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Honorable Ricardo H. Hinojosa
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

**Re: Proposed Priority Policy Issues for Amendment Cycle Ending May 1,
2010**

Dear Judge Hinojosa,

Thank you for the opportunity to provide public comment from the Federal Public and Community Defenders on the Commission's proposed priority policy issues for the amendment cycle ending May 1, 2010.

We have commented on many of the proposed priority policy issues in our testimony at the Commission's ongoing regional public hearings.¹ For efficiency's sake, we incorporate that testimony by reference into these comments, and write separately to add to or highlight those areas on which we believe the Commission should particularly focus this year. As always, we hope to be able to supplement our comments to the proposed priorities, and otherwise work with the Commission and its staff to ensure a more effective amendment cycle.

¹ See U.S. Sentencing Commission Public Hearing Transcript, Statement of Alexander Bunin, Federal Public Defender for the Northern District of New York (July 9, 2009); U.S. Sentencing Commission Public Hearing Transcript, Statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia (July 9, 2009); U.S. Sentencing Commission Public Hearing Transcript, Joint Statement of Thomas W. Hillier II, Federal Public Defender for the Western District of Washington and Davina Chen, Assistant Federal Public Defender for the Central District of California, at 29-30 (May 27, 2009); Testimony of Alan Dubois, Senior Appellate Attorney for the Federal Public Defender for the Eastern District of North Carolina, and Nicole Kaplan, Staff Attorney for the Federal Public Defender for the Northern District of Georgia (Feb. 10, 2009).

I. Mandatory Minimum Penalties

Despite long-standing evidence against them, mandatory minimum penalties remain the most serious impediment to justice in federal sentencing and the main cause of over-incarceration.² They are unnecessarily harsh, routinely and arbitrarily causing sentences greater than necessary to serve the purposes of sentencing both directly and through their incorporation into the guideline penalty structure.³ The ability to invoke the excessive penalties required by mandatory minimums vests prosecutors with unchecked power, resulting in unwarranted disparities based on prosecutorial decisions. Not only does this violate basic principles of just sentencing, it threatens the very integrity, accuracy, and authority of the criminal justice process.⁴

Mandatory minimums are frequently used to trump the guideline range. In 2008, 11,372 offenders were affected by mandatory minimums that trumped the otherwise applicable guideline range: 8,292 were convicted of a charge with a mandatory minimum above the top of the applicable guideline range, and the remaining 3,080 were convicted of a charge with a mandatory minimum that truncated the bottom of the range.⁵ Eliminating the crack/powder disparity would not change this result. Excluding cases where available data indicate that crack was the most serious drug involved in the offense, 8,942 offenders were affected by mandatory minimum trumps: 6,605 were convicted of a charge with a mandatory minimum above the top of the applicable guideline range, and the remainder with the bottom of the range truncated. It should be noted that the government's use of mandatory penalties to override the guidelines had an adverse impact on African America defendants. While African Americans constituted 24% of all federal offenders, they were 31% of those affected by statutory trumps.⁶

² See U.S. Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress*, at ii-iv (1991); U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* at 7 (June 18, 1987); Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed. Sent. Rep. 29 (1993); see also U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at 48, 54 (Nov. 2004) ("*Fifteen Year Review*").

³ See Statement of Michael Nachmanoff at 5-7.

⁴ *Id.* at 10-14.

⁵ Trumping mandatory minimums affected the sentencing decision in all of these cases, because the minimum statutory penalty serves as the starting point for any departures. Departures below the statutory penalty are possible for substantial assistance, and a small number of offenders who qualify for the safety valve also receive departures in addition to the two-level decrease in their guideline range. Even after taking these departures into account, 5,338 of the offenders subject to trumping statutory minimums were sentenced above the minimum of their guideline range and 3,083 were sentenced above the maximum. Nearly half of the offenders actually sentenced above the maximum of their applicable guideline range were African-American.

In its report to Congress, the Commission should firmly and unequivocally recommend the repeal of every mandatory minimum sentence in the criminal code.⁷ The Commission should also take steps to insulate the guideline development process from the pernicious effects of mandatory minimums by reviewing and revising all of the guidelines that were based in whole or in part on mandatory minimums, particularly the drug and child pornography guidelines.⁸ In addition, the Commission should review those guidelines that are the product of specific congressional directives and report to Congress regarding how they should be revised to better reflect the purposes of sentencing.

As an interim measure,⁹ the Commission should recommend that Congress immediately expand eligibility for the safety valve found at 18 U.S.C. § 3553(f) to all mandatory minimums. Limiting eligibility to those defendants charged with violations of 21 U.S.C. §§ 841, 844, 846, 960, and 963 arbitrarily excludes deserving defendants convicted of other offenses, and in some instances allows prosecutors to evade application of the safety valve through their charging decisions.¹⁰ The safety valve should also be extended to all offenders in Criminal History Categories I and II at least, if not to all offenders. By requiring no more than one criminal history point, the safety valve excludes many non-violent offenders who participated only minimally in the offense and offenders with minor prior offenses such as traffic violations. Worse, black offenders are disproportionately excluded from safety valve relief because they are at higher risk of arrest and prosecution than similarly situated white offenders.¹¹

II. Guideline Departure Provisions

We are pleased that the Commission has proposed to review of the departure provisions in the Guidelines in light of Congress's intent regarding certain factors as set forth in various statutory provisions. As we have explained during the course of the Commission's ongoing regional hearings, Congress did not require the Commission to promulgate the restrictive policy statements in Chapter 5 that discourage and prohibit courts from considering numerous offender

⁶ This data was obtained from the Commission's FY 2008 Monitoring Datafile and analyzed by Paul J. Hofer.

