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Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Attention: Public Affairs – Priorities Comment

**Re: Public Comment on USSC Notice of Proposed Priorities for Amendment
Cycle Ending May 1, 2012**

Dear Judge Saris:

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 2, 4-6 and 8-10 for the 2012 amendment cycle. We address the Commission's mandatory minimum report and *Booker* report, as well as Priority 7 (Chapter 5 departures) in separate letters. In this letter, we also encourage the Commission to abolish the use of acquitted conduct in calculating the guideline range and eliminate or reduce the impact of uncharged conduct, and recommend to Congress that it amend the Sentencing Reform Act to provide for a representative of the Federal Public and Community Defenders to serve as an *ex officio* Commissioner.

I. Proposed Priority #2: Securities Fraud, Fraud Relating to Financial Institutions and Mortgage Fraud

The Commission has proposed as a priority that it continue its work of implementing the directives of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Those directives – one aimed at securities fraud, and the other at bank fraud and other frauds relating to financial institutions – require the Commission to “review and if appropriate, amend” relevant guidelines and policy statements, and consider whether the guidelines account for the harm from these offenses. We believe no amendments are necessary because the current guidelines provide penalties that are more than sufficient to account for the harm from these offenses. Instead, we

urge the Commission to turn its attention to the multi-year study of the fraud guideline that the Commission indicated it was considering in the January 2011 Notice of Proposed Amendments and Request for Public Comments.¹ A decade ago, the Commission “valiantly attempted to make the economic crime guidelines more coherent.”² We hope the Commission will now resist unnecessary tinkering with a guideline that is “rapidly becoming a mess,” and instead conduct a multi-year comprehensive review of what is arguably “the most complex of all the sentencing guidelines.”³

No amendments increasing penalties are necessary in response to the Dodd-Frank directives because no evidence shows that the fraud guidelines produce sentences that are too low to satisfy the purposes of sentencing. “[S]ince *Booker*, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high.”⁴ On top of the quickly escalating loss table, in any given case there are a multitude of cumulative enhancements for many closely related factors, which easily drive the guideline range to what a “rational jurist would consider to be a draconian sentence.”⁵ With enhancements for multiple victims (§2B1.1(b)(2)), sophisticated means (§2B1.1(b)(9)), organizers and supervisors (§3B1.1), effect on a financial institution (§2B1.1(b)(14)(B)), and obstruction (§3C1.1), among others, fraud offenders are assured of a severe penalty under the guidelines, and no additional enhancements in response to the Dodd-Frank directives are appropriate or necessary.

These enhancements are not only evidence that the guideline is more than sufficiently punitive, but also support the need for a comprehensive review of the guidelines. They replicate or overlap with each other and the concept of loss. The guideline has become the epitome of

¹ Many of the reasons we believe a comprehensive review of the fraud guideline is appropriate and necessary are set forth in our regional hearing testimony. See Statements of Alan Dubois and Nicole Kaplan Before the U.S. Sentencing Comm’n, Atlanta, GA, at 30-31 (Feb. 10, 2009); Statement of Jason D. Hawkins Before the U.S. Sentencing Comm’n, Austin, TX, at 21 (Nov. 19, 2009); Statement of Nicholas T. Drees Before the U.S. Sentencing Comm’n, Denver, CO, at 16 (Oct. 21, 2009).

² Alan Ellis, John R. Steer, and Mark H. Allenbaugh, *At a “Loss” for Justice: Federal Sentencing for Economic Offenses*, 25-WTR Crim. Just. 34, 34-35 (Winter 2011).

³ *Id.*

⁴ Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Set’g Rep. 167, 169 (Feb. 2008).

⁵ *United States v. Parris*, 573 F. Supp. 2d 744, 750-51 (E.D.N.Y. 2008); see also *United States v. Adelson*, 441 F. Supp. 2d 506, 510 (S.D.N.Y. 2006) (on top of a loss amount that called for increasing the base offense level by 24 points, the government argued for guideline enhancements increasing the offense level an additional 20 points, representing the “kind of ‘piling-on’ of points for which the guidelines have frequently been criticized”).

“factor creep,” where “more and more adjustments are added and it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.”⁶

Perhaps even more critically, comprehensive review is necessary to reconsider the “undue weight” the guidelines afford to the loss amount.⁷ “‘Loss’ simply needs to be given less weight.”⁸ It does not “adequately account for extrinsic factors such as market conditions . . . or the scienter of the offender.”⁹ It treats a defendant who steals “to finance a lavish lifestyle the same as one who steals the same amount to pay for an operation for a sick child.”¹⁰ And because loss is a poor indicator of culpability, the guideline that puts loss at its center inevitably creates unwarranted disparity by treating different offenders the same.

Although a comprehensive review of the fraud guideline would take time, its import cannot be questioned: Fraud constituted the third largest portion of the federal criminal docket in 2010.¹¹ We encourage the Commission to take on this challenge, and we stand ready to assist in whatever way we can.

II. Proposed Priority #4: Drug Offenses

We encourage the Commission to continue its multi-year review of §2D1.1, but believe it should take immediate action to ameliorate the harsh effects of the drug guidelines and their linkage to mandatory minimum penalties by dropping the base offense levels by two. As we have stated many times before, we believe the Commission should re-promulgate a revised and improved guideline because the current one punishes defendants more severely than Congress intended in the Anti-Drug Abuse Act of 1986 and more harshly than necessary to serve the purposes of sentencing at 18 U.S.C. § 3553(a). Short of that, we believe it imperative that the

⁶ USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 50, 137 (2004) (hereinafter *Fifteen Year Review*), citing Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 742 (2001).

⁷ *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) (“The Guidelines place undue weight on the amount of loss involved in the fraud” which in many cases is “kind of an accident,” and, accordingly, is “a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.”).

⁸ Ellis, *supra* note 2, at 35.

⁹ *Id.*

¹⁰ *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005).

¹¹ See USSC, *2010 Sourcebook of Federal Sentencing Statistics* fig. A (2010) (hereinafter *2010 Sourcebook*).

Commission take the interim measure of revising the Drug Quantity Table to reduce by two the offense level for all drug offenses. Earlier this year, James Skuthan, Chief Assistant Federal Public Defender for the Middle District of Florida, testified before the Commission, and explained in detail the changes we seek to §2D1.1 and the reasons for them.¹² For the sake of efficiency, we incorporate his testimony by reference, and here provide the highlights of our position.

The most significant problem with the current guideline is the excessive emphasis on drug quantity.¹³ By focusing on quantity, the guideline does not reliably categorize offenders according to their culpability, as reflected in their functional roles, and thus does not properly reflect the seriousness of the offense.¹⁴ A guideline with an increased emphasis on role would better serve the purposes of sentencing.¹⁵

A two-level reduction in offense levels across the Drug Quantity Table is a positive step toward the goal of a guideline that better incorporates the concept of role. As a practical matter it would ensure that the statutorily-set mandatory minimum penalties are *within* rather than *below* the guideline ranges for first offenders. This is critical because it would reduce the frequency with which the guideline-recommended sentence for an offender who performs a low-level function is as long as what was intended only for wholesalers and kingpins.¹⁶ Additionally,

¹² See Statement of James Skuthan Before the U.S. Sentencing Comm'n, Washington, D.C., at 1-17 (Mar. 17, 2011) (hereinafter "Skuthan Statement"); Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 58-68 (Mar. 17, 2011) (James Skuthan).

¹³ See Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U.S. Sentencing Commission* 2 (1995) ("[T]he Judicial Conference: . . . encourages the Commission to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved."); Peter H. Reuter & Jonathan P. Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. of Pub. Health 1059, 1062 (1995) (reporting recommendations of a RAND corporation working group, which concluded: "The U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug.").

¹⁴ The Commission's research has shown many low-level offenders receive sentences that Congress intended only for managers or kingpins. See USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 28-30 (2007) (showing large numbers of low-level crack and powder cocaine offenders exposed to harsh penalties intended for more serious offenders); *id.* at 28-29 (showing drug quantity not correlated with offender function); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 42-49 (2002) (showing drug mixture quantity fails to closely track important facets of offense seriousness).

¹⁵ See Skuthan Statement at 6-8; see also Letter from Marjorie A. Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 3-4 (Mar. 21, 2011).

¹⁶ See Skuthan Statement at 9-11.

a two-level reduction would allow aggravating and mitigating factors – including the new adjustments directed by the Fair Sentencing Act – to have greater weight relative to quantity.

Fiscal responsibility is another reason the two-level reduction is crucial and timely. As everyone within government is being asked to critically examine and eliminate unnecessary expenditures, a two-level reduction in the offense levels is one area where the Commission could contribute to cost reduction. The Commission has reported that 25 percent of the average length for drug sentences in fiscal year 2001 was the result of the Commission’s discretionary choice to link the statutory thresholds to the guidelines in the manner it did.¹⁷ And now, “[m]ost of the inmates in Bureau [of Prisons] facilities are serving sentences for drug trafficking offenses.”¹⁸ With “about 52 percent of the inmates in federal prison” serving “extremely long” sentences for drug-related offenses, drug offenders have “been and continue[] to be the driver” of the federal prison population.¹⁹ Reducing the extreme length of sentences for drug offenses would be an important step toward reducing the Federal Bureau of Prisons budget, which has grown to over \$6 billion a year.²⁰ One recent study estimates that “a 50 percent reduction in non-violent offender inmates would save the federal government about \$2.1 billion per year.”²¹

Importantly, saving money by reducing the length of the guideline recommended sentence would not jeopardize public safety. A two-level reduction is a marginal change: the top of the proposed guideline range would be the bottom of the current one.²² Marginal

¹⁷ See *Fifteen Year Review* 54.

¹⁸ Statement of Harley G. Lappin Before the U.S. Sentencing Comm’n, Washington, D.C., at 2 (Mar. 17, 2011).

¹⁹ Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 55 (Mar. 17, 2011) (Harley G. Lappin). Additionally, “approximately 40 percent of those admitted have a need for intensive treatment.” *Id.* at 13.

²⁰ See U.S. Dep’t of Justice, Budget and Accountability Summary, Federal Prison Systems (BOP), at 142, <http://www.justice.gov/jmd/2010summary/pdf/bop-bud-summary.pdf>.

²¹ John Schmitt, Kris Warner & Sarika Gupta, Center for Economic Policy & Research, *The High Budgetary Cost of Incarceration* (June 2010), <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>. The offenders who would be impacted by the proposed two-level reduction are, in large measure, non-violent offenders with limited criminal history. In 2010, more than 50 percent (51.5%) of drug offenders fell within criminal history category I, and almost two-thirds (63.2%) were in criminal history category I or II. See *2010 Sourcebook* tbl. 37. Only 16.4 percent of drug offenses involved a weapon. *Id.* at tbl. 39.

