FEDERAL PUBLIC DEFENDER
District of Arizona
850 Adams Street, Suite 201
PHOENIX, ARIZONA 85007

JON M. SANDS
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

July 9, 2007

Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Priorities for 2007-2008

Dear Judge Hinojosa:

On behalf of the Federal Public and Community Defenders and pursuant to 28 U.S.C. § 994(o), we write to recommend priorities for the Commission to address in the next amendment cycle. In addition to the issues discussed below, we join in the recommendations of the Practitioners' Advisory Group regarding updating the Manual to conform with current law, the need to make the criminal history amendments retroactive, expansion of safety valve eligibility, alternatives to imprisonment, and the base offense level for impure mixtures of precursor chemicals.

I. Alleged Offenses of Which the Defendant was Acquitted, That Were Never Charged or that Were Dismissed

We continue to urge the Commission to (1) abolish consideration of acquitted conduct, (2) strike out subsection § 1B1.3(a)(2), and (3) abolish cross-references to greater crimes. In addition, the definition currently in § 1B1.3(a)(1) (B) needs to be clarified, as courts continue to read it as including conduct of others that is merely "reasonably foreseeable" but was not within the scope of the defendant's agreement. *See, e.g., United States v. Gall*, 446 F.3d 884, 887 (8th Cir. 2006) (stating that the defendant received a "benefit" by virtue of not being sentenced on the basis of drug sales by others after he withdrew from conspiracy).

The requirement that uncharged, dismissed, and acquitted alleged offenses be used in calculating the guideline range to dramatically increase sentences, at the same

rate as if a charge had been brought and conviction obtained, has engendered much of the criticism of the Guidelines.[1]

Concurring in *Rita v. United States*, 2007 WL 1772146 (U.S. June 21, 2007), Justices Scalia and Thomas warned that a system that evaluates the reasonableness of a sentence based on judge-found facts may still run afoul of the Sixth Amendment:

> In order to avoid the possibility of a Sixth Amendment violation, which was the object of the *Booker* remedy, district courts must be able, without

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[1] *United States v. Pruitt*, __ F.3d __, 2007 WL 1589409 at *47 & nn.2-3 (10th Cir. June 4, 2007) (McConnell, J., concurring) (identifying uncharged and acquitted conduct as a "misguided" policy); *United States v. Mercado*, 474 F.3d 654, 662 (9th Cir. 2007) (Fletcher, J., dissenting) ("I am not content, as the majority is, to join this "parade of authority."); *United States v. Grier*, 475 F.3d 556, 573 (3d. Cir. 2007) (en banc) (Ambro, J., concurring) ("Sean Grier is in prison in part for a crime for which he was never indicted, never tried, and never convicted."); *id.* at 574 ("In effect, we have a shadow criminal code under which, for certain suspected offenses, a defendant receives few of the trial protections mandated by the Constitution."); *United States v. Faust*, 456 F.3d 1342 (11th Cir. 2006) (Barkett, J., specially concurring) (use of acquitted conduct "violently erodes" the right to jury trial and to proof beyond a reasonable doubt); *United States v. Lombard*, 103 F.3d 1, 5 (1st Cir. 1996) (though precedent is binding, "many judges think that the guidelines are manifestly unwise, as a matter of policy, in requiring the use of acquitted conduct;" though a "lawyer can explain the distinction logically," as a "matter of public perception and acceptance, the result can often invite disrespect for the sentencing process."); *United States v. Baylor*, 97 F.3d 542, 551 (D.C. Cir. 1996) (Wald, J., concurring specially) ("[T]his justification could not pass the test of fairness or even common sense from the vantage point of an ordinary citizen. The 'law,' however, has retreated from that standard into its own black hole of abstractions."); *United States v. Frias*, 39 F.3d 391, 392-94 (2d Cir. 1994) (Oakes, J., concurring) ("this is jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'"); *United States v. Hunter*, 19 F.3d 895, 897-98 (4th Cir. 1994) (Hall, J., concurring) ("As regards uncharged 'relevant' conduct, this pricing [at exactly the same level of severity as convicted conduct] is at best a poor policy choice; as regards charges on which the jury has acquitted the defendant, it is just wrong."); *United States v. Concepcion*, 983 F.2d 369, 395-96 (2d Cir. 1992) (Newman, J., dissenting from denial of petition for rehearing en banc) (a "just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal."); *United States v. Boney*, 977 F.2d 624, 647 (D.C. Cir. 1992) (Randolph, J., dissenting in part and concurring in part) ("[T]his conceptual nicety might be lost on a person who . . . breathes a sigh of relief when the not guilty verdict is announced without realizing that his term of imprisonment may nevertheless be 'increased' if, at sentencing, the court finds him responsible for the same misconduct."); *United States v. Galloway*, 976 F.2d 414, 437 (8th Cir. 1992) (en banc) ("If the former Soviet Union or a third world country had permitted [sentencing based on uncharged offenses], human rights observers would condemn those countries."); *United States v. Coleman*, 370 F.Supp.2d 661, 668 (S.D. Ohio 2005) ("A layperson would undoubtedly be revolted by the idea that, for example, a person's sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.").

finding any facts not embraced in the jury verdict or guilty plea, to sentence to the maximum of the *statutory* range.

2007 WL 1772146, at * 20 (Scalia and Thomas, JJ. concurring) (emphasis in original). The system upheld in *Rita*, however, would deem a sentence reasonable only because it relies on a guideline range based solely on the "existence of judge-found facts." *Id.* at 23. At least in a case where the sentence is increased significantly, as is so often the case with relevant conduct, Justices Scalia, Thomas, Stevens and Ginsburg, and Justice Souter in any event, would hold that the process is unconstitutional. *Id.* at **17, 23 & n.4, 29-34.

