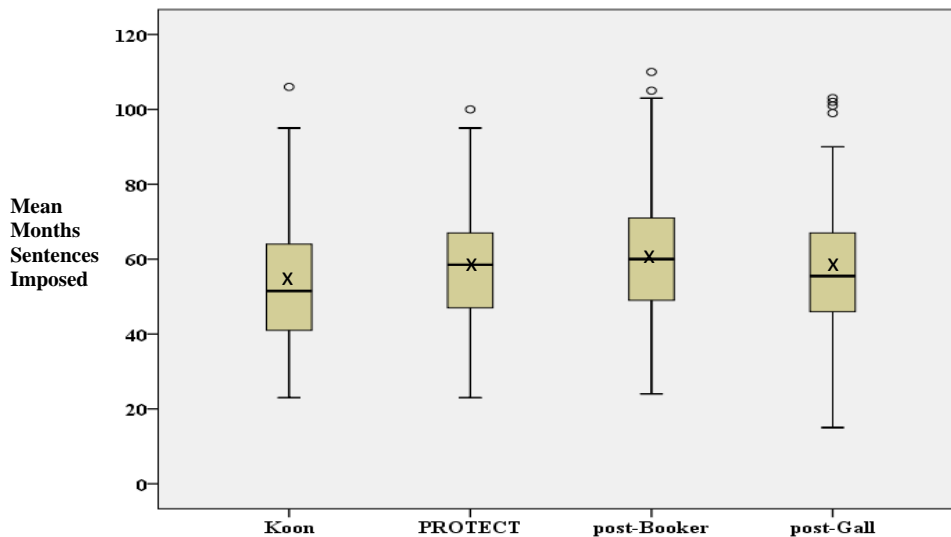
<sup>5</sup>U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing* (2004), 99-112.

<sup>6</sup>The interquartile range is the difference in rates between the districts at the 25<sup>th</sup> and 75<sup>th</sup> percentiles. The Commission uses the interquartile range as the most representative measure of variation (USSC Report, Part C, p. 6).

**Data and research on variation in sentence length among districts show that this important measure has *not* increased following *Booker* or *Gall*.**

- The Commission highlights only variation in *rates* of NGS below-range sentences, but a more complete picture would look at the bottom line: whether variation among districts in *sentence length* has grown over time.
- Sentence length reflects the influence of judges *and* prosecutors, the mix of cases in a district, changes in guidelines and statutes, rates and extents of variances/departures, and other factors.
- The USSC Report lists data on average sentence lengths in each circuit and district, in each of the four time periods (USSC Report, Part C, p 81-83), but does not display it graphically.<sup>7</sup>
- The chart below was prepared from that data. The boxes show the interquartile range in average sentences among all federal districts.<sup>8</sup> The horizontal line in the box shows the median sentence; the x shows the mean sentence. (The “whiskers” show the range from minimum to maximum average sentence, with ‘o’s above the whiskers representing districts that are statistical outliers.)

**Range of Average Sentences Imposed Among Federal District Courts**



- As shown by the size of the boxes on the chart, the interquartile range has changed very little, varying from a low of 21 months in both the PROTECT Act and *Gall* periods to a high of 23 months in the earliest *Koon* period. The combined effects of all actors and influences on sentence lengths has resulted in remarkable stability, and provides no evidence that sentence lengths depend increasingly on the district in which a defendant is sentenced.

- Researchers outside the Commission have concluded from multivariate regression analyses that unexplained regional variation in sentences has not grown since *Booker*, and has even decreased.
  - Ulmer, Light and Kramer found that the percentage of sentence length variation explained by differences among districts was 6.6% before the PROTECT Act, 5.8% after the PROTECT Act, 5.2% after *Booker*, and 6.3% after *Gall* through 2009.<sup>9</sup>
  - Lynch and Omori, analyzing drug cases from 1993 through 2009, found that the proportion of variation in sentence length due to differences among districts was 14.1% before *Koon*, 12% after *Koon*, 13.6% after the PROTECT Act, 13.9% after *Booker*, and 13.1% after *Kimbrough*.<sup>10</sup>

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<sup>7</sup>These data reflect all sentences for which information is available. Probation sentences are counted as 0 months; life and other sentences of imprisonment are capped at 470 months.

<sup>8</sup>The Commission uses the interquartile range as the most representative measure of variation (USSC Report, Part C, p. 6).

<sup>9</sup>See Jeffery Ulmer et al., *The “Liberation” of Federal Judges’ Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence Between Courts?*, 28 JUSTICE Q. 799, 816 (2011).

<sup>10</sup>See Lynch & Omari, *Legal Change and Sentencing Norms in the Wake of Booker: The Impact of Time and Place on Drug Trafficking Cases in Federal Court* at 46, tbl.3, Criminology, Law and Society, University of California, Irvine, Paper presented at Conference on Empirical Legal Studies, Stanford Law School (Nov. 2012).

