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Honorable William K. Sessions III
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 2002-8002

Re: Priorities 1 and 2

Dear Judge Sessions:

This letter offers comments on the Commission's priorities regarding (1) a possible report on matters related to the advisory guideline system, and (2) a report to Congress on statutory mandatory minimum penalties.

I. ADVISORY GUIDELINE SYSTEM (Priority #1)

The Commission anticipates issuing a report that would possibly include (A) an evaluation of the impact of *United States v. Booker*, 543 U.S. 220 (2005) and subsequent Supreme Court decisions on the guideline system; (B) recommendations for legislation regarding federal sentencing policy; (C) the appellate standard of review; and (D) amendments to the guidelines.

Defenders have addressed most of these issues in testimony for the Commission's regional hearings. In addition, we hope to complete a report on these and other issues this Fall, which we would share with the Commission. The following comments address some of our most important concerns.

A. Impact of Supreme Court Decisions on the System

The Commission should emphasize the positive impact of the Supreme Court's decisions on the system. The advisory guideline system has improved sentencing by permitting judges to impose individualized sentences that best advance the purposes of sentencing in consideration of all relevant facts, and by permitting judges to scrutinize and reject unsound guidelines. Unlike the mechanical calculation of months corresponding to a variety of aggravating factors, sentences that are explained in terms of the background and

circumstances of the defendant and the purposes of sentencing are transparent, show respect to defendants and their families, and increase respect for law. The sentencing decision (unless there is a mandatory minimum) is made by an impartial judge who explains her decision in open court, subject to appellate review. Prosecutors' former dominion over sentencing has been lessened, to the benefit of the system as a whole.

Importantly, the advisory guideline system gives judges a significant role in the constructive evolution of the guidelines, as Congress intended. If fully accepted by the Commission, the new system will restore the Commission to its proper role as an independent expert body. The Commission has a potential new ally in the Judiciary, and a new opportunity to gain respect on the merits of its work.

We are concerned, based on the Department's letter dated June 28, 2010,¹ and the topic of the report -- the impact of *Booker* and subsequent cases -- that the report not reflect a myopic focus on increased judicial discretion in narrow terms (e.g., rates of compliance, differences in rates of compliance) that fail to recognize the big picture. If so, as in the past, this would divert attention from the most serious causes of unfairness and *unwarranted* disparity in sentencing -- structural disparity built into the guidelines and mandatory minimums, and the unfair use of those rules by prosecutors and law enforcement agents.

We believe that any productive discussion of the advisory guideline system must recognize the problems in the mandatory guideline system it replaced, and include an analysis of how increased judicial discretion has alleviated some of those problems.

1. Increased judicial discretion has decreased unwarranted disparity overall.

One form of structural disparity in the guidelines is that they are constructed almost exclusively of aggravating factors. Because mitigating factors are difficult to quantify, it is understandable that few mitigating factors are included in the guideline rules. Under the mandatory guidelines system, structural disparity existed due to policy statements prohibiting and discouraging consideration of mitigating factors, which were required to be followed. See § 3553(b) (requiring sentence within the guideline range absent a circumstance not adequately taken into consideration by the Commission, to be determined solely in consideration of guidelines, policy statements, and commentary). This created unwarranted uniformity, *i.e.*, "similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing."² Increased judicial discretion to consider all

¹ Letter to Hon. William K. Sessions III from Jonathan Wroblewski (June 28, 2010).

² U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 113 (2004) (hereinafter *USSC Fifteen Year Review*) (emphasis in original).

relevant factors under § 3553(a) has addressed this unwarranted uniformity.

Another form of structural disparity is when a rule is not necessary to achieve sentencing purposes. For example, the 100:1 powder to crack ratio in the statute, as well as the various ratios that exist in the guidelines after the two-level reduction,³ overstate the harms of crack cocaine and result in penalties that were meant for drug “kingpins” being applied to low-level offenders. Similarly, the career offender guideline vastly overstates the risk of recidivism and serves no deterrent or crime prevention purpose for most offenders to whom it applies.⁴ Other examples of guidelines that produce sentences that are greater than necessary to achieve sentencing purposes are the illegal re-entry guideline and the child pornography guideline. Structural disparity is particularly problematic when it has an adverse impact on racial or ethnic minorities because it widens the gap in average sentences among groups without a justifiable reason and undermines confidence in the criminal justice system. Increased judicial discretion has allowed judges to correct for structural disparity resulting from unjust rules.⁵

Another form of unwarranted disparity is that caused by the exercise of prosecutorial and law enforcement discretion, practices, and policies. Judges have begun to identify and correct for some forms of prosecutor-created disparity. One category is the existence of “fast track” programs in some districts but not others.⁶ Another is when prosecutors unfairly refuse to move for a substantial assistance departure to recognize

³ The amendment was “a partial remedy” to correct for “the manner in which [the Commission] constructed . . . the Drug Quantity Table in USSG § 2D1.1” by setting base offense levels two levels above the statutory mandatory minimum penalties. U.S. Sentencing Commission Report to Congress: *Cocaine and Federal Sentencing Policy* 9-10 (2007).

⁴ *Fifteen Year Review* at 133-34.

⁵ See, e.g., *Kimbrough v. United States*, 552 U.S. 85 (2007) (crack); *United States v. Santillanes*, 274 Fed. Appx. 718, 718-19 (10th Cir. 2008) (methamphetamine); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009) (career offender); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (same); *United States v. Dorvee*, ___ F.3d ___, 2010 WL 3023799 (2d Cir. Aug. 04, 2010) (child pornography); *United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (acquitted conduct); *United States v. Settles*, 530 F.3d 920 (D.C. Cir. 2008) (same); *United States v. Mondragon-Santiago*, 564 F.3d 357 (5th Cir. 2009) (illegal re-entry); *United States v. Amezcu-Vasquez*, 567 F.3d 1050 (9th Cir. 2009) (same).

⁶ In most circuits, judges may grant the equivalent of a fast track departure where there is no fast track program. See, e.g., *United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008); *United States v. Seval*, slip op., 2008 WL 4376826 (2d Cir. Sept. 25, 2008); *United States v. Camacho-Arellano*, ___ F.3d ___, 2010 WL 2869394 (6th Cir. July 16, 2010); see also *United States v. Hernandez-Lopez*, 2009 WL 921121, *5 (10th Cir. Apr. 7, 2009) (noting without discussion district court’s statement that it had previously granted variances based on the disparity between sentences in fast track and other districts).

defendants' cooperation.⁷ Another is manipulation of the type or quantity of drugs by law enforcement agents,⁸ and another is the unfair piling on of consecutive mandatory minimums.⁹

2. The government's complaints about judicial discretion are without merit.

Notably, the complaints the Commission has heard about the advisory guideline system have come from some (not all) prosecutors. Some prosecutors at the regional hearings provided anecdotes in an attempt to show undue leniency or unwarranted disparity by judges,¹⁰ but these claims collapsed when the true facts were known.¹¹ Some prosecutors appeared to believe that judges should not have discretion, but that prosecutors should have wide discretion to control or limit sentencing outcomes through mandatory minimums, binding plea agreements, and departures and variances in the prosecutor's discretion.¹²

⁷ See, e.g., *United States v. Blue*, 557 F.3d 682, 686 (6th Cir. 2009); *United States v. Jackson*, 296 Fed. App'x 408, 409 (5th Cir. 2008); *United States v. Arceo*, 535 F.3d 679, 688 & n.3 (7th Cir. 2008); *United States v. Doe*, 218 Fed. App'x 801, 805 (10th Cir. 2007); *United States v. Fernandez*, 443 F.3d 19, 35 (2d Cir. 2006); *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir. 2006); see also USSC, *2009 Sourcebook of Federal Sentencing Statistics*, tbls.25, 25A, 25B (223 below guideline sentences for cooperation without a § 5K1.1 motion).

⁸ See, e.g., *United States v. Torres*, 563 F.3d 731, 736 (8th Cir. 2009); *United States v. Williams*, 372 F. Supp. 2d 1335 (M.D. Fla. 2005); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005).

⁹ See, e.g., *United States v. Angelos*, 433 F.3d 738, 754 (10th Cir. 2006); *United States v. Barrera-Vera*, 354 Fed. App'x 404, 410-11 (11th Cir. 2009); *United States v. Guthrie*, 557 F.3d 243, 256 (6th Cir. 2009).

¹⁰ Statement of Dana Boente, U.S. Attorney, Eastern District of Virginia, Before the U.S. Sent'g Comm'n, New York (July 9, 2009). The Eastern District of Virginia processes more crack cases than any district in the nation, and has the highest number of Rule 35 motions in the nation. USSC, *2009 Sourcebook of Federal Sentencing Statistics*, Table 62.

