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United States Sentencing Commission
One Columbus Circle, N.E.
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Attention: Public Affairs – Priorities Comment

Re: Public Comment on USSC Notice of Proposed Priorities for Cycle Ending May 1, 2011

Dear Judge Sessions:

On behalf of the Federal Public and Community Defenders, and pursuant to 28 U.S.C. § 994(o), we offer the following comments on the Commission's proposed priorities for the upcoming amendment cycle. We look forward to working with the Commission to ensure fair and just sentences and to address unwarranted disparities in application of federal statutes and guidelines. Here we address many of the priorities proposed in the notice and request for comment. We address the Commission's post-*Booker* review and study of mandatory minimums by separate cover.

Proposed Priority #3: Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 and Possible Amendments to Part K or Part M of Chapter Two.

In Pub. L. 111-195, effective July 1, 2010, Congress directed the Commission to study and report within one year on the "impact and advisability of imposing mandatory minimum sentences for violations of -- (1) section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. 287c(a)); (2) sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. 2778, 2779, and 2780); and (3) the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.)." The Commission has proposed that in addition to conducting this study, it consider amendments to §2M5.2 or other guidelines in part K or Part M of Chapter Two "that might be appropriate in

light of the information obtained from such study." We address this proposed priority in four parts discussing (1) our opposition to new mandatory minimums; (2) the need to revise the guidelines for possession of a stolen firearm or firearm with an altered or obliterated serial number; (3) the problems with the definitions of crimes of violence and controlled substance offenses in §2K2.1(a)(1)-(4); and (4) the absence of evidence supporting the Department of Justice's (DOJ) request for increased sentences for straw purchasers. [1]

A. Recommend No New Mandatory Minimums

As the Commission is well aware, we oppose any new mandatory minimum sentences. The chief reasons for our opposition were set forth in our testimony at the Commission's mandatory minimum hearing on May 27, 2010. [2] Statutory mandatory minimum penalties, along with prosecutorial charging decisions, are ranked as a leading cause of unwarranted disparity.[3] They have not been proven to deter crime. Mandatory minimum penalties also waste prison resources, undermine the role of the Sentencing Commission, and make impossible individualized sentencing tailored to the circumstances of each offense and offender. The only real purpose they serve is to shift power over sentencing from the Commission and judges to prosecutors who view them as tools to leverage plea bargains, often on the least culpable defendants. Sound sentencing policy should not be based on what might make it easier for prosecutors to obtain convictions. Indeed, the presence of mandatory minimum sentencing provisions and the leverage they provide prosecutors undermines communities and promotes disrespect for the law. They also encourage cooperators to fabricate and exaggerate to curry favor with prosecutors.[4]

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[1] We have additional concerns about §2K2.1, including the broad reach of the four-level increase under §2K2.1(b)(6) ("reason to believe" that the firearm "would be used or possessed in connection with another felony offense"). The standard is so broad and vague, and the number of potential felony offenses so vast, that the provision applies to nearly a quarter of the cases sentenced under that guideline. *USSC, 2009 Sourcebook of Federal Sentencing Statistics*, at 45 (2009) (hereinafter *2009 Sourcebook*).

[2] Statement of Michael Nachmanoff, Before the U.S. Sentencing Comm'n, Washington, D.C. (May 27, 2010). We are not alone in our opposition. The Judicial Conference of the United States has consistently and vigorously opposed mandatory minimums for over fifty years. Mandatory Minimums and Unintended Consequences, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives, 11th Cong. (July 14, 2009) (Honorable Julie E. Carnes, Chair, Criminal law Committee of the Judicial Conference of the United States) available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:51013.pdf. The number of judges supporting expansion of the safety valve across all offenses provides additional evidence that mandatory minimum sentencing regimes are disfavored. USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 2 (June 2010) (hereinafter *Judges Survey*).

[3] *Judges Survey*, Question 16.

[4] *See* Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* (2009).

While we firmly oppose mandatory minimums and hoped DOJ would join in that opposition, we are pleased to see that the Department has set forth stringent criteria for any new mandatory minimum legislation. At the Commission's May hearing on mandatory minimums, it stated "that no new mandatory minimum should be proposed unless there is *substantial evidence* that such a minimum would *rectify a genuine problem* with imposition of sentences below the advisory guidelines; would *not have an unwarranted adverse impact* on any racial or ethnic group; and would not substantially exacerbate prison crowding." (emphasis added). [5] These criteria set a high bar for any new mandatory minimums.

Should the Commission change its historical opposition to mandatory minimums (which we strongly urge it not to do), we encourage it to proceed with great care and adopt a similarly strict test for when it might recommend any new ones. For the statutes subject to this congressional directive, we doubt if the evidence would pass even the bar DOJ has set. For example, even a cursory review of preliminary data raises concerns that any new mandatory minimum directed at arms export violations sentenced under §2M5.2 will have a disproportionate impact on people of color. In 2008, Hispanic defendants comprised 69.8% of the defendants sentenced under §2M5.2. [6] A new mandatory minimum for those offenders would only add to the adverse impact of already existing mandatory minimums directed at firearms offenders.[7]

B. Modify the Stolen Firearms and Altered or Obliterated Serial Number Enhancement under §2K2.1

The Commission should add a mens rea requirement to the adjustment at §2K2.1(b)(4) for a stolen firearm and firearm with an altered or obliterated serial number, lower the adjustment from 4 to 2 for an altered or obliterated serial number, and clarify that the altered or obliterated serial number adjustment does not apply where the serial number is visible with microscopy or is otherwise recoverable.

No sound penological objective supports §2K2.1(b)(4), which treats the unknowing possession of a stolen firearm or firearm with an altered or obliterated serial number the same as knowing possession. The Commission did not explain why it removed the mens rea requirement in 1991. [8] Nor has any explanation emerged since then. The adjustments in §2K2.1(b)(4) stand

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[5] Statement of Sally Quillian Yates. U.S. Attorney, N.D. Ga, Before the U.S. Sentencing Comm'n, Washington, D.C. (May 27, 2010).

[6] Source: USSC, *2009 Datafile*, FY 2009.

[7] The Commission's data shows that African-Americans constitute 49% of all firearms offenders, but 63% of those subject to mandatory minimum penalties. USSC, *Overview of Statutory Mandatory Minimum Sentencing* 13 (2008).

[8] The guideline originally called for a one-level adjustment "if the defendant knew or had reason to believe that a firearm was stolen or had an altered or obliterated serial number." The Commission doubled the offense level in 1989 to "better reflect the seriousness of this conduct." USSG App C, Amend. 189 (Nov. 1, 1989). It removed the mens rea requirement in 1991 without explanation, USSG App. C, Amend. 374, and then added an application note in 1993 that merely stated the enhancement

out for their lack of a scienter requirement. The most analogous guideline – §2K1.3(b)(2) (stolen explosive material) – requires that the "defendant knew or had reason to believe" the material was stolen. To single out possession of a stolen firearm (or a firearm with an obliterated or altered serial number) as a strict liability adjustment, absent any sound objective for the enhancement, is an arbitrary and capricious "tough luck"[9] policy that is antithetical to the statutory purposes of sentencing.

Candid criticism on this issue has come from several quarters. As one court put it, "To add many months of incarceration for possession of a gun because the gun was stolen, when the defendant did not and could not know it was stolen, is to punish by lottery. Haphazard chance is not a guiding spirit of our rule of law." [10] As a strict liability enhancement, §2K2.1 (b) (4) permits punishment "on the cheap" and promotes disrespect for the rule of law.[11]

The strict liability enhancement in §2K2.1(b)(4) also is not "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. § 994(a). Congress meant for defendants to be punished for possession of a stolen firearm or a firearm with an obliterated or altered serial number only if they knowingly did so. 18 U.S.C. §§ 922(j) and (k). To convict a defendant of such an offense, the prosecution would have to prove the scienter requirement beyond a reasonable doubt, using only evidence admissible under the Constitution and the Federal Rules of Evidence. Under the current guideline, the prosecution can exact punishment without proving any mens rea and without having to follow strict evidentiary standards.

The statistics confirm that the government uses the enhancement in lieu of prosecution under §§ 922(j) (stolen) and (k) (obliterated). In 2008, 197 defendants were reportedly convicted under § 922(j). [12] That same year, the enhancement for a stolen firearm was applied over 992 times. [13] In FY 2009, the enhancement applied in 17.5% of §2K2.1 cases, or 1114 times. [14] In

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applies "whether or not the defendant knew or had reason to believe that the firearm was stolen or had an obliterated serial number." USSG App. C, Amend. 478 (Nov. 1, 1993). In 2006, it doubled the enhancement for an altered or obliterated serial number, claiming that the "increase reflects both the difficulty in tracing firearms with altered or obliterated serial numbers and the increased market for these types of weapons. USSG App. C, Amend. 691 (Nov. 1, 2006). Its market theory was not the subject of any hearing testimony and no evidence was provided regarding a "market" for firearms with obliterated or altered serial numbers.

[9] *See* Sanford H. Kadish, *Excusing Crime*, 75 Cal. L. Rev. 257, 267 (1987).

[10] *United States v. Handy*, 570 F. Supp. 2d 437, 439 (E.D.N.Y. 2008*); see also United States v. Mobley*, 956 F.2d 450, 459-68 (Mansmann, J., dissenting).

[11] *United States v. Grier*, 475 F.3d 556, 574 (3d Cir. 2006) (Rendell, J., concurring).

[12] Source: FY2008 Number of defendants in cases closed, 18 U.S.C. § 922(j), available at http://fjsrc.urban.org/tsec.cfm.

[13] USSC, *Use of Guideline and Specific Offense Characteristics, Fiscal Year 2008*, at 45 (2009) (the total number of cases is over 992 because the adjustments for stolen firearm and obliterated or altered serial number for offenses occurring before November 2006 are not included).

2008, 52 defendants were reportedly convicted of § 922(k).[15] That same year, the obliterated or altered serial number enhancement applied in 454 cases. [16] In FY 2009, the four-level enhancement for altered or obliterated serial number applied in 6% of cases under §2K2.1, or 384 cases.

In addition to requesting that the Commission add a mens rea requirement to §2K2.1 (b) (4) (A) and (B), we encourage the Commission to reduce and modify the adjustment for an obliterated or altered serial number because it overstates the seriousness of merely possessing a firearm with an altered or obliterated serial number and the individual's personal culpability for that harm.[17] An understanding of how tracing works and the punishments available for other conduct that interferes with tracing reveals why the current strict liability four-level increase is a grossly disproportionate punishment.

A serial number on a firearm allows the ATF to trace the firearm from the point of manufacturer to the *first* retail purchaser.[18] The ATF does not routinely trace the firearm beyond the point of sale. [19] The chief benefits of tracing data for law enforcement officers is that it may identify the purchaser of a firearm recovered in a crime or raise a red flag about illegal firearm trafficking *at the point of sale.* Those benefits, however, very much depend on the amount of time that has passed from the retail sale and law enforcement's recovery of a firearm ("time-to-crime" rate). As the ATF itself puts it, if the time-to-crime rate is short, and "several short time-to-crime traces involve the same individual/Federal firearm licensee, illegal trafficking activity is highly probable." [20]

The ATF's use of serial numbers to trace firearms from the manufacturer to the point of retail sale has several implications for §2K2.1 (b)(4) and whether a four-level enhancement serves a legitimate purpose of sentencing. First, since the chief vice of an altered or obliterated serial number is that it obstructs the ATF's ability to trace the firearm from manufacture to point of sale and then follow investigative leads from there, the possession of a firearm with an altered or obliterated serial number should not be punished any more harshly than other acts that

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[14] USSC, *Use of Guideline and Specific Offense Characteristics, Fiscal Year 2009,* at 45 (2010).

[15] Source: FY2008 Number of defendants in cases closed, 18 U.S.C. § 922(k), available at http://fjsrc.urban.org/tsec.cfm.

[16] *Use of Guideline and Specific Offense Characteristics, Fiscal Year 2009,* at 45.

[17] *See United States v. Weaver,* 1999 WL 1253972 (2d Cir. Dec. 15, 1999) (unpub) (district judge concluded that the presence of an obliterated serial number "was not relevant to 'the true measure of [the defendant's] moral turpitude'").

[18] PL 110-161 (Consolidated Appropriations Act, 2008) ("Firearms are normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime.").

[19] *See* National Tracing Center, available at http://www.ojjdp.ncjrs.gov/pubs/gun_violence/sect08-j.html.

[20] *Id*. (describing Project LEAD of the ATF).

obstruct law enforcement investigations. USSG § 3C1.1 contains a two- level enhancement for obstruction or impeding the administration of justice. [21] No greater penalty should apply to §2K1.2(b)(4).

The unfairly high punishment for unknowingly possessing a firearm with an altered or obliterated serial number becomes more stark when compared to the penalty for other acts that impede the tracing of firearms. For example, a dealer who fails to maintain adequate records regarding the sale of a firearm impedes the ability of the ATF to identify the first retail purchaser as much, if not more, than an altered or obliterated serial number. Yet, the *knowing f*ailure to keep records is nothing more than a misdemeanor punishable by no more than one-year of imprisonment.[22] Such dealers rarely face criminal prosecution and typically escape with a warning. Only after repeated violations does the ATF seek to revoke their license to sell firearms. [23] It is strangely disproportionate for a person who unknowingly possesses a firearm that may or may not be traceable to face a more severe punishment than one who knowingly fails to keep records designed to facilitate the tracing of firearms.

Aside from restoring the mens rea element it removed in 1991 and returning to the pre-2006 two-level adjustment, the Commission should also clarify the definition of an altered or obliterated number to exclude firearms with serial numbers that are recoverable. Some courts read the enhancement so broadly that it applies even if the serial number is detectable by a microscope; uncovered with paint remover; or readable, but scratched.[24] The ATF has an

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[21] The likelihood of an altered or obliterated serial number actually obstructing the ability of the ATF to identify illegal trafficking at the point of sale is small. As the time-to-crime rate increases, the usefulness of tracing in identifying illegal trafficking declines. In most cases, the time-to-crime rate for a firearm exceeds three years. *See generally* ATF, *Firearms Trace Data – 2009*, available at http://www.atf.gov/statistics/trace-data/2--0-trace-data.html. Additionally, the typical number of years between the point of retail sale to recovery of a firearm makes it more likely that the firearm passed through a number of unregulated secondary markets, including one or more of the 4000+ gun shows dedicated primarily to the sale and exchange of firearms, as well as "countless other public markets." Dep't of Justice, Dep't of Treasury, Bureau of Alcohol, Tobacco, and Firearms, *Gun Shows: Brady Checks and Crime Gun Traces* 1 (1999), available at http://www.atf.gov/publications/download/treas/treas-gun-shows-brady-checks-and-crime-gun-traces pdf; Philip J. Cood, Stephanie Molliconi, and Thomas Cole, *Regulating Gun Markets*, 86 J. Crim. L. & Crim. 59, 70 (1995) (estimating that half of gun purchases each year are used guns purchased in the secondary market). According to the ATF, used firearms purchased in such markets are "rarely" traceable, even with a serial number. *Gun Shows*, at 7, n.18.

[22] 18 U.S.C. § 922(m); 18 U.S.C. § 924(a)(3)(B).

