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November 27, 2006

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

Re: ***Follow-up on Commission Priorities***

Dear Judge Hinojosa:

This letter is to follow up on some of the issues raised at the Commission's hearing on cocaine policy on November 14, 2006, and at the roundtables on simplification and criminal history, which were held on October 31-November 3, 2006.

I. Cocaine Policy

A. The guidelines are not required "by law" to be calibrated according to statutory mandatory minimums.

The Department of Justice contends that the Commission must calibrate the guidelines to track the mandatory minimum statute "by law." This is incorrect.

The original Commission *chose* to calibrate the drug guidelines below, between and above the mandatory minimum levels, but it was not required to do so and did not explain why it did. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal System is Achieving the Goals of Sentencing Reform* at 49 (November 2004).

The Commission is required by law to assure that the purposes of sentencing are met, to ensure that the guidelines are effective in meeting those purposes, to reflect advancement in knowledge of human behavior, to minimize the likelihood of prison overcrowding, and to avoid unwarranted disparities while ensuring sufficient flexibility to permit individualized sentences. *See* 28 U.S.C. §§ 991(b), 994(g). Since the original Commission's early decision to incorporate mandatory minimums across the board for all drug cases, the Commission has had the benefit of substantial evidence leading it to conclude "firmly and unanimously . . . that the current federal

cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress." *See* U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* at May 2002).

The Commission therefore has an obligation to revise the guidelines applicable to crack cocaine offenses. *See* 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.").

This would create no conflict with any mandatory minimum because in any case in which application of the guidelines would result in a lower sentence than the statutory minimum, the statutory minimum would trump. *See* U.S.S.G. § 5G1(b).

B. The Commission should adopt a 1:1 ratio, and add one possible upward departure or specific offense characteristic for bodily injury.

As every witness told the Commission at the hearing on November 14, 2006, the Commission had it right in 1995: There is no justification for *any* disparity based on drug quantity in sentencing crack and powder cocaine cases. At the Sentencing Institute last July, Mike Volkov, counsel to Mr. Sensenbrenner, stated unequivocally that the disparity must be eliminated and that the ratio should be one-to-one. The Commission should take advantage of this long-awaited opportunity, and not settle for halfway measures. Further, *any* disparity will permit and invite agents and informants to manipulate the type and quantity of drug, as described in the numerous recent examples in Mr. Kramer's written testimony, thus resulting in further unwarranted disparity. This is simply wrong, and the only way to stop it is with equal penalties for equal amounts of crack and powder cocaine.

We believe that appropriate enhancements for harms that sometimes result from drug use or trafficking are already available under the current guidelines and statutes. We are also very concerned that penalties for drug crimes generally not go any higher. If anything, they are already too high, according to the 2004 Fifteen-Year Report, the 2002 Survey of Judges, and the 1997 Public Opinion Survey.

The only harm that arguably is not covered under existing guidelines is bodily injury resulting from the use of violence in the course of the offense. Thus, at most, the Commission could add a specific offense characteristic or upward departure for this particular harm. At a time when the Commission has committed to simplification, it should not add the complex set of adjustments for various levels of bodily injury suggested in the 2002 Cocaine Report.

The Commission should explain to Congress how a higher sentence for each of the other possible harms is already available under current law. Dangerous weapons are already covered through the two-level enhancement in § 2D1.1(b)(1), the four-level enhancement in § 2K2.1(b)(6), and through a separate § 924(c) charge. The Commission should not include the complex series of

adjustments tied to problematic definitions (*e.g.*, brandished, otherwise used, etc.) suggested in the 2002 Report. Use of a minor is covered by § 3B1.4. Sales to pregnant women, to minors, and in a protected location can be charged under applicable statutes and sentenced under § 2D1.2. There is no justification for enhancing a sentence for an importer who does not receive a mitigating role adjustment, as suggested in the 2002 Report, as most of those defendants will receive an aggravating role adjustment, and the quantity in such cases is likely to be quite high.

