

**Statement of Nicholas T. Drees  
Federal Public Defender for the Northern and Southern Districts of Iowa**

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

**“The Sentencing Reform Act of 1984: 25 Years Later”  
Denver, Colorado  
October 21, 2009**

I thank the Commission for holding this hearing and for inviting me to testify on behalf of the Federal Public and Community Defenders.<sup>1</sup> I have been the Federal Public Defender for the Northern and Southern Districts of Iowa for ten years. Like only eight other Defenders in the nation, my territory covers more than one judicial district. This has given me a relatively unusual vantage point from which to observe the differences in policy and practice between two U.S. Attorney Offices. I worked for three years as an assistant in the State of Iowa’s public defender system before joining Iowa’s newly-created Federal Defender Office as an assistant in 1994. I have had some exposure to pre-guidelines sentencing, having clerked for Judge Donald E. O’Brien in the Northern District of Iowa from 1989 to 1991, whose caseload included pre-guideline cases.

Like the other Defenders and most other witnesses who have testified previously, I believe that the advisory guideline system has greatly improved fairness, honesty and transparency in sentencing, as well as the quality of advocacy, decision-making, and the sentences imposed. We can now speak for our clients in ways that make sense to them and that can make a difference in their sentences and in their lives. Judges are required to carefully consider and explain their sentences in terms of sentencing purposes, which leads to better decisions. Prosecutors, too, must justify the sentences they seek and some make better decisions as a result. Finally, the advisory system holds out the possibility of improved guidelines and a more credible and useful role for the Sentencing Commission, as it responds to increased feedback from judges and all of the stakeholders in the sentencing process.

In reading the testimony from your previous hearings, I appreciate that some prosecutors, like Mr. Fitzgerald from the Northern District of Illinois, have honestly acknowledged some of the benefits of the advisory guideline system. However, Mr. Fitzgerald said, these benefits come at the expense of “similar treatment for similarly situated defendants and certainty of punishment.”<sup>2</sup> A few other prosecutors have claimed that sentencing disparities have grown and they blame this perceived trend on judges.<sup>3</sup> In

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<sup>1</sup> The Defenders are required to “submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful.” 28 U.S.C. § 994(o).

<sup>2</sup> USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 242-43.

<sup>3</sup> See USSC Public Hearing, Stanford, California, May 27, 2009, Testimony of Karin Immergut at

support of these claims of disparity and uncertainty, prosecutors have cited data and anecdotes that are in many ways mistaken or misleading, have assumed that sentences below the guideline range, unless sponsored by the government, create disparity, and have generally omitted discussion of their own practices.<sup>4</sup>

My experience in my two districts, as well as my review of data in preparing for this hearing, leads me to conclude that the advisory nature of the guidelines does not cause unwarranted disparity, but instead often prevents it. The most pronounced and unfair disparities are caused by prosecutors. After *Booker*, judges can reduce these disparities to some extent. Disparities also result from the failure of certain guidelines to recommend fair and rational sentences, and judges can now correct for those problems. While some judges continue to follow the guidelines when a different sentence would better comply with § 3553(a), whatever disparity this creates should be addressed by the Commission replacing those guidelines that many judges find to be problematic with guidelines based on data and research.

In Part I, I will address the topic of disparity, both warranted and unwarranted, provide examples of unwarranted disparity created by prosecutors, some of which judges can now correct, and make some suggestions for what the Commission can do to correct these disparities. This Part also discusses misunderstandings that have arisen about the Commission's statistics regarding below guideline sentences. Part II addresses certainty and deterrence, and corrects mistaken data that has been cited regarding rates of prison and non-prison sentences. In Part III, I urge the Commission to revise those guidelines most in need of revision, the drug and child pornography guidelines, and to explain and support all of its guidelines. Part IV addresses how we believe the Commission should respond to mandatory minimums. In Part V, I address issues regarding alternatives to incarceration, including programs and incentives for post-offense rehabilitation. Part VI describes new reentry programs in the Southern District of Iowa, and some of the problems with the Bureau of Prisons' current approach to reentry.

## **I. DISPARITY**

### **A. Warranted and Unwarranted Disparities**

As the Attorney General has said, “not every disparity is an unwelcome one.”<sup>5</sup> Put another way, sentences that differ one from another or that differ from the guideline

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2; USSC Public Hearing, New York, New York, July 9, 2009, Testimony of Dana Boente.

<sup>4</sup> My colleagues have corrected some of this mistaken information. See Statement of Michael Nachmanoff at 3-4, 8-14, 16-22, Public Hearing Before the United States Sentencing Commission, July 9, 2009; Statement of Jacqueline Johnson at 4-10, 29-36 & Appendix 1 & 2, Public Hearing Before the United States Sentencing Commission, September 10, 2009.

<sup>5</sup> Attorney General Holder's Remarks for the Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium, “Rethinking Federal Sentencing Policy 25th Anniversary of the Sentencing Reform Act,” Washington, D.C., Wednesday, June 24, 2009.

range are often warranted. When Congress enacted the Sentencing Reform Act (SRA), it recognized that disparities based on factors relevant to the purposes of sentencing were not only inevitable but desirable.<sup>6</sup> It therefore directed the Commission to *reduce* (not eliminate) *unwarranted* sentencing disparities,<sup>7</sup> and to *maintain sufficient flexibility to permit individualized sentencing*.<sup>8</sup> But, again quoting the Attorney General, “[t]he desire to have an almost mechanical system of sentencing has led us away from individualized, fact-based determinations that . . . within reason, should be our goal.”<sup>9</sup>

Unwarranted disparity can result from the *exercise* of discretion, as when prosecutors apply charging or plea bargaining criteria that are unrelated to, do not advance, or thwart, sentencing purposes.<sup>10</sup> Unwarranted disparity can result from the *restriction* of discretion, as when judges were precluded by the mandatory nature of the guidelines from considering relevant offense and offender characteristics,<sup>11</sup> and were required to impose a guideline sentence when the guideline itself was unsound.<sup>12</sup> In contrast, sentences outside the guideline range that comply with § 3553(a) are, by definition, warranted.

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<sup>6</sup> S. Rep. No. 98-225 at 52-53, 150, 161 (1983).

<sup>7</sup> 28 U.S.C. § 994(f).

<sup>8</sup> 28 U.S.C. § 991(b)(1)(B).

<sup>9</sup> See note 5, *supra*.

<sup>10</sup> See Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, Part I, Sept. 22, 2003.

<sup>11</sup> For example, policy statements in the Guidelines Manual deem a host of factors to be never or not ordinarily relevant, including but not limited to first offender status, age, employment record and need for training, education and need for education, family ties and responsibilities, addiction and need for treatment, and aberrant conduct in drug cases, *see* Chapter 5, Part H & Part 5K2, which are highly relevant to the risk of recidivism and the likelihood and need for rehabilitation. *See* USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004); USSC, *Recidivism and the First Offender* (May 2004); USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005).

<sup>12</sup> Examples include crack, *see* USSC, *Cocaine and Federal Sentencing Policy* (May 2007), career offender, *see* USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* at 133-35 (2004) (“Fifteen Year Review”), the absence of fast track departures in most districts, *see* USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003), and criminal history rules that incorporate unwarranted disparity in arrest and conviction in the states. *See* Fifteen Year Review at 134; Testimony of Christopher Stone, United States Sentencing Commission Public Hearing, New York City, July 9-10, 2009; Michael Tonry, *Malign Neglect – Race, Crime, and Punishment in America*, New York: Oxford University Press (1995).

Even if it were correct, as some have implied, that sentences below the guideline range that are not sponsored by the government represent disparity, the median decrease in such sentences is exceedingly small. *See* Appendix. And even if correct that differences in the rates of below guideline sentences among districts represent unwarranted disparity, the government creates more of it than judges do. The difference between the lowest and highest rates by district of below guideline sentences identified as “government-sponsored” is 57.6 percentage points, while the difference between the lowest and highest rates of below guideline sentences identified as “non-government sponsored” is 49.2 percentage points.<sup>13</sup>

But this is an overly simplistic view. Even when the guidelines were mandatory, there were variations among districts and circuits.<sup>14</sup> Some inter-district disparity is warranted or at least inevitable.<sup>15</sup>

In Chicago, Mr. Fitzgerald noted that prosecutors in his office generally request sentences within the guideline range “rather than introduce yet another point of disparity, namely, the subjective sentencing philosophies of individual AUSA’s.”<sup>16</sup> Even so, Mr. Fitzgerald’s philosophy on issues including the safety valve and the Ashcroft memorandum, although commendable and warranted in my view, differs from that of prosecutors in my two districts and in many other districts. As Mr. Fitzgerald said, his office sometimes uses a telephone count to avoid a mandatory minimum for a defendant who is not strictly eligible for a cooperation motion or safety valve relief. In one of my districts, prosecutors select charges to prevent safety valve relief. Mr. Fitzgerald also acknowledged that the Ashcroft Memorandum can be interpreted in different ways. His

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<sup>13</sup> The difference between the lowest and highest rates of “government sponsored” sentences by district is 57.6 percentage points (4% in the Western District of Louisiana and 61.6% in Arizona), while the difference between the lowest and highest “non-government sponsored” rates by district is 49.2 percentage points (0 in the Northern Mariana Islands and 49.25 in Delaware). USSC, *Preliminary Quarterly Data Report, 3d Quarter Release 2009*, Table 2.

<sup>14</sup> Fifteen Year Review at 99-102, 140; 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>15</sup> *See* Statement of Alexander Bunin at 5-11, Public Hearing Before the United States Sentencing Commission, July 9, 2009 (reviewing differences among districts and the reasons for them); John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 Hofstra L. Rev. 639, 656 n.66 (2008) (“These differences matter, not just to the residents of our nation’s communities, but to the jurors, lawyers, and judges in them. They are acted upon in numerous ways, including in plea bargaining decisions, to produce results that prosecutors and judges believe are just.”).

<sup>16</sup> Transcript of United States Sentencing Commission Regional Hearing, Chicago, Illinois, September 9-10, at 245.

interpretation, in conjunction with § 9-27.300 of the *U.S. Attorney's Manual*,<sup>2</sup> provides broader options for prosecutors in filing charges, reaching plea agreements, and arguing for particular sentences. Across the river in my two districts, prosecutors generally charge and pursue conviction on the most serious provable offense without reliance on the *Manual's* directive to consider proportionality, the purposes of sentencing, and other factors.

I do not believe that anyone would say that Mr. Fitzgerald is creating unwarranted disparity by exercising judgment in a way that, unlike other prosecutors elsewhere, may avoid maximum severity. Surely it is even more appropriate that neutral, life-tenured judges make similar judgments based on the cases and defendants before them. The transparency of judicial decision-making is far preferable to the opacity of prosecutorial discretion.

In the pre-guidelines era, judicial discretion could act as a check on prosecutor-created disparity. Under mandatory guidelines, however, prosecutors and law enforcement agents could precisely control sentences without judicial review. During the debates leading to passage of the SRA, Congress became concerned that prosecutorial practices could actually increase disparities in the federal sentencing process,<sup>17</sup> and directed the Commission to address it.<sup>18</sup> The Commission adopted various mechanisms,

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<sup>2</sup>The section says, in relevant part:

Except as provided in USAM 9-27.330, (precharge plea agreements), once the decision to prosecute has been made, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction. . . . The "most serious" offense is generally that which yields the highest range under the sentencing guidelines.

However, a faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime. Thus, for example, in determining "the most serious offense that is consistent with the nature of the defendant's conduct that is likely to result in a sustainable conviction," it is appropriate that the attorney for the government consider, inter alia, such factors as the Sentencing Guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation. . . .

*U.S. Attorney's Manual*, § 9-27.300

<sup>17</sup> Stephen J. Schulhofer & Ilene Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231, 240 (1989).

but these measures failed, and one of them, the relevant conduct rule, gave prosecutors even more power, serving as a one-way ratchet to increase sentences.<sup>19</sup>

After *Booker*, judges can now compensate for some forms of disparity created by prosecutors. The most obvious examples are in immigration cases where there is no fast track program, or in cases where the defendant cooperates but the government refuses to file a § 5K1.1 motion at all, or only if the defendant gives up relevant sentencing arguments under the guidelines or § 3553(a). I will provide other examples below.

## **B. Unwarranted Disparities Created by Prosecutors**

As I said at the beginning of my testimony, I have a unique vantage point in being the Defender for two adjoining districts in the same state, with fairly indistinguishable demographics, types of crimes, and crime rates. In my experience, prosecutors in the Northern District of Iowa create unwarranted disparity by overcharging, seeking unduly severe sentences, and manipulating the rules to their advantage.