²² The average length of imprisonment for drugs under the current guideline ranges from 36.8 months for marijuana to 96.5 months for methamphetamine to 111.0 months for crack. See *2010 Sourcebook* tbl. J.

increases in punishment do not increase any deterrent effects of imprisonment.²³ Similarly, a Commission study found that drug offenders have lower than average rates of recidivism.²⁴ And recently, in its recidivism study of offenders released as a result of the 2007 crack amendments, the Commission has evidence that sentences can be reduced without an increase in recidivism.²⁵

Indeed, saving money by reducing the drug offense levels by two could *increase* the safety of the public and those who work and live in prison. Federal prisons currently suffer from “severe crowding” which makes managing inmates a “huge challenge.”²⁶ Over the next few years, as the net number of inmates increases, without a comparable addition of new beds, “crowding is going to continue to be a problem.”²⁷ This means not only that prison guards will face significant management problems, but also that offenders will encounter “longer waiting lists to get into GED, vocational training, Prison Industries, and other opportunities that we know can reduce recidivism.”²⁸

In the end, there are many reasons to reduce by two the offense levels for all drug quantities and no reasons *not* to reduce them. The Commission has the authority to make this change.²⁹ And, short of a wholesale re-promulgation with a role-driven guideline, it is the best way to increase the chances that application of §2D1.1 will effectuate the statutory purposes of sentencing.

III. Proposed Priority #5: Child Pornography Offenses

We commend the Commission for continuing to place among its priorities a review of child pornography offenses. When the Commission issued its 2009 report, *The History of the*

²³ See Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Justice: A Review of Research* 28-29 (Michael Tonry, ed., 2006).

²⁴ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (2004) (“Offenders sentenced in fiscal year 1992 under fraud, §2F1.1 (16.9%), larceny, §2B1.1 (19.1%), and drug trafficking, §2D1.1 (21.2%) are overall the least likely to recidivate”; “no apparent relationship between the sentencing guideline final offense level and recidivism risk.”).

²⁵ Kim S. Hunt & Andrew Peterson, *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* (May 31, 2011).

²⁶ Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 10 (Mar. 17, 2011) (Harley G. Lappin).

²⁷ *Id.* at 57.

²⁸ *Id.* at 52.

²⁹ Skuthan Statement at 15-16.

Child Pornography Guidelines, it noted that sentencing courts have “expressed comment on the perceived severity of the child pornography guidelines through increased below-guidelines variance and departure rates.” USSC, *The History of the Child Pornography Guidelines* 54 (2009). Since then, the evidence that this guideline is in serious need of amendment has grown. The incidence of departures and variances, the disproportionate severity of the sentences, and the availability of evidence showing that child pornography offenders present little danger to others, supports changes to the guidelines and pertinent statutory provisions.

A. Judges and Commentators Continue to Criticize the Child Pornography Guideline.

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.”³⁰ The Commission’s latest data release shows continued widespread dissatisfaction with the child pornography guideline. For those defendants where USSG §2G2.2 served as the primary offense guideline, 46.4% received a non-government sponsored sentence below the guideline range either because of a departure, variance, or combination thereof.³¹ Another 14.2% received a government-sponsored below-range sentence for reasons other than cooperation.³² By comparison only 17.1% of all defendants received a non-government below guideline range sentence either as a result of downward departure and/or variance, and only 4.2% received a government-sponsored variance.³³

In the past year, more judges have authored opinions discussing many of the flaws with the child pornography guideline, described by the Second Circuit as “an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.” *United States v. Dorvee*, 616 F.3d. 174, 188 (2d Cir. 2010). In April, the Ninth Circuit held that “similar to the crack cocaine Guidelines, district courts may vary from the child pornography Guidelines, §2G2.2, based on policy disagreement with them” because the guidelines are “to a large extent, not the result of the Commission’s ‘exercise of its characteristics institutional role.’” *United States v. Henderson*, ___ F.2d ___, 2011 WL 1613411

³⁰ See USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (2003); USSG ch. 1, intro, pt. 4(b); see also 28 U.S.C. § 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.”).

³¹ USSC, *Preliminary Quarterly Data Report: 2nd Quarter Release, Preliminary Fiscal Year 2011 Data Through March 31, 2011* tbl. 5 (2011) (hereinafter *2nd Quarter Release*).

³² *Id.*

³³ *Id.*, tbl. 1.

(9th Cir. April 29, 2011).³⁴ In July, Judge Wood granted a defendant's motion for resentencing under 28 U.S.C. § 2255 on the grounds that it "was a fundamental defect resulting in a miscarriage of justice," thereby depriving the defendant of his due process rights, for the sentencing court to conclude that USSG §2G2.2 "was the product of the Sentencing Commission's empirical expertise." *Gordon v. United States*, 2011 WL 2638133, at *3 (S.D.N.Y. July 1, 2011).

One of the chief judicial criticisms of the guideline has been that its "relatively high" base offense level of 18 combined with numerous enhancements that apply in virtually all cases yield ranges for first-time offenders that exceed the ten year statutory maximum sentence. *Henderson*, 2011 WL 1613411, at *8 (Berzon, J., concurring).³⁵ The Commission's 2010 data shows that the average sentence for a child pornography offender was 120.1 months, and for those in criminal history category I, the average sentence was 109.6 months.³⁶ "Concentrating offenders at the top of the sentencing spectrum in this manner has been described as 'fundamentally incompatible with § 3553(a).'" *United States v. Apodaca*, 641 F.3d 1077, 1083 (9th Cir. 2011) (quoting *Dorvee*, 616 F.3d at 187)).

Other judicial criticism has been directed toward specific enhancements, including those for use of a computer and number of images. As one judge observed: "[E]mpirical data does not show that using a computer as a means to possess and view pornography is a more serious or culpable offense than viewing the same images if they had been received by another medium such as through the mail." *United States v. Tapp*, 2010 WL 4386523, at *6 (N.D. Ind. Oct. 28, 2010); see also *United States v. Hanson*, 561 F. Supp. 2d 1004, 1010-11 (E.D. Wis. 2008) (enhancement flawed because it comes from same pool of images as other formats); *United States v. Burns*, 2009 U.S. Dist. Lexis 100642, at *24 (N.D. Ill. Oct. 27, 2009) (enhancements are "duplicative and draconian"). Nor are the enhancements for number of images an "accurate indication of culpability." *Tapp*, 2010 WL 4386523, at *6.

³⁴ See also *United States v. Poluouizzi*, 760 F. Supp. 2d 284, 286 (E.D.N.Y. 2011) (guideline range of 135-168 months for receipt and possession of child pornography was "grossly excessive"); *United States v. Diaz*, 720 F. Supp. 2d 1039, 1041 (E.D. Wis. 2010) (collecting cases of district judges who have declined to impose sentences within recommended guidelines for child pornography).

³⁵ See also *United States v. Apodaca*, 641 F.3d 1077, 1083 (9th Cir. 2011); *United States v. Grober*, 624 F.3d 592, 611 (3d Cir. 2010); *Dorvee*, 616 F.3d at 186; *United States v. Stark*, 2011 WL 555437 *7 (D. Neb. Feb. 8, 2011) (guidelines for child pornography "illogically skews sentences for 'average' defendants to the upper end of the statutory range, regardless of the particular defendant's acceptance of responsibility, criminal history, specific conduct, or degree of culpability, thus blurring distinctions between the least culpable and the worse offenders"); *United States v. Mood*, 741 F. Supp. 2d 821, 825 (E.D. Mich. 2010).

³⁶ 2010 Sourcebook tbl. 14.

Commentators have criticized child pornography statutes and guidelines as unsound policy that contributes to disproportionate sentences and disparity, and which is unsupported by empirical evidence. *See, e.g.*, Carissa Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 Wash. U. L. Rev. 853 (2011); Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric*, 22 Stan L. & Pol’y Rev. 545 (2011) (reviewing history of federal child pornography laws, case law, and empirical research); Jesse Basbaum, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 Hastings L. J. 1281 (2010).

B. Sentences for Child Pornography Offenders are Disproportionately Severe.

Notwithstanding the high rates of below guideline sentences and the widespread criticism of the child pornography guideline, sentences for child pornography are among the highest of all federal offenses. For 2010, the average term of imprisonment for a child pornography offense was 120.1 months.³⁷ This was higher than the average sentence for sexual abuse (113.8 months), robbery (80.8 months), arson (78.2 months), firearms (91.1 months), manslaughter (73.5 months), and assault (49.1 months).³⁸ Only murder (288 months) and kidnapping/hostage taking (168.9 months) had higher average sentences.³⁹ The average term of imprisonment for a child pornography offender in criminal history category I was 109.6 months – more than the 105.4 month average sentence given to career offenders convicted of assault, and more than most of the average sentences given to Criminal History Category VI offenders, including those convicted of assault (70.8 months), robbery (88.9 months), and arson (102.3 months).⁴⁰

The disproportionate severity of federal sentences for child pornography is also apparent when federal sentences are compared to state sentences.⁴¹ Data from the Pennsylvania Commission on Sentencing show that in the three-year period from 2008 to 2011, 260 offenders were sentenced for a first offense of possession of child pornography. *See* Attached Exhibit D. Of those, only 29 offenders were sentenced to state prison, the remaining offenders were given terms in the county jail (108 offenders), community sentences (17), or probation (105 offenders).

³⁷ 2010 Sourcebook tbl. 14.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ The federal child pornography laws are also significantly harsher than those in Canada. There, possession of child pornography and accessing child pornography is subject to a minimum term of forty-five days and a maximum of five years. *See* R.S.C. § 163.1(4) – (4.1).

Of the few offenders sentenced to state prison, the average minimum and maximum terms were 12.2/53.5 months in 2008, 10.1/60 months in 2009, and 11.8/39.4 months in 2010.⁴²

Data on persons convicted of possession of child pornography in Harris County, Texas between January 2008 through December 2010 reveal that 55 offenders received an average sentence of 72 months, with a median of 36 months.⁴³ Another 33 defendants were placed on probation for terms ranging from two to ten years following deferred adjudications of guilt.⁴⁴

C. Child Pornography Offenders Have Low Recidivism Rates and They Should Not Be Treated As if They Committed Contact Sex Offenses.

No reliable evidence supports the common myth that the majority of offenders involved with child pornography pose a risk of committing a contact offense. The most frequently cited study to support this myth is the “Butner study.” But even the author of that study states: “[s]ome individuals have misused the results of [the Butner study] to fuel the argument that the majority of CP offenders are indeed contact offenders and therefore, dangerous predators. This simply is not supported by the scientific evidence.”⁴⁵ The Butner study has also been vetted and debunked in litigation and by other researchers.⁴⁶ The few other studies cited in support of a link between viewing child pornography and child molestation have been similarly rejected as unsound or unpersuasive. *See, e.g., United States v. C.R.*, ___ F. Supp. 2d. ___, 2011 WL

⁴² Pennsylvania has an advisory guidelines system. Sentencing options include, *inter alia*, state imprisonment, incarceration in the county jail, restrictive intermediate punishments, or probation. *See generally Pennsylvania Sentencing Guidelines Manual* 9-11 (6th ed. Rev. 2008). Restrictive intermediate punishment is a community correctional program that may house the person in the community full or part-time, restrict offender’s movement, and monitor program compliance. *Id.*

⁴³ *See* Attached Exhibits B & C. This data was compiled by an investigator in the Office of the Federal Public Defender for the Southern District of Texas based upon records obtained from the Harris County District Clerk.