⁷ *Id.* at 15-16; *see also* Statement of Alexander Bunin at 3; Joint Statement of Thomas W. Hillier and Davina Chen at 37-39.

⁸ Statement of Michael Nachmanoff at 15-16; Statement of Alexander Bunin at 12; Joint Statement of Thomas W. Hillier and Davina Chen at 15-16, 20-23, 31.

⁹ *Accord* Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. Rep. 180 (Jan/Feb. 1999) (the safety valve "is a small, tentative step in the right direction . . . [but a] more complete solution would be to abolish mandatory minimums altogether").

¹⁰ *See id.* at 7-8.

¹¹ *See id.* at 7.

characteristics of a mitigating nature. While 28 U.S.C. § 994(c), (d), and (e) contain directives to the Commission to consider whether to include certain factors in the formal guideline rules regarding the kind and extent of the sentence, there is no provision in the Sentencing Reform Act directing the Commission to take any action with respect to reasons for sentences outside the guidelines range. The *only* provisions that address sentences outside the guideline range are the directives to *judges* in 18 U.S.C. § 3553(a) and (b), the latter of which has been excised.

The original Commission decided to include only criminal history and role in the offense in the formal guideline rules, apparently as a result of “traditional compromise.” See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 (1988). But the Commission went further, promulgating policy statements restricting or prohibiting consideration of every other factor mentioned by Congress for purposes of departure, in conflict with Congress’s intent. The legislative history of 28 U.S.C. § 994(d) and (e) makes clear that Congress’s purpose in directing the Commission to assure that the guidelines were entirely neutral regarding certain factors and that other factors were generally inappropriate “in recommending a term of imprisonment or length of term of imprisonment” was “of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.” S. Rep. No. 98-225, at 175 (1983). In other words, Congress did not want the Commission to promulgate guidelines that had the effect of relegating to prison those for whom the only purpose of prison would be to provide a program that “might be good for [them].” *Id.* at 171 n.153.

The restrictive policy statements conflict with the plain language of 18 U.S.C. § 3553(a) and with the remedy for the Sixth Amendment violation caused by mandatory guidelines. After *Booker*, limitations on factors judges may consider to impose sentence outside the guideline range, whether above or below it, are not permissible. *United States v. Booker*, 543 U.S. 220, 266 (2005). As a result, judges are moving away from the restrictive departure analysis of the Commission’s policy statements (and circuit caselaw interpreting them) and increasingly relying on § 3553(a) as the basis for imposing a sentence outside the guidelines. Sentences based on judicial guideline departures now represent by far the smallest proportion of sentences outside the guideline range.

The Commission should take this opportunity to better conform the guidelines to Congress’s intent and the feedback received from judges after *Booker*. We recommend the following changes:

- The Commission should delete Chapter 5, Part H (Specific Offender Characteristics) and Chapter 5, Part K.2 (Other Grounds for Departure) and move them to a historical note. The restrictions are inconsistent with current law, and the encouraged departures are complicated and unnecessary.
- The Commission can retain encouraged “departures” in the Chapter 2 and Chapter 4 guidelines. These do not purport to prohibit the courts from considering factors they must consider under § 3553(a) and Supreme Court law.

- The Commission should delete from USSG § 4A1.3(b)(3) the one-level limitation on the extent of downward departure for career offenders. This limit was adopted in response to, but was not required by, the PROTECT Act. It is inconsistent with current law, and the courts ignore it. It is inconsistent with the Commission’s own research showing that the criminal history category for career offenders is often several categories higher than their recidivism rate would justify.¹²
- The Commission should revise USSG § 1B1.4 to clarify that the information to be used in imposing sentence applies to determination of “an appropriate sentence...within the applicable guideline range, or outside that range,” rather than “within the guideline range, or whether a departure from the guidelines is warranted.” The robbery example is not appropriate, as the factors judges may consider in sentencing outside the guideline range are now unlimited. The guideline can state that the court may not determine the kind or length of the defendant’s sentence “because of” race, sex, national origin, creed, religion or socioeconomic status. We propose the following language:

§ 1B1.4 Information to be Used in Imposing Sentence

- (a) In determining an appropriate sentence to impose within the applicable guideline range, or outside that range, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.
- (b) Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status. The court may not determine the kind or length of the defendant’s sentence because of the defendant’s race, sex, national origin, creed, religion or socioeconomic status.