In addition to continuing constitutional concerns, the relevant conduct provision is a significant source of unwarranted and hidden disparity. While some judges may carefully find facts, others accept hearsay allegations included in PSRs unless the defendant can somehow disprove them, with the blessing of several courts of appeals.[2] Further, one Probation Officer may include "information" as relevant conduct that another does not.[3] And the theory upon which the relevant conduct concept was based has failed in practice, as it has given prosecutors more, not less, control over sentencing outcomes.

With respect to uncharged conduct, at the very least, the Commission should recommend a higher standard of proof. *Apprendi* and *Blakely* emphasize the importance of two separate constitutional guarantees: 1) determination by the jury of the facts

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[2] *See e.g. United States v. Caldwell*, 448 F.3d 287, 290-91 (5th Cir. 2006); *United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005); *United States v. Hall*, 109 F.3d 1227, 1233 (7th Cir. 1997); *United States v. Terry*, 916 F.2d 157, 160-62 (4th Cir. 1990).

[3] As Judge O'Toole recently noted in a case in which PSRs 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:

> The possibility of inconsistent resolutions of essentially the same question with respect to two separate but similar defendants is a structural problem within the Guidelines' manner of addressing "relevant conduct." Moreover, because the "relevant conduct" inquiry is adjunct rather than central to the question of criminal culpability, it is possible that it will be pursued by different investigators with different levels of vigor and thoroughness. In other words, the Guidelines are susceptible to the possibility that the effect of "relevant conduct" on the sentencing range can depend on something as impossible to know as how aggressively someone, whether prosecutor or probation officer or perhaps even judge, has probed to learn information about a defendant's past illegal activities. . . . The essential scandal of the anomaly as it works in this case is that it directly subverts one of the fundamental objectives of the Guidelines: to reduce disparity in sentences given to similarly situated defendants.

United States v. Quinn, 472 F.Supp.2d 104, 111 (D.Mass. 2007).

necessary to enhance a sentence, and 2) proof beyond a reasonable doubt. Even if the preponderance of the evidence standard is constitutionally permissible under the Due Process Clause (an issue the Court has not yet decided), that standard is a floor, not a ceiling. The Commission should encourage courts to use a beyond a reasonable doubt standard, or at minimum, clear and convincing evidence.

The Commission should preclude consideration of acquitted conduct at sentencing. Justice Breyer himself, who helped devise the "relevant conduct" concept, has urged the Commission to revisit this issue given "the role that juries and acquittals play in our system." *United States v. Watts*, 519 U.S. 148, 159 (1997) (Breyer, J. concurring). Other judges have declined to consider relevant conduct out of respect for the jury verdict. *See, e.g. United States v. Pimental*, 367 F. Supp. 2d 143 (D. Mass. 2005); *United States v. Coleman*, 370 F.Supp.2d 661 (S.D. Ohio 2005); *United States v. Carvajal*, 2005 WL 476125 *4 (S.D.N.Y. Feb. 22, 2005). It is, after all, the Sixth Amendment's requirement of proof to a jury beyond a reasonable doubt that underlies *Apprendi* and its progeny.

II. Sentencing Procedure and Procedural Protections

The Commission should revise Chapter Six to embody the principles set forth in *Booker* and *Rita*. In permitting an appellate presumption of reasonableness for a guideline sentence, the Supreme Court emphasized that certain procedural requirements are to be met in imposing a post-*Booker* sentence.

First, the district court has a duty independently to determine the sentence by considering the factors set forth in 18 U.S.C. § 3553(a). *Rita*, 2007 WL 1772146 at **6, 11. The statute also requires that "the resulting sentence be 'sufficient, but not greater than necessary, to comply with the purposes' of sentencing set forth in [the] statute." *Id.* at *11; *id.* at *27 (Scalia & Thomas, JJ., concurring). The Guidelines shall not "enjoy the benefit of a legal presumption" before the sentencing court. *Id.* at *9.

Second, the sentencing judge has a duty to address "all nonfrivolous reasons" offered by the parties for imposing a sentence different from the Guidelines and to explain why if she has rejected them. *Rita*, 2007 WL 1772146 at *12; *see also United States v. Cooper*, 437 F.3d 324, 329-30 (3d Cir. 2006); *United States v. Cunningham*, 429 F.3d 673, 676 (7th Cir. 2006).

Third, USSG § 5K2.0 needs to be revised to reflect the increased discretion afforded district courts in determining a sentence pursuant to 18 USC § 3553(a). Any reference to or repetition of 18 USC § 3553(b) must, of course, be excised. The sentencing court should be directed to impose a sentence that is sufficient but not greater than necessary to satisfy the purposes of sentencing set forth in § 3553(a)(2) after considering all of the purposes and factors set forth in § 3553(a)(1)-(7).

Fourth, the Supreme Court expects sentencing courts to "subject[] the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure." *Rita*, 2007 WL 1772146 at *9, citing Fed. R. Crim. P. 32(f), (h), (i)(C), (i)(D); *Burns v. United States*, 501 U.S. 129 (1991). Reliance on a PSR based on "probably accurate" hearsay does not constitute thorough adversarial testing.

Fifth, although both the defense bar and the Department of Justice have recognized the importance of notice of the sentencing court's intention to vary from the Guidelines,[4] the courts of appeals are split on whether notice is required post-*Booker*.[5] As the Court emphasized in *Rita*, notice and a meaningful opportunity to be heard are essential to a fair and accurate determination at sentencing. 2007 WL 1772146 at * 9, citing *Burns v. United States*, 501 U.S. 129 (1991). The Commission should amend USSG § 6A1.4 to provide for notice of any departure or variance from the Guideline range.

III. Criminal History

While the Commission took steps during the 2006-2007 cycle to address flaws in the criminal history provisions contained in Chapter Four, there is much that remains to be done. Inconsistent definitions of violent crimes and drug offenses result in sentences that do not reflect the § 3553(a) factors. As one judge has noted, there are at least eight different definitions of crimes of violence in the United States Code and the Guidelines, each with different words and phrases. *United States v. Charles*, 301 F.3d 309, 315 (5th Cir. 2002) (en banc) (DeMoss, J. concurring). Some of the definitions are so broad that they encompass offenses that are not violent, based on speculation about potential risk.[6] In particular, the career offender guideline's sweeping definition includes misdemeanors as well as felonies, and requires harsh sentences for serial petty offenders who are typically struggling with drug addiction and poverty.[7] Technical and inconsistent

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[4] *See United States v. Walker*, 447 F.3d 999, 1007 n.7 (7th Cir. 2006).

