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**Public Hearing Before the**  
**United States Sentencing Commission**

**“The Sentencing Reform Act of 1984: 25 Years Later”**  
**Stanford, California**  
**May 27, 2009**

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We thank the Commission for holding this hearing and for inviting us to testify on behalf of the Federal Public and Community Defenders regarding how the federal sentencing system is working twenty-five years after the Sentencing Reform Act was enacted, and what changes can be made to improve it.

Twenty-three years ago, the Commission traveled the country in a series of six regional hearings in order to obtain feedback regarding a Preliminary Draft of the Guidelines. The Commission heard repeatedly from Federal Defenders that the guidelines as drafted would result in sentences that were too harsh and virtually eliminated consideration of mitigating circumstances. We predicted that, in practice, judges would be imposing mandatory sentences based on unreliable fact-finding by probation officers, without ordinary constitutional protections, and that the facts would come not from any independent investigation by the probation officer but from the prosecutor. We expressed concern about the constitutionality of requiring judges to mathematically calculate punishment for conduct with which the defendant was not charged or of which the defendant was acquitted. We protested that the guidelines effectively eliminated probation as a sentencing option though it had been frequently and appropriately used in the past, and that the Commission’s decision to limit probation in this manner was in conflict with Congress’s general expectations and its directive in 28 U.S.C. § 994(j).<sup>1</sup>

The Supreme Court eventually agreed that the mandatory guidelines system was unconstitutional, but saved the guidelines by excising two provisions that made them mandatory. Thus, while all of the concerns the Defenders raised about the guidelines in 1986 remain today, judges need not follow them. Instead, judges have the power and the

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<sup>1</sup> See USSC, Transcript of Proceedings (Oct. 17, 1986) (Chicago); USSC, Transcript of Public Hearing (Oct. 21, 1986) (New York); USSC, Transcript of Public Hearing Regarding Sentencing Draft Guidelines (Oct. 29, 1986) (Atlanta); USSC, Transcript of Regional Public Hearing (Nov. 5, 1986) (Denver); USSC, Transcript of Public Hearing (Nov. 18, 1986) (San Francisco); USSC, Transcript of Proceedings (Dec. 2, 1986) (Washington, D.C.) (all transcripts on file at the Sentencing Commission).

duty to treat every defendant as a human being and to impose sentences that fairly and effectively advance the purposes of sentencing. They may openly disagree with guidelines that do not advance sentencing purposes, and must explain their sentences in terms of sentencing purposes. The Commission, in turn, can revise the guidelines based on judicial feedback and empirical research. In this way, the Commission can improve the guidelines, thereby encouraging judges to follow them more consistently.<sup>2</sup>

This evolutionary process can be hastened with the Commission's help in addressing a number of key problems which contribute to unwarranted sentencing severity and over-incarceration in the federal system.

First, the Commission should encourage the use of probation and other alternatives to imprisonment. We suggest that the Commission create a guideline for the in/out question, remove the zones from the sentencing table or create an alternative sentencing table, and publish evidence-based guidance to assist judges in making the in/out decision and crafting alternative sentences. Substantial change is important because the guidelines' current marginalization of probation and other alternatives is contrary to empirical evidence and congressional intent, and thus contributes unnecessarily to over-incarceration. *See* Part I (pp. 3-14).

Second, the Commission should abandon its policy of mirroring mandatory minimums in the guidelines. Rather than creating proportionality, this policy magnifies the *disproportionality* of mandatory minimum penalties by spreading them across the board. Similarly, the Commission should not abdicate its independent expert role when responding to congressional directives. *See* Part II (pp. 15-16).

Third, the Commission should substantially reduce the unwarranted severity of the drug and relevant conduct guidelines, the career offender guideline, the illegal re-entry guideline, and the child pornography guideline. By doing so, it would reduce true unwarranted disparity, as well as the rate of sentences below the guideline range. Sentencing data, sentencing decisions, and the Commission's own empirical research demonstrate that these guidelines recommend punishments that are greater than necessary to satisfy legitimate sentencing purposes, and that they create unwarranted disparity. *See* Part III (pp. 16-31).

Fourth, the Commission should eliminate policy statements that prohibit, restrict or limit consideration of offender characteristics and offense circumstances. These policy statements are contrary to current law and practice, create confusion and unnecessary complication, and are contrary to congressional intent. *See* Part IV (pp. 31-37).

Fifth, the Commission should issue an updated report on mandatory minimums, and urge their repeal. Current data indicates that prosecutorial control over mandatory

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<sup>2</sup> *See United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Spears v. United States*, 129 S. Ct. 840 (2009); *Nelson v. United States*, 129 S. Ct. 890 (2009).

minimums results in disparity, including racial disparity, which judges and the Commission are powerless to correct. The Commission should also urge the repeal of specific congressional directives that interfere with needed revision of the guidelines. *See* Part V (pp. 37-39).

Sixth, we propose several ways in which the Commission can foster and improve an ongoing dialogue among the Commission, the courts, Congress, and all other stakeholders, including explaining the guidelines; organizing more effective and inclusive district trainings on current sentencing law and practice; supporting legislation to place a Defender *Ex Officio* on the Commission; and more effectively collecting, studying and reporting the reasons judges give for the sentences they impose. *See* Part VI (pp. 39-48).

#### **I. The Commission Should Encourage the Use of Probation and Other Alternatives to Incarceration.**

Two years after the guidelines went into effect, Commissioner Breyer said that the “major way in which the Guidelines raise penalties” was to “raise[] sentences for white collar crimes,” such that “[m]any [of these] offenders who previously would have received no incarceration will now receive one to six months in a community treatment center or halfway house.”<sup>3</sup> He said that the guidelines would change the focus of sentencing to ask, “What should we be doing with this offender, this human being?” The answer would not be imprisonment for every crime, but “other forms of punishment that may prove both more cost-effective and more humane.”<sup>4</sup>

The guidelines, however, dramatically raised sentences for nearly every crime, and required prison terms for the vast majority of offenders. The United States now has the highest rate of imprisonment in the world, the Bureau of Prisons is the largest prison system in the nation,<sup>5</sup> and it is operating at 36-37% over its rated capacity.<sup>6</sup> The federal prison population has increased at least three times the rate of state prisons since 1995,<sup>7</sup> is at 203,692 inmates today,<sup>8</sup> and costs the taxpayers over \$5 billion per year.<sup>9</sup> The

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<sup>3</sup> Ilene H. Nagel, Stephen Breyer, Terence MacCarthy, *Panel V: Equality Versus Discretion in Sentencing*, 26 Am. Crim. L. Rev. 1813, 1822 (Spring 1989).

<sup>4</sup> *Id.* at 1825, 1830.

<sup>5</sup> *See* Bureau of Justice Statistics, *Prisoners in 2007* (December, 2008), <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf>.

<sup>6</sup> Statement of Harley Lappin Before the Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, U.S. House of Representatives, Concerning Federal Prisoner Reentry and the Second Chance Act, at 2, March 10, 2009.

<sup>7</sup> Sentencing Project, *The Federal Prison Population: A Statistical Analysis*, [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_federalprisonpop.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_federalprisonpop.pdf).

<sup>8</sup> Quick Facts About the Bureau of Prisons, <http://bop.gov/about/facts.jsp#1>.

Director of the Bureau of Prisons recently told a congressional appropriations committee that, after less-than-anticipated inmate population growth in FY 2008 due to the retroactive reduction in the crack guidelines, inmate population growth was back “on track,” with expected increases of 4,500 inmates per year over the next several years at current punishment levels.<sup>10</sup> The annual cost of imprisonment, at \$25,894.50 per inmate, is eight times the cost of supervision, at \$3,743.23 per inmate.<sup>11</sup>

The Commission’s symposium on alternatives to incarceration last summer demonstrated that the states, but not the federal system, have reduced costs and succeeded in protecting the public through non-prison alternatives. In a recent report, the Commission observed:

Effective alternative sanctions are important options for federal, state, and local criminal justice systems. For the appropriate offenders, alternatives to incarceration can provide a substitute for costly incarceration. Ideally, alternatives also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.<sup>12</sup>

Still missing, however, is assistance from the guidelines in ensuring that alternatives to incarceration are used when appropriate. Consideration of alternatives to incarceration was on the Commission’s list of priorities for the most recent amendment cycle, but no alternatives were considered or promulgated. We urge the Commission to make this a top priority next amendment cycle and to take a bold approach rather than tinkering at the margins. As explained in more detail in Part E below, we urge the Commission to:

- (1) Create a New Guideline for the In/Out Question.
- (2) Remove the Zones from the Sentencing Table, or Create an Alternative Sentencing Table.
- (3) Provide Evidence-Based Guidance.

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<sup>9</sup> Costs of Incarceration and Supervised Release (\$25,894.50 per inmate in FY 2008), available at <http://www.uscourts.gov/newsroom/2009>.

<sup>10</sup> Statement of Harley Lappin, *supra* note 6.

<sup>11</sup> See <http://www.uscourts.gov/newsroom/2009>.

<sup>12</sup> USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 2-3 (Jan. 2009).

**A. The Guidelines Discourage the Appropriate Use of Probation and Other Alternatives to Incarceration.**

Congress authorizes probation for a broad range of offenses and offenders, *i.e.*, for any offense with a statutory maximum below 25 years so long as probation is not expressly precluded and the defendant is not sentenced to prison for a non-petty offense at the same time.<sup>13</sup> Chapter Five does contain a version of the “in/out” question that courts should be asked and answered in every case in which prison is not required:

The Comprehensive Crime Control Act of 1984 makes probation a sentence in and of itself. 18 U.S.C. § 3561. Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.

USSG, Chapter 5, Part B - Probation, Introductory Commentary.

However, this goes unnoticed because it is located in Part B, entitled “Probation,” and the guidelines recommend against probation in most cases where it is authorized by statute.<sup>14</sup> Similarly, U.S. Probation Monograph 107 directs that “[o]fficers should consider the appropriateness of any available alternatives before deciding to recommend a term of imprisonment,”<sup>15</sup> but this is routinely ignored. Why? As the Commission recently confirmed, “sentencing zone ultimately determines whether offenders are sentenced to alternatives. Specifically, guideline offense level and Criminal History Category, alone or in combination, are the principal factors determining whether an offender receives an alternative sentence.”<sup>16</sup>

Offense levels, however, bear little relationship to the need for incarceration: “There is no correlation between recidivism and guideline’s offense level. Whether an offender has a low or high guideline offense level, recidivism rates are similar.” USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 15 (2004) (hereinafter *Measuring Recidivism*). Further, the guidelines do

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<sup>13</sup> See 18 U.S.C. § 3561(a); 18 U.S.C. § 3559(a).

<sup>14</sup> The court can impose a within-guideline sentence of straight probation only at levels 1 through 8 (0 to 6 months). The within-guideline sentence is at least intermittent confinement, community confinement, or home detention at levels 9 and 10 (1 to 12 months), is at least half prison at levels 11 and 12 (8 to 16 months), and is prison only at level 13 or greater (12 months to life).

<sup>15</sup> Publication 107 at II-74, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Revised March 2005.

<sup>16</sup> USSC, *Alternatives to Incarceration in the Federal Criminal Justice System*, at 12 (Jan. 2009).

not incorporate, but instead deem not ordinarily relevant, or limit the effect of, factors that bear on risk of recidivism and the likelihood of success under supervision, including first offender status, age, family ties, education, employment and treatment. “If, as the data indicate, abstinence from illicit drug use, or high school completion, reduces recidivism rates, then rehabilitation programs to reduce drug use or to earn high school diplomas may have high cost-benefit values.” *Id.* at 15-16. Indeed, they do, as substantial empirical research shows.

As a result of the marginalization of the in/out question, the zone system, and the Guideline Manual’s treatment of offender characteristics, the guidelines recommend prison for offenders who are not a threat to public safety and either require no rehabilitation or would benefit far more from work, education, and treatment in the community than from being warehoused in prison at taxpayer expense.

**B. Congress Did Not Intend This Result.**

Congress intended that probation would be the presumptive sentence for first offenders not convicted of a crime of violence or otherwise serious offense, and that probation and other alternatives would be permissible for all offenders except those convicted of a crime of violence resulting in serious bodily injury. *See* 28 U.S.C. § 994(j).

By statute, the threshold question for the sentencing court in any case in which probation is statutorily allowed is whether probation is sufficient or whether prison is required:

The court, in determining *whether* to impose a term of imprisonment, and, *if* a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

18 U.S.C. § 3582(a) (emphasis supplied). “This section specifies the factors to be considered by a sentencing judge in determining *whether* to impose a term of imprisonment and, *if* a term is to be imposed, the length of the term.” S. Rep. No. 98-225 at 116 (1983) (emphasis supplied). “The phrase ‘to the extent that they are applicable’ acknowledges the fact that different purposes of sentencing are sometimes served best by different sentencing alternatives.” *Id.* at 119 n.415.

Consistent with this directive to the courts, Congress directed the Commission to promulgate guidelines for both the “in/out” question, and the “if prison, how long” question:

The Commission . . . shall promulgate . . . guidelines . . . for use of a sentencing court in determining the sentence . . . including -- (A) a determination *whether* to impose a sentence to probation, a fine, or a term

of imprisonment [and] (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment.

28 U.S.C. § 994(a)(1)(A) & (B) (emphasis supplied).

Congress encouraged the use of non-prison sentences in a variety of ways. First, “in light of current knowledge that imprisonment is not an appropriate means of promoting correction and rehabilitation,” S. Rep. No. 98-225 at 76 (1983), it directed the Commission and the courts to use prison only if necessary to serve a purpose of sentencing other than rehabilitation, and to use probation in all other circumstances. *See* 28 U.S.C. § 994(k); 18 U.S.C. § 3582(a); S. Rep. No. 98-225 at 119, 176 (1983). Congress specifically noted that “if an offense does not warrant imprisonment for some other purpose of sentencing, the committee would expect that such a defendant would be placed on probation.” *Id.* at 171 n. 531.