Commentary

Application Notes:

1. *Subsection (a) distinguished between factors that determine the applicable guideline sentencing range (§ 1B1.3) and information that a court may consider in imposing sentence within or outside that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to impose a sentence outside the guideline range.*

¹² *Fifteen Year Report* at 134.

2. *Subsection (b) restates former policy statement 5H1.10. It makes clear that the court may not determine the kind or length of the defendant's sentence because of the defendant's race, sex, national origin, creed, religion, or socioeconomic status. Congress directed the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders." See 28 U.S.C. § 994(d).*
- The Commission should also revise Application Note 1(E) to USSG § 1B1.1 to simplify it and bring it in line with current law and practice. We propose the following language:

§ 1B1.1 Application Instructions

Commentary

Application Notes:

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

"Downward departure" means departure that affects a sentence less than the sentence recommended by the applicable guideline range. "Depart downward" means grant an upward departure.

"Upward departure" means departure that affects a sentence greater than the sentence recommended by the applicable guideline range. "Depart upward" means grant an upward departure.

III. Alternatives to Incarceration

We continue to urge the Commission to encourage the use of probation and other alternatives to imprisonment by amending the guidelines to provide needed guidance in this area to courts. The guidelines currently discourage the use of alternative sanctions, contrary to

congressional intent, judicial feedback, and empirical research.¹³ The solutions to this problem, however, are relatively simple.

First, the Commission should create a new guideline at the beginning of Chapter Five, to be consulted in every case, stating that probation is a sentence in and of itself, is permissible in every case in which prison is not statutorily required, and that the court should address at the outset in every case in which probation is statutorily allowed whether prison is actually necessary to satisfy any purpose set forth in § 3553(a)(2)(A), (B) or (C). The guideline should also make clear that in cases where probation is statutorily prohibited, as is the case for many drug offenses, courts have the option to impose a split sentence involving minimal imprisonment. For example, courts can impose a sentence of time served or, for those defendants who were released pre-trial, as little as one day with a term of supervised release with appropriate conditions.

Second, the Commission should remove the Zones from the Sentencing Table, or create an Alternative Sentencing Table for those offenders for whom prison is not necessary. The Commission should recommend probation or supervised release with conditions that the court finds appropriate in light of § 3553(a) as a potential sentence. Standard release conditions that are currently ignored by §5C1.1, such as restitution, community service, electronic monitoring, intensive supervision, day reporting, and substance abuse or mental health treatment should be recommended. An Alternative Sentencing Table could provide for higher fines, longer periods of home detention, longer hours of community service, or combinations of these punishments for more serious offenders.¹⁴

Third, the Commission should provide information to courts by referencing in the commentary its own research and other literature regarding factors that correlate with reduced recidivism and options that have been found to be effective. In their testimony at the regional hearing in Stanford, Thomas Hillier and Davina Chen provided examples of such findings pertaining to education, vocational skills, and employment; drug and alcohol abuse and treatment; mental health treatment; community service; first or near-first offenders; age; fraud, larceny and drug offenders; and sex offenders.¹⁵

Fourth, the Commission should continue to study state practices with respect to alternatives, and should adopt those that make sense for the federal system. For example, studies have shown that pre-incarceration therapeutic sentences have been very effective at reducing recidivism in state systems that use them,¹⁶ and many of these effects can be recreated in the

¹³ See Joint Statement of Thomas W. Hillier II and Davina Chen at 5-10.

¹⁴ See U.S. Sentencing Commission, Staff Discussion Paper, *Sentencing Options under the Guidelines* at 24-25 (Nov. 1996).

¹⁵ See Joint Statement of Thomas W. Hillier II and Davina Chen at 11-13.

¹⁶ See, e.g., National Institute of Justice, *Drug Courts: The Second Decade* (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/211081.pdf> (discussing characteristics of successful drug court programs).

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federal system. The Commission should consider recommending typical therapeutic sentencing options, such as:

- Allowing a defendant on pretrial release to enroll in a drug treatment program, delaying sentencing long enough to measure success in the program, and imposing a reduced sentence based on the defendant's success in the program;
- Imposing a term of probation coupled with intensive supervision and graduated sanctions for violations;
- Imposing a short prison term followed by a period of intensive supervised release and graduated sanctions.

Preliminary evidence also suggests that restorative justice principles can be effective at reducing recidivism, increasing victim satisfaction with the criminal justice system, and holding offenders accountable for their conduct in lasting ways.¹⁷ Such practices might be incorporated into the federal system by, for example, amending Chapters Three or Five to permit a discretionary departure based on successful participation in a restorative justice program.

We look forward to working with the Commission to implement these and any other ideas that would promote the use of alternative sanctions in the federal system. We firmly believe that these sanctions will improve public safety as well as the lives of our clients, and strongly support their use.

IV. Cocaine Sentencing Policy

The Commission has earned universal and well-deserved praise for its work since 1995 to fix the fundamental unfairness of crack cocaine sentencing. The Commission's empirical research and reports not only permitted it to take the first step of reducing the crack guidelines by two levels and giving that reduction retroactive effect, they were also an integral part of the Supreme Court's decision in *Kimbrough v. United States* and the Department of Justice's new commitment to eliminating the disparity between crack and powder cocaine sentences.¹⁸

We applaud the Commission for its past efforts, and for continuing to work toward fairer and more appropriate drug sentencing policies generally, and crack sentencing policies in particular. We believe that this can best be accomplished by the following suggestions.