[5] *United States v. Evans-Martinez*, 448 F.3d 1163 (9th Cir. 2006) (notice required); *United States v. Davenport*, 445 F.3d 366 (4th Cir. 2006); *but see United States v. Mejia-Huerta*, 480 F.3d 713 (5th Cir. 2007) (notice not required); *United States v. Irizarry*, 458 F.3d 1208 (11th Cir. 2006); *United States v. Vampire-Nation*, 451 F.3d 189, 196-96 (3d Cir. 2006); *United States v. Walker*, 447 F.3d 999, 1007 (7th Cir.), *cert. denied*, 127 S.Ct. 314 (2006); *United States v. Long Soldier*, 431 F.3d 1120, 1122 (8th Cir. 2005).

[6] Examples include: failures to return to non-secure corrections facilities, *United States v. Winn*, 364 F.3d 7, 12 (1st Cir. 2004); *United States v. Gay*, 251 F.3d 950, 953 (11th Cir. 2001), joy-riding or car theft, *United States v. Sun Bear*, 307 F.3d 747, 752-53 (8th Cir. 2002); *United States v. Galvan-Rodriguez*, 169 F.3d 217, 219 (5th Cir. 1999), and even failure to stop for a blue light. *United States v Riddle*, 186 Fed. Appx. 367 (4th Cir. 2006).

[7] *See e.g. United States v. Pruitt*, ___F.3d ___, 2007 WL 1589409, at *18 (10th Cir. June 4, 2007) (McConnell, J., concurring).

definitions result in lengthy sentencing arguments. Frustrated judges then disavow the guideline altogether based on precisely the type of factual inquiry into prior convictions that the Guidelines sought to avoid. *See e.g. United States v. Tsep-Mejia*, 461 F.3d 522 (5th Cir. 2006). To the extent possible, the Commission should embrace a single, narrow definition of violent crimes and drug trafficking offenses that reflect Congress's desire to impose substantial prison terms on "repeat violent offenders and repeat drug traffickers."[8] We urge the Commission to revisit the definitions of violent crimes and drug crimes set forth in Chapter Four, the firearms provisions which rely on chapter Four, *e.g.* USSG § 2K2 1, and the illegal re-entry guideline, USSG § 2L1.2.

A. Career Offender

1. The definition of "crime of violence" should be revised to ensure that it reaches only those crimes that are either inherently or empirically violent.

When Congress directed the Commission to create the career offender guideline, it assumed that "the guidelines development process can ensure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and drug traffickers."[9] Accordingly, it is time for the Commission to develop a consistent and rational definition of "crime of violence."

Recommendations:

- Excise § 4B1.2(a)(2) and add specified crimes of violence to the definition that is currently set forth in § 4B1.2(a)(1). This would restrict "crimes of violence" to offenses that have as an element "the use, attempted use, or threatened use of physical force against the person of another" and a limited list of enumerated offenses.

- Collect and analyze data in order to determine which offenses should be listed as crimes of violence under § 4B1.2(a) because they either result in injury to another or involve the use of force against the person of another in a significant number of cases.

- Include in the enumerated list only those offenses that are either (1) violent by definition (*e.g.*, murder, aggravated assault, forcible sex offenses, arson, use of explosives, armed robbery) or (2) empirically violent, as demonstrated by data showing either that the offense actually results in injury in a significant number of

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[8] *See* S. Rep. No. 98-225 at 175 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3358.

[9] *See* S. Rep. No. 98-225 at 175 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3358.

cases, or that it actually involves the use of force against the person of another in a significant number of cases.[10]

- Analyze the risk of recidivism for career offenders with "crime of violence" predicates to ensure that sentences under the career offender guideline are not greater than necessary to achieve the purposes of sentencing.

2. The definition of "controlled substance offense" should be amended to reflect the Commission's empirical data on recidivism and to bring the guideline closer to congressional intent and sound policy.

The guideline definition of "controlled substance offense" treats street corner dealers the same as international drug traffickers. The guideline fails under any theory of just desserts, deterrence, or proportional punishment, and has a disproportionate impact on African Americans. The Commission should narrow the definition of "controlled substance offense" to focus on serious and unrepentant drug traffickers, reflect the data on recidivism risk and actual sentencing practices, and alleviate the stark and unjustifiable racial disparity caused by the current definition.

Congress directed the Commission to ensure a sentence at or near the statutory maximum for defendants with two or more prior "felony" convictions for "an offense described in section 401 of the Controlled Substances Act (21 U.S.C. § 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Act (21 U.S.C. §§ 952(a), 955, and 959), and chapter 705 of title 46."[11] The career offender guideline exceeds the congressional directive by expanding the definition of "controlled substance offense" to cover offenses not specified in 28 U.S.C. § 994(h), including export, conspiracy, attempt, possession of a flask or equipment with intent to manufacture under 21 U.S.C. § 843(a)(6), maintaining a place for the purpose of facilitating a controlled substance offense under 21 U.S.C. § 856, and use of a communications facility in committing or facilitating a controlled substance offense under 21 U.S.C. § 843(b). *Id.* & comment. (n.1).

Further, the guideline includes any offense, whether classified as a felony or misdemeanor by the convicting jurisdiction, that is punishable by as little as a year and a

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[10] Any jurisdictional idiosyncrasies with respect to the names of offenses can easily be addressed in § 4B1.2's commentary to ensure that courts do not apply the enumerated list too narrowly. *See, e.g.*, F.B.I., *Uniform Crime Reporting Handbook* (2004) (advising states on how to uniformly categorize and report offenses despite differences in various state and federal nomenclature), available at http://www.fbi.gov/ucr/handbook/ucrhandbook04.pdf.