Second, Congress recognized that probation would often satisfy the other purposes of sentencing: “It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose. This is particularly true in light of the new requirement in section 3563(a) that a convicted felon who is placed on probation must be ordered to pay a fine or restitution or to engage in community service.” *Id.* Congress recently restored payment of fine, restitution and community service as the three options for a mandatory condition of probation after the AEDPA of 1996 had mistakenly made restitution, notice to victims, and residence restrictions the three choices.<sup>17</sup>

Third, Congress provided numerous examples of when probation *should* be used, based on the very same factors that the policy statements in the Guidelines Manual prohibit or discourage from consideration. Through the directives in 28 U.S.C. § 994(d) and (e), Congress sought to guard against the use of incarceration to warehouse defendants who lack the advantages of education, employment, and stabilizing ties, and it specifically intended that probation would be used to rehabilitate defendants who were poor, uneducated, and in need of education and vocational training, so long as prison was not necessary for some other purpose of sentencing.<sup>18</sup>

According to the Commission’s data, however, the federal prison population consists overwhelmingly of people of color who are poor and uneducated, and whose crimes were not violent. With the exception of crack offenders (who are mostly African American and have a higher risk of arrest and prosecution than similarly situated Whites), drug offenders are usually first offenders.<sup>19</sup> This is totally inconsistent with Congress’s

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<sup>17</sup> *See* Pub. L. No. 110-406, Sec. 14(a) (Oct. 13, 2008), amending 18 U.S.C. § 3563(a)(2).

<sup>18</sup> S. Rep. No. 98-225 at 171-175 & nn. 531 & 532 (1983).

<sup>19</sup> This data shows that over 92% of federal defendants are sentenced to prison (85.3% to straight prison), that these defendants are overwhelmingly people of color (70%), poor (87% get no fine

intent that probation would be used for offenders who are not dangerous or likely to commit a serious crime in the future, offenders who are in need of services, and first offenders.

**C. Longstanding Judicial Feedback Calls for the Expansion of Probation and Other Alternatives to Incarceration Under the Guidelines.**

A 1990 judicial survey indicated support for the addition of alternatives to the guidelines, with 62% in favor of community service, 56% in favor of intensive supervision, and 53% in favor of boot camp. *See* USSC, *Alternatives to Incarceration Project, The Federal Offender: A Program of Intermediate Punishments* (Dec. 28, 1990).

The majority of district judges responding to a 2002 Commission survey urged greater availability of probation with confinement conditions, particularly for drug trafficking offenders (64 %); the majority of circuit judges requested that such sentencing options be made either more available or not reduced from their current availability, and 50% urged greater availability for drug trafficking cases.<sup>20</sup> “In sentencing drug trafficking offenders, more than half of responding district court judges (and a somewhat smaller proportion of responding circuit court judges) would like greater access to straight probation, probation-plus-confinement, or ‘split’ sentencing options. Slightly more than 40 percent of both responding district and circuit court judges also would like greater availability of sentencing options (particularly probation-plus confinement or ‘split’ sentences) for theft and fraud offenses.”<sup>21</sup> Further, 41.5% of district judges and 53.5% of circuit judges believed that many guideline sentences did not provide needed education, training, medical care or treatment in the most effective manner; 45.1% of district judges and 47.7% of circuit judges believed that the guidelines failed to permit individualized sentences when warranted.<sup>22</sup>

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imposed), and relatively undereducated (only 6% graduated from college, and half did not graduate from high school); and their crimes are typically victimless (drugs and immigration account for 6 out of 10 convictions). Further, contrary to the perception that guns go with drugs, 83% of federal drug offenses do not involve a firearm. With the exception of crack offenders, drug offenders are usually first offenders. Two-thirds of marijuana defendants are in criminal history category I, as are 60% of heroin and cocaine defendants, and half of methamphetamine defendants. Crack offenders, 82% of whom are African American, are more likely to have criminal history points. *See* USSC, *Overview of Federal Criminal Cases Fiscal Year 2007* (Dec. 2008); *Changing Face of Federal Criminal Sentencing* (Dec. 2008).

<sup>20</sup> *See* USSC, *Survey of Article III Judges on the Federal Sentencing Guidelines*, II-17, III-17 (Feb. 2003) (hereinafter “Judicial Survey”).

<sup>21</sup> USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* Nov. 2004 ((hereinafter “Fifteen Year Review”), Appendix C, Summary Report on the U.S. Sentencing Commission’s Survey of Article III Judges at C-4.

<sup>22</sup> Judicial Survey II-12, III-12.



After *Booker* and its progeny, judges have imposed probation only sentences and other alternatives in cases that fall within Zone D, finding that such sentences meet the purposes of sentencing set forth in § 3553(a) far better than a term of imprisonment.<sup>23</sup> As the Supreme Court recognized in *Gall*, standard conditions of probation involve a substantial restriction of liberty, *Gall*, 128 S. Ct. at 595-96 & n.4, and “a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.” *Id.* at 599 (internal quotation marks and citation omitted).

#### **D. Empirical Research Supports the Use of Alternatives to Incarceration.**

In 1990, the Commission’s Alternatives to Incarceration Project identified numerous benefits of alternative sanctions, including cost savings, efficiency and increased fairness at sentencing. See USSC, *Alternatives to Incarceration Project, The Federal Offender: A Program of Intermediate Punishments*, Message from the Director at 5-9 (Dec. 28, 1990). It recommended “an expansion of the sentencing options currently available by providing an array of intermediate punishments for the federal offender,” including probation and 24 hour incarceration in the community. *Id.*

In 1996, Commission staff authored a paper entitled *Sentencing Options under the Guidelines*,<sup>24</sup> which acknowledged that non-prison sentences are associated with less recidivism than prison sentences,<sup>25</sup> that “[m]any federal offenders who do not currently

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<sup>23</sup> See, e.g., *United States v. Duhon*, 541 F.3d 931 (5<sup>th</sup> Cir. 2009) (affirming 5 year probationary sentence for child pornography defendant in guideline range of 27-33 months where sentence of imprisonment would have interfered with defendant’s psychological treatment and made him lose social security disability benefits); *United States v. Rowan*, 530 F.3d 379 (5<sup>th</sup> Cir. 2008) (affirming 5 year probation sentence for child pornography defendant in guideline range of 46-57 months); *United States v. Ruff*, 535 F.3d 999, 1001 (9<sup>th</sup> Cir. 2008) (affirming sentence in case involving convictions for health care fraud and embezzlement; the district court cited as one of several mitigating factors the defendant’s “history of strong employment” in granting a variance from 30-37 months’ imprisonment to one day of imprisonment followed by three years’ supervised release [to be partially served in a community confinement facility], in part so that the defendant could continue to work); *United States v. Munoz-Nava*, 524 F.3d 1137 (10<sup>th</sup> Cir. 2008) (affirming a below-guideline sentence in heroin trafficking case of one year and a day in prison, plus a year of home confinement and five years of supervised release, where the guidelines called for a sentence of 63-78 months). To the extent there has been a decreasing trend in alternative sentences even after *Booker* and its progeny, it appears to be attributable to the growing percentage of non-citizens in the federal sentencing population. USSC, *Alternative Sentencing in the Federal Criminal Justice System* at 5-6 (Jan. 2009).

<sup>24</sup> USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* (Nov. 1996), available at [http://www.rashkind.com/alternatives/dir\\_00/USSC\\_sentencingoptions.pdf](http://www.rashkind.com/alternatives/dir_00/USSC_sentencingoptions.pdf).

<sup>25</sup> *Id.* at 18.

qualify for alternatives have relatively low risks of recidivism compared to offenders in state systems and to federal offenders on supervised release,”<sup>26</sup> and that “alternatives divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties.”<sup>27</sup>

A wealth of other research likewise has shown that prison contributes to increased recidivism and does not prepare prisoners for successful re-entry. For example, Bureau of Prisons research in 1994 concluded that for the 62.3% of federal drug trafficking prisoners in Criminal History Category I, guideline sentences were costly to taxpayers, had little if any incapacitation or deterrent value, and were likely to negatively impact recidivism. *See e.g., Miles D. Harar, Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (July/August 1994).

“The rapid growth of incarceration has had profoundly disruptive effects that radiate into other spheres of society. The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality.” *See Sentencing Project, Incarceration and Crime: A Complex Relationship* 7-8 (2005). The recurring theme at the Sentencing Commission’s Symposium in July 2008 was that lengthy incarceration leads to increased recidivism and is not the most cost effective means of protecting public safety.

## **E. Proposed Solutions**

### **1. The Commission Should Create a New Guideline for the In/Out Question.**

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)(1), (2) or (3).

### **2. The Commission Should Remove the Zones from the Sentencing Table or Create an Alternative Sentencing Table.**

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 the

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 19.

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

### 3. The Commission Should Give Evidence-Based Guidance.

It would be helpful to the courts in making the in/out decision and in fashioning an alternative sentence if the Commission were to reference 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, such as the following:

- **Education, Vocational Skills and Employment.** The Commission’s research shows that recidivism rates decrease with increasing educational level (no high school, high school, some college, college degree), and that stable employment in the year prior to arrest is associated with a lower risk of recidivism. *Measuring Recidivism, supra*, at 12 and Exhibit 10. Evidence-based research shows that post-offense educational and vocational training correlates to lowered risk of recidivism. See Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, Exs. A.1 & 4 (Oct. 2006) (setting forth a comprehensive review of programs that have demonstrated an ability to reduce recidivism, which includes educational programs); USSC, *Symposium on Alternatives to Incarceration* (2008), at 22-24 (testimony of Chief Probation Officer Doug Burris, E.D. Mo.) (reporting that the district’s employment program has resulted in a 33% reduction in recidivism rates); see also *id.* at 238-39 (testimony of Judge Jackson, E.D. Mo.) (reporting that the district’s revocation rate is “lower than the circuit and the national rates”).
- **Drug and Alcohol Abuse and Treatment.** Recidivism rates are lower for those without illicit drug use in the year prior to the offense (17.4%) than those who used illicit drugs in the year prior to the offense (31%). See *Measuring Recidivism, supra*, at 13 & Exhibit 10. It is well-established that substance abuse and dependence cause crime, that treatment within the criminal justice system is effective in reducing substance abuse and addiction and the accompanying crime and costs, and that community-based treatment is more effective and less costly than prison without treatment or treatment in prison.<sup>28</sup> For example, the

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<sup>28</sup> See Chandler, Fletcher & Volkow, *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, *Journal of the American Medical Association*, Vol. 301, No. 2, January 14, 2009; Government Accountability Office, Report to Congressional Committees, *Adult Drug Courts, Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes*, Feb. 2005 at 72-74; Testimony of Faye S. Taxman, Ph.D., Before the Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on

Washington State Institute for Public Policy found that treatment-oriented intensive supervision reduces recidivism by 16.7%, that community drug treatment reduces recidivism by 9.3%, and that prison drug treatment programs reduce recidivism by only 5.7%.<sup>29</sup>

- **Mental Health Treatment.** The Council of State Governments Justice Center recently released a report that summarizes the kind of community mental health treatment programs proven to work. *See Council of State Governments Justice Center, Improving Outcomes for People with Mental Illness Under Community Corrections: A Guide to Research Informed Policy and Practice* (2009). Often a mentally ill defendant's need for special attention is confused with increased risk, when the factors used to predict recidivism for these defendants is the same as for all defendants. *Id.* at 15. Therapeutic mental health court programs designed to treat mental disorders as an alternative to longer prison sentences reduce recidivism rates. *See* Dale E. McNeil, Ph.D. and Renée L. Binder, M.D., *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 16 Am. J. Psychiatry 1395-1403 (Sept. 2007); Ohio Office of Criminal Justice Services, *Research Briefing 7: Recidivism of Successful Mental Health Court Participants* (April 2007).
- **Community Service.** A 2005 report issued by U.S. Probation and Pretrial Services encourages the use of community service sentences as “a flexible, personalized, and humane sanction, a way for the offender to repay or restore the community. It is practical, cost-effective, and fair, a ‘win-win’ proposition for everyone involved.” *See* Probation and Pretrial Services Division of the Administrative Office of the U.S. Courts, *Community Service Sentences* (2005). According to the report, “community service addresses the traditional sentencing goals of punishment, reparation, restitution, and rehabilitation . . . It restricts offenders’ personal liberty . . . allows offenders to atone or ‘make the victim whole’ in a constructive way [and] may be regarded as . . . a form of symbolic restitution when the community is the victim.” *Id.* Further, “Courts can use community service successfully with a wide spectrum of offenders: corporations

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Appropriations, U.S. House of Representatives, at 1, 6, March 10, 2009, [http://appropriations.house.gov/Witness\\_testimony/CJS/faye\\_taxman\\_03\\_10\\_09.pdf](http://appropriations.house.gov/Witness_testimony/CJS/faye_taxman_03_10_09.pdf); USSC, *Symposium on Alternatives to Incarceration*, at 34 & Taxman-8 (July 2008); Nat’l Institute on Drug Abuse, National Institutes of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations* (2006); Susan L. Ettner et al., *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment “Pay for Itself?”*, 41 Health Services Res. 192-213 (2006); Doug McVay, Vincent Schiraldi, & Jason Ziedenberg, Justice Policy Institute Policy Report, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* at 5-6, 18 (March 2004).

<sup>29</sup> *See* Washington State Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, Exh. 4 at p. 9 (October 2006), available at <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>.

and individuals, first offenders and recidivists, the indigent and the affluent, juveniles and senior citizens.” *Id.*

- **First or Near First-Offender.** Minimal or no prior involvement with the criminal justice system is a powerful predictor of a reduced likelihood of recidivism. See USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, at 15 (2005) (hereinafter “*Salient Factor Score*”).
- **Age.** “Recidivism rates decline relatively consistently as age increases,” from 35.5% under age 21, to 9.5% over age 50. See *Measuring Recidivism* at 12 and Exhibit 9. The U.S. Parole Commission has long included age as part of its salient factor score because it is a validated predictor of recidivism risk. See *Salient Factor Score* at 1, 8 & n.29.
- **Fraud, Larceny, and Drug Offenders.** These defendants are the least likely of all offenders to recidivate. See *Measuring Recidivism, supra*, at 13 & Exhibit 11.
- **Sex Offenders.** Recidivism rates are lower for sex offenders than for the general criminal population. See Center for Sex Offender Management, Office of Justice Programs, *Myths and Facts About Sex Offenders* (August 2000). According to studies by the Bureau of Justice Statistics of the Department of Justice and by the Canadian government, the vast majority of sex offenders do not re-offend.<sup>30</sup> The Bureau of Justice Statistics found that 5.3% of sex offenders were rearrested for a sex crime within three years of release, while 68% of non-sex offenders were rearrested within three years of release.<sup>31</sup> As with other offenses, sex offense recidivism declines with age.<sup>32</sup> Contemporary treatment methods, particularly cognitive-behavioral therapy, substantially reduce recidivism.<sup>33</sup> Studies

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<sup>30</sup> U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* (November 2003) (5.3% of 9691 sex offenders released from prison in 1994 were re-arrested for a new sex crime within 3 years); R.K. Hanson & K. Morton-Bourgon, *The characteristics of persistent sexual offenders: A meta-analysis of sexual offender recidivism studies*, *Journal of Consulting and Clinical Psychology*, Vol. 73(6), 1154 (2005) (of 19,267 sex offenders of all types, 14% were charged or convicted of a new sex crime within 5-6 years); R.K. Hanson & M.T. Bussiere, *Predicting relapse: A meta-analysis of sexual offender recidivism studies*, *Journal of Consulting and Clinical Psychology*, Vol. 66, 348 (1998) (of 29,450 sex offenders, 14% of all types, 13% of child molesters and 20% of rapists were charged or convicted of a new sex crime within 4-5 years).