¹⁷ See, e.g., Lawrence W. Sherman & Heather Strang, *Restorative Justice: The Evidence* (2007), available at http://www.smith-institute.org.uk/pdfs/RJ_full_report.pdf; Mark S. Umbreit, et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 89 Marq. L. Rev. 251 (2005).

¹⁸ Accord Statement of Michael Nachmanoff at 1.

A. Recommend the Repeal of Mandatory Minimums

The Commission should recommend that Congress repeal the mandatory minimum sentences for all drugs, including the indefensible mandatory minimum for possessing crack cocaine. Although Congress thought that the quantity thresholds set forth in the mandatory minimum drug penalties would result in five- and ten-year minimum sentences for more serious “major” and “serious traffickers,”¹⁹ the largest portion of powder and crack cocaine offenders receiving those penalties perform low level functions (*i.e.*, street level dealer, courier/mule, loader, lookout) and have much less culpability.²⁰ Other research has likewise shown that drug quantity “is not significantly correlated with role in the offense,” and that this “lack of association” provides “fairly robust support of the claim of unwarranted or excessive uniformity in federal drug sentencing.”²¹ The quantity-based thresholds encourage manipulation by law enforcement and inaccurate information from informants.²² And the resulting sentences fail to serve the purposes of punishment and increase recidivism risk.²³

B. Recommend Expansion of Safety Valve

As stated in Part I, *supra.*, the Commission should also recommend that Congress expand 18 U.S.C. § 3553(f)’s safety valve at least to mandatory minimum offenders in Criminal History Categories I and II. In its current form, the statute excludes many drug offenders with minor

¹⁹ U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* at 118-21 (1995); 132 Cong. Rec. 27,193-94 (daily ed. Sept. 30, 1996); 132 Cong. Rec. 22,993 (daily ed. Sept. 11, 1986); H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596.

²⁰ U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* at 85, 19 (Fig. 2-4), 28-29 (Figs. 2-12 & 2-13) (May 2007). Those categorized as “wholesalers” also were frequently subject to mandatory minimums. However, the most frequent function of over one third of crack defendants classified as “wholesalers,” and nearly 8% of powder defendants classified as “wholesalers,” was actually less serious, such as street-level seller. For more than 50% of these defendants, law enforcement initiated a sale of greater than one ounce, thus placing them in the “wholesaler” category. *Id.* at 23-24, A-5 to A-7 (May 2007).

²¹ Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminol. 155, 171 (2009).

²² See *Fifteen Year Review* at 50, 82.

²³ See *id.* at 134 (no deterrence from lengthy sentences because drug dealers are easily replaced); *Special Report to Congress* (1995) (DEA and FBI report dealers are immediately replaced); Lynne M. Vieraitis, Tomaslav V. Kovandzic, Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Crim. & Pub. Pol. 589 (2007) (lengthy sentences for non-violent, low-level offenders increases recidivism risk because it disrupts employment, reduces prospects of future employment, breaks family and community ties, and exposes less serious offenders to more serious offenders).

criminal histories and minor roles in their offenses, and has a disparate effect on black offenders, who have a greater risk of arrest and prosecution than similarly situated whites.²⁴ The safety valve should also be expanded to encompass all mandatory minimums.²⁵

C. Amend the Guidelines Directly

The Commission need not wait for Congress to act. Rather, the Commission has the power to de-link the drug guidelines, including the crack and powder guidelines, from 21 U.S.C. § 841's flawed statutory scheme.²⁶ Such an action would remedy some of the most egregious errors of the guidelines. The Commission was not required to adopt the mandatory minimum penalty structure when determining the appropriate guideline ranges for drug offenses, the statute's flawed quantity-based proxy for culpability, or the utterly unjustifiable 100-to-1 powder/crack ratio. The Commission is free to amend the guidelines to focus more on role in the offense, adjust the guideline ranges to better mirror its research on recidivism risk and the purposes of punishment, and adopt the 1:1 crack/powder penalty structure that it recommended back in 1995 and that President Obama and the Department of Justice support.²⁷ Indeed, adopting these changes would better comport with Congress's directives that the Commission avoid unwarranted disparities, ensure the guidelines meet the purposes of sentencing, reflect advancement in the knowledge of human behavior, and minimize prison overcrowding.²⁸

Even if the Commission chooses to adhere to the mandatory minimum penalty structure for the drug guideline, it should still reduce all drug guidelines by two levels to remedy the guidelines' unnecessary and unintentional contribution to excessive drug sentences, just as it did for the crack guideline.²⁹

The Commission should also expand the mitigating role adjustment by acknowledging in the commentary that in drug cases where the guideline range is driven by quantity, the adjustment may not be adequate and, if that is the case, that the court should depart by increasing the impact of the adjustment accordingly. In addition, the mitigating role adjustment should be based on the defendant's functional role in the drug trafficking trade, even if the defendant was the sole participant. The availability of the adjustment should not depend on the happenstance of whether there are other known participants. The Commission should delete the word

²⁴ See Statement of Michael Nachmanoff at 7-8.