There is no justification, as suggested in the 2002 Report, for adding any further enhancement for having a prior felony drug trafficking offense, which is already counted in a variety of ways. Though African Americans comprise only 15% of the country's drug users, they comprise 37% of those arrested for drug offenses, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.[1] This is an unfortunate result of both racial profiling and the fact that in the inner city, drugs are sold and used on the street where drug crime is easier to detect, while in the suburbs, drugs are sold and used indoors. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 133-34 (2004). As a result, African Americans already have higher criminal history scores than whites, are sentenced more often under the career offender guideline, are subjected to higher mandatory minimums for prior drug trafficking felonies under 21 U.S.C. § 841, and are disqualified from safety valve relief. Adding a further enhancement for a repeat felony drug trafficking offense would double count this form of racial disparity.

C. The Commission should publish a revised guideline in this amendment cycle, in conjunction with public education.

We are concerned that, if the Commission waits even one more year, members of Congress will fear accusations of being soft on crime in an election year.

In conjunction with publication of the amendment, the Commission should devote resources to public education. Respondents to the 1997 public opinion survey conducted on the Commission's behalf disagreed with the harshness of drug sentences generally and with the harsher treatment of crack cases. *See* Peter H. Rossi & Richard A. Berk, U.S. Sentencing Commission, Public Opinion on Sentencing Federal Crimes (1997), http://www.ussc.gov/nss/jp_exsum.htm. If the broader public were educated about the lack of justification for the crack/powder disparity, its detrimental effects on families and communities, the efficacy and cost-effectiveness of treatment, and the cost savings in reduction of imprisonment, the public would favor elimination of the disparity.

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[1] *See* Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

D. The amended guideline should be given retroactive effect.

When the Commission previously amended § 2D1.1 to decouple the guideline calculations for LSD and marijuana from the corresponding statute, it took the principled approach and made the amendments retroactive. Here, the Commission's own studies have shown that the disparity between crack and powder cocaine was unjustified and unwarranted from the beginning. In addition, the 1:100 ratio has had a racially disparate impact that has been a powerful contributor to the public perception that insidious discrimination animates our drug policies.

Given the Commission's past practice with respect to LSD and marijuana, basic principles of fairness and equality virtually compel the retroactive application of an amendment that will correct the racially discriminatory effects of the crack/powder disparity.

Contrary to Judge Walton's suggestion at the hearing on November 14, any administrative inconvenience resulting from making an amendment retroactive will not "wreak havoc." Indeed, to describe the righting of a longstanding wrong as "wreak[ing] havoc" is to admit the magnitude of the injustice and must not stand in the way of the appropriate solution. As recent experience in the wake of *Booker* demonstrates, the federal criminal justice system is fully capable of revisiting many thousands of sentences when justice so requires.

E. The Commission should add a downward adjustment or encouraged downward departure for successful completion of a drug treatment program.

We strongly support Judge Sessions' suggestion that the Commission add a downward adjustment or a recommended downward departure for successful completion of a drug treatment program.

Drug treatment has long been recognized as a cost-effective means of reducing drug consumption and recidivism. *See, e.g.*, National Institutes of Health, National Institute on Drug Abuse, Principles of Drug Addiction Treatment: A Research Based Guide at 18-20; 31-33 (October 1999), available at http://www.drugabuse.gov/PDF/PODAT/PODAT.pdf. According to the National Institutes of Health, even conservative estimates reflect that "every $1 invested in addiction treatment programs yields a return of between $4 and $7 in reduced drug-related crime, criminal justice costs, and theft alone."[2] *Id.* at 21. The efficacy and cost-effectiveness of drug treatment programs in reducing recidivism ought to be reflected in the guidelines.

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[2] *See also* Caulkins, Rydell, Schwabe & Chiesa, *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* At xvii-xviii (RAND 1997); Rydell & Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (RAND 1994); Aos, Phipps, Barnoski & Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime* (Washington State Institute for Public Policy 2001), available at http://www.ncjc.org/Library/020074.

The National Institute on Drug Abuse has released five manuals on various cocaine addiction treatment protocols with treatment lengths of between 12 and 24 weeks.[3] It notes that "the best documented drug-free treatments" for heroin addiction "are the therapeutic community residential programs lasting 3 to 6 months."[4] It also states in general: "Research indicates that for most patients, the threshold of significant improvement is reached at about 3 months in treatment. After this threshold is reached, additional treatment can produce further progress toward recovery."[5] These time periods are within the average time between arrest or indictment and sentencing, and courts should thus be able to take successful completion of such a program into consideration during sentencing with minimal continuances necessary.