[23] *See, e.g.*, USAO District of Maryland Press Release, *Court Upholds ATF's Revocation of Gun License of Bel Air Guns* (recounting license revocation of dealer who failed to maintain records on 124 firearms, making it "hard for ATF to do its job and trace guns recovered in crimes back to their purchasers"), available at http://www.justice.gov/usao/md/Public-Affairs/press_releases/press07/CourtUpholdsATFsRevocationofGunLicenseofBelAirGuns.html

[24] *United States v. Carter*, 421 F.3d 909, 911-17 (9th Cir. 2005) (miscroscopy); *United States v. Shabazz*, 2007 WL 580666 (9th Cir. Feb. 22, 2007) (acetone); s*ee also United States v. Perez*, 585 F.3d 880, 883-84 (5th Cir. 2009) (damage to serial number that did not render it unreadable qualifies as alteration).

"Obliterated Serial Number Program" designed to "assist in the positive identification of firearms when serial numbers have been partially obliterated or have been partially recovered." [25] According to forensic scientists, "[r]estoration of obliterated serial numbers can many times be accomplished because the metal crystals under the stamped numbers are placed under a permanent strain. When a suitable etching agent is applied, the strained crystals will dissolve at a faster rate as compared to the unaltered metal, thus permitting the etched pattern to appear in the form of the original numbers."[26]

C. Narrow the Reach of USSG §2K2.1 (a)(1) -(4)

We also believe that the Commission should review USSG §§2K2.1(a)(1)-(4) and the manner in which those provisions increase sentences for defendants with prior convictions for a crime of violence or a controlled substance offense. The double-counting of convictions to increase the offense level and criminal history score is unfair and promotes disrespect for the law. Defendants simply do not understand how a prior conviction, for which they have been punished, can justify a substantially increased sentence for a new offense.

These guidelines also suffer from many of the same overbreadth problems as the career offender guideline and we offer here some of the same amendments to §2K2.1 that we have offered in the career offender context: define "crime of violence" to bring it in line with Supreme Court precedent, limit the definition of "controlled substance offense," and define "prior felony conviction" consistent with 21 U.S.C. § 802(13).[27] For this amendment cycle, the Commission might start with the modest goal of revising the definition of "controlled substance offense" to make a meaningful distinction between more and less serious drug offenders, reflect the data on recidivism risk, and alleviate the stark and unjustifiable racial disparity caused by the current definition. [28]

The rate of below guideline sentences in §2K2.1 cases raises concerns worthy of the Commission's attention. The Commission has long recognized that "departures serve as an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines."[29] As envisioned by the original Commission,

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[25] *See* ATF Fact Sheet, available at http://www.atf.gov/publications/factsheets/factsheet-national-tracing-center.html

[26] Iowa Division of Criminal Investigation Crimalistics Laboratory Firearm & Toolmark Section Restoration of Obliterated Serial Numbers, available at http://www.dps.state.ia.us/DCI/lab/firearms/restoration.shtml.

[27] *See generally* Letter of Jon Sands, Chair, Federal Defender Guideline Committee, to Honorable Ricardo H. Hinojosa, Acting Chair, U.S. Sentencing Comm'n 11 (Aug. 24, 2009).

[28] *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133-134 (Nov. 2004) (hereinafter *Fifteen Year Review*).

[29] *See* USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (October 2003) (hereinafter *Downward Departures*); *see* USSG ch. 1, intro, pt. 4(b); *see also* 28 U.S.C. §

"such feedback from the courts would enhance its ability to fulfill its ongoing statutory responsibility under the Sentencing Reform Act to periodically review and revise the guidelines."[30] The Commission has explained, "a high or increasing rate of departures for a particular offense . . . might indicate that the guideline for that offense does not take into account adequately a particular recurring circumstance and should be amended accordingly."[31] For example, in 1991 the Commission found that the rate of upward departure for those sentenced under §2K2.1 was 8.4%, which led to a steep increase in guideline ranges.

Here, the rate of below guideline sentences in §2K2.1 cases suggests that the guidelines are too high. The Commission's 2009 4th quarter data shows that a below guideline sentence was imposed in 30.5% of §2K2.1 cases, with a judicial below guideline rate of 17.6% and government-sponsored rate of 12.9%. [32] These data reflect sufficient dissatisfaction with the firearms guidelines for the Commission to study how the guidelines can be restructured to better reflect the purposes of sentencing.

D. Guideline Ranges Should Not Be Increased for Straw Purchasers

We are concerned with the suggestion DOJ sets forth in its June letter that the Commission review §2K2.1 with an eye toward increasing sentences for straw purchasers prosecuted under §922(a) (6) and adding enhancements where the offense involved trafficking of semi-automatic weapons or the defendant knew or should have known that a firearm was either being transferred to a prohibited person or to a foreign country.

We take issue with DOJ's suggestion that sentences for those convicted under 18 U.S.C. § 922(a) (6) are too low. Defendants convicted under 18 U.S.C. § 922(a)(6) are overwhelmingly first time, non-violent offenders for whom prison should be "generally" inappropriate. 28 U.S.C. § 994(j). Courts already are imposing prison terms on these first-time offenders who upon release will be convicted felons facing a myriad of collateral consequences of conviction that will haunt them for the rest of their lives.[33] Just earlier this year, judges in the Southern

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994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.").

[30] *Downward Departures*, at 5.

[31] *Id*. at 5.

[32] Source: USSC, *Preliminary Quarterly Data Report, 4th Quarter Release*, tbl. 4

[33] *See, e.g.*, U.S. Dept. of Justice, Office of the Pardon Attorney, *Statutes Imposing Collateral Consequences Upon Conviction* (Nov. 16, 2003) (describing federal consequences of convictions on offenders'ability to vote; serve on federal jury; hold federal office, federal employment or certain federally-issued licenses; serve in armed forces; participate in federal contracts or programs; receive federal benefits; become a U.S. citizen or remain in the U.S.; and live free from registration or community notification requirements), available at http://www.justice.gov/pardon/collateral_consequences.pdf. ; Legal Action Center, *After Prison: Roadblocks to Reentry: A Report on State Legal Barriers Facing People with Criminal Records* (2004), available at http:// www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf; ABA Standards on Collateral Sanctions, *Internal Exile:*

District of Texas imposed prison terms ranging from six to fifteen months on straw purchasers. Three of them were 20 years old.[34] Lengthier terms of imprisonment will do nothing but increase their risk of recidivism and expose them to more serious offenders, prison gangs, and prison violence. [35]

An increase in the guideline ranges for straw purchasers also would have a devastating impact on our clients who buy firearms for their spouse, partner or other family members. These clients typically receive no compensation for their acts and are often motivated by an intimate or familial relationship or fear. They too often go to prison under the current guideline.[36] No legitimate purpose of sentencing is served by sending them away for longer periods of time.

DOJ contends that the sentences for §922(a)(6) should be greater because the statutory maximum term of imprisonment is ten years under 18 U.S.C. § 924(a) (2), while the §2K2.1 range for criminal history I offenders is 10-16 months. The Department's reasoning does not support an increase in the guideline range. The ten-year statutory maximum sentence set in 18 U.S.C. § 924(a)(2) covers a wide range of offenses under the firearms statute, including possession of a firearm by a prohibited person, shipment of stolen firearms, trafficking in stolen firearms, and possession of a machinegun. Of those, a straw purchaser who makes a false statement during the purchase of a firearm, is the least culpable and should receive a sentence well below the statutory maximum penalty. Additionally, statutory maximum penalties are a poor proxy for the seriousness of an offense because they are driven by politics rather than empirical data or principles of proportionality.

Collateral Consequences of Conviction in Federal Laws and Regulations (January 2009), available at http://www.abanet.org/cecs/internalexile.pdf.

[34] *See* US Attorney for Southern District of Texas, Press Release: *Three 20-Year-Olds Sentenced to Prison for Lying to Buy Firearms* (June 22, 2010); US Attorney for Southern District of Texas, Press Release*: San Juan Man Sentenced for Lying and Buying 18 Firearms* (March 30, 2010).

[35] *See generally* Christopher T. Lowenkamp and Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, Topics in Community Corrections - 2004, at 3 (2004), available at http://nicic.gov/pubs/2004/period266.pdf; Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 Wis. L. Rev. 1049 (2008) (cataloging criminogenic effects of incarceration).

[36] *See, e.g., Dixon v. United States*, 548 U.S. 1,4 (2006) (defendant purchased firearms for her boyfriend after he "threatened to kill her or hurt her daughters if she did not buy the guns for him"); *see also United States v. Flory*, 2007 WL 1849452*1 (7th Cir. 2007) (year and a day sentence for defendant who purchased 3 firearms for her boyfriend); *United States v. Pierre*, 71 Fed. Appx. 187, 190 (4th Cir. 2003) (wife sentenced to 15 months imprisonment for purchasing two firearms for her husband). These more recent sentences are significantly greater than sentences imposed over a decade ago. See *United States v. Howell*, 37 F.3d 1197, 1201 (7th Cir. 1994) (wife who purchased four handguns for husband sentenced to four years probation with six months home detention); *United States v. Outlaw*, 1991 WL 157271, *1 (4th Cir. Aug. 19, 1991) (girlfriend sentenced to three months community confinement and two years supervised release for purchasing two firearms for her boyfriend).

What DOJ seems to be complaining about here is not that the guideline range of 10-16 months is too short, but that the Commission's 2010 zone expansion now may make more defendants convicted under § 922(a)(6) eligible for split sentences that include community confinement or home detention. The Commission should not entertain a proposal that circumvents the Commission's decision to expand alternatives to detention for non-violent offenders by turning around and raising offense levels.[37]

As to DOJ's concern about certain factors that may "aggravate" a straw purchase case, current law provides prosecutors with ample tools to prosecute and punish offenders involved with transferring semi-automatic weapons or other firearms to prohibited persons or foreign countries:

- §2K2.1 has a higher base offense level (14 rather than 12) for a defendant who has falsified a record to conceal the sale to a prohibited person, *i.e.*, they knew or had reasonable cause to believe that such person was a prohibited person. USSG §2K1.2, n. 9.

- §2K2.1(c) contains a cross-reference that may be applied to violations of the export laws, which carry greater penalties under §2M5.2.

- § 2K2.1 n. 14(D) contains an encouraged upward departure where the defendant possessed the firearm to facilitate another firearms offense, *e.g.*, attempting to export a firearm without a license under 22 U.S.C. § 2778. *See* §2K2.1n. 14(D).

- §2K1.2(b)(5) contains a hefty four- level increase if the defendant engaged in trafficking of firearms – an increase that the Commission put in place just four years ago at DOJ's request.

In addition to the firearms statutes in title 18, which are generally referenced to §2K2.1, the government has other tools to prosecute those involved in firearms trafficking across the border. In the past, it has used 22 U.S.C. § 2278 to prosecute defendants who export or attempt to export firearms and munitions across the Mexican border without a license. Section 2278, which is referred to §2M5.2, carries substantial penalties even for first-time offenders.[38] Straw purchasers

[37] No evidence supports the need for increased penalties for any firearm offenses, much less straw purchasers. Seventy percent of judges surveyed believe the firearms guidelines are generally appropriate. Twenty-three-percent thought they were too high. Only a small percentage thought they were too low. *Judges Survey*, Question 8. One-third of judges surveyed believed that in firearm cases split sentences rather than straight terms of imprisonment should be more available not less, as the government would have it. *Id*. at Question 11.

[38] *See, e.g, United States v. Castro-Trevino,* 464 F.3d 536, 540 (5th Cir. 2006) (criminal history category I defendant sentenced to 46 months imprisonment for attempting to export ammunition across border); *United States v. Galvan-Revuelta*, 958 F.2d 66, 69 (5th Cir. 1992) (defendant responsible for attempting to export ammunition to Mexico sentenced to 24 months – a departure from a guideline range of 33-41 months).

who aid and abet the export of a firearm without a license may be prosecuted under § 2278 and sentenced under §2M5.2, as well.

Just four years ago, Congress passed a new smuggling statute, 18 U.S.C. § 554, which law enforcement authorities have described as "particularly useful in targeting weapons smuggling."[39] The statute is broad enough to prosecute those who facilitate the transportation, concealment or sale of items, including a firearm, knowing it would be transferred to a foreign country contrary to law. Thus, defendants who purchase a firearm knowing it would be transferred to a foreign country without an export license may be prosecuted under this statute and sentenced under §2M5.2, which carries a base offense level of 26 when the offense involves semi-automatic firearms.[40]

Not only does the government have ample tools to prosecute and severely punish straw purchasers and others involved in trafficking firearms across the border, we question the usefulness of harsh sentences for these first-time, non-violent defendants. Indeed, although Congress and other government agencies have conducted many hearings and researched the issues surrounding gun trafficking across the border, government representatives have not focused on the need for higher sentences for straw purchasers. The reason is obvious. Harsher sentences for poor, first-time offenders who accept money to purchase firearms will not stop the flow of firearms into Mexico. Just as mandatory minimum sentences for low-level street sellers of drugs do nothing to stop dealing, there will always be a fresh supply of young men or women who will agree to buy a firearm for quick cash or because of an intimate or familial relationship.

Even if the government could successfully shut down straw purchases, the efficacy of that strategy in stopping the flow of firearms to Mexico is doubtful. The drug cartels will simply turn elsewhere for their supply, including the secondary market or other countries.[41] At gun

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[39] *Escalating Violence in Mexico and the Southwest Border as a Result of the Illicit Drug Trade*, *Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives*, 111th Congress 44 (May 6, 2009) (statement of Janice Ayala, Deputy Assistant Director, Office of Investigations, U.S. Immigration and Customs Enforcement, U. S. Dep't of Homeland Security,).

[40] The base offense level is 14 when the offense involves 10 or less non-fully automatic small arms.

In 2008, 46 defendants were sentenced under §2M5.2. Forty-four of them were criminal history category I offenders. Thirty-eight received prison only sentences, 4 received split sentences, and only 2 received probation only sentences. BJS' Federal Justice Statistics Program website (http://fjsrc.urban.org) (Data Source: U.S. Sentencing Commission - USSC Offender Dataset (Standardized Research data file), FY 2008 (as standardized by the FJSRC). In 2009, the average sentence for defendants sentenced under 2M5.2 was 32.9 months, while the median was 21 months. An overwhelming percentage of these defendants, 69.8 were Hispanic. Source*:* USSC*, 2009 Datafile,* FY 2009.

[41] James C. McKinley, *U.S. Stymied as Guns Flow to Mexican Cartels*, New York Times, April 15, 2009. *See also* Anthony Braga, *Disrupting Illegal Firearms Markets in Boston: The Effects of Operation Ceasefire on the Supply of New Handguns to Criminals*, 4 Criminology & Public Policy 717 (2005)

shows in Texas, and Arizona, "[i]ndividuals may sell guns at gun shows or even through classified advertisements without running a criminal background check or even recording the buyer's name."[42] Given that market, prosecuting straw purchasers and sending them to prison for longer periods of time is an ill-advised use of scarce resources, including prison bed space.

To be clear, we understand that weapons trafficking in Mexico is a law enforcement problem, but for the Department to suggest that it can combat the problem by imposing longer periods of imprisonment on non-violent first-offenders is seriously misguided and without one iota of evidentiary support. [43]

Proposed Priority #4: Patient Protection and Affordable Care Act, Pub. L. 111-148

Section 10606(a) of the Patent Protection and Affordable Care Act, Pub. L. 111-148, directs the Sentencing Commission to amend the guidelines to provide 2-level, 3-level, and 4-level increases in offense levels for any defendant convicted of a Federal health care offense relating to a Government health care program, depending on the amount of the loss. It also directs the Sentencing Commission to provide that "the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss." Finally, in carrying out this section, the law generally directs the Sentencing Commission to ensure that the guidelines and policy statements are reasonably consistent with other guidelines and policy statements, account for appropriate aggravating or mitigating circumstances that might justify exceptions, reflect the seriousness of the harm, provide increased penalties in appropriate circumstances, and adequately meet the purposes of sentencing.