As Judge Heaney has observed, “Similarly situated defendants in the Northern and Southern Districts of Iowa are sentenced differently due to prosecutorial discretion.” *United States v. Buckendahl* 251 F.3d 753, 765 (8th Cir. 2001) (Heaney, J., dissenting). He noted, during the mandatory guidelines regime, that “there is as much regional disparity in sentencing now as there was prior to the creation and enactment of the Sentencing Commission and Guidelines,” but “[t]he origin of that disparity . . . has shifted from the judiciary to politically appointed prosecutors.” *Id.* at 765.

### **1. Unwarranted Uniformity**

#### **John Doe**

Under advisory guidelines, judges can correct unwarranted disparities and unwarranted uniformity cause by prosecutorial decisions.

In this case, our 19-year-old client (whom I will call John Doe) and his 21-year-old friend had consensual sex with the client’s 15-year-old girlfriend. Because the defendant and his friend photographed the sex act, it was possible to prosecute them federally. The U.S. Attorney’s Office in the Northern District did so. The government insisted that our client either plead guilty to possessing child pornography, with no mandatory minimum, or be charged with producing child pornography, with a mandatory minimum of fifteen years, giving him little choice but to plead to possession of child

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<sup>18</sup> It adopted the recommendation of a report by the Federal Judicial Center to use judicial power to review plea agreements under standards promulgated by the Commission, Federal Judicial Center, *Prosecutorial Discretion and Federal Sentencing Reform* (1979), which became 28 U.S.C. § 994(a)(2)(E).

<sup>19</sup> Fifteen Year Review at 91-92.

pornography.

Because the incident occurred in the summer of 2004 and the guidelines had since changed to the client's disadvantage, the 2003 version was used. In the initial draft of the presentence report, the probation officer calculated the guideline range (under then § 2G2.4) as 16 (15 +2 for 10 visual depictions + 2 for 10 images – 3 for acceptance of responsibility), with a range of 21-27 months. The government, however, argued that the cross reference to production of child pornography should apply. The probation officer obliged, thus resulting in an offense level of 26 and a range of 63-78 months in the final presentence report.

Fortunately, the judge disagreed, finding that the sexually explicit conduct was not “for the purpose of producing a visual depiction of such conduct,” and varied from twenty-one to eight months, thus mitigating some of the damage to this young man's life.

This case would not have been brought in the Southern District, or, I suspect, in most other districts.

### **Dane Yirkovsky**

With mandatory minimum sentences, a prosecutor's decision to charge a case federally can produce absurd results that are beyond repair by the courts.

Dane Yirkovsky found a bullet under a carpet while remodeling his girlfriend's apartment, placed it in a small box, and kept it in his room, where police later found it. *United States v. Yirkovsky*, 259 F.3d 704, 705 (8th Cir. 2001). The U.S. Attorney's Office for the Northern District of Iowa charged and convicted Yirkovsky for possessing the bullet following a felony conviction. His prior convictions for second degree and attempted burglary subjected him to the Armed Career Criminal Act's fifteen-year mandatory minimum. The Eighth Circuit affirmed the sentence, while noting, “In our view Yirkovsky's sentence of fifteen years is an extreme penalty under the facts as presented to this court. However, . . . our hands are tied in this matter by the mandatory minimum sentence which Congress established in 18 U.S.C. § 924(e).” *Id.* at 707 n.4.

I have surveyed the Defenders regarding whether prosecutors invoke the ACCA on a regular basis or not. Of thirty-five responses, two said “rarely,” three said “sometimes,” six said it is usually possible to plead to a charge that does not carry the 15-year mandatory minimum (such as possession of a stolen firearm or a firearm with an obliterated serial number), and twenty-four said “always” or “almost always.” I would venture to say that few prosecutors would invoke the ACCA for a bullet kept in a box in a drawer by a person who was not up to drug dealing or violence.

### **The Postville Workers**

Prosecutorial power to threaten a mandatory minimum sentence—albeit what turned out to be a legally flawed threat—played a central role in the prosecutions of nearly

300 workers at the Postville, Iowa, meatpacking plant in May of 2008. The government threatened the arrested workers, most of whom had no criminal history at all, with prosecution for aggravated identity theft under 18 U.S.C. § 1028A. The workers could avoid the identity theft statute's two-year minimum by pleading guilty instead to document fraud, 18 U.S.C. § 1546, or social security fraud, 42 U.S.C. § 408, under a Rule 11(c)(1)(C) agreement with a stipulated sentence of five months. The government was able to force almost all of the workers to accept the deal because, at that time, Eighth Circuit precedent held that the government could obtain a conviction for aggravated identity theft without having to prove that a defendant knew the identification papers he had used belonged to a real person.<sup>20</sup> Only a few weeks before the raid at Postville, the Eighth Circuit reaffirmed this ruling in *United States v. Flores-Figueroa*, 2008 WL 1808508 (8th Cir. 2008). The Supreme Court's unanimous reversal in *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009), eliminated the threat that had been used against the Postville workers, though too late to help them. The Supreme Court, in essence, echoed an earlier editorial in *The New York Times*: "[T]here is a profound difference between stealing people's identities to rob them of money and property, and using false papers to merely get a job." *The New York Times*, "The Shame of Postville, Iowa," July 13, 2008, available at <http://www.nytimes.com/2008/07/13/opinion/13sun2.html> (visited on Oct 2, 2009).

It is interesting to see how these cases are reflected in the Commission's data. Only 1% of the total 292 immigration cases in the Northern District of Iowa in 2008 are reflected as below guideline sentences, and the average sentence length was 7.2 months; 259 of these cases were convictions for document fraud. Of 45 fraud cases, 68.9% are reflected as receiving a § 5K3.1 departure (though there is no fast-program), and the average sentence length was 16.4 months; 33 fraud cases were convictions for social security fraud.<sup>21</sup>

## **2. Manipulation of charges to prevent safety valve relief**

In the Northern District of Iowa, prosecutors exercise their charging discretion to require mandatory minimum sentences for defendants who would otherwise qualify for the safety valve. Safety valve relief applies only to defendants convicted under 21 U.S.C. §§ 841, 844, 846, 960 and 963. *See* 18 U.S.C. § 3553(f). The list does not include 21 U.S.C. § 860, which prohibits drug activities within 1000 feet of schools, playgrounds, and other protected locations. Thus, defendants convicted under this statute cannot obtain safety valve relief.<sup>22</sup> In districts where substantial portions of small towns and cities fall within protected zones, prosecutors can, and some do, charge violations of 21 U.S.C. § 860 for the purpose of preventing safety valve relief for low-level offenders

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<sup>20</sup> *See United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008); *United States v. Aguilar-Morales*, 2007 WL 2903189 (8th Cir. 2007).

<sup>21</sup> The data for the offenses of conviction was obtained from the 2008 Monitoring dataset.

<sup>22</sup> *United States v. Koons*, 300 F3d 985, 993 (8th Cir. 2002).



with little or no criminal history who would otherwise qualify. In the Northern District of Iowa, prosecutors often include a violation of 21 U.S.C. § 860 among the other charges in an indictment. The Southern District does not follow this practice. Based on my survey of Defenders, similar manipulations occur in four other districts.

The Commission should urge Congress to expand the safety valve to all mandatory minimums to prevent this manipulation, and also because there is no rational basis for excluding offenses not currently on the list. The safety valve should also be expanded to include defendants at least in Criminal History Category II, if not higher.

### **3. Disparate Use of USSG § 1B1.8**

Defenders at previous hearings brought to your attention that prosecutors in different districts interpret USSG §1B1.8 differently, some deeming pre-agreement statements to be protected and others refusing protection until the defendant has a lawyer and the agreement is signed. The latter interpretation, adopted by prosecutors in the Southern District of Iowa, punishes defendants who choose to be cooperative before they have a lawyer to assist them. I urge the Commission to correct this problem by revising § 1B1.8 to provide that, if a defendant enters a plea/cooperation agreement with the government, protection relates back to any earlier statements.

The problem in the Northern District of Iowa is even more serious. With rare exceptions, the U.S. Attorney's Office there does not grant immunity under §1B1.8 at all. Cooperation agreements provide that any self incriminating information given by the defendant during proffer sessions with government agents will be used against the defendant at his sentencing. Although this reduces the frequency of cooperation, some defendants enter into cooperation agreements anyway in hopes that the possible reduction in sentence for their substantial assistance will more than offset any increase in their offense level caused by the unprotected self incriminating information they provide in the proffer sessions. The government occasionally makes a sufficiently large recommendation to offset the increase, but we must advise clients that they cannot count on this and that their proffer will more likely hurt them in the end.

I note that the median percent decrease in FY 2008 for substantial assistance motions in the Northern District of Iowa was 36.1%, while it was 47.8% nationwide.<sup>23</sup> The average sentence length in drug cases was 156.8 months in the Northern District, 136.1 months in the Southern District, and 79.9 months nationwide.<sup>24</sup>

When the guidelines were mandatory, defendants in the Northern District argued that this policy created unwarranted sentencing disparities between the Northern District and the Southern District as well as nearly all other districts, which provided a basis for downward departure. Judge Bennett found that he had the authority to depart on this

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<sup>23</sup> USSC, 2008 Sourcebook, Table 30. Paul Hofer provided the information for N.D. Iowa.

<sup>24</sup> USSC, 2008 Sourcebook of Federal Sentencing Statistics, Table 13, Appendix B.

basis, and granted a departure to a defendant who had participated in a debriefing and testified before the grand jury. As a result of the information he provided, his offense level increased from 28 to 36, more than doubling his guideline range. *See United States v. Buckendahl* 251 F.3d 753 (8th Cir. 2001).

The Eighth Circuit reversed, finding that the Northern District’s “disparate and unique practice” could not be the basis for a departure because “[t]he scope of prosecutorial discretion is defined not by reference to the practices of other federal districts, but by the Guidelines and governing law.” *Id.* at 760. The court of appeals concluded that the Commission intended that any disparities arising from prosecutorial practices are justified. *Id.* at 761.

After *Booker*, Judge Bennett granted a variance for the same reason, finding that it was appropriate to eliminate unwarranted disparity as compared with over 90 other districts that gave the benefit of protection under § 1B1.8. *See United States v. Blackford*, 469 F.3d 1218, 1220 (8th Cir. 2006). The Eighth Circuit reversed, stating that the “Commission intended a decision about entering into [§ 1B1.8] agreements to be left to the prosecutor’s discretion,” and that while “*Buckendahl* addressed the use of downward departures to *circumvent* disparities created by the Government’s discretionary use of § 1B 1.8 agreements, its logic applies equally to the use of variances.” This, the court said, was “a broad-based policy enunciated by the Commission, and a sentencing court’s disagreement with such a policy is an improper factor upon which to base a variance.” *Id.* at 1220-21 (emphasis supplied).

The premise of both *Buckendahl* and *Blackford* – that prosecutorial disparity is warranted and may not be corrected by judges – is in obvious conflict with § 3553(a)(6) and subsequent Supreme Court law.<sup>25</sup> But the Eighth Circuit has not yet revisited the issue, the Northern District of Iowa continues in its disparate and unique disuse of §1B1.8, and the Commission has not clarified its position on this source of disparity.

Of course, the Commission cannot dictate that prosecutors agree not to use self incriminating information provided in the course of cooperation. If the Commission is interested in reducing unwarranted disparity, however, it could state in the commentary of § 1B1.8 that it does not have a policy of approving unwarranted disparity created by the government’s disuse of this guideline. As Chief Judge Holderman said in Chicago, it is now “important for the Sentencing Commission to . . . use its best efforts to improve and clarify the sentencing guidelines and the provisions of those guidelines so that they retain credibility with judges throughout the United States as the years go on.”<sup>26</sup>

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<sup>25</sup> *See Rita v. United States*, 127 S. Ct. 2456, 2465 (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, 891-92 (2009).

<sup>26</sup> USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 18.

#### 4. Withholding and limiting motions for cooperation departures

**§ 3553(e)** When a defendant has provided substantial assistance, the government can limit the extent of the departure by filing a § 5K1.1 motion but not filing a motion under 18 USC § 3553(e) to permit the court to impose a sentence below an applicable mandatory minimum. *See United States v. Moeller*, 383 F.3d 710 (8th Cir. 2004). Or the government can limit the court's ability to reduce a cooperator's sentence by filing a § 3553(e) motion on some but all counts of conviction. *See United States v. Freemont*, 513 F.3d 884 (8th Cir. 2008). Unless the government acts for an unconstitutional motive, it cannot be required to explain the reasons underlying its departure recommendations. *United States v. Burns*, 577 F.3d 887, 893-94 (8th Cir. 2009) (en banc).