II. Simplification Priorities

While there are many ways in which individual guidelines could be simplified, here we propose simplification in two areas that we believe would have the most effect in reducing unfairness, complexity, disparity and dissatisfaction with the guidelines.

A. Separate Crimes Relevant Conduct

Separate crimes relevant conduct has long been a blight on the Federal Sentencing Guidelines and invited the decisions in *Blakely* and *Booker*. We have detailed its problems elsewhere. *See* Memorandum Regarding Priorities at 20-24, attached to Defender Letter Re: Proposed Priorities for 2006-2007 (July 19, 2006). According to statements made at the October 2006 public meeting, the Commission intends to address separate crimes relevant conduct as part of its simplification effort. We propose the following:

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[3] *See* National Institute of Health, National Institute on Drug Abuse, *Therapy Manuals for Drug Abuse, Cognitive Behavioral Approach: Treating Cocaine Addiction (Manual 1)* at 4 (12-week program); *Community Reinforcement Approach: Treating Cocaine Addiction (Manual 2)* at 7 (24-week program); *Individual Drug Counseling Approach to Treat Cocaine Addiction: The Collaborative Cocaine Treatment Study Model (Manual 3)* at 12 (6-month program); *Drug Counseling for Cocaine Addiction: The Collaborative Cocaine Treatment Study Model (Manual 4)* at 11 (24-week program); *Brief Strategic Family Therapy for Adolescent Drug Abuse (Manual 5)* at 2 (program lasts 8-24 weeks, depending on severity of addiction), available at http://www.nida.nih.gov/drugpages/treatment.html.

[4] National Institute of Health, National Institute on Drug Abuse, *NIDA Research Report: Heroin Abuse and Addiction* at 5 (May 2005), available at http://www.drugabuse.gov/PDF/RRHeroin.pdf.

[5] National Institute of Health, National Institutes on Drug Abuse, *Principles of Drug Addiction Treatment: A Research Based Guide* at Principle 5 (first page) (October 1999), available at http://www.drugabuse.gov/PDF/PODAT/PODAT.pdf.

1. Abolish acquitted conduct.

2. Strike out subsection 1B1.3(a)(2).

3. Abolish cross-references to greater crimes.

4. Tighten up the definition of 1B1.3(a)(1) (B) as follows:

   in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others), all reasonably foreseeable acts and omissions of others which are in furtherance of the specific conduct and objectives embraced by the defendant's specific agreement in furtherance of the jointly undertaken criminal activity.

   This is what the application notes indicate, but the definition is still applied unevenly. It should be moved to the guideline so that it will be consistently, rather than haphazardly, applied.

5. Tighten up the definition of 1B1.3(a)(4) to the following:

   all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions.

   The guideline as written includes "harm" that merely resulted, and therefore fails to reflect just punishment for the seriousness of the offense or the need for specific deterrence.

6. If the Commission declines to adopt proposals 2 and 3 this amendment cycle, it should at least recommend in Chapter 6 that notice of all such conduct be provided before entry of a guilty plea.

B. Reduce the number of levels in the sentencing table

The sentencing table could be reduced to about eighteen levels without violating the 25% rule. The ranges would still widen as one moves down the table because of the 25% rule, but would not overlap as they do now. The Commission would have to reduce the number of points assigned to enhancements. For example, 4 points for aggravated role would become 2 points.

This would eliminate much of the false precision and many of the meaningless distinctions for which the guidelines have been widely criticized. It would simplify sentencing, and by broadening the ranges, would increase discretion within range.

This should not result in increased severity. If neutral as to severity, any given defendant's current range would fall right in the middle of the new wider range. For example, a defendant whose range is now 33-41 months would have a range that was 30-46 months.

III. Criminal History Priorities

A. Career offender

In 28 U.S.C. § 994(h), Congress directed the Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and -- (1) has been convicted of a felony that is--(A) a crime of violence; or an offense described in [21 U.S.C. §§ 841, 952(a), 955, 959, or 46 U.S.C. § 1901 *et seq.*] and (2) has previously been convicted of two or more prior felonies, each of which is--(A) a crime of violence; or an offense described in [21 U.S.C. §§ 841, 952(a), 955, 959, or 46 U.S.C. § 1901 *et seq.*]."