Here, we set forth our preliminary concerns regarding this directive. Our primary concern is that the loss amount in §2B1.1 (as amended by this directive) will not accurately reflect the culpability of "low-level" defendants who participate in a health care fraud scheme, especially when that scheme involves numerous perpetrators and a large monetary loss. Without appropriate guideline adjustments for these offenders, the resulting guideline sentence will be unjust and unfair, will violate 18 U.S.C. § 3553(a), and will decrease confidence not only in the criminal justice system, but also in the guidelines themselves. If the Commission were to promulgate guidelines that treat all defendants the same, based on the aggregate dollar amount of fraudulent bills, without providing for mitigating circumstances, it will create "unwarranted similarities" among dissimilarly situated individuals. *See Gall v. United States*, 552 U.S. 38, 55-56 (2008).

(noting how a focus on supply-side enforcement strategies may shift market to older guns and away from retail outlets).

[42] *U.S. Stymied as Guns Flow to Mexican Cartels, supra.*

[43] FY 2009 data do not support the notion that the guideline for straw purchasers is too low. Of the 117 criminal history category I defendants convicted under § 922(a)(6) in 2009, only one received an above range sentence. Forty-one percent received a sentence within the range, 29.9% received a government sponsored below guideline sentence, and 26.2% received other below guideline sentences. Source*:* USSC, *2009 Data File*, FY 2009.

Health care fraud involves a variety of defendants, from major corporations and institutions, to doctors and nurses, to receptionists and secretaries, to street gang members, to "straw" or nominee owners and middlemen, to recruiters, and finally to purported beneficiaries who are often recruited at soup kitchens, senior centers and even skid row.[44] Many of the "lower-level" defendants have little or no knowledge of the scope of the fraudulent scheme and receive little personal gain for their role in the offense. While the defendants who conceive and implement the scheme may receive millions of dollars in fraudulent payments, these smaller participants may realize only small sums of money for their efforts. A few examples from defender caseloads demonstrate our point and how the current guidelines do not adequately account for mitigating circumstances in cases like these.

Mercedes Yanes, was the nominee owner of a durable medical equipment (DME) company controlled by a third party for whom Ms. Yanes worked as a chauffeur and delivery driver. [45] Ms. Yanes, who speaks only Spanish, agreed to act as a nominee for the company so that she could keep her job. The only remuneration she received was her continued employment as a driver. The actual owner of the DME company billed Medicare approximately $1,647,759.97. The actual loss – what Medicare actually paid out -- was $327,967.30. One might expect for the mitigating role adjustment at §3B1.2 to lessen Ms. Yanes's sentence, particularly as compared to the actual owner of the company. The adjustment, however, was disputed at sentencing.

Jose Montes is another nominee owner of a medical supply company that billed Medicare $4 million.[46] Mr. Montes received only $10,000 for agreeing to be the nominee owner. The intended loss amount was calculated at $3.2 million, and the actual amount paid by Medicare was $2 million. The court denied Mr. Montes a minor role adjustment.

Our proposal that the Commission delete the word "substantially" from the commentary to §3B1.2 (*see* discussion *infra* on Cocaine Sentencing Policy), would help clarify that persons in the position of Ms. Yanes and Mr. Montes should receive a role adjustment. The Commission should also add an application note, which clarifies that nominee owners of fraudulent companies who receive little remuneration from the fraud are eligible for a minor or minimal role adjustment.

Existing confusion about the appropriate scope of "relevant conduct" adds to our concern with changes to the health care fraud guidelines. Health care fraud offenses often involve conspiracies with numerous agreements. One co-conspirator may know nothing about other co-conspirator agreements or the scope of the overall operations. We have commented in the past on the need to clarify the application of §1B1.3(a)(1)(B) governing cases of jointly undertaken

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[44] *See Enforcement of the Criminal Laws Against Medicare and Medicaid Fraud: Hearing Before the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security*, 111th Cong. (March 4, 2010) (statement of Timothy Menke, Deputy Inspector General for Investigations, Office of the Inspector General, Department of Health & Human Services).

[45] *United States v. Mercedes Yanes*, No. 09-20316 (S.D. Fla. 2009).

[46] *United States v. Jose Montes*, No. 09-20330 (S.D. Fla. 2009).

activity so that it is clear that relevant conduct covers only reasonably foreseeable activity within the scope of the defendant's agreement.[47] With the directive for amount-driven changes to the health care fraud guidelines, the need to clarify and limit the scope of "relevant conduct" is heightened.

Another case example demonstrates this point. Ricardo Aguera, like several of his family members, operated a company that provided durable medical equipment to Medicare beneficiaries.[48] His company obtained prescriptions for aerosol medications for these beneficiaries, many of whom were using respiratory devices. A couple that operated two pharmacies, which were able to submit Medicare claims for aerosol prescriptions, paid kickbacks to Mr. Aguera in exchange for him referring the prescriptions to them. Fifty other DME owners were involved in a far-reaching scheme set up the couple. Although Mr. Aguera's company billed $1.7 million in claims, the court held him responsible for the $17 million in claims generated by all fifty businesses. The government argued that Mr. Aguera saw the names of the other business in a logbook he signed when he received his money from the masterminds of the scheme – the couple who owned the pharmacy. Based on that evidence, the government claimed, and the court found, that the activities of the other businesses were reasonably foreseeable to Mr. Aguera. The court imposed a sentence of 121 months. In an all too common cruel twist, the masterminds of the scheme received lighter sentences than Mr. Aguera because of the cooperation they provided against the fifty owners they directed.

Health care fraudulent schemes also vary in ways that make it difficult to accurately determine the loss amount. In some cases, the subjects engage in one hundred percent fraud. In more traditional health care fraud cases, however, the subjects of the investigation often provide some level of actual services. The Commission should ensure that only those amounts that the government can prove as fraudulently submitted be included as a loss. In other cases, an unsophisticated defendant may unsuccessfully submit a single claim multiple times, only to have it repeatedly denied. The sum total of the multiple submissions of this single claim reflects neither the intended loss, nor the culpability of this defendant. Application notes should provide examples and directions that ensure that loss amounts are not inflated and properly reflect a defendant's level of culpability. In this respect we recommend that the Commission expressly state that the amount of money received by an individual defendant as a result of his participation in the fraudulent scheme is indicative of the role played (*i.e.*, less money received, less culpable as a general rule).

Finally, the Commission should clarify that the congressionally required language establishing that fraudulent bills submitted to the Government health care program constitute prima facie evidence of the amount of intended loss does not shift the burden of proof in any way from the government and that such evidence is not conclusive or irrefutable. The government always retains the burden of proof regarding sentencing enhancements. *See, e.g., Mitchell v. United States,* 526 U.S. 314, 330 (1999) ("The Government retains the burden of proving facts relevant to the crimes at the sentencing phase and cannot enlist the defendant in the process at the expense of the self-incrimination privilege.").

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[47] *See, e.g.*, Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee to the Honorable William K. Sessions, Chair, USSC (July 1, 2010).

[48] *United States v. Richard Aguera*, No. 06-20609 (S.D. Fla.2007).

Proposed Priority #5: Cocaine Sentencing Policy

The Commission has proposed as a priority continuation of its work on cocaine sentencing policy, including possible amendment of the drug quantity table. After the Commission published its notice of proposed priorities, Congress passed the Fair Sentencing Act of 2010 ("FSA"), which, among other things, changed the crack-powder ratio to 18:1 and directed the Commission to promulgate emergency amendments. Here, we set forth our preliminary concerns with implementation of FSA, encourage the Commission to drop the base offense levels for all drug types (just as it did with crack cocaine), and provide suggestions for amending the guidelines to ensure that low-level offenders involved in drug trafficking receive the mitigating role adjustments they deserve.

A. Implement the Fair Sentencing Act of 2010 By Keeping the Base Offense Levels for the Mandatory Minimum Triggering Quantities of Crack at 24 and 30; Reducing by Two Base Offense Levels the Quantity Thresholds for other Drugs; and Narrowly Construing Those Directives That Require Increases to Offense Levels

Congress's decision in FSA to reduce the crack-powder ratio from 100:1 to 18:1, along with FSA's emphasis on certain aggravating and mitigating factors, provides the Commission with a unique opportunity to continue the work it started when it reduced the guidelines for crack by two- levels in 2007 and set in place a mitigating role cap in 2002. We offer some initial thoughts on how the Commission might amend the guidelines to accommodate the new legislation and look forward to working with the Commission as it grapples with the myriad issues FSA raises.

Implementing the Ratio. In 2007, the Commission modified the drug quantity thresholds for crack cocaine so that the base offenses levels (24 and 30) corresponded to guideline ranges (51-63 and 97-121 months) that *included* the statutory mandatory minimum penalties (60 and 120 months). The guidelines had previously set the drug quantity thresholds so that the base offense levels corresponded to ranges that were *above* the statutory mandatory minimum. *See* USSG App. C, Amend. 706 (Nov. 1, 2007). For the seven other drug types subject to mandatory minimums, the drug quantity thresholds triggering mandatory minimums remained at base offense levels (26 and 32) corresponding to ranges above the statutory minimum.

In implementing FSA, the Commission should, at a minimum, modify the drug quantity thresholds for all eight drugs subject to mandatory minimum penalties[49] so that the base offense levels are at 24 and 30, while preserving the 18:1 crack-to-powder ratio in FSA. For example, at base offense levels 24 and 30, the new drug quantity table would look like this for cocaine powder and cocaine base.

[49]21 U.S.C. § 841(b)(1) (setting forth mandatory minimum penalties for heroin, cocaine, cocaine base, PCP, LSD, fentanyl and its analogue, marijuana, and methamphetamine).

	Level 24
At least 500 G but less than 2 KG of Cocaine	
At least 28 G but less than 112 G of Cocaine Base	
	Level 30
At least 5 KG but less than 15 KG of Cocaine	
At least 280 G but less than 840 G of Cocaine Base	

The Commission may amend the guidelines in this manner without running afoul of the need for the guidelines to be consistent with other provisions of federal law. As the Commission acknowledged in its reason for amendments to the crack threshold and its report on child pornography, the way the drug guidelines currently account for mandatory minimum sentences is not required.[50] Instead, the guidelines may account for mandatory minimum statutes in a number of ways. [51] The Commission may set the base offense level to include but not exceed the mandatory minimum, as it has done with crack offenses. It may set the base offense level below the mandatory minimum and rely on Chapter Two and Three adjustments to reach the mandatory minimum. If the guideline range still fails to reach the mandatory minimum, §5G1.1 (b) accommodates the mandatory minimum by trumping the guideline range. [52]

[50] USSG App. C, Amend. 706 (Nov. 1, 2007); USSC, *The History of the Child Pornography Guidelines* at 44-47 (October 2009); *see also Kimbrough v. United States*, 552 U.S. 85, 102- 105 (2007); *cf. Neal v. United States*, 516 U.S. 284 (1996) (approving amendment of LSD guideline to use presumptive-weight methodology instead of statute's "mixture or substance" methodology); *see also* Statement of Jacqueline A. Johnson, Before the U.S. Sentencing Comm'n, Chicago, Illinois, at 17 (Sept. 10, 2009).

[51] More than half of the judges surveyed (58%) believe that the sentencing guidelines should be "delinked" from the statutory mandatory minimum sentences. *Judges Survey*, Question 3.

[52] In its June 28, 2010 letter to the Commission, DOJ stated the view that the guidelines should be tied to applicable mandatory minimum statutes and that the "Commission should generally choose a base offense level so that after accounting for regularly occurring aggravating and mitigating factors elsewhere in the guidelines manual, the low end of the guideline range for the final offense level is not generally below the mandatory minimum sentence." Letter from Jonathan Wroblewski, DOJ Office of Policy and Legislation, to Chief Judge Sessions, Chair, U.S. Sentencing Commission 6 (June 28, 2010). We have grave concerns about DOJ's proposal. First, we do not believe there is a principled way to link the guidelines to mandatory minimums because the concept of empirically derived guidelines is fundamentally incompatible with mandatory minimum sentencing statutes. Second, because many defendants receive acceptance of responsibility reductions, DOJ's proposal may well raise the base offense levels for the mandatory minimum triggering quantities. Third, DOJ's proposal depends very much on the happenstance of which factors, be they mitigating or aggravating, "regularly occur." Because the use of certain factors may change over time, *e.g.*, the use of safety valve or role adjustments, presumably the Commission would need to monitor their use and change the drug quantity thresholds accordingly.

In addition to promoting uniformity and implementing the 18:1 ratio, a two- level lowering of the quantity thresholds would further the purposes set forth in 18 U.S.C. § 3553(a)(2). 28 U.S.C. § 991(b). The drug guidelines are responsible for a sizable percentage of the prison population and contribute substantially to overcrowding without any real concomitant reduction in crime. For example, drug offenders comprise one third of the federal docket,[53] and half the federal prison population.[54] As put by one criminologist: "Lock up a rapist and there is one less rapist on the street. Lock up a drug dealer and you've created an employment opportunity for someone else."[55]

Implementing the Aggravating Role Directives. The FSA contains a number of directives for the Commission to increase or decrease the offense level based upon specific offense characteristics (SOC). We urge the Commission to construe narrowly any directive that requires the Commission to increase offense levels. Because many of the directives cover conduct already covered in the guidelines, we are especially concerned that the Commission avoid duplicative punishment for similar offense conduct.

Some of the problems with double counting are obvious, while others are not. For example, FSA directs the Commission to ensure an increase from the base offense level of at least two offense levels "if the defendant maintained an establishment for the manufacture or distribution of a controlled substances, as generally described in 21 U.S.C. § 856. " USSG §2D1.1(b)(5) already contains a two-level enhancement "[i]f the defendant is convicted under 21 USC § 856." [56] Similarly, FSA directs the Commission to "ensure that the guidelines provide an

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If the Commission wanted the mandatory minimums to apply to those who Congress had in mind – kingpins and mid-level managers – it could set the base offense level low enough that the guideline range encompassing the mandatory minimum is not reached unless the defendant receives a role enhancement under §3B1.1. For example, the base offense level for 28 grams of cocaine base, 500 grams of cocaine powder, 100 grams of heroin, *etc*. would be set at 22. A range that includes, or is higher than the sixty month mandatory minimum would be reached by application of the two to four- level aggravating role adjustments in §3B1.1.

[53] *2009 Sourcebook*, fig.A .

[54] The Sentencing Project, *The Federal Prison Population: A Statistical Analysis* (2006), available at http://www.sentencingproject.org/doc/publications/sl_fedprisonpopulation.pdf; The Sentencing Project, *Changing Racial Dynamics of the War on Drugs* 6 (2009) (in 2005, 95,211 federal inmates were drug offenders), *available at* http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf.

[55] Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980 – 1988*, 12 Fed. Sent. Rep. 12, 15 (1999) (quoting Alfred Blumstein).

[56] Where the specific offense characteristic set forth in the directive mirrors, or is similar to a federal statutory offense (*e.g.*, maintaining drug involved premises or obstruction of justice), we urge the Commission to require proof beyond a reasonable doubt before the court may apply the enhancement. This will ensure that a specific offense characteristic does not become a substitute for criminal prosecution. A higher standard of proof would also promote respect for the law by ensuring procedural protections. *Cf.* USSG §3A1.1(a) (applying beyond a reasonable doubt standard to finding under 3A1.1(a) (hate crime motivation).

additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense." Such an enhancement may include conduct covered under such guidelines as §2D1.1(b)(1) (possession of dangerous weapon); 18 U.S.C. § 924(c); or §3C1.1 (Obstructing or Impeding the Administration of Justice).[57] Our main concern here is to urge the Commission to take great care in ensuring that FSA's directives do not result in undue severity when combined with existing guideline provisions.