<sup>31</sup> U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* (November 2003).

<sup>32</sup> R.K. Hanson, *Recidivism and age: Follow-up data from 4,673 sexual offenders*, *Journal of Interpersonal Violence*, Vol. 17(10), 1046 (2002).

<sup>33</sup> CSOM, *Understanding Treatment for Adults and Juveniles Who Have Committed Sex Offenses* at 10-11 (November 2006); CSOM, *Myths and Facts About Sex Offenders* (August 2000).

comparing offenders who complete treatment with offenders who receive no treatment or who do not complete treatment show differences in recidivism rates ranging from 37% to over 50%.<sup>34</sup> Numerous studies show that safety and stability, social support, steady employment, and education are essential factors in decreasing recidivism.<sup>35</sup> Sex offenders can be safely managed in the community at less cost than prison.<sup>36</sup>

Removing the artificial lines drawn by the Zones in favor of guidance based on empirical evidence would encourage less costly and more effective, humane and rational sentences.

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<sup>34</sup> F. Losel & M. Schmucker, *The effectiveness of treatment for sexual offenders: A comprehensive meta-analysis*, Journal of Experimental Criminology, Vol. 1, 117 (2005) (offenders treated with cognitive-behavioral therapy showed 37% less sexual recidivism than untreated offenders); R.K. Hanson, A. Gordon, A.J.R. Harris, J.K. Marques, V.L. Quinsey, et al., *First report of the collaborative outcome data project on the effectiveness of treatment for sex offenders*, Sexual Abuse: A Journal of Research and Treatment, Vol. 14(2), 169 (2002) (cognitive-behavioral methods associated with reductions in sexual recidivism (from 17.4 to 9.9%) and general recidivism (from 51 to 32%)); Looman, Jan et al., *Recidivism Among Treated Sexual Offenders and Matched Controls: Data from Regional Treatment Centre (Ontario)*, Journal of Interpersonal Violence 3, at 279-290 (Mar. 2000) (recidivism rate reduced from 51.7% to 23.6% with treatment); *Ten-Year Recidivism Follow-up of 1989 Sex Offender Releases*, State of Ohio Department of Rehabilitation and Correction (April 2001) (sex-related recidivism after basic sex offender programming was 7.1% as compared to 16.5% without programming); Orlando, Dennise, *Sex Offenders*, Special Needs Offenders Bulletin, a publication of the Federal Judicial Center, No. 3, Sept. 1998, at 8 (analysis of 68 recidivism studies showed recidivism rate of 10.9% for treated offenders v. 18.5% for untreated offenders, 13.4% with group therapy, 5.9% with relapse prevention combined with behavioral and/or group treatment); Vermont Department of Corrections, *Facts and Figures FY 2007* (sex offense recidivism rate was 5% for inmates who completed treatment v. 30% for inmates who received no treatment).

<sup>35</sup> See R.K. Hanson & K. Morton-Bourgon, *The characteristics of persistent sexual offenders: A meta-analysis of recidivism studies*, Journal of Consulting and Clinical Psychology, Vol. 73(6), 1154 (2005); C.A. Kruttschnitt, C. Uggen & K. Shelton, *Predictors of desistance among sex offenders: The interaction of formal and informal social controls*, Justice Quarterly, Vol. 17(1), 61 (2000); J. Petersilia, *When prisoners come home: Parole and prisoner reentry* (2003).

<sup>36</sup> See generally Center for Sex Offender Management, *Twenty Strategies for Advancing Sex Offender Management in Your Jurisdiction* (2008); Berlin, F.S. et al., *A Five-Year Plus Follow-up Survey of Criminal Recidivism Within a Treated Cohort of 406 Pedophiles, 111 Exhibitionists and 109 Sexual Aggressives: Issues and Outcome*, 12 Am. J. of Forensic Psych. 3 (1991); U.S. Dep't of Justice, Bureau of Justice Statistics, Office of Justice Programs, *Recidivism of Sex Offenders Released from Prison in 1994* (Nov. 2003) (finding sex offenders had lower overall rearrest rate compared to non-sex offenders and no clear association between length of incarceration and recidivism rates); U.S. Dep't of Justice, Center for Sex Offender Management, Office of Justice Programs, *Myths and Facts About Sex Offenders* (Aug. 2000) (discussing recidivism rates and finding that treatment costs far less than incarceration).

## II. The Commission Should Abandon its Policy of Mirroring Mandatory Minimums in the Guidelines, Should Not Exceed Congressional Directives, and Should Seek Reconsideration of Congressional Directives that Are Unsound.

The guidelines are most credible when they are based on empirical data and research. While the original Commission did not explain why it designed the drug guidelines as it did, a “proportionality principle” has recently been offered as a possible explanation. According to this principle, the Commission did not base the drug guidelines on empirical data and research, but rather adopted the mandatory minimums set by Congress, based on drug type and quantity alone, as the “norm” for offense seriousness. To “sentence similarly situated defendants convicted of similar crimes similarly” and to avoid “cliffs,” the Commission made the guidelines for all drug trafficking defendants “proportional” to mandatory minimum sentences.<sup>37</sup> This “proportionality principle” has been used to increase guideline ranges for firearms offenses,<sup>38</sup> and child pornography offenses<sup>39</sup> as well.

While a principle of proportionality that seeks to match the severity of punishment to the seriousness of the offense can be a sound basis for sentencing policy, true proportionality tracks both the harms caused by a defendant’s offense and the defendant’s culpability or blameworthiness for those harms.<sup>40</sup> Mandatory minimums, however, fail to track either the harms caused or the defendant’s culpability. Drug quantity has proven to be a very poor proxy for offense seriousness,<sup>41</sup> and linking the guidelines to the mandatory minimum levels has resulted in unwarranted disparity and excessive uniformity. See Part III.C.1, *supra*. It has magnified the *disproportionality* of the mandatory minimum penalties by spreading them across the board.

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<sup>37</sup> USSC, Public Hearing, Atlanta, Georgia, Transcript at 25-27 (Feb. 10 & 11, 2009).

<sup>38</sup> The rationale for increasing the base offense level under § 2K2.1 from 12 to 20 if the defendant had one prior conviction for a “crime of violence” or “controlled substance offense” and from 12 to 24 if the defendant had two or more such prior convictions was to achieve consistency with the Armed Career Criminal Act, 18 U.S.C. § 924(e). See USSC, *Firearms and Explosive Materials Working Group Report* (Dec. 11, 1990).

<sup>39</sup> See USSG, App. C, Amend. 664 (Nov. 1, 2004) (“As a result of these new mandatory minimum penalties . . . the Commission increased the base offense level for these offenses.”).

<sup>40</sup> Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 Minn. L. Rev. 571, 590 (February 2005); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 Crime and Justice 55, 68, 71, 76-77 (1992).

<sup>41</sup> Fifteen Year Review at 50-52 (recounting some of the reasons that “quantity serve[s] as a poor proxy for offense seriousness”).

As the Supreme Court has found, the Commission was not required by Congress to key the guidelines to mandatory minimums. *See Kimbrough*, 128 S. Ct. at 571. If the Commission were to amend the drug guidelines based on a more accurate measure of culpability such as functional role in the offense, there would be “cliffs” from the mandatory minimums (as long as Congress does not repeal them), but the “cliffs” would be caused by mandatory minimums that fail to reflect the seriousness of the offenses subject to them. As Judge Hinkle said in Atlanta, “It is better to have five good sentences and five bad ones than to have ten bad but consistent sentences.”<sup>42</sup>

Thus, we do not believe that the directive in 28 U.S.C. § 991(b)(1)(B) to “avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct” supports the Commission’s continued adherence to a “proportionality principle” that uses mandatory minimum punishments based on drug type and quantity as the measure of offense seriousness.<sup>43</sup> Indeed, the inferred “proportionality principle” appears to conflict with a variety of directives that are plain, including the need to avoid *unwarranted* disparities, to ensure that the guidelines meet the purposes of sentencing set forth in § 3553(a)(2), to reflect advancement in knowledge of human behavior, and to minimize prison overcrowding. *See* 28 U.S.C. § 991(b)(1)(A), (B) & (C), § 994(g).

Similarly, when Congress issues a directive to the Commission, the Commission should not abdicate its “characteristic institutional role.” Rather, the Commission should interpret congressional directives in the manner most consistent with this role. If the directive is to study and amend if appropriate, the Commission should not amend unless careful study shows it to be necessary to satisfy sentencing purposes. If the directive is an express instruction to increase, but careful study shows that an increase is not necessary, the Commission should seek reconsideration, explaining to Congress why the directive is unsound. Finally, the Commission should not exceed congressional directives, particularly when the result is excessive punishment in light of sentencing purposes, as it has done with the career offender guideline. *See* Part III.C.5, *infra*.

### **III. The Commission Can Reduce Disparity by Reducing Unwarranted Severity.**

The SRA did not call for “uniformity” in sentencing, but rather avoidance of unwarranted sentencing disparities. Unwarranted disparity is different treatment of offenders who are similar in ways that are relevant to the purposes of sentencing, and uniform treatment of offenders who differ in ways that are relevant to the purposes of

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<sup>42</sup> USSC, Public Hearing, Atlanta, Georgia, February 11, 2009, Transcript at 136.

<sup>43</sup> The general requirement, added by the PROTECT Act in 2003, that the guidelines be “consistent with all pertinent provisions of any Federal statute,” § 994(a), also fails to support this policy. The guidelines need not be calibrated to mandatory minimums to be “consistent with” them, *see* USSG § 5G1.1(b), as the Judicial Conference has pointed out. *See* Comments of the Criminal Law Committee of the Judicial Conference (March 16, 2007), [http://www.ussc.gov/hearings/03\\_20\\_07/walton-testimony.pdf](http://www.ussc.gov/hearings/03_20_07/walton-testimony.pdf).



sentencing.<sup>44</sup> When judges decline to follow guidelines that create unwarranted disparity or excessive uniformity, they are preventing these problems. Nevertheless, the Commission may be concerned about an increasing number of sentences outside the guideline range. The Commission can reduce both unwarranted disparity and the number of sentences outside the guideline range by reducing unwarranted severity in the guidelines. As the Supreme Court has suggested “advisory guidelines . . . and ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’” 128 S. Ct. at 573-74, quoting *Booker*, 543 U.S. at 264. As “the Commission revis[es] the advisory Guidelines to reflect actual sentencing practices consistent with the statutory goals,” “district courts will have less reason to depart from the Commission’s recommendations.” *Rita*, 127 S. Ct. at 2482-83 (Scalia, J., concurring).

#### **A. True Disparity Under Mandatory Guidelines**

The mandatory guidelines were called a normative and empirical failure because they failed to appreciably reduce disparity and probably increased it.<sup>45</sup> Differences in the “primary judge effect” were reduced by about one month under the mandatory guideline system.<sup>46</sup> Regional differences remained,<sup>47</sup> and even increased in drug trafficking cases as prosecutors and judges in different regions compensated in different ways for the unwarranted severity of the drug trafficking guidelines.<sup>48</sup> The gap between African-American defendants and other groups in average time served grew much wider in the guidelines era, due to the unjustified adverse impact of various guidelines and mandatory minimum statutes. The drug guidelines, the career offender guideline, and the illegal re-entry guideline, all disproportionately affect racial and ethnic minorities.<sup>49</sup>

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<sup>44</sup> See Fifteen Year Review at 80, 113.

<sup>45</sup> See Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85 (October 2005).

<sup>46</sup> See Anderson, Kling & Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & Econ. 271, 271 (April 1999) (showing expected difference in sentence length of 4.9 months before the guidelines, 3.9 months after the guidelines); Hofer, Blackwell & Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 Crim. L. & Criminology 239, 286-87 & tbl. 1 (1999) (difference of 7.87 months before the guidelines, 7.61 months after the guidelines).

<sup>47</sup> Fifteen Year Review at 99-102.

<sup>48</sup> *Id.* at 140; Hofer, Blackwell & Ruback, *supra* note 46, at 303-04; Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043, 1134 (2001).

<sup>49</sup> Fifteen Year Review at 131-135.

Many guidelines created, and continue to create, unwarranted disparity because they required, and now recommend, sentences that are greater than necessary to achieve any purpose of sentencing. The Commission's policy statements also created unwarranted uniformity by deeming a wide range of offender and offense characteristics that are highly relevant to the purposes of sentencing to be never or not ordinarily relevant. Sentencing pursuant to such guidelines and policy statements treated offenders with widely varying culpability, risks of recidivism, dangerousness, and need for treatment or training all the same.<sup>50</sup>

During the mandatory guidelines era, prosecutors were given inappropriate power over sentencing through their ability to threaten punishment to the full extent of the "applicable" guideline range,<sup>51</sup> based on information that may or may not be reliable, and guideline interpretations that may or may not be "correct" or consistent among cases.<sup>52</sup> Prosecutors determined what the sentence would be, through charge bargaining, fact bargaining, factor bargaining, control over relevant conduct "facts," substantial assistance motions, fast track motions, the third acceptance of responsibility point,<sup>53</sup> and even manipulation of the type or quantity of drug for which the defendant would be sentenced.<sup>54</sup> This created hidden, unreviewable, and unwarranted disparity.<sup>55</sup>

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<sup>50</sup> See Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833 (1992).

<sup>51</sup> Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (May 2008).

<sup>52</sup> Fifteen Year Review at 50, 87.

<sup>53</sup> See Fifteen Year Review at 50, 82, 92; Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* 33 (June 7, 2005); USSC, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 20-21 (1998).