In *Moeller*, the defendant pled guilty to conspiring to manufacture and distribute five grams of actual methamphetamine, for which he was facing a 78-97 month guideline range, and a five-year mandatory minimum. He gave an initial statement that led to a search warrant of the co-defendant's residence and the discovery of methamphetamine there; gave three proffer statements; and testified at the co-defendant's sentencing. The government requested a 20% reduction under § 5K1.1, which would have reduced the sentence to 62 months, just above the mandatory minimum, but declined to file a motion under § 3553(e), for the purpose of limiting the judge's discretion. Judge Bennett asked defense counsel to orally move to compel the government to file the motion, which he granted based on a finding of bad faith, and imposed a sentence of 50 months. The Eighth Circuit reversed, finding that the government's motive was not unconstitutional and that it was not the judge's function to "look behind" the prosecutor's decision.

In *Freemont*, the defendant and her boyfriend participated in trafficking in more than two kilograms of crack cocaine over the course of a year. The police searched their residence, finding cash, crack, and a handgun which Ms. Freemont admitted she owned. She pled guilty to drug trafficking, drug conspiracy, and possession of a firearm in furtherance of drug trafficking under § 924(c) under a cooperation agreement. The information she provided led to the federal indictment of seven people and state charges against another; she testified before three grand juries and at three jury trials; she initially declined to cooperate against her boyfriend but later testified against him as the key witness on a § 924(c) count. The AUSA said she was "truthful and complete" and "one of the best witnesses I've seen as in regards to memory and presentation." A police officer said her assistance was "extraordinary" and the best that he had seen.

Nonetheless, the government filed § 851s requiring mandatory life, and moved for a 40% reduction under § 3553(e) only on the drug counts, declining to make the motion on the consecutive five-year mandatory minimum on the § 924(c) count. The government's request for perhaps the best cooperation it had ever seen worked out to 301 months (taking 402 months as life – 40% + 60 months). In most districts, the § 851s would not have been filed or would have been dropped once an agreement was reached. In many districts, the standard reduction is 50% or more.

In response to questioning by Judge Bennett, the AUSA said that her refusal was “based on a determination of her overall assistance.” Judge Bennett questioned why prosecutors in this particular district, again the Northern District of Iowa, unlike in other districts, did not make the motion on all of the counts. As put by the Eighth Circuit, the AUSA “could not give a specific or complete answer” and simply repeated “that it was based on her overall assistance.” 513 F.3d at 887.

Once again, Judge Bennett asked defense counsel to move to compel the government to file the motion, and granted it. He found that the government was acting in bad faith and not on the basis of the nature or extent of the cooperation, which was by all accounts perfect. Judge Bennett then imposed a sentence of 186 months, based on three different alternatives depending on the outcome of an appeal. The Eighth Circuit reversed. On remand, Judge Bennett sentenced Ms. Freeman to 116 months on each of the drug counts and a consecutive 60 months on the gun count, for a total of 176 months. The government did not appeal.

**§ 5K1.1** We have had cases in the Northern District involving low-level participants in methamphetamine trafficking where, in exchange for the possibility of a § 5K1.1 motion, the defendants had to agree not to argue for a role reduction. Prosecutors in the Northern District of Illinois apparently condition § 5K1.1 motions on agreement to a specific sentence, without the ability to bring relevant matters under § 3553(a) to the court’s attention.

After *Booker*, judges can ameliorate disparity created by prosecutors in unfairly withholding or limiting § 5K1.1 motions.<sup>27</sup> See *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir 2006); *United States v. Nuno-Alvarez*, 182 Fed. Appx. 630, 631 (8th Cir. 2006). As Chief Judge Loken said in *Lazenby*, “Under the Sentencing Reform Act and *Booker*, sentencing discretion rests in the final analysis with the sentencing judge, not with the prosecution.” 439 F.3d at 934.

As Mr. Fitzgerald testified in Chicago, defense counsel sometimes decline the binding sentence under Rule 11(c)(1)(C), and instead bring both cooperation and § 3553(a) factors to the judge. He said that his “impression” was that they get “somewhat less cooperation, but later cooperation as well.”<sup>28</sup> Ms. Brook has informed me that, based on the experience of her office, which encompasses the majority of cases in the district, their clients are not engaging in less cooperation or later cooperation, because it is still very much in their clients’ interests to provide cooperation when they have it. In any event, plea bargaining leverage is not a purpose of sentencing, and should not be the Commission’s concern.

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<sup>27</sup> See also *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. Fernandez*, 443 F.3d 19, 35 (2d Cir. 2006).

<sup>28</sup> USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 279-80.

### C. Misunderstandings regarding statistics

Misunderstandings can arise from simplistic comparisons between and among rates of below guideline sentences not identified as government sponsored. This can lead to inaccurate conclusions about what judges are doing and ignores what prosecutors are doing. For one thing, it happens all the time that the guideline range is calculated differently for similar defendants.<sup>29</sup> As Judge Hinkle said in Atlanta, “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>30</sup>

In addition, there have been misunderstandings about what the statistics mean. At the hearing in Chicago, Mr. Fitzgerald sought to illustrate district-to-district variations caused by *Booker* by comparing what he said were “below-range sentences” in “contested sentencings” in the Northern District of Illinois with such sentences in the nation as a whole. He defined all sentences not identified as “government-sponsored below range” as “contested sentencings.”<sup>31</sup> Among other problems with this characterization,<sup>32</sup> as Judge Hinojosa pointed out, the government sometimes does not object to sentences not identified by the Commission as “government sponsored below range.”<sup>33</sup> This exchange prompted Sentencing Resource Counsel to take a closer look at the Commission’s reports, and this has raised some concerns about assumptions that have been made by all concerned, including the Defenders.

#### Table 1 of the Commission’s Third Quarter Preliminary Data Report (Report)

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<sup>29</sup> See Panel Discussion, *Federal Sentencing Under “Advisory Guidelines”: Observations by District Judges*, 75 Fordham L. Rev. 1, 16 (2006) (Judge Lynch describing how when application of an enhancement is a close call, he could find that it does not apply, which is counted as compliant, or apply it and vary, which is counted as noncompliant); Statement of the Honorable Robert L. Hinkle Before the U.S. Sentencing Commission, February 11, 2009 (listing ways in which different guideline ranges in similar cases result from the government’s actions or happenstance); USSC, Fifteen Year Review at 50, 87 (relevant conduct rule is inconsistently applied); 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) (sample test administered by researchers for the Federal Judicial Center to probation officers resulted in widely divergent guideline ranges for three similar defendants).

<sup>30</sup> Statement of the Honorable Robert L. Hinkle Before the U.S. Sentencing Commission, February 11, 2009.

<sup>31</sup> See Statement of Patrick Fitzgerald at 3 n.4, USSC Hearing, Chicago, Illinois, Sept. 10, 2009.

<sup>32</sup> It assumes that all within guidelines sentences are “contested,” and ignores the fact that above guideline sentences are almost always “government sponsored.”

<sup>33</sup> USSC, Public Hearing, Chicago Illinois, September 9-10, 2009, Transcript at 297-98.

divides cases into four overall groups: “Within Guideline Range” (33,231 cases), “Above Guideline Range” (1,034 cases), “Government Sponsored Below Range” (14,471 cases), and “Non-Government Sponsored Below Range” (9,110 cases). Naturally, one assumes that the government did not sponsor any of the sentences in the “Non-Government Sponsored Below Range” group. And it is easy to assume that the government objected to all of the sentences in this group, especially since DOJ policy requires prosecutors to seek the authorization of supervisors before they may “refrain from objecting to a defendant’s request for a below-range sentence.”<sup>34</sup>

But these assumptions turn out to be wrong. Table 6 of the Report is entitled “Sentences Relative to the Guideline Range for Outside of the Range Attribution Categories,” and shows how often various boxes indicating the source of an outside guideline sentence (*e.g.*, plea agreement, motion by a party, other than a plea agreement or motion by a party) were checked on the statement of reasons form (SOR), and how often no box was checked. Table 6 shows that the government “did object” in 2,399 instances of a defense motion for a sentence below the guideline range in cases classified in Table 1 as “Non-Government Sponsored Below Range,” and that the government “did not object” in 1,738 such instances.<sup>35</sup> In other words, the government objected in 58% of these 4,137 instances of a defense motion, and did not object in 42% of these instances.

Table 6 also shows that the SOR’s “other than a plea agreement or motion by the parties” box was checked 3,019 times in cases classified in Table 1 as “Non-Government Sponsored Below Range.” However, because the SOR does not provide any subcategories to indicate the government’s position when this box is checked, the government’s position in these 3,019 instances is unknown. Since the government did not object in 42% of instances of a defense motion in cases classified as “Non-Government Sponsored Below Range,” and judges avoid raising frivolous grounds *sua sponte*, it seems likely that the government did not object to at least some portion of these as well.<sup>36</sup>

Table 6 also shows that the “Non-Government Sponsored Below Range” group in Table 1 includes 2,368 cases in which the court did not check any of the attribution boxes on the SOR.<sup>37</sup> In other words, in over a quarter (2,368 of 9,110 = 26%) of the “Non-Government Sponsored Below Range” cases, we do not know if the source was a plea agreement, a motion by the government or the defense, something “other than a plea

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<sup>34</sup> Memorandum from Deputy Attorney General James B. Comey to All Federal Prosecutors, Department Policies and Procedures Concerning Sentencing at 2 (January 28, 2005).

<sup>35</sup> The 9,110 cases labeled “Non-Government Sponsored Below Range” in Table 1 are labeled “Below Range” in Table 6.

<sup>36</sup> We understand that this does not represent 3,019 different cases, and that a defense motion box was probably checked, in addition to this box, in some cases.

<sup>37</sup> Unlike the other entries in Table 6, these are 2,368 cases, for which there could not have been multiple attributions, because the only way to be placed in this column is if no box is checked on the SOR.

agreement or motion by a party,” or, if it was not a plea agreement or motion by the government, whether the government objected. Given that 68 % of the 21,213 cases in which an attribution box was checked were identified as “Government Sponsored,” and that the government did not object to a defense motion for a departure or variance 42% of the time, it is reasonable to assume that some portion of the 2,368 cases for which no box was checked were also government sponsored or not objected to by the government.

There is another category that is not captured by the data. Sometimes, even when a prosecutor dutifully objects to a downward variance as required by a supervisor, the stated objection carries his or her tacit agreement to the variance, an acquiescence apparent to everyone in the courtroom. These comprise only a small portion of the “Non-Government Sponsored” variances, but they do occur in both of my districts and in districts across the country. Finally, the “Government Sponsored Below Range” group does not capture sentence reductions under Rule 35(b), which are used in 80-100% of cooperation cases in several districts.<sup>38</sup>

We do not believe that the current Department of Justice would purposely mischaracterize statistics in order to undermine confidence in judges or the advisory guideline system. We do know, however, that the statistics are being offered in support of claims that judges are creating disparity under the advisory guideline system. We should not forget that inaccurate statistics were used to secure passage of the PROTECT Act, and that only after the damage was done was it clarified that at least 40% of departures that had been attributed to judges were actually initiated by the government.<sup>39</sup>

We hope that the Commission will ensure that the data is not misinterpreted, will correct any mistakes that have been made, and will consider how the SOR and the corresponding tables could be revised to prevent confusion.

## II. CERTAINTY, SEVERITY AND DETERRENCE

Contrary to what was said at the hearing in Chicago, probation is imposed less often and straight prison more often than before *Booker*, demonstrating not that certainty has suffered but that guidance from the Commission on alternatives is needed. Congress meant to achieve “certainty” by abolishing parole, not by abolishing alternatives to incarceration. No particular kind or length of punishment is necessary to achieve deterrence. Indeed, the existence of harsh sentences does not deter crime and can create

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<sup>38</sup> Defenders who answered a survey reported that Rule 35s are used in 80-100% of cooperation cases in the Eastern District of Arkansas, the Southern District of Illinois, the Southern District of Louisiana, the District of Nebraska, the Eastern District of Virginia, and the Western District of Wisconsin; and are used over half the time in one division of the Western District of Virginia.

<sup>39</sup> See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 60 (October 2003). See also Max Schanzenbach, *Have Federal Judges Changed Their Sentencing Practices? The Shaky Empirical Foundations of the Feeney Amendment*, 2 J. of Empirical Legal Studies 1 (2005).

disrespect for law.