B. Clarify the Guideline Commentary to Encourage Mitigating Role Adjustments for Couriers and Other Low-Level Offenders

Because of the Commission's original policy of tying the drug guidelines to mandatory minimums and focusing on quantity rather than role, the guidelines recommend substantial periods of imprisonment for low-level, non-violent defendants.[58] While the mitigating role adjustment at USSG §3B1.2 is meant to ameliorate the harsh effects of quantity-driven guidelines, the role adjustments are not having their intended effect and should be clarified so as to effectuate the Commission's finding that "those who played a minor or minimal role" in drug trafficking should receive a lesser sentence than higher-level offenders. [59] Too few defendants receive mitigating role adjustments when their conduct is plainly less culpable than others involved.[60] Without clarification, some courts will continue to underutilize the mitigating role adjustment and contribute to unwarranted disparity.

The Commission last amended §3B1.2 in 2001. At that time, the Commission intended to make the mitigating role adjustment available to a drug courier whose base offense level was determined solely on the quantity personally handled by that defendant. To accomplish that end, the Commission adopted the approach articulated by the Eleventh Circuit in *United Sates v. Rodriquez De Varon*, 175 F.3d 930 (11th Cir. 1999). According to the Commission's view of *De Varon*, a defendant is not automatically precluded from receiving a role adjustment "in a case in which the defendant is held accountable under §1B1.3 solely for the amount of drugs the defendant personally handled."

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[57] These double-counting problems represent just the "tip of the iceberg" FSA's directives raise numerous other double-counting issues that will have to be addressed.

[58] In 2005, the average length of imprisonment for a cocaine powder courier was 60 months. The average street-level crack dealer received 97 months imprisonment. USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 30 (May 2007) (*2007 Cocaine Report*).

[59] *2007 Cocaine Report*, at 7.

[60] *2009 Sourcebook*, Table 40 (19.7% of drug offenders received mitigating role adjustment). In the *2007 Cocaine Report*, the Commission reported that in 2005, 53.1% of powder cocaine offenders were low-level offenders (couriers, street-level dealers, renters, loaders, lookouts, users). Yet, that same year, only 20.3% of powder cocaine defendants received a mitigating role adjustment. USSC, *2005 Sourcebook of Federal Sentencing Statistics*, Table 40 (hereinafter *2005 Sourcebook*). For crack offenders, the numbers are even more dismal. While 55.4% were street-level dealers, *2007 Cocaine Report*, at 21, only 6.3% of all crack offenders received a mitigating role adjustment. *2005 Sourcebook*, Table 40.

Had the Commission stopped with that clarification, more drug couriers and other low-level participants may have received mitigating role adjustments. The Commission, however, either added or continued to include a number of provisions that diluted the intended effect of the 2001 amendment. It required that the defendant play "a part in committing the offense that makes him *substantially* less culpable than the average participant." It retained the note stating that it intended for the minimal role adjustment to be "*used infrequently*." And, it added a note discouraging the court from using the defendant's statement to support the role adjustment. USSG §3B1.2, n. 3(C) ("the court, in weighing the totality of the circumstances, is not required to find based solely on the *defendant's bare assertion*, that such a role adjustment is warranted"). USSG App. C, amend. 635. The Commission also discouraged use of the mitigating role adjustment for the very defendants it intended to include within the guideline (*i.e.*, those whose role in the offense was limited to such low-level functions as transporting or storing drugs even if the defendant was accountable only for the quantity personally transported or stored) when it stated in its reason for amendment that it did not mean to "suggest that a such a defendant can receive a reduction *based only on those facts*." USSG App C, Amend. 635.

This unclear restrictive commentary language has contributed to a problem of hidden disparity, which arises from inconsistent application of the guideline. Because the rule lacks clarity, "[s]imilar offenders are likely to receive different sentences not because they are warranted by different facts, but because the same facts are interpreted in different ways by different decisionmakers." [61] Henry Bemporad, the Defender in the Western District of Texas, explained these problems in detail in his testimony at the Phoenix regional hearing. [62]

In addition to the intradistrict disparity Mr. Bemporad described, regional differences exist in application of §3B1.1. For example, our colleagues report that in the Eastern District of New York and in California, couriers routinely receive role adjustments based on their account of their role in importing drugs, including large quantities, and even though no, or few, other participants are identified. Couriers in the Southern District of Florida may get the same benefit. [63]

In contrast, district judges in the Middle District of Florida; apply the *DeVaron* decision to preclude couriers from receiving a minor role reduction even though everyone agrees they are mere mules. Those judges typically rule, based on *DeVaron*, that the large quantity of drugs transported precludes the defendant from obtaining a role reduction even when the defendant is unaware of the quantity of drugs involved. The judges also will compare the role of each crewmember, find that they are equally culpable, and refuse to apply the role reduction, even if the defendant was hired only to pretend to be a fisherman and had no role in offloading the

[61] Barbara Vincent, *Informing a Discussion of Guideline Simplification*, 8 Fed. Sent'g. Rep. 36, 37 (Aug. 1995).

[62] Statement of Henry Bemporad Before the U.S. Sentencing Comm'n, Phoenix, Arizona, at 4-7 (Jan. 21, 2010).

[63] *See United States v. Dorvil*, 784 F. Supp. 849 (S.D. Fla. 1991) (granting minimal role reduction to defendant involved in off-loading 227 kilograms of cocaine).

drugs. The obvious fact that these couriers are nothing but small, easily replaced, cogs in a much larger drug trafficking organization is irrelevant.[64]

The disparate treatment of §3B1.1 and the need for the Commission to clarify its application is also apparent from a review of the case law. The Fifth Circuit has held that, to qualify for a *minor* role adjustment, it is not enough that a defendant was substantially less culpable than the average participant in the offense. Instead, the defendant's role must also have been "peripheral to the advancement of the illicit activity." *United States v. Armendariz*, 65 Fed. Appx. 510, 510 (5th Cir. 2003) (unpub).[65] By contrast, other circuits apply a "peripheral role" requirement for the *minimal*-role downward adjustment of §3B1.2(a). *See United States v. Teeter*, 257 F.3d 14, 30 (1st Cir. 2001) (to qualify as minimal participant, defendant must show she was, at most, a "peripheral player" in the crime); *United States v. Dumont*, 936 F.2d 292, 297 (7th Cir. 1991) (noting that defendant was not "the kind of peripheral figure for which the four-point adjustment is designated").

The Commission could fix USSG §3B1.2 in several ways: [66]

- Remove from the commentary the language that the defendant must be "*substantially* less culpable than the average participant." While the commentary seeks to make clear that the adjustment is not precluded for one who transports or stores drugs, it has not had the intended effect. Indeed, the Tenth Circuit has upheld the denial of role adjustments for drug couriers because their services "were as indispensable to the completion of the criminal activity as those of the seller," going so far as to say that is "not productive" to argue that one participant in criminal activity is "more or less culpable" than another. [67]

[64] The sentencing law is particular harsh on these defendants because they are subject to mandatory minimum penalties but not eligible for relief under the safety-valve when prosecuted under 46 U.S.C. § 70503.

[65] The Ninth Circuit appears to have adopted this view. *See United States v. Ramirez*, 1994 WL 384310, *3 (9th Cir., Jul 22, 1994) (unpub.).

[66] We have heard it argued that more and better training of judges and probation officers may increase the use of the mitigating role adjustments. We believe that the case law and practice is too entrenched for training to make much of a difference. In the past, the Commission has promulgated clarifying amendments rather than rely on training to ensure that judges applied the guidelines in the manner in which they were intended. *See, e.g*, USSG App. C, Amend. 78 (Nov. 1, 1989) (clarifying definition of conduct for which the defendant is "otherwise accountable" under USSG §1B1.3); USSG App. C, Amend. 83 (Nov. 1, 1989) (clarifying that a firearm is a type of dangerous weapon); USSG App. C, Amend. 91 (Nov. 1, 1989) (clarifying guideline commentary regarding use of force or threats); USSG App. C, Amend. 666 (Nov. 1, 2004) (adding application notes and illustrative examples to clarify meaning of "high-level decision-making or sensitive position" under USSG §2C1.1).

[67] *United States v. Carter*, 971 F.2d 597, 600 (10th Cir. 1992) (upholding denial of role reduction for driver of car who transported 42 pounds of marijuana); *see also United States v. Martinez*, 512 F.3d 1268, 1276 (10th Cir.) (citing *Carter* and concluding that defendant would receive a "windfall" if awarded a minor role reduction when he has "sentenced only for the amount of drugs he personally transported), *cert. denied*, 553 U.S. 1046 (2008).

- Amend the guideline commentary to make clear that paid-by-the trip couriers with limited knowledge deserve a lesser role, even if they are driving drugs across the border or performing some other "indispensable" or "integral" role in the offense.[68] Just recently, the Fifth Circuit affirmed the denial of a mitigating role adjustment for a defendant who did nothing more than pick up another person who was carrying marijuana in a backpack. The Court found that his participation was "essential, and not merely peripheral, to the advancement of the illicit activity," and was "coextensive with the conduct for which he was held accountable." [69]

- Amend the guideline commentary to make clear that the amount of drugs involved or distance traveled has little bearing on the defendant's role. [70]

- Remove from application note 3(C) the following sentence: "As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted."

  We agree as a matter of logic that a mitigating role adjustment should apply only when there is more than one participant, but judges should not be discouraged from making such a finding based upon the defendant's uncorroborated statements. The guidelines do not discourage judges from making numerous upward adjustments based solely on a

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[68] *See, e.g., United States v. Enny*, 34 Fed. Appx. 527, 529 (9th Cir. 2002) (defendant denied role adjustment because he provided "vital link" in operation); *United States v. Acevedo*, 326 Fed. Appx. 929, 932 (6th Cir. 2009) ("A defendant who plays a lesser role in a criminal scheme may nonetheless fail to qualify as a minor participant if his role was indispensable or critical to the success of the scheme.") (quoting *United States v. Salgado*, 250 F.3d 438, 458 (6th Cir. 2001)).

[69] *United States v. Zuniga*, 2010 WL 2930844, *2 (5th Cir. July 22, 2010) (unpub). The Fifth Circuit routinely upholds denials of mitigating role adjustments when the defendant's participation was "coextensive with the conduct for which [the defendant] was held accountable." *United States v. Delgado*, 236 Fed. Appx. 156, 156 (5th Cir. Aug. 21, 2007); *see also Martinez*, 512 F.3d at 1276. That law conflicts with the commentary in §3B1.2, which permits a role reduction even if the defendant is held "accountable only for the conduct in which the defendant was personally involved." USSG §3B1.1, comment., n. 3(A). The Seventh Circuit, in contrast, took seriously the Commission's 2001 amendment. *See United States v. Hill*, 563 F.3d 572, 578 (7th Cir.) (discussing 2001 amendment and how it changed circuit law so that defendant's role not measured solely against conduct for which defendant was personally responsible), *cert. denied*, 130 S. Ct. 623 (2009).

[70] *Rodriguez De Varon*, 175 F.3d at 943 (en banc) (amount of drugs involved is material consideration and may be dispositive) (overruling panel decision holding that minor role reduction could not be denied on sole basis of quantity involved); *United States v. Bonilla-Ortiz*, 362 Fed. Appx. 63, 65 (11th Cir. 2010) (denying role reduction to crew member and finding that drug quantity is material consideration in role analysis and may be "dispositive"); *United States v. Carrillo*, 283 Fed. Appx. 307, 307 (5th Cir. 2008) (defendant properly denied role reduction where the defendant, a courier, was paid for services, traveled long distance, suspected he was transporting illegal narcotics, and transported large quantity of cocaine): *United States v. Rossi*, 309 Fed. Appx. 12, 13 (7th Cir. 2009) (defendant who transported many kilograms of methamphetamine a long distance not entitled to role reduction).

cooperating witness's bare assertions, and they should not do so for adjustments based on a defendant's statements. Courts are well equipped to determine the credibility of a defendant and are encouraged to base their finding on reliable information. This language merely chills the exercise of that discretion, signaling the Commission's skepticism about giving role adjustments based upon the defendant's statements regarding his or her role in the offense.

- Delete the last sentence in application note 4, which states: "It is intended that the downward adjustment for a minimal participant will be used infrequently." USSG §3B1.2. The Commission proposed to eliminate this language in 2001, but it chose not to over DOJ's objection that it would invite role reductions for drug couriers. *See* Letter from James K. Robinson, Assistant Attorney General to Chair, U.S. Sentencing Commission 4-5 (Jan 12, 2001). The language has had the effect of curtailing all role reductions – minimal and minor. [71]

- Clarify the distinction between minor and minimal role so that defendants who play a peripheral role obtain a four-level adjustment. [72]

- Provide for a departure in the commentary to §2D1.1 or §3B1.2, which states that in some cases, the adjustment for mitigating role may not be adequate and the court may give an additional reduction.[73] Remove from §5K2.0(d)(3) and §5H1.7 the prohibitions on departures for role in the offense.

Proposed Priority #6 Child Pornography

The guideline governing the receipt and possession of child pornography, U.S.S.G. §2G2.2, is critically flawed and in need of immediate and substantial revision. This guideline, which is not based on reliable empirical or scientific underpinnings, produces sentences that are far too severe and fails to distinguish between offenders of differing levels of culpability. Because of these flaws, it has lost the respect of judges who now, in a majority of cases, impose a sentence lower than that called for by the guideline. This judicial rejection of the current guideline's severity finds empirical support in recent studies, which refute the notion that pornography offenders are especially likely to commit acts of molestation or sexual abuse. These studies suggest that these defendants do not present an elevated risk of either danger or

[71] The "infrequently" language appears in the note discussing the adjustment for minimal role. The Fifth and Ninth Circuits, however, have applied it to all role adjustments under §3B1.2. *See United State v. Mitchell*, 31 F.3d 271, 278 (5th Cir. 1994); *United Sates v. Hernandez-Franco*, 189 F.3d 1151, 1160 (9th Cir. 1999) (citations omitted); *United States v. Gonzalez-Corona*, 2 Fed. Appx. 858, 858 (9th Cir. 2001) (denying role adjustment to driver of car that contained 60 pounds of marijuana); *United States v. Gomez-Valdes*, 273 Fed. Appx. 663, 665 (9th Cir. 2008).

[72] Two-thirds of the judges surveyed agreed that the distinction between minor and minimal role should be explained more clearly. *Judges Survey*, Question 9.

[73] Close to one-half (46%) of judges surveyed thought that the guidelines should allow for role adjustments greater than four-levels.

recidivism. To restore the relevance and legitimacy of this guideline, the Commission must amend §2G2.2 in a manner that substantially lowers the length of sentences it produces.