²⁵ *Id.*

²⁶ *Id.* at 15.

²⁷ See Joint Statement of Thomas W. Hillier II and Davina Chen at 20-23; Joint Statement of Alan DuBois and Nicole Kaplan at 23-24 (urging the Commission to support 1:1 ratio).

²⁸ See *id.*; see also Statement of Michael Nachmanoff at 15-16; 28 U.S.C. §§ 991(b)(1)(A)-(C), 994(g).

²⁹ See Joint Statement of Thomas W. Hillier II and Davina Chen at 20.

“substantially” and give examples illustrating that being “integral” to the offense does not preclude the adjustment and the proper application of Note 3(A).³⁰

V. Crimes of Violence

The Commission’s priorities state that it intends to continue reviewing the statutory and guideline definitions of “crime of violence,” “aggravated felony,” “violent felony,” and “drug trafficking crime.”

A. **Narrow the Career Offender Guideline**

As we said in our response to this same priority last year, the grave and widely recognized problems associated with the career offender guideline demand direct and immediate attention.³¹ In our letter, we urged the Commission to narrow the criteria of the guideline so that it is no broader than what 28 U.S.C. § 994(h) strictly requires, and to recommend that Congress repeal § 994(h) altogether.³² To aid the Commission in effectively narrowing the guideline, we made four specific suggestions. First, we suggested that the Commission define “crime of violence” to bring it in line with Supreme Court precedent, and provided the following sample language:

"Crime of violence" includes burglary of a dwelling, arson, extortion, and offenses involving the use of explosives. Other offenses are included as "crimes of violence" if (A) the offense has as an element the use, attempted use, or threatened use of physical force against the person of another; or (B) the elements of the offense of which the defendant was convicted (i) require purposeful, violent and aggressive conduct on the part of the defendant and (ii) present a serious potential risk of physical injury to another.³³

Second, we suggested that the Commission limit the definition of “controlled substance offense” to only those federal offenses set forth in § 994(h) and analogous state offenses with a statutory maximum of at least ten years, and provided the following sample language:

A “controlled substance offense” is a felony that is described in 21 U.S.C. §§ 841, 952(a), 955, 959, or 46 U.S.C. § 70503, or that is an analogous offense under state law, and that is punishable by imprisonment for at least ten years.³⁴

³⁰ See also Statement of Alexander Bunin at 17-18; Joint Statement of Thomas W. Hillier and Davina Chen at 24.

³¹ See Defender Letter to the Commission regarding Final Priorities for Cycle Ending May 1, 2009 at 8 (Sept. 8, 2008).

³² *Id.* at 8-19.

³³ *Id.* at 9-11.

³⁴ *Id.* at 11-12.

Third, we suggested that the Commission conform the guideline to § 994(h) by defining “prior felony conviction” consistent with 21 U.S.C. § 802(13) as follows:

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

We also urged the Commission to add a requirement that the sentence served, or at least the sentence imposed, exceeded a threshold that reasonably distinguishes between serious and minor offenses to alleviate the illogical result that under the career offender guideline as currently written, a defendant who served, or was sentenced to, 6 months of unsupervised probation, and a defendant who served, or was sentenced to, 20 years in prison are treated exactly the same.³⁵

Fourth, we suggested that the Commission revise USSG §4A1.3(b)(3)(A) to remove the criminal history category departure limit for career offenders.³⁶

These suggestions have been echoed in the testimony presented by Defender witnesses at the regional hearings,³⁷ and we continue to believe that these are the minimum steps that the Commission must take to bring the guideline closer to § 994(h). While the Commission may wish to continue studying other aspects of the guidelines relating to the listed definitions, there is no reason for it to delay remedying these problems now.

B. Seek the Repeal of 28 U.S.C. § 994(h)

We also continue to believe that § 994(h) itself represents unsound sentencing policy because it is unnecessary and interferes with the purposes of sentencing and the broader goals of the SRA, including fairness and avoidance of unwarranted disparity. It requires punishment that overstates the recidivism risks of the defendants subjected to it, and otherwise fails to serve any legitimate purpose of punishment.³⁸ Worse, because black offenders have a greater risk of being subjected to enhanced punishment based on drug offenses, § 994(h) has created racial disparities

³⁵ *Id.* at 12-15.

³⁶ *Id.* at 15.

³⁷ See U.S. Sentencing Commission Public Hearing Transcript, Statement of Alexander Bunin, Federal Public Defender for the Northern District of New York, at 14-15 (July 9, 2009); U.S. Sentencing Commission Public Hearing Transcript, Joint Statement of Thomas W. Hillier II, Federal Public Defender for the Western District of Washington and Davina Chen, Assistant Federal Public Defender for the Central District of California, at 29-30 (May 27, 2009).

³⁸ See *Fifteen Year Report* at 133-35; U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 9, 32, Ex. 13 (May 2004).

