TO: Defenders and CJA Counsel
FR: Amy Baron-Evans, SRC
RE: USSC's Criminal History Reports
DA: 1/27/06

Criminal history relates to all of the 3553(a)(2) purposes of sentencing – just punishment (according to the Commission, those with aggravated criminal backgrounds are more culpable in the instant offense), the need to deter the defendant from committing further crimes (recidivism prediction), the need to incapacitate the defendant to protect the public from further crimes of the defendant (same), and the need for treatment, rehabilitation and other correctional treatment in the most effective manner (there may be little or no need for correctional treatment at all if it is unlikely the defendant will recidivate, or a high potential for rehabilitation, or a need to address the root cause, such as addiction, through treatment rather than lengthy incarceration).

The Sentencing Commission has released three reports in its series on recidivism: Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines (Release 1), Recidivism and the "First Offender" (Release 2), and A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score (Release 3), all available at http://www.ussc.gov/research.htm . I have only read the first and third Releases, and summarize some points that might be useful below.   The second Release is worth looking at too, but I haven't yet.

The CHC rules were not based on the Commission's own direct empirical evidence because (1) of time pressures, and (2) unlike all other known recidivism scales, CHC seeks not only to predict recidivism, but, more subjectively, to punish repeat offenders for longer on the theory that they are more culpable, and to achieve general deterrence. [1] Release 1 at 1-2; Release 3 at 2-4. The Commission was supposed to incorporate empirical research and data as it became available, but it hasn't yet.   Release 1 at 2.

Release 1
The difference between the rate of recidivism (defined as re-conviction, re-arrest with no info re conviction, and supervision revocation within 2 years) between CHC V and CHC VI is almost nonexistent.   Id. at 9 & Exhibit 5. What accounts for this is the inclusion of people who are in CHC VI because of the Career Offender Guideline, who recidivate at a lower rate than a person with 13 CH points or more.   Id. at 9. This means that **career offender status is not justified by an increased risk of recidivism.**

The number of CH points is a better predictor of recidivism than CHC category, and the difference is statistically significant. Id. at 10-11. Taken literally, this would be of help to those defendants with a number of points with an associated recidivism rate that does not follow the general upward trend.   For example, the rate for defendants with 18 points is the same for defendants with 5 points. The rate for defendants with 19 points is the same for defendants with 9 points. See Table 4. The rate of re-conviction within 2

years for defendants with 19 points is less than that for defendants with 0 points. Id. Go figure.

Women recidivate at a lower rate than men, and the difference is even greater in CHC V and VI. Id. at 11 & Exhibit 9.

Recidivism rates decline with age. Id. at 12 & Exhibit 9.

Stable employment in the year prior to arrest is associated with a lower risk of recidivism. Id. at 12 & Exhibit 10.

Recidivism rates decrease with educational level (no high school, high school, some college, college degree). Id. at 12 & Exhibit 10. However, in CHC V, recidivism rates are higher for those with a college education than those with less than a high school education.

Recidivism rates are associated with marital status (never married, divorced, married). Id. at 12 & Exhibit 10.

In CHC I, II, III, IV and VI, recidivism rates are lower for those without illicit drug use in the year prior to the offense. In CHC V, the recidivism rate is lower for illicit drug users. Id. at 13 & Exhibit 10.

The Offense Level is not a predictor of recidivism. Id. at 13 & Exhibit 11.

Offenders sentenced under the fraud, larceny and drug guidelines are the least likely to recidivate, and *drug offendersleast of all except in CHC I* . Id. at 13 & Exhibit 11.

Offenders are most likely to recidivate when their sentence is straight prison, as opposed to probation or split sentences. Id. at 13 & Exhibit 12.

<u>Conclusions</u>

If the point is to predict recidivism (and not to punish more for more points), CHC V & VI should be combined. Id. at 15.

Rehabilitation programs focused on drug use or education would have a high cost-benefit value. Id. at 16. (and should be used instead of incarceration where appropriate in individual cases)

Legally permissible offender characteristics should be incorporated into the CHC computation. Id. at 16.

<u>Release 3</u>

This study compares the SFS used by the Parole Commission and the CHC under the Guidelines in terms of predictive ability, with a view to simplifying CHC in light of the possibility that aspects of priors such as type, recency and length of imposed sentence will be deemed beyond the fact of conviction under <u>Apprendi</u> and <u>Blakely</u>.

The SFS method is a better predictor of recidivism than is the CHC for three reasons that were identified in the report.   <u>Id</u>. at 12.

<u>Violence</u>
SFS has no violence component/CHC adds 1 point for each prior conviction of a crime of violence otherwise uncounted, USSG 4A1.1(f).   **The predictive power of USSG 4A1.1(f) is statistically insignificant** . <u>Id</u>. at 7, 11, 15.

<u>Age</u>
Under the SFS, the older the defendant is and the fewer the number of prior commitments, the less likelihood of recidivism, and defendants over 41 get an automatic reduction./Under CHC, age is not accounted for at all.   **Age is a powerful component of recidivism prediction, which the Guidelines do not take into account**. <u>Id</u>. at 8, 13-15.

<u>First or Near-First Offender Status</u>
Minimal or no prior involvement with the criminal justice system is also a powerful predictor of recidivism, which the Guidelines do not take into account . <u>Id</u>. at 15.

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[1] The evidence on deterrence, both general and specific, is ambiguous at best, and not a good basis for particular rules. <u>See</u> Paul J. Hofer & Mark H. Allenbaugh, The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines, 40 Am. Crim. L. Rev. 19, 61-62 (2003).   Incarceration has little effect on reducing drug crime because drug crime is driven by demand, and low-level dealers and couriers are easily replaced. <u>See</u> The Sentencing Project, <u>Incarceration and Crime: A Complex Relationship</u> at 6-7 (2005).   Nor do lengthy terms of incarceration have a deterrent effect on white-collar offenders, presumably the most rational group of offenders. <u>See</u> Sally S. Simpson, Corporate Crime, Law, and Social Control 6, 9, 35 (Cambridge University Press) (2002); David Weisburd et al., Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes, 33 Criminology 587 (1995).