¹¹ Statement of Jacqueline A. Johnson, First Assistant Federal Public Defender, Northern District of Ohio, Before the U.S. Sent'g Comm'n, Chicago at 35-36 (Sept. 10, 2009) (providing full description of cases described by AUSA Boente).

¹² For example, the U.S. Attorney for the District of Oregon complained about judicial consideration of mitigating evidence, characterized judicial variances as creating unwarranted disparity, and noted that prosecutors in the district rely on binding plea agreements and mandatory minimums to limit and prevent judicial discretion. Statement of Karin J. Immergut, U.S. Attorney, District of Oregon, Before the U.S. Sent'g Comm'n, Stanford at 9-11 (May 27, 2009) In the District of Oregon, the rate of "Government Sponsored" below guideline sentences has increased from 21.8% in 2005 to 32.6% in 2008 to 36.5% in 2009, while the rate of "Non-Government

The rate of “Government Sponsored” below range sentences is almost 10 percentage points higher than the rate of “Non-Government Sponsored” below range sentences.¹³ These statistics understate the extent to which the government sponsors or acquiesces in below range sentences,¹⁴ and do not include Rule 35 reductions, which are used in a large majority of cooperation cases in several districts.¹⁵ While many of our clients benefit from “Government-Sponsored” departures and variances, sentencing should not be dominated by government-controlled incentives to obtain cooperation, quick guilty pleas, and waiver of constitutional rights. The congressionally mandated purposes and factors set forth in § 3553(a) should be the primary considerations at sentencing.

In its recent letter, the Department notes that it has received reports from prosecutors in some districts that sentences depend on which judge is assigned to the case, and that it sees a “troubling” trend of rates of below guideline sentences being substantially higher or lower in some districts than the national average.¹⁶ If this is a problem, the varied practices of individual prosecutors and U.S. Attorneys’ Offices should be even more troubling. The difference between the highest and lowest “Government Sponsored” rates by district is 62.1 percentage points, while the difference between the highest and lowest “Non-Government Sponsored” rates by district is only 36.1%.¹⁷ Moreover, while 75% of “Non-

Sponsored” below guideline sentences has *decreased* from 22.9% in 2005 to 19.4% in 2008 to 17.6% in 2009. USSC, *Federal Sentencing Statistics by State, District and Circuit, 2005-2009*, District of Oregon, Table 8. In 2009, the government moved for a below-guideline sentence based on substantial assistance or fast track in 23.9% of cases, and for other reasons in 12.6% of cases. *Id.*

¹³ *Id.*, Table 1.

¹⁴ Paul J. Hofer, *How Well Do Sentencing Commission Statistics Help in Understanding the Post-Booker System?*, 22 Fed. Sent. Rep. 89 (Dec. 2009).

¹⁵ Defenders who answered a survey reported that Rule 35s are used in 80-100% of cooperation cases in the Eastern District of Arkansas, the Southern District of Illinois, the Southern District of Louisiana, the District of Nebraska, the Eastern District of Virginia, and the Western District of Wisconsin; and are used over half the time in one division of the Western District of Virginia. Commission statistics also show large numbers of Rule 35s in South Carolina, Wyoming and the Southern District of Florida. See USSC, *2009 Sourcebook of Federal Sentencing Statistics*, tbl.62.

¹⁶ Letter to Hon. William K. Sessions III from Jonathan Wroblewski at 2 (June 28, 2010).

¹⁷ Prosecutors seek downward departures and variances in 67% of cases in the District of the District of Columbia, while prosecutors seek downward departures and variances in 4.9% of cases in the District of South Dakota. Judges impose downward departures and variances in 41.6% of cases in the District of Rhode Island, while judges impose downward departures and variances in 5.5% of cases in the Northern District of Mississippi. See USSC, *2nd Quarter 2010 Preliminary Cumulative Data* (October 1, 2009, through March 31, 2010), Table 2.

Government Sponsored” below guideline sentences are 24 months or less below the guideline range, only 43% of “Government Sponsored” § 5K1.1 departures are 24 months or less below the guideline range and 75% are 60 months or less below the range.¹⁸

Meanwhile, the Department appears not to intend to provide or publish data that would assist the Commission in examining, or the public in understanding, the results of prosecutorial discretion. At the hearing on mandatory minimums, the Department’s witness said that there was no central database that would provide that information, and noted that if statistics were gathered from presentence reports, they could not tell the full story because prosecutors consider factors not reflected in presentence reports.¹⁹ Of course, statistics that are gathered on judicial decisionmaking do not reflect many legitimate factors that judges consider, as the Commission has noted.²⁰ Since prosecutors are partisans for one side in an adversary process and their decisions are not explained in open court or subject to judicial review, it seems likely, and what evidence there is appears to confirm, that disparity resulting from the exercise of their discretion would often be unwarranted.

3. Judges have exercised their discretion moderately.

The guidelines remain the focal point at sentencing,²¹ and judges have exercised their discretion moderately. One year after *Booker*, when the guidelines were still being widely enforced, the Commission reported that judges sentenced below the guideline range without government sponsorship in 12.5 percent of cases,²² an increase from 11 percent in 2001 when the guidelines were mandatory.²³ During the first two quarters of FY 2010 --

¹⁸ USSC 2009 Monitoring Dataset. This analysis includes only cases with complete documentation and excludes cases with a guideline minimum of life or life equivalent (more than 470 months) for which calculation of the extent of departure is not possible.

¹⁹ U.S. Sent’g Comm’n, Transcript, Hearing on Mandatory Minimum Statutes 63-65, May 27, 2010 (testimony of Sally Quillan Yates).

²⁰ USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report’s Multivariate Regression Analysis* 4, 9-10 (March 2010).

²¹ USSC, Preliminary Quarterly Data Report, 2d Quarter, Figure C.

²² USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* vi-vii (2006).

²³ The reported rate in 2001 was 18.3%, see *2001 Sourcebook of Federal Sentencing Statistics*, tbl.26, but the Commission later reported that at least 40% of these departures were government-sponsored. See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 60 (2003).

three years after the Supreme Court made clear that judges may consider all relevant circumstances including those placed off limits by the Commission's policy statements, and may disagree with unsound guidelines -- the rate of sentences below the guideline range classified as "Non-Government Sponsored" was only 16.9 percent.²⁴ A 4.4 percent increase between March of 2006 and March of 2010 is remarkably small, given the clarification of the law in the interim.²⁵ And even these low rates overstate how frequently judges initiate downward departures or variances or act over the government's objection.²⁶

The judicial variance rate is remarkably low, given that surveys of judges show that many rate the guidelines as ineffective at achieving the purposes of sentencing. A plurality of judges responding to a survey in 2002 rated the mandatory guidelines as ineffective at maintaining sufficient flexibility to permit individualized sentences when warranted and at providing defendants with training, medical care, or treatment in the most effective manner.²⁷ In the Commission's recent survey, large majorities of judges reported that offense and offender characteristics that the guidelines deem never or not ordinarily relevant are "ordinarily relevant" to the decision whether to depart or vary.²⁸ Large portions believed that probation or alternatives to straight prison should be more available for most types of offenses.²⁹ The majority of judges believe that the guidelines for crack and for possession and receipt of child pornography are too high, and large portions believe that many other guidelines, including those for trafficking in drugs other than crack and illegal reentry, are

²⁴ USSC, *Preliminary Quarterly Data Report, 2d Quarter Release 2010*, tbl.1.

²⁵ For at least a year and a half following *Booker*, many courts of appeals continued to enforce the guidelines and policy statements, holding that judges could not consider mitigating factors if discouraged or prohibited by policy statements, and that they could not disagree with the most obviously unsound guidelines, such as crack. This came into doubt on June 21, 2007, when the Supreme Court said that a judge may vary when the guideline itself fails to reflect § 3553(a) considerations, or when the guidelines treat offender characteristics improperly. *Rita*, 551 U.S. at 351, 357. These instructions became unmistakably clear on December 10, 2007, when the Court held that judges must consider all of the relevant factors under § 3553(a)(1), *Gall*, 552 U.S. at 49-50 & n.6, and that judges may disagree with a guideline that is not based on empirical evidence when it produces a sentence that is greater than necessary to satisfy sentencing purposes and/or creates unwarranted disparity. *Kimbrough*, 552 U.S. at 101-02, 109-10.

²⁶ Paul J. Hofer, *How Well Do Sentencing Commission Statistics Help in Understanding the Post-Booker System?*, 22 Fed. Sent. Rep. 89 (Dec. 2009).