⁴⁴ *Id.*

⁴⁵ Andrea E. Hernandez, *Psychological and Behavioral Characteristics of Child Pornography Offenders in Treatment* (Apr. 5-7, 2009) (unpublished manuscript), http://www.iprc.unc.edu/G8/Hernandez_position_paper_Global_Symposium.pdf.

⁴⁶ *See United States v. Johnson*, 588 F. Supp. 2d 997, 1005-07 (S.D. Iowa 2008); Richard Wollert, Ph.D., et al., *Federal Internet Child Pornography Offenders – Limited Offense Histories and Low Recidivism Rates* (2011) (Chapter 2 of forthcoming book entitled *The Sex Offender*, Volume VII) (Prepublication author’s proof attached as Exhibit A); Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric*, 22 *Stan L. & Pol’y Rev.* 545 (2011) (discussing problems with Butner study including sample bias and possible over reporting of past history of abuse to curry favor with clinicians).

1901645, *28-30 (E.D.N.Y. May 26, 2011) (discussing statistical unreliability of many studies and dubious value of anecdotal inquiries).

We have in our past comments discussed empirical research showing that few internet child pornography offenders commit contact offenses against children,⁴⁷ and that internet offenders are less likely to recidivate or commit more serious contact offenses than other sex offenders. Michael Seto and his colleagues recently concluded that “online offenders who had no history of contact offenses almost never committed contact sexual offenses.”⁴⁸

Richard Wollert, Ph.D, a clinical treatment provider and expert on the prediction of sexual recidivism, along with his colleagues, Jacqueline Waggoner, Ed.D, and Jason Smith, Psy.D. have added to the growing body of empirical research with a study specifically aimed at federal internet child pornography offenders. In a forthcoming chapter in a new edition of *The Sex Offender*,⁴⁹ Dr. Wollert and his colleagues catalog the litany of issues that have arisen with the child pornography guidelines and discuss the need for more empirical research to guide the

⁴⁷ See Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee to the Honorable Patti Saris, Chair, U.S. Sentencing Comm’n, at n. 40 (June 6, 2011); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee to the Honorable Patti Saris, Chair, U.S. Sentencing Comm’n (Aug. 18, 2010). The relevant research includes: 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), <http://sax.sagepub.com/cgi/content/abstract/19/4/449>; Kelly M. Babchishin, et. al, *The Characteristics of Online Sex Offenders: A Meta-Analysis*, *Sexual Abuse: J. of Research and Treatment*, Vol. 23, No.1 (Mar. 2011).

⁴⁸ Michael C. Seto et al., *Contact Sexual Offending by Men with Online Sexual Offenses*, 23 *Sex. Abuse: J. of Research & Treatment* 124, 137 (2011). See also Michael Seto, *Assessing the Risk Posed by Child Pornography Offenders* (2009) (paper prepared for G8 Global Symposium), http://www.iprc.unc.edu/G8/Seto_Position_Paper.pdf (reviewing studies, which show that child pornography offenders with no history of contact sex offenses present low risk of sexually abusing a child).

⁴⁹ *The Sex Offender* is a multi-volume publication of the Civic Research Institute, which is a reference book on sex offenders for clinical and criminal justice settings. See Civic Research Institute, <http://www.civicrosearchinstitute.com/tso.html>

Commission's decisions. See Richard Wollert, Ph.D., et al., *Federal Internet Child Pornography Offenders – Limited Offense Histories and Low Recidivism Rates* (2011) (Chapter 2 of forthcoming book entitled *The Sex Offender, Volume VII*) (Prepublication author's proof attached as Exhibit A). Dr. Wollert's greatest contribution, however, is in his analysis of published studies and the report of his own independent research with federal child pornography offenders on supervision.

In an analysis of nine of the quantified and published studies of child pornography offenders, Dr. Wollert and his colleagues conclude that the studies confirm "some important hypotheses about" child pornography offenders:

Over time (from 1990 to 2010) and space (Switzerland, Canada, the United States, the United Kingdom, and other countries), the great majority of CPOs [child pornography offenders] have not had problems with sexual contact crimes prior to being convicted of a child pornography offense, and the great majority will not have post-conviction problems with the commission of sexual contact crimes. It also seems to be the case that CPOs, although more limited in their intimate social relations than others, are compliant with supervision and able to draw on substantial personal resources to benefit from treatment and rebuild their lives.

Wollert, *supra*, at 2-13.

Noting the absence of a well-designed study of a representative sample of *federal* child pornography offenders, Wollert and his colleagues undertook a study of seventy-two federal child pornography offenders on supervision and in treatment. Over an average span of four years, only two of the child pornography offenders had been arrested for another child pornography offense. "None of the CPOs was arrested on charges of child molestation however, and no one who had successfully completed supervision was charged with either a contact or noncontact sex offense." Wollert, *supra*, at 2-18.

Also noteworthy is the observation of Wollert and his colleagues regarding their experience in providing federally contracted treatment services to child pornography offenders:

[C]onsistent with other findings, it has been our clinical experience that the great majority of offenders in the group generally do quite well in treatment, supervision, and post-supervision, and are able to conform their behavior to society's expectation. 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 and in another follow-up study that recruited CPOs from three different outpatient treatment programs. (Webb et al., 2007). 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 1 and 15% –

meet the diagnostic criteria for pedophilia (American Psychiatric Association, 2000). We therefore believe it is precipitous to claim that the use of child pornography may be taken as an indicator of pedophilia (Seto et al., 2006) in the absence of research on a representative sample of federal CPOs in which physiological and psychological testing are combined with true diagnostic assessment.

Wollert, *supra*, at 2-18.

In the absence of solid empirical evidence that (1) child pornography offenders want to actually engage in sex with children; and (2) possession of child pornography increases the likelihood that those individuals will sexually abuse a child, severe sentences for child pornography offenders cannot be justified on the grounds of preventive detention or selective incapacitation.⁵⁰

D. Offense Levels for Persons Convicted of Possession or Receipt of Child Pornography Should Not Be Based Upon A Fear that a Small Percentage Might Commit a Contact Sex Offense.

We think it inappropriate to set offense levels for persons convicted of child pornography receipt or possession based upon a fear that a small percentage might commit a contact sex offense. Preventative detention for an entire class of persons – only some of whom may present a risk to reoffend – is unnecessary in light of the entire statutory scheme governing the civil commitment and supervised release of sex offenders. First, the civil commitment laws are expressly designed to identify, treat, and detain those persons who are considered sexually dangerous predators. 18 U.S.C. § 4248 (providing for civil commitment of “sexually dangerous” persons in the custody of the Bureau of Prisons). It is far better for a court to make this determination in an individual case after having the benefit of experts and a full adversarial proceeding rather than for the Commission to recommend a longer period of incarceration based upon the defendant’s membership in a class of persons who may or may not present a risk to others. If the Commission were to recommend higher sentences because of the perceived risk that a child pornographer may commit a contact offense, it would “in effect circumvent[] the civil commitment procedure and the procedural and substantive protections that go along with it: specifically the clear and convincing evidence standard.” *United State v. Pinson*, 542 F.3d 822, 939 (10th Cir.), *cert. denied*, 129 S. Ct. 657 (2008). Moreover, the “prediction of the risk the defendant will pose to the public upon release, made before treatment, is far more imprecise” than an evaluation of risk undertaken after incarceration. *Id.*

⁵⁰ “[A]ny sophisticated sentencing policy predicated on the theory of incapacitation must be able to reduce crime without significantly increasing the overall number of persons incarcerated.” Hessick, *supra*, at 875. Here, simply no evidence shows that the costs of incarcerating child pornography offenders for long period of times lessens the prevalence of child sex abuse.

Second, U.S. Probation has the ability to manage whatever risk child pornography offenders may present in the community. In June 2011, U.S. Probation revised its sex offender policy and procedural manual.⁵¹ While the details of the procedures are held confidentially by U.S. Probation, the new policy emphasizes evidence-based interventions. *See Guide to Judiciary Policy*, Vol. 8, Part I (2011). The policy also recognizes that “[n]ot all persons charged with or convicted of sex offenses are alike” so the officer’s supervision technique should be specifically designed to meet the individual risks and therapeutic needs of the individual offender. Particularly noteworthy is the policy’s admonition for officers to “monitor research publications and use the most effective, evidence-based intervention.” *Id.* Given the ever-growing body of research to help supervision officers target resources and interventions to those factors that place a person most at risk of committing a new offense or violating a condition of release, the Commission should have confidence in the ability of probation to manage sex offenders of all kinds. *See generally* Center for Sex Offender Management, *Enhancing the Management of Adult and Juvenile Sex Offenders: A Handbook for Policymakers and Practitioners* (July 2007); Center for Sex Offender Management, *Managing the Challenges of Sex Offender Reentry* (Feb. 2007).

The experience of Dr. Wollert and his colleagues also shows that U.S. Probation is capable of contracting with competent treatment providers who have had considerable success in working with persons convicted of child pornography offenses and helping them get their lives on track. *See also* L. Webb, J. Craiassait, and S. Keen, *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, 18 *Sexual Abuse: J. of Research & Treatment* 449 (2007) (follow-up research suggested that internet sex offenders were significantly less likely to fail in the community than child molesters in terms of all types of recidivism).

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

⁵¹ Nancy Gregorie, *Memo on New Sex Offender Management Policy and Procedures* (June 27, 2011), jnet.ao.dcn/

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 run of the mill case.

To this end, the Commission should:

- Lower the guideline's base offense levels and eliminate the difference in the base offense level for possession and receipt of child pornography. No meaningful difference exists between these offenses.
- Eliminate the enhancement for use of a computer during the course of the offense (U.S.S.G. §2G2.2(b)(6)). This enhancement applies in nearly every case and bears no relevance to the severity of the offense or the relative culpability of the offender.⁵²
- Eliminate the enhancement for images of a prepubescent minor or a minor under the age of 12 (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.⁵³
- 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, including through automatic file sharing, 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.⁵⁴
- 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."⁵⁵

⁵² USSC, *Use of Guidelines and Specific Offense Characteristics* 38 (2010) (enhancement applied in 96.2% of cases) (hereinafter *Use of Guidelines*); *Dorvee*, 616 F.3d at 186 (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").

⁵³ *Use of Guidelines*, at 38 (enhancement applied in 95.6% of cases).

⁵⁴ See *United States v. Donaghy*, 2010 WL 2605375, *3 (E.D. Wis. June 24, 2010) ("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.")

⁵⁵ *Hanson*, 561 F. Supp. 2d at 1009.

- Amend USSG §5D1.2 so that internet child pornography offenders are not exposed to life-time supervision like contact sex offenders.⁵⁶

IV. Proposed Priority #6: Crimes of Violence, Aggravated Felonies, Violent Felonies, and Drug Trafficking Offenses

The Commission requests comment on whether it should place among its priorities a continued study of the statutory and guideline definitions of “crime of violence,” aggravated felony,” violent felony,” and “drug trafficking offense.” Among the issues the Commission proposes considering is “an amendment to specify the types of documents to be considered under the ‘categorical approach,’ for determining the applicability of guideline enhancements;” “an examination of relevant circuit conflicts” regarding whether any offense categorically falls within a recidivism sentencing provision; and a “possible report to Congress making recommendations on any statutory changes that may be appropriate to relevant statutes, such as 8 U.S.C. § 1326.”