# ***Fact Sheet: The 2012 USSC Booker Report Inter-Judge Differences in Federal Sentencing***

**The Supreme Court’s decision in *United States v Booker*, 543 U.S. 220 (2005), solved a Sixth Amendment constitutional violation with the federal sentencing guidelines.**

- The Court made the sentencing guidelines “effectively advisory” by striking portions of the Sentencing Reform Act of 1984 that had made the guidelines mandatory in practice.
- Subsequent decisions, such as *Rita*, *Gall*, *Kimbrough*, and *Pepper*<sup>1</sup> reaffirmed the importance of judicial discretion in implementing the statutory directives of 18 U.S.C. § 3553(a).
- In a 2012 report, the U.S. Sentencing Commission found that the guidelines “have remained the essential starting point in all federal sentences and have continued to exert significant influence on federal sentencing trends over time.”<sup>2</sup> (USSC Report, Part A, at 3)
- Nonetheless, the Commission has proposed several statutory changes that would restore a mandatory guidelines system. (USSC Report, Part A, at 111-114)<sup>3</sup>
- The “Key Findings” of the 2012 report include: “Variation in the rates of non-government sponsored below range sentences among judges within the same district has increased in most districts since *Booker*, indicating that sentencing outcomes increasingly depend upon the judge to whom the case is assigned.” (USSC Report, Part A, p. 8.) The report noted elsewhere, however, that “[t]he average extent of the reduction below the guideline minimum varied broadly during each period, and did not appear to have been affected by legislation [the PROTECT Act] or Supreme Court decisions.” (USSC Report, Part D, at 1, 7).

**The Commission presents data that does not separate disparity caused by judges from disparity arising from other sources. Gaps among judges in the Commission’s graphs overstate the disparity caused by judges.**

- Part D of the USSC Report contains graphs displaying the rates of “Non-Government Sponsored Below Range Sentences” [NGS below-range] for individual federal judges, in each circuit and district, and in four time periods labeled “Koon,” “PROTECT,” “Booker,” and “Gall.” Readers must inspect the numerous graphs and draw their own conclusions.
- In Part E of the USSC Report, the Commission criticizes “simplistic” analyses of aggregate data, because without the use of control variables in a regression analysis it is difficult to assess the sources of differences in sentencing, or changes over time. No such analyses are performed in Part D with data on inter-judge differences, however. It is therefore impossible to know how much of the gaps among judges are due to judges themselves, or due to differences in caseloads, or differences in prosecutorial practices before different judges or in different cities within a district or circuit.

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<sup>1</sup> *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimrough v. United States*, 552 U.S. 85 (2007); *Pepper v. United States*, 131 S. Ct. 1229 (2011).

<sup>2</sup> U.S. Sentencing Commission, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (2012) [hereinafter USSC Report].

<sup>3</sup> Amy Baron-Evans & Thomas W. Hillier, II, *The Commission’s Legislative Agenda to Restore Mandatory Guidelines*, (forthcoming) 25 Federal Sentencing Reporter (April, 2013). Available at SSRN: <http://ssrn.com/abstract=2252105>

- Research outside the Commission shows that at least some of the gap among judges in NGS below-range rates is due to judges themselves,<sup>4</sup> and research in one district showed a modest increase in gaps over time due to judges.<sup>5</sup> The graphs in the Commission’s report, however, exaggerate the variation due to judges themselves, because the data are not limited to judges in the same random caseload assignment pool.
- The Commission states that “[t]he majority of districts (N=64) showed a contraction in the spread from the *Koon* to the PROTECT Act periods.” However, much of this change is due to data collection changes and cannot be attributed to the PROTECT Act. As noted elsewhere in the report (USSC Report, Part C, p. 2), in the *Koon* period *all* below-range sentences for reasons other than defendants’ substantial assistance were classified as NGS below-range sentences. Approximately 40 percent of these sentences were actually government sponsored, under plea agreements benefiting the government, primarily in informal “fast track” programs in drug and immigration cases on the border.

**Differences in below-range rates among judges are generally modest; the causes of and solutions to these variations are very different today from the pre-guidelines era; and “the uniformity that Congress originally sought to secure . . . is no longer an open choice.” *Booker*, 543 U.S. 263.**

- While most districts showed an increase in the spread of NGS below-range rates in the *Booker* period, 14 districts showed either a contraction or no discernible change. The rate of increase in the spread slowed in the *Gall* period (USSC Report, Part D, p. 6), suggesting a system moving toward stability.
- Unlike the pre-guidelines era, judicial discretion today is guided by the advisory guidelines, the purposes of sentencing, and the other factors set forth in 18 U.S.C. § 3553(a). The advisory guidelines serve as a starting point and benchmark and exert a gravitational pull, which helps reduce disparity compared to the purely discretionary pre-Guidelines era.
- In the pre-guidelines era, inter-judge disparity was due largely to philosophical differences among judges. Today, variation in NGS below-range rates arises in part due to differences in judges’ willingness to scrutinize whether a guideline rests on sound empirical evidence. The Supreme Court expected that judicial scrutiny and rejection of unsound guidelines would improve the system by encouraging the Commission to fix the guidelines, and it already has, at least with respect to crack cocaine sentencing. But many problematic guidelines remain.
- Differences among judges in the rates of below-range sentences can be reduced by the Commission. Feedback from judges provides valuable information about which guidelines are out of line with judicial experience with individual defendants.
- As the Supreme Court said, “[A]dvisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’” But “[t]hese measures will not eliminate variations between district courts,” for “some departures from uniformity were a necessary cost of the remedy we adopted.” *Kimbrough v. United States*, 552 U.S. 85, 108 (2007).

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<sup>4</sup> Transactional Records Access Records Clearinghouse, *Examining Current Federal Sentencing Practices: A National Study of Differences Among Judges*, 25 Fed Sent Rep. (2012); but see Paul J. Hofer *Data, Disparity, and Sentencing Debates: Lessons from the TRAC Report on Inter-Judge Disparity*, 25 Fed. Sent. Rep. (2012).

<sup>5</sup> Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 Stan. L. Rev. 1 (2010). The author noted that “the effect of the judge remains relatively modest.”