[11] 28 U.S.C. § 994(h)(1)(B), (2)(B)

day.[12] Because of the expansive definition of "controlled substance offense," the career offender guideline fails to distinguish between small-time (albeit serial) drug offenders and the serious traffickers that Congress had in mind. The result has been a litany of court opinions criticizing the absurd results, unwarranted uniformity, unfairness, and disproportionate nature of the sentences generated by the guideline calculation.[13]

The Commission has recognized that the career offender guideline "makes the criminal history category a less perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses," does not serve a deterrent purpose, and has a disproportionate impact on African Americans.[14] Nor does it further any interest in proportionality: "it is not at all uncommon to find, as in the instant case, that the supplier of drugs has a minimal criminal record, and thus, avoids career offender status, precisely because of his distance from street activities, while the street dealer winds up with a substantial" sentence.[15] And it treats "offenders who are not equally culpable the same[, which] is a false equality, not at all consistent with the admonition 'to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.'"[16]

If the Commission intends the career offender guideline to "focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate," [17] and to avoid unwarranted disparities, it should make the following change.

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[12] U.S.S.G. § 4B1.2, comment. n. 1 ("'Prior felony conviction' means 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 specifically designated as a felony and regardless of the actual sentence imposed.").

[13] *See e.g. United States v. Pruitt*, ___F.3d ___, 2007 WL 1589409, at *11-13, 19 (10th Cir. June 4, 2007) (McConnell, J. concurring and describing 292-month sentence for defendant convicted of selling 18.5 grams of methamphetamine as excessive); *United States v. Williams*, 481 F. Supp. 2d 1298, 1304 (M.D. Fla. 2007) (declining to impose 30-year sentence on street-level crack dealer); *United States v. Fernandez*, 436 F. Supp. 2d 983 (E.D.Wis. 2006) (declining to impose career offender sentence on defendant convicted of sale of cocaine to undercover officer where prior convictions involved sales of 2.9 grams and 1 gram of cocaine).

[14] Fifteen Year Report at 133-34; *see also United States v. Pruitt*, __ F.3d __, 2007 WL 1589409, *12 (10th Cir. June 4, 2007) (McConnell, J., concurring) ("[t]his might appear to be an admission by the Commission that this guideline, at least as applied to low-level drug sellers like Ms. Pruitt, violates the overarching command of § 3553(a) that '[t]he court . . . impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in' § 3553(a)(2)").

[15] *United States v. Ennis*, 468 F.Supp.2d 228, 230-31 (D. Mass. 2006).

[16] *Id.* at 235-36.

[17] U.S.S.G. § 4B1.1, comment.

Recommendation: Distinguish between true career drug offenders and repeat street dealers by amending the definition of "controlled substance offense" as follows:

> a felony that is described in 21 U.S.C. §§ 841, 952(a), 955, 959 or 46 U.S.C. § 70503 or that is a similar offense under state law, and that is punishable by imprisonment for at least ten years.

This definition is consistent with 28 U.S.C. § 994(h), and is also consistent with the definition in 18 U.S.C. § 924(e)(2).

3. No prior conviction should be counted as a "felony" unless it was classified as a felony by the convicting jurisdiction and the defendant served at least one year in jail or prison for the offense.

Congress intended the career offender guideline to reach defendants with prior "felony" convictions.[18] The guideline as written sweeps in all convictions punishable by more than one year, irrespective of whether the defendant was actually convicted of a misdemeanor, received an insignificant jail sentence, or was not sentenced to incarceration at all.[19]

Some states punish misdemeanors by up to two, three, or even ten years.[20] Convictions under these statutes, by definition, are for conduct considered by the convicting jurisdiction to be less serious than a felony and, as a result, dispositions are generally not accorded the same level of searching treatment as that accorded to felony charges.[21] The career offender guideline, however, treats such defendants exactly the

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[18] 28 U.S.C. § 994(h).

[19] *United States v. Thompson*, 88 Fed. Appx. 480 (3d Cir. 2004) (misdemeanor conviction for simple assault for which defendant received sentence of probation qualified as career offender predicate); *United States v. Raynor*, 939 F.2d 131 (4th Cir. 1991) (misdemeanor conviction for assault on a law officer punished by unsupervised probation and a $25 fine qualified as career offender predicate).

[20] *See, e.g.*, Letter to Hon. Ricardo H. Hinojosa from Jon M. Sands re: Follow-Up to March 20 Hearing (March 29, 2007) at 5-6; *see also* Br. of Amici Curiae National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums Foundation in Support of Petitioner, *Logan v. United States*, 2007 WL 1577172, *14 n.7 (May 24, 2007) (listing state misdemeanors punishable by more than two years imprisonment).

[21] *See* Br. of Amici Curiae National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums Foundation in Support of Petitioner, *Logan v. United States*, 2007

same as felons, resulting in unwarranted uniformity. Moreover, defendants with prior misdemeanor convictions in at least some states will have a countable career offender predicate, even while defendants convicted of the identical conduct in another state will not, resulting in unwarranted geographic disparity.

Nor does the career offender guideline look to the relative culpability of defendants by considering the sentence actually served by the defendant, or even the sentence imposed by the convicting jurisdiction. Although the former is preferable for purposes of assessing culpability, either would at least give a rough estimate of the seriousness with which the convicting jurisdiction viewed the conduct, and thus would better differentiate between petty offenders and more dangerous criminals. Instead, the guideline looks only to the statutory maximum to assess whether a prior conviction should count as a "career offender" predicate, and requires an extremely low one at that. Thus a defendant who serves 6 months of unsupervised probation and a defendant who serves 20 years in prison are treated exactly the same under the career offender guideline.[22]

We continue to urge the Commission to revise the career offender guideline to count prior sentences based upon the sentence actually served. Given the number of jurisdictions that continue to sentence defendants on the understanding that the defendant will actually serve less than 50% of the time, a "sentence served" rule is a far more accurate indicator of the convicting jurisdiction's view of the seriousness of the offense.[23] It also solves the false equality generated by treating non-parole jurisdictions the same as parole jurisdictions.[24] The Commission should set a threshold sentence of more than one year served in jail or prison to count as a "career offender" predicate, and should study and consider raising the threshold to sixty months. A 1999 Department of Justice report

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WL 1577172, *passim* (May 24, 2007) (discussing difference in collateral consequences between felony and misdemeanor convictions in the states).