**A. Probation is imposed less often and straight prison more often than before *Booker*.**

At the hearing in Chicago, Mr. Fitzgerald said that “certainty of punishment” has been undercut by *Booker*. He said that the original Commission had made a “finding” that an “inappropriately high percentage” of white collar offenders were sentenced to probation under past practice, and that *Booker* had started a “trend to that type of leniency in some economic-crime cases.” In support, he said that 32.4% of fraud offenders received “entirely non-prison sentences” in FY 2008, as compared with 26.7% in FY 2003.<sup>40</sup>

According to the Commission’s data, white collar and all other offenders are receiving probation *less* often and straight prison *more* often than they did before *Booker*. The rate at which fraud offenders receive straight probation has *decreased* from 20.1% of cases in 2003 to 15.7% in 2008 to 14.5% in 2009; the rates at which they receive probation and confinement or a probation/community split likewise have *decreased*; and the rate at which they receive straight prison has *increased* from 59.6% of cases in 2003 to 68.3% in 2008 to 72.1% in 2009.<sup>41</sup> The same trends appear, though less dramatically, for all offenses combined.<sup>42</sup> Under the initial set of guidelines, fraud offenders were expected to receive straight probation in 24% of cases (1.65 times today’s rate), probation with confinement in 20% of cases (2.47 times today’s rate), split sentences in 21% of cases (4 times today’s rate), and straight prison in 35% of cases (less than half today’s rate).<sup>43</sup>

<sup>40</sup> See Statement of Patrick Fitzgerald at 4, USSC Hearing, Chicago, Illinois, Sept. 10, 2009; USSC, Hearing, Chicago, Illinois, Sept. 10, 2009, Transcript at 244-45.

<sup>41</sup>

Fraud	Probation	Probation & Confinement	Probation/Community Split	Straight Prison
2003	20.1%	12.5%	7.8%	59.6%
2008	15.7%	9.5%	6.6%	68.3%
2009	14.5%	8.1%	5.2%	72.1%

USSC, 2003 and 2008 Sourcebook, Table 12; USSC, *Preliminary Quarterly Data Report, 3d Quarter Release 2009*, Table 18.

<sup>42</sup>

All Offenses	Probation	Probation & Confinement	Probation/Community Split	Straight Prison
2003	9%	4.7%	3%	83.3%
2008	7.4%	3.6%	2.6%	86.4%
2009	7.3%	3.1%	2.5%	87.1%

USSC, 2003 and 2008 Sourcebook, Table 12; USSC, *Preliminary Quarterly Data Report, 3d Quarter Release 2009*, Table 18.

<sup>43</sup> USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* at 68,



**B. This trend runs contrary to data and research and is not what Congress intended.**

This unfortunate trend is contrary to the evidence-based practices for which the Attorney General has voiced support, and the Commission’s own data and research.<sup>44</sup> According to surveys, judges want to impose alternative sanctions more often.<sup>45</sup> Apparently, they rarely do so because they follow the guidelines, which currently fail to provide sufficient guidance as to alternatives.

This is also not what Congress intended. It meant to achieve “certainty” by abolishing parole, not by abolishing alternatives to incarceration. It enacted § 3553(a)(3) to ensure that judges “consider[ed] all sentencing options,”<sup>46</sup> rejected the idea that probation is not punishment,<sup>47</sup> and said that it “may very often be that release on

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Table 2 (1987).

<sup>44</sup> USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 2-3 (Jan. 2009) (“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.”); USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* (Nov. 1996) (finding that “[m]any federal offenders who do not currently qualify for alternatives have relatively low risks of recidivism compared to offenders in state systems and to federal offenders on supervised release,” 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.”); USSC, *Alternatives to Incarceration Project, The Federal Offender: A Program of Intermediate Punishments*, Message from the Director at 5-9 (Dec. 28, 1990) (finding numerous benefits of alternative sanctions, including cost savings, efficiency and increased fairness at sentencing, and recommending “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).

<sup>45</sup> See USSC, *Alternatives to Incarceration Project, The Federal Offender: A Program of Intermediate Punishments* (Dec. 28, 1990) (judicial survey indicated support for addition of alternatives, with 62% in favor of community service, 56% in favor of intensive supervision, and 53% in favor of boot camp); USSC, *Survey of Article III Judges on the Federal Sentencing Guidelines*, II-17, III-17 (Feb. 2003) (64% of district judges and 50% of circuit judges urged greater availability of straight probation, probation-plus-confinement, and split sentences for drug offenders; over 40% of district and circuit judges urged greater availability of alternatives for theft and fraud offenders; 41.5% of district judges and 53.5% of circuit judges believe guideline sentences often do not provide needed education, training, medical care or treatment in the most effective manner).

<sup>46</sup> S. Rep. No. 98-225 at 77 (1983).

<sup>47</sup> *Id.* at 55 (sentencing policy should not be formulated by “assum[ing] that a term of imprisonment . . . is necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine.”); *id.* at 91 (“[T]he best course is to provide no

probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose.”<sup>48</sup> Indeed, 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.<sup>49</sup>

### C. Certainty of punishment does not require certainty of imprisonment.

Congress expected the guidelines to “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.”<sup>50</sup> In explaining this provision, it said that “we do not know very much about how to deter criminal conduct or rehabilitate offenders. . . . Subsection (b)(1)(c) is designed to encourage the constant refinement of sentencing policies and practices as more is learned about the effectiveness of different approaches.”<sup>51</sup>

We now know that many offenders in the federal system have a low risk of recidivism,<sup>52</sup> and that prison can do more harm than good.<sup>53</sup> We know that no particular amount of imprisonment or any imprisonment is necessary for deterrence.<sup>54</sup> “There is no correlation between recidivism and guidelines’ offense level. Whether an offender has a low or high guideline offense level, recidivism rates are similar.”<sup>55</sup> There is no difference

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presumption either for or against probation as opposed to imprisonment.”).

<sup>48</sup> *Id.* at 92.

<sup>49</sup> See 28 U.S.C. § 994(j).

<sup>50</sup> See 28 U.S.C. § 991(b)(1)(C).

<sup>51</sup> S. Rep. No. 98-225 at 161 (1983).

<sup>52</sup> USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004); USSC, *Recidivism and the First Offender* (May 2004); USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005).

<sup>53</sup> See Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22 (1994). Lynne M. Vieraitis, Tomaslav V. Kovandzic, Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Public Policy 589 (2007); Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005); USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* (Nov. 1996).

<sup>54</sup> Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime and Justice: A Review of Research* 28-29 (2006).

<sup>55</sup> See USSC, *Measuring Recidivism* at 15.

in deterrence of white collar offenders, presumably the most rational offenders, between imprisonment and probation.<sup>56</sup>

Probation *is* punishment, as are other alternatives to straight prison. Even standard conditions “substantially restrict . . . liberty.” *Gall*, 128 S. Ct. at 595. In my experience with clients, supervision requires more self-motivation and responsibility than the structured environment of prison.<sup>57</sup> Clients face revocation of supervised release and a return to prison when they have difficulties abiding by the requirements that they, for example, check in regularly with a probation officer, restrict their travel, maintain employment, and visit with treatment professionals. Faced with a choice, some clients choose at the revocation hearing to return to prison with no supervised release to follow the imprisonment rather than resume their term of supervised release.

**D. The existence of stiff penalties does not deter crime, and can create disrespect for law.**

The Project Safe Neighborhoods Program works to deter gun violence, not because of the existence of harsh federal sentences, but because of its holistic approach combining respect, warning, and support. Even there, with explicit advance warning, the length of a prison term is not important. As Mr. Kennedy said, whether potential offenders know they will receive two days for a supervision violation, a low-level state conviction, or a federal five-year mandatory minimum, the certainty that it will occur is what counts.<sup>58</sup> The more extreme punishments are not necessary to deter, and create extreme community backlash, which he vividly described.

For the vast majority of would be offenders, who don’t participate in these programs and have no idea what the potential punishment might be, the existence of stiff guideline sentences and mandatory minimums has no effect on deterrence. David Kennedy’s testimony on this issue coincides with my experience. He said that people do not know in advance what will move them from the state to the federal system, or what triggers a mandatory minimum, and that when they find out, after they have already been charged, they “they literally collapse in tears.”<sup>59</sup> In my experience, the reaction is often

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<sup>56</sup> See David Weisburd et. al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 *Criminology* 587 (1995).

<sup>57</sup> “Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. Most probationers are also subject to individual ‘special conditions’ imposed by the court.” *Id.* at 595-96. Probation is “not granted out of a spirit of leniency.” *Id.* at 595 n.4.

<sup>58</sup> USSC, Public Hearing, Chicago Illinois, Sept. 9-10, 2009, Transcript at 171, 175, 177-78, 182, 183-84.

<sup>59</sup> *Id.* at 187.

anger and sheer disbelief. When informed that they face a mandatory 20-year or life sentence, clients have told me that the sentence cannot possibly be that high, that I must be mistaken, that they want a “real lawyer.” The general public simply does not know the particulars of federal sentencing law.

Absurdly unfair sentences like those the government sought or obtained in the examples above diminish respect for law. David Kennedy and Patrick Fitzgerald made a similar point, indirectly, when they praised the Project Safe Neighborhoods Program. The program uses an alternative approach to reducing gun violence, and is credited with reducing the homicide rate by 37% in twenty-four dangerous Chicago neighborhoods. The researchers who evaluated the program, however, attributed the dramatic results not to increased federal firearms prosecutions or harsh federal sentences, but to “Offender Notification Forums” during which recent parolees or probationers meet with law enforcement, community representatives, and service providers to discuss the consequences of possessing a gun, how to successfully stay away from offending, and the services available to keep them from re-offending, including substance abuse treatment, GED courses, job training, and behavior counseling.<sup>60</sup> The Offender Notification Forums are based on research suggesting “that individuals are most likely to comply with the law (a) when they believe in the substance of the law, (b) when they have positive interactions with law enforcement agents, and (c) when they perceive the procedures used in enforcing the law to be fair and just.”<sup>61</sup> The recidivism rate of those who attended the forums was half that of those who did not, and survey results showed that offenders were more likely to comply with the law and less likely to carry a gun when they had more positive opinions of the law and the police.<sup>62</sup>

On the other hand, Mr. Kennedy warned that the existence of extreme federal sentences, and their unfair and arbitrary enforcement, promotes disrespect for law and does not promote compliance.

### **III. GUIDELINES IN NEED OF REVISION**

I appreciate the Commission’s decision to include a review of the child pornography guidelines and possibly promulgate amendments and/or report to Congress as a result of that review. The Commission should do the same with the drug guidelines.

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<sup>60</sup> Tracy Meares, Andrew Papachristos, and Jeffrey Fagan, *Homicide and Gun Violence in Chicago: Evaluation and Summary of the Project Safe Neighborhoods Program* 3-4 (Project Safe Neighborhoods in Chicago, Jan 2009), available at [http://www.psnchicago.org/PDFs/2009-PSN-Research-Brief\\_v2.pdf](http://www.psnchicago.org/PDFs/2009-PSN-Research-Brief_v2.pdf) (visited Oct 2, 2009).

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.* at 4.

## A. Drug guidelines

Aside from the problems created by the combination of prosecutorial discretion and mandatory minimum sentences, the guidelines recommend that low-level, non-violent defendants be sentenced to prison for substantial periods. This is not based on empirical evidence, but on the Commission's policy of tying most, but not all, drug guidelines to mandatory minimums.

In one recent example from the Northern District of Iowa, the U.S. Attorney's Office is investigating and prosecuting a group of people for "smurfing" – providing pseudoephedrine to someone else who uses it to make methamphetamine. The applicable offense is possessing a listed chemical with reasonable cause to believe it will be used to manufacture methamphetamine, in violation of 21 U.S.C. § 841(c)(2), which itself carries no mandatory minimum.

The drug equivalency table equates 1 gram of pseudoephedrine to 10 kg of marijuana, and 1 gram of methamphetamine actual to 20 kg of marijuana. The Commission established this 1:2 pseudoephedrine/methamphetamine actual ratio in response to a congressional directive; it assumes that pseudoephedrine yields half its weight in methamphetamine actual.<sup>63</sup>

Since the resulting guideline ranges for pseudoephedrine were based on a ratio with methamphetamine actual, they were directly affected by a previous amendment that conformed the guidelines for methamphetamine actual to new mandatory minimums that cut the triggering quantities in half.<sup>64</sup> Commission staff noted that while the Commission had previously unlinked the guidelines for methamphetamine mixture from the mandatory minimums in a way that raised sentences, "un-linking the Drug Quantity Table from the mandatory minimum quantities established by Congress in a manner that

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<sup>63</sup> Congress directed the Commission to increase penalties to "correspond[] to the quantity of controlled substance that could reasonably have been manufactured using the quantity of . . . pseudoephedrine possessed or distributed," and to establish the conversion ratio "based on scientific, law enforcement, and other data the Sentencing Commission considers appropriate." Pub. L. No. 106-310, Div. B, Title XXXVI, § 3651(b), Oct. 17, 2000. The Commission "tie[d] the base offense levels . . . to the base offense levels for methamphetamine (actual) set forth in § 2d1.1, assuming a 50 percent yield . . . based on information provided by the Drug Enforcement Administration (DEA) that the typical yield of these substances for clandestine laboratories is 50 to 75 percent." USSC, App. C, Amend. 611 (May 1, 2001). A 1999 study conducted by the Iowa Department of Criminal Investigation Laboratory found that it is "not likely" that a clandestine laboratory would yield 80% or higher, but that, where the exact procedure is not known, "a range of 40-50% yield . . . is a reasonable estimate," but that the yield from certain procedures is more likely to be in the 15-30% range. See Nila Bremer, M.S. and Robin J. Woolery, M.S., *The Yield of Methamphetamine, Unreacted Precursor and Birch By-Product with the Lithium-Ammonia Reduction Method as Employed in Clandestine Laboratories* at 16, Iowa Division of Criminal Investigation Laboratory, Fall 1999.