²⁷ *Summary Report: U. S. Sentencing Commission's Survey of Article III Judges (2002)*, available at http://www.ussc.gov/Judge_Survey/jsurvey02.pdf.

²⁸ USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.13, available at http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_201006.pdf.

²⁹ *Id.*, tbl.11.

also too high.³⁰ Based on these results, one might have expected judges to sentence below the guideline range in the majority of cases.

Further, the extent of downward departures and variance is moderate and has not increased over time. The Table in the Appendix shows the number of cases receiving various types of below-range sentences in FY2006-FY2009. The median sentence, median decrease, and median percent decrease are also shown. All three types of government-sponsored sentences show modest increases in the extent of decrease below the guideline range. But for non-government sponsored departures and variances, the extent of decrease has remained constant and may have even decreased.

Fortunately, given the over-incarceration problem, average sentence length has begun to drop slightly.³¹ This drop, however, is not primarily due to departures or variances, because the difference between the average guideline range and average sentence imposed has remained stable since *Booker* was decided.³² *Id.* Rather, the drop is driven by lower guideline ranges, primarily in cases sentenced under § 2L1.2, and to a lesser extent under § 2D1.1, with the latter the result of the Commission's amendment of the thresholds applicable to crack cocaine.³³

Most important, rates of sentences outside the guideline range are often a measure of disparity *prevented* instead of disparity caused. When judges decline to follow guidelines that create unwarranted disparity or excessive uniformity, they are moving toward treating similar defendants similarly and different defendants differently based on the purposes of sentencing rather than unsound guideline rules. Rates of sentences outside the guideline range were not a good measure of unwarranted disparity in the mandatory guidelines era,³⁴

³⁰ *Id.*, tbl.8.

³¹ USSC, Preliminary Quarterly Data Report, 2d Quarter, Figure C.

³² *Id.*

³³ *Id.*, Figures C, G and H.

³⁴ The guidelines do not include all relevant factors, and the guideline range is frequently "calculated" very differently in cases that are essentially the same. *See, e.g., United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant); Panel Discussion, *Federal Sentencing Under "Advisory Guidelines": Observations by District Judges*, 75 Fordham L. Rev. 1, 16 (2006) (Judge Lynch describing how when application of an enhancement is a close call, he could find that it does not apply, which is counted as compliant, or apply it and vary, which is counted as noncompliant); Statement of the Honorable Robert L. Hinkle Before the U.S. Sentencing Commission (Feb. 11, 2009) (listing ways in which different guideline ranges in similar cases result from the government's actions or happenstance,

and they are even less appropriate now.

4. The solution to differences among judges is for the Commission to revise those guidelines that have lost credibility.

We agree with the Department insofar as it recognizes that differences among judges stem in large measure from the fact that certain guidelines have lost credibility with the Judiciary, and that such guidelines should be revised downward.³⁵

While most judges consider all relevant facts about the offense and the offender and consider arguments to reject or discount guidelines that are not justified by sentencing purposes, some continue to impose sentences within guideline ranges when the guideline does not fit the offense or the offender or when the guideline itself is unsound. However, this represents a reduction in much more serious forms of unwarranted disparity that occurred when judges were not permitted to consider relevant factors and were forced to impose sentences that they knew were unjust.

If some judges take relevant mitigating factors into account as required by § 3553(a), though others do not, there has been a reduction in unwarranted uniformity. If prior to *Booker*, all ten judges in a district sentenced within the guideline range for ordinary crack cases, but today five of those judges sentence below the range to better reflect the true seriousness of crack offenses, there has been an increase in inter-judge disparity, but the structural disparity caused by the unsound crack guideline is reduced by half. Chief Judge Hinkle put it well: "It is better to have five good sentences and five bad ones than to have ten bad but consistent sentences. And it would be better still to have ten good sentences even if they could be explained only as the considered judgment of a good and honest and experienced district judge whose goal was to get it right, and even if that explanation could not be fit into the grids on a guideline chart."³⁶

and stating, "Your statistics showing the number of sentences within the guideline range do not pick up these disparities, because they are disparities in the calculation of the guideline range."), http://www.ussc.gov/AGENDAS/20090210/Hinkle_statement.pdf; Michael Tonry, *Are the U.S. Sentencing Commission's Guidelines "Working Well"?*, 2 Fed. Sent'g Rep. 122 (1989) ("[J]udges can manipulate the guidelines to pick a sentence just as a pianist plays the keyboard to pick a melody. Thus, 'compliance rates' indicate only whether judges sentence within the guideline range, they do not indicate whether judges are applying the guideline range that most appropriately applies. It would make little sense for a judge to choose a guideline that permits the sentence he wishes to impose, and then to depart from that guideline range and have to justify a departure.").

³⁵ Letter to Hon. William K. Sessions III from Jonathan Wroblewski at 2-3 (June 28, 2010).

³⁶ Transcript of Hearing Before the U.S. Sentencing Comm'n, Atlanta, Georgia, at 136 (Feb. 10-11, 2009).

As the Commission takes on the evolutionary development of the guidelines, differences among judges will lessen. If the guidelines were revised downward, most judges who today feel bound to impose an excessive guideline sentence would presumably be comfortable imposing the amended guideline sentence. In that case, both structural and inter-judge disparity would be eliminated. As the Supreme Court said, “ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’” *Kimbrough v. United States*, 552 U.S. 85, 107 (2007) (quoting *United States v. Booker*, 543 U.S. 220, 264 (2005)); see also *Rita v. United States*, 551 U.S. 338 358 (2007) (the guidelines can “constructively evolve over time, as both Congress and the Commission foresaw”).

The author of a recent study finding differences in the rates at which judges in the District of Massachusetts sentence outside the guideline range notes that “inter-judge disparity is but one consideration among many in evaluating the federal sentencing system. It is entirely possible that *Booker* has, on balance, produced more just sentences by allowing judges greater flexibility and authorizing them to reject unsound guidelines, despite the corresponding increase in inter-judge disparity.” Ryan W. Scott, *The Effects of Booker on Inter-Judge Sentencing Disparity*, 22 Fed. Sent. Rep. 104, 107 (Dec. 2009). He also notes that “plenty of other federal sentencing priorities deserve attention,” including “reevaluating the wisdom of mandatory minimum sentences, and investigation of unwarranted disparity created by prosecutorial charging and bargaining practices.” *Id.*

5. There is no evidence that judges determine the kind or length of sentences based on invidious factors.

A comprehensive study published by the Department of Justice’s Bureau of Justice Statistics in 1993 found that prior to the guidelines when judges had complete discretion, sentencing differences by race or ethnicity were uniformly small or insignificant. After mandatory minimums and mandatory guidelines went into effect, however, there were substantial aggregate differences by race and ethnicity and this was because of factors built into the guidelines and statutes.³⁷ Similarly, the Commission’s 2004 Fifteen Year Review found: “The evidence shows that if unfairness continues in the federal sentencing process, it is more an ‘institutionalized unfairness’ built into the sentencing rules themselves rather than a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges. . . . Today’s sentencing policies, crystallized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to the guidelines implementation. Attention might fruitfully be turned to asking whether these

³⁷ Douglas C. McDonald & Kenneth E. Carlson, U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90*, at 1-2, 24-25 (1993).

new policies are necessary to achieve any legitimate purpose of sentencing.”³⁸

More recently, the Commission issued a report concluding that black male offenders received longer sentences than white male offenders after *Booker*.³⁹ It also found that black females received shorter sentences than males of any race and females of any race except “other.”⁴⁰ Under a different model spanning a ten-year period, the Commission found the greatest black/white difference in 1999, during the mandatory guidelines era.⁴¹ The Commission noted that legitimate factors likely to explain the differences it found, such as differences in employment history and kinds of criminal history, were not included in its analysis because data on those factors are not in its datasets.⁴²

Shortly after the release of the Commission’s report, a study by a team of researchers at Pennsylvania State University found that “extralegal effects have not increased post-Booker.”⁴³ The difference in these findings is the result of differences in methodology,

³⁸ USSC *Fifteen Year Review* at 135.

³⁹ USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report’s Multivariate Regression Analysis 2* (March 2010) (“USSC *Demographic Differences Report*”).

⁴⁰ *Id.* at 4, 22, 23. “Other” includes Native American, Asian, Alaskan Native, and Pacific Islander.

⁴¹ *Id.* at 14.

⁴² *Id.* at 4, 9-10 (“[O]ne or more key factors which could affect the analysis may have been omitted from the methodologies used because a particular factor is unknown or was erroneously excluded from the analysis, or because data concerning such a factor is unavailable in the Commission’s dataset. Examples of factors for which no data is readily available . . . include a measure of the violence in an offenders’ criminal past, information about crimes not reflected in an offender’s criminal history . . . and information about an offender’s employment record. For these reasons, the results presented in the report should be interpreted with caution.”). The only offender characteristics included in the Commission’s datasets are age, educational level, and number of dependents.