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that did not exist before the Sentencing Reform Act.³⁹ And much like mandatory minimums, § 994(h) unduly constrains the Commission's ability to improve the guideline in ways that incorporate judicial wisdom and experience and the Commission's own empirical research, contrary to the Act's intent.

The Commission should report all of the problems associated with § 994(h) to Congress. It should also make clear that § 994(h) is not necessary to protect the public, both because there are several statutory sentencing enhancements, such as those found at 21 U.S.C. § 851 and 18 U.S.C. § 3559(c), which mandate stiff prison terms for repeat offenders, and because courts now possess the authority and discretion to identify those truly dangerous offenders who have made a "career" out of serious crime and, through § 3553(a), to impose a punishment as severe as their misdeeds deserve.

C. Recommend Revising Definition of “Aggravated Felony”

Sentences under USSG §2L1.2 are unjustifiably severe, in part because the guideline incorporates the overly-broad definition of “aggravated felony” in 8 U.S.C. § 1101(a)(43).⁴⁰ As early as 2001, the Commission knew that more than half of all defendants who committed an “aggravated felony” under §1101(a)(43)'s definition had actually committed offenses involving no injuries, no weapon involvement, no violence, and no indicia of dangerousness,⁴¹ and the list of non-serious crimes in § 1101(a)(43) has only grown since then. We hope that part of the Commission's multi-year review has been directed toward updating the research it conducted in 2001.⁴²

VI. Child Pornography

We are also very pleased that the Commission intends to review the appropriateness of the sanctions for child pornography offenders, and to possibly promulgate amendments and/or a report to Congress as a result of that review.

³⁹ See *Fifteen Year Report* at 133-35.

⁴⁰ See, e.g., Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-Entry Cases*, 8 Fed. Sent. Rep. 275 (Mar/Apr. 1996); James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry after Deportation: A Proposal for Simplified and Principled Sentencing*, 8 Fed. Sent. Rep. 264, 268 (Mar/Apr. 1996).

⁴¹ Maxfield, 11 George Mason L. Rev. at 542, Ex. 2 (describing Commission study showing 53.9% of pre-2001 aggravated felonies involved “no dangerousness”).

⁴² Although not listed in the priorities for this amendment cycle, we also continue to believe that the Commission should independently act to reduce the unwarranted severity of sentences under §2L1.2 and to bring them more in line with its own empirical data and the purposes of sentencing. See *id.* at 15-16; see also Joint Statement of Thomas W. Hillier II and Davina Chen at 26-29; Joint Statement of Alan DuBois and Nicole Kaplan at 27-28.

A. Report to Congress

As reflected in numerous judicial decisions across the country,⁴³ sentences for child pornography offenses are far too severe. In large part, this is due to the mandatory minimum penalties in the statute, which require courts to impose a minimum sentence of five years for a first offender convicted of receiving, transporting or distributing child pornography⁴⁴ despite the fact that there is no meaningful difference in culpability between those defendants who “receive” child pornography and those that “possess” it.⁴⁵ Indeed, the Department of Justice admits that it “routinely” piles on child pornography charges that carry mandatory minimum sentences in order to effectuate the lengthiest sentence possible without regard to whether that sentence is greater than necessary to satisfy the purposes of sentencing, and thus contrary to 18 U.S.C. § 3553(a).⁴⁶

⁴³ *United States v. Beiermann*, 599 F.Supp.2d 1087, 1104-05 (N.D. Iowa 2009) (categorically rejecting child pornography guideline because it “does not reflect empirical analysis, but congressional mandates that interfere with and undermine the work of the Sentencing Commission;” and it “impermissibly and illogically skews sentences for even ‘average’ defendants to the upper end of the statutory range, regardless of the particular defendant’s acceptance of responsibility, criminal history, specific conduct, or degree of culpability”); *see also United States v. McElheney*, ___ F.Supp.2d ___, 2009 WL 1904565 (E.D. Tenn. July 2, 2009); *United States v. Jacob*, ___ F.Supp.2d ___, 2009 WL 1849942 (N.D. Iowa June 26, 2009); *United States v. Fulfor*, slip. op. 2009 WL 1839005 (D. Neb. June 25, 2009); *United States v. Szymanski*, slip op., 2009 WL 2009 WL 1212252 *2 (N.D. Ohio Apr. 30, 2009); *United States v. Phinney*, 599 F. Supp. 2d 1037 (E.D. Wis. 2009); *United States v. Grober*, 595 F.Supp.2d 382 (D. N.J. 2008); *United States v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio 2008); *United States v. Johnson*, 588 F.Supp.2d 997 (S.D. Iowa 2008); *United States v. Rausch*, 570 F. Supp. 2d 1295 (D. Colo. 2008); *United States v. Doktor*, slip op., 2008 WL 5334121 (M. D. Fla. Dec. 19, 2008); *United States v. Ontiveros*, 2008 WL 2937539 (E.D. Wis. July 24, 2008); *United States v. Hanson*, 561 F.Supp.2d 1004 (E.D. Wis. June 20, 2008); *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa June 19, 2008); *United States v. Taylor*, 2008 WL 2332314 (S.D.N.Y. June 2, 2008); *United States v. McClelland*, 2008 WL 1808364 (D. Kan. April 21, 2008); *United States v. Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008); *United States v. Stabell*, 2009 WL 775100 (E.D. Wis. March 19, 2009); *United States v. Gellatly*, 2009 WL 35166, *3-5 (D. Neb. Jan. 5, 2009); *United States v. Noxon*, 2008 WL 4758583, *2 (D. Kan. Oct. 28, 2008); *United States v. Stults*, 2008 WL 4277676, *4-7 (D. Neb. Sept. 12, 2008); *United States v. Grinbergs*, 2008 WL 4191145, *5-8 (D. Neb. Sept. 8, 2008); *United States v. Goldberg*, 2008 WL 4542957, *6 (N.D. Ill. April 30, 2008); *United States v. Sudyka*, 2008 WL 1766765, *5-6, 8-9 (D. Neb. April 14, 2008).

