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July 16, 2008

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

Re: Proposed Priorities for 2008-2009

Dear Judge Hinojosa:

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

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

I. Career Offender

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

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

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

A. Crime of Violence

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

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

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

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

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

⁵ See Fifteen Year Review at 134.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²³ 495 U.S. 575 (1990).

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

B. Drug Trafficking Offenses

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

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

²⁴ 28 U.S.C. § 994(h).

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

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

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

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

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

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

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

C. Convicted of a “Felony”

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

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

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

³⁰ *Id.* at 235-36.

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

³² 28 U.S.C. § 994(h).

³³ USSG § 4B1.2, comment. (n.1).

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

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

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

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

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

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

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

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

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

The Commission should revise the commentary as follows:

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

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

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

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

⁴⁰ *Id.*

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

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

C. Departure

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

II. Relevant Conduct

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

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

⁴¹ Fifteen Year Review at 134.

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

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

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

A. The Sentencing Reform Act

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

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

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

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

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

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

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

⁴⁴ *See* Federal Courts Study Committee, *Report of the Federal Courts Study Committee* 138 (Apr. 2, 1990) ("We have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system."); United States General Accounting Office: *Central Questions Remain Unanswered* 14-16 (Aug. 1992) (suggesting that the way prosecutors plea-bargain with defendants may adversely impact blacks and interfere with the Commission's mission of eliminating disparity based on race); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 557 (1992) (arguing that circumvention of the Guidelines through plea bargaining, while not "necessarily bad," is "hidden and unsystematic," suggests "significant divergence from the statutory purpose" of the Guidelines, and "occurs in a context that forecloses oversight and obscures accountability").

⁴⁵ Fifteen Year Review at 50, 86, 92.

⁴⁶ *Id.* at 50.

⁴⁷ *Id.* at 87.

⁴⁸ *See* Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997).

In a recent case, two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant. *See United States v. Quinn*, 472 F. Supp. 2d 104 (D. Mass. 2007). Because this occurred in the same case, it highlighted a form of disparity that is rampant but is otherwise hidden. As the court commented:

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

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

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

Id. at 111 (footnote omitted).

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

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

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

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

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

The Court of Appeals for the District of Columbia recently sympathized with a defendant who said at his sentencing, “I just feel as though, you know, that that’s not right. That I should get punished for something that the jury and my peers, they found me not guilty.” *United States v. Settles*, ___F.3d___, 2008 WL 2549841, at *2 (D.C. Cir. June 27, 2008). Congress was concerned about respect for law from both the public’s and the defendant’s perspective. In

895, 897-98 (4th Cir. 1994) (Hall, J., concurring) (“As regards uncharged ‘relevant’ conduct, this pricing [at exactly the same level of severity as convicted conduct] is at best a poor policy choice; as regards charges on which the jury has acquitted the defendant, it is just wrong.”); *United States v. Concepcion*, 983 F.2d 369, 395-96 (2d Cir. 1992) (Newman, J., dissenting from denial of petition for rehearing en banc) (a “just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal.”); *United States v. Boney*, 977 F.2d 624, 647 (D.C. Cir. 1992) (Randolph, J., dissenting in part and concurring in part) (“[T]his conceptual nicety might be lost on a person who . . . breathes a sigh of relief when the not guilty verdict is announced without realizing that his term of imprisonment may nevertheless be ‘increased’ if, at sentencing, the court finds him responsible for the same misconduct.”); *United States v. Galloway*, 976 F.2d 414, 437 (8th Cir. 1992) (en banc) (“If the former Soviet Union or a third world country had permitted [sentencing based on uncharged offenses], human rights observers would condemn those countries.”); *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) (“most people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were acquitted.”), *rev’d*, 2008 WL 895660 (4th Cir. Apr. 1, 2008); *United States v. Coleman*, 370 F.Supp.2d 661, 668 (S.D. Ohio 2005) (“A layperson would undoubtedly be revolted by the idea that, for example, a person’s sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.”).

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

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

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

C. Past Practice and National Experience

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

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

Though judges and the Parole Commission took into account many details of offenders' actual conduct in the pre-guidelines era, *see* USSG, Ch. 1, Pt. A, ¶ 4(a), the Parole Commission did not take acquitted conduct into account as a general matter,⁵³ due to the "perceived unfairness" of this approach.⁵⁴ Further, during the pre-guideline era, judges were not required to impose additional punishment based on uncharged or acquitted conduct, much less at the same rate as convicted conduct. They were free to, and did, reject information about uncharged and acquitted conduct and to give it little or no effect, because it was unfair, unreliable, illegally-obtained, or for any other reason.⁵⁵ Moreover, state guideline systems, before and after the Federal Sentencing Guidelines, have never required or allowed the use of uncharged or acquitted crimes in calculating the guideline range.⁵⁶ In part as a result of these provisions, sentences under the guidelines far exceed past practice.⁵⁷

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

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

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

⁵⁶ *See* Phyllis J. Newton, Staff Director, U.S. Sentencing Commission, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent. Rep. 68, 1995 WL 843512, at *3 (Sept./Oct. 1995) ("Virtually all states, in contrast to the federal system, have adopted an offense of conviction system under which uncharged conduct generally remains outside the parameters of the guidelines.").

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

D. Serious Sixth Amendment Questions

A within-guideline sentence necessarily tied to facts underlying acquitted, dismissed, and uncharged offenses remains vulnerable to Sixth Amendment challenge. While an appellate court may presume a within-guidelines sentence to be reasonable, *Rita v. United States*, 127 S. Ct. 2456, 2462-63 (2007), there are cases in which a sentence could not be upheld as reasonable absent a judicial finding of fact not found by the jury, and if so, it violates the Sixth Amendment. *See Rita*, 127 S. Ct. at 2479-80 (Scalia, J., concurring); *id.* at 2473 (Stevens, J., concurring). “The door . . . remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.” *Gall*, 128 S. Ct. at 603 (Scalia, J. concurring).⁵⁸

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

III. Alternatives to Incarceration

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

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

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

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

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

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

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

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

IV. Drug Offenses

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

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

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

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

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

Very truly yours,



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