A. The Child Pornography Guideline Is Seriously Flawed

The sentencing guidelines were typically developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices, and were intended to be revised as necessary based on empirical research and sentencing data.[74] "However the Commission did not use this empirical approach in formulating the Guidelines for child pornography. Instead, at the direction of Congress, the Sentencing Commission has amended the Guidelines under § 2G2.2 several times since their introduction in 1987, each time recommending harsher penalties."[75] Because directive-driven amendments are more often the product of passion and politics than reason, data and reflection, they do not promote rational and logically coherent guideline development. Indeed, the Commission itself has observed that such directives hinder the Commission's ability to fulfill its characteristic role by "mak[ing] it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress."[76]

For this reason, the Commission has opposed a number of these Congressional directives. On one occasion in response to a legislative proposal to alter the pornography guideline, the Chair of the Commission "wrote to the House of Representatives stating that the proposed Congressional action 'would negate the Commission's carefully structured efforts to treat similar conduct similarly and to provide proportionality among different grades of seriousness, 'and would instead 'require the Commission to rewrite the guidelines for these offenses in a manner that will reintroduce sentencing disparity among similar defendants."[77] "In another instance, the Commission criticized the two-level computer enhancement (which is currently set forth at §2G2.2(b)(6) and was adopted pursuant to statutory directive) on the ground that it failed to distinguish serious commercial distributors of online pornography from more run-of-the-mill users."[78] Unfortunately, the Commission's objections have generally fallen on deaf ears to the great detriment of this guideline's evolution. Indeed, after carefully reviewing the history of §2G2.2, the Second Circuit cautioned that sentencing courts must bear "in mind that they are

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[74] *Rita v. United States*, 551 U.S 338, 349-50 (2007) (citing USSG §1A1.1, ¶ 3); 28 U.S.C. § 991(b)(1)(C), (b)(2); 28 U.S.C. § 994(o)).

[75] *United States v. Dorvee*, __ F. 3d __, 2010 WL 3023799, *9 (2d Cir. Aug. 4, 2010) (citing USSC, *The History of the Child Pornography Guidelines* (Oct. 2009)).

[76] *Fifteen Year Review*,at 73.

[77] 137 Cong. Rec. H6736-02 (Sept. 1991); *Dorvee*, 2010 WL 3023799, *9 (citing Stabenow, S., *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, Jan. 1, 2009, at 4-9.

[78] *Dorvee*, 2010 WL 3023799, *9 (citing USSC, *Report to Congress*: *Sex Offenses Against Children Findings and Recommendations Regarding Federal Penalties* 25-30 (June 1996)).

dealing with an eccentric Guideline of highly unusual provenance that, unless carefully applied, can easily generate unreasonable results."[79]

B. The Child Pornography Guideline Produces Sentences That Are Far Too Severe

The Second Circuit's warning regarding the inequitable outcomes produced by §2G2.2 is borne out by the data. On average, sentences for child pornography are some of the highest to be found in the federal system. For 2009, the average term of imprisonment for a child pornography offense was 117.8 months. The mean median term was 78 months.[80] This was higher than the average and median sentences for sexual abuse (92.6 average, 57 median), robbery (80, 60), arson (58.2, 60), drug trafficking (77.9, 60), assault (37.2, 24) and manslaughter (66.6, 42).[81] The only offense categories with higher average and median sentences were murder and kidnapping.[82] If offense categories involving less than 100 cases are excluded, no category of offenses receives higher sentences than child pornography.

As a number of courts have noted, §2G2.2 tends to generate sentences at or near the statutory maximum in even the run-of-the-mill case.[83] Part of the reason for this is that a number of the guideline's enhancement provisions apply in nearly every case and thus fail to distinguish between offenders with differing levels of culpability. The recent case of *United States v. Donaghy*[84] provides a good example of this phenomenon:

> Defendant received four specific guideline enhancements in this case: 2 levels for possession of material involving children under age twelve, an enhancement applicable in 94.8% of sentences under §2G2.2 in fiscal year 2009; 4 levels for possession of material involving sadistic or violent conduct, applicable in 73.4% of cases in 2009; 2 levels for use of a computer, applicable 97.2% of the time; and for number of images, applicable in some form 96.6% of the time, with 63.1 % receiving a full 5 level increase. See *Dorvee*, 604 F.3d at 96; United States

[79] *Dorvee*, 2010 WL 3023799, *12.

[80] *2009 Sourcebook*, Table 13 (note these figures include sentences for all child pornography offenders not only those sentenced under §2G2.2).

[81] *Id.*

[82] *Id.*

[83] *See United States v. Beiermann*, 599 F. Supp. 2d 1087, 1105 (N.D. Iowa 2009); *United States v. Phinney*, 599 F. Supp. 2d 1037, 1041-43 (E.D. Wis. 2009); *United States v. Grober*, 595 F.Supp.2d 382, 397 (D. N.J. 2008); *United States v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio 2008); *United States v. Johnson*, 588 F.Supp.2d 997, 1004 (S.D. Iowa 2008); *United States v. Rausch*, 570 F. Supp. 2d 1295, 1298 (D. Colo. 2008); *United States v. Doktor*, 2008 WL 5334121*1 (M. D. Fla. 2008); *United States v. Ontiveros*, 2008 WL 2937539 *8 (E.D. Wis. 2008); *United States v. Hanson*, 561 F.Supp.2d 1004, 1008-09 (E. D. Wis. 2008); *United States v. Shipley*, 560 F. Supp. 2d 739, 744 (S.D. Iowa 2008); *United States v. Taylor*, 2008 WL 2332314 *8 (S.D.N.Y. June 2, 2008); *United States v. McClelland*, 2008 WL 1808364 *3 (D. Kan. April 21, 2008); *United States v. Baird*, 580 F. Supp.2d 889, 894 (D. Neb. 2008).

[84] 2010 WL 2605375, *3 (E.D.Wis. June 24, 2010).

> Sentencing Commission, *Use of Guidelines and Specific Offense Characteristics for Fiscal Year 2009* 36-37. As the Second Circuit recently explained, these enhancements produce a sentence approaching the statutory maximum, based solely on characteristics that are all but inherent to the crime of conviction, an approach fundamentally inconsistent with § 3553(a). *Dorvee*, 604 F.3d at 96.

Part of the task of sentencing is to discriminate between offenders and to punish aggravated offenders more severely than their less culpable counterparts. A guideline like §2G2.2 which indiscriminately pushes all offenders toward the statutory maximum is thus, in some fundamental sense, broken.

One of the cruel ironies of the Guidelines § 2G2.2 is that it punishes those who possess images of child sex abuse more severely than those who actually commit child sex abuse. Again, the Second Circuit's decision in *Dorvee* is instructive:

> The irrationality in §2G2.2 is easily illustrated by two examples. Had Dorvee actually engaged in sexual conduct with a minor, his applicable Guidelines range could have been considerably lower. An adult who intentionally seeks out and contacts a twelve year-old on the internet, convinces the child to meet and to cross state lines for the meeting, and then engages in repeated sex with the child, would qualify for a total offense level of 34, resulting in a Guidelines range of 151 to 188 months in prison for an offender with a criminal history category of I. Dorvee, who never had any contact with an actual minor, was sentenced by the district court to 233 months of incarceration.[85]

This irony is compounded by the fact that one of the justifications for high child pornography sentences is the belief that these offenders present a high risk to commit contact sex offenses. Yet, as shown below, this intuition, while often stated, is not supported by the evidence.

C. The Most Recent Data Suggests That Child Pornography Offenders Do Not Possess A Serious Elevated Risk of Danger or Recidivism

Supporters of the notion that child pornography possessors represent a uniquely dangerous and incorrigible cohort of offenders have often cited[86] the work of Dr. Andres Hernandez who, in two research papers, asserted that a high percentage of child pornography offenders in the Sex Offense Treatment Program at FCI-Butner admitted having committed contact sex offenses.[87] Recently, however, Dr. Hernandez has stated that his work has been

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[85] *Dorvee*, 2010 WL 3023799, *10.

[86] *See* Richard Wollert, Jacqueline Waggoner, & Jason Smith., *Federal Child Pornography Offenders (CPOs) Do Not Have Florid Offense Histories and Are Unlikely to Recidivate* will appear in the forthcoming book *The Sex Offender: Volume 7*, at 21 (collecting citations) (attached as appendix) (© Civic Research Institute).

[87] *See* Andres Hernandez, *Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders* (poster session presented at the 19th Annual Research and Treatment Conference of the Association for the Sexual Abusers, San Diego, CA.); Michael Bourke and Andres Hernandez, *The 'Butner Study' Redux: A Report*

misinterpreted: "Some individuals have misused the results of Hernandez (2000) and Bourke and Hernandez (2009) to fuel that the argument that the majority of CP offenders **are** indeed contact sex offenders and, therefore, dangerous predators. This simply is not supported by the scientific evidence."[88] Dr. Hernandez went on to state: "While I empathize with the emotional issues and moral dilemmas experienced by those who investigate and prosecute CP crimes, I believe we cannot prosecute or incarcerate our way out of this problem. The answer to complex problems requires complex and rational solutions."[89]

Dr. Hernandez's cautions about the misuse of his work are well taken since other researchers have raised serious questions about the validity of his Butner studies.[90] A paper written by Dr. Richard Wollert[91] and several colleagues found that, among other things, the Butner studies used an idiosyncratic definition of sex offense, created incentives for study participants to embellish their criminal histories, used a flawed variable to assess the risk of child molestation, and failed to properly collect recidivism data. This paper concluded that "the best explanation of Dr. Hernandez's results about prior contact offenses by CPOs [child pornography offenders] is therefore they were artifacts of inadequate research design."[92] This conclusion was echoed by the judge in *United States v. Michael P. Johnson* who found "no error in (the) conclusion that the Butner Study... 'doesn't meet scientific standards for research, and is based upon, frankly, an incoherent design for a study.'"[93]

In their study, Wollert, *et al*, reviewed the treatment and offense histories of 72 offenders who participated in a federally funded outpatient treatment program after they were charged with or convicted of possession, distribution or production of child pornography. The offenders were under supervision for an average of four years. During the four-year period of the study, only two offenders were taken into custody for possessing child pornography and another was

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of the Incidence of Hands-on Child Victimization by Child Pornography Offenders, 24 J.Fam.Viol. 183-191 (2009).

[88] Andres Hernandez, *Position Paper: Psychological and Behavioral Characteristics of Child Pornography Offenders in Treatment* 4 (2009) (emphasis in original) (presented at the Global Symposium: Examining The Relationship Between Online and Offline Offenses and Preventing The Sexual Exploitation Of Children,(UNC-Chapel Hill 4/5-7/09)), available at http://www.iprc.unc.edu/G8/Hernandez_position_paper_Global_Symposium.pdf.

[89] *Id.* at 5.

[90] Richard Wollert, Jacqueline Waggoner, & Jason Smith, *Federal Child Pornography Offenders (CPOs) Do Not Have Florid Offense Histories and Are Unlikely to Recidivate*, *supra*.

[91] Dr. Wollert is a noted clinical psychologist and expert in the treatment and evaluation of sex offenders.

[92] *Id.* at 23.

[93] No. 4:07-cr-00127 (S.D. Iowa, December 3, 2008), at 18.

apprehended for the commission of a non-contact sex offense. None were arrested on charges of child molestation.[94] The authors of this study concluded that

> This is the first report that, to our knowledge, has been compiled on the treatment performance and offense patterns of individuals referred to federally-funded outpatient treatment programs after being charged with or convicted of a child pornography offense. Whereas research by the U.S. Department of Justice indicates that over 3% of child molesters released to the community are rearrested for another contact sex crime against a child during a 3-year risk period, none of the CPOs in the present study were rearrested for this type of crime during a 4.0 year survival period that censored the data of offenders who died or were taken into custody for other offenses. Since survival analysis generates larger recidivism estimates than risk period analysis, *this finding indicates that CPOs differ from child molesters.*[95]

The authors further noted that "it has been our experience that the great majority of offenders in this group *generally do quite well in treatment, supervision, and post-supervision*, and are able to conform their behavior to society's expectations. Their responsivity to outpatient treatment, and thus the value of treatment, is reflected in the very low rate of contact sex offenses (0%) that were recorded in the study at hand.... Finally, having interacted on at least a weekly basis with most of our clients for years, our impression is *that very few – perhaps somewhere between 10 to 15 percent – meet the diagnostic criteria for Pedophilia."*[96]

These conclusions, while striking, are far from unique. While more research needs to be done, there is strong empirical support for the position 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.[97] Thus, to the extent that

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[94] Richard Wollert, Jacqueline Waggoner, & Jason Smith, *Federal Child Pornography Offenders (CPOs) Do Not Have Florid Offense Histories and Are Unlikely to Recidivate*, *supra*, at 25-26.

[95] *Id.* (citations omitted) (emphasis supplied).

[96] *Id.* (citations omitted) (emphasis supplied).

[97] *See, e.g.*, Jerome Endrass, et. al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC Psychiatry 43 (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'"); L. Webb, et.al., *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.

the harsh sentences mandated for child pornography offenders are premised on the notion that these offenders are likely to be or to become contact sex offenders, that premise is simply not supported by the best available data.

D. The Current Guideline Has Lost the Support of Sentencing Judges

Because of the serious problems outlined above, sentencing judges increasingly ignore §2G2.2, recognizing that the sentences it produces are unjustifiably severe and bear little relationship to a particular defendant's culpability. In 2009, courts imposed below-guideline sentences in a majority (51.6%) of child pornography possession cases.[98] The average reduction in these cases was significant: about 40% below the bottom of the guideline range.[99] The Commission's most recent quarterly data tells a similar tale: courts imposed a below guideline sentence for reasons other than substantial assistance in 52.3% of cases sentenced under §2G2.2 with a median reduction of 52 months below the bottom of the range.[100] These figures suggest that district courts believe that, in most child pornography cases, the sentences called for by §2G2.2 are on average almost twice as high as they need to be.

Interestingly, the more courts are exposed to the pornography guideline, the more likely they are to reject it. Nationwide, from 2007 to 2009, the number of sentences imposed under this guideline almost doubled from 853 to 1546 and the percentage of below-guideline sentences increased from 30.8% to 51.6%. Similarly, the average percentage reduction increased from 36.3% in 2007 to 40.3% in 2009.

These results are reinforced and explained by the Commission's recent survey of judges, which revealed that 69-70% of judges believe the guidelines for receipt and possession of pornography are too high.[101]

This deep and pervasive judicial dissatisfaction is perhaps the clearest signal that §2G2.2 needs to be fundamentally revised. The framers of the Sentencing Reform Act believed that the evolution and improvement of the Guidelines would be driven by a dialogue between the Commission and the judiciary. The judges, through their actions, have spoken plainly and decisively: this guideline is flawed and must be amended.

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[98] *See* Data presented by U.S.S.C. to Judge Gregory Presnell on sentences imposed under U.S.S.G. §2G2.2 2007-2009, available at http://sentencing.typepad.com/files/circuit-data-on-ussg-2g2.2-with-tables.pdf (note these figures for below guideline sentences do not include sentences resulting from substantial assistance or early disposition departures).

[99] *Id.*

[100] USSC, *Preliminary Quarterly Data Report, Second Quarter FY10*, available at http://www.ussc.gov/sc_cases/USSC_2010_Quarter_Report_2nd.pdf. (note the median reduction figure includes all pornography offenders not just those sentenced under §2G2.2).

[101] *See 2010 Judicial Survey,* Question 8.

E. Recommendations

In general, the Commission must take steps to rationalize §2G2.2. As shown above many of the flaws of the current guideline are the result of the eccentric manner in which it developed. Because the guideline was not formulated in accordance with the Commission's characteristic institutional role, it lacks a sound empirical and conceptual basis. The guideline does not incorporate the best data about the relative dangers and risks of recidivism posed by these offenders. Consequently, it produces sentences that are both arbitrary and overly severe.

Specifically, the Commission should revise the guideline to reflect more accurately the relative seriousness of the offense and the actual risks presented by those who commit it. The Commission should also make sure that the guideline's enhancement provisions do a much better job discriminating between aggravated and run-of-the-mill cases. Most importantly, §2G2.2 should be revised so that it does not produce sentences at or near the statutory maximum in the mine run case.