While we believe that the Commission should continue to pursue this important subject, we are concerned that the focus of the proposed priority is too narrow. In the current Guidelines Manual, applications of these “recidivist” definitions are exceedingly complex; they lack any empirical basis, and fail to track the statutes they are meant to implement; and they lead to inconsistent results and disparate impacts. We believe that the Commission should more broadly study the use of recidivist definitions, with four goals in mind: (1) that the definitions apply generally, across the entire Manual; (2) that they be relatively easy to apply; (3) that they do not exceed their statutory basis, or alternatively their empirical justification; and (4) that the Commission generally recognize, and account for, the fact that any such definitions will be both over- and under-inclusive. Achieving these goals is all the more important because, as the Commission knows, most criminal cases in federal court involve guideline sections that include one or more of the listed recidivist definitions.

A. The Commission Should Consolidate and Clarify Its Definitions of “Crime of Violence,” “Controlled Substance Offense,” and “Drug Trafficking Offense.”

For many of our clients, the amount of time they will serve behind bars depends upon whether they are subject to recidivist sentencing provisions. The definitions of terms used in recidivist enhancements, such as “crime of violence,” “controlled substance offense,” and “drug trafficking offense,” have presented some of the most complex, time-consuming, and significant

⁵⁶ *Apodaca*, 641 F.3d at 1085 (Fletcher, J., concurring) (statute and guidelines governing supervised release for persons convicted of possession of child pornography “grossly overestimate the risk that defendants . . . who are convicted of possessing child pornography downloaded from the Internet, and who have no prior contact child sexual abuse convictions, will commit contact sex offenses against children”).

litigation issues in federal sentencing practice. Issues surrounding these definitions account for a sizable share of federal criminal appeals. *See 2010 Sourcebook* tbl. 59 (challenges to a court's determination on whether a prior offense meets the criteria under §§4B1.4 (Armed Career Criminal, 18 U.S.C. § 924(e)), 4B1.2, and 2L1.2 comprise a significant number of the issues appealed under the criminal history and immigration guidelines).

The application of more than a dozen different guidelines throughout Chapter 2, 3, 4, 5, and 7 turns on the definition of “crime of violence.”⁵⁷ The term “controlled substance offense,” defined at §4B1.2, governs the application of six different guidelines.⁵⁸ An entirely different term – “drug trafficking offense” – governs the application of §§2L1.2(A),(B), and (E). Another term, “serious drug trafficking offense” applies under §5K2.20, comment. (n.1). Yet another term, “drug trafficking crime” applies under USSG §3B1.5. Statutory provisions relevant to sentencing, which may or may not overlap with the guideline terms, include “violent felony,” 18 U.S.C. § 924(e); “serious drug offense,” 18 U.S.C. § 924(e); “drug trafficking crime,” 18 U.S.C. § 924(c); “crime of violence,” 18 U.S.C. § 16; “crime of violence,” 18 U.S.C. § 924(c)(3); “aggravated felony,” 8 U.S.C. § 1101(a)(43); and “serious violent felony.” 18 U.S.C. § 3559(c).

The guidelines and the criminal code even contain different definitions for “felony.” In some provisions, it means “an offense punishable by a maximum term of imprisonment of more than one year,” 18 U.S.C. § 3156; *see also* USSG §4B1.2, comment. (n.1) (“an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specially designated as a felony and regardless of the actual sentence imposed”). *Cf.* 18 U.S.C. § 3559(a) (offenses carrying more than one year imprisonment classified as felonies). In another, it means “any Federal or State offense classified by applicable Federal or State law as a felony.” 21 U.S.C. § 802(13).

Litigation about the meaning of these various terms and their relation to one another has been extensive. One of the frequently litigated issues involves the interplay of the “crime of violence” definitions in the guidelines and 18 U.S.C. § 924(e). Numerous circuits have held that the guideline definition of “crime of violence” in USSG §4B1.2 must be interpreted the same as 18 U.S.C. § 924(e).⁵⁹ Those holdings are consistent with Amendment 270, which states that “[t]he definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e).

⁵⁷ *See* USSG §§2D1.1(d)(2); 2K1.3(a)(1) and (2); 2K2.1(a)(1) ,(2) (3); 2L1.2 (b)(1)(A) and (E), 2S1.1(b)(1); 3B1.5; 4A1.1(e), 4A1.2(p); 4B1.1(a); 4B1.2 (a) and (c); 4B1.4(b)(3)(A) and (c)(2); 5G1.2,comment. (n.2); 5G1.3, comment. (n.2); 5K2.17; and 7B1.1(a)(1).

⁵⁸ USSG §§2K1.3(a)(2); 2K2.1(a)(1) – (4); 4B1.1(a); 4B1.4 (b)(3) and (c); 5K2.17; and 7B1.1.

⁵⁹ *See United States v. McMurray*, ___ F.3d ___, 2011 WL 3330061, *17 n.1 (6th Cir. Aug. 4, 2011); *United States v. Peterson*, 629 F.3d 432, 439 (4th Cir. 2011) (*Begay's* analysis applies to §4B1.2 because language is “identical” to ACCA).

USSG, App. C, Amend. 270 (Nov. 1, 2003). *But see* USSG §4B1.4 comment. (n.1) (noting that definitions of “crime of violence” and “violent felony” are not identical).

Courts, however, vary in how they interpret the commentary to §4B1.2. The commentary enumerates a series of offenses included within the definition of “crime of violence.” As a result of this commentary, some courts have acknowledged that “the practice of interchanging the two provisions cannot be followed universally” because the commentary does not apply to section 924(e).” *United States v. Watson*, ___ F.3d ___, 2011 WL 3568918, *7 n.6 (8th Cir. Aug. 16, 2011) (citing *United States v. Ross*, 613 F.3d 805, 809-10 (9th Cir. 2010)). This is an argument often advanced by the government. *See United States v. Peterson*, 629 F.3d 432, 434 (4th Cir. 2011) (in arguing that involuntary manslaughter qualified as crime of violence, government argued that *Begay v. United States*, 553 U.S. 137 (2008), did not apply to sentencing guidelines, “which have their own binding interpretive rubrics”).

Other courts, however, have adhered to the view that even if an offense is enumerated in the commentary to §4B1.2, it does not qualify as a crime of violence unless it is at least purposeful or intentional. *See United States v. Armijo*, 2011 WL 2687274, *7 (10th Cir. July 12, 2011) (even though the commentary to §4B1.2 enumerates “manslaughter” as a crime of violence, a Colorado manslaughter does not qualify because it involves only reckless conduct, not purposeful or intentional conduct); *United States v. Peterson*, 629 F.3d 432, 438 (4th Cir. 2011) (North Carolina involuntary manslaughter does not qualify as a crime of violence); *United States v. Ossana*, 638 F.3d 895, 899-901 (8th Cir. 2011) (even though commentary to §4B1.1 enumerated “aggravated assault” as a crime of violence, Arizona conviction for aggravated assault did not qualify as “crime of violence” because it encompassed mere reckless use of vehicle).

Another area of litigation revolves around the difference, if any, between the “elements” of an offense, 18 U.S.C. § 924(e), and the “conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted.” USSG §4B1.2, comment. (n.1). Whether this language differs from the categorical approach’s examination of the elements of a statute is subject to considerable debate. In one case, the question sharply divided a panel of the Fifth Circuit, producing three separate opinions. *See United States v. Lipscomb*, 619 F.3d 474, 478 (5th Cir. 2010), cert. denied, 131 S. Ct. 2475 (2011). In *Lipscomb*, the court held that the defendant’s instant offense of conviction under 18 U.S.C. § 922(g) was a crime of violence because the indictment charged him with possessing a sawed off shotgun even though the elements of the offense only required that he possess a firearm.⁶⁰ Judge Jolly rejected the argument that the

⁶⁰ Even though *Lipscomb* involves the application of §4B1.2’s definition of a crime of violence to the instant offense, the same definition governs the analysis of predicate convictions. *See* USSG §4B1.2, comment. (n. 2).

categorical examination of the elements of an offense required by *Taylor v. United States*, 495 U.S. 575 (1990) applied to §4B1.2. According to Judge Jolly, “had the Sentencing Commission intended the sentencing court to be bound by the statute of conviction, its reference in Application Note 1 to the ‘conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted’ would be superfluous.” *Id.* at 478. Judge King, writing separately, agreed that an “elements-based categorical approach is inappropriate.” *Id.* at 479. Judge Stewart, dissenting, reasoned that under the modified categorical approach, a court may “consider only the elements contained within the statutory definition of the crime.” *Id.* at 492.⁶¹

The above discussion demonstrates just some of the complex issues arising under the ACCA’s definition of “violent felony” and the §4B1.2’s definition of “crime of violence.”⁶² The best way to reduce litigation, avoid confusion, and ensure more consistent application is to adopt a uniform definition of “crime of violence” for the guidelines, which focuses on the elements of the offense. *See* Discussion Part B, *infra*.

B. The Guideline Definitions Should Apply a Categorical Approach That Relies Solely on the Elements of the Prior Conviction.

Setting aside the problems that arise from the use of multiple definitions in the guidelines and statutes, other complicated issues arise in sorting through enumerated offenses in USSG §§4B1.1 and 2L1.2, and applying the residual clause in USSG §4B1.2 (as well as 18 U.S.C. § 924(e)). Both the enumerated offenses and the residual clause result in extensive litigation over arcane questions of law that have little to do with the defendant or his offense,⁶³ and which result in Circuit splits.⁶⁴

In setting forth their respective definitions of “crime of violence,” the commentaries in §§4B1.2 and 2L1.2 list over a dozen separate offenses. In determining whether any particular state or federal offense falls within any of these enumerated offenses, a court must engage in a complicated, time-consuming exercise. A court must (1) determine the generic, contemporary meaning of those offenses by examining state criminal codes, Model Penal Codes, criminal law

⁶¹ Other courts have drawn a distinction between examining the elements of the offense and the actual conduct with which the defendant was charged. *See United States v. Young*, 990 F.2d 469, 471 (9th Cir. 1993); *United States v. Searcy*, 299 F. Supp. 2d 1285, 1288 (S.D. Fla. 2003).

⁶² One need only look to the Commission’s *Immigration Primer*, *Drug Primer*, and *Firearms Primer* to see the breadth of issues that arise under recidivist enhancements.

⁶³ *See* Statement of Henry J. Bemporad Before the United States Sentencing Comm’n, Phoenix, AZ, at 11-16 (Jan. 21, 2010).