<sup>64</sup> USSC, App. C, Amend. 594 (Nov. 1, 2000).

reduces sentences . . . may prove politically unwise.”<sup>65</sup> Not surprisingly, courts are beginning to reject the guidelines for pseudoephedrine and methamphetamine, finding that they are not grounded in empirical data.<sup>66</sup>

In any event, one would at least expect that a defendant who possessed pseudoephedrine would be punished less harshly than a defendant who distributed or manufactured the same weight of methamphetamine actual. But that is not always the case. A defendant who possessed 100 grams of pseudoephedrine receives an offense level of 32, the same offense level as that for 100 grams of methamphetamine actual. Under this scheme, one of the defendants in the “smurfing” investigation was sentenced under the guidelines to 97 months in prison for possessing 100 grams of pseudoephedrine. He possessed no weapons and engaged in no violence. His criminal history score of II was based on relatively minor offenses for which he received fines and no jail time, one of which was twelve years old (a 1997 conviction for possessing a controlled substance and simple misdemeanor theft convictions in 2007 and 2008). He received no role adjustment because there were no other participants in the offense of conviction. The only reduction he received was three levels for acceptance of responsibility.

Unfortunately, this defendant’s lawyer did not bring to the judge’s attention the fact that the guideline itself fails properly to reflect § 3553(a) considerations because it was not based on empirical evidence. Such arguments would be less necessary, and there would be less disparity, if the Commission untied the guidelines from mandatory minimums and based them instead on data and research.

Another reason to untie the drug guidelines from mandatory minimums is that doing so creates the perception that guideline sentences for other offenses, to which no mandatory minimum applies, should match the severity of guideline sentences for drug offenses. At the hearing in Chicago, Judge Simon said that he felt that large scale fraud

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<sup>65</sup> USSC, *Methamphetamine - Final Report of the Methamphetamine Policy Team*, at 18 (Nov. 1999).

<sup>66</sup> See *United States v. McCormick*, 2008 WL 268441, \*10 (D. Neb. Jan. 29, 2008) (finding guidelines for pseudoephedrine “were, like the drug-trafficking Guidelines, determined with reference to statutory directives and not grounded in empirical data”). In *United States v. Santillanes*, 274 Fed. App’x 718, 718-19 (10th Cir. 2008), the Tenth Circuit reversed as procedurally unreasonable a guideline sentence of 121 months based on the actual weight of methamphetamine in a case involving methamphetamine mixture where the judge erroneously believed he did not have authority to disagree with the guideline. On remand, the judge reduced the sentence to 78 months, finding “no empirical data or study to suggest that actual purity should be punished more severely by an arbitrary increase of the four levels in this case or at the higher level,” that he “would not allow it under *Daubert*,” that it “seems to be contrary to any empirical evidence, and really undermines Section 3553(a), as it does create an unwarranted disparity.” *United States v. Santillanes*, No. 07-619 (D. N. M., Sept. 19, 2009), Sentencing Transcript, <https://ecf.nmd.uscourts.gov/doc1/12111917143>.

cases scored too low as compared to crack offenders.<sup>67</sup> This is a surprising observation, both because the guideline range for high- and even mid-level fraud offenders can reach thirty years or life,<sup>68</sup> and because crack sentences are plainly too high.<sup>69</sup> This demonstrates the problem, however, that harsh sentences in drug cases create the impression that sentences for other kinds of offenses should be as harsh. Indeed, the “penalty gap” between fraud and drug cases was used to pressure the Commission to amend USSG § 2B1.1 to promulgate a 10% increase for all fraud offenders, with the effect of limiting or precluding non-prison alternatives for the 40% of fraud offenders at the lowest levels, in the name of legislation aimed at high-end, big-dollar corporate scandals.<sup>70</sup> As the Judicial Conference has warned, “proportionality should not become a one-way ratchet for increasing sentences.”<sup>71</sup>

Just recently, the Commission’s Legislative Affairs Director suggested at a legislative briefing that the general introductory phrase in § 994(a), stating that the Commission shall promulgate guidelines “consistent with all pertinent provisions of any Federal statute,” now prevents the Commission from taking any further action with

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<sup>67</sup> USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 110-11.

<sup>68</sup> See *United States v. Parris*, 573 F. Supp. 2d 744, 756 (E.D.N.Y. 2008); *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006).

<sup>69</sup> It appears that the calculation Judge Simon used for his fraud example was mistaken. The guideline range for the fraud offender in his example would have been 51-63 months, higher than the guideline range of 37-46 months for the crack offender. The fraud offender’s offense level would have been 24 (7 + 16 for \$2 million loss + 2 for sophisticated means + 2 for abuse of a position of trust – 3 for acceptance of responsibility), with a guideline range of 51-63 months in criminal history category I. The crack offender’s offense level would have been 21 (26 for 25 grams -2 for safety valve – 3 for acceptance of responsibility), with a guideline range of 37-46 months in criminal history category I.

<sup>70</sup> See USSC, App. C, Amend. 653 (Nov. 1, 2003). This amendment increased the base offense level from six to seven for defendants convicted of an offense with a statutory maximum of 20 years, *i.e.*, any type of fraud after the Sarbanes-Oxley Act. Congress had directed the Commission to “consider the extent to which the guidelines and policy statements adequately address whether the guideline offense levels and enhancements for violations of the sections amended by this Act are sufficient to deter and punish such offenses, and specifically, are adequate in view of the statutory increases in penalties contained in this Act.” Sarbanes-Oxley Act of 2002, Pub. L. 107-204, § 905(b)(2). The Commission resisted increasing penalties for low-level fraud offenders, but succumbed after intense pressure from DOJ and a unilateral amendment of the legislative history by one Senator directing the Commission to determine whether enhanced penalties were warranted not only for the high-end, big-dollar corporate scandals at which Sarbanes-Oxley was directed, but for low-level fraud offenders, after “closely considering” the “penalty gap” between fraud and narcotics cases. See Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373, 387-435 (2004).

<sup>71</sup> Letter from Hon. Sim Lake, Chair of the Judicial Conference Committee on Criminal Law to Members of the Sentencing Commission, March 8, 2004.

respect to the crack guidelines, and that only Congress can fix the problem.<sup>72</sup> While we can understand that the Commission would want Congress to “go first” on crack, given the history, we hope that it is not the formal position of the Commission that it must tie the guidelines to every mandatory minimum. If it is, we hope that it will reconsider.

The Supreme Court has held that the Commission was not required to tie the guidelines to mandatory minimums. *See Kimbrough v. United States*, 128 S. Ct. 558, 571-72 (2007). If it were otherwise, “the [LSD] Guidelines involved in *Neal* would be in serious jeopardy.” *Id.* at 572. While I have not combed the Manual to identify other guidelines that are not tied to mandatory minimums, the guidelines count each marijuana plant as 100 grams, while 21 U.S.C. § 841 counts each plant as 1 kilogram, and as noted above, there was a period of time when the guidelines for methamphetamine mixture were not linked to the mandatory minimums.<sup>73</sup> The Commission “may abandon its old methods in favor of what it has deemed a more desirable approach.” *Neal v. United States*, 516 U.S. 284, 295 (1996).

The guidelines will always be “consistent with” any mandatory minimum, as they explicitly provide that a mandatory minimum trumps a lower guideline range. *See* USSG § 5G1.1(b). The phrase, “consistent with all pertinent provisions of any Federal statute,” replaced the former phrase, “consistent with all pertinent provisions of this title and title 18, United States Code,” via the Feeney Amendment. *See* Pub. L. 108-21 § 401(k) (April 30, 2003). There is no mention of this provision in the legislative history. It makes no sense to interpret it as requiring the Commission to tie the drug guidelines to mandatory minimums, an interpretation that is inconsistent with its enabling legislation requiring the Commission 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, to minimize prison overcrowding, and to review and revise the guidelines in light of data and comments from stakeholders. *See* 28 U.S.C. § 991(b)(1)(A), (B) & (C), § 994(g) & (o).

The comments the Commission has received in these hearings appear to be unanimous: The drug guidelines are “arbitrary,” “not based on anything empirical,” and should be de-linked from the mandatory minimums.<sup>74</sup> The Commission should not wait

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<sup>72</sup> Remarks of Lisa Rich, Legislative Affairs Director, U.S. Sentencing Commission, “Crack the Disparity” coalition of the Justice Roundtable legislative briefing, *Crack Cocaine Sentencing: Exploring & Examining the Issues*, available at <http://www.cspan.org/Watch/Media/2009/10/13/HP/A/24240/ACLU+Discussion+on+Crack+Cocaine+Sentencing.aspx>.

<sup>73</sup> USSC, App. C, Amend. 555 (Nov. 1, 1997).

<sup>74</sup> USSC, Public Hearing, Atlanta, Georgia, February 10-11, 2009, Transcript at 24 (Judge Tjoflat); USSC, Public Hearing, Stanford, California, May 27, 2009, Transcript at 6-22 (Judge Walker). *See also* USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 70-71 (Judge Carr and Judge Holderman testifying guidelines should be de-linked from mandatory minimums); USSC, Public Hearing, New York, New York, July 9-10, 2009, Transcript at 92 (Judge Newman, same); *id.* at 139-41 (Judge Newman, advising Commission to



for Congress to repeal mandatory minimums, but should take the lead by untying the guidelines from mandatory minimums and promulgating new guidelines based on empirical data and research. Or, if the Commission still believes that it must tie the drug guidelines to mandatory minimums, it should educate Congress by preparing a report and proposal for a new set of drug guidelines. The Commission should give serious consideration and study to a set of drug guidelines based primarily on functional role in the drug trade with quantity as a secondary factor.

In any event, the Commission should reduce all of the drug guidelines by two levels, as it did with crack cocaine. As the Commission acknowledged then, the drug guideline ranges are set two levels above that necessary to include the mandatory minimum penalties at the two statutory quantity levels.<sup>75</sup>

## **B. Child Pornography**

The guidelines for child pornography offenses, driven by congressional directives and also mandatory minimums, are simply too severe. Most judges who have testified before the Commission share this view.<sup>76</sup> Judges have decided to apply only parts of the child pornography guideline because they recognize that several of the enhancements were based on congressional mandates rather than the Commission's exercise of its expert institutional role, and that they do not advance any purpose of sentencing.<sup>77</sup> They recognize too that some of the enhancements, such as use of a computer, apply in virtually every case. During the first three quarters of 2009, 53.7% of defendants sentenced under USSG § 2G2.2 received a below guideline sentence, 10.9% of which were identified as "government sponsored."<sup>78</sup>

Prosecutors create unwarranted uniformity in child pornography cases by prosecuting primarily who are not dangerous. The example of my client, John Doe, is extreme, but most people prosecuted for child pornography do not have a history of child abuse or exploitation and are not a danger to the public. Only two judges who have testified before you have indicated that child pornography cases brought in their districts are of a serious nature.<sup>79</sup> That is the exception, not the rule. In reviewing 112 child

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educate Congress).

<sup>75</sup> See USSG, App. C, Amend. 706, Reason for Amendment (Nov. 1, 2007).

<sup>76</sup> USSC, Public Hearing, Chicago, Illinois, Transcript at 36-38, 53-60, 238 (Judges Carr, Rosen, Easterbrook); USSC, Public Hearing, New York, New York, July 9-10, 2009, Transcript at 54, 113-14, 124, 139-44, 337-38 (Judges Arcara, Ambrose, Woodcock, Howard).

<sup>77</sup> See, e.g., *United States v Beiermann*, 599 F. Supp. 2d 1087, 1100 (N.D. Iowa 2009) (citing cases); *United States v. Johnson*, 588 F. Supp. 2d 997, 1004 (S.D. Iowa 2008).

<sup>78</sup> USSC, *Preliminary Quarterly Data Report, 3d Quarter Release 2009*, Table 5.

<sup>79</sup> USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 100 (Judge Caldwell, Eastern District of Kentucky, stating those charged have a history of child abuse or at

pornography cases sentenced in 1995 (22 of which involved production), the Commission found that “a significant portion of child pornography offenders have a criminal history that involves the sexual abuse or exploitation of children.”<sup>80</sup> In 2006, however, 79.9% of child pornography defendants had no prior felonies of any kind, let alone a criminal history of past “sexual abuse or exploitation.”<sup>81</sup> I expect that your review will confirm that the percentage is as high or higher now.