To this end, the Commission should:

- Lower the guideline's base offense level and eliminate the difference in the base offense level for possession and receipt of child pornography. There is no meaningful difference between these offenses and thus no reason to provide a higher base offense level for receipt of child pornography.

- Eliminate the enhancement for use of a computer during the course of the offense (U.S.S.G. §2G.2.2(b)(6)). As shown above, this enhancement applies in nearly every case and bears no relevance to the severity of the offense or the relative culpability of the offender.[102]

- Eliminate the enhancement if the offense involved an image of a prepubescent minor (U.S.S.G. §2G2.2(b)(2)). This enhancement applies in nearly every case and is essentially an inherent part of the offense in all but the most unusual cases.

- Eliminate or modify the enhancements based on the number of images possessed (U.S.S.G. §2G2.2(b)(7)). Given the ease by which large numbers of images may be acquired and the quasi-compulsive behavior of many offenders, this enhancement is a poor proxy for culpability, especially when the sentence increases for these enhancements are so large.[103]

[102] *Dorvee*, 2010 WL 3023799, *9 (noting Commission opposed computer enhancement "on the ground that it fails to distinguish serious commercial distributors of online pornography from more run-of-the-mill users").

[103] *See Donaghy*, 2010 WL 2605375, *3 ("The number of images enhancement makes little sense because, as a result of internet swapping, defendants readily obtain the necessary number of images with minimal effort. Further, to the extent that number of images may serve as a proxy for harm, the guideline overstates that harm.")

- Modify the enhancement for possession of sadomasochistic images (U.S.S.G. §2G2.2(b)(4)) to include a requirement that the defendant intended to obtain such images. As one court has written, "To the extent that harsh punishment is necessary in these types of cases to reduce the demand for material that results in harm to children, a defendant who does not seek out the worst of that material should not receive the same sentence as someone who does."[104]

Proposed Priority #7: Departures and Offender Characteristics

We are pleased that the Commission has made a priority its continuing review of the departure provisions in Parts H and K of Chapter Five of the Guidelines Manual. The Commission has taken some positive steps with the recent amendments to the policy statements addressing age (USSG §5H1.1); mental and emotional conditions (USSG §5H1.3); physical condition, drug dependence and alcohol abuse (USSG §5H1.4); and military service (USSG §5H1.11), as well as the encouraged departure in order to treat substance abuse or mental disorders (USSG §5C1.1). We join the Commission in its hope that these changes will encourage judges to view the factors addressed by the amendments as relevant to departure. However, the general standard for departures based on these factors contains unnecessary restrictions and conditions that could limit their usefulness in too many cases. Indeed, the general standard for the factors now deemed "relevant" under §§ 5H1.1, 5H1.3, 5H1.3, and 5H1.11 is hard to distinguish from the standard governing departures based on factors deemed "not ordinarily relevant" under the pre-PROTECT Act version of the Guidelines. *Compare* 75 Fed. Reg. 27,388, 27,390 (May 14, 2010) ("Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions . . . are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.") *with* USSG §5K2.0 (2002) ("[A]n offender characteristic or other circumstance that is, in the Commission's view, 'not ordinarily relevant' in determining whether a sentence should be outside the applicable guideline range [such as mental and emotional conditions] may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines.").[105]

The changes to the Introductory Commentary to Chapter 5, Part H are also problematic. That commentary will now advise district courts in sweeping terms that, even though certain mitigating factors "may be relevant" to departure under certain conditions, "the most appropriate

[104] *Hanson*, 561 F.Supp.2d at 1009.

[105] Although we recommended during the previous amendment cycle that the Commission revise USSG §5K2.0 to return to the general pre-PROTECT Act standard for departures, we *also* recommended that it remove the last paragraph of that standard in order to conform to our recommendation that the Commission remove the language in Chapter 5, Part H stating that offender characteristics are "not ordinarily relevant" or "not a reason" to depart. *See* Letter from Jon M. Sands to Hon. William K. Sessions, III, Chair, U.S. Sentencing Comm'n, *Re: Comments on Proposed Amendments to the Sentencing Guidelines Issued January 21, 2010*, at 5-6 (Mar. 22, 1010).

use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the guideline range, the type of sentence (*e.g.*, probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table and various other aspects of an appropriate sentence." *See* 75 Fed. Reg. 27,388, 27389 (May 14, 2010). It further instructs, in the interest of avoiding unwarranted disparity, that judges should not give specific offender characteristics "excessive weight." *Id.* As written, this broad language refers to not only "departure" determinations, but also the determination whether to sentence outside the guideline range generally.

To the extent that this advice purports to extend beyond departure determinations, it flatly contradicts the obligation of district courts to consider the "history and characteristics" of every offender without restriction or limitation. *See* 18 U.S.C. §§ 3553(a)(1), 3661. It is also inconsistent with Supreme Court decisions making clear that district courts are and must be free to disregard the Commission's restrictions and limitations regarding any given offender characteristic. *See Gall v. United States*, 552 U.S. 38, 50 & n.6, 51-52 (2007) (noting that § 3553(a)(1) is a "broad command to consider 'the nature and circumstances of the offense and the history and characteristics of the defendant'" and upholding the district court's consideration of mitigating factors that the Commission's policy statements put off limits); *Rita v. United States*, 551 U.S. 338, 357 (2007) (judge may decide that the guidelines "reflect an unsound judgment, or, for example, that they do not generally treat certain characteristics in the proper way.").

Even if it only applies to departures, this new language adds another restrictive layer to the analysis without sound basis. Although the Commission cites the need to avoid unwarranted disparity as its reason for advising judges to consider specific offender characteristics only for purposes of within-guideline sentences, it does not explain how departures based on factors that are clearly relevant to the purposes of sentencing can lead to *unwarranted* disparity. If the Commission's goal is to encourage judges to use departures rather than variances,[106] the new Introductory Commentary is not consistent with that goal.

In continuing its review of the departure provisions of Parts H and K of Chapter 5, the Commission should revisit the Introductory Commentary and delete its suggestion that offender characteristics are not to be given excessive weight and are ordinarily relevant only to a within-guideline sentence. At the very least, the Commission should revise the Introduction to Chapter 5H to make clear that it and the policy statements therein apply only to a decision whether to "depart."[107] And for all the reasons given in our previous testimony and public comment,[108] we urge the Commission to revisit its changes to §§ 5H1.1, 5H1.3, 5H1.4, and 5H1.11 to remove the

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[106] *See* 75 Fed. Reg. 27,388, 27,391 (May14, 2010) (explaining that the Commission undertook a review of departures due to the decreased use of departures in favor of variances under section 3553(a)).

[107] As the Commission recognizes in the new background commentary to §1B1.1, *see id.* at 27,392, "'[d]eparture' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *Irizarry v. United States*, 128 S. Ct. 2198, 2202 (2008).

[108] Statement of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 54-79 (Mar. 17, 2010).

remaining conditions and restrictions, including those relating to factors that were not the subject of any amendment, such as gambling addiction, prior good works, and lack of guidance as a youth.[109] The Commission should simply state that the factors addressed by those policy statements "are relevant" or "may be relevant" to the question whether departure is warranted.

The Commission should do the same with respect to the mitigating factors listed in 28 U.S.C. § 994(e), and should also clarify that these factors should not be used to choose prison over probation or a longer prison sentence, but may be used to choose probation or an alternative to straight prison, or a shorter prison sentence. The plain language of § 994(e) and its legislative history mean that the Commission should not recommend that these factors, or the lack thereof, be used to choose prison over probation or to recommend a longer prison sentence, *i.e.*, they should not be used as aggravating factors, but each of these factors may be used as mitigating factors.

In section 994(e), Congress directed the Commission to "assure that the Guidelines in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." 28 U.S.C. § 994(e). The purpose of this subsection was "to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties." S. Rep. No. 99-225, at 175 (1983). The Senate Judiciary Committee explained that the presence of one of these five factors, or the lack thereof, was not to be used to recommend imprisonment over probation or a longer prison term, but "each of these factors may play other roles in the sentencing decision." *See id.* at 174. "[T]hey may, in an appropriate case, call for the use of a term of probation instead of imprisonment." *Id.* at 174-75. In fact, the Senate Judiciary Committee gave several examples of how these factors, or the lack thereof, may be used to mitigate sentences.[110] None of the examples indicates that these factors should aggravate sentences.

Commission staff recognized fourteen years ago that Congress intended an "asymmetrical reading of [§ 994(e)] – in other words, that these factors should not increase a defendant's likelihood of being sentenced to prison but may increase a defendant's likelihood of

[109] We have previously recommended that the Commission delete these provisions, as Congress has not *required* the Commission to consider their relevance under 28 U.S.C. § 994(d). *Id.* at 74, 76, 79. Our current recommendation is made with the understanding that the Commission is unlikely to delete these provisions.

[110] *See* S. Rep. No. 98-225, at 172-73 (1983) ("need for an educational program might call for a sentence to probation"); *id*. at 173 (same regarding vocational skills); *id*. (same regarding employment); *id*. at 171 n. 531 ("if an offense does not warrant imprisonment for some other purpose of sentencing, the committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training"); *id*. at 173 n.532 ("a defendant's education or vocation would, of course, be highly pertinent in determining the nature of community service he might be ordered to perform as a condition of probation or supervised release"); *id*. at 174 (family ties and responsibilities may indicate, for example, that the defendant "should be allowed to work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family").

being sentenced to probation."[111] Through the "brute force of logic," if these factors are appropriate considerations in choosing probation over prison, they are necessarily appropriate in choosing a lesser prison term than the guidelines recommend.[112]

This "asymmetrical approach" to the factors listed in section 994(e) is further supported by the current structure of the guideline rules (which are comprised primarily of aggravating factors), and feedback from judges and prosecutors in the form of data regarding departures.[113] Indeed, all of the judges who addressed this issue in varying contexts at the regional hearings sought information about the purposes and evidentiary bases of *the guideline rules*, noting that the guideline rules are, if anything, too severe, and that they use their discretion after *Booker* to mitigate the harshness of the Guidelines.[114]

We emphasize that section 994(e) reflects a very narrow concern – that defendants not be sentenced to prison rather than probation or to a longer prison term *because* they lack education, employment, or stabilizing ties. *See* S. Rep. No. 98-225, at 175 (1983). The presence or absence of these factors *should* be considered, however, whenever "relevan[t] to the purposes of sentencing." *Id.* Education, vocational skills, employment record, family ties and responsibilities, and community ties *are* relevant to the purposes of sentencing, as are the lack of those advantages. These factors are relevant in a host of ways, including predicting reduced

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[111] *See* USSC, *Simplification Draft Paper, Departures and Offender Characteristics*, Part II(B)(2) & II(E)(3), available at http://www.ussc.gov/SIMPLE/depart.htm.

[112] *See Lussier v. Runyon*, 50 F.3d 1103, 1108 (1st Cir. 1995). This logic is illustrated by the history of §5H1.4. Legislative history suggested that health problems may call for a sentence of probation rather than prison. S. Rep. No. 98-225 at 173 (1983). The original version of USSG §5H1.4 stated that a physical impairment may be a reason for "a sentence other than imprisonment." The courts of appeals declined to read this as "an all-or-nothing choice between an incarcerative sentence within the guideline range or imposing no prison sentence" because "the greater departure (no incarceration) necessarily included the lesser departure (a prison sentence below the bottom of the guideline sentencing range)." *United States v. O'Neil*, 11 F.3d 292, 297 (1st Cir. 1993); *see also United States v. Love*, 19 F.3d 415, 416 (8th Cir. 1994); *United States v. Slater*, 971 F.2d 626, 635 (7th Cir. 1992); *United States v. Hilton*, 946 F.2d 955, 958 (1st Cir. 1991); *United States v. Ghannam*, 899 F.2d 327, 329 (4th Cir. 1990). In 1991, the Commission amended USSG §5H1.4 to replace "a sentence other than imprisonment" with "a sentence below the guideline range." USSG, App. C, Amend. 386 (Nov. 1991).

[113] *See* Statement of Heather Williams Before the U.S. Sentencing Comm'n, Phoenix, Arizona, at 35, 39-40 (Jan. 21, 2010) (discussing in more detail and providing data); Statement of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 43-47 (Mar. 17, 2010) (same).

[114] *See* Transcript of Public Hearing, Stanford, California, at 89-90, 133-36, 147-48 (May 27, 2009) (Judge Lasnik); *id*. at 95, 120, 123, 125-26 (Judge Mollway); *id*. at 139 (Judge Breyer); Transcript of Public Hearing, Stanford, California, at 46-47 (May 28, 2009) (Judge Walker); *id*. at 51, 92-93 (Judge Shea); 81-83, 85 (Judge Winmill); Transcript of Public Hearing, Chicago, Illinois, at 30-31, 33, 37 (Sept. 9-10, 2009) (Judge Carr); *id*. at 87, 91 (Judge McCalla); *id*. at 104-105, 113; Transcript of Public Hearing, Denver, Colorado, at 27-28 (Oct. 20, 2009) (Judge Hartz); *id*. at 63-64, 91-92 (Judge Marten); *id*. at 77, 80-81 (Judge Kane); *id*. at 281-83, 300-302 (Judge Ericksen); *id*. at 289-90, 298-300 (Judge Pratt); *id*. at 291-92 (Judge Gaitan); Transcript of Public Hearing, Austin, Texas (Jan. 21, 2010) (Judges Cauthron, Starrett, Zainey, Holmes).

recidivism, demonstrating reduced culpability, and indicating a need for and amenability to treatment or training in a non-prison setting.

Proposed Priority #8: Prior Crimes, the Categorical Approach, and Time Limits for Counting Priors under §2L1.2 (Unlawfully Entering or Remaining in the United States)

The Commission also proposes to continue its multi-year study of the statutory and guideline definitions of "crime of violence," "aggravated felony," "violent felony," and "drug trafficking offense." This year, the Commission proposes to (A) examine relevant circuit conflicts regarding whether any offense categorically fits any of the above definitions for purposes of triggering an enhanced sentence under certain federal statutes and guidelines, (B) possibly consider an alternative approach to the categorical method for determining the applicability of guideline enhancements, and (C) possibly consider an amendment to provide that the time period limitations in USSG § 4A1.2(e) apply for purposes of determining the enhancements of §2L1.2.

Apply §4A1.2(e)'s time period limitations to §2L1.2. We fully support the Commission's proposal to make §4A1.2(e)'s time period limitations applicable to §2L1.2. Courts have found that the disparities caused by §2L1.2's direction to enhance the offense level on the basis of stale convictions that are otherwise not counted under the guidelines can render the guideline sentence itself unreasonable.[115] We agree – the divergent rules on whether or not a prior conviction counts to increase the guideline calculation make no sense. Luckily, the fix is simple. Any prior conviction used to increase the offense level under §2L1.2 should simply be subject to Chapter Four's criminal history rules. This approach would better calibrate §2L1.2's sentence recommendations to the purposes of sentencing by eliminating the use of prior convictions that reflect neither increased recidivism risk nor increased culpability.[116]

Simplify §2L1.2 by eliminating the 16- and 12-level increases instead of conducting yet another study of the categorical method. We understand that the Commission is interested in finding a way to address ongoing judicial frustration with §2L1.2's approach to sentencing, which requires courts to engage in multiple analyses of a defendant's prior convictions to determine which offense level increases they trigger under the guidelines. While the Defenders appreciate and support the Commission's desire to simplify §2L1.2, spending limited resources

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[115] *See, e.g., United States v. Amezcua-Vazquez*, 567 F.3d 1050, 1054-55 (9th Cir.) (reversing within-guideline sentence as substantively unreasonable where defendant's prior conviction increased his offense level by 16 levels even though it was too old to score for purposes of criminal history calculation and his subsequent history showed no other countable convictions), *rehearing en banc denied*, 586 F.3d 1176 (9th Cir. 2009); *see also United States v. Chavez-Suarez*, 597 F.3d 1137, 1138 (10th Cir. 2010) (agreeing with *Amezcua-Vazquez* that the staleness of a prior conviction may warrant rejection of the guideline range under §2L1.2 and as might cases where the prior conviction was relatively benign because "[w]e are convinced that the attempted distribution of marijuana is in itself not nearly as serious a crime as murder, human trafficking, child molestation, and other felonies triggering the sixteen-level enhancement*"), petition for cert. filed*, (July 7, 2010) (No. 10-5378).