⁴³ Jeffrey T. Ulmer, Michael T. Light, James Eisenstein, and John H. Kramer, *Does Increased Judicial Discretion Lead to Increased Disparity: The Liberation of Judicial Sentencing Discretion in the Wake of the Booker/Fanfan Decision* at 22 (“Penn State Study”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577238. This study concluded that disparity in sentences based on race, ethnicity and gender has not increased after *Booker*. *Id.* at 32-33. It found that black/white and gender differences in sentence length are slightly but significantly smaller after *Booker* compared to October 2001-April 2003 when the guidelines were mandatory, *id.* at 20, 21, 31, and that the effects of race, ethnicity and gender were considerably less after *Booker* than in 1994-95 when the guidelines were mandatory. *Id.* at 33 n.24. It found that there were no statistically significant differences across time periods for Hispanics or non-citizens. *Id.* at 20-21. And it found that there is no evidence that downward departures result in greater disparity

primarily that the Commission included all sentences together, treating probationary sentences as zero months, while the Penn State researchers studied the in/out decision and the decision how long to imprison separately.⁴⁴ The Penn State researchers tested the statistical significance of changes across time periods,⁴⁵ and found that changes in the post-*Booker* period were limited to the in/out decision and were *not* statistically significant.⁴⁶

Divergent findings in this area of research are long-standing and common, due to the relatively modest size of the effects, methodological differences among researchers, random fluctuations, and other sources of error. Findings that fluctuate depending on technical differences in statistical models, or that fluctuate from year to year, are insufficiently reliable for policy making.⁴⁷

Because these studies treat the rules and pre-sentencing decisions as “legally relevant,” they do not assess the impact of rules that are needlessly harsh and that disproportionately punish minorities, or the impact of unequal law enforcement scrutiny, arrests, or charging and plea bargaining practices. Nor do they assess how much increased judicial discretion after *Booker* has improved the fairness of sentencing. The fact is, defendants of all groups are treated more fairly when judges can discount unjustified and excessively severe rules and take greater account of relevant differences among defendants.

B. Recommendations for Legislation

Numerous witnesses at the regional hearings, at the hearing on mandatory minimums, and at the Commission’s conference in New Orleans have been asked whether the Commission should recommend to Congress that it repeal some mandatory minimums in exchange for mandatory guidelines with broader ranges and jury factfinding. This question

post-*Booker* than when the guidelines were mandatory. *Id.* at 31. The paper is being prepared for publication.

⁴⁴ Penn State Study at 30-31.

⁴⁵ *Id.* at 12, 30.

⁴⁶ *Id.* at 31. The Penn State study used the Commission’s datasets. Factors that are not included in the datasets, such as violence in criminal history or the need to maintain a job, are likely to be more important to the in/out decision than to the decision how long to incarcerate.

⁴⁷ “Any findings that are sensitive to minor changes in model specifications such as these must be interpreted with caution.” See Douglas C. McDonald & Kenneth E. Carlson, U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90* at 21-35 (1993) (discussing divergent findings in the pre-guidelines era and cautioning against reliance on findings that vary depending on statistical model).

was also posed in the Survey of United States District Judges. The overwhelming response has been “No.”

As Mr. Nachmanoff and Mr. Drees have testified, the Defenders also oppose this idea.⁴⁸ We believe that sentencing should be primarily in the hands of impartial judges, applying the purposes and factors set forth in 18 U.S.C. § 3553(a), including advisory guidelines. We believe that the advisory guidelines should be developed by this Commission as a neutral expert body, using feedback from judges in the form of data and reasons, and empirical research. The result of this proposal would be a new set of mandatory ranges applicable to all instead of some cases, once again placing sentencing in the hands of prosecutors, preventing the evolution of responsible guidelines, and possibly obviating any role for the Commission.

Five and a half years after *Booker* was decided, Congress has taken no action to replace the advisory guideline system.⁴⁹ The system is remarkably stable. It is working well,

⁴⁸ U.S. Sent’g Comm’n, Transcript, Hearing on Mandatory Minimum Statutes 135-40, May 27, 2010 (testimony of Michael Nachmanoff); Statement of Nicholas T. Drees before the U.S. Sent’g Comm’n at 28, Denver, CO (Oct. 21, 2009).

⁴⁹ In 2004, following the decision in *Blakely v. Washington*, 542 U.S. 296 (2004) when it appeared that there may be a legislative “fix” and that the choice was between mandatory guidelines with jury factfinding and so-called “topless” guidelines, the defense bar generally supported the former. See Memorandum from James E. Felman to U.S. Sentencing Commission (Sept. 16, 2004); Transcript of Public Hearing Before the U.S. Sent’g Comm’n (Nov. 16, 2004) (testimony on behalf of Defenders, Practitioners Advisory Group, NACDL). Immediately after *Booker*, the defense bar recommended to the Commission that it not support or propose any legislative change, that advisory guidelines within the framework of § 3553(a) was a workable solution, and that the Commission should study and learn from the new system. See Testimony of Jon Sands on Behalf of the Federal Defenders Before the U.S. Sentencing Comm’n (Feb. 15-16, 2005); Testimony of Amy Baron-Evans on Behalf of the Practitioners Advisory Group Before the U.S. Sentencing Comm’n (Feb. 15-16, 2005); Transcript of Hearing Before the U.S. Sentencing Comm’n, at 105-06 (Feb. 16, 2005) (Carmen Hernandez on behalf of NACDL). Those who had initially proposed the two legislative “fixes” and the Judiciary took the same view. See Testimony of Frank O. Bowman, III, *A Counsel of Caution*, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives (Feb 10, 2005); Testimony of James E. Felman Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives (Mar. 16, 2006); Testimony of Judge Paul G. Cassell Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives (Mar. 16, 2006). The policy merits of “topless” guidelines were never seriously defended by anyone, and would most likely be held unconstitutional today. In *Harris v. United States*, 536 U.S. 545 (2002), five members of the Court agreed that *Apprendi* applies to facts that raise the minimum of a sentencing range, including Justice Breyer. Justice Breyer concurred with four other justices, however, in permitting judicial factfinding to increase a mandatory minimum, because he did not “yet” accept *Apprendi*. *Id.* at 569-71 (Breyer, J., concurring). Justice Breyer now accepts *Apprendi* “because it’s the law

and holds the promise of working even better as the Commission improves the guidelines. It has overwhelming support. There is no good reason to disrupt it. The hypothetical trade is overwhelmingly opposed by judges, key leaders in Congress, the defense bar, sentencing policy advocates including Families Against Mandatory Minimums,⁵⁰ and academics. The Department of Justice does not endorse it.⁵¹

The Commission should take seriously the fact that 75% of sentencing judges believe that the advisory guidelines system best achieves sentencing purposes, and only 14% think that a system of mandatory guidelines with jury factfinding, broader ranges, and fewer mandatory minimums may be better.⁵² Judges are the only impartial actors in the system, and they take sentencing very seriously. Their duty is to impose sentences that protect the public and that are fair to defendants. They believe that they are best equipped to do so by finding the facts, consulting the advisory guidelines, and imposing the appropriate sentence pursuant to § 3553(a). In addition, key congressional leaders support the advisory guidelines system, and support the Commission in doing the job it was created to do, including advising Congress about the problems with mandatory minimums and guidelines that are driven by mandatory minimums and congressional directives.⁵³

and has been for some time.” See Transcript of Oral Argument at 19-20, *United States v. O’Brien*, No. 08-1569, 19-20 (Feb. 23, 2010).

⁵⁰ “Such a compromise would abandon mandatory sentences that apply to some crimes and replace them with mandatory or near-mandatory guidelines across the criminal code. There is no reason to alter the advisory nature of the guidelines.” See Memorandum from Families Against Mandatory Minimums to Spencer Overton, Jonathan Wroblewski and Stephanie Baucus, Extension of Remarks Listening Session at 7, August 14, 2009.

⁵¹ Statement of Sally Quillan Yates, U. S. Attorney for the District of Georgia, on Behalf of the U.S. Department of Justice, Hearing Before the U.S. Sent’g Comm’n 9 (May 28, 2010)

⁵² USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.19, available at http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_201006.pdf.