⁶⁴ *See generally* Megan A. Embrey, *A Circuit Split Survey on Violent Felonies and Crimes of Violence: Where Does the Tenth Circuit Stand?*, 88 Den. U. L. Rev. 469 (2011).

treatises, secondary sources, and dictionaries;⁶⁵ (2) examine the state statute of conviction, review state case law, and (3) determine if the offense fits within the generic meaning.⁶⁶

An analysis of offenses under the “residual clause” is even more daunting. Until this year, the Supreme Court had decided three cases on the scope of the residual clause and how it should be applied: *James v. United States*, 550 U.S. 192 (2007) (Florida attempted burglary is similar in degree of risk to enumerated offense of burglary); *Begay v. United States*, 553 U.S. 137 (2008) (driving under the influence of alcohol is not similar in kind to an enumerated offense); and *Chambers v. United States*, 129 S. Ct. 687 (2009) (failure to report to custody is neither similar in kind nor degree of risk posed to enumerated offenses). The Court in *Begay* set forth a test that required offenses under the residual clause to be “similar in kind as well as in degree of risk posed” to the enumerated offenses. 553 U.S. at 144. To be similar in kind, the offense must be “purposeful, violent, and aggressive.” *Id.* at 145-48. For three years, *Begay* governed litigation under the residual clause. This year, however, the Court introduced a new test focused on risk, but did not clearly delineate whether or when one test applied over the other. *Sykes v. United States*, 131 S. Ct. 2267 (2011) (Indiana conviction for knowing or intentional flight from law enforcement officer by vehicle was a violent felony).

The aftermath of *Sykes* remains to be seen, but it clearly will create more rather than less litigation. Shortly after *Sykes*, Justice Scalia wrote a harsh criticism of the Court’s residual clause cases – calling them “incomprehensible to judges” and characterizing the residual provision itself as a “farce playing in federal courts throughout the Nation.” *Derby v. United States*, 131 S. Ct. 2858, 2859 (2011).

We think the time has come to put the residual clause to rest as an unworkable formulation. The Commission is in a unique institutional role to intelligently survey the various options, and arrive at a single, workable, definition of crime of violence that targets truly violent offenders. One approach would be to limit crimes of violence to those that have as an element the use, attempted use, or threatened use of physical force against the person of another. This definition already appears in the commentary to USSG §2L1.2, comment. (n.1(B)(iii)), and is consistent with (though narrower than) the statutory definition used for the aggravated felony

⁶⁵ *United States v. Garcia-Caraveo*, 586 F.3d 1230, 1233 (10th Cir. 2009); *United States v. Fierro-Reyna*, 466 F.3d 324, 326-27 (5th Cir. 2006).

⁶⁶ *See, e.g., United States v. Dominquez-Ochoa*, 386 F.3d 639, 646 (5th Cir. 2004) (Texas crime of criminally negligent homicide was not equivalent to manslaughter); *United States v. Ramirez-Garcia*, 646 F.3d 778, 2011 WL 2684908, at *3 (11th Cir. 2011) (examining contemporary generic meaning of “sexual abuse of a minor” and applying it to North Carolina conviction for taking indecent liberties with a child); *United States v. Escobar-Pineda*, 2011 WL 2183724, at *1 (11th Cir. June 6, 2011) (applying generic meaning of aggravated assault from court’s earlier decision in *United States v. Palomino Garcia*, 606 F.3d 1317, 1326 (11th Cir. 2010), to Florida aggravated assault with a deadly weapon).

enhancement. It also tracks the definition of crime of violence in §4B1.2 and the definition of violent felony in 18 U.S.C. § 924(e).

We also think it important that any definition the Commission uses be confined to the elements necessary to sustain a conviction, and not permit a broader look at the conduct charged in the indictment or information. The approach set forth by the majority in *Lipscomb*, discussed above, is unfair and unwise. Fairness to the defendant requires that the government should only be allowed to use a charging document to show the facts necessary to sustain the conviction. Otherwise, a defendant is at the mercy of a prosecutor's broad discretion to include within a charging document a litany of allegations that are extraneous to the offense. A broad examination of the conduct set forth in an indictment may subject a defendant to an enhanced sentence even though the defendant never admitted the additional allegations and a jury never found such allegations proven beyond a reasonable doubt

In addition to providing a definition that is easily applied under the categorical approach, narrowing the definition of "crime of violence" would help ameliorate the "grossly unjust results" the guidelines produce, and the "arbitrary distinctions . . . that just don't square with reality."⁶⁷

C. The Guidelines Should Limit the Range of Documents A Court May Consider to Those Approved in *Shepard v. United States*, 544 U.S. 13 (2005).

The issue for comment asks whether the Commission should consider an amendment "to specify the types of documents to be considered under 'the categorical approach.'" Notice of Proposed Priorities, at 4. We think it would be a grave mistake for the Commission to amend the guidelines in a way that would set up a different method for determining the nature of prior convictions under the guidelines than what courts use to determine the nature of prior convictions for purposes of statutory sentencing enhancements.

First, the primary recidivist statutes, like the Armed Career Criminal Act, focus on what the defendant was convicted of, not what acts the defendant committed, and not the facts involved in the offense of conviction. *Taylor*, 495 U.S. at 600 ("Section 924(e)(1) refers to 'a person who . . . has three previous convictions' for – not a person who has committed – three previous violent felonies or drug offenses."). See 28 U.S.C. § 994(h) (refers to person "previously convicted of two or more prior felonies"); 8 U.S.C. § 1326 (b)(2) (refers to person whose "removal was subsequent to conviction for aggravated felony"); 21 U.S.C. § 841 (refers to person who commits violation "after a prior conviction for a felony drug offense").

⁶⁷ USSC, Transcript of Public Hearing, Atlanta, GA, at 134. 152 (Feb. 11, 2009) (Hon. Gregory A. Presnell) (addressing §2L1.2).

Second, criminal history issues are complicated enough. Separate rules would generate more confusion and more litigation. Under *Shepard*, litigants know that in determining the applicability of guideline enhancements or statutory sentencing enhancements, the court may look only to documents that reliably reflect the offense of which the defendant was convicted, *i.e.*, “*Shepard* approved” documents.⁶⁸

Third, if the Commission were to specify documents other than *Shepard* approved documents to be considered under the guidelines, it would undo the categorical approach. The Court made clear in *Shepard* that its holding was necessary to preserve *Taylor*’s categorical approach. The Court reasoned that permitting the courts to look at anything but a narrow range of documents was incompatible with *Taylor* and would upset settled precedent. *Shepard*, 544 U.S. at 23 and n.4.⁶⁹ Because the categorical approach “achieves uniformity in enforcement of federal sentencing enhancements,” *United States v. Peterson*, 629 F.3d 432, 436 (4th Cir. 2011), the Commission should not amend the guidelines in a way that would undermine it.⁷⁰

Fourth, the *Taylor/Shepard* approach to determining the nature of prior convictions is the most “pragmatic” and workable solution. *Shepard*, 544 U.S. at 20. The categorical approach set forth in *Taylor* and *Shepard* is driven by the need to avoid elaborate, protracted “collateral trials” about prior proceedings. *Shepard*, 544 U.S. at 23. If the Commission were to expand the scope of documents that could be considered in determining the nature of a prior conviction, it would

⁶⁸ Courts use the categorical approach set forth in *Taylor* and *Shepard* in determining whether prior convictions qualify for guideline enhancements based upon criminal history. *See United States v. Palomino Garcia*, 606 F.3d 1317, 1328 (11th Cir. 2010) (noting numerous other circuits that have rejected government’s argument that categorical approach does not apply to determination of whether offense is crime of violence); *United States v. Rios-Hernandez*, 645 F.3d 456, 464 n.3 (1st Cir. 2011); *United States v. Savage*, 542 F.3d 959, 966 (2d Cir. 2008); *United States v. Acosta-Brito*, 312 Fed. Appx. 491, 493 (3d Cir. 2009); *United States Savillon-Matute*, 636 F.3d 119, 123 n.6 (4th Cir. 2011) (noting distinction between *Shepard*’s statutory holding, which applies to the guidelines, and Sixth Amendment holding, which may not); *United States v. McCann*, 613 F.3d 486, 502 (5th Cir. 2010); *United States v. McFalls*, 592 F.3d 707, 715 (6th Cir. 2010); *United States v. Black*, 636 F.3d 893, 898 n.1 (7th Cir. 2011); *United States v. Williams*, 627 F.3d 324, 328 (8th Cir. 2010); *United States v. Aguila-Montes De Oca*, ___ F.3d ___, 2011 WL 3506442, at* 6 (9th Cir. Aug. 11, 2011) (en banc) (*Taylor/Shepard* framework applies to determination of whether crime qualifies as “crime of violence” for purposes of guideline enhancement); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1120 (10th Cir. 2008); *United States v. De Jesus Ventura*, 565 F.3d 870, 875 (D.C. Cir. 2009).

⁶⁹ The Court’s concern about upsetting *Taylor*’s precedent (discussed in part I of the opinion) often takes a back seat to the Court’s Sixth Amendment analysis in *Shepard* (discussed in part II of the opinion), but it is plain that the Court merely used the Sixth Amendment concerns about expanding the scope of documents as an additional reason not to upset *Taylor*’s categorical approach.

⁷⁰ The Court crafted the categorical approach to avoid having recidivist enhancements depend on the “vagaries of state law.” *Taylor*, 495 U.S. at 579.

invite such mini-trials and courts would be required to resolve a myriad of disputes. See USSG §6A1.3 (Resolution of Disputed Factors); Fed. R. Crim. P. 32(i). Given the large number of criminal cases involving recidivist enhancements under guidelines such as §§2L1.2, 4B1.2, 4B1.4, and 2K2.1, it would be hard to justify asking a busy federal district court to resolve disputes about whether a document accurately and reliably reflects what happened in another criminal case – often years before and in another jurisdiction. Under the *Taylor/Shepard* approach, it is easy to determine what an individual was convicted of: “Simply look to the record of the prior conviction.” *United States v. Hayes*, 555 U.S. 415, ___, 129 S.Ct. 1079, 1092 (2009).

The First Circuit’s opinion in *Shepard* demonstrates the additional litigation over the reliability of documents, and what they actually reflect, that would occur if courts began to use documents other than those approved in *Shepard*. In the first appeal in *Shepard*, the First Circuit did not presume that police reports and complaint applications reliably reflected the nature of the defendant’s guilty plea. Rather, the court required the district court to undertake an extensive inquiry, which included whether the state court taking the guilty plea had before it the police reports or other documents, where the police reports came from, and what took place at the guilty plea hearing. The court also made clear that the defendant should be permitted to contest the facts set forth in the police reports and complaint applications.⁷¹ On remand, the district court held two hearings and reviewed myriad briefs and submissions before finally concluding that the police reports did not provide reliable evidence of what the defendant pled to in state court.⁷²

Fifth, it would be a monumental undertaking for the Commission to identify all of the documents that may be considered under the categorical approach and all of those which may not. Even the courts that attempted to do so before *Shepard* did so after much litigation. State courts do not have standard names for documents. In addition, even within states, there may be different versions of the same documents – some of which may be considered and some not. Compare *United States v. Kirksey*, 138 F.3d 120, 125-26 (4th Cir. 1998) (court may look to affidavits of probable cause from witnesses that were incorporated into statement of charges) with *United States v. White*, 231 Fed. Appx. 301, *1 (4th Cir. 2007) (statement of probable cause did not provide basis for enhancement because it was not incorporated into charging document).