⁴⁴ *See* 18 U.S.C. § 2252A(a)-(b).

⁴⁵ *See, e.g.*, U.S. Sentencing Commission, Report to Congress, *Sex Offenses against Children: Findings and Recommendations Regarding Federal Penalties* at 11 (June 1996) (“[T]here appears to be little difference in the offense seriousness between typical receipt cases and typical possession cases. Indeed, all material that is possessed must at some point have been received (unless it was produced, in which case the defendant would be sentenced under the more severe production guideline).”).

⁴⁶ *See* U.S. Sentencing Commission Public Hearing Transcript, Statement of Karen Immergut, U.S. Attorney for the District of Oregon, at 8 (May 27, 2009) (“We routinely charge counts carrying mandatory minimum sentences (such as receiving, transporting, or distributing child pornography) in cases where the evidence supports those counts, in addition to possession counts. We routinely allege prior convictions, where applicable, which enhance both the statutory maximum and mandatory minimum

As in other contexts, we urge the Commission to inform Congress about the negative effect of child pornography mandatory minimums on our justice system and to recommend the repeal of all such penalties. *See also* Part I, *supra*.

We also urge the Commission to provide Congress with an accurate description of today's federal child pornography offender and to urge Congress to allow the Commission to revise the guideline despite congressional directives that recommend sentences decades longer than five years and near or above the statutory maximum. Many of the problems with §2G2.2 are due to congressional directives that have hijacked the Commission's ability to act in its characteristic institutional role.⁴⁷ Yet the Commission has not acted to remedy many of the misperceptions on which such directives are based, thereby perpetuating a marked disconnect between the type of offender Congress intends its harsh policies to reach and the defendants typically subjected to them.⁴⁸ For example, in its 1996 report (the last report issued by the Commission to Congress on this issue), Congress was told that "a significant portion of child pornography offenders have a criminal history that involves the sexual abuse or exploitation of children."⁴⁹ While that may have been true in 1996, by 2006 the opposite was true due to changes in federal prosecutorial policy – 80% of child pornography defendants were first offenders with no prior offenses of any sort.⁵⁰ At the very least, Congress should be informed of this material change in the offender population. Similarly, Congress should be told that, unlike the cases described in the 1996 report, §2G2.2 no longer covers defendants who engage in more serious conduct such as transporting children for prostitution, engaging in criminal sexual abuse, or producing child pornography, and that these more serious offenders are now referred to other guidelines for sentencing.⁵¹

Congress's practice of frequently directing the Commission to increase child pornography sentences without regard to need has stunted the development of sound sentencing policy in this area.⁵² It also arguably violates the Supreme Court's mandate that the Commission

penalties. Many AUSAs require the defendant to either plead guilty to a mandatory minimum count, or at the least, to agree under Rule 11(c)(1)(C) to a guideline sentence with no variances or departures.”).

⁴⁷ See Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* at 3 (Jan. 1, 2009) (noting that current §2G2.2 is “not the product of an empirically demonstrated need for consistently tougher sentencing” but instead is “largely the consequence of numerous morality earmarks, slipped into larger bills over the last fifteen years, often without notice, debate, or empirical study of any kind”).

⁴⁸ *See id.* at 13-15.

⁴⁹ *See* U.S. Sentencing Commission, *Sex Offenses against Children* at i.

⁵⁰ *See* Stabenow, *Deconstructing the Myth of Careful Study* at 14.

⁵¹ *Id.* at 14-15.

⁵² *See Fifteen Year Report* at 73 (“The frequent mandatory minimum legislation and specific directives to the Commission to amend the guidelines make it difficult [for the Commission] to gauge the effectiveness

bring “judicial experience and expertise” to the guidelines, and that it not allow the Judicial Branch’s reputation for impartiality and nonpartisanship “to be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.”⁵³ The Commission should respectfully remind Congress that it is better able to develop guidelines that serve the purposes of sentencing when it is not handcuffed by specific directives, just as courts are better able to impose fair and appropriate sentences when they are not handcuffed by mandatory minimums, and should seek a repeal of all congressional directives that have bound the Commission to a particular course of action.