⁵³ See *Plenary Speech by Mr. Robert C. “Bobby” Scott*, at 11-13, Sentencing Advocacy, Practice and Reform Institute, American Bar Association Criminal Justice Section (Oct. 24, 2008); Letter from John Conyers, Jr., Chairman, Committee on the Judiciary and Robert C. “Bobby” Scott, Chairman, Subcommittee on Crime, Terrorism, and Homeland Security, to Hon. William J. Sessions, Chair of the U.S. Sentencing Commission (Apr. 6, 2010); Letter from Patrick Leahy, Chairman, Committee on the Judiciary to Hon. William J. Sessions, Chair of the U.S. Sentencing Commission (Mar. 22, 2010); NYU Law School, Center on the Administration of Criminal Law, *Federal Sentencing at a Crossroads: A Call for Leadership*, May 24, 2010, webcast at 31:29-31:54 (Honorable John Conyers, Jr.), <http://www.law.nyu.edu/centers/adminofcriminallaw/events/federalsentencingatacrossroads/index.htm>.

We and others who oppose the hypothetical trade do so in part because it is implausible. As most optimistically described, Congress would repeal all or some mandatory minimums, issue fewer directives, lower sentences overall, and include an appropriate departure power. However, the central feature is that there would *not* be an appropriate departure power, since the absence of judicial discretion is what would make jury factfinding necessary. As stated in the Commission's Judge Survey, the guidelines would be "mandatory," thus replacing mandatory minimums for some offenses (assuming any mandatory minimums would be repealed) with mandatory sentences for all offenses. Congress would not lower sentences overall,⁵⁴ and it would not refrain from issuing directives.⁵⁵ Directives would still be issued, but with a more severe, and mandatory, effect.⁵⁶

Perhaps worst of all, this proposal would put a halt to the evolution of responsible guidelines, just as it has begun. The sentencing range in each case would be set by the prosecutor's charges and the jury's factfinding or the defendant's admissions. Since judges would have no role in determining the range and little or no power to depart from a range, judicial feedback to the Commission about guideline ranges would be non-existent. Without a mechanism for impartial input from the Judiciary, the Commission would need to respond only to the wishes of Congress and the Department of Justice. The views of other stakeholders would be rendered irrelevant. Empirical evidence would play no role. Assuming that the Commission would still be setting ranges in theory, the ranges would be set by the political branches in fact.

⁵⁴ This is evidenced by the difficulty of passing a bill to reduce sentences for crack offenders and the compromises it required, even after fifteen years of education by the Commission and a favorable political climate.

⁵⁵ NYU Law School, Center on the Administration of Criminal Law, *Federal Sentencing at a Crossroads: A Call for Leadership*, May 24, 2010, webcast at 29:04-30:13 (Honorable John Conyers, Jr., explaining that Congress issues directives for political, emotional, and irrational reasons), <http://www.law.nyu.edu/centers/adminofcriminallaw/events/federalsentencingatacrossroads/index.htm>.

⁵⁶ For example, under the current system, if Congress issues a directive to the Commission to increase the guideline range for an offense by two levels, assuming a base range of 24-30 months, a two-level increase would increase the range to 30-37 months. Under a system with 10 levels, Congress would either move the whole offense into a higher range or direct the Commission to add a new fact that would move the offense with that fact into a higher range. Assuming a starting range of 24-36 months, raising the range even one level would increase it to 36-54 months, and raising it two levels would bring it to 54-81 months. For what a system of 10 ranges would look like, see Memorandum from James E. Felman to U.S. Sentencing Commission at 3 (Sept. 16, 2004).

There is a possibility that asking Congress to intervene in the manner suggested would end the Commission's role as an expert body, something the Defenders would not like to see. Congress may see no need to have a Sentencing Commission to promulgate a small number of ranges based on a limited set of facts to be charged in an indictment and proved to a jury. Even if Congress chose to delegate this legislative function to the Commission, it may well violate Separation of Powers. Judges on the Commission would not be making rules for the use of judges in imposing sentences – “the Judicial Branch's own business” – but would be determining what criminal conduct must be charged in an indictment and proved to a jury beyond a reasonable doubt. The prosecutor's charges and the jury's factfinding, not the judge, would determine the sentencing range in each case. Making rules for that purpose is the business of Congress, not “the Judicial Branch's own business-that of passing sentence on every criminal defendant.” *Mistretta v. United States*, 488 U.S. 361, 407-08 (1989).

In light of the overwhelming opposition to this proposal, the dangers it presents, and the disruption it would cause, the Commission should not pursue it.

C. Standard of Appellate Review

Contrary to a suggestion at the hearing on mandatory minimums, we do not believe that Congress is free to enact a stricter standard of review for sentences outside the guideline range without also requiring jury factfinding. The Supreme Court found it necessary to excise *de novo* review so that the guidelines would be sufficiently advisory to pass constitutional muster. See *Booker*, 543 U.S. at 259, 261. It also held that courts of appeals may not adopt a presumption of unreasonableness for sentences outside the guideline range. *Rita*, 551 U.S. at 354-55. The furthest the Court could go was to permit, but not require, a presumption of reasonableness for sentences within the guideline range.

In *Rita*, Justice Scalia, joined by Justice Thomas, wrote separately to point out that any kind of substantive reasonableness review will result in constitutional violations in some cases. *Id.* at 368-84 (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment); see also *Gall v. United States*, 552 U.S. 38, 60 (2007) (Scalia, J. concurring); *Rita*, 551 U.S. at 353 (“the Sixth Amendment concerns [Justice Scalia] foresees are not presented by this case.”); *id.* at 365-66 (Stevens, J., joined by Ginsburg, J., concurring) (“this case does not present such a problem”); *Cunningham v. California*, 549 U.S. 270, 309 & n.11 (2007) (Alito, Kennedy & Breyer, JJ., dissenting) (first articulating the problem Justice Scalia pointed out in *Rita*).

We are unaware of any proposal to change the standard of review that would not run afoul of the Sixth Amendment. If the Commission has something in mind, we would appreciate the opportunity to consider and discuss it.

In any event, concerns that reasonableness review is ineffective or creates “needless litigation”⁵⁷ are much overstated. The government has successfully appealed many cases on the ground that the sentence imposed was substantively unreasonable.⁵⁸ When cases are

⁵⁷ Comments of Jonathan Wroblewski, Director of the Office of Policy and Legislation, Criminal Division, Department of Justice, at the Nineteenth Annual National Seminar on the Federal Sentencing Guidelines, St. Petersburg, Florida (May 15, 2010).

⁵⁸ *United States v. Irej*, ___ F.3d ___, 2010 WL 2949265 (11th Cir. July 29, 2010) (en banc) (where defendant sexually tortured young children and produced and distributed child pornography, variance from 30 years to 17 ½ years was substantively unreasonable); *United States v. Ressam*, 593 F.3d 1095 (9th Cir. 2010) (in a terrorism case, reversing as both procedurally and substantively unreasonable below-guideline sentence of 22 years where guideline range was 35 years to life); *United States v. Camiscione*, 591 F.3d 823 (6th Cir. 2010) (in a child pornography case, reversing as substantively unreasonable sentence of a partial day in the custody of the United States Marshal’s Office and three years of supervised release in a child porn case where the recommended guideline range was 27 to 33 months in prison); *United States v. Engle*, 592 F.3d 495 (4th Cir. 2010) (in a tax evasion case, reversing sentence of 4 years’ probation as both procedurally and substantively unreasonable where the guideline range was 24 to 30 months’ imprisonment); *United States v. Lychock*, 578 F.3d 214 (3^d Cir. 2009) (in a child pornography case, vacating as substantively unreasonable a below guideline sentence (no prison term imposed where guideline range was 30 to 37 months); *United States v. Friedman*, 554 F.3d 1301 (10th Cir. 2009) (reversing as substantively unreasonable a 57-month sentence for a defendant classified as a career offender convicted of bank robbery, where advisory guideline range was 151 to 188 months); *United States v. Harris*, 339 Fed. App’x 533, 539 (6th Cir. 2009) (in a child porn case, reversing as substantively unreasonable a below-guideline sentence because the district court placed “an unreasonable amount of weight” on the character of the defendant); *United States v. [Davis] Omole*, 523 F.3d 691, 698-700 (7th Cir. 2008) (in a wire fraud case, vacating as substantively unreasonable sentence of 36 months because the sentencing judge failed to offer a compelling justification for a sentence so far below the applicable guideline range of 87 to 102 months, and because nothing in the record supported such a reduced sentence); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008) (reversing as substantively unreasonable (“a clear error of judgment”) a sentence of probation in a child porn case; stating that “an appellate court may still overturn a substantively unreasonable sentence, albeit only after examining it through the prism of abuse of discretion, and that appellate review has not been extinguished”); *United States v. Hunt*, 521 F.3d 636, 650 (6th Cir. 2008) (in health care fraud case, reversing as substantively unreasonable sentence of five years’ probation (where guidelines recommended range of 27 to 33 months) because district court may have relied on factor (the defendant’s possible innocence) that “cannot be legitimately relied upon”); *United States v. Hughes*, 283 Fed. App’x 345 (6th Cir. 2008) (unpublished) (in a bank fraud case, reversing as substantively unreasonable sentence of one day in prison and five years’ supervised release); *United States v. Cutler*, 520 F.3d 136 (2^d Cir. 2008) (in a bank fraud case, reversing as both procedurally and substantively unreasonable two below guideline sentences (one for a year and a day in prison where guideline range was 78 to 87 months, the other for three years’ probation where guideline range was 108 to 135 months); *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (in a terrorism case, reversing as substantively unreasonable sentence of 360 months’ imprisonment and 360 months’ supervised release, stating “we decline to adopt the view that *Gall* eviscerated any form of appellate review of trial court sentencing” and emphasizing that “*Gall* did not substitute a regime of total

reversed as unreasonable, whether on procedural or substantive grounds, whether inside or outside the guidelines, the district courts more often than not impose a different sentence on remand.⁵⁹

The courts of appeals are no longer substituting their judgment for that of the district court judge, the judicial actor in the best position to make the sentencing decision,

unreviewability for the fallen regime of Guidelines rigidity”).