In the year following *Booker*, the rate of below-guideline sentences in career offender cases was 21.5%. This should tell the Commission that the definitions of crime of violence and drug trafficking offense need to be narrowed.

1. Crime of Violence

Congress did not direct the Commission to define "crime of violence" in any particular way, but instead left it to the Commission. Congress had in mind "repeat violent offenders." S. Rep. No. 98-225, 98th Cong., 2d Sess. 175 (1983).

The original career offender guideline defined "crime of violence" as in 18 U.S.C. § 16, section (b) of which defines a "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." In 1989, the definition was amended according to 18 U.S.C. § 924(e). The current definition of crime of violence is: "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that - (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Application note 1 adds to the definition by specifying that "crime of violence" includes aiding and abetting, conspiring and attempting, murder, manslaughter, kidnaping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, a violation of 18 U.S.C. §§ 924(c) or 929(a) if the offense of conviction established that the underlying offense was a crime of violence. It excludes unlawful possession of a firearm unless the firearm is described in 26 U.S.C. § 5845(a).

These must be "felony convictions," defined as a "prior adult federal or state conviction for an offense punishable by . . . 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."

The courts have interpreted this provision to include offenses that involve no actual violence, actual injury or even a risk of injury to another, including tampering with a motor vehicle, burglary of a non-dwelling, fleeing and eluding, operating a motor vehicle without the owner's consent, possession of a short-barreled shotgun, oral threatening, car theft, and failing to return to a halfway house. Other offenses that have been found to be crimes of violence under the identical language in 18 U.S.C. § 924(e) include pickpocketing, possession of a sap, failing to stop for a blue light, carrying a concealed weapon, and driving while intoxicated. Such offenses are deemed by appellate courts to be "crimes of violence" based on hypothetical scenarios that might "present a serious potential risk of physical injury to another," with no empirical support whatsoever.

The problem is exacerbated by defining a prior felony conviction as a "prior adult federal or state conviction for an offense punishable by . . . 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." U.S.S.G. § 4B1.2, comment. (n.1). Some states have misdemeanors punishable by up to two years (North Carolina, Pennsylvania), two and one-half years (Massachusetts), three years (South Carolina), and even ten years (Maryland). Thus, defendants are regularly classified as career offenders based on misdemeanor convictions that resulted in only the most minimal punishment in state court.

This results in punishment that is disproportionate to the seriousness of the offense and unwarranted uniformity. A defendant who receives two simple assault convictions for bar room scuffles and spends not a day in jail is treated no differently under the career offender guideline than a defendant with murder and rape convictions.

Defender Proposal:

1. Excise § 4B1.2(a)(2), and add specified crimes of violence. 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 set of offenses. This would be consistent with the definition in § 2L1.2.

2. No offense, other than ones that are by definition violent (*i.e.*, murder, aggravated assault, forcible sex offenses, arson, use of explosives) should be included in the list of specified crimes of violence (in § 4B1.2 or § 2L1.2) without empirical support demonstrating either that the offense actually results in injury in a significant number of cases, or actually involves the use of force against the person in a significant number of cases.

As demonstrated in recent cases, the Commission should use its mandate to collect and analyze data in order to determine which offenses should be classified as crimes of violence.

In the pending case of *James v. United States*, No. 05-9264, the issue is whether Florida attempted burglary is a crime of violence under § 924(e). At oral argument on November 7, 2006, the Justices expressed interest in the percentage of cases in which someone actually was injured in order to determine whether the offense "presents a serious potential risk of physical injury to another." At one point, Justice Breyer noted that the Commission has a "mandate" to collect such data and that the career offender guideline includes attempted burglary. He said he hoped the Commission "did get [the data] before coming to the conclusion they did."[6]

In *United States v. Golden*, 466 F.3d 612 (7th Cir. Oct. 25, 2006), the Seventh Circuit held that failing to report for jail service was a crime of violence. Judge Rovner concurred based on circuit precedent, but he observed that the government "has given us no statistics to support a conclusion that failure to report to jail presents a serious potential risk to the public or to the officers involved in the subsequent capture," and that "[n]ow that we have found that failure to report constitutes a violent felony, we are on the path to determining that comparable crimes, a probation violation, for example, might qualify as well. If statistics do not bear out the assumption that persons who fail to report pose a serious potential risk of physical harm to others, we may have to reconsider our approach." *Id.* at 615-16. Judge Williams wrote a sharp dissent contending that counting this offense as a crime of violence failed to give fair notice.