<sup>54</sup> See David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 So. Methodist U. Dedman School of Law 211 (2004). See also, e.g., *United States v. Fontes*, 415 F.3d 174 (1<sup>st</sup> Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F.Supp.2d 1335 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with Williams' prior drug sales), the base criminal offense level would have been only 14."); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

<sup>55</sup> Frank Bowman et al., *Panel II: The Effects of Region, Circuit, Caseload and Prosecutorial Policies on Disparity*, 15 Fed. Sent. Rep. 165, 170 (2003); Eric P. Berlin, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wisc. L. Rev. 187 (1993); USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003); Linda Drazga Maxfield & Keri

Finally, the notion that the guideline range is uniformly “calculated” has always been unfounded. Differences in the strength and reliability of proof, complex and ambiguous rules, and different interpretations of the rules all result in disparities in “calculating” the guideline range.<sup>56</sup> As Judge Hinkle told the Commission at the hearing in Atlanta: “There is disparity that your statistics do not and cannot measure. . . . Your statistics showing the number of sentences within the guideline range do not pick up these disparities because they are disparities in the calculation of the guideline range.”<sup>57</sup>

**B. Judges Can Reduce Unwarranted Disparity and Unwarranted Uniformity Under the Advisory Guideline System.**

Judges can now reduce hidden disparity by openly disagreeing with guideline policies and explaining why. Under the mandatory guidelines, judges, prosecutors and defense lawyers, alone or together, often circumvented the guidelines to reach a sentence that was more just.<sup>58</sup> This kind of “institutionalized subterfuge” is no longer necessary or acceptable. *See Spears v. United States*, 129 S. Ct. 840, 844 (2009). Since judges must explain their disagreements on a reasoned basis in terms of the § 3553(a) purposes and factors, this explains the rationale for the sentence to the defendant and the public, and can provide useful information to the Commission.

Judges can now avoid both unwarranted disparity and unwarranted uniformity because they must consider all of the “nature and circumstances of the offense and characteristics of the offender” that are relevant to sentencing purposes. *See* 18 U.S.C. § 3553(a)(1); *Gall v. United States*, 128 S. Ct. 586 (2007).

Judicial discretion can now operate as a check on the unwarranted disparity created by prosecutorial charging and plea practices.<sup>59</sup> Rather than being entirely dependent on the choices of prosecutors, sentences are imposed by a neutral judge charged with imposing a sentence that is sufficient but not greater than necessary to achieve sentencing purposes. In addition, judges can now directly reduce disparity created by prosecutorial choices by correcting for unwarranted disparity among co-

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Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 2002 WL 31304861 (Mar./Apr. 2002).

<sup>56</sup> Fifteen Year Review at 50.

<sup>57</sup> USSC, Public Hearing, Atlanta, Georgia, February 11, 2009, Transcript at 136.

<sup>58</sup> *Id.* at 32, 82, 87, 141-42.

<sup>59</sup> *Cf.* Fifteen Year Review at 92 (“the ability of judges to compensate for disparities in [prosecutors’] presentence decisions is reduced . . . in a tightly structured sentencing system like the [mandatory] federal sentencing guidelines.”).

defendants,<sup>60</sup> by taking into account cooperation when the government fails to file a substantial assistance motion,<sup>61</sup> and in at least two circuits, by correcting for unwarranted disparity created by the absence of a fast track program.<sup>62</sup>

**C. The Commission Can Reduce True Disparity, As Well As the Number of Below-Guideline Sentences, by Reducing Unwarranted Severity.**

The guidelines discussed below recommend sentences that are greater than necessary to achieve any purpose of sentencing. Sentencing data and decisions show that judges view these guidelines as being too severe. Empirical research, including the Commission’s own research, indicates that these guidelines recommend excessive punishment and create unwarranted disparity. When judges decline to follow these guidelines, they are correcting these problems in individual cases. The problem is that this occurs on an *ad hoc* basis and not much at all in some districts and circuits. The Commission “can help to avoid excessive disparities” through “ongoing revision of the Guidelines in response to sentencing practices,” *Kimbrough*, 128 S. Ct. at 574; *Booker*, 543 U.S. at 264, by providing sensible advice that judges want to follow.<sup>63</sup>

**1. Drug Guidelines**

We urge the Commission to reduce the offense levels in the Drug Quantity Table by two levels for all drugs, as it has already done for crack. This is a step the Commission can and should take even if it adheres to the mandatory minimum statute as the norm for drug sentencing. In promulgating the two-level reduction to the crack

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<sup>60</sup> *Gall*, 128 S. Ct. at 600; USSC, 2008 Sourcebook, Table 25B (1,607 variances to avoid unwarranted disparity among defendants).

<sup>61</sup> See *United States v. Blue*, 557 F.3d 682, 686 (6th Cir. 2009); *United States v. Arceo*, 535 F.3d 679, 688 & n.3 (7th Cir. 2008); *United States v. Jackson*, 296 Fed. Appx. 408, 409 (5th Cir. 2008); *United States v. Doe*, 218 Fed. Appx. 801, 805 (10th Cir. 2007); *United States v. Nuno-Alvarez*, 182 Fed. Appx. 630, 631 (8th Cir. 2006); *United States v. Fernandez*, 443 F.3d 19, 35 (2d Cir. 2006); USSC, 2008 Sourcebook, Table 25B (142 variances for cooperation without government motion).

<sup>62</sup> See *United States v. Rodriguez*, 527 F.3d 221, 225, 227 (1<sup>st</sup> Cir. 2008); *United States v. Seval*, 293 Fed. Appx. 834, 836 (2d Cir. 2008).

<sup>63</sup> See Michael A. Wolff, *Missouri’s Information-Based Discretionary Sentencing System*, 4 Ohio St. J. Crim. L. 95, 98, 101 (Fall 2006) (describing Missouri’s “hearts and minds” approach in which advisory guidelines are based on data of sentencing practices, and judges are given information they need); Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the post-Blakely Era*, 17 Fed. Sent. Rep. 233, 237 (2005) (A “strength of advisory guidelines systems is the potential for judicial ‘buy-in’ to the system, if judges are involved in their construction and allowed regular meaningful feedback. This can lessen the ‘gaming’ that may occur in presumptive systems.”).

guidelines, the Commission acknowledged that it had contributed to the problem by unnecessarily setting the guideline range two levels above that required to include the mandatory minimum penalties at the two statutory quantity levels for defendants in Criminal History Category I. *See* USSG, App. C, Amend. 706, Reason for Amendment (Nov. 1, 2007). This is true of all of the drug guidelines, and should be addressed.

As a more permanent solution, the Commission should abandon the idea that calibrating guidelines to mandatory minimums creates proportionality. *See* Part II, *supra*. It should revise the drug guidelines to reduce severity to a sensible level in light of culpability. The Commission should give serious consideration and study to creating a set of drug guidelines based primarily on functional roles (*e.g.*, importer/high-level supplier, manufacturer/producer, launderer, wholesaler, street level dealer, courier/mule, etc.), with quantity perhaps as a secondary factor.

As Judge Tjoflat said at the hearing in Atlanta, the quantity-based drug guidelines are “not based on anything empirical” but are “just arbitrary.”<sup>64</sup> Instead of relying on data of past sentencing practices, the Commission simply adopted the quantity-based punishments at the five and ten-year mandatory minimum levels from the Anti-Drug Abuse Act of 1986, added two levels, and extrapolated across 17 quantity levels below, between and above the mandatory minimum levels. Other than the two-level reduction for crack, the Commission has not revised this guideline in response to substantial feedback from judges and other stakeholders, or its own empirical research and that of others.

In a 2002 Commission survey, 73.7 % of district court judges and 82.7 % of appeals court judges rated drug punishments as greater than appropriate to reflect the seriousness of drug trafficking offenses.<sup>65</sup> In 2008, only 51.6% of sentences in drug cases were within the guideline range, with 33.9% below-guideline sentences requested by the government and 13.4% below-guideline sentences imposed by the judge. The high rate of below-guideline sentences requested by the government indicates that prosecutors, too, believe the guideline sentence is greater than necessary, other than to serve their cooperation and case management purposes, and obviates the need for judges to vary without a government motion in more cases.<sup>66</sup>

The Judicial Conference has urged the Commission to assess and adjust the guidelines based on principles of parity, proportionality and parsimony, independent of any potentially applicable mandatory minimums. Mandatory minimums “interfere with the operation of the Sentencing Reform Act,” and “may, in fact, create unwarranted

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<sup>64</sup> USSC, Public Hearing, Atlanta, Georgia, Transcript at 24 (Feb. 10 & 11, 2009).

<sup>65</sup> *See* USSC, *Survey of Article III Judges on the Federal Sentencing Guidelines*, Chapters II & III (Feb. 2003).

<sup>66</sup> Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043, 1134 (2001).

sentencing disparity.” Thus, guidelines that are based on mandatory minimums provide no helpful advice in cases in which a mandatory minimum does not apply. The Commission is therefore “obligated to make an independent assessment of what the appropriate sentence should be.”<sup>67</sup>

The quantity-driven approach of the drug guidelines, exacerbated by the relevant conduct guideline and the narrow scope and impact of role adjustments, has long been criticized for failing to assure true proportionality and for creating excessive uniformity. Quantity drives the sentence, though it does not accurately reflect the seriousness of the offense, while other more relevant measures of offense seriousness, such as role in the offense, are given little or no weight.<sup>68</sup> As explained by DOJ in 1994, a substantial number of federal drug offenders play minor functional roles, engage in no violence, and have minimal or no prior contacts with the criminal justice system; though these offenders “are much less likely than high-level defendants to re-offend” and “a short prison sentence is just as likely to deter them from future offending as a long prison sentence,” they “still receive sentences that overlap a great deal with defendants who had much more significant roles in the drug scheme.”<sup>69</sup> The safety valve does not correct the problem because it is too narrow in scope; it does not distinguish between high-level and low-level offenders based on their role in the offense, but instead distinguishes among low-level offenders who differ little from each other, *i.e.*, by one criminal history point.<sup>70</sup>

A 2009 empirical study confirmed that drug quantity was the “strongest predictor” of sentence length, while role in the offense had an “insignificant and weak” effect on sentence length.<sup>71</sup> Further, drug quantity “is not significantly correlated with role in the offense,” as Congress may once have believed, thus providing “fairly robust support of the claim of unwarranted or excessive uniformity in federal drug sentencing.”<sup>72</sup> Thus, “quantity-driven sentencing, coupled with culpability-based

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<sup>67</sup> See Comments of the Criminal Law Committee of the Judicial Conference 3, 4, 5 (March 16, 2007), [http://www.uscourts.gov/hearings/03\\_20\\_07/walton-testimony.pdf](http://www.uscourts.gov/hearings/03_20_07/walton-testimony.pdf).

<sup>68</sup> See, e.g. Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833 (1992); Albert A. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chic. L. Rev. 901 (1991); Hofer & Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19 (2003)

<sup>69</sup> U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994).

<sup>70</sup> See Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. Rev. 1471, 1498-99 (2000).

<sup>71</sup> Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminol. 155, 169 (2009).

<sup>72</sup> *Id.* at 171.

adjustments that are too limited in scope, leads to excessively uniform sentences for offenders of widely differing culpability and responsibility in the drug trade.”<sup>73</sup> In addition, “significant associations” were found between both role and race and role and gender, thus suggesting that “an indirect consequence of excessive uniformity [through the relative undervaluation of role] is the exacerbation of racial and gender disparities.”<sup>74</sup>

In addition, the severity of the drug guidelines, exacerbated by the relevant conduct rules, creates unwarranted disparity by giving prosecutors the power to decide the sentence through their control of the “facts,” whether reliable or not, that dictate the length of the guideline range.<sup>75</sup> The 2009 study described above found that “discretionary plea and charge bargaining practices have stronger independent effects on sentence length than many legally relevant offense factors,” and “may further compound disparate sentencing outcomes. . . . Although empirical research suggests that prosecutorial practices in drug cases are often framed by a desire to achieve fair sentences for low-level or otherwise sympathetic defendants, legitimate concerns of reintroduced disparity arise when prosecutors grant and judges accede to plea and charge bargains that are conducted in an *ad hoc* and largely unreviewable manner.”<sup>76</sup>

The threat of a very high guideline calculation also provides a strong incentive for informants and cooperators to provide exaggerated or completely false information.<sup>77</sup> The Commission has recognized the unreliability of the information often used to establish evidence of drug quantity and the hidden disparity it creates.<sup>78</sup>

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<sup>73</sup> *Id.* at 172.

<sup>74</sup> *Id.* at 171.

<sup>75</sup> “[T]he Guidelines . . . granted prosecutors an unprecedented measure of authority over particular sentences because the pre-Booker Guidelines were mandatory and fact-driven, and prosecutors are largely in control of the facts.” Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 *Stan. L. Rev.* 235, 244 (2005).

<sup>76</sup> *Id.* at 173.

<sup>77</sup> In overturning the convictions of a mother and her sons obtained through testimony manufactured by informants housed together in a federal facility colluding to produce an entirely false story, Judge Melancon in the Western District of Louisiana reviewed several other cases in the district, and found the problem of collusive false testimony to be “systemic.” See *United States v. Colomb*, No. 02-CR-60015, Order Ruling on Defendant’s Motion for New Trial (W.D. La. Aug. 31, 2006), available on PACER, Docket No. 531. See also *United States v. Kandirakis*, 441 F. Supp. 2d 282, 303 (D. Mass. 2006) (“In truth, [the] ‘real conduct’ . . . system relies on ‘findings’ that rest on a mishmash of data, including blatantly self-serving hearsay largely served up by the Department [of Justice].”) (internal quotation marks and citations omitted).

<sup>78</sup> See Fifteen Year Review at 50 (“research suggested significant disparities in how [the relevant conduct] rules were applied,” and “questions remain about how consistently it can be applied,” given that “[d]rug quantity often is highly contested, and disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators”).

## 2. Mitigating Role

Unless and until the Commission revises the drug guidelines to reflect role in the offense, and in any event for application to other cases, the commentary of the mitigating role adjustment should say that in some cases, such as those subject to quantity and loss-driven guidelines, the adjustment may not be adequate, and if not, the court should “depart” by increasing the impact of the adjustment accordingly. If the Commission wishes to see more cases sentenced within the guidelines or a guideline-sanctioned “departure,” this would accomplish that result.

In addition, unless and until the drug guidelines are revised to be based on role in the offense, the mitigating role adjustment should apply based on the defendant’s functional role as compared to other functional roles in the drug trafficking trade, and even if the defendant was the sole participant. If the adjustment is meant to reflect reduced culpability, it should depend on his or her functional role, and not on the happenstance of whether there are other known participants. The requirement that there be other known participants may explain why mitigating role adjustments are given so infrequently, and even less frequently in crack and methamphetamine cases, despite the fact that the government is not targeting kingpins.<sup>79</sup>

## 3. Relevant Conduct

We urge the Commission to reform the relevant conduct guideline to:

- State in the commentary to § 1B1.3 that uncharged and acquitted offenses are not included in the definition of “relevant conduct.”
- Eliminate cross-references to guidelines for more serious crimes than the offense of conviction by deleting “cross references in Chapter Two” from the introductory paragraph of § 1B1.3 and all cross-references in the Chapter Two guidelines.