[22] *See United States v. Washington*, 2001 WL 1301744, *5 (6th Cir. Aug. 8, 2001) ("the district court did not abuse its discretion by electing not to sentence Defendant as a 'career offender' subject to a sentence of 360 months to life imprisonment, where Defendant's prior convictions resulted only in probation").

[23] For example, a DOJ study found that, between 1992 and 1994, inmates incarcerated for violent offenses in parole jurisdictions (which include most states) served an average of 48 % of the sentence they had received. *See* U.S. Dept. of Justice, Bureau of Justice, *Prison Sentences and Time Served for Violence* (April 1995), available at http://www.ojp.usdoj.gov/bjs/abstract/vospats.htm. For non-violent offenses, the percentage rate is likely lower still.

[24] U.S. Sentencing Commission, *Simplification Draft Paper, Chapter Four, Part V* (failing to distinguish between sentences imposed in parole and non-parole systems is problematic because defendants may serve two very different terms of imprisonment).

reflects that people sentenced to state prison in 1992 for violent offenses served an average of between 92 and 129 months.[25]

Recommendations:

- Revise the commentary to § 4B1.2 to read as follows:

  "Prior felony conviction" means a prior adult federal or state conviction for an offense classified as a felony by the convicting jurisdiction and for which the defendant served a sentence of incarceration of more than one year.

- Analyze the data to determine the optimal sentence threshold to determine recidivism risk and distinguish between serious and non-serious offenders.

B. First Offenders

The Commission should amend the guidelines to specifically recommend alternatives to prison for first offenders who have not been convicted of an actual crime of violence or a truly serious offense, in order to fulfill its congressional directive to "ensure the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."[26] We join the Practitioners' Advisory Group in recommending that the Commission promulgate a guideline in Chapter 5 for all first offenders that is modeled on the "safety valve" provisions of § 5C1.2.

C. Minor Offenses

In the last amendment cycle, the Commission took some steps toward revising § 4A1.2(c) to eliminate some of the unfairness of counting minor offenses by moving fish and game violations and local ordinance violations (except those violations that are also violations under state criminal law) from (c)(1) to (c)(2), by amending (c)(1) to count sentences to probation of more than one year, and by adding guidance on how to decide whether a prior offense is "similar to" those listed in (c)(1) and (c)(2). These amendments should be given retroactive effect.

There is still work to be done, however, including removing the minor traffic offenses that appear to have an "unwarranted adverse impact" on minorities "without

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[25] *Id.*

[26] 28 U.S.C. § 994(j).

clearly advancing a purpose of sentencing."[27] The Commission should also complete and publish a study on the predictive power of minor offenses on rates of recidivism.

D. Criminal History Points

We have previously pointed out that some state misdemeanor offenses are counted as felony crimes of violence because they are punishable by a term of imprisonment greater than one year.[28] The harsh and disparate effects of this assessment are felt throughout the guidelines, including the determination whether prior crimes of violence are "related." The proposed amendment to § 4A1.1(f) does not ameliorate the disparity, and may even exacerbate it.

Currently under § 4A1.1(f), the Commission adds one point for each prior conviction of a crime of violence that is otherwise uncounted under § 4A1.2(a)(2) because it is "related" to another crime of violence.[29] In contrast, the Parole Commission's Salient Factor Score, which is a better predictor of recidivism than Criminal History Score under the guidelines, has no violence component.[30] Not only does § 4A1.1(f) unfairly inflate some defendants' criminal history scores, but its predictive power is statistically insignificant.[31] Therefore, we urge the Commission to delete it.

The proposed 2007 amendment to § 4A1.1(f) exacerbates the problem. It instructs judges to add one point for "each prior sentence resulting from a conviction for a crime of violence that did not receive any points under (a), (b), or (c) because that sentence *was* counted as a single sentence." (emphasis added) Unlike the current provision, the proposed guideline does not limit its application to those situations in which a prior crime of violence was not counted because it was related *to another crime of violence*. While the amended Application Note 6 explains that the guideline is still intended to apply only to prior crimes of violence that were not counted because they were counted as a single sentence along with *another crime of violence*, this language should be included in the Guideline for the sake of clarity.

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[27] *Fifteen Year Report* at 134.

[28] *See* Letter to Hon. Ricardo H. Hinojosa from Jon M. Sands re: Comments on Criminal History Issues, at 5-6 (Mar. 13, 2007).

[29] U.S.S.G. § 4A1.1(f) (2006).

[30] *Salient Factor Score* at 7.

[31] *Id.* at 7, 11, 15.

We continue to urge the Commission to delete § 4A1.1(f). At the very least, we recommend that the Commission amend § 4A1.1(f) to read as follows:

> Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), and (c) above because it was counted as a single sentence with another crime of violence under § 4A1.2(a)(2).

We also continue to urge the Commission to revise its approach to Chapter Four's point system, which places undue emphasis on the commission of the instant offense while "under any criminal justice sentence,"§ 4A1.1(d), and if the defendant also committed the instant offense less than two years after being released from prison or while in prison or on escape status. § 4A1.1(e).