3. In both § 4B1.2 and § 2L1.2, the definition should require that the offense be classified as a felony by the jurisdiction ***and*** that the defendant actually served over one year in prison. The definition of felony used in 18 U.S.C. § 924(e) excludes convictions designated as misdemeanors by the jurisdiction. *See* 18 U.S.C. § 921(a)(20)(B). The length of sentence served is a more accurate indicator of the seriousness of the offense than the statutory maximum because some states, as noted above, have statutory maximums for misdemeanors well in excess of one year. The length of the sentence served is preferable to the length of the sentence imposed because the latter over-represents the seriousness of the offense in states that have parole and similar devices and creates unwarranted disparity.

Under our proposal, judges and appeals courts would no longer speculate about what might "otherwise involve a serious potential risk of physical injury to another" based on hypotheticals that vary from judge to judge, appeals court to appeals court. This creates unpredictability for the parties, and unwarranted disparity among different judges and circuits. Our proposal is straightforward, simple, and predictable, and would eliminate the need for courts to engage in the multi-level and complex analysis under the categorical approach. It is closer to congressional intent to punish at or near the statutory maximum those persons who actually have made a "career" of *violent* crime, not those with a record of petty crimes and misdemeanors, or who reported one day late to a federal sentence. It provides fair notice to the defendant, who otherwise is often surprised that a prior state

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[6] *See* Transcript at 17-18, http://www.supremecourt.us.gov/oral_argument_transcript/05-9264.pdf.

misdemeanor or factually nonviolent conduct that did not result in serious sanctions by the convicting jurisdiction could result in massive increases in an already severe federal sentence.

Request for recidivism data:

As it has with drug trafficking predicates, the Commission should analyze the risk of recidivism for career offenders with "crime of violence" predicates. In order to be at all useful, this should be done by offense.

2. Controlled Substance Offense

Congress directed the Commission to punish defendants with prior felony drug trafficking convictions "described in" 21 U.S.C. §§ 841, 952(a), 955, 959, or 46 U.S.C. § 1901 *et seq*. *See* 28 U.S.C. § 994(h). The lowest statutory maximum for the vast majority of the specified offenses is twenty years. *See* 21 U.S.C. §§ 841(b), 960(b). Only two are subject to a lower statutory maximum of five years: wrongful distribution or possession of a List I or II chemical, 21 U.S.C. § 841(f), and importation of lesser amounts of marijuana or hashish, 21 U.S.C. §960(b)(4).

The Commission has significantly expanded the drug offenses subject to the career offender guideline, by offense type and seriousness, so that the definition is far broader than Congress directed and does not distinguish between serious and non-serious drug offenses. *See* Memorandum Regarding Priorities at 11-12, attached to Defender Letter Re: Proposed Priorities for 2006-2007 (July 19, 2006) (listing statutes included in career offender guideline outside of those listed in 28 U.S.C. § 944(h)).

The current definition is inconsistent with the congressional directive, and is unjustifiable. The failure to differentiate between serious and non-serious drug offenders has repeatedly been cited by courts as a reason to depart or vary from the career offender guideline range. According to the Sentencing Commission's statistics, drug trafficking offenders are the least likely to recidivate. *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13. Indeed, the inclusion of drug trafficking offenses as now defined makes the career offender guideline a poor measure of the risk of recidivism. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* at 133-34 (2004). Further, although African Americans comprise only 26% of all federal defendants, they make up 58% of those subject to the career offender guideline, primarily because of the inclusion of drug trafficking offenses. This is not because African Americans commit more drug offenses, but because of racial profiling and the fact that in inner city neighborhoods, drug use and trafficking take place out in the open. *See id.* at 133.

The Commission should amend 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. § 1901 *et seq*, 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).