[116] *See, e.g.*, USSC, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines* 24 (Jan. 20, 2006); USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004).

on studying whether to replace the categorical method is the wrong way to achieve that goal. Most glaringly, it won't work. Five years ago, the Commission conducted the very study it proposes now and concluded that "[a]ny offense for illegal reentry will inevitably involve [the] categorical analysis' approach, due to the fact that the court must determine if the defendant's prior conviction is an aggravated felony for purposes of selecting the appropriate statutory penalty."[117] Because courts must apply the categorical method to illegal reentry cases whether the guidelines tell them to or not, studying this issue again is, quite frankly, a waste of the Commission's time.

What the Commission can do – quite easily – to eliminate the need for courts to conduct the categorical analysis under §2L1.2 multiple times, is streamline the guideline categories into which prior offenses can fall. Specifically, the Commission should delete the 16- and 12-level increases from §2L1.2, and recommend instead that all "aggravated felonies" as defined in 8 U.S.C. § 1101(a)(43) receive an 8-level increase.

Deleting §2L1.2's 16-level and 12-level increases is fully supported by empirical data, in marked contrast to the guideline in its present form. The 16-level increase was not justified by data or analysis when it was first incorporated in 1991, and it has not proven to be empirically necessary or desirable since.[118] To the contrary, by 2001, public criticism of the disproportionate penalties recommended by the overly-broad 16-level increase had grown so loud that the Commission attempted to ameliorate it by adding graduated sentencing increases of 8 and 12 levels for offenses that qualified as "aggravated felonies" under the statute but were, in the Commission's opinion, less serious.[119]

Unfortunately, the Commission's attempt to better calibrate sentences under §2L1.2 has proven to be as empirically unsound as the 16-level increase itself. According to our review of the Commission's most recent data set, courts and the government continue to recommend sentences below the recommended guideline range for defendants who receive 16- and 12-level increases under §2L1.2.[120] Defendants in 2009 with 16-level increases received below-guideline

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[117] *See* USSC, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines* 24 (Jan. 20, 2006).

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

[119] *See* USSC, App. C, Amend. 632 (Nov. 1, 2001) (reporting that the graduated offense levels were intended both to "respond[] to concerns raised by a number of judges, probation officers, and defense attorneys" that the 16-level increase is overly harsh, and to Commission observations that "the criminal justice system has been addressing this inequity on an ad hoc basis . . . . by increased use of departures").

[120] For purposes of this analysis, we analyzed the data for defendants convicted under 8 U.S.C. § 1326 for whom §2L1.2 served as the primary guideline. We assumed that those with an adjusted offense level of 24 had received a 16-level increase with a 3-level adjustment for acceptance of responsibility, those with an adjusted offense level of 20 received a 12-level increase with a 3-level acceptance adjustment, those with an adjusted offense level of 16 received an 8-level increase with a 3-level acceptance adjustment,

sentences 67.1% of the time, while defendants with 12-level increases received below-guideline sentences 64.9% of the time. These numbers show that departures from these guideline recommendations occur over one-third more frequently than the national below-guideline average of 41.2%.[121] In contrast, the below-guideline rate for §2L1.2 defendants at lower offense levels was much closer to the national average; defendants with 8-level increases received below-guideline sentences 49.3% of the time, and defendants with 4-level increases received below-guideline sentences 41.7% of the time, almost identical to the national average of 41.2%.[122]

These statistics show that, in practice, the government and the courts (and the Defenders) agree: §2L1.2's 16-level and 12-level increases result in sentences that are too harsh in a large majority of the cases in which they are recommended. Too often, defendants who reenter the country illegally but otherwise live law-abiding lives find themselves subjected to sentences years later that are far greater than necessary to satisfy any purpose of punishment, simply because of one prior conviction that was committed a decade or more ago.

Deleting the increases would directly respond to these "silent" criticisms, as well as the more vocal complaints the Commission received during last year's regional hearings and judicial survey.[123] It would also do away with the need for courts to engage in multiple categorical analyses beyond what is required by the statute, thereby addressing that separate body of criticism more effectively and efficiently than the Commission's proposed approach, which would involve not only repeating its prior study but also reviewing case law for the proverbial needle in a haystack. Because the categorical method depends upon the precise statute of conviction, direct conflicts (where one court finds that a conviction under that particular statute qualifies and another court finds that it does not) are extremely rare. Moreover, ferreting out those conflicts takes an extraordinary amount of research time because it literally requires comparing the offense of conviction used in any given case (as it existed at the time of the original conviction), the circumstances of the analysis (e.g., whether the modified categorical

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those with an adjusted offense level of 12 received a 4-level increase with a 3-level acceptance adjustment and those with an adjusted offense level of 8 received no increase.

[121] *See* 2009 *Sourcebook*, Table N.

[122] *See id.* The same holds true for within-guideline and above-guideline sentence rates. Defendants with 16-level increases received within-guideline sentences only 32.5% of the time (compared to the national average of 56.8%) and above-guideline sentences 0.3% of the time (compared to the national average of 2%), and defendants with 12-level increases received within-guideline sentences only 34.2% of the time and above-guideline sentences 0.9% of the time. In contrast, defendants with 8-level increases received within-guideline sentences 47.9% of the time and above-guideline sentences 2.7% of the time, and defendants with 4-level increases received within-guideline sentences 56.2% of the time and above-guideline sentences 2.2% of the time, meaning that defendants with a 4-level increase under §2L1.2 received within- and above-guideline sentences at rates almost identical to the national average of 56.8% and 2%, respectively.

[123] *Judges Survey*, Question 8; Transcript of Public Hearing, Boulder, Colorado, at 101-02 (Oct. 20, 2009) (Chief Probation Officer Kevin Lowry); Transcript of Public Hearing, Atlanta, Georgia, at 134, 152 (Feb. 11, 2010) (Judge Gregory Presnell).

approach was used and, if so, the quality of the proof offered by the government), and the result reached.

The Commission should not waste its time and resources going back over reconnoitered ground. We firmly believe that studying our suggestion to streamline §2L1.2's categories would be a better use of the Commission's time, would better resolve complaints about inefficient processes under §2L1.2, and would result in an empirically better illegal reentry guideline.

Amend §4B1.2. Finally, we continue to urge the Commission to make those changes to the career offender guideline that we have been requesting for years.[124] In this amendment cycle, we recommend that the Commission focus on:

- Targeting the definition of "controlled substance offense" to more meaningfully distinguish between more and less serious drug offenders, reflect the data on recidivism risk, and alleviate the stark and unjustifiable racial disparity caused by the current definition;[125]

- Clarifying that offenses committed prior to age eighteen but convicted and sentenced at or after age eighteen should not be counted as career offender predicates;[126] and

- Deleting from USSG §4A1.3(b)(3) the one-level limitation on the extent of downward departure for career offenders, which is inconsistent with the Commission's own research showing that the criminal history category for career offenders is often several categories higher than their recidivism rate would justify.[127]

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[124] *See, e.g.*, Letter from Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee to Hon. Ricardo Hinojosa, Acting Chair, U.S. Sentencing Guidelines Committee (Aug. 24, 2009); Letter from Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Guidelines Committee (July 16, 2008); Letter from Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Guidelines Committee (July 9, 2007); Letter from Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Guidelines Committee (July 19, 2006).

[125] *See Fifteen Year Review*, at 133-34 (Nov. 2004); *see also* Letter from Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Guidelines Committee at (July 9, 2007) .

[126] *Compare* USSG §4B1.2, comment. (n. 3); *United States v. Mason*, 284 F.3d 555, 558 (4th Cir. 2002) ("a juvenile conviction cannot be counted in determining whether a defendant is a career offender"); *United States v. Moorer*, 383 F.3d 164, 167 (3rd Cir. 2004) *with United States v. Torres*, 541 F.3d 48, 51-52 (1st Cir. 2008) (affirming career offender enhancement based on offenses committed at age seventeen because Application Note 3 to §4B1.2 states that "[t]he provisions of §4A1.2 are applicable to the counting of convictions under §4B1.1," and therefore court finds that §4A1.2(d) applies to career offender calculations regardless of §4B1.2, comment. (n. 1)), *cert. denied*, 129 S. Ct. 1987 (2009).

[127] *See Fifteen Year Review*, at 134.

Proposed Priority #9: Reduction in Offense Level for Agreeing to a Stipulated Order of Deportation

We welcome the Commission's proposal to consider a reduction in offense level for deportable aliens who agree to a stipulated order of removal pursuant to 8 U.S.C. § 1228(c)(5) or otherwise consent to deportation.[128] We agree with John Morton, the Assistant Secretary of U.S. Immigration and Customs Enforcement, who testified at the Commission's regional hearing in support of such a reduction in offense level, but do not agree that those convicted of illegal reentry should be excluded or that the reduction should be limited to one-level.[129]

We believe that a two-level specific offense level reduction would be appropriate for stipulated orders of removal. The benefits to the government of stipulated removals are significant. As the Supreme Court acknowledged not long ago in a related context:

> From the Government's standpoint, the alien's agreement to leave voluntarily expedites the departure process and avoids the expense of deportation-including procuring necessary documents and detaining the alien pending deportation. The Government also eliminates some of the costs and burdens associated with litigation over the departure. [130]

Given the volume of immigration cases, the associated costs to taxpayers of the additional time spent in custody and coming before an immigration judge, and the rights the defendant gives up to enter into the stipulation, a two-level adjustment may better represent the value of the quid pro quo.

We also urge the Commission to include a one-level adjustment for those defendants who consent to deportation even though the local U.S. Attorney's Office may have no program in place for stipulated orders of removal. Notwithstanding the discretion prosecutors currently have to enter into stipulated orders of removal and move for a downward departure, the practice occurs rarely. While an offense level reduction, along with ICE's stamp of approval, may result in some US Attorney Offices negotiating more stipulated removals, we fear that the process will not be uniform across the country. It may be more like the "fast track" departure, where some districts have it and others do not. In the past, when defendants have requested departures for consenting to deportation even though the government has declined to pursue a stipulated order

[128] Section 1228(c)(5) of Title 8 has long contained a provision permitting the U.S. Attorney to enter into a plea agreement with a deportable alien for the individual to "waive the right to notice and a hearing . . . and stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both."

[129] Transcript of Public Hearing, Phoenix, Arizona, at 18 (Jan. 20, 2010) (John Morton, Ass't Secretary of U.S. Immigration and Customs Enforcement).

[130] *Dada v. Mukasey*, 554 U.S. 1, 128 S. Ct. 2307, 2314 (2008).

of removal, most courts have found that the district judge cannot grant a departure without the government's consent. [131]

A specific offense adjustment also would help ameliorate the unfair disparity of illegal entry and reentry defendants typically not being eligible for a departure under §5K.1.[3] Defendants charged with immigration offenses are typically remorseful and cooperative: 99.3% plead guilty and 98.8% are found to have accepted responsibility for their offense.[132] At the same time, illegal reentry defendants typically cannot cooperate against other individuals in order to receive a substantial-assistance departure under policy statement §5K1.1, because they are involved in a single-defendant immigration crime, unrelated to any other federal offense.[133]As a result, cooperative illegal-reentry defendants are treated differently, and more harshly, than cooperative defendants charged with other (often more serious) offenses.

The suggested adjustment would not be likely to delay or increase the cost of handling these cases. Because a defendant's alienage and prior deportation are elements of the government's proof in an illegal-reentry prosecution, the prosecutor often provides substantial discovery regarding the defendant's immigration history, and defense counsel is required to conduct a thorough investigation into the defendant's immigration status, including whether he or she has any available defenses to deportation (such as a claim for acquired or derivative citizenship).[134] Accordingly, questions regarding the propriety of stipulation to deportation will usually be answered during the pretrial investigation of the case. This may not be the case with other types of offenses, in which the deportability of the defendant, and the consequences of the criminal conviction, may not be as clear.[135]

Proposed Priority #10: Supervised Release, Part D of Chapter 5

We welcome and encourage the Commission's proposed priority regarding supervised release. The current provisions of Part D of Chapter 5 (as well as Chapter 7 – Violations of Probation and Supervised Release) are obsolete and inconsistent with the criminological research on "what works" in corrections. Here, we point out just a few of the areas worthy of the

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[131] *See United States v. Gomez-Sotelo*, 18 Fed. Appx. 690, 692 (10th Cir. 2001) (citing cases). *But see United States v. Galvez-Falconi*, 174 F.3d 255, 260 (2d Cir. 1999) (defendant who consents to deportation even though he has colorable defense may be eligible for departure even when U.S. Attorney does not consent).

[132] *See 2009 Sourcebook*, Tbl 11 and 19.

[133] *See* Tony Plohetski, *Travis County leads nations in deporting 'noncriminal' immigrants, groups find*, Austin American- Statesman (Aug 11, 2010) (describing massive number of undocumented immigrants with little or no criminal history who are subject to removal), available at http://www.statesman.com/news/local/travis-county-leads-nation-in-deporting-noncriminal-immigrants-852776.html

[134] *See* 8 U.S.C. § 1409.

[135] [2]*See Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

Commission's attention and highlight the myriad ways that new evidence can inform the Commission's decision making.

The Commission should build into the guidelines sufficient flexibility for the courts to consider the defendant's risk of recidivism and unique rehabilitative needs in fashioning the term and condition of supervised release. Many subsections of Part D of Chapter 5 contain mandatory language, suggesting to the court that for a sentence to remain within the guidelines, the court must impose a certain term and conditions of supervised release. These restrictive provisions are not only inconsistent with pertinent federal statutes,[136] they are inconsistent with what we know about how offenders respond to supervision, which offenders should be targeted for more intensive supervision, and which may not need supervision at all.

One key principle that empirical data has proven over the last decade is that "offenders should be provided with supervision and treatment levels that are commensurate with their risk levels."[137] The studies show that intense supervision of low risk offenders either has no effect, thereby wasting limited resources, or leads to increased recidivism for low-risk offenders.[138] The "risk principle" suggests that treatment is most effective when intensive services are reserved for higher risk offenders. [139]

A recent study performed by the Office of Probation and Pretrial Services and reported to the Criminal Law Committee of the Judicial Conference demonstrates this point. Following revisions to *The Supervision of Federal Offenders Monograph 109*[140] in 2003 and again in 2004, which, inter alia, sets forth criteria to "help probation officers identity stable, low-risk offenders who may quality for early termination of supervision," the Administrative Office of the U.S

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[136] *Compare* USSG §5D1.1 ("court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed) with 18 U.S.C. § 3583(a) (imposition of term of supervised release is left to judge's discretion unless it is required by statute). Also compare USSG §5D1.2 (specifying minimum term of supervised release) with 18 U.S.C. § 3583 (providing only for maximum, not minimum, term of supervised release).

[137] Christopher T. Lowenkamp and Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, Topics in Community Corrections – 2004, at 3 (2004) (published by U.S. Dep't of Justice, National Institute of Correction)s, available at http://www.uc.edu/ccjr/Articles/ticc04_final_complete.pdf.