The use of uncharged and acquitted offenses in calculating the guideline range at the same rate as if an indictment and conviction were obtained is fundamentally unfair and promotes disrespect for law. 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.<sup>80</sup> There appears to be no justification for it in the federal system. Instead, it creates many serious problems.

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<sup>79</sup> In FY 2008, only 20.7% of all drug offenders received mitigating role adjustments. Only 5.2% of crack offenders, and 13.8% of methamphetamine offenders received mitigating role adjustments; 19.8% of powder cocaine offenders, 41.8% of marijuana offenders, and 22.5% of heroin offenders received mitigating role adjustments.

<sup>80</sup> 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 \*3



The theory behind relevant conduct was that it would prevent prosecutors from controlling sentencing outcomes through charge bargaining. *See* USSG, Ch. 1, Pt. A, ¶ 4(a). But the opposite has occurred -- the use of uncharged, dismissed, and acquitted crimes in calculating the guideline range has transferred sentencing power to prosecutors, and has created hidden and unwarranted disparities from the outset.<sup>81</sup> As the Commission noted in 2004, the relevant conduct rule “is not working as intended” and “tend[s] to work in one direction,” that is, by increasing sentences.<sup>82</sup>

The relevant conduct rule aggravates the excessive uniformity of the drug guidelines, and creates a host of hidden unwarranted disparities, with a very substantial impact. As the Commission noted in 2004, probation officers “relied to a great extent on information supplied by prosecutors” for their account of relevant conduct.<sup>83</sup> Indeed, probation officers rely almost solely on summaries and reports from case agents, which is especially noticeable when there was a trial, and the pre-sentence report still reiterates the case agent’s summary. The “facts” that appear in the presentence report, moreover, are not necessarily true and disputes are resolved in different ways, as the Commission also noted in 2004.<sup>84</sup> 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.”<sup>85</sup>

In a sample test administered by researchers for the Federal Judicial Center, probation officers applying the relevant conduct rules sentenced three defendants in

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(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.”).

<sup>81</sup> *See* 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”); 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); 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.”).

<sup>82</sup> Fifteen Year Review at 92.

<sup>83</sup> *Id.* at 86.

<sup>84</sup> *Id.* at 50, 86, 92.

<sup>85</sup> *Id.* at 87.

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.<sup>86</sup> A recent case in the District of Massachusetts demonstrates that these problems persist. 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). When this came to light, the judge found that “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,” and thus “directly subverts one of the fundamental objectives of the Guidelines: to reduce disparity in sentences given to similarly situated defendants.” *Id.* at 111.

Former Commissioner John Steer, one of the original architects of relevant conduct and co-author of *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990), left the Commission with a proposal to eliminate acquitted conduct from § 1B1.3. In addition to the fact that its use “varies from judge to judge according to the jurist’s thinking regarding use of acquitted conduct” which conflicts with the “enforceable right to a correct application of the sentencing guidelines,” he cites “the whole gamut of policy objections to its mandatory inclusion,” and the fact that the guidelines are “alone among sentencing reform efforts in using acquitted conduct to construct the guideline range.” *See An Interview With Former USSC Vice Chair John R. Steer*, 32 *Champion* 40 (September 2008).

Former Commissioner Steer also said that “the aspect of the guideline that [is] most difficult to defend” is that uncharged conduct is “given the same guideline weight as an equivalent drug quantity in the count(s) of conviction.” *Id.* He believes that the weight given uncharged conduct should be decreased to “address another major unfairness perception about the guideline and . . . provide an incentive to prosecutors to convict on more counts if they want the underlying conduct to count more.” *Id.* We agree that the guidelines’ treatment of uncharged crimes is unsupportable, but believe that the way to address it is to eliminate it. It is no more fair for the government to obtain half a sentence for an uncharged offense than it is to obtain a whole sentence for an uncharged offense. Reducing the impact would still permit prosecutors to create hidden and unwarranted disparities by deciding which defendants are or are not “charged” at sentencing, and would not address complexity and inconsistent applications.

#### **4. Immigration Guidelines**

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<sup>86</sup> 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).

We urge the Commission to lower guideline penalties for immigration offenses, and to recommend a downward variance to account for the more difficult conditions under which illegal immigrants serve their sentences and the additional time they are held in immigration custody.

Fifty-six percent of judges surveyed in 2002 reported that sentences imposed for illegal re-entry were greater than appropriate.<sup>87</sup> In FY 2008, the below-guideline rate for the illegal re-entry guideline nationwide, with or without a government motion, was 39.3%.<sup>88</sup> As the Commission has recognized, “a high or increasing rate of departures for a particular offense might indicate that the guideline for that offense does not take into account adequately a particular recurring circumstance and should be amended accordingly.”<sup>89</sup>

The rate varies widely among districts depending on whether or not the district has a fast track program, for example, 83.7% of 577 cases in the Central District of California and 62.1% of 103 cases in the Western District of Washington, both of which have fast track; and 9.8% of 461 cases in the Southern District of Florida and 1.9% of 51 cases in the Eastern District of North Carolina, neither of which has fast track.

The Commission has found that the government’s selective use of fast track programs creates unwarranted disparity because defendants sentenced in districts without authorized fast track programs receive longer sentences than similarly situated defendants in districts with such programs.<sup>90</sup> However, what makes fast track possible and makes it run is the high guideline ranges under § 2L1.2, a guideline that lacks any empirical basis.<sup>91</sup> Like the threat of a mandatory minimum, this guideline is used by prosecutors to coerce guilty pleas and dictate sentencing outcomes. Unlike a mandatory minimum, nothing stands in the way of the Commission ameliorating its harshness.

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<sup>87</sup> USSC, *Survey of Article III Judges on the Federal Sentencing Guidelines*, II-4 (Feb. 2003).

<sup>88</sup> USSC, 2008 Sourcebook, Table 28.

<sup>89</sup> See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 5 (October 2003).

<sup>90</sup> See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003); Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 2002 WL 31304861 (Mar./Apr. 2002).

<sup>91</sup> 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).

Both of our districts have fast track programs, and many of our clients benefit from fast track departures. However, fast track is a symptom of the problem of too-high guideline ranges for these cases, not the solution.

The fast track system in the Central District of California is coercive and unhealthy. Even with the 4-level departure for waiving the ability to present their individualized circumstances to the court, most of our clients serve more time for illegal reentry than they served for any of their underlying offenses. Without the guaranteed 4-level departure, the sentences are of course much higher. The unduly severe sentencing ranges are due primarily to the enhancements under § 2L1.2(b); but also to the fact that (unlike § 2K2.1, for example), there is no washout period for §2L1.2 priors<sup>92</sup>; and the fact that most circuits construe illegal reentry to be a continuing offense, which inflates criminal history categories for these clients.<sup>93</sup> It is the excessive guideline ranges for these cases that create the inducement to accept fast track agreements. These agreements distort the criminal justice system, and especially sentencing practices, for this discrete subset of offenders.

Clients who are offered fast track agreements in the Central District of California must agree to them before we have adequate time to investigate their lives and circumstances. This makes it impossible to obtain documentation related to the alleged prior convictions; to evaluate competently whether they should take the fast track deal or move for a *Booker* variance; or even to determine whether the client has a defense to the crime, based on either derivative citizenship status or the unconstitutionality of their deportation. Competent attorneys have had the experience of advising their clients to plead guilty and learning only later that they were U.S. citizens, or were unlawfully deported.

Moreover, not only do the agreements in the Central District of California prohibit *Booker* variances, but they require a near-absolute appellate waiver, including offense level calculations. Thus, these clients are treated differently from all other clients. Even if a court erroneously finds that a prior is a qualifying predicate, there is no relief on appeal. Of course, without the ability to request *Booker* variances or appeal resulting sentences, there is no dialogue with the Commission based either on statements of reasons or appellate review. This not only stunts the development of sentencing practice in this area, but can result in our clients serving sentences not warranted even under the guidelines. For example, after the United States Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Ninth Circuit sitting en banc overruled preexisting caselaw on the definition of a crime of violence. *Fernandez-Ruiz v.*

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<sup>92</sup> Compare § 2L1.2, comment. (n. 6) with § 2K2.1, comment. (n. 10).

<sup>93</sup> See, e.g., *United States v. Villareal-Ortiz*, 553 F.3d 1326 (10<sup>th</sup> Cir. 2009) (affirming application of § 4A1.1(d) where defendant was not on probation at reentry, but was on probation when he was technically “found”); *United States v. Reyes-Pacheco*, 248 F.3d 942 (9<sup>th</sup> Cir. 2001) (affirming application of § 4A1.1(d), (e) where defendant was on parole and within two years of release from prison at time of reentry, but not when he was found).

*Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc). Clients who entered fast track pleas were required to serve the prison terms imposed under the old, erroneous, definition.

Compounding the severity of the illegal re-entry guideline and the unwarranted regional disparity it fosters, these defendants are subject to additional burdens to which U.S. citizens are not. Undocumented immigrants are not eligible for community confinement and judges generally do not sentence them to probation because there can be no supervision after deportation. Thus, these defendants receive a straight prison sentence at a much higher rate than their U.S. citizen counterparts.<sup>94</sup> Further, because of the high security level to which BOP assigns these defendants, they cannot participate in programs available to U.S. citizens, including the RDAP program with its sentence reduction. In addition, as Mr. Flores pointed out at the Atlanta hearing, although these defendants are held in immigration custody for weeks or months before charges are brought and again after they serve their sentences before deportation, they rarely receive credit for that confinement.<sup>95</sup>

## 5. Career Offender Guideline

The career offender guideline, promulgated in response to 28 U.S.C. § 994(h) and then broadened beyond the statutory terms, is contrary to the Commission's own research, the sentencing data, and judicial decisions.<sup>96</sup> According to the Commission's research, the guideline fails to serve any of the purposes of sentencing in the majority of cases in which it applies, *i.e.*, those involving prior drug convictions, and has a disproportionate impact on African Americans.<sup>97</sup> We urge the Commission to present these findings to Congress with a recommendation that § 994(h) be repealed.

In the meantime, the Commission should narrow the guideline so that it applies no more broadly than required by statute, as detailed in the Defenders' Letter to the Commission regarding Final Priorities for Cycle Ending May 1, 2009 at 8-19, September 8, 2008. First, the Commission should narrow the definition of "crime of violence." The guideline's definition is broader than that contained in either 18 U.S.C. § 16 or 18 U.S.C.

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<sup>94</sup> USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 4-5 & Tables 4 & 5.

<sup>95</sup> USSC, Public Hearing, Atlanta, Georgia, Transcript at 189, 196-98 (Feb. 10 & 11, 2009).

<sup>96</sup> *United States v. Liddell*, 543 F.3d 877 (7<sup>th</sup> Cir. 2008); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Martin*, 520 F.3d 87, 88-96 (1<sup>st</sup> Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); *United States v. Marshall*, slip op., 2008 WL 55989 at \*\*8-9 (7th Cir. Jan. 4, 2008); *United States v. Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008) (career offender); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008) (career offender); *United States v. Hodges*, slip op., 2009 WL 366231 (E.D.N.Y. Feb. 12, 2009).

<sup>97</sup> Fifteen Year Review at 133-34.

§ 924(e), the courts have repeatedly urged the Commission to narrow it,<sup>98</sup> and all of the courts are now interpreting the term consistent with the definition of “violent felony” under *Begay v. United States*, 128 S. Ct. 1581 (2008). The definition should be revised as follows:

“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.

Second, the Commission should limit the definition of “controlled substance offense” to the federal offenses set forth in § 994(h), and only those state offenses that are analogous to the required federal offenses and punishable by a maximum of ten years, consistent with 18 U.S.C. § 924(e):

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.

Third, the Commission should amend the definition of “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.

Fourth, the Commission should remove the limit to one criminal history category for departures under USSG § 4A1.3(b)(3)(A), p.s. This limitation was adopted in response to the PROTECT Act, but was not required by the PROTECT Act.

## **6. Child Pornography Guideline**

We urge the Commission to reduce the severity of the child pornography guideline to the extent it can without running afoul of a specific directive, and to report to Congress its recommendations for how the guideline should be revised overall.<sup>99</sup> In addition, the safety valve should be extended to this guideline.

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<sup>98</sup> See *United States v. Stubler*, 2008 WL 821071 \*2 (3d Cir. Mar. 23, 2008); *United States v. McQuilken*, 97 F.3d 723, 728-29 (3d Cir. 1996); *United States v. Rutherford*, 54 F.3d 370, 377 (7<sup>th</sup> Cir. 1995); *United States v. Parson*, 955 F.2d 858, 874-75 (3d Cir. 1992).

The below-guideline rate in child pornography cases nationwide is 35.7% without a government motion and 8.5% with a government motion.<sup>100</sup> The problems with this guideline have been well-documented, including the fact that the guideline range for a typical first offender can easily exceed not only the mandatory minimum but the statutory maximum.<sup>101</sup> While the Commission does not publish statistics by district for this guideline, there are wide variations in the sentences imposed. The problem is not the 44.2% of defendants who receive a below-guideline sentence, but the 55.8% of defendants who continue to be sentenced within the guideline range. As several judges have found, it is the indefensible severity of this guideline that promotes disparity, both because it gives undue leverage to prosecutors and because many (but not all) judges find they must reject this guideline in typical cases when they measure it against § 3553(a).<sup>102</sup>

#### **IV. The Commission Should Eliminate Policy Statements Restricting Consideration of Offender Characteristics and Offense Circumstances.**

##### **A. Judges Must Consider All Circumstances Of The Offense And Characteristics of the Offender That Are Relevant To The Purposes Of Sentencing, Including Those That Are Prohibited Or Discouraged By The Commission’s Policy Statements.**

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<sup>99</sup> While several of the enhancements in the base offense level under § 2G2.2 were directed or even legislated by Congress, some were adopted by the Commission on its own or exceeded a congressional directive.

<sup>100</sup> USSC, 2008 Sourcebook, Table 28.

<sup>101</sup> See *United States v. Beiermann*, 599 F. Supp. 2d 1087 (N.D. Iowa 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).

<sup>102</sup> See *United States v. Grober*, 595 F. Supp. 2d 382, 397-400 (D.N.J. 2008) (“the harshness of § 2G2.2 is fostering a capricious and dangerous environment”); *United States v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio 2008) (inconsistencies in the way child pornography cases are charged and sentenced is fueled by the “absence of coherent and defensible Guidelines,” leaving district courts “without a meaningful baseline from which they can apply sentencing principles.”); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1115 (N.D. Iowa 2009) (same, quoting *Stern*); *United States v. Goldberg*, slip op., 2008 WL 4542957 \*2 (N.D. Ill. Apr. 30, 2008) (court “is struck by the inconsistency in the way apparently similar cases are charged and sentenced”).