B. First Offender

To ensure that 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," 28 U.S.C. § 994(j), we propose the following definition for a first offender:

> (1) the defendant has 0 criminal history points; (2) the defendant did not use violence or credible threats of violence, or violate 18 U.S.C. §§ 924(c) or 929(a) with an underlying offense that was a crime of violence, in the instant offense; (3) the instant offense did not result in death or serious bodily injury to any person.

Defendants should not be excluded from first offender status based on arrests first because of the presumption of innocence, second because arrests are not in fact a reliable indicator of guilt, and third because racial minorities have a higher rate of arrests because of racial profiling.

The Commission should make non-prison alternatives available to first offenders by encouraging downward departure to a specific sentence type, or zone where non-prison alternatives are available.

C. Minor offenses with little or no value in predicting recidivism

Minor offenses with little or no value in predicting recidivism should be excluded from the criminal history score. The Commission has previously indicated that including minor traffic offenses in the criminal history calculation may have an "unwarranted adverse impact" on minorities "without clearly advancing a purpose of sentencing." *See Fifteen Year Report* at 134; *United States v. Leviner*, 31 F.Supp.2d 23, 33-34 & n.26 (D. Mass. 1998). The Commission's report, *Recidivism and the First Offender* (May 2004), refers to a companion recidivism report entitled "The Exclusionary Rules," *see* p. 5 n.14, which apparently set out to study whether minor offenses predict recidivism. We have been told the report was never completed.

We urge the Commission to complete this research, and to exclude priors that do not advance sentencing purposes.

D. Actual Convictions

U.S.S.G. §4A1.2 includes as countable convictions under § 4A1.1(c) any diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding even if a conviction was not formally entered.

Many states have dispositions whereby a person with no significant criminal history and less culpable conduct can admit to sufficient facts, serve a probationary term (often unsupervised), and have the case dismissed at the end. In Massachusetts, for example, this procedure (called a "continuance without a finding") often requires the assent of the government and always requires the approval of the court. The guideline's treatment of such dispositions as though a conviction was entered is a legal fiction at odds with the judgment of the jurisdiction.

The Commission should direct courts to look to the jurisdiction: If there is no judgment of conviction entered against the defendant in state court, there should be no judgment of conviction counted against the defendant in federal court.

E. Actual Sentence Served/Time Served Sentences

U.S.S.G. § 4A1.2(b)(1) instructs that a "sentence of imprisonment" is to be calculated based on the sentence imposed, rather than the sentence served.

Many states, however, have parole, suspended and split sentences, sentence ranges, and other devices that automatically reduce the sentence imposed. It is understood that the length of the sentence imposed is not the sentence that the defendant will serve.

"Sentence of imprisonment" should be redefined as "the length of time actually served." This would more accurately reflect the severity of the conduct, create reasonable uniformity by minimizing the differences in sentencing regimes, and promote proportionality by ensuring that criminal history calculations are based more on the seriousness of the prior offense and less on the technical quirks of the state system under which the defendant happened to be sentenced.

There should be special provision for "time served" sentences allowing the court to "look behind" the number of months in a time-served sentence. A time served sentence is no indicator of the seriousness of the offense. It means the case fell apart, or the defendant was held until it was time to testify. Indigent defendants sit in jail until their initial appearance on minor, weak cases, and accept the time served option because they have, or see, no other realistic option. This has to do with lack of finances or other inability to be bailed out or not held pretrial and little to do with the culpability of the defendant.

F. Current Recidivism Data

The guidelines prohibit or restrict consideration of factors that predict a reduced risk of recidivism or an increased likelihood of rehabilitation: age, employment, education, family responsibilities (marital status and dependents), abstinence from drug use, engagement in drug treatment, being a non-violent offender (drug, fraud and larceny especially). The Commission should remove all prohibitions and restrictions on factors that indicate a reduced risk of recidivism, so that the courts will not be dissuaded from taking them into account when appropriate.

The predictive power of U.S.S.G. §4A1.1(f) is statistically insignificant. The Commission should therefore delete it.