[138] *Id.*

[139] Brian Lovins, Christopher Lowenkamp, and Edward J. Latessa, *Applying the Risk Principle to Sex Offenders*, 89 The Prison Journal 344, 345 (2009). available at http://www.uc.edu/ccjr/Articles/sextxtprisonjournal.pdf.

[140] Available at http://www.uscourts.gov/FederalCourts/ProbationPretrialServices/RelevantFederalPretrialServicesDocuments/AOPretrialServicesMonographsAndGuide.aspx.

Courts ("AO") undertook a study of offender granted early termination of supervised release.[141] The results of the study were startling and provide strong evidence that the guidelines' "one-size fits all approach," which is based on the classification of the offense rather than the recidivism risk and rehabilitative needs of the defendant is counter-productive. The study concluded:

> Based on the charged data entered into PACTS by 70 of the 94 federal probation districts, it is clear that offenders granted early termination do not pose a greater safety risk to the communities in which they are released than offenders who complete a full term of supervision. In fact, *early term offenders in this study presented a lower risk of recidivism than their full term counterparts.* Not only were early term offenders charged with a new criminal offense at a lower rate than full term offenders, but when they were charged with a new crime it was generally for misdemeanor offenses. Early term offenders committed a lower percentage of felony offenses than did full term offenders.[142]

Researchers hypothesize several reasons why more intensive and restrictive correctional interventions may increase the risk of recidivism for low risk offenders:

> First, exposing lower risk offenders to higher risk offenders may enhance negative social learning, thereby reinforcing antisocial attitudes and beliefs. Second, placing lower risk offenders into intensive programs can disrupt prosocial network and opportunities. [143]

This "risk principle" has numerous implications for the supervised release guidelines and how they affect an offender's rehabilitative needs and protect public safety.[144] If supervised release lasts too long or conditions are too burdensome, the risk of recidivism may well increase.[145]

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[141] Office of Probation and Pretrial Services, *Early Terminated Offenders: A Greater Risk to the Community.* (June 2010) (emphasis added), available from OPPS, James L Johnson/DCA/AO/USCOURTS (summary reported in OPPS, News and Views, January 18, 2010).

[142] *Id.*

[143] *Applying the Risk Principle to Sex Offenders, supra,* at 345.

[144] Just to pose a few of the questions the "what works" literature raises for the Commission as it examines the guidelines governing the terms and conditions of supervised release: should the court always impose a term of supervised release; should the guidelines specify minimum terms of release as they currently do at §5D1.2; under what circumstances should a court impose special conditions, are all of the standard conditions necessary; should the court always impose a treatment condition on sex offenders?

[145] *See generally* Christopher Lowenkamp, Jennifer Pealer, Paula Smith, and Edward Latessa, *Adhering to the Risk and Needs Principle: Does it Matter for Supervision-Based Programs?*, 70 Federal Probation 3 (Dec. 2006), available athttp://www.uscourts.gov/FederalCourts/ProbationPretrialServices/FederalProbationJournal.aspx.

The current advisory guidelines fail to follow the "risk" principle. Terms of supervision are based upon the classification of the offense rather than the individual defendant's risk of recidivism or rehabilitative needs.[146] "Congress intended supervised release to assist individuals in their transition to community life,"[147] but such assistance is not the driving force behind the current guidelines. Listed below are just a few of the problems with Part D of Chapter 5 that the Commission should take up with this proposed priority.

First, rather than providing for shorter terms of supervision or for termination of supervision when the defendant has successfully transitioned back into the community, the guidelines insist on minimum terms with standard conditions and provide no guidance to judges on when early termination might be appropriate. As a result, some judges are reluctant to end supervision even when a defendant has complied with all conditions, including payment of fines and restitution.

Take for example the case of Hal Hicks. Mr. Hicks asked the court to terminate his three-year period of supervised release because he had complied with all the terms of his supervision and wanted to work in the trucking industry, which would require travel outside the district. The judge refused to terminate his supervision, stating that courts "generally do not consider mere compliance with the terms of supervised release grounds for early termination."[148] The court added: "Hick's desire to work within a particular field that may require travel does not constitute the sort of changed circumstance that might induce the Court to grant a request for early termination in the interest of justice." What the court missed is that keeping Mr. Hicks on supervision could well increase his chance of recidivism by depriving him of an employment opportunity and otherwise disrupting his pro-social thinking.

In the small percentage of cases where judges terminate supervision early (12% of all supervision cases), the offenders serve substantial periods of supervised release (an average of 26 months) before being terminated.[149] Under the risk principle, many of these offenders could have been terminated earlier with no increase in their risk of recidivism. The guidelines should encourage terms of release no longer than necessary to facilitate the defendant's transition into the community and make it clear that early termination is in the "interest of justice" when the defendant presents a low risk of reoffending because his rehabilitative needs have been met and he no longer needs transitional services.

Second, the Commission should extinguish the term of supervision upon deportation. "Congress intended supervised release to assist individuals in their transition to community

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[146] Indeed, one risk factor that the guidelines do consider elsewhere – criminal history – plays no role in the decision regarding supervised release. *See* USSC, *Federal Offenders Sentenced to Supervised Release* 56-58 (2010) ("Even though criminal history score is correlated with a higher risk of recidivism, there is no difference across criminal history scores in the average term of supervised release, indicating that there is no relation between length of term of supervision and risk of recidivism or need for rehabilitation").

[147] *United States v. Johnson*, 529 U.S. 53, 59 (2000).

[148] *United States v. Hicks*, 2009 WL 1515203 (S.D. Ill. June 1, 2009).

[149] *Supervised Release Report*, at 62.

life."[150] "It is not meant to be punitive." [151]Given that purpose, it makes no sense for defendants who will be deported to face terms of supervised release. As the Defender in the Western District of Texas explained at the Commission's regional hearing in Phoenix:

> "Supervised" release is a misnomer when it comes to deported defendants. They receive no supervision at all – no opportunities for training, education programs, drug or alcohol addiction or psychiatric treatment, or any of the other benefits regularly available to U.S. citizen releases as they attempt to reenter society. Deported defendants are simply dropped on the other side of the border and told not to return.[152]

For these defendants, supervised release simply provides a means of additional punishment should they return. In addition to the draconian multiple counting of the prior reentry conviction in any new prosecution, the defendant will face a revocation of his supervised release term and a consecutive sentence of imprisonment under §7B1.3(f). To remedy the punitive nature of supervised release terms for deported defendants, we urge the Commission to amend §5D1.1 to recommend against automatic imposition of supervised release on defendants facing deportation.

Third, most conditions of supervision, even special conditions, are standardized rather than geared toward the individual's needs. Many districts have their own standard conditions in addition to those set forth in §5D1.3.[153] When such conditions do nothing more than create additional obstacles to reentry by unnecessarily increasing the intensity of supervision, they violate the risk principle and should be abandoned.

Fourth, if the Commission were to revise the guidelines on supervised release consistent with evidence-based practices, and encourage judges to consider the individualized needs of the persons appearing before them when fashioning the term and conditions of supervised release, it would likely advance the Commission's goal of encouraging alternatives to incarceration for those offenders who do not need to be incapacitated. Without such changes, the Commission is likely to see the kind of underutilization of sentencing options that are reported in the Commission's recent publication on supervised release. According to that report,

> Only a small proportion (3.3%) of offenders sentenced to imprisonment followed by supervised release were sentenced pursuant to USSG §5C1.1(d)(2), which authorizes a term of community confinement or home detention to be substituted as a condition of supervised release for some part of the guidelines' range of imprisonment when an offender's guideline range is in Zone B or Zone C of the Sentencing Table. The remaining 96.7 percent of federal offenders sentenced to prison and subsequent terms of supervised release were sentenced to prison terms

[150] *Supervised Release Report*, at 2 (citing *United States v. Johnson*, 529 U.S. 53, 59 (2009)).

[151] *Supervised Release Report*, at 2 (citing *United States v. Granderson*, 511 U.S. 39, 60 (1994)).

[152] Statement of Henry Bemporad Before the U.S. Sentencing Comm'n, Phoenix, Arizona (Jan. 21, 2010).

[153] *Supervised Release Report*, at 27.

as provided by USSG §5C1.1(f) such that the entire confinement term was served by imprisonment and no part of the supervised release term was substituted.[154]

Fifth, the Commission should consider addressing procedural issues related to conditions, including notice of special conditions. The guidelines contain a lengthy list of potential special conditions, some of which involve significant restraints on liberty (*e.g.*, community confinement, home detention, intermittent confinement, and court ordered sex offender treatment, psychiatric treatment, and drug and alcohol abuse treatment). Under current practice, defense counsel receives little or no notice of special conditions.[155] Counsel should not be required to guess as to which of the myriad conditions set forth in the guidelines or otherwise contemplated by the court might be imposed. We believe that the presentence report should identify any special conditions of release, including those listed as special conditions in §5D1.3(d) and (4), so that the defense has a meaningful opportunity to explore the merits of the proposed condition and respond accordingly at the sentencing hearing.

These are just a few of the concerns we have regarding the terms and conditions of release. Should the Commission choose to make this a priority this year, we look forward to working with the Commission to further explore how the supervised release guidelines can be updated to reflect evidence-based practices and truly reflect Congress's intent for supervised release to facilitate an offender's reentry rather than serve as additional punishment. While the Commission has expressly identified Part D of Chapter 5 as a possible priority, we encourage it to take up Chapter 7 in coming amendment cycles so that those guidelines may be updated in light of the available "what works" literature and other empirical evidence.

Proposed Priority #11: Alternatives to Incarceration

We encourage the Commission to make alternatives to incarceration a top priority for the coming years. Last year, the Commission took a step toward expanding the availability of alternatives to incarceration for a narrow category of defendants. We acknowledge that this represented a critical shift in the Commission's view of alternatives and welcome the possibility for more.

The "what works" in corrections research is ever-evolving. More states are moving to reduce prison populations by implementing evidence-based alternatives to incarceration. Yet, the federal population continues to spiral out of control and too few sentencing options exist for federal defendants. The Commission has never implemented the directive that "[t]he sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission." 28 U.S.C. § 994(g). It is time to so by encouraging judges to impose alternatives to incarceration.

In recent years, the Federal Bureau of Prisons, which was once the model of a well-managed correctional system, has reported that it is 35 to 40 percent over capacity. This has

[154] *Supervised Release Report*, at 60-61.

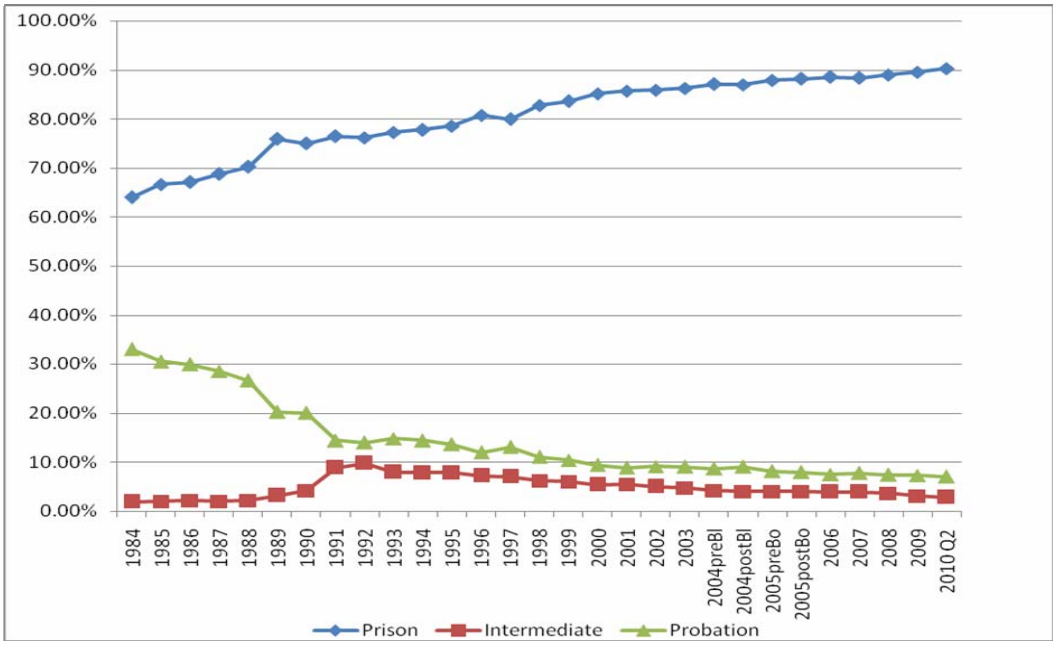
[155] *Supervised Release Report*, at 29.

created crowding and unsafe conditions, with staff to inmate ratios higher than in the largest state prison systems. In the words of the BOP Director:

> We have not been able to build enough new facilities to keep up with the increase in the federal inmate population; tight budgets have also meant that we have not been able to increase our staffing to the level necessary to keep pace with the population growth. . . We are forced to double bunk nearly all of our high security inmates, many of whom are aggressive and violent and have various anti-social tendencies, and we are triple bunking nearly half of the remaining inmate population. None of our facilities were designed for triple bunking. With the inmate population expected to continue to increase by 7,000 inmates each year, we do not anticipate a reduction in the level of crowding in the near future.[156]

The Commission's data shows that imprisonment rates have steadily increased since 1984 while alternative sentences have declined. Figure 1[157] shows the percentages of three groups of offenders: 1) those who received a sentence involving some term of imprisonment, 2) those who received alternative confinement at home or in a community facility, and 3) those who received "simple" or "straight" probation without confinement conditions.

FIGURE 1: PERCENTAGE OF DEFENDANTS RECEIVING VARIOUS TYPES OF SENTENCES All Felonies 1984 - 2010 2nd Quarter



[156] Statement of Harley G. Lappin, Director Federal Bureau of Prisons Before the U.S. Sentencing Comm'n, Austin, Texas (Nov. 20, 2009).

[157] Sources: 1984-1990 FPSSIS Datafiles, Administrative Office of U.S. Courts; 1991-2009 Annual Reports and Sourcebooks of Federal Sentencing Statistics, USSC Table 18.

We believe that the Commission can, and should, reverse this trend of over-incarceration. A sizable percentage of judges also believe that sentencing options should be more available for a range of offenses.[158] Last year, we offered a number of suggestions on how the Commission might expand the options for alternatives to incarceration. We stand ready to work with the Commission on this critical priority.

Proposed Priority #12: Circuit Conflicts

Defenders do not believe that the Commission should make the resolution of circuit conflicts a priority this year. The Commission has a full agenda this year: the need to respond to the new crack legislation and other congressional directives on mandatory minimums, the pressing need to overhaul often used guidelines like §2G2.2 (child pornography) and §2L1.2 (illegal reentry), and continuation of its work on alternatives to incarceration. The Commission can ill afford to spend valuable time and resources on resolving the esoteric circuit conflicts discussed in DOJ's June letter or responding to isolated court decisions that affect a handful of cases.

Conclusion

We were pleased last year to see that the Commission promulgated several amendments to the guidelines that should lower sentences for a small number of our clients. This year, we look forward to seeing the Commission's final priorities and working with the Commission toward revising the guidelines to better meet the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). *See* 28 U.S.C. § 991(b)(1)(A).

Very truly yours,

/s/ *Marjorie Meyers*

Marjorie Meyers
Federal Public Defender

Chair, Federal Defender Sentencing
Guidelines Committee

[158] *Judges Survey*, Question 11.

cc: Hon. William K. Sessions III, Chair
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