⁵⁹ See, e.g., *United States v. [Davis] Omole*, 523 F.3d 691, 698-700 (7th Cir. 2008) (on government’s appeal, reversed as substantively unreasonable; higher sentence imposed on remand); *United States v. Lychock*, 578 F.3d 214 (3d Cir. 2009) (same); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008) (same); *United States v. Hunt*, 521 F.3d 636, 650 (6th Cir. 2008) (same); *United States v. Hughes*, 283 Fed. App’x 345 (6th Cir. 2008) (unpublished) (same); *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (same); *United States v. Ofray-Campos*, 534 F.3d 1, 44 (1st Cir. 2008) (on defendant’s appeal, reversed as substantively unreasonable; lower sentence on remand); *United States v. Olhovsky*, 562 F.3d 530 (3d Cir. 2009) (same); *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009) (same); *United States v. Paul*, 561 F.3d 970, 973-74 (9th Cir. 2009) (same); *United States v. Marroquin-Frias*, 2010 WL 510640 (9th Cir. Feb. 12, 2010) (unpublished) (same); *United States v. Lopez*, 343 Fed. App’x 484 (11th Cir. 2009) (same); see also *United States v. Levinson*, 543 F.3d 190 (3d Cir. 2008) (on government’s appeal, reversed as procedurally unreasonable; higher sentence on remand); *United States v. Gaskill*, 318 Fed. App’x 251, 259 (4th Cir. 2009) (same); *United States v. Pena-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008) (same); *United States v. Johnson*, 273 Fed. Appx. 95 (2d Cir. 2008) (same); *United States v. Sevilla*, 541 F.3d 226, 232-33 (3d Cir. 2008) (on defendant’s appeal, reversing due to insufficient explanation; lower sentence on remand); *United States v. Lynn*, 592 F.3d 572 (4th Cir. 2010) (same); *United States v. Swift*, 357 Fed. Appx. 489 (3d Cir. 2009) (same); *United States v. Grant*, 323 Fed. App’x 189, 192 (3d Cir. 2009) (same); *United States v. Shambry*, 343 Fed. App’x 941 (4th Cir. 2009) (same); *United States v. Cameron*, 340 Fed. App’x 872 (4th Cir. 2009) (same); *United States v. Raby*, 575 F.3d 376, 381-83 (4th Cir. 2009) (same); *United States v. Terry*, 2009 WL 1845598, *3 (4th Cir. June 29, 2009) (same); *United States v. Batts*, 317 Fed. App’x 329, 331-33 (4th Cir. 2009) (same); *United States v. Maynor*, 310 Fed. App’x 595, 597 (4th Cir. 2009) (same); *United States v. Troupe*, 307 Fed. App’x 715, 717-18 (4th Cir. 2008) (same); *United States v. Strickland*, 2010 WL 235080 (4th Cir. Jan. 21, 2010) (same); *United States v. Simmons*, 568 F.3d 564, 569-70 (5th Cir. 2009) (same); *United States v. Brown*, 578 F.3d 221 (3d Cir. 2009) (same); *United States v. Moreno-Flores*, 542 F.3d 445, 457 (5th Cir. 2008) (same); *United States v. Aguilar-Rodriguez*, 288 Fed. App’x 918, 921 (5th Cir. 2008) (same); *United States v. Tisdale*, 264 Fed. App’x 403 (5th Cir. 2008) (same); *United States v. Blackie*, 548 F.3d 395, 401-02 (6th Cir. 2008) (same); *United States v. Barahona-Montenegro*, 565 F.3d 980 (6th Cir. 2009) (same); *United States v. Steward*, 339 Fed. App’x 650, 653 (7th Cir. 2009) (same); *United States v. Lovelace*, 565 F.3d 1080, 1088-93 (8th Cir. 2009) (same); *United States v. Viezcas-Soto*, 562 F.3d 903, 906 (8th Cir. 2009) (same); *United States v. Smith*, 573 F.3d 639, 662 (8th Cir. 2009) (same); *United States v. Oba*, 2009 WL 604936, at *1 (9th Cir. Mar. 9, 2009) (same); *United States v. Santillanes*, 274 Fed. App’x 718, 718-19 (10th Cir. 2008) (same); *United States v. Simone*, 2009 WL 2168944, *2 (11th Cir. July 22, 2009) (same); *United States v. Phalo*, 283 Fed. App’x 757, 765 (11th Cir. 2009) (same).

and that is as it should be.⁶⁰ They are reversing sentences that are *outside the bounds of reasonableness*. For example, the Second Circuit recently reversed a guideline sentence of 240 months under § 2G2.2 (capped at the statutory maximum) as substantively unreasonable where the defendant pled guilty to one count of distributing child pornography.⁶¹ A few days earlier, the Eleventh Circuit reversed a 210-month sentence below the guideline range of 360 months under § 2G2.1 (capped at the statutory maximum) as substantively unreasonable in a case involving sexual torture of young children and production of child pornography overseas.⁶²

D. Amendments to the Guidelines

We address some needed revisions to the guidelines that are within the scope of the Commission's proposed priorities in the other letter submitted to the Commission today. In addition, we hope that the Commission will soon address the career offender guideline, other criminal history issues, and relevant conduct, as discussed in our letter of July 1, 2010.

II. MANDATORY MINIMUM PENALTIES (Priority #2)

The following supplements Michael Nachmanoff's testimony for the hearing on May 27, 2010.

A. Description of Interaction Between Mandatory Minimums and Plea Agreements

The Commission is directed to include in its report "a description of the interaction between mandatory minimum sentencing provisions under Federal law and plea agreements." Pub. L. 111-84, § 4713(b)(5).

First, we urge the Commission to reject the notion that mandatory minimums might be a good idea if they are useful or to induce cooperation. Sentencing policies, including mandatory minimum penalties, should be evaluated in light of their fairness and effectiveness at meeting the purposes of sentencing. 28 U.S.C. § 991(b)(2). Like the American Bar Association, we "reject the very premise that the inducement of cooperation is a legitimate aim of sentencing policy."⁶³ This is particularly so in light of evidence that mandatory

⁶⁰ *Booker*, 543 U.S. at 260-62; *Rita*, 551 U.S. at 357-58; *Gall*, 552 U.S. at 51-52.

⁶¹ *United States v. Dorvee*, ___ F.3d ___, 2010 WL 3023799 (2d Cir. Aug. 04, 2010).

⁶² *United States v. Irely*, ___ F.3d ___, 2010 WL 2949265 (11th Cir. July 29, 2010) (en banc).

⁶³ Testimony of James E. Felman before the U.S. Sent'g Comm'n for the Hearing on Mandatory Minimums at 13 (May 27, 2010).

minimums appear to have played a role in inducing false testimony and guilty pleas by innocent people, and appear to have been used by law enforcement agents and informants for corrupt ends.⁶⁴ The premise that inducement of cooperation is a legitimate purpose of sentencing policy assumes that mandatory minimums might be worth it if they make it easier for prosecutors to obtain evidence. It assumes that the tens of thousands of low-level, non-violent offenders who bear the brunt of disproportionately severe mandatory minimums might be a justifiable sacrifice to this end. The directive calls for a neutral description of the interaction between mandatory minimum sentencing provisions and plea agreements. It does not direct the Commission to presume that mandatory minimums might be legitimate if they induce cooperation.