G. Eliminate "over counting" a defendant's criminal history

U.S.S.G. §4A1.1 permits up to six criminal history points to be assessed for a single prior conviction as follows: **3 points** if the defendant received a sentence of imprisonment for at least 1 year and 1 month (§4A1.1(a)) + **2 points** if the defendant committed the instant offense while "under any criminal justice sentence" (§4A1.1(d)) + **1 point** 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 3 points for recency of the offense and the fact of an existing "criminal justice sentence" – which is an unclear term that has been subject to widespread litigation and varying interpretations – 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. *See, e.g., United States v. Johnson*, 2005 WL 1788784 at *3 n.1 (E.D. Wis., July 25, 2005) (recognizing unfairness of assigning 2 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).

Both of these provisions were modeled on the Salient Factor Score. Unlike the guidelines, however, 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. *See* Thomas W. Hillier II, *Chapter Four: Time for an Overhaul, or a Tuneup*, 9 Fed. Sent. Rep. 4, 5 (Jan./Feb 1997). 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. *Id.* at *6.

H. Circuit split over suspended sentences for misdemeanor convictions

A circuit split has developed regarding the appropriate way to count misdemeanor offenses governed by §4A1.2(c)(1) where the sentence was completely stayed. Misdemeanor offenses "similar to" those listed in U.S.S.G. § 4A1.2(c)(1) count for criminal history purposes only if they

involved a sentence of probation of at least one year or imprisonment for at least 30 days. Under §4A1.2(b)(2), if part of a sentence of imprisonment is stayed, the term "'sentence of imprisonment' refers only to the portion that was not suspended." Under §4A1.2(a)(3), a conviction for which the imposition or execution of sentence was totally suspended or stayed "shall be counted as a prior sentence under §4A1.1(c)" (which assigns 1 point for each prior offense). So what if the prior court sentenced the defendant to a term of imprisonment of at least 30 days but stayed the entire sentence?

The circuits are split on the question. The Ninth and Eleventh Circuits have read 4A1.2(a)(3) as requiring a point for each such conviction. *See United States v. Williams*, 291 F.3d 1180, 1195 (9th Cir. 2002) (1 point for suspended six-month term of imprisonment); *United States v. Hernandez*, 160 F.3d 661, 667 (11th Cir. 1998) (1 point for suspended 30-day term of imprisonment). The Eighth Circuit disagrees. *See United States v. Johnson*, 43 F.3d 1211 (8th Cir. 1995) (no points where defendant's 1-year sentence was stayed and no probationary period was assigned).

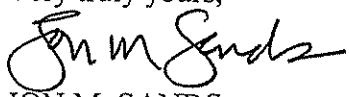
So does Thomas Hutchinson, who notes that the Ninth and Eleventh Circuit's interpretation creates an anomaly. *See* Hutchinson, Fed. Sent. L. & Pract. § 4A1.1, Author's Comments at (f)(B)(5). Imagine two defendants who were both convicted of misdemeanor reckless driving and sentenced to a 30-day term of imprisonment. The court suspended one day of Defendant Number 1's sentence, and he serves the remaining 29 days. Finding that Defendant Number 2 was less culpable, however, the court suspended all of Defendant Number 2's sentence. Defendant Number 1's sentence would not be counted under the guidelines because under 4A1.2(b)(2), when a sentence is partially stayed, only that portion that was not suspended is counted. Defendant Number 1 served 29 days, one day less than the 30-day term of imprisonment needed to count his prior conviction under 4A1.2(c)(1). In contrast, under the Ninth and Eleventh Circuit interpretations, Defendant Number 2's conviction *would* be counted under 4A1.2(a)(3) and 4A1.1(c), simply because he had the "misfortune"not to serve any jail time.

In addition to this anomalous result, Hutchinson points to note 2 of the Application Notes to 4A1.2, which states, "to qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence." *See* U.S.S.G. §4A1.2, Applic. Note 2. In other words, a fully suspended sentence does not comply with the definition of a "sentence of imprisonment" set forth in Application Note 2. Given this, Hutchinson concludes that, "taking 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)." *See* Hutchinson, Author's Note at (f)(B)(5).

The Commission cannot have intended to treat defendants whose entire sentence was stayed more harshly than defendants who actually served jail time.

We appreciate your consideration of our input and look forward to working with the Commission in the coming year.

Very truly yours,



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