⁷¹ *United States v. Shepard*, 231 F.3d 56, 68 (1st Cir. 2000).

⁷² *United States v. Shepard*, 181 F. Supp. 2d 14, 17-18 (D. Mass. 2002). Before *Shepard*, courts were often saddled with litigation over the reliability of documents used to determine the nature of a prior conviction. *United States v. Delgado*, 288 F.3d 49, 56 (1st Cir. 2002) (acknowledging that police reports may not be reliable in all respects but finding it acceptable to determine the location of a breaking and entering); *Kirksey*, 138 F.3d at 125-26. Many courts before *Shepard* declined to consider any documents other than charging documents and jury instructions, recognizing the difficulty in resolving factual disputes based upon documents drafted years earlier. See *United States v. Shannon*, 110 F.3d 382, 384-85 (7th Cir. 1997) (en banc).

D. The Guideline Definitions Should be Narrower, Not Broader, Than the Various Statutory Definitions Congress Has Used.

Several of the key definitions the guidelines use are broader than what Congress required.⁷³ Here, we discuss two of particular importance to Defender clients: the definitions of “controlled substance offense” and “prior felony conviction” in §4B1.2.⁷⁴

Section 994(h) directed the Commission to “assure that the guidelines specify a sentence to a term of imprisonment at or near the” statutory maximum for a defendant convicted of a “felony” that is a “crime of violence” or one of several enumerated *federal* drug trafficking offenses. Rather than follow the directive, the Commission substantially expanded the class of persons subject to the career offender provisions by including state drug offenses, which are often minor offenses involving small quantities for personal use or small sales to support drug use.⁷⁵

As the Commission acknowledged in its *Fifteen Year Review*, the use of these prior drug trafficking convictions to define career offenders has a significant adverse impact on African-American and other Black offenders. And it does so without clearly promoting an important purpose of sentencing. The Commission’s study showed that the recidivism rate of offenders qualifying on the basis of prior drug offenses was substantially lower than the rate for those qualifying on the basis of prior violent offenses, and more closely resembled the recidivism rate of defendants in the criminal history category that would have otherwise applied. *Fifteen Year Review* 131, 133-34.

Because the guidelines define “prior felony conviction” in broad terms, many defendants are classified as career offenders when they are actually convicted of state misdemeanors and receive insignificant jail terms or no jail at all. See *United States v. Colon*, 2007 WL 4246470, *6 (D. Vt. Nov. 29, 2007) (Sessions, J.) (imposing 64 month sentence after downwardly departing from career offender guideline; defendant classified as career offender based on state misdemeanor convictions for which he served no time in a state correctional facility).⁷⁶ Because

⁷³ For example USSG §§2L1.2, comment. (n.1(B)(3)), and 4B1.2, comment. (n.1), contain many more enumerated offenses than does 18 U.S.C. § 924(e).

⁷⁴ See generally Amy Baron-Evans, Jennifer Coffin, and Sara Silva, *Deconstructing the Career Offender Guideline*, 2 *Charl. L. Rev.* 39 (2010) (comprehensive discussion of how the career offender guideline exceeds the express terms of 28 U.S.C. § 994(h).

⁷⁵ See *id.* at 52-58.

⁷⁶ See, e.g. *United States v. Camara*, 81 Fed. Appx. 135, 135 (9th Cir. 2003) (California possession for sale conviction counted as a felony even though sentence was suspended and defendant was civilly committed for narcotics treatment); *United States v. Damon*, 595 F.3d 395, 399-400 (1st Cir. 2010) (Massachusetts misdemeanor drug conviction with two year maximum sentence counted as felony under

these offenses are considered less serious and do not carry with them the significant collateral consequences of a felony conviction, the state courts and litigants do not treat them with the same level of scrutiny as they would a felony. Yet, under §4B1.2's definition of "felony," these are treated the same as felonies, resulting in unwarranted uniformity among dissimilarly situated defendants.⁷⁷

The commentary to §4B1.2 defines a "prior felony conviction" as a "prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specially designated as a felony and regardless of the actual sentence imposed." This definition is broader than that set forth in 21 U.S.C. § 802(13), which defined the term "felony" when § 944(h) was enacted in 1984 and continues to do so. Section 802(13) defines felony as "any Federal or State offense classified by applicable Federal or State law as a felony."

Until it amends the guideline so that it applies only to offenders described in 28 U.S.C. § 994(h), courts will undoubtedly continue to disagree with how it classifies too many offenders as career criminals when in fact, they are not.⁷⁸

guidelines); *United States v. Boyd*, 218 Fed. Appx. 539, 541-42 (7th Cir. 2007) (misdemeanor battery conviction counted as felony). *But see United States v. Bridgeforth*, 441 F.3d 864, 870-71 (9th Cir. 2006) (California assault conviction not a felony because it was treated as misdemeanor under California "wobbler" statute).

⁷⁷ See also Letter from Jon Sands, Chair, Federal Defender Guideline Committee, to the Honorable Ricardo J. Hinojosa, Acting Chair, U.S. Sentencing Comm'n 12-14 (Sept 8, 2008); Baron-Evans et al, *supra* note 74, at 74-75 (discussing disparate treatment resulting from use of misdemeanor assault convictions in the few states where the offense carries a maximum penalty of more than one year).

⁷⁸ See *Vazquez v. United States*, No. 09-5370, 78 U.S.L.W. 3416 (Jan. 19, 2010) (granting certiorari, vacating the judgment, and remanding for further consideration in light of Solicitor General's position that district court may lawfully conclude that career offender guideline yields a sentencing "greater than necessary" to serve the objectives of sentencing); Brief of the United States, *Vazquez v. United States*, No. 09-5370 (U.S. Nov. 16, 2009); *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010) (en banc); *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009); *United States v. Steward*, 339 Fed. Appx. 650, 653-54 (7th Cir. 2009) (district court abused its discretion in failing to consider defendant's argument based on "Sentencing Commission's own report, questioning the efficacy of using drug trafficking convictions, especially for retail-level traffickers, to qualify a defendant for career offender status"); *United States v. McLean*, 331 Fed. Appx. 151, 152 (3d Cir. June 22, 2009) (remanding so that district court could consider Commission's findings on career offender guideline); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008). See generally Baron-Evans et al., *supra* note 74, at 82-88 (citing numerous cases where courts have departed from the career offender guideline).

The Defenders recognize that narrowing the recidivist definitions may have some adverse consequences. Bright line rules, no matter how well designed, can lead to results that are inconsistent with the purposes of sentencing set forth at 18 U.S.C. § 3553(a). There will always be individuals who do not fit into the general class of persons for whom a particular sentence is intended. The Commission acknowledged this fact when it added a departure provision in §2L1.2, comment. (n. 7) based on the seriousness of the prior conviction.⁷⁹

In combination with significant and consistent narrowing of the recidivist definitions, we encourage the Commission to include a more general departure provision that gives courts latitude to determine whether a defendant's categorization under a recidivist sentencing provision understates, or overstates, the seriousness of the prior offense and the impact it rightfully ought to have on the sentencing decision. In this way, the Commission will further its purpose of avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct, while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices. 28 U.S.C § 991(b)(1)(B).

E. Recommendations on Statutory Changes

The Commission seeks comment on whether it should make recommendations to Congress on changes to relevant statutes, such as 8 U.S.C. § 1326. We think it premature for the Commission to consider making recommendations to Congress about changes to the various definitional sections in the federal recidivist statutes. The approach we propose here – a comprehensive analysis of the various definitions governing recidivist-sentencing enhancements followed by consolidation and clarification of those definitions – is an ambitious undertaking. Once the Commission accomplishes that priority, it will be better situated to determine what, if any, specific recommendations to make to Congress.

V. Proposed Priority #8: Human Rights Offenses

The Commission has proposed as a priority the continuation of a multi-year review on the application of the guidelines to human rights offenses. Because there have been so few prosecutions under the referenced statutes, and no evidence of the inadequacy of the current guidelines, we believe a multi-year study is not warranted at this time.

⁷⁹ In the career offender context, however, the Commission has severely limited departures even though no empirical evidence justified such limits. The one criminal history category limit on downward departures that the Commission promulgated in 2003 is wholly unjustified and contrary to the Commission's own data, which shows that career offenders recidivate at a lower rate than other offenders in a criminal history category of VI. See *Fifteen Year Review* 134.

The genesis for this study appears to be a suggestion by the Department of Justice in 2009 that the Commission postpone referencing the then-new child soldiers crime (18 U.S.C. § 2442) to any specific guideline and instead “undertake a broader review of this and other similar crimes that could result in the promulgation of a new umbrella guideline for human rights offenses, including Genocide (18 U.S.C. § 1091), War Crimes (18 U.S.C. § 2441), Torture (18 U.S.C. § 2340A) and Maiming with intent to Commit Torture (18 U.S.C. § 114).”⁸⁰ That year, the Commission referenced the new child soldier offense to USSG §2H4.1, and also announced as a priority for the 2010 amendment cycle a multi-year review of the guidelines and their application to these human rights offenses.⁸¹ But whatever the perceived need was in 2009 for a comprehensive review, it now appears unnecessary because prosecutions under these statutes are almost non-existent.

Based on a review of cases in the Westlaw database citing 18 U.S.C. §§ 1091, 2441, and 2442, and the Bureau of Justice Statistics Federal Criminal Case Processing Statistics for filings in 2007-2009,⁸² there have been no recent prosecutions under these three statutes. In addition, the first, and apparently only, person to be prosecuted under the torture act (18 U.S.C. § 2340A) – Roy M. Belfast, Jr., a.k.a. Chuckie Taylor, for atrocities he committed in Liberia from 1999-2003 during the presidency of his father, Charles Taylor – received a 97 year sentence that was affirmed on appeal as reasonable.⁸³ Finally, while there have been a handful of prosecutions for maiming under 18 U.S.C. § 114 – only 13 cases were filed in 2007-2009 according to the Bureau of Justice Statistics – the cases available on Westlaw citing that statute do not indicate application of §2A2.2 is inadequate.⁸⁴ In short, no empirical evidence demonstrates a need to review the guidelines for human rights offenses.

⁸⁰ Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Dep’t of Justice, to the Honorable Ricardo H. Hinojosa, Acting Chair, U.S. Sentencing Comm’n, at 51 (Mar. 27, 2009).

⁸¹ USSG App. C, Amend. 733 (Nov. 1, 2009); USSC Notice of Final Priorities, 74 Fed. Reg. 46,478-79 (Sept. 9, 2009).

⁸² <http://bjs.ojp.usdoj.gov/fjsrc/tsec.cfm>.

⁸³ *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010).