We also do not believe that the Commission can say with assurance whether or not mandatory minimums are necessary to induce cooperation. Prosecutors often claim, and may believe, that mandatory minimums are essential to obtain cooperation. But they do not offer evidence that this is so, and we do not believe that such evidence exists. Guilty pleas and other forms of cooperation are affected by a wide variety of factors. Mandatory minimums have a variety of effects on different defendants, including increasing the likelihood of trial in some cases. In any case involving both a mandatory minimum and cooperation, how can we tell whether the prosecutor charged a mandatory minimum because he thought it was necessary to obtain cooperation but it was not, or the defendant cooperated because he was charged with a mandatory minimum? Our experience is that defendants cooperate if they have information to give in the hope of receiving a reduced sentence, whether or not a mandatory minimum applies. Some Defenders recommend against cooperation because of the danger involved,⁶⁵ or because prosecutors in the district are too stingy or unreliable in moving for departure.⁶⁶ Despite these warnings, clients usually cooperate. It does not matter whether the sentence is mandatory or not, or how uncertain it is that the prosecutor will move for a departure.

It seems impossible to statistically assess the effect of mandatory minimums on cooperation. What pattern would prove that mandatory minimums work as an incentive? Would we expect high rates of cooperation in cases where mandatory minimums *were* imposed (applicability of a mandatory minimum induced cooperation) or *were not* imposed

⁶⁴ See Statement of Michael Nachmanoff at 13-14, Public Hearing before the U.S. Sent'g Comm'n, Mandatory Minimum Sentencing Provisions Under Federal Law (May 27, 2010); Statement of Julia O'Connell at 12-14, Hearing before the U.S. Sent'g Comm'n, Austin (Nov. 19, 2009).

⁶⁵ See Statement of Julia O'Connell, Federal Public Defender for the Eastern and Northern Districts of Oklahoma, before the United States Sentencing Comm'n, Austin, Texas (Nov. 19, 2009) (cooperating client was brutally murdered, most likely a direct result of suspicions that she was cooperating).

⁶⁶ See Statement of Jason D. Hawkins, First Assistant Federal Public Defender for the Northern District of Texas, at 2, 7-8, before the United States Sentencing Comm'n, Austin, Texas (Nov. 19, 2009).

(withdrawal of an applicable mandatory induced cooperation)? There is no data showing whether a mandatory penalty was threatened in cases that did not receive one.

We do know from the Commission's statistics that cooperation is routinely obtained in cases involving offenses that do not carry mandatory minimums. In 2009, the rate of substantial assistance departures in drug trafficking cases was 25.9%. For the 311 cases involving Oxycodone, Oxycontin, Oxymorphone and Hydrocodone, in which no mandatory minimum applies, the rate was 39.4%.⁶⁷ The rate was comparable or higher in many other kinds of cases without mandatory minimums: 85% in antitrust cases, 25% in arson cases, 32.2% in bribery cases, 17.7% in civil rights cases, 26.8% in kidnapping cases, 24% in money laundering cases, and 19.7% in racketeering/extortion cases.⁶⁸ The rate is naturally lower in cases where there is ordinarily no one to cooperate against, such as burglary (5.6%), larceny (5.8%), embezzlement (3%), sexual abuse (2.5%), pornography/prostitution (4%), and assault (1.3%).⁶⁹

Second, we urge the Commission to examine the disparity caused by the interaction of mandatory minimums and prosecutorial power over plea bargaining. We realize that this is difficult because for most mandatory minimums the Commission does not know whether prosecutors declined to charge a mandatory minimum where they could have. As reviewed in previous testimony, the data that are available has always shown uneven charging of mandatory minimums, including disproportionate effects on minority offenders. Nor would full and consistent charging solve the problem, because mandatory minimums routinely require sentences far above that necessary to achieve the purposes of sentencing, and even above the guideline range. If the Commission cannot unearth all of the facts, it should highlight the information that is missing.

Before the guidelines, discretion was shared by the judge and prosecutor and each acted as a check on the other. During the debates leading to the SRA, Congress became aware of concerns that mandatory rules could transfer sentencing power from judges to prosecutors, and thus create disparities more pronounced and less transparent than any disparity created by the decisions of neutral judges made in open court. Research by the Federal Judicial Center confirmed these concerns and warned against the constraint of judicial discretion without corresponding regulation of prosecutorial discretion.⁷⁰ Congress became convinced that "without attention to plea bargaining, sentencing reform could

⁶⁷ USSC, 2009 Monitoring Dataset.

⁶⁸ USSC, 2009 Sourcebook of Federal Sentencing Statistics, tbl.27.

⁶⁹ USSC, 2009 Sourcebook of Federal Sentencing Statistics, tbl.27.

⁷⁰ Federal Judicial Center, *Prosecutorial Discretion and Federal Sentencing Reform* (1979).

actually increase disparities in the federal sentencing process.”⁷¹ Congress decided to try to regulate charging and plea bargaining through judicial power to review and reject plea agreements. It directed the Commission to issue policy statements regarding the appropriate use of “the authority granted [by Fed. R. Crim. P. 11] to accept or reject a plea agreement.” 28 U.S.C. § 994(a)(2)(E). “The legislative history illustrates that both the House and Senate viewed this provision as crucial to the success of the sentencing reform effort.”⁷²

The Commission responded by adopting policy statements regarding judicial review of plea agreements along with other policies, such as the relevant conduct rule. These mechanisms did not work for obvious reasons. They were aimed only at controlling prosecutorial leniency, while leaving prosecutors free to wield severity under rules that were mandatory on judges. Mandatory minimums, mandatory guidelines (aided by relevant conduct and severe restrictions on judicial departures), and prosecutorial control over mechanisms for leniency all placed tremendous sentencing power in the hands of prosecutors,⁷³ and law enforcement agents,⁷⁴ with resulting unwarranted disparity. Now that the guidelines are advisory, the situation has much improved in cases where mandatory minimums do not apply. But there is little or nothing a judge can do to control prosecutors’ choices in charging or not charging mandatory minimums, even in the rare situation that the judge knows what choices have been made and directly questions those choices. *See United States v. Vasquez*, slip op., 2010 WL 1257359 (E.D.N.Y. Mar. 30, 2010).

The full extent of this disparity remains unknown because prosecutors do not make their decisions in open court or reveal the reasons for their decisions, and DOJ does not collect or provide the relevant information. Nonetheless, it is obvious to everyone else involved in handling federal criminal cases that prosecutorial decisions in the use of mandatory minimums remains the most serious source of disparity in the system. *See U.S. Sent’g Comm’n, Results of Survey of United States District Judges, January 2010 through March 2010*, tbl.16.

⁷¹ Stephen J. Schulhofer & Ilene Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231, 240 (1989).

⁷² *Id.* at 241.

⁷³ *See* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420, 1425 (May 2008); Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 Stan. L. Rev. 235, 244 (2005).

⁷⁴ Eric P. Berlin, *The Federal Sentencing Guidelines’ Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wis. L. Rev. 187; David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. Rev. 211 (2004); Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims under the Federal Sentencing Guidelines*, 94 Mich. L. Rev. 2385 (1996).

B. Compatibility With Different Guideline Systems

Congress has directed the Commission to assess “the compatibility of mandatory minimum sentencing provisions under Federal law and the sentencing guidelines system established under the Sentencing Reform Act of 1984 (Public Law 98-473; 98 Stat. 1987) and the sentencing guidelines system in place after *Booker v. United States*, 543 U.S. 220 (2005).” Pub. L. 111-84, § 4713(b)(4).

Mandatory minimums are incompatible with any kind of guideline system. First, they interfere with the Commission’s duty to construct guidelines based on empirical research, sentencing data and decisions, and consultation with all stakeholders. Second, they prevent judges from imposing individualized sentences. Mandatory minimums were “compatible” with the mandatory guideline system in an artificial sense, because many of the guidelines were designed to mirror mandatory minimums and both sets of rules were mandatory. This does not mean that mandatory minimums, or guidelines designed to mirror them, reflect the purposes of sentencing or the other goals of the Sentencing Reform Act. Both suffered from the same lack of empirical basis at their inception and the same resistance to change in light of research, data and feedback from judges.⁷⁵

The advisory guideline system is superior to any system of mandatory rules. It permits individualized sentencing and restores some balance between neutral judges and partisan prosecutors, thus preventing unwarranted disparity and unwarranted uniformity. It makes the problems with mandatory minimums even more obvious, which is a healthy development. By generating data and judicial decisions that expose the problems with mandatory minimums and the guidelines that are tied to them, the advisory system can help the Commission to educate Congress about the advisability of repealing mandatory minimums.