At the Chicago hearing, Mr. Fitzgerald noted the disconnect between prosecutors and judges in these cases, and asked for further study to clear up whether possession of child pornography “correlates” with child exploitation. Recidivism research shows that child pornography offenders, without prior contact offenses, have a very low risk of recidivism of any kind, rarely commit a subsequent contact offense, and do very well in treatment and under supervision.<sup>82</sup>

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least spousal abuse); USSC, Public Hearing, New York, New York, July 9-10, 2009, Transcript at 144 (Judge Chin, Southern District of New York, stating he has seen only one case and it involved production and molestation).

<sup>80</sup> See Report to Congress, Sex Offenses Against Children, at i, 3, 29 (1996), [http://www.ussc.gov/r\\_congress/SCAC.HTM](http://www.ussc.gov/r_congress/SCAC.HTM).

<sup>81</sup> See Bureau of Justice Statistics Bulletin: “Federal Prosecution of Child Sex Exploitation Offenses, 2006,” at 5, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fpcseo06.pdf>.

<sup>82</sup> See Wollert, R. W., Waggoner, J., & Smith, J., *Child Pornography Offenders Do Not Have Florid Offense Histories and Are Unlikely to Recidivate*. Poster session presented at the annual meeting of the Association for the Treatment of Sexual Abusers, Dallas, TX (2009, October) (study of 72 offenders who participated in federally funded outpatient program found that over an average span of 4 years, only one was taken into custody for possessing child pornography, another was apprehended for the commission of a non-contact sex offense, and none were arrested on charges of child molestation); Endrass, J., Urbaniok, F., Hammermeister, L., Benz, C., Elbert, T., Laubacher, A., Rossegger, A., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, BMC Psychiatry (July 14, 2009) (study of 231 suspected child pornography users found that “only 1% were known to have committed a past hands-on sex offense, and only 1% were charged with a subsequent hands-on sex offense in the 6 year follow-up. The consumption of child pornography alone does not seem to represent a risk factor for committing hands-on sex offenses in the present sample – at least not in those subjects without prior convictions for hands-on sex offenses”); Webb, L., Craissati, J. & Keen, S., *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters* (Nov. 16, 2007) (Study comparing internet and contact sex offenders found that “Internet offenders had only three formal failures: one was a general offense and two were new internet sex offenses. Otherwise, internet offenders appear to be extremely compliant with community treatment and supervision sessions. Internet offenders (14%) did engage in some sexually risky behavior, which mainly related to increased usage of adult pornography or gambling on the internet rather than specific child pornography use or ‘approach’ behaviors.”), published online on behalf of the Association for the Treatment of Sexual Abusers, available at <http://sax.sagepub.com/cgi/content/abstract/19/4/449>.

Prosecutors also exploit the non-existent distinction between receiving and possessing child pornography by requiring some defendants to plead guilty to a receiving charge, thus preventing the court from imposing a sentence of less than five years. This decision also dictates the base offense level – 18 for possession, 22 for receiving. USSG §2G2.2(a)(1) & (2). In both of my districts, receipt is charged in addition to possession in almost every case, and this is not based on indicia of dangerousness. Our clients, like the defendants described by most of the judges who have testified before you, have little or no criminal history, and rarely, if ever, any past contact offenses.

### **C. Explanations**

The Commission should justify the guidelines by stating what purpose or purposes each guideline is meant to accomplish, and by providing the evidence upon which the Commission relied to conclude that the guideline would be effective in achieving the intended purposes. If so, judges' statements of reasons could respond to and build on the Commission's reasons, and the appeals courts would have something to review. As several district court judges,<sup>83</sup> appeals court judges,<sup>84</sup> and prosecutors,<sup>85</sup> have said, explanations and supporting data are needed to decide whether or not the guidelines should be followed. If a guideline is based on a mandatory minimum or a congressional directive, it should say so.

## **IV. MANDATORY MINIMUMS**

I appreciate that the Commission has made it a priority to study and possibly report to Congress on mandatory minimums. I hope that the Commission will recommend that Congress eliminate or significantly reduce mandatory minimum sentences. The examples above regarding prosecutors' disregard for §1B1.8, intentional avoidance of the safety valve, selective filing of child pornography charges, and refusal to file motions to reduce sentences under §3553(e), show that the availability of mandatory minimum sentences transfers sentencing authority from judges to prosecutors, and that this creates unwarranted disparity. Eliminating mandatory minimums would also produce other beneficial effects, such as increasing respect for the law. Basing a sentence on the § 3553(a) factors instead of a mechanical recitation of a mandatory

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<sup>83</sup> *See, e.g.*, Testimony of Judge Mollway Before the U.S. Sentencing Commission, May 27, 2009, at 125-26; Testimony of Judge Gertner Before the U.S. Sentencing Commission, September 10, 2009, at 362-63.

<sup>84</sup> *See, e.g.*, Testimony of the Honorable Gerald B. Tjoflat Before the U.S. Sentencing Commission, February 10, 2009, at 14, 23-24, 27; Testimony of the Honorable Vaughn R. Walker Before the U.S. Sentencing Commission, May 28, 2009, at 20.

<sup>85</sup> USSC, Public Hearing, Chicago, Illinois, September 9-10, Transcript at 253 (Mr. Fitzgerald asking the Commission to "clarify the thinking on the area of child pornography" in the hope of alleviating disagreement between judges and prosecutors); Statement of Benton J. Campbell Before the U.S. Sentencing Commission, July 9, 2009, at 15 ("policy analysis and data that support . . . advised Guidelines ranges" would be "an effective tool in persuading courts that they should heed the advice that the Guidelines provide.").

minimum lets the court explain its sentences to defendants and other important people in the courtroom. Mr. Fitzgerald made the same point regarding the switch from mandatory to advisory guidelines: “[A]s a matter of perception, both defendants and victims may well view and are likely to perceive that the sentencing process is fair, give[n] greater emphasis on the facts specific to an individual defendant and a specific offense.”<sup>86</sup>

At the same time, the prosecutors who have testified before you have voiced strong support for mandatory minimums, stating that they are necessary to enforce the law, to obtain cooperation, and to control judicial discretion, and that their repeal would be “devastating.”<sup>87</sup> While we disagree, this is the prosecutorial view, and the notion that mandatory minimums could be replaced by guidelines with sufficient flexibility and departure authority, as suggested by some, is, we think, implausible.<sup>88</sup> This is manifest in the difficulty of getting even a crack bill passed, though the Sentencing Commission, the President, the Attorney General, and Democratic congressional leaders have all stood up for reform in this area. Like the judges who have testified before you, we think that such a compromise would be illusory, and may well end up replacing 20-25% of cases subject to mandatory sentencing with 100% of cases subject to mandatory sentencing.<sup>89</sup> Among additional concerns, this could directly politicize sentencing policy and leave the system constantly vulnerable to crime *du jour* politics. As Judge Hinkle said in Atlanta, “if you take this whole broad issue back to the Congressgoing to Congress “would be like grabbing the garden hose six feet from the end. It’s not clear who is going to get sprayed.”<sup>90</sup>

At this time, we think that the best way for the Commission to deal with mandatory minimums is to educate Congress, to urge Congress to repeal or at least

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<sup>86</sup> USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 242.

<sup>87</sup> USSC, Public Hearing, Stanford, California, May 27-28, 2009, Transcript at 234-35 (Ms. Immergut stating that her office routinely charges mandatory minimums and 851s to prevent the exercise of judicial discretion); USSC, Public Hearing, New York, New York, July 9-10, 2009, Transcript at 314-15 (Mr. Boente arguing in favor of mandatory minimums because they cause cooperation); USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 271 (Mr. Fitzgerald stating that mandatory minimums are necessary for law enforcement and their repeal would be devastating).

<sup>88</sup> Judge Newman hypothesized a compromise system as “mandatory in its application, but . . . sufficiently flexible in the way the guidelines are structured, and the departure authority is adequate.” USSC, Public Hearing, New York, New York, July 9-10, 2009, Transcript at 94.

<sup>89</sup> USSC Hearing, Chicago, Illinois, Sept. 9-10, 2009, Transcript at 73-75, 77-79; USSC Hearing, Atlanta, Georgia, February 10-11, 2009, Transcript at 150-51, 159-61; USSC Hearing, Stanford, California, May 27-28, 2009, Transcript at 40-48, 60, 65, 84-85; USSC, Public Hearing, New York, New York, July 9-10, 2009, Transcript at 145-51.

<sup>90</sup> USSC Hearing, Atlanta, Georgia, February 9-10, Transcript at 159.

reduce them, to de-link the guidelines from mandatory minimums or seek permission to do so, and to seek expansion of the safety valve.

## V. ALTERNATIVES TO INCARCERATION

I commend the Commission for prioritizing the study of alternatives to incarceration during the upcoming amendment cycle, and hope that it will begin implementing the suggestions Defenders and others have made throughout the Commission's multi-year study.<sup>91</sup>

### A. The Guidelines Should Advise Courts to Determine at the Outset Whether a Prison Sentence Is Truly Necessary to Satisfy the Purposes of Sentencing.

The current Sentencing Table does not permit probation as a stand-alone sanction except for those few offenders with a guideline range of 6 months or less – and does not permit it at all for anyone with a guideline range higher than 12 months – despite the fact that probation is statutorily available for all offenses with a statutory maximum less than 25 years and for which probation has not been expressly precluded.<sup>92</sup> No range in the Sentencing Table advises *against* a period of imprisonment – even for offenders with no criminal history points and an offense level of 1.

The notion that incarceration is potentially appropriate in every case (and presumptively appropriate in all but the most minor cases) is contrary to congressional intent. When Congress passed the Sentencing Reform Act, it intended that sentencing options would be *expanded* to cut down on the incidents of unnecessary incarceration.<sup>93</sup>

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<sup>91</sup> I incorporate by reference all of the previous testimony from Defender witnesses on non-prison sanctions. *See* Statement of Carol A. Brook, Executive Director, Federal Defender Program for the Northern District of Illinois, Chicago, Illinois, at 23-25 (Sept. 10, 2009); Statement of Alexander Bunin, Federal Public Defender for the Northern District of New York, New York New York at 19 (July 9, 2009); Joint Statement of Thomas W. Hillier II, Federal Public Defender for the Western District of Washington, & Davina Chen, Assistant Federal Public Defender for the Central District of California, Stanford, California, at 3-14 (May 27, 2009); Testimony of Alan Dubois, Senior Appellate Attorney, Federal Public Defender of the Eastern District of North Carolina, & Nicole Kaplan, Staff Attorney for the Federal Public Defender of the Northern District of Georgia, Atlanta, Georgia at 15-17, 39-47 (Feb. 10, 2009).

<sup>92</sup> *See* 18 U.S.C. §§ 3559(a)(2), 3561(a)(1)-(2). Probation is also unavailable if the defendant is sentenced “at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.” 18U.S.C. § 3561(a)(3).

<sup>93</sup> S. Rep. No. 225, 98th Cong., 1st Sess., 50, 59 (1983) (“Current law is not particularly flexible in providing the sentencing judge with a range of options from which to fashion an appropriate sentence. The result is that a term of imprisonment may be imposed in some cases in which it would not be imposed if better alternatives were available. In other cases, the judge might impose a longer term than would ordinarily be appropriate simply because there were no available alternatives that served the purposes he sought to achieve with a long sentence. . . . The

It also expected that “sentences imposed under this new [guideline] sentencing system will not, on average, be materially different from the actual times now spent in prison by similar offenders who have committed similar offenses.”<sup>94</sup> Contrary to Congress’s hope, “on average, federal offenders receive substantially more severe sentences than they did in the preguidelines era,”<sup>95</sup> due in large part to the guidelines’ restrictive approach to non-prison sentences.<sup>96</sup>

The notion that incarceration is presumptively appropriate is also contrary to modern criminological research. As Attorney General Holder recently noted, “imprisonment is not a complete strategy for law enforcement. . . . [H]igh rates of incarceration have tremendous social costs . . . , and crime rates appear to have reached a plateau and no longer respond to increases in incarceration.”<sup>97</sup> The Attorney General is right. Lengthy prison sentences are unnecessarily costly and too often end up harming public safety by limiting an offender’s ability to rehabilitate him or herself.<sup>98</sup> Incarceration hurts one’s ability to get a job, maintain a family, and become a productive

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Committee encourages the fashioning of conditions of probation in order to make probation a useful alternative to a term of imprisonment.”).

<sup>94</sup> *Id.* at 116.