⁸⁴ See, e.g., *United States v. Michel*, 2011 WL 2109913 (4th Cir. May 27, 2011) (affirming as reasonable a 240-month sentence for assaulting a BOP employee using a dangerous weapon, maiming a BOP employee, forcibly resisting BOP employees using a dangerous weapon, assaulting a West Virginia Corrections Officer inflicting bodily injury, and forcibly resisting employees of West Virginia inflicting bodily injury); *United States v. Ganeous*, 400 Fed. Appx. 794 (4th Cir. 2010) (defendant convicted of maiming and assault with deadly weapon and sentenced to 63 months); *United States v. Jackson*, 276 Fed. Appx. 701 (9th Cir. 2008) (120 month sentence, 33 months above the guideline, affirmed for maiming conviction because of “long history of violent conduct, including multiple assaultive conduct and murder of another being” and “absolute heinous nature of the crime”).

VI. Proposed Priority #9: Circuit Conflicts

We do not believe that the Commission should make the resolution of circuit conflicts a priority this year. The Commission has a full agenda and should not spend valuable time and resources on resolving esoteric circuit conflicts about guideline application issues that affect a small number of cases or that have not been thoroughly vetted in all the Circuits.

VII. Proposed Priority # 10: 5K2.19 and BZP

A. 5K2.19

When the Commission prohibited downward departure for post-sentencing rehabilitative efforts, USSG §5K2.19, p.s., seven courts of appeals had found, in carefully-reasoned opinions, that post-sentencing rehabilitation is relevant to the purposes of sentencing, that there is no unwarranted disparity between defendants who are resentenced after an appeal and defendants who are not, that there is no reasonable basis for treating post-offense rehabilitation and post-sentencing rehabilitation differently, and that a judge's consideration of post-offense rehabilitation in no way interferes with the Bureau of Prisons' award of good time credits for compliance with disciplinary regulations.⁸⁵ While the Commission cited most of these cases, it did not mention or address their reasoning, adopting instead the flawed reasons given by the lone Eighth Circuit for its prohibition against post-sentencing rehabilitation.⁸⁶ *See* USSG App. C Amend. 602 (Nov. 1, 2000).

The Supreme Court has now found that the policy statement “rest[s] on wholly unconvincing policy rationales,” and that post-sentencing rehabilitation is “highly relevant” to the purposes of sentencing. *Pepper v. United States*, 131 S. Ct. 1229, 1242-43, 1247 (2011); *id.* at 1254-55 (Breyer, J., concurring) (“[t]he Commission offers no convincing justification” for prohibiting “post-sentencing rehabilitation”); *id.* at 1258 (“this outcome would not represent my own policy choices” because “postsentencing rehabilitation can be highly relevant to meaningful resentencing”) (Thomas, J., dissenting).

The Commission should delete the policy statement.

⁸⁵ *See United States v. Core*, 125 F.3d 74, 77-78 (2d Cir. 1997); *United States v. Rhodes*, 145 F.3d 1375, 1378-82 (D.C. Cir. 1998); *United States v. Green*, 152 F.3d 1202, 1207-08 & n. 6 (9th Cir. 1998); *United States v. Rudolph*, 190 F.3d 720, 723-25 (6th Cir. 1999); *United States v. Bradstreet*, 207 F.3d 76, 82-83 & n.6 (1st Cir. 2000); *United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997); *United States v. Roberts*, 1999 WL 13073, at *6 & n.1 (10th Cir. Jan. 14, 1999) (unpublished).

⁸⁶ *United States v. Sims*, 174 F.3d 911 (8th Cir. 1999).

B. BZP

The Commission requests comment on whether it should provide in the Drug Quantity Table a specific reference to N-Benzylpiperazine (BZP). We are aware that a panel of the Second Circuit alerted the Commission to litigation over determining what substance is “most closely related” to BZP. *United States v. Figueroa*, ___ F.3d ___, 2011 WL 2040285 (2d Cir. May 26, 2011). Defenders do not believe that BZP presents such an issue that it warrants the Commission’s attention at this time. Most courts use MDMA as the drug equivalency for BZP.⁸⁷ *Figueroa* presented the odd circumstance where the evidence was insufficient to show that the appropriate equivalent was MDMA, mainly because the BZP was combined with other drugs. Because *Figueroa* appears to be a bit of an anomaly, we believe the Commission should leave it to litigation and monitor future developments.

VIII. Other Issues: (A) Relevant Conduct, (B) Defender Ex Officio,

The Commission also requests comment on other issues that might warrant the Commission’s attention. Here, we include two significant issues that we believe the Commission should take up: (1) amend the relevant conduct rules; and (2) recommend to Congress that it amend the Sentencing Reform Act to allow a Federal Defender to serve as an *ex officio* member of the Commission.

A. Relevant Conduct

Although not included in the Commission’s proposed priorities for 2012, we hope the Commission will consider a comprehensive review of relevant conduct under USSG §1B1.3. The Commission has been aware of problems with the relevant conduct guidelines for many years. In 1996, the Commission announced as a priority for the 1996-97 amendment cycle “developing options to limit the use of acquitted conduct at sentencing,” and for future amendment cycles, “[s]ubstantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence.”⁸⁸ Commission staff began to “investigate ways of incorporating state practices; *e.g.*, using an offense of conviction system for base sentence determination; providing a limited enhancement for conduct beyond the offense of

⁸⁷ See *United States v. Williams*, 2011 WL 2181492 (4th Cir. June 6, 2011); *United States v. Chowdhury*, 639 F.3d 583, 584 (2d Cir. 2011); *United States v. Rose*, 722 F. Supp. 2d 1286, 1289 (M.D. Ala. 2010); *United States v. Beckley*, 715 F. Supp. 2d 743 (E.D. Mich. 2010). *But see United States v. Major*, ___ F. Supp. 2d ___, 2011 WL 3320800 (E.D. Va. Aug. 1, 2011) (using amphetamine).

⁸⁸ See 61 Fed. Reg. 34,465 (July 2, 1996).

conviction; or limiting acquitted conduct to within the guideline range.”⁸⁹ Proposals to abolish the use of acquitted conduct were published for comment at various times.⁹⁰ But the Commission has declined to act. We urge the Commission to address this long-standing, well-known problem.

As the Commission knows, a sizable majority of judges believe that it is not appropriate to consider dismissed conduct (69% of judges), uncharged conduct not presented at trial or admitted by the defendant (68%) and acquitted conduct (84%).⁹¹ These views are not surprising. This opposition is well-placed because the “relevant conduct” rules work great mischief at sentencing: they contribute to unwarranted disparity, undue severity, and disrespect for the law.⁹² They create hidden disparities because of their complexity and inconsistent application among prosecutors, courts and probation officers.⁹³

⁸⁹ See Phyllis J. Newton, Staff Director, U.S. Sent’g Comm’n, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent’g Rep. 68, 1995 WL 843512 *3 (Sept./Oct. 1995); see also USSC, Guidelines Simplification Draft Report on Relevant Conduct (Nov. 1996).

⁹⁰ See 62 Fed. Reg. 152,161 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832 (1992).

⁹¹ See USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 5 (2010). Both district and appellate court judges have issued sharply worded opinions criticizing the use of acquitted conduct. See, e.g., *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) (“the unfairness perpetuated by the use of “acquitted conduct” at sentencing in federal district courts is uniquely malevolent”); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, B., J., dissenting) (“Reliance on acquitted conduct in sentencing diminishes the jury’s role and dramatically undermines the protections enshrined in the Sixth Amendment.”); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) (“I strongly believe ... that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.”); *United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) (Kelley, J.) (“Sentencing a defendant to time in prison for a crime that the jury found he did not commit is a Kafka-esque result.”), *vacated by*, 271 Fed. Appx. 298 (4th Cir. 2008); *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005) (Gertner, J.) (“To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense-as a matter of law or logic.”). See also *State v. Cote*, 530 A.2d 775, 784 (N.H. 1987) (“disingenuous at best to uphold the presumption of innocence . . . while at the same time punishing a defendant based upon charges in which that presumption has not been overcome”).

⁹² The relevant conduct rules conflict with an essential provision of the Sentencing Reform Act, which directed the Commission to take into account “the circumstances under which the *offense was committed*,” the “nature and degree of the harm caused by the *offense*.” 28 U.S.C. § 994(c)(2), (3) (emphasis added). It was also to provide “certainty and fairness” and “avoid[] unwarranted sentencing disparities among defendants . . . who have been *found guilty* of similar criminal conduct.” 28 U.S.C. § 991(b)(1)(B) (emphasis added).

⁹³ See *Fifteen Year Review* 50, 87 (relevant conduct rule is inconsistently applied because of ambiguity in the language of the rule, law enforcement’s role in establishing it, and untrustworthy evidence); Pamela

The relevant conduct rules give prosecutors “indecent power”⁹⁴ over sentencing and enormous leverage during plea negotiations, allowing them to inflate guideline ranges with the use of uncharged, dismissed, and acquitted conduct.⁹⁵ Prosecutors need only provide information about uncharged or acquitted conduct to a probation officer to include in the presentence report. In *United States v. Hurn*, 496 F.3d 784 (7th Cir. 2007), for example, “[a]fter a two day trial, a jury acquitted Mark Hurn of possession of cocaine base with intent to distribute, but found him guilty of possession of powder cocaine with intent to distribute.” *Hurn*, 496 F.3d at 785. Probation, however, “advised the district court to consider Hurn’s possession of cocaine base when determining Hurn’s relevant conduct” pursuant to USSG §1B1.3, and, accordingly, calculated the guideline range to be 188-235 months. *Id.* at 786. The sentencing court imposed a sentence of 210 months imprisonment. *Id.* “Had the PSR not included Hurn’s [acquitted conduct] in its relevant conduct calculation, Hurn’s recommended Guidelines range would have been 27–33 months.” *Id.*

The relevant conduct rules also deprive defendants of their basic trial rights by permitting prosecutors to circumvent a defendant’s Sixth Amendment trial rights⁹⁶ and undermine the

B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline §1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent’g Rep. 16 (1997) (sample test administered by researchers for the Federal Judicial Center to probation officers resulted in widely divergent guideline ranges for three similar defendants); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 857 (1992) (“interaction of quantity-driven Guidelines with the relevant conduct standard can produce enormous [sentence increases] for virtually any drug defendant” resulting in manipulation of guidelines; “judicial acquiescence in such manipulation must be understood against the backdrop of this special feature in drug cases”). See also *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).

⁹⁴ Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (2008).

⁹⁵ American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463 (2001); Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 140, 159 (1998); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 524-54 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 Stan. L. Rev. 523, 524 (1993); Paul J. Hofer, *Implications of the Relevant Conduct Study for the Revised Guideline*, 4 Fed. Sent’g Rep. 334 (May/June 1992).