C. Effect of Mandatory Minimums on the Federal Prison Population, Crime Control and Deterrence

DOJ continues to contend that the drop in the crime rate can be attributed, at least in part, to the increase in federal incarceration over the past three decades and the role of mandatory minimums in particular.⁷⁶ Mandatory minimums have certainly been the main

⁷⁵ See *Gall*, 552 U.S. at 46 & n.2; *Kimbrough*, 552 U.S. at 96.

⁷⁶ Statement of Sally Quillan Yates, U. S. Attorney for the District of Georgia, on Behalf of the U. S. Department of Justice, Hearing Before the U.S. Sent’g Comm’n (May 28, 2010) (stating that “Congress enacted mandatory minimum sentencing statutes to work together with the federal sentencing guidelines. . . . As a result of these sentencing reforms, many other criminal justice reforms, and larger cultural changes in society, crime rates have been reduced dramatically. . . . Mandatory sentencing laws increase deterrence and cooperation by those involved in crime.”).

reason for the dramatic growth in the federal prison population. As the Commission predicted,⁷⁷ and as confirmed by later research,⁷⁸ the quantity-based minimum penalties in the Anti-Drug Abuse Act of 1986 have been the primary cause of the severe over-crowding the Bureau of Prisons now faces. The budget of the Federal Bureau of Prisons has grown to over \$6 billion a year,⁷⁹ with another \$1.4 billion spent on the Office of the Federal Detention Trustee.

The cost-effectiveness of incarceration depends on whether it incapacitates dangerous and crime-prone offenders. Mandatory minimums (and the guidelines that are tied to them) do an especially poor job of focusing prison resources on the most serious and dangerous offenders. Instead, they have resulted in the lengthy incarceration of many tens of thousands of non-violent, low-level drug offenders with little or no criminal history and relatively low risks of recidivism.⁸⁰ Drug offenders comprise one third of the federal docket,⁸¹ and approximately half the federal prison population.⁸² Of 24,918 defendants convicted of drug trafficking in 2009, nearly two thirds (16,052) were subject to a mandatory minimum of five, ten, or more than ten years.⁸³ But 83.2% of all drug trafficking offenses involved no weapon, 94.1% of defendants in these cases played no aggravating role or a mitigating role, and 63.1% had only zero to three criminal history points.⁸⁴ Except in Criminal History Category I, drug trafficking offenders have the lowest, or second lowest,

⁷⁷ USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 74 (1987).

⁷⁸ Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed Sent'g Rep. 26 (1990).

⁷⁹ U.S. Dep't of Justice, Budget and Accountability Summary, available at <http://www.justice.gov/jmd/2010summary/pdf/bop-bud-summary.pdf>.

⁸⁰ U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (1994); USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Exh. 11 (2004).

⁸¹ USSC, 2009 Sourcebook of Federal Sentencing Statistics, Figure A.

⁸² The Sentencing Project, *The Federal Prison Population: A Statistical Analysis* 1 (2006) (55% of federal prisoners serving time for a drug offense), 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), http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf.

⁸³ USSC, 2009 Sourcebook of Federal Sentencing Statistics, tbl.43.

⁸⁴ *Id.*, tbls.37, 39 & 40.

rate of recidivism across criminal history categories.⁸⁵ Locking up nonviolent, low-level offenders for long periods is likely to increase recidivism by disrupting employment, reducing prospects of future employment, breaking family and community ties, and exposing less serious offenders to more serious offenders.⁸⁶ Imprisoning offenders with a low risk of re-offending is more expensive than the benefits of any crimes averted, especially if the costs associated with disruption of families, lost wages, and other social costs are included.⁸⁷

As to deterrence, “the clear weight of the evidence is, and for nearly 40 years has been, that there is insufficient credible evidence to conclude that mandatory penalties have significant deterrent effects.”⁸⁸ This is especially true of federal mandatory minimums. The Commission reports that “[d]rug offenders . . . represented the vast majority of those offenders convicted under a statute carrying a mandatory minimum penalty . . . with 16,198 (82.5%) of the 19,628 offenders convicted under such statutes [in FY 2008] having committed a drug offense.”⁸⁹ Yet drug crimes are “uniquely insensitive to the deterrent effects of sanctions,” because, as many studies have shown, “[m]arket niches created by the arrest of dealers are . . . often filled within hours.”⁹⁰ For many crimes, including “drug trafficking, prostitution, and much gang-related activity, removing individual offenders does not alter the structural circumstances conducing to the crime.”⁹¹ 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.”⁹² As long as there is user demand, the

⁸⁵ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Exh. 11 (2004).

⁸⁶ See Lynne M. Vieraitis, Tomaslav V. Kovandzic, Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974–2002*, 6 *Criminology & Pub. Pol’y* 589 (2007); see also USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* at 19 (Nov. 1996) (recognizing imprisonment has criminogenic effects including “contact with more serious offenders, disruption of legal employment, and weakening of family ties.”).

⁸⁷ John J. Donohue, III, *Economic Models of Crime and Punishment*, 74 *Soc. Res.* 379 (2007).

⁸⁸ See Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *Crime & Just.* 65, 100 (2009) (hereinafter Tonry, *Mostly Unintended*); see also *id.* at 69, 91-100.

⁸⁹ USSC, Memorandum of July 15, 2009, *Overview of Statutory Mandatory Minimum Sentencing*, available at http://www.ussc.gov/MANMIN/man_min.pdf.

⁹⁰ *Id.* at 102. “Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.” Fifteen Year Review at 134.

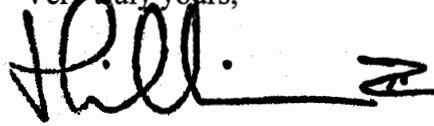
⁹¹ Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Just.* 1, 29 (2006).

⁹² Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 *Fed. Sent’g Rep.* 12, 19 n.20, 1999 WL 1458615 (July/August 1999) (quoting Alfred Blumstein).

drug market quickly replaces sellers that are imprisoned and the drug crime is not prevented.⁹³

We hope that these comments are helpful, and are available to discuss these issues further.

Very truly yours,

A handwritten signature in black ink, appearing to read 'T. Hillier, II', followed by a horizontal line and a small flourish.

Thomas W. Hillier, II, Co-Chair, Defender
Legislative Expert Panel
Michael Nachmanoff, Defender
Legislative Expert Panel
Marjorie Meyers, Chair, Defender
Sentencing Guidelines Committee

cc: Hon. Ruben Castillo, Vice Chair
William B. Carr, Jr., Vice Chair
Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa, Commissioner
Dabney Friedrich, Commissioner
Beryl A. Howell, Commissioner
Isaac Fulwood, Jr., Commissioner *Ex Officio*
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel
Michael Courlander, Public Affairs Officer

⁹³ USSC *Fifteen Year Review* at 134; *see also* USSC, *Cocaine and Federal Sentencing Policy* 68 (1995) (DEA and FBI reported dealers were immediately replaced).

**APPENDIX
NUMBER OF CASES AND DEGREE OF DECREASE
FOR VARIOUS TYPES OF SENTENCES FY2006 – FY2009**

			2006	2007	2008	2009
GOVERNMENTSPONSORED						
5K1.1	Number of cases		10,134	10,049	10,048	9,296
	Median Sentence		37	36	36	36
	Median Decrease		30	29	30	30
	Median Decrease %		47.8	47.4	47.8	48.9
5K3.1	Number of cases		5,166	5,233	5,894	6,701
	Median Sentence		18	18	18	18
	Median Decrease		8	7	7	7.0
	Median Decrease %		28.3	27.8	28.6	33.2
Other Govt	Number of cases		1,939	2,614	3,121	2,674
	Median Sentence		24	24	21	25.5
	Median Decrease		12	10	10	12
	Median Decrease %		33.2	26.8	27.4	33.3
NON-GOVERNMENT SPONSORED						
Down Dep	Number of cases		1,903	1,757	1,544	1,456
	Median Sentence		24	24	24	24
	Median Decrease		10	10	10	10
	Median Decrease %		29.8	26.8	28.6	28.5

Down Dep w/3553(a)	Number cases	of	1,432	1,013	915	807
	Median Sentence		24	24	24	24
	Median Decrease		15	15	15	18
	Median Decrease	%	40.3	39.1	40.5	44.4
3553(a)	Number cases	of	4,243	4,957	6,678	8,892
	Median Sentence		24	27	27	27
	Median Decrease		12	12	12	13
	Median Decrease	%	34.3	33.3	33.3	34.8
Other Judicial	Number cases	of	929	706	835	770
	Median Sentence		16.5	12	13	12
	Median Decrease		8	6	6	6
	Median Decrease	%	39.3	45.9	39.2	38.5

Source: USSC, 2006, 2007, 2008, 2009 *Sourcebook of Federal Sentencing Statistics* Tables 30-31a.