<sup>95</sup> See *Fifteen Year Review* at 43; see also U.S. Sentencing Commission, Staff Discussion Paper, *Sentencing Options under the Guidelines* at Appendix A, Type of Sentence Imposed for All Offenses, 1984-1995 (Nov. 1996) (“*Sentencing Options*”) (showing increase in prison sentences and decrease in probation sentences in the years immediately following the guidelines’ implementation), available at [http://www.rashkind.com/alternatives/dir\\_00/USSC\\_sentencingoptions.pdf](http://www.rashkind.com/alternatives/dir_00/USSC_sentencingoptions.pdf). This trend is also reflected in the tables in Appendix A that track types of sentence imposed for drug, violent, and white collar offenses, with white collar offenses showing the largest difference. *Id.*

<sup>96</sup> See *Fifteen Year Review* at 77 (the guidelines “substantially increased the certainty and severity of punishment for many types of crimes, and for some crimes quite substantially”) (emphasis added).

<sup>97</sup> See Remarks as Prepared for Delivery by Attorney General Eric Holder at the Vera Institute of Justice’s Third Annual Justice Address (July 9, 2009) (“Holder Remarks at the Vera Institute”), available at <http://www.usdoj.gov/ag/speeches/2009/ag-speech-090709.html>.

<sup>98</sup> “Research has demonstrated that increasing the length of prison terms produces little in the way of increased deterrence of crime or reduced recidivism, yet contributes significantly to higher costs of corrections.” Ryan S. King, The Sentencing Project, *Changing Direction? State Sentencing Reforms 2004-2006* at 19 (March 2007), available at <http://www.sentencingproject.org/Admin/Documents/publications/sentencingreformforweb.pdf>; accord The JFA Institute, *Unlocking America: Why and How to Reduce America’s Prison Population* at 8 (Nov. 2007) (“*Unlocking America*”) (“The states that increased incarceration rates the least were just as likely to experience decreases in crime as those that increased them the most.”), available at <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf>.

member of society<sup>99</sup> -- important factors that, where lacking, increase the risk of recidivism.<sup>100</sup> It “often leads to a breakup of family or other social relationships, and lessens parental involvement with children. . . . The remaining family members may be less effective in supervising and controlling teenage children. Furthermore, incarceration reduces the supply of marriageable men, leaving more single mothers to support and raise the children.”<sup>101</sup> “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.”<sup>102</sup> Simply put, “[t]he longer someone is in prison, the less likely they’re going to be able to make a good adjustment when they come out.”<sup>103</sup>

Non-prison alternatives enhance public safety in both the short and long term because, unlike prison sentences, they do not break up families, they permit stable employment, and they do not isolate or ostracize offenders.<sup>104</sup> The Commission should follow the President’s and the Attorney General’s lead by “embracing reducing recidivism as a very important goal of sentencing and corrections,”<sup>105</sup> and by acting on

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<sup>99</sup> Justice Policy Institute Policy Report, Doug McVay, Vincent Schiraldi & Jason Ziedenberg, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* at 3 (Jan. 2004) (“even a short period of incarceration has been shown to affect people’s earnings and ability to get a job, to be parents, and to become productive parts of their communities”), available at [http://www.justicepolicy.org/images/upload/04-01\\_REP\\_MDTreatmentorIncarceration\\_AC-DP.pdf](http://www.justicepolicy.org/images/upload/04-01_REP_MDTreatmentorIncarceration_AC-DP.pdf).

<sup>100</sup> *Measuring Recidivism* at 12 (“those with stable employment in the year prior to their instant offense are less likely to recidivate (19.6%) than are those who are unemployed (32.4%)” and “[o]ffenders who have never been married are most likely to recidivate”).

<sup>101</sup> Doris Layton MacKenzie, *Sentencing and Corrections in the 21st Century: Setting the Stage for the Future* at 36, 38 (Feb. 23, 2000) (“*Sentencing and Corrections in the 21st Century*”) (report to DOJ via the National Institute of Justice, Office of Justice Program), submitted to the Sentencing Commission at its Symposium on Crime and Punishment: Alternatives to Incarceration (July 14-15, 2008) and available at [http://www.rashkind.com/alternatives/dir\\_04/MacKenzie\\_.pdf](http://www.rashkind.com/alternatives/dir_04/MacKenzie_.pdf).

<sup>102</sup> The Sentencing Project, *Incarceration and Crime: A Complex Relationship* at 7 (“*Incarceration and Crime*”), available at [http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cinc\\_iandc\\_complex.pdf](http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cinc_iandc_complex.pdf).

<sup>103</sup> See USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 395 (Mr. Wicklund); see also *id.* at 396 (Ret. Judge Warren) (describing a 2002 meta-analysis showing that, albeit relatively small, “the statistical relationship between length of incarceration and subsequent recidivism was a positive and escalating one”).

<sup>104</sup> See *Sentencing Options* at 18-19 (“At the very least, . . . 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>105</sup> See USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 384

the vast body of research proving that non-prison sentences “better protect the public and future potential victims from the risk of re-offense”<sup>106</sup> at far less cost.<sup>107</sup> Carl Wicklund, Executive Director of the American Probation and Parole Association, made an excellent point when he testified at the Chicago regional hearing that, when he began his career, “we had sort of a creed that prison was the alternative sentence. We didn’t see community supervision as the alternative. We saw prison as the alternative. And if you start from that perspective, it gives you a whole different perspective on where you’re going forward.”<sup>108</sup>

I join my colleagues who have urged the Commission to “go forward” by adding 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 and is permissible in every case in which prison is not statutorily required, and that the court should address at the outset whether prison is actually necessary to satisfy any purpose set forth in § 3553(a)(2)(A), (B) or (C). The guideline should also make clear that in cases where probation is statutorily prohibited, as is the case for many drug offenses, courts have the option to impose a split sentence involving minimal imprisonment. For example, courts can impose a sentence of time served, or for those who were released pre-trial, as little as one day, with a term of supervised release with appropriate conditions.

**B. The Guidelines Should Encourage the Use of Non-Prison Sanctions to Address the Risks and Needs of a Wide Range of Defendants.**

I also agree with the Chicago panelists that the Commission should not limit the availability of alternative sanctions under the guidelines to a narrow class of first offenders.<sup>109</sup> When Congress directed the Commission in the SRA to ensure that the

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(Commissioner Wroblewski) (noting that “the President and the Attorney General have embraced reducing recidivism as a very important goal of sentencing and corrections, and I think this Commission will be embracing that”).

<sup>106</sup> Written Statement of Judge (Ret.) Roger K. Warren to the U.S. Sentencing Commission, Alternatives to Incarceration Panel at 1 (Sept. 10, 2009).

<sup>107</sup> Memorandum from Matthew Rowland, Deputy Assistant Director, Administrative Office of the United States Courts, to Chief Probation Officers and Chief Pretrial Services Officers re: Cost of Incarceration and Supervision (May 6, 2008) (advising that, in 2008, housing an inmate in federal prison cost \$24,922 per inmate per year, compared to \$22,871 for sentencing a defendant to community confinement, and \$3261.64 for imposing a sentence of supervised probation).

<sup>108</sup> See USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 377 (Sept. 9-10, 2009) (Mr. Wicklund).

<sup>109</sup> See *id.* at 390-91 (Ret. Judge Warren) (advising the Commission to “move away from defining eligibility [for non-prison sentences] based on offense characteristics, you know, first offender, nonviolent offense., to more of the risk/needs-assessment-based approach, where you’re also considering the criminogenic needs that the treatment providers and probation folks are talking about” and warning that permitting non-prison sentences based solely on static factors such as a



guidelines reflect “the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense,”<sup>110</sup> it did not intend to limit non-prison sentences to *only* that class of offender. To the contrary, Congress supported such sentences whenever they serve the purposes of punishment, and directed that prison sentences were “generally appropriate[.]” only in cases involving “a person convicted of a crime of violence that results in serious bodily injury.”<sup>111</sup>

As Attorney General Holder has said, “[s]mart risk assessments can identify which offenders can safely remain in their communities and which require continued detention and more intensive supervision.”<sup>112</sup> Risk assessment tools are currently being used in the Eastern District of Michigan and in other courts to identify the criminogenic needs of federal defendants on the front end.<sup>113</sup> The Risk Prediction Index is an assessment tool created by the Federal Judicial Center after several years of study and testing in eleven districts for use at the front end of sentencing.<sup>114</sup> Although the RPI was developed to assist U.S. Probation Officers in identifying appropriate release conditions upon reentry, it can be used to determine whether a non-prison sentence is appropriate and, if so, which community-based conditions will best protect public safety and the defendant’s chances of success. I am happy to report that the probation office in the Southern District of Iowa will soon be participating in a pilot risk-needs assessment program along with three other districts. The Commission should encourage the use of

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defendant’s prior criminal history means “you’re going to fail from the outset”).

<sup>110</sup> See 28 U.S.C. § 994(j).

<sup>111</sup> See *id.*; see generally Joint Statement of Thomas W. Hillier II and Davina Chen at 6-8 (citing numerous provisions of the SRA where Congress implicitly or explicitly expressed its support for alternative sentences in a wide array of contexts).

<sup>112</sup> See Holder Remarks at the Vera Institute.

<sup>113</sup> See Statement of Phillip Miller, Chief United States Probation Officer for the Eastern District of Michigan, Public Hearing Before the U.S. Sentencing Commission, Chicago, Illinois, at 4 (Sept. 9, 2009) (describing practice in the district of using “risk assessment tools at the presentence stage to assist us in recommending and justifying special conditions of supervision for defendants based on their criminogenic needs” and noting that “a comprehensive, validated, actuarial risk/needs tool will be critical in allowing probation officers to make a number of important sentencing determinations when it comes to alternatives to incarceration”); see also USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 392-93 (Mr. Van Dyke) (describing practice in Northern District of Illinois where Salvation Army works with defendants presentence to identify and begin to address criminogenic needs, thereby permitting probation sentences with individualized and appropriate conditions); *id.* at 387 (Ret. Judge Warren) (describing additional front end risk/needs assessment tools that are available through the National Institute of Corrections and the American Probation and Parole Associations).

<sup>114</sup> See Pat Lombard and Laural Hooper, *RPI FAQs Bulletin* (August 1998), available at <http://ftp.resource.org/courts.gov/fjc/0014.pdf>.

such assessments tools.

Moving away from the static fact of an individual's criminal history as the primary determinant of whether a non-prison sentence is appropriate will also allow for alternative sentences for the many low-level drug offenders who currently are sentenced to straight prison.<sup>115</sup> The over-incarceration of these non-violent offenders has attracted criticism from even the highest levels of federal law enforcement<sup>116</sup> and must be remedied. Judge Sessions is right that there are many such offenders in the federal system. The largest proportion of powder cocaine offenders are couriers and mules and the largest proportion of crack offenders are street level dealers.<sup>117</sup> In FY 2008, 20,149 of all federal drug trafficking offenses (82.9%) involved no weapon, and 15,396 of all federal drug trafficking offenders (63.3%) had 0-3 criminal history points.<sup>118</sup> In Iowa, we see a good number of low-level methamphetamine defendants. They distribute methamphetamine or supply pseudoephedrine to the people who are cooking methamphetamine simply to support their own habits. These offenders should have the opportunity under the guidelines to receive evidence-based sentences geared toward addressing their needs and increasing public safety, rather than a one-way ticket to incarceration and, too often, future criminal behavior.

**C. The Guidelines Should Provide Information on Types of Programs that Reduce Recidivism and Encourage Defendants to Participate in those Programs through Open-Ended Departures.**

During the Chicago hearing, a concern was raised that encouraging defendants to

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<sup>115</sup> See USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 388 (Ret. Judge Warren) (explaining that risk/needs assessments work because they balance static factors like criminal history against “things you can do something about. If you’re only going – if you’re going to give up on a young kid because he’s a young kid as a high risk of recidivism, you’re not going to get anywhere. That young kid is also probably the person that you will have the most likelihood of success with because if you look at all the factors, some of the adverse static factors get outweighed in the overall mix”).

<sup>116</sup> See Holder Remarks at the Vera Institute (“One specific area where I think we can do a much better job by looking beyond incarceration is in the way we deal with non-violent drug offenses.”); see also Statement of Edward M. Yarborough, U.S. Attorney for the Middle District of Tennessee, U.S. Dept. of Justice, Public Hearing Before the U.S. Sentencing Commission, Chicago, Illinois, at 6 (Sept. 10, 2009) (noting that “[s]ometimes the valid ends of justice would be better served by probation or other forms of alternative sentencing,” that “[i]n drug cases particularly, we often see defendants who need treatment as well as incarceration, but sometimes no workable accommodation is available to the court,” and that the Department “is considering providing for greater flexibility in certain areas to open the door to more creative use of treatment alternatives”).

<sup>117</sup> See USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 20-21, 85 (May 2007).