⁹⁶ Although appellate courts have generally upheld the use of acquitted conduct after *United States v. Booker*, 543 U.S. 220 (2005), serious questions remain about whether it violates the Sixth Amendment to sentence a defendant on the basis of such conduct. The Court in *United States v. Watts*, 519 U.S. 148 (1997), held only that the use of acquitted conduct did not violate the Double Jeopardy Clause. See generally Eang Ngov, *Jury Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn.

legitimacy of the presumption of innocence by permitting the use of acquitted conduct. In *United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc), for example, the defendant was sent to prison for 14 additional years for three crimes the jury in its verdict said he did not commit. The enhancement more than doubled the sentence to 22 years.” *White*, 551 F.3d at 386 (Merritt, J., dissenting). Cross-references based upon acquitted or uncharged conduct provide a particularly egregious example of how the rules work an end-run around fundamental constitutional rights. Under USSG §2K2.1(c)(1)(B), a defendant convicted of nothing more than possessing a firearm after being convicted of a felony can be sentenced as a murderer even though he may have had a viable defense in front of a jury.⁹⁷ Justice Scalia has characterized the guidelines approach of punishing a defendant for such uncharged conduct as producing an “absurd result.”⁹⁸

Lest there be any doubt that the Defenders are in good company in our desire to see the Commission address relevant conduct, John Steer, former General Counsel and Vice-Chair of the Commission, has called for the Commission to exclude “acquitted conduct” from the guidelines and permit its use only as a discretionary factor.⁹⁹ In addition to the disparity created by the use of acquitted conduct, Mr. Steer noted that the “federal guideline system is alone among sentencing reform efforts in using acquitted conduct to construct the guideline range.”¹⁰⁰ Mr. Steer also recommended that the Commission “decrease the weight given to unconvicted counts that are part of the same course of conduct or scheme under 1B1.13(a)(2) and (3).”¹⁰¹

Law Rev. 235 (2009). In addition, in *United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc), six dissenting judges concluded *Watts* did not govern the issue and “[b]ecause the sentence cannot be upheld as reasonable without accepting as true certain judge-found facts, the sentence represents an as applied violation of White’s Sixth Amendment rights.” *White*, 551 F.3d at 387, 392 (Merritt, J., dissenting).

⁹⁷ See Statement of Alan DuBois Before the U.S. Sent’g Comm’n, Atlanta, GA, at 24 (Feb 10, 2009) (describing case in Eastern District of North Carolina where defendant would have had excellent argument for self-defense had he been tried for murder before a jury).

⁹⁸ *Blakely v. Washington*, 545 U.S. 296, 306 (2004). A district court offered the following comment about cross-references based upon relevant conduct rules: “As the Queen of Hearts said, ‘Sentence first-verdict afterwards.’ See L. Carroll, *Alice’s Adventures in Wonderland* 146 (Random House, 1946). Federal offenders deserve better justice than that meted out in the court of the King and Queen of Hearts.” *United States v. Carroll*, 798 F. Supp. 291, 294 (D. Md. 1992) (Smalkin, J.), *vacated*, 3 F.3d 98 (4th Cir. 1993).

⁹⁹ *An Interview with John R. Steer*, 32 *Champion* 40, 42 (2008).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

We agree with Mr. Steer that the Commission should prohibit the use of acquitted conduct. Its use undermines respect for the law in many quarters.¹⁰² We also encourage the Commission to revisit the use of uncharged or dismissed conduct and either eliminate it or limit its impact on the guideline range.

B. Defender Ex Officio

In 2004, the Judicial Conference of the United States, upon recommendation of the Committee on Criminal Law, voted to recommend legislation authorizing the Conference to appoint a federal defender to serve as an *ex officio* member of the Commission.¹⁰³ We encourage the Commission itself to recommend such legislation.¹⁰⁴

The Commission includes judges, members of the private bar, and two *ex officio* members from the Department of Justice. No role exists for federal defenders even though they, along with CJA counsel, represent the vast majority of criminal defendants and have significant experience in the day-to-day operations of the federal criminal justice system. The lack of a defender *ex officio* deprives the Commission of advice and input at crucial stages in the process. While the defenders may offer comment and participate in hearings, they do not have a voice at critical times during the Commission's internal discussions and debates. Compounding this disadvantage is that when comment is provided, it is without the benefit of the information which often times is central to the Commission's ultimate decision. For example, Defenders are not privy to staff briefings nor do they see staff reports, memos, results of special coding projects, or the myriad amendment-related data analyses. They do not see drafts of Commission reports and thus are unable, unlike the Department of Justice, to offer comments and encourage revisions. They do not see proposed amendments before they are published. And they do not see proposed final amendments before the Commission reads them aloud in public during its vote, all of which clearly follows deliberations closed to the public.

¹⁰² Courts have commented on this issue on more than one occasion. *See, e.g., United States v. Settles*, 530 F.3d 920, 923-924 (D.C. Cir. 2008) (noting that the defendant's sentiment ("I just feel as though, you know, that that's not right. That I should get punished for something that the jury and my peers, the found me not guilty.") was similar to that of "many judges and commentators" who have argued that using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system"); *United States v. Magallanez*, 408 F.3d 672, 683 (10th Cir. 2005) (defendant "might well be excused for thinking that there is something amiss" with using acquitted conduct to increase his sentence by 43 months); *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) ("most people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they are acquitted"), *vacated and remanded*, 271 Fed. Appx. 298 (4th Cir. 2008).

¹⁰³ *See Report of the Proceedings of the Judicial Conference of the United States*, at 11 (March 16, 2004).

¹⁰⁴ *See generally* Abraham L. Clott, *Appointing a Federal Defender to the Sentencing Commission*, 8 Fed. Sent. R. 30 (1995).

The absence of a defender *ex officio* also creates an appearance that the Commission is disproportionately influenced by the Department of Justice. As Attorney General Holder recognized: “Our laws and their enforcement must not only be fair, they also must be perceived as fair. A perception of unfairness undermines government authority in the criminal justice process.”¹⁰⁵ A dozen years ago, Professor Doug Berman described the perception of unfairness that undermines the Commission’s legitimacy:

[B]oth formally and informally, Commission deliberations have encompassed, and appear to have reflected, more of a prosecutorial orientation than a defense orientation. As a formal matter, this is a function of the fact that the SRA provides for a designee of the Attorney General to be an *ex officio* member of the Commission, but provides no equivalent representation to a member of the defense bar. As an informal matter, this is a function of the fact that, in the view of many observers, the Commission has always been far more responsive to the concerns of the Department of Justice than to the concerns of the defense bar.¹⁰⁶

The U.S. Sentencing Commission is among a minority of sentencing commissions that does not have a public defender serving as a commissioner. *See* National Center for State Courts, *State Sentencing Guidelines: Profiles and Continuum* (July 2008).¹⁰⁷ Minnesota’s system, for example, which has been widely praised and is similar to the federal system in its goals and objectives, requires that a representative from the public defender’s office serve on its commission, thereby facilitating the consideration of more points of view and the development of more effective sentencing guidelines. *See* Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. Rev.* 715, 772, 778, 783, 800 (Feb. 2005); *see also* Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 *Judicature* 173, 174 (1995) (noting that most state sentencing

¹⁰⁵ *See* Attorney General Holder’s Remarks for the Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium, *Rethinking Federal Sentencing Policy 25th Anniversary of the Sentencing Reform Act* (June 24, 2009), <http://www.usdoj.gov/ag/speeches/2009/ag-speech-0906242.html>.

¹⁰⁶ Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 *Stan. L. & Pol’y Rev.* 93, 109 (1999). *See also* Fred W. Bennett, *A Direct Participant’s Perspective on the Guideline Amendment Process*, 3 *Fed. Sent. R.* 148 (1990) (“An *ex officio* member from the defense bar would also help dispel the widespread belief that the Commission is too heavily influenced by the views of the Department of Justice”).

¹⁰⁷ Fourteen out of the twenty-one states studied require that defense counsel serve on their sentencing commissions: Alabama, Arkansas, Delaware, the District of Columbia, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Ohio, Pennsylvania, Utah, and Washington. All except Alabama, Louisiana, Pennsylvania, and Washington explicitly require a representative from the state public defender system, and no state disallows public defenders from serving. Alabama specifically refers to “private” attorneys, but this is likely because Alabama does not have a public defender system.

commissions include defense attorneys and other interested parties, “making these panels much more broadly representative than the federal commission”). As with the states, a Defender member would create a more productive dynamic within the U.S. Sentencing Commission, resulting in a more effective criminal justice system.

A representative of the Federal Defender would bring unparalleled breadth and experience to the work of the Commission. The Federal Defender system – which includes 80 offices nationwide serving 90 of the 94 judicial districts – includes among its ranks lawyers who have devoted their entire professional careers to indigent defense work. They possess the kind of experience and judgment that can only be acquired through continuous day-to-day interaction with all players in the criminal justice system – judges, probation officers, prosecutors, law enforcement officials, correctional administrators, community treatment providers, and other stakeholders. Defender representatives already serve as voting members of the Advisory Committee on Evidence Rules and the Advisory Committee on Criminal Rules. Their role is to bring extensive experience to inform the development of federal criminal policy and practice.

Some claim that it would be inappropriate to have a Defender *Ex Officio* member on the Commission because a defense lawyer would do nothing but advocate for lower sentences. The positions of the Federal Defenders over the years, however, prove that to be unfounded. Defenders have advanced agendas aimed at broader goals than simply lowering sentences. Defender input is no less valuable and carries no more risk of being inherently suspect than that from law enforcement. Defenders and the Department represent two sides in court. There should be balance between these two perspectives on the Commission.

Nor do any legal barriers stand in the way of a Defender serving as an *ex officio* member of the Commission. Nothing in the Criminal Justice Act restricts the ability of a Federal Defender to serve as a member of the Commission. The CJA only prohibits Defenders from engaging in the “private practice of law.” 18 U.S.C. § 3006A(g)(2)(A). Moreover, Canon 4 of the Code of Conduct for Federal Public Defender Employees expressly permits a Defender employee to “serve as a member, officer or director of an organization or governmental agency devoted to the improvement of law, the legal system, or the administration of justice.” The Commission certainly qualifies as such an agency. *See* 28 U.S.C. §§ 991(b), 995(a)(12), 995(a)(20). No special ethical tensions would arise from having a Defender *ex officio* member of the Commission. The Model Rules of Professional Conduct authorize a lawyer to serve as a “member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer.”¹⁰⁸

¹⁰⁸ American Bar Ass’n, *Annotated Model Rules of Professional Conduct*, Sixth Ed., Rule 6.4, Law Reform Activities Affecting Client Interests (2007). The lawyer need only disclose to the organization that the interests of a client may be materially benefited.

In summary, we encourage the Sentencing Commission to support a Defender *Ex Officio* because it would enrich the quality of the Commission's deliberations. In so doing, the voting Commissioners would be assured the broadest possible understanding of the ramifications of their decisions, which can only serve to advance the Commission's work.

IX. Conclusion

As the Commission pursues its priorities for the 2011-2012 amendment cycle, we remain hopeful that it will take steps to formulate guidelines based upon judicial feedback and sound empirical research, and that reflect advances in knowledge of human behavior as it relates to the criminal justice process. 28 U.S.C. 991(b)(1)(C). The Commission has the institutional capacity and authority to fashion a workable advisory guideline system that results in fair and just sentences. We look forward to working with the Commission and its staff during the upcoming amendment cycle.

Very truly yours,

/s/ Miriam Conrad
Miriam Conrad
Federal Public Defender
Vice-Chair, Federal Defender Sentencing
Guidelines Committee

/s/ Marjorie Meyers
Marjorie Meyers
Federal Public Defender
Chair, Federal Defender Sentencing
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Enclosures

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