The Commission's policy statements prohibit, discourage or limit consideration of many factors that bear directly on culpability, risk of recidivism, and the need for or accomplishment of rehabilitation.<sup>103</sup> As Justice Stevens put it in *Rita*, the Commission "has not developed any standards or recommendations" for many individual characteristics, but "[t]hese are . . . matters that § 3553(a) authorizes the sentencing judge to consider," even though they are "not ordinarily considered" under the guidelines. 127 S. Ct. at 2473 (Stevens, J., concurring).

In *Gall v. United States*, 128 S. Ct. 586 (2007), the Supreme Court upheld a non-guideline sentence in which the judge imposed a sentence of probation based on circumstances of the offense and characteristics of the defendant which the guidelines' policy statements prohibit, *i.e.*, voluntary withdrawal from a conspiracy, or deem "not ordinarily relevant," *i.e.*, age and immaturity, and self rehabilitation through education, employment, and discontinuing the use of drugs.<sup>104</sup> *Id.* at 598-602. In approving the sentence and the factors upon which it was based, the Court made no mention of the Commission's conflicting policy statements. Thus, these policy statements are defunct in light of § 3553(a)(1) & (2), or, as the Court said in *Rita*, they "do not generally treat certain defendant characteristics in the proper way." 127 S. Ct. at 2468.

As the Court noted, § 3553(a)(1) is a "broad command to consider 'the nature and circumstances of the offense and the history and characteristics of the defendant.'" *Id.* at 596 n.6. Such consideration is necessary to determine what sentence is sufficient, but not greater than necessary, to satisfy just punishment, to prevent further crimes of the defendant, to provide rehabilitation in the most effective manner, 18 U.S.C. § 3553(a)(2), and to avoid unwarranted similarities among defendants who are not similarly situated and unwarranted disparities among defendants who are similarly situated. *Id.* at 600.

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<sup>103</sup> See, e.g., USSG §§ 5H1.1 (age); 5H1.2 (education or vocational skills); 5H1.3 (mental and emotional conditions); 5H1.4 (drug or alcohol abuse, gambling addiction, physical condition, including physique), 5H1.5 (employment record), 5H1.6 (family ties and responsibilities), 5H1.7 & 5K2.0 (d)(3) (role in the offense), 5H1.11 (military, civic, charitable or public service; employment-related contributions; prior good works), 5H1.12 (lack of guidance as a youth, disadvantaged upbringing), 5K2.0(d)(2) (acceptance of responsibility), 5K2.0(d)(5) (fulfillment of restitution obligations "only" to the extent required by law), 5K2.10 (victim provocation in a non-violent offense), 5K2.12 (financial difficulties and economic pressures on a trade or business), 5K2.13 (diminished capacity caused by voluntary use of drugs or other intoxicants, etc.), 5K2.16 (voluntary disclosure in connection with investigation or prosecution), 5K2.19 (post-sentencing rehabilitation efforts), 5K2.20 (aberrant behavior if offense involved serious bodily injury or death, defendant used a firearm or other dangerous weapon, the instant offense is a serious drug offense, the defendant has more than one criminal history point or any prior uncountable criminal history).

<sup>104</sup> See USSG §§ 5H1.1, 5H1.2, 5H1.4, 5H1.5. While voluntary withdrawal from a conspiracy is a factor that may be considered in determining whether to grant a two-level reduction for acceptance of responsibility, see USSG § 3E1.1, comment. (n.1(b)), acceptance of responsibility is a prohibited ground for departure. See USSG § 5K2.0(d)(2).



**B. Policy Statements that Restrict Consideration of Offense and Offender Characteristics Create Confusion and Unnecessarily Complicate Sentencing Proceedings and Appeals.**

The evidence indicates the Commission's restrictive policy statements create confusion, add nothing of value, complicate the process, and waste time and resources.

Judges are no longer bound by these policy statements, are not required to engage in a departure analysis unless a party seeks a "departure," *Rita*, 127 S. Ct. at 2465, and must consider all relevant factors brought to their attention regardless of any policy statement to the contrary. *Gall*, 128 S. Ct. at 598-602. Thus, while departures are allowed, it is not permissible to deny a request for an outside-guideline sentence because a policy statement prohibits or discourages consideration of a particular factor.<sup>105</sup>

How does this play out? The defense may ask the judge to "depart" based on employment and family responsibilities, both of which are "not ordinarily relevant." The judge concludes that he cannot "depart" because there is a grandparent who can care for the defendant's two small children and welfare can pay for their upbringing, and the fact that the defendant has obtained legitimate employment and is a star employee is not extra-ordinary under the policy statement. The judge then focuses on the defendant's circumstances in light of the purposes of sentencing. He finds that the defendant's strong commitment to her children and her job will prevent her from committing future crimes, that her risk of recidivism is relatively low because she is a first time drug offender, and that respect for law would be promoted by allowing her to support and raise her own children.

In this example, the "departure" analysis was a pointless exercise. And this is not infrequent. According to the 2008 Sourcebook, judges relied on a factor mentioned in a policy statement, but imposed sentence based on "Booker/18 U.S.C. § 3553(a)," and not a "departure," 2336 times.<sup>106</sup> Now that judges are required to look at each case in light of sentencing purposes, it is difficult to see how these policy statements add anything of value. This is particularly so because they are unexplained and inexplicable. How could the Commission have determined in advance and in the abstract that age, employment record, family responsibilities, drug addiction, a disadvantaged upbringing, or aberrant conduct in a drug case were never or not ordinarily relevant to the purposes of sentencing? The Commission has not provided any explanation, and we think it would be hard pressed to do so.

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<sup>105</sup> This is a necessary corollary of the Court's decision, on constitutional grounds, to make the guidelines advisory. *United States v. Booker*, 543 U.S. 220, 233 (2005) ("The availability of a departure in specified circumstances does not avoid the constitutional issue.").

<sup>106</sup> See USSC, 2008 Sourcebook, Table 25B. "Below Guideline Range with Booker/18 U.S.C. § 3553 consists of cases with a sentence below the guideline range with no departure indicated and that cite U.S. v. Booker, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system." Appendix A.

Policy statements that tell courts that mitigating factors are never or not ordinarily relevant are confusing because they are not consistent with § 3553(a)(1) and Supreme Court law. The new commentary in USSG § 1A2 adds to the confusion by incorrectly directing judges to consider these policy statements in every case. Many of the policy statements, moreover, explicitly direct judges to do what the law prohibits them from doing, stating that they apply not only to “departures” but to any sentence below the guideline range.<sup>107</sup> The introductory commentary to Part H of Chapter 5 continues to state the “exceptional circumstances” standard struck down in *Gall*, and the new commentary in USSG § 1A2 mentions only the guidelines and the extent of variance as issues for appellate review, contrary to *Gall*.<sup>108</sup> Section 5K2.0 continues to refer to § 3553(b) as if it were valid, as do the provision for departures for organizations, § 8C4, intro. comment., and the standards for acceptance of plea agreements, § 6B1.2, p.s.

Some courts of appeals have recognized that the departure framework is obsolete or beside the point.<sup>109</sup> Nonetheless, and in spite of the invalidation of § 3553(b) in *Booker*, the plain language of § 3553(a)(1), and the Supreme Court’s approach in *Gall*, confusion has persisted in the district courts and the courts of appeals,<sup>110</sup> and this

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<sup>107</sup> See USSG, Chapter 5, Part H, Introductory Commentary; USSG §§ 5H1.6, 5K2.0(b), 5K2.0, comment. (n.3(C)); 5K2.10, 5K2.11.

<sup>108</sup> Grounds for appeal also include “treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” See 128 S. Ct. at 597.

<sup>109</sup> See *United States v. Rinaldi*, 461 F.3d 922, 929-30 (7<sup>th</sup> Cir. 2006); *United States v. Laufle*, 433 F.3d 981-986-87 (7<sup>th</sup> Cir. 2006); *United States v. Arnaout*, 431 F.3d 994 (7<sup>th</sup> Cir. 2005); *United States v. Mohamed*, 477 F.3d 94 (9<sup>th</sup> Cir. 2006); *United States v. Toliver*, 183 Fed. Appx. 745 (10<sup>th</sup> Cir. 2006).

<sup>110</sup> For example, the Eighth Circuit has both upheld a variance based on mental condition when a departure would not have been allowed under §5K2.13, *United States v. Myers*, 503 F.3d 676, 685-86 (8<sup>th</sup> Cir. 2007), and held that a district court abused its discretion by imposing a variance based on age because the policy statement deems age to be “not ordinarily relevant.” *United States v. Feemster*, 531 F.3d 615, 619-20 (8<sup>th</sup> Cir. 2008). The Sixth Circuit has held that while age may be “not ordinarily relevant” under § 5H1.1, the court must consider it under § 3553(a)(1), *United States v. Davis*, 537 F.3d 611, 616-17 (6<sup>th</sup> Cir. 2008), but also held that because a defendant’s “medical condition is not ordinarily a relevant ground for imposing a lower sentence under the Guidelines unless it ‘is present to an exceptional degree,’ the failure to reduce his sentence on the basis of his health . . . was not an abuse of discretion.” *United States v. Renner*, 281 Fed.Appx. 529 (6<sup>th</sup> Cir. 2008). The Seventh Circuit has reversed a district court judge who declined to impose a below-guideline sentence based on the defendant’s public service because the judge thought he could not do so under the guidelines, *United States v. Carter*, 530 F.3d 565, 577 (7<sup>th</sup> Cir. 2008), but also reversed a below-guideline sentence based on the defendant’s young age (20) and lack of serious involvement with the law, because “judges are not allowed to simply ignore the guidelines ranges.” *United States v. Omole*, 523 F.3d 691, 698-700 (7<sup>th</sup> Cir. 2008). Other circuits are less confused. See *United States v. Limon*, 273 Fed. Appx. 698

confusion is fostered by the Guidelines Manual. In *United States v. Chase*, 560 F.3d 828 (8<sup>th</sup> Cir. 2009), for example, the sentencing judge thought that it would “run afoul” of § 3553(a) to take account of the defendant’s advanced age, honorable military service, health problems, and employment history because the Commission’s policy statements deem these factors “not ordinarily relevant.” The panel reversed, holding that “district courts are not only permitted, but required, to consider ‘the history and characteristics of the defendant.’” Similarly, in *United States v. Hamilton*, slip op., 2009 WL 995576, \*3 (2d Cir. April 14, 2009), the district court abused its discretion by not understanding “that it had discretion to consider the policy argument disagreeing with the Guidelines’ refusal to consider age and its correlation with recidivism.” See also *United States v. Simmons*, \_\_\_ F.3d \_\_\_, 2009 WL 1363544 (May 18, 2009) (similar).

**C. “Departures” Have Become Increasingly Irrelevant.**

The data show that the rate of “departures” is shrinking. In fiscal year 2004, 5.2% of sentences were non-government-sponsored below-guideline sentences, all of which at the time were downward “departures.” See USSC, 2004 Sourcebook, Table 26A. In fiscal year 2008, judges imposed below guideline sentences based on “departures” alone in only 2.1% of cases, on “departures” with *Booker* in another 1.2% of cases, and on grounds that did not involve “departures” at all in 10.1% of cases. See USSC, 2008 Sourcebook, Table N. This data tends to show that courts are increasingly dispensing with the “departure” analysis even when a “departure” may be warranted.

**D. Policy Statements That Restrict Consideration of Mitigating Factors Are Contrary To Congressional Intent.**

Congress directed the Commission to “assure that the guidelines and policy statements, *in recommending a term of imprisonment or length of a term of imprisonment*, reflect the general inappropriateness of considering education, vocational skills, employment record, family ties and responsibilities, and community ties.” 28 U.S.C. § 994(e) (emphasis added). According to the Senate Judiciary Committee, the “purpose of [this] subsection is, 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, the guidelines were not to recommend prison over probation or a lengthier prison sentence over a shorter one, because of a defendant’s lack of education, employment, or family or community ties. Instead, such factors “may, in an appropriate case, call for the use of a term of probation instead of

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(10<sup>th</sup> Cir. Apr. 3, 2008) (“Consequently, § 5H1.3 clearly applies to departures and not to a variance under 18 U.S.C. § 3553(a), which is at issue here.”); *United States v. Martin*, 520 F.3d 87, 93 (1<sup>st</sup> Cir. 2008) (“such policy statements normally are not decisive as to what may constitute a permissible ground for a variant sentence in a given case”); *United States v. Vasquez*, 282 Fed. Appx. 47, \*1 (2d Cir. June 20, 2008) (“the district court is free to consider the factors discussed in the Section 5H policy statements in determining whether a non-Guidelines sentence is warranted”).

imprisonment if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community.” *Id.* at 174-75.

Congress also 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.” 28 U.S.C. § 994(d). The purpose of this subsection was to make clear that it would be inappropriate for the guidelines to recommend “preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training.” S. Rep. No. 98-225 at 171. Again, “in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, the Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training.” S. Rep. No. 98-225 at 171 n.531.

In sum, the Commission was not required to prevent leniency for any defendant, rich or poor, educated or uneducated, Catholic or Muslim. It was required to ensure that the guidelines were not used to warehouse the disadvantaged in prison.

### **E. Recommendations**

We recommend the following specific changes to the guidelines and policy statements to conform with current law and practice:

- 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 could 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.<sup>111</sup>
- 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

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<sup>111</sup> Fifteen Year Review at 134.

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 should 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. *See* Appendix.

- 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. *See* Appendix.

#### **V. The Commission Should Urge Congress to Repeal Mandatory Minimums and Specific Directives Through a Report to Congress.**

In FY 2008, there were 9,972 below-guideline sentences imposed by judges without a government motion, many of which *prevented* unwarranted disparity. In the same year, 11,372 offenders were affected by mandatory minimums that trumped the otherwise applicable guideline range: 8,292 were sentenced above the top of the applicable guideline range, and the remaining 3,080 had the bottom of their guideline range truncated. African Americans constituted 24% of all federal offenders, but 31% of those affected by the mandatory minimum trumps.<sup>112</sup>

Thus, it appears that prosecutors create unwarranted disparity through their control over mandatory minimums. Neither judges nor the Commission are able to correct for this unwarranted disparity. The only answer is the repeal of mandatory minimums. The Commission should therefore make it a top priority to urge their repeal through an updated report on mandatory minimums.