<sup>118</sup> See USSC, 2008 Sourcebook, tbls. 37, 39.

participate in programs designed to address their criminogenic needs (for example, by reducing sentences or recommending alternative sentence packages) would somehow result in less sincere participation. But as James Van Dyke, Executive Director of the Salvation Army in Chicago, testified, the Commission's focus should be on outcomes, not motive. Even individuals "ordered to pursue substance treatment who otherwise might not have done so who, once they become involved, embrace it for other than simply compliance reasons."<sup>119</sup> It is well-established that treatment within the criminal justice system is effective in reducing substance abuse and addiction.<sup>120</sup> The criminal justice system is often the only way in which our clients can learn what they need to do to improve their lives, and receive the services they need to succeed.

The simplest way to amend the guidelines to encourage or incentivize defendants to rehabilitate themselves would be for the Commission to provide information on factors that correlate with reduced recidivism and options that have been found to be effective in addressing particular needs, as suggested by Tom Hillier and Davina Chen in their testimony.<sup>121</sup> When defendants with particular needs participate in programs designed to address those needs, the guidelines can recommend an open-ended departure. This would allow courts to better individualize the sentencing package based on factors such as the quality of the defendant's participation, the personal hurdles s/he overcame in order to participate, the number of needs the defendant has begun to address, and other individual circumstances reflecting the defendant's relative commitment to a law-abiding lifestyle.

An open-ended departure is preferable to specified level reductions, both because the factors at issue are inherently case specific and because a levels-based approach would limit the availability of alternative sentences under the guidelines for those

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<sup>119</sup> USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 359.

<sup>120</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 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>121</sup> See Joint Statement of Thomas W. Hillier II and Davina Chen, at 11-15 (suggesting sample guidance relating to education, vocational skills and employment, drug and alcohol abuse and treatment, mental health treatment, age, community service, first or near-first offenders, drug, larceny and fraud offenders, and sex offenders).

offenders with higher guideline ranges who are capable of turning their lives around. Take, for example, a drug courier whose guideline range is high because she carried a large quantity of drugs. She is a drug addict, and committed the offense to support her addiction. After her arrest and before sentencing, she participated in a drug treatment program. At the time of sentencing, she is doing well in the program, and interrupting treatment would not advance the purposes of sentencing in her case. If the departure were limited to say, two or four levels, she would have to be imprisoned. A judge concerned with not interrupting treatment would either ignore the departure provision and vary under § 3553(a), or vary from the departure.

There are numerous programs already being used in the federal system on a pretrial or presentence basis. At the Chicago hearing, Jacqueline Johnson mentioned a program in the Northern District of Ohio that identifies the educational and employment-related needs of defendants on pretrial release. The program is known as Defendants/Ex-Offenders Workforce & Reentry Success, or DOWD, and is available by invitation from Pretrial Services or Probation to pretrial defendants (both releasees and detainees) and defendants on probation or supervised release. Program participants attend weekly group sessions for several weeks during which time their strengths and weaknesses are assessed and they hear from speakers on a wide range of employment-related issues. The officers then design an individualized program that meets each defendant's specific needs. Services include conducting mock job fairs, organizing job fairs in the community, offering individual employment assistance (such as providing tips on how to complete a job application), and referring defendants for job readiness and skills training (including GED classes). Local employers are encouraged to hire defendants by informing them about tax credits, federal bonds, and standard supervision requirements (such as drug testing), as well as through letters in support of the program from the Chief Judge and assurances that the probation officer will work with the employer to address any performance issues.

Ms. Johnson has informed me about a client who was invited to participate in the program. This client was charged with possession with intent to distribute marijuana and was facing 27-33 months of imprisonment after the government's motion for a two-level downward departure for cooperation. (She did not qualify for safety valve because she was in Criminal History Category II.) The client did so well in the workforce program that a supervisor in the probation office took the unusual step of amending the PSR to list the client's exceptional performance in the program as a basis for a variance, indicating that she should remain in the community and in the program without interruption. Based on this, along with her low level involvement in the conspiracy and her family ties, the court sentenced her to one day of custody in the Marshal's Office (for ten minutes), ten months home confinement, and three years supervised release. She is currently employed and completing the post release workforce program.

The District of Utah recently began a Defendant/Offender Workforce Development program which, like the Ohio program, is available to defendants awaiting trial or sentence, as well as those on probation or supervised release. The program provides guidelines for officers to use in securing meaningful employment or educational

opportunities for defendants and, like most such programs, requires a collaborative approach from many agencies and stakeholders, including the Defenders, DOJ, and federal and state pretrial services and probation officers. Like the Ohio program, it is designed to address offender employment – described in the program’s literature as “one of the more difficult challenges faced by our defendants/offenders” and “one of the most salient predictors of success on supervision.”

In 2008, the U.S. Probation Office for the Southern District of Iowa held a job fair at a convention center in Des Moines. Chief Judge Robert Pratt provided opening remarks for the event. Representatives from thirty-seven employers participated in the fair, which attracted more than 200 federal defendants and former offenders, as well as 300 former offenders from local and other jurisdictions.

Amending the guidelines to provide evidence-based guidance and to invite open-ended departures will encourage judges in districts like these to develop sentencing packages that better address the criminogenic needs of defendants, and encourage the development of programs to address common issues bearing on recidivism risk, such as employment-related needs, in a way that takes into account locally-available opportunities.

## **VI. RE-ENTRY**

Reentry programs can also provide incentives. Following the example of the successful reentry court in St. Louis, Missouri, the Southern District of Iowa started similar programs in Des Moines and Davenport in July, 2009. The reentry court serves people who are on supervised release and have shown an increased risk of revocation. In each city, a district court judge, probation officer, assistant federal defender, and assistant U.S. attorney staff the program. They meet at least once a month with the ten current participants. During the meetings, the participants and staff discuss challenges the participants have faced and successes they have achieved since the previous meeting. The program provides participants with substance abuse counseling and employment services as needed. Participants also work with counselors on journaling exercises in a reentry court workbook. Successful completion of the program offers the potential for a reduced term of supervised release.

At the Chicago hearing, Judge Sessions said that “the logical way of approaching re-entry is to actually move it back into the Bureau of Prisons,” and that the BOP perhaps could “provid[e] incentives for people who are coming toward the end of their sentence, something along the line of the 500-hour drug and alcohol rehabilitation program.”<sup>122</sup>

If so, there needs to be a substantial change in BOP’s overall approach. As Steve Sady, Deputy Federal Public Defender for the District of Oregon, recently testified before Congress, BOP has failed to fully implement available statutory mechanisms to ameliorate sentences in six areas: the Second Chance Act, the second look statute (18

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<sup>122</sup> USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 293-94.

U.S.C. § 3582(c)), good time credit, the residential drug treatment program (RDAP), the boot camp program, and the sentence calculation statutes.<sup>123</sup>

BOP's policies relating to RDAP especially illustrate its institutional failure to fully implement statutory mechanisms that can reduce time spent in prison. First, BOP underutilizes RDAP by not making eligibility determinations early enough to send prisoners to available programs, a practice that will be exacerbated by BOP's new regulations requiring that RDAP determinations be made late in a prisoner's term of imprisonment.

In addition, BOP has promulgated inappropriate practices regarding who is an eligible prisoner, disqualifying persons who have not used substances within a year of custody even when it was because the addicted person had been complying with pretrial release conditions.<sup>124</sup> On the other hand, in one instance we know of, BOP deemed a client of the Federal Defender Office for the District of Massachusetts, who was on the waiting list for RDAP, ineligible for the program because he used drugs while in prison.<sup>125</sup> These are the very individuals who most need the program.<sup>126</sup>

BOP also excludes from RDAP inmates convicted of nonviolent offenses but who have prior convictions for certain "crimes of violence," no matter how stale and despite the fact that Congress intended to preclude RDAP only for those whose *instant* offense was violent.<sup>127</sup> Similarly, BOP disqualifies gun possessors from early release consideration. Recently, it added arson and kidnapping as prior offenses disqualifying an

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<sup>123</sup> See Prepared Statement of Stephen R. Sady Before the United States House of Representatives Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, Federal Bureau of Prisons Oversight Hearing (July 21, 2009).

<sup>124</sup> See *Salvador-Orta v. Daniels*, 531 F. Supp. 2d 1249, 1252 (D. Or. 2008).

<sup>125</sup> BOP lists the use of alcohol or drugs as a ground for expulsion from RDAP. 28 C.F.R. § 550.53(g)(3).

<sup>126</sup> "Individuals trying to recover from drug addiction may experience a relapse, or return, to drug use. . . . Monitoring drug use [during treatment]. . . provides opportunities to intervene to change unconstructive behavior—determining rewards and sanctions to facilitate change, and modifying treatment plans according to progress." National Institute on Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations* available at [http://www.drugabuse.gov/PODAT\\_CJ/principles/](http://www.drugabuse.gov/PODAT_CJ/principles/).

<sup>127</sup> 18 U.S.C. § 3621(e)(2)(B) ("The period a prisoner *convicted of a nonviolent offense* remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons . . .") (emphasis added). The Ninth Circuit recently held that the BOP violated the Administrative Procedure Act by excluding a prisoner serving time for drug trafficking from early release based on a 1970 manslaughter conviction. *Crickon v. Thomas*, 579 F.3d 978 (9th Cir. 2009) ("The administrative record before us is devoid of any contemporaneous rationale for the BOP's promulgation of a rule categorically excluding inmates with certain prior convictions from early release eligibility.").

inmate for early release programs.<sup>128</sup>

BOP has failed to implement Congress's intent in the Second Chance Act.<sup>129</sup> Congress doubled the amount of time (to twelve months) during which an inmate can serve the last part of a sentence in a halfway house. In "implementing" the Act, BOP issued rules that effectively limit placement to no more than six months, representing no change in its previous policy.<sup>130</sup> This was not based on any empirical evidence.

In the Council Bluffs/Omaha metropolitan area, which has a population of over 800,000 people, BOP's contract with a single halfway house prevents it from placing anyone in another halfway house within fifty miles. With increasing numbers of federal defendants released pretrial in Council Bluffs on the condition that they reside at a halfway house, there is less available space at the same halfway house for those released into the community.

Finally, BOP has adopted a methodology that awards only 47 days good time credit per year of sentence imposed, rather than the 54 days required by statute. *See* 18 U.S.C. § 3624(b).<sup>131</sup>

Given BOP's current policies, it cannot be expected to implement new or improved reentry programs in an effective manner.

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<sup>128</sup> *See* BOP Policy Statement 5331.02 (March 16, 2009).

<sup>129</sup> Pub.L. 110-199, § 251, 122 Stat. 657 (Apr. 9, 2008); 18 U.S.C. §3624(c) (2008).

<sup>130</sup> Memorandum From Joyce Conley and Kathleen Kennedy to Chief Executive Officers Re: Pre-Release Residential Re-Entry Center Placements Following The Second Chance Act of 2007 (Apr. 14, 2008).

<sup>131</sup> The Solicitor General has been ordered to respond to a petition for the certiorari filed in *Tablada v. Thomas*, No. 08-11034, which challenges the BOP's reading of 18 U.S.C. § 3624(b).

**APPENDIX**

		<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>First three quarters 2009</b>
<b>GOVERNMENT SPONSORED</b>					
5K1.1	Number of cases	10,134	10,049	10,048	7,293
	Median Sentence	37	36	36	36
	Median Decrease	30	29	30	31
	Median % Decrease	47.8	47.4	47.8	48.9
5K3.1	Number of cases	5,166	5,233	5,894	5,067
	Median Sentence	18	18	18	18
	Median Decrease	8	7	7	7
	Median % Decrease	28.3	27.8	28.6	33.2
Other Govt	Number of cases	1,939	2,614	3,121	2,111
	Median Sentence	24	24	21	27
	Median Decrease	12	10	10	12.1
	Median % Decrease	33.2	26.8	27.4	33.3
<b>NOT IDENTIFIED AS GOVERNMENT SPONSORED</b>					
Downward Departure	Number of cases	1,903	1,757	1,544	1,159
	Median Sentence	24	24	24	24
	Median Decrease	10	10	10	10
	Median % Decrease	29.8	26.8	28.6	28.6
Downward Departure w/3553(a)	Number of cases	1,432	1,013	915	599
	Median Sentence	24	24	24	24
	Median Decrease	15	15	15	18



	Median % Decrease	40.3	39.1	40.5	43.2
3553(a)	Number of cases	4,243	4,957	6,678	6,658
	Median Sentence	24	27	27	27
	Median Decrease	12	12	12	13
	Median % Decrease	34.3	33.3	33.3	34.8
All Remaining	Number of cases	929	706	835	694
	Median Sentence	16.5	12	13	12
	Median Decrease	8	6	6	6
	Median % Decrease	39.3	45.9	39.2	35.8

Source: USSC, *Preliminary Quarterly Data Report, 2006, 2007, 2008, 3d Quarter Release 2009*, Tables 1, 7-13.