B. Guideline Amendments

The current iteration of §2G2.2, like the drug guideline, “does not exemplify the Commission’s exercise of its characteristic institutional role.” *Kimbrough v. United States*, 128 S.Ct. 558, 575 (2007). This is because, in formulating §2G2.2’s current base offense levels, “the Commission looked to the mandatory minimum sentences set forth in [the PROTECT Act], and did not take into account empirical data and national experience.” *Id.* (internal quotations omitted); *see* USSG App. C, Amend. 664 (“As a result of [the PROTECT Act’s] new mandatory minimum penalties and the increases in the statutory maxima for [child pornography] offenses, the Commission increased the base offense level” for all such offenses).

For receipt and trafficking offenses, the Commission arrived at a base offense level of 22, not because its own empirical studies showed that level is generally appropriate in light of § 3553(a), but rather because “when combined with several specific offense characteristics which are expected to apply in every case (e.g. use of a computer, material involving children under 12 years of age, number of images), the mandatory minimum of 60 months’ imprisonment will be reached or exceeded in almost every case.” *See* USSG App. C, Amend. 664. It then increased the base offense level for possession offenses, again not based on any empirical analysis, but simply to “maintain proportionality with receipt and trafficking offenses” and to reflect the increased statutory maximum. *Id.*

Similarly, the Commission did not rely on empirical data when creating many of §2G2.2’s specific offense characteristics. One of the most problematic is the two-level “use of a computer” enhancement. The enhancement was initially added pursuant to a congressional directive to cases involving transmission, receipt, distribution and possession of child pornography, despite Commission misgivings as to the appropriateness of it and despite the fact that the enhancement as drafted went well beyond the language of the congressional directive on which it was based.⁵⁴ At the time, the Commission found that the enhancement would apply to

of any particular policy change, or to disentangle the influences of the Commission from those of Congress.”).

⁵³ *Mistretta v. United States*, 488 U.S. 361, 407-07 (1989).

⁵⁴ *See* U.S. Sentencing Commission, *Sex Offenses against Children* at 29 (adopting and expanding directive recommending enhancement where computer was used to transmit notice of or advertisement for child pornography, or to transmit or ship the pornography, despite noting that “not all computer use is

only 31% of child pornography offenses.⁵⁵ By 2008, courts were applying the enhancement in 96.5% of cases sentenced under §2G2.2.⁵⁶ Clearly this characteristic now represents the base offense and sentences should not be enhanced because of it. *Accord* USSG App. C, Amend. 664 (noting that “several specific offense characteristics . . . are expected to apply in almost every case (e.g., use of a computer, material involving children under 12 years of age, number of images)”). At the very least, the Commission should study the types of cases in which courts are applying the enhancement, particularly where the Commission’s 1996 study reflected that the typical federal case did “not involve the type of computer use that would result in either wide dissemination or a likelihood that the material will be viewed by children,”⁵⁷ and due to shifting prosecutorial priorities, the federal government prosecutes far less culpable defendants today than it did in 1996.⁵⁸

Many other aspects of §2G2.2 are in need of revision – including the five-level enhancement for “pattern of activity involving the sexual abuse or exploitation of a minor” that applies to every defendant who traded images with more than one person or chatted online to an agent s/he thought was a minor, the “number of images” enhancement, the counting of each video clip no matter how short as 75 images, the enhancement for swapping porn for porn, and others. The result of these unsound policies – made up of an amalgam of specific congressional directives and political pressure – is that first offenders with no prior criminal record commonly face guideline ranges at or beyond the statutory maximum.⁵⁹

We are happy to see that the Commission intends to conduct its own research into recidivism rates for child pornography defendants. Presumably, this research will consist of both validated, peer-reviewed outside studies and analysis of the Commission’s own copious data. We look forward to assisting the Commission and its staff in reviewing and revising the child pornography guidelines to better reflect the purposes of sentencing.

equal,” that “[s]entencing policy should be sensitive to these differences in culpability,” and that “[f]ederal cases to date typically do not involve the type of computer use that would result in either wide dissemination or a likelihood that the material will be viewed by children”).

⁵⁵ *Id.* at 29.

⁵⁶ See U.S. Sentencing Commission, *Use of Guidelines and Specific Offense Characteristics: Fiscal Year 2008* at 37.

⁵⁷ See U.S. Sentencing Commission, *Sex Offenses against Children* at 29.

⁵⁸ Stabenow, *Deconstructing the Myth of Careful Study* at 13 (“By 2006, when 2,191 defendants were federally prosecuted for child pornography offenses, federal authorities had broadened their reach, and were routinely prosecuting less egregious instances of misconduct.”).

⁵⁹ *Id.* at 26-27.

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
August 24, 2009

As always, we very much appreciate the opportunity to submit comments on this and all of the Commission's proposed guideline amendments. We look forward to continue working with the Commission to improve federal sentencing policy.

Sincerely,

s/ Jon M. Sands

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines
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Commissioner William B. Carr, Jr., Vice Chair
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