The Commission’s 1991 report on mandatory minimums showed that mandatory minimums result in unduly severe sentences, transfer sentencing power directly from judges to prosecutors, and result in unwarranted disparity and unwarranted uniformity.<sup>113</sup> Since then, only more evidence demonstrating that mandatory minimums require sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense, and racially discriminatory, has accumulated.<sup>114</sup> In its Fifteen Year Review,

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<sup>112</sup> USSC FY 2008 Monitoring Datafile.

<sup>113</sup> *See* USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress* (1991).

<sup>114</sup> *Fifteen Year Review* at 135; Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 3, 12 (June 26, 2007); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); Leadership Conference on Civil Rights, *Justice on Trial* (2000); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199 (1993); *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment).

the Commission reported that sentences for similarly situated offenders vary dramatically depending on the disparate charging and plea bargaining decisions of individual prosecutors,<sup>115</sup> and that such decisions “disproportionately disadvantage minorities,”<sup>116</sup> as confirmed by the FY 2008 data described above.

The stacking of § 924(c) counts is a new and serious problem since the Commission’s last report. The immoral and wasteful abuse of prosecutorial power in this context has been highlighted in several recent cases. In *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), the government stacked three § 924(c) counts after the defendant declined a plea to drug trafficking and one § 924(c) count, resulting in a 55 year sentence for a twenty-four-year-old first offender with a good job and two young children. In *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008), a 53-year-old woman with no prior convictions received a 45-year sentence, ten years of which was for drug conspiracy and possession with intent to distribute drugs, and thirty years of which was for two counts of possessing guns in furtherance of drug dealing. There was “no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house.” In *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006), a severely mentally ill 52-year-old woman who had led a completely law-abiding life was sentenced to 159 years in prison, 150 years of which was for seven stacked § 924(c) counts. She was unable to plead guilty on the prosecutor’s initial terms because she held a fixed belief, due to her mental illness, that she was innocent. The prosecutor, taking the position that she had no one to blame but herself, locked her away, in his sole discretion, forever.

The government uses the same coercive tactics with the five-year mandatory minimum for receipt of child pornography. It is typical for the government to threaten to charge one or more counts of receipt to induce a plea to possession or one count of receipt.<sup>117</sup> This is one reason that sentences for child pornography are so inconsistent, as several courts have noted. It is also why these defendants, most of whom have no criminal history, are not predators, and are often otherwise productive members of society with jobs and families, are going to prison for at least five years.

In addition to updating its report on mandatory minimums, the Commission should expand it to explain the detrimental role played by specific congressional directives in shaping the guidelines and interfering with its ability to perform as an

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<sup>115</sup> Fifteen Year Review at 84-85, 89-91, 102-04, 106, 141-42; *see also* Statement of John R. Steer, Member and Vice Chair of the United States Sentencing Comm’n Before the ABA Justice Kennedy Comm’n 17 (Nov. 13, 2003); Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes and Prospects for Improvement*, 37 Am. Crim. L. Rev. 41 (2000).

<sup>116</sup> Fifteen Year Review at 91.

<sup>117</sup> *See, e.g., United States v. Grober*, 595 F.Supp.2d 382, 388 (D.N.J. 2008) (government offered plea to one possession count and dismissal of the only receipt count, then, on the eve of trial, superseded with five receipt counts, thus coercing the defendant to plead on its original terms).

independent expert body. The Commission should urge Congress to repeal such directives, beginning with the directives behind the career offender guideline and the child pornography guideline. Section 994(h) should be repealed in light of the Commission's empirical research showing that the guideline fails to serve any of the purposes of sentencing in the majority of cases in which it applies, *i.e.*, those involving prior drug convictions, and has a disproportionate impact on African Americans.<sup>118</sup> The Commission should similarly study the child pornography guideline, including the rates and types of recidivism for these offenders, to support repeal of the various *ad hoc* directives that shaped this guideline, and to allow the Commission to start over. The Commission has been specifically urged by the Chair of the House Subcommittee on Crime, Terrorism and Homeland Security to review and report to Congress on congressionally-driven guidelines.<sup>119</sup>

## **VI. The Commission Can Improve the Ongoing Dialogue Among the Commission, the Courts, Congress and All Other Stakeholders.**

The Supreme Court's decisions, drawing on the SRA, contemplate an ongoing dialogue that results in the constructive evolution of the guidelines:

The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

*Rita*, 127 S. Ct. at 2464. “[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.” *Booker*, 543 U.S. 264.

Ideally, this dialogue would consist of (1) the Commission explaining the guidelines; (2) judges explaining their sentences; (3) the Commission collecting and disseminating sentencing data, sentencing reasons, and empirical research; and (4) the Commission reviewing and revising the guidelines in light of sentencing data, sentencing reasons, and empirical research. *See* 28 U.S.C. §§ 994(o), 995(a)(12)-(16).

### **A. The Commission Should Explain the Guidelines.**

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<sup>118</sup> Fifteen Year Review at 133-34.

<sup>119</sup> *Plenary Speech by Mr. Robert C. “Bobby” Scott*, Sentencing Advocacy, Practice and Reform Institute, American Bar Association Criminal Justice Section, October 24, 2008.

The Commission should explain in the commentary of each guideline what purpose or purposes the guideline is intended to serve, how the specific guideline elements are meant to achieve those purposes, and the evidence upon which the Commission relied to conclude that the guideline would be effective in achieving that purpose or those purposes. This would improve the ability of judges to decide on a reasoned basis whether or not to follow the guideline in a particular case, and to explain their sentences.

When a guideline, or any of its elements, is based on a congressional directive or a statutory minimum or maximum, that should be stated in the commentary. For example, unless and until the Commission substantially amends the drug guidelines, the commentary to § 2D1.1 should state that the base offense levels in the Drug Quantity Table were set to mirror the punishments at the two quantity levels in 21 U.S.C. § 841, increased by two levels, and extrapolated across 17 quantity levels. The Commission should avoid general references to sentencing purposes or *post hoc* rationalizations for a guideline that was, in fact, based on a congressional action instead of empirical evidence. Using the drug guideline example, the commentary should not say that it reflects the seriousness of the offense because empirical data and research demonstrate that it does not,<sup>120</sup> or that it reflects general deterrence because research shows that it does not,<sup>121</sup> or that it reflects the need to protect the public from further crimes of the defendant because recidivism studies show that it does not.<sup>122</sup>

We believe that the reasons should be stated in the commentary of the guideline itself rather than only in Appendix C. Many judges, lawyers and probation officers are unaware of Appendix C, and it is not easy to use. The historical reasons for a guideline should be clear and understandable to anyone calculating and considering it.

**B. The Commission Should Organize More Effective and Inclusive District Trainings on Current Sentencing Law and Practice.**

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<sup>120</sup> See Fifteen Year Review at 50-52; USSC, *Survey of Article III Judges on the Federal Sentencing Guidelines*, Chapters II & III (Feb. 2003); USSC, 2008 Sourcebook, Table 28; Part III.C.1, *supra*.

<sup>121</sup> Fifteen Year Review at 134 (“[C]riminologists and law enforcement officials testifying before the Commission have noted that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.”); Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime and Justice: A Review of Research* (2006) (“[F]or many crimes including drug trafficking, prostitution, and much gang-related activity, removing individual offenders does not alter the structural circumstances conducting to the crime.”).

<sup>122</sup> The recidivism rate for drug offenders is low, and there is no correlation between recidivism and offense level. USSC, *Measuring Recidivism* at 13, 15, & Exhibit 11.



We do not believe that the Commission provides adequate training on what the Supreme Court's decisions mean, what the purposes of sentencing mean, or how to sentence under § 3553(a). While it is understandable that the Commission is more comfortable training on the guidelines, this leaves a gap in the training that judges, law clerks, and probation officers receive, and the emphasis on the guidelines may be misleading. We therefore urge the Commission to invite knowledgeable practitioners to assist at its trainings. We also believe that these trainings should be inclusive, with judges, law clerks, probation officers, defense counsel and prosecutors together in the same room.

**C. The Commission Should Support Legislation to Place a Defender *Ex Officio* on the Commission.**

The most successful state sentencing commissions include defense lawyers: Minnesota's includes a public defender, Washington's includes two defense lawyers, and North Carolina's includes one defense lawyer.<sup>123</sup> We agree with the Judicial Conference that the federal system would benefit by the presence of a Defender *Ex Officio* on the U.S. Sentencing Commission. Exclusion of a representative of defendants and defense lawyers is unbalanced and deprives the Commission of important expertise and information at crucial decision points. When amendments are based on communications with the Department of Justice without input from the defense bar, or are based on data that we have not seen, or, in some instances, have not even been published for comment, this stands in the way of consensus and calls into question the legitimacy of the Commission and its work. The Judicial Conference has supported a Defender *Ex Officio* for several years and has proposed legislation to implement it. We ask the Commission to support that legislation.

**D. The Commission Should Improve the Collection, Study and Dissemination of Sentencing Reasons.**

Now that judges are not required to impose the guideline sentence absent a "departure" identified in the Guidelines Manual, it is more important than ever that the reasons judges give for the sentences they impose be collected, studied and disseminated in a complete and meaningful way. This is required by the SRA,<sup>124</sup> primarily so that the

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<sup>123</sup> Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 772, 778, 783, 800 (Feb. 2005). See also Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 *Judicature* 173, 174 (1995).

<sup>124</sup> The Commission is responsible to establish a data collection, analysis, and research program, and to serve as a clearinghouse and information center for the collection, preparation, and dissemination of information on federal sentencing practices; to publish data concerning the sentencing process; to collect and disseminate information concerning sentences actually imposed and the relationship of such sentences to the factors set forth in 18 U.S.C § 3553(a); and to collect and disseminate information regarding the effectiveness of sentences imposed. 28 U.S.C. § 995(a)(12)-(16).

Commission can measure the effectiveness of sentencing, penal, and correctional practices in meeting the purposes of sentencing, and refine the guidelines to reflect, to the extent practicable, advancement in knowledge of human behavior.<sup>125</sup> The Supreme Court has now repeatedly emphasized that the Commission will collect, examine, and learn from the explanations judges give, particularly those that evidence dissatisfaction with the guidelines, and revise the guidelines accordingly, with the hoped-for result that the guidelines will constructively evolve and excessive disparities will be avoided as judges more frequently follow the guidelines' improved advice.<sup>126</sup> In addition, dissemination of complete information about the reasons for sentences imposed would assist judges and the parties at sentencing by supplementing the information available in published decisions.<sup>127</sup> Finally, if the Commission is to report to Congress why certain congressionally-driven guidelines are inappropriate, or if Congress questions why judges are frequently rejecting certain guidelines, the reasons judges have found those guidelines to be inappropriate will be important.

The Defenders have two areas of concern about the way in which the Commission collects and reports reasons for outside-guideline sentences. First, the reasons the Commission currently collects are not being reported in a useful way. Second, we do not believe that the reasons judges are giving are being adequately captured.

### **1. Reporting reasons**

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<sup>125</sup> S. Rep. No. 98-225 at 182 (1983).

<sup>126</sup> “[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.” *Booker v. United States*, 543 U.S. 220, 264 (2005). “The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. . . . The Commission will collect and examine the results. . . . And it can revise the Guidelines accordingly.” *Rita*, 127 S. Ct. at 2464. The judge’s “reasoned sentencing judgment, resting upon an effort to filter the Guidelines’ general advice through § 3553(a)’s list of factors, can provide relevant information to both the court of appeals and ultimately the Sentencing Commission. The reasoned responses of these latter institutions to the sentencing judge’s explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.” *Id.* at 2469. “And as that occurs, district courts will have less reason to depart from the Commission’s recommendations.” *Rita*, 127 S. Ct. at 2482-83 (Scalia, J., concurring).

<sup>127</sup> See, e.g., *United States v. Beiermann*, 599 F. Supp. 2d 1087 (N.D. Iowa 2009) (reviewing published decisions in other child pornography cases); *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008) (reviewing information compiled by the parties regarding sentences imposed in other securities fraud cases). But see *United States v. Cole*, 256 Fed. Appx. 510, 511 (3d Cir. Nov. 29, 2007) (“the contention that Cole’s sentence departs from the average sentence for bribery nationwide and in the Eastern District of Pennsylvania is unpersuasive because he has not explained how the severity of his offense or his other relevant circumstances are comparable in degree to those of the average bribery defendant in either jurisdiction”).

The Commission reports the number and rate of reasons for all cases in the aggregate, but not by guideline or offense type. See USSC, 2008 Sourcebook, Tables 24-25B, and the number of outside-guideline sentences by guideline, but without reasons. *Id.*, Table 28. It would be more helpful to know the reasons that judges impose, and that prosecutors move for, below-guideline sentences by guideline. For example, in drug trafficking cases in FY 2008, judges imposed below-guideline sentences in 3,267 cases and prosecutors moved for below-guideline sentences for reasons other than substantial assistance or fast track in 878 cases, but the reasons for those sentences are not available.

At the recent data conference, the Commission said that reasons by guideline could be extracted from the dataset that was given out at the conference. This, however, requires an expert. The information is not accessible to anyone who does not have the dataset, is not an expert, or cannot hire an expert, and so it is not accessible to most judges, lawyers or probation officers.

Since a document listing reasons by guideline would be quite large, we suggest that it be made available online, like the Commission's Guideline Application Frequencies. The Commission should include at least the number, rate and reasons for outside-guideline sentences for each offense guideline and, if possible, for each offense type where the guideline covers different offense types, nationally and by circuit and district. Further, the Commission should report the reasons for below-guideline variances that are cited less than 75 times, which currently are not reported. See USSC, 2008 Sourcebook, Table 25B. Reasons under "Booker/§ 3553(a)" are at least as important as reasons for "departure," which are reported if cited only 12 times.

In addition, the Commission should publish the number, rate and reasons for below-guideline sentences in career offender cases, and in what kinds of cases these occur, *e.g.*, drug trafficking, robbery. This information is currently not available, though the career offender guideline is one of the most problematic guidelines.

## 2. Capturing the reasons

In our districts, judges are giving thorough and thoughtful explanations on the record. Judges across the country are writing sentencing decisions in many more cases.<sup>128</sup> On the record and in written decisions, judges are explaining problems with particular guidelines,<sup>129</sup> and they are explaining the interplay between particular offender characteristics or offense circumstances and the purposes of sentencing.<sup>130</sup>

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<sup>128</sup> A Westlaw search of district court opinions mentioning § 3553(a) and excluding § 2255s and § 3582(c) proceedings reveals 357 opinions in 2005, 462 opinions in 2006, 588 opinions in 2007, 717 opinions in 2008, and a projected 699 opinions in 2009.