Adding three points for recency and commission of the offense while under a criminal justice sentence is frequently too harsh, adding the equivalent of a second prior felony conviction to the criminal history score regardless of whether either the prior or instant offense merits such an increase.[32] Unlike the guidelines, the Salient Factor Score assigned only 1 point to each of the considerations (recent offenses and offenses committed while under supervision) and did not assess an additional point for offenses committed while on unsupervised probation.[33] The Commission should revise the point system to "make it more consistent with the purposes of sentencing and with the data underlying" the Salient Factor Score.[34]

E. Stayed Sentences

The Commission should resolve a circuit split over whether sentences that are completely stayed should nonetheless be counted under § 4A1.2(a)(3). The Eleventh and Ninth Circuits have interpreted § 4A1.2(a)(3) to require a court to count a prior sentence if it was completely stayed, whereas the Eighth Circuit and a leading commentator believe the sentence should not be counted.[35] The Commission cannot have intended to

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[32] *See, e.g.*, *United States v. Johnson*, 2005 WL 1788784 at *3 n.1 (E.D. Wis. July 25, 2005) (recognizing unfairness of assigning two additional points for being in "escape" status where the underlying crime was failing to surrender, meaning that the defendant was punished for failing to surrender while in escape status, which she was in because she had failed to surrender).

[33] *See* Thomas Hillier, *Time for an Overhaul*, 9 Fed. Sent. Rept. at *5.

[34] *Id.* at *6

[35] *Compare United States v. Williams*, 291 F.3d 1180, 1195 (9th Cir. 2002) (assessing one point for suspended six-month term of imprisonment); *United States v. Hernandez*, 160 F.3d 661, 667 (11th Cir. 1998) (assessing one point for suspended 30-day term of imprisonment) *with United States v. Johnson*, 43 F.3d 1211 (8th Cir. 1995) (no points should be assessed where defendant's one-year sentence was stayed and no probationary period was assigned); Hutchinson, Fed. Sent.

treat defendants whose entire sentence was stayed more harshly than defendants who actually served jail time.

F. Related Cases

The proposed 2007 amendment eliminates the concept of "related cases" and instructs the sentencing judge to determine whether multiple prior sentences are "counted separately or as a single sentence." By eliminating the concept of "related cases" and its complex definition, the Commission has simplified the process of determining criminal history. In addition, the Commission has fixed the serious problems surrounding the concept of "functional consolidation." Unfortunately, the Commission has also settled on a method that counts prior offenses separately even when they were in fact substantively related.

There are cases in which prior offenses were considered related because they occurred on the same occasion or were clearly part of a single common scheme or plan, but the offenses were neither charged in the same instrument nor sentenced on the same day.[36] The proposed amendment will require courts to count such cases separately (and

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L. & Pract. § 4A1.1, Author's Comments at (f)(B)(5) ("[T]aking the guidelines and the commentary as a whole, it would appear equally plausible, and consistent with the principle of lenity, to exclude the suspended portion of a term of imprisonment in determining the application of § 4A1.2(c)(1).").

[36] In a case from the District of Nevada, the defendant pled guilty to two prior drug offenses, one prosecuted in the Northern District of Illinois and one prosecuted in the Central District of Illinois. He was sentenced on different days to concurrent sentences pursuant to a plea agreement. Because the offenses involved overlapping time, place, and persons, the probation office found the two prior offenses to be "related" under the current definition. Under the proposed amendment, the offenses would be counted separately under the proposed amendment.

In a case from the District of Massachusetts, the defendant had two prior robbery convictions from different counties. Pursuant to a package deal between the two jurisdictions, the defendant entered guilty pleas in two different counties on two different days. The probation office treated the cases as "related," and the government agreed. Because the two offenses were not charged in the same instrument or sentenced on the same day, they would be counted separately under the proposed amendment.

In a case from the Northern District of Georgia, the defendant was a homeless drug addict who was used by others in a single check cashing scheme involving four different counties with no intervening arrests. He was charged in separate indictments by the different counties and sentenced on different days, with some of the sentences running concurrently. The probation offense found the cases to be "related" and assigned three criminal history points. Under the proposed amendment, the defendant would receive fourteen criminal history points for the same related offenses

therefore add criminal history points) despite their clear relationship and although they would have been considered related under the prior guideline definition. For these defendants, sentences will be higher – sometimes by several years – for no apparent reason.

Courts had previously criticized the current Guideline's reliance on "related cases," because it "created the potential for widely disparate treatment of prior criminal convictions based on matters wholly unrelated to the underlying offense," such as disparate charging practices in different jurisdictions. *United States v. Carter*, 283 F.3d 755, 758 (6th Cir. 2002). The revised Guideline does not remedy this problem. Under the new version, a defendant could receive a higher sentence merely because multiple jurisdictions chose to prosecute him for the same course of conduct. Courts also urged the Commission to review the definition of related cases in USSG 4A1.2 to make it parallel to the broader definition of a course of conduct set forth in USSG § 1B1.3(a)(2) for the sake of consistency and fairness. *Carter*, 283 F.3d at 759-60.

The Commission has explained that the amendment to § 4A1.2 is intended to "simplify the rules for counting multiple prior sentences" and to "promote[] consistency in the application of the guideline." The amendment is also intended to clarify that the inquiry involves the relationship between the prior offenses, not a prior offense and the instant offense. Thus, it does not appear that the amendment was intended to raise sentences for any category of offenders.

We believe that the goals of simplicity, consistency and clarity can be met without raising sentences for those defendants who do not meet the test due to procedural accident or geography. The purely procedural test will result in unwarranted disparity because defendants with similar past patterns of criminal behavior will be measured differently depending on procedures used by different jurisdictions. In order to implement the goal of fairly and accurately assessing past patterns of criminal behavior, the Commission should reinstate the substantive inquiry of "related cases" while at the same time retain the simplified procedural concept of a "single sentence." By doing so, the Commission will have streamlined the process of assessing criminal history without sacrificing fairness.

In the Southern District of Texas, the defendant had been previously convicted of bank fraud in federal court for a "multistate multidefendant scheme" to pass worthless checks with bogus bank accounts. He was sentenced to 28 months in prison. On the same day, he was sentenced by one state court to a prison term to be served concurrent to the federal sentence for passing a check involving the same scheme. On a later day, he was sentenced by another state court for another check involving the scheme. The district court found that all three were "related," for a total of three criminal history points. Under the proposed amendment, the same offenses would be counted separately for six points.