<sup>129</sup> Judges have written numerous opinions explaining the problems with the child pornography guideline, *see, e.g., United States v. Beiermann*, 599 F. Supp. 2d 1087 (N.D. Iowa 2009), *United States v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio 2008), as well as opinions discussing problems with drug guidelines other than crack, *e.g., United States v. Goodman*, 556 F.Supp.2d 1002, 1016 (D. Neb. April 14, 2008); *United States v. Urbina*, 2009 WL 565485, \*3 (E.D. Wis. March 5,

We do not believe that the Commission is adequately capturing these reasons, both because judges may not realize that the Commission relies only on the Statement of Reasons form, and because the Statement of Reasons form is not designed to elicit relevant information.

There seems to be a disconnect between what judges have been told by the Supreme Court and the courts of appeals – that their on-the-record explanations and sentencing decisions are not only required for procedural reasonableness, but will be collected and studied by the Commission for the purpose of potentially revising the

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2009); *United States v. Thomas*, 595 F. Supp. 2d 949 (E.D. Wis. 2009); *United States v. Cabrera*, 567 F.Supp.2d 271 (D. Mass. 2008), the fraud guidelines, e.g., *United States v. Lenagh*, 2009 WL 296999 (D. Neb. Feb. 6, 2009); *United States v. Parris*, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008), the second degree murder guideline, *United States v. Grant*, slip op., 2008 WL 2485610 (D. Neb. June 16, 2008), the firearms guideline, *United States v. Handy*, 570 F. Supp. 2d 437, 440 (E.D.N.Y. 2008), *United States v. Cook*, 2009 WL 872465, \*4-6 (D. Neb. March 30, 2009), and the career offender guideline, e.g., *United States v. Hodges*, slip op., 2009 WL 366231 (E.D.N.Y. Feb. 12, 2009); *United States v. Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008). The courts of appeals have approved such policy disagreements. See, e.g., *United States v. Simmons*, \_\_\_ F.3d \_\_\_, 2009 WL 1363544 (5th Cir. May 18, 2009) (“*Kimbrough* does not limit the relevance of a district court’s policy disagreement with the Guidelines to situations such as the cocaine disparity and whatever might be considered similar,” and therefore, “the district court’s disagreement with the policy statement concerning age . . . is relevant”); *United States v. Santillanes*, 274 Fed. Appx. 718, 718-19 (10<sup>th</sup> Cir. Apr. 21, 2008) (methamphetamine); *United States v. Mondragon-Santiago*, \_\_\_ F.3d \_\_\_, 2009 WL 782894 (5<sup>th</sup> Cir. Mar. 26, 2009) (§ 2L1.2); *United States v. White*, 551 F.3d 381, 386 (6<sup>th</sup> Cir. 2008) (en banc) (acquitted conduct); *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2009) (en banc) (all guidelines); *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008) (fast track disparity); *United States v. Vanvliet*, 542 F.3d 259 (1<sup>st</sup> Cir. 2008) (§ 2G3.1 computer enhancement); *United States v. Liddell*, 543 F.3d 877 (7<sup>th</sup> Cir. 2008) (career offender); *United States v. Boardman*, 528 F.3d 86, 87 (1<sup>st</sup> Cir. 2008) (career offender); *United States v. Rodriguez*, 527 F.3d 221 (1<sup>st</sup> Cir. 2008) (fast track disparity); *United States v. Evans*, 526 F.3d 155, 161 (4<sup>th</sup> Cir. 2008) (identity fraud); *United States v. Smart*, 518 F.3d 800, 808-09 (10<sup>th</sup> Cir. 2008) (all guidelines); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008) (career offender); *United States v. Barsumyan*, 517 F.3d 1154, 1158-59 (9<sup>th</sup> Cir. 2008) (all guidelines).

<sup>130</sup> See, e.g., *United States v. Panyard*, 2009 WL 1099257 (E.D. Mich. Apr. 23, 2009); *United States v. Smith*, 2009 WL 249714 (N.D. Ohio Feb. 2, 2009); *United States v. Grooters*, 2008 WL 2561380 (W.D. Mich. June 24, 2008); *United States v. Harris*, 2008 WL 2228526 (E.D. Va. May 29, 2008); *United States v. Delgado-Ruiz*, 2008 WL 2229454 (D.N.M. Feb. 26, 2008); *United States v. Bates*, 2009 WL 1011113 (E.D. Wis. Apr. 15, 2009); *United States v. Halaska*, 2009 WL 1090701 (S.D. Ill. Apr. 22, 2009); *United States v. Ballinger*, 2009 WL 1076202 (E.D.N.Y. Apr. 21, 2009); *United States v. Mayala*, 2009 WL 1181051 (E.D.N.Y. May 1, 2009); *United States v. Simon*, 2009 WL 1033174 (W.D. La. Apr. 16, 2009); *United States v. Jones*, 2009 WL 1034439 (E.D. Pa. Apr. 16, 2009).

guidelines<sup>131</sup> – and the fact that the Commission relies solely on the Statement of Reasons form.

We understand that the Commission can see that there is a problem with a guideline from a high percentage of sentences outside the guideline range,<sup>132</sup> but more could be learned about the nature of the problem from the “decisions” and “reasons” to which the Supreme Court has repeatedly referred. For example, one of the reasons that judges frequently find that the offense level in child pornography cases is too harsh is that it is enhanced by factors, such as the computer and the number of images enhancements, that are inherent in the offense and thus are not “aggravating.”<sup>133</sup> Another example is the career offender guideline. We assume that the Commission codes the reasons for most below-guideline sentences in career offender cases as “criminal history issues.”<sup>134</sup> But what are the issues? Often, the predicates are minor state drug offenses indicative of a small-time dealer, or a prior offense classified as a “crime of violence” that was not violent, or the predicates are remote in time, indicating that the defendant has not made a “career” out of crime. These reasons are typically stated on the record, and they support the need to narrow the career offender guideline where it exceeds what § 994(h) strictly requires.

The Statement of Reasons form was issued in June 2005, just a few months after *Booker* was decided and before the Supreme Court’s later decisions explaining how judges are to sentence under § 3553(a). Perhaps for that reason, the form does not accurately reflect current law and practice, and does not elicit much relevant information, as reflected in the Commission’s tables. .

The Statement of Reasons form is problematic in a number of ways. First, under the Supreme Court’s decisions and the governing sentencing statute, the judge must (1)

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<sup>131</sup> See the Supreme Court’s statements in footnote 126, *supra*. For similar statements by the courts of appeals, see, e.g., *United States v. Cavera*, 550 F.3d 180, 193 (2d Cir. 2008); *United States v. Mendoza*, 543 F.3d 1186, 1192-93 (10<sup>th</sup> Cir. 2008); *United States v. Levinson*, 543 F.3d 190, 196 & n.5 (3d Cir. 2008); *United States v. Prather*, 279 Fed. Appx. 761, 775 (11th Cir. 2008); *United States v. Vonner*, 516 F.3d 382, 386-87 (6th Cir. 2008); *United States v. Batts*, 251 Fed. Appx. 197, 202 (4th Cir. 2007). Some judges explicitly direct their remarks to the Commission. See, e.g., *United States v. Parris*, 573 F. Supp. 2d 744, 746 (E.D.N.Y. 2008); *United States v. Arboleda*, 2009 WL 1181049 (E.D.N.Y. May 1, 2009); *United States v. Ballinger*, 2009 WL 1076202 (E.D.N.Y. Apr. 21, 2009); *United States v. Pender*, slip op., 2009 WL 1013500 (E.D.N.Y. Apr. 14, 2009).

<sup>132</sup> See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003).

<sup>133</sup> See, e.g., *United States v. Szymanski*, slip op., 2009 WL 2009 WL 1212252 \*2 (N.D. Ohio Apr. 30, 2009); *United States v. Beiermann*, 599 F.Supp.2d 1087, 1104-05 (N.D. Iowa Feb. 24, 2009); *United States v. Grober*, 595 F. Supp. 2d 382, 397 (D.N.J. 2008).

<sup>134</sup> See USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 140 (March 2006).

calculate the guideline range, (2) consider the parties' arguments and choose the sentence that complies with § 3553(a), and (3) explain the sentence in terms of the statute. *See Nelson v. United States*, 129 S. Ct. 890, 891-92 (2009); *Gall*, 128 S. Ct. at 596-97; *Rita*, 127 S. Ct. at 2464-65. The second step is *the* substantive component of sentencing, and its content is supplied by all of the purposes and factors in § 3553(a). The judge *must* consider *all* of the purposes of sentencing in every case, and must "impose a sentence sufficient, but not greater than necessary, to comply with [those] purposes." *See Kimbrough*, 128 S. Ct. at 570. The form, however, relegates sentencing purposes to an undifferentiated list of statutory subsections at the tail end of the form, as if they have little importance. Moreover, the number of times judges check off a box corresponding to a purpose they must consider in every case fails to tell us anything.

Second, the form gives priority – *before* sentencing purposes, characteristics of the defendant, circumstances of the offense, all of which must be considered -- to policy statements that largely restrict consideration of such factors. Judges are not required to consult departure policy statements unless a party seeks a departure. *Rita*, 127 S. Ct. at 2465. The judge must consider all relevant characteristics of the defendant and circumstances of the offense, *see* 18 U.S.C. § 3553(a)(1), regardless of any policy statement to the contrary. *Gall*, 128 S. Ct. at 598-602. The focus on these policy statements is thus out of step with sentencing law and practice. As noted above, the rate of departures is steadily shrinking, and the number of times a departure is cited is a small fraction of the number of times the purposes of sentencing and other statutory factors are cited.

Third, the form strongly indicates that the guidelines and policy statements are presumptive, by dividing sentencing reasons into those related to the "advisory guidelines system" and those "outside the advisory guideline system," and by instructing judges to "justify" a sentence outside the guideline range. Since the form was issued, the Supreme Court has made unmistakably clear that the guidelines may not be treated as presumptive. *Nelson v. United States*, 129 S. Ct. 890, 892 (2009); *Gall*, 128 S. Ct. at 596-597; *Rita*, 127 S. Ct. at 2465. Judges are not required to "justify" their sentences, but instead must "explain" them based on § 3553(a).

Fourth, the form instructs judges to "explain the *facts* justifying a sentence outside the advisory guideline system." Since the form was issued, the Supreme Court has repeatedly held that judges may impose a sentence outside the guideline range because the guideline *itself* fails to satisfy § 3553(a) considerations, in the absence of any facts.<sup>135</sup>

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<sup>135</sup> *See Cunningham v. California*, 549 U.S. 270, 279-81 (2007) (recognizing that judges' authority to sentence outside the guideline range based solely on general policy objectives, without any factfinding anchor, is necessary to avoid a Sixth Amendment violation); *Rita*, 127 S. Ct. 2465, 2468 (because the guidelines may not be presumed reasonable at sentencing, sentencing judges are permitted to find that the "Guidelines sentence itself fails properly to reflect § 3553(a) considerations," that the guidelines "reflect an unsound judgment," or that the guidelines "do not generally treat certain defendant characteristics in the proper way"); *Kimbrough*, 128 S. Ct. at 570 (reiterating that a district court may consider arguments that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," and thus, "courts may vary [from Guideline ranges]

The purpose of this requirement is to preserve the constitutionality of the advisory guidelines system, but it also can provide the Commission with useful information about guidelines that do not satisfy sentencing purposes “even in a mine-run case.”

Perhaps because the form does not reflect current law and practice, most judges do not treat it with the same care as the reasons they give in open court or in a written decision. In a survey of Defenders, the vast majority said that the courtroom clerk, a probation officer or even a secretary fills out the form. Some Defenders said they did not believe the judge ever sees the form. The vast majority of Defenders who see the form reported that they have found inconsistencies between the reason given on the record and the reason checked off on the form. Some said they do not check for errors as long as they get the sentence they have requested. In several districts, defense counsel is denied access to the form and so they have no way of checking whether it is accurate. A few noted the obvious, that a checked box cannot adequately convey the reason for a sentence, and that even if a further explanation is added, it is not as detailed or nuanced as the explanation the judge gives in open court.

Proposed Solutions: To learn as much as possible from judges’ sentencing reasons, the ideal would be to encourage judges to attach a transcript or written decision, when one has been prepared, at least for non-guideline sentences. *See* 28 U.S.C. § 994(w)(1)(F) (Commission may require “any other information as the Commission finds appropriate”). We realize that this would require lawyers rather than data entry personnel to analyze and classify the reasons, and that this could be a resource problem. Perhaps the Commission could encourage judges to send a transcript or sentencing decision when they wish to convey something important regarding a problem with the guidelines.

In any event, the Statement of Reasons form should be substantially revised. We agree with the suggestion in the Open Letter to the Commission from scholars and researchers that a balanced multi-agency task force is needed to hammer out the details. At minimum, the form should be designed to reflect current sentencing law, and to elicit relevant information, perhaps through a series of questions related to each subsection of § 3553(a). To encourage judges to use the form to give feedback on the guidelines, the form might ask: “Is there any feedback you would like to give the Commission regarding any guideline applicable in this case?”

The Commission should also amend the new commentary entitled “Continuing Evolution and Role of the Guidelines,” USSG § 1A2, Intro., to accurately reflect § 3553(a) and the Supreme Court’s decisions. As written, the commentary is misleading and incomplete and if followed, would not contribute to the continuing evolution of the

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based solely on policy considerations, including disagreements with the Guidelines.”); *id.* at 564, 575 (because “the cocaine Guidelines, like all other Guidelines, are advisory only,” a conclusion that a sentencing judge was barred from disagreeing with the crack guidelines in a “mine-run case” was error because it rendered the guidelines “effectively mandatory.”); *Spears*, 129 S. Ct. at 842 (“The only fact necessary to justify such a variance is the sentencing court’s disagreement with the guidelines-its policy view that the 100-to-1 ratio creates an unwarranted disparity.”).

guidelines. The significant problems with this commentary and suggested improvements are explained in Part I of the Appendix to the Defenders' written testimony for the Commission's regional hearing in Atlanta.



APPENDIX

§1B1.1. Application Instructions

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Commentary

Application Notes:

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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 other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "Depart" means grant a departure.

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

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

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

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2. *Subsection (b) restates former policy statement 5H1.10. It makes clear that the court may not determine the kind or length of the defendant's sentence because of the defendant's race, sex, national origin, creed, religion, or socioeconomic status. Congress directed the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders." See 28 U.S.C. § 994(d). The purpose of this directive was to make clear that it would be inappropriate "to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training." See S. Rep. No. 98-225 at 171 (1983). "Indeed, in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, [the Senate Judiciary] Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training." Id. at 171 n.531.*

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For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for an upward departure. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. See, e.g., Chapter Five, Part H (Specific Offender Characteristics).

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