Recommendation: The Commission should amend the third and fourth sentences of proposed § 4A1.2(a)(2) to read as follows:

If there is no intervening conviction, prior sentences are to be counted separately unless the sentences (A) were for offenses that occurred on the same occasion; (B) were for offenses that were part of a common plan, scheme or course of conduct; (C) resulted from offenses contained in the same charging instrument; or (D) were imposed on the same day. Count any prior sentence covered by (A) through (D) as a single sentence.

IV. Cocaine Policy

A. The Commission should adopt a 1:1 crack-to-powder ratio for purposes of calculating the base offense level for crack offenses.

We agree with the Commission that the problems associated with the statutory 100-to-1 crack to powder ratio are "so urgent and compelling" that the Commission should act without delay to alleviate some of those problems and to facilitate prompt congressional action. We also commend the Commission for taking the first step toward that goal with the proposed amendment. The Commission should go further in this upcoming cycle by finally eliminating the unjustified calibration of the guideline above, below, and between the mandatory minimum levels.[37] By retaining the extrapolations upward and downward to set guideline ranges for quantities above and below the quantities that trigger the mandatory minimum, the Commission continues to contribute to the problems created by the statutory 100-to-1 ratio.

As the Commission recently reaffirmed, quantity-based penalties for crack cocaine offenses overstate the relative harmfulness of crack cocaine compared to powder cocaine, sweep too broadly and apply most often to lower level offenders, overstate the seriousness of most crack offenses, and disproportionately impact minorities.[38] Retaining the quantity-driven calibration when it is not required by statute means that the guidelines perpetuate and support sentences that undermine the congressional directives set forth in 18 U.S.C. § 3553(a).

The Commission should remove itself entirely from the business of advising guideline ranges that are extrapolated from a statutory system that it has concluded has no rational basis in policy or fact. As the Judicial Conference has said, it is unnecessary and

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[37] *See* Fifteen Years of Guidelines Sentencing, at 49.

[38] *See* U.S. Sentencing Commission, Report to Congress, *Cocaine and Federal Sentencing Policy*, at 8 (May 2007) (hereinafter "*2007 Cocaine and Federal Sentencing Policy*").

unwise for the Commission to peg the Guidelines to mandatory minimums.[39] The Commission should rely on the current body of research, data, and public opinion to set advisory guideline ranges that meet, rather than undermine, the purposes of sentencing. The Commission has, in the past, allowed the Guidelines to deviate from statutory minimums that create unwarranted disparity and unduly harsh sentences. *See, e.g.*, USSG § 2D1.1, n.1 (defining drug "mixture or substance" as used in 21 USC § 841 except for inclusion of waste materials and carrier mediums).

B. The Commission should fix the problems created by the proposed crack amendment.

By partially addressing only some of the problems associated with guidelines sentences for crack offenses, the Commission has unintentionally injected yet another layer of disparity into an already unfair system. Recalibrating the crack cocaine quantity thresholds above, below, and between the new base offense levels creates a system in which the ratio of crack to powder cocaine varies wildly from one offense level to the next. Even worse, the ratio is often more severe for low-level players than it is for bigger dealers.

We recognize that the current amendments are intended as an interim measure, but we believe the Commission should fix these problems while awaiting congressional action. The Commission should follow its own findings and conclusions to adopt a 1:1 crack-to-powder ratio for calculating the base offense level for crack offenses. By doing so, the Commission will ensure a drug quantity guideline that is both internally consistent and consistent with its findings.

C. The amendment to the crack guideline should be made retroactive.

The same forces that have compelled the Commission to partially alleviate the problems associated with the 100:1 ratio should also compel the Commission to make the amendment retroactive.

Section 1B1.10 of the Guidelines explains that in selecting which amendments should be given retroactive effect, the Commission considers, among other factors, "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)."[40]

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[39] *See* Testimony of Judge Walton on Behalf of the Judicial Conference of the United States (Mar. 20, 2007).

[40] *See* U.S.S.G. § 1B1.10(c) & cmt. background.

Over the years, the Commission has amended the drug guideline with the effect of lowering sentences in particular drug cases, and in each instance the relevant factors have weighed toward making amendment retroactive. The Commission's current proposed amendment to § 2D1.1 – that would modestly reduce offense levels across the board for crack cocaine – is intended as an interim measure to alleviate the "urgent and compelling" problems associated with the 100-to-1 crack-to-powder ratio. Principles of fairness, consistency, and proportionality should likewise lead the Commission to make retroactive the proposed amendment lowering the base offense levels for crack.

Further, relevant factors including the animating purposes of the amendment, the limited nature of the change, the relative ease of applying it, as well as several other factors, weigh in favor of making the amendment retroactive. First, since 1995, the Commission has consistently taken the position that the 100:1 ratio was unwarranted from its inception, and has a racially disparate impact. The Reason for the May 11, 2007 Amendment notes that the Commission set drug quantity thresholds to produce base offense levels corresponding to guideline ranges above the statutory mandatory minimum penalties. The amendment is meant to remedy the Commission's contribution to the problem.

Second, the amendments related to LSD, marijuana, and oxycodone and made retroactive have generally benefited white defendants. Given the racially disparate impact of the 100:1 ratio and the public perception that our drug laws are racially discriminatory, making this amendment retroactive is the only fair and principled course.

Third, as a practical matter, courts will be able to respond to a retroactive amendment with relative ease. If the amendment is not made retroactive, the courts will be inundated with tens of thousands of *pro se* filings using various vehicles, such as 28 U.S.C. §§ 2241, 2255. The same number of motions filed under 18 U.S.C. § 3582(c) would be a far more cost-effective and efficient manner of managing the inevitable requests for relief, creating "cleaner" and more uniform decisions. No additional factfinding would be necessary because the drug quantity has already been determined. The defendant need not be present for a proceeding involving the correction or reduction of sentence,[41] no hearing is required,[42] and appellate review is very limited.[43] In fact, under § 3582(c)(2), the court may reduce the term of imprisonment "on its own motion," and thus could enter a blanket order reducing all sentences imposed under the former guideline.

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[41] *See* Fed. R. Crim. P. 43(b)(4).

[42] *See United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000); *United States v. Tidwell*, 178 F.3d 946, 948-49 (7th Cir. 1999); *United States v Townsend*, 98 F.3d 510, 513 (9th Cir. 1996).

[43] *See United States v Lowe*, 136 F.3d 1231, 1233 (9th Cir. 1998) (no jurisdiction to review district court's decision not to exercise discretion afforded under the statute); *cf. Legree, supra* (may review if motion was decided "in violation of law")

Finally, as post-*Booker* practice demonstrates, the federal criminal justice system is fully capable of revisiting many thousands of sentences when justice so requires. The large number of persons who might benefit from the amendment proves the magnitude of the injustice that should be ameliorated. At the same time, the taxpayers would save at least $23,500 per prisoner year.[44]

V. Illegal Re-Entry

We continue to believe that the illegal reentry guideline, USSG § 2L1.2, fails to reflect the factors set forth in Section 3553(a).

Analysis of sentences imposed, pursuant to USSG § 2L1.2, for the offense of illegal re-entry, including the extraordinary number of downward departures, both sought by the government and determined by the court, as well as comments from frontline participants including judges and defense attorneys, reveals that the current guideline for this offense is greater than necessary to address the purposes of punishment. *See generally* 18 U.S.C. § 3553(a). Further, the guideline results in sentences that are disproportunately high when compared with other federal offenses. Finally, the guideline is one of a number of guidelines with different definitions of certain prior offenses, resulting in unwarranted confusion and disparity.

Our proposed guideline, attached, is modeled on the guideline for prohibited persons in possession of firearms, USSG § 2K2.1, as both offenses and guidelines are enhanced on the basis of the nature of the defendant's prior convictions. We believe, however, that the potential harm to the community of a felon's possession of a firearm, particularly a felon with serious prior convictions for violence and drug trafficking, is far greater than the potential harm resulting from illegally re-entering the United States.

The proposed guideline retains an enhancement for defendants who enter the United States in connection with the commission of a national security or terrorism offense, resulting in conviction.

Finally, the proposed guideline notes, as have the courts, that a downward departure may be warranted where the defendant has returned because of family medical needs, *see e.g. United States v. Singh*, 224 F.S.2d 962 (E.D. Pa. 2002), or because the defendant was culturally assimilated into the United States. *See e.g. United States v. Rodriguez-Montelongo*, 263 F.3d 429 (5th Cir 2001); *United States v. Lipman*, 133 F.3d 726 (9th Cir. 1998).

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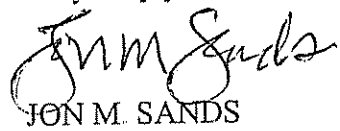
[44] *See FY 2004 Costs of Incarceration and Supervision* , The Third Branch, Vol. 37, No. 5 (May 2005), available at http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html (costs provided by the Bureau of Prisons).

VI. Victims' Advisory Group

The Commission has requested comment on the formulation of a standing victim's advisory group. We intend to comment on or before July 30, 2007.

We appreciate the opportunity to provide our input on these important issues. As always, we are happy to provide additional information on any of the issues raised in this letter or on any other issue involving fair and appropriate sentencing policy. We look forward to continuing to work with the Commission in the coming year.

Very truly yours,



JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

AMY BARON-EVANS
ANNE BLANCHARD
SARA E. NOONAN
JENNIFER COFFIN
Sentencing Resource Counsel

cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions, III, Vice Chair
Commissioner John R. Steer, Vice Chair
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Judith Sheon, Chief of Staff
Kenneth Cohen, General Counsel

§ 2L1.2 Unlawfully Entering or Remaining in the United States

(a) Base Offense Level (Apply the Greatest):

(1) [16] if the defendant committed the instant offense subsequent to sustaining at least two "aggravated felony" convictions of either a crime of violence or a controlled substance offense or one "aggravated felony" conviction of a national security or terrorism offense;

(2) [14] if the defendant committed the instant offense subsequent to sustaining one "aggravated felony" conviction of either (I) a controlled substance offense for which the sentence served exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense); (iv) a child pornography offense; (v) a human trafficking offense; or (vi) an alien smuggling offense; or

(3) [12] if the defendant committed the instant offense subsequent to sustaining any other "aggravated felony" conviction;

(4) [10] if the defendant committed the instant offense subsequent to sustaining a conviction for any other felony or three or more convictions for misdemeanors that are crimes of violence or controlled substance offenses, or

(5) [8] except as provided below.

(b) Specific Offense Characteristics

(1) If the defendant committed the instant offense in connection with the commission of a national security or terrorism offense, resulting in a conviction, increase by [8] levels. If the resulting offense level is less than level [24], increase to level [24].

Commentary

Statutory Provisions: *8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).*

Application Notes:

. . .

7. For purposes of this guideline:

> *"Controlled substance offense" has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1). "Crime of violence" has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2. "Felony conviction" means 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 specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g. a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).*

8. A conviction for an offense punishable by a maximum term of imprisonment of one year or less shall not be treated as a felony or an "aggravated felony" under this guideline.

9. For purposes of applying subsection (a)(1), (2), (3), or (4), use only those felony convictions that receive criminal history points under § 4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under § 4A1.1(a), (b) or (c). See § 4A1.2(a)(2); § 4A1.2, comment. (n.3).

10. Departure Considerations

> *There may be situations in which the offense level determined under this guideline substantially overstates the*

seriousness of the offense. For example, the defendant may have returned to the United States (1) to offer medical or humanitarian care to ill family members, (2) because he or she was assimilated into the culture of the United States, or (3) because of dangerous conditions in his or her country of origin. In such cases, a